SUPREME COURT OF QUEENSLAND

CITATION:	*Wiesac Pty Ltd & Anor v Insurance Australia Limited* [2018] QSC 123
PARTIES:	**WIESAC PTY LTD** (first plaintiff) **MURPHYSCHMIDT SOLICITORS (A FIRM)** (second plaintiff) **v** **INSURANCE AUSTRALIA LIMITED** **ABN 11 000 016 722** (defendant)
FILE NO/S:	BS No 538 of 2015
DIVISION:	Trial Division
PROCEEDING:	Trial
DELIVERED ON:	1 June 2018
DELIVERED AT:	Brisbane
HEARING DATE:	5, 6, 7 December 2017
JUDGE:	Davis J
ORDER:	**1. The emails between the parties and my Associate dated 2 March 2018 and 5 March 2018 are collectively admitted and marked exhibit 8.** **2. The claims of both plaintiffs are dismissed.** **3. I will hear the parties on costs.**
CATCHWORDS:	INSURANCE – PROPERTY AND PECUNIARY LOSS INSURANCE – CONDITIONS, WARRANTIES AND EXCEPTIONS – EXCLUSION CLAUSES – FLOOD DAMAGE – where the plaintiffs had insurance in relation to a property in the Brisbane CBD which was affected by the 2011 Brisbane floods – where the basement of the insured premises was inundated by water through drainage pipes – where the insurance policy excluded claims for loss "occasioned by or happening through" flood – where flood was defined as "the inundation of normally dry land water escaping or released from the normal confines of any natural water course or lake" – whether the land was normally dry land – whether the water was escaping or released from the normal confines of the river – whether the flood exclusion defeated the plaintiffs' claim INSURANCE – THE POLICY – CLAIMS GENERALLY – where the

plaintiffs' insurance covered loss consequential to property damage – where the insurance policy included a method for calculation of indemnity for loss of earnings – where the evidence was unavailable to apply that method – whether the indemnity could be ordered

Insurance Contracts Act 1984 (Cth) s 7, s 57

Caine v Lumley General Insurance Ltd (2008) 15 ANZ Insurance Cases 61-756, cited
CIC Insurance Ltd v Bankstown Football Club Ltd [1994] NSWCA 359; (1995) 8 ANZ Insurance Cases 61-232, applied
Coalex Pty Ltd v Commercial Union Assurance Co of Australia Ltd (1988) 5 ANZ Ins Cas 60-858, applied
Countrywide Finance Ltd v State Insurance Ltd [1993] 3 NZLR 745, cited
Eastern Suburbs Leagues Club Ltd v Royal & Sun Alliance Insurance Australia Ltd [2003] QSC 413, cited
Elilade Pty Ltd v Nonpareil Pty Ltd (2002) 124 FCR 1, followed
Fink v Fink (1946) 74 CLR 127, cited
Freshmark Ltd v Mercantile Mutual Insurance (Australia) Ltd [1994] 2 Qd R 390, cited
Hams & Anor v CGU Insurance Limited (2002) 12 ANZ Insurance Cases 61-525, applied
Hungerfords v Walker (1989) 171 CLR 125, applied
LMT Surgical Pty Ltd v Allianz Australia Insurance Ltd [2014] 2 Qd R 118, distinguished
McCann v Switzerland Insurance Australia Ltd (2000) 203 CLR 579, cited
McCarthy v St Paul International Insurance Co Ltd (2007) 157 FCR 402, cited
Mercantile Mutual Insurance (Aust) v Rowprint Services (Victoria) Pty Ltd [1998] VSCA 147, followed
New Zealand Government Property Corp v HM&S Ltd [1982] QB 1145, cited
Prosser v AMP General Insurance Ltd [2003] NTSC 80, cited
Provincial Insurance Australia Pty Ltd v Consolidated Wood Products Pty Ltd (1991) 25 NSWLR 541, cited
Pye v Metropolitan Coal Limited (1934) 50 CLR 614, cited
Robertson v French (1803) 102 ER 779, cited
Switzerland General Insurance Co Ltd v Lebah Products Pty Ltd (1982) 2 ANZ Insurance Cases 60-498, cited
Ted Brown Quarries Pty Ltd v General Quarries (Gilston) Pty Ltd (1977) 16 ALR 23, applied
Trickett v Queensland Insurance Co Ltd [1936] AC 159, cited
Wayne Tank and Pump Co Ltd v Employers Liability Insurance Corporation Limited [1974] 1 QB 57, considered

COUNSEL: R Ashton QC for the plaintiffs

P L O'Shea QC and D W Williams for the defendant

SOLICITORS: Synkronos Legal for the plaintiffs
Carter Newell for the defendant

[1] The first plaintiff is a company which is the trustee of the Wiesac Trust.[1] In that capacity, the first plaintiff is the registered proprietor in fee simple of a commercial building in the Brisbane Central Business District, situated at 130 Mary Street (the premises).

[2] The second plaintiff is a firm of solicitors who, by arrangement with the first plaintiff, occupy the premises. It is from the premises that they conduct their legal practice.

[3] There are a number of partners of the second plaintiff. Some are "equity partners"[2] being partners who share in the profits of the practice and some are "non-equity partners" who are presumably paid salaries rather than share in practice profits. The equity partners are Patricia Mary Schmidt (Ms Schidmt) who gave evidence before me, Joanne Rennick and Luke Murphy.[3]

[4] The equity partners of the second plaintiff are all officers of the first plaintiff[4] and are discretionary beneficiaries of the Wiesac Trust.[5] Presumably, other named beneficiaries who were previously partners of the second plaintiff, namely Gerald Anthony Murphy and John Charlton Chambers, have ceased to be beneficiaries or distributions are no longer made to them.[6]

[5] As is typical of a discretionary trust such as the Wiesac Trust, members of the equity partners' families are also discretionary beneficiaries.

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1 Trust Deed, Ex 4.

2 Transcript at 1-64 ll 10–15.

3 At 1-72 ll 25–35.

4 SAI Global ASIC Search of Wiesac Pty Ltd, Ex 5.

5 Trust Deed, Ex 4, cl 1.1, definition of "primary beneficiary", and Schedule item 8.

6 Transcript at 1-70, ll 30-40.

[6] Although there was no formal written lease of the premises from the first plaintiff to the second plaintiff, rental was invoiced and paid monthly to the first plaintiff.[7] The second plaintiff occupied the premises at a monthly rental of $6,650.67 and also paid those outlays which are typically paid by a tenant of commercial premises.

[7] The premises had been fitted out appropriately for occupation and use as solicitors' offices[8] as explained by Ms Schmidt.[9] Although the premises were owned by the first plaintiff, it is common ground that while the fitout may have been affixed to the land, the fixtures were owned by the second plaintiff.[10]

[8] The plaintiffs held a policy of insurance with the defendant styled "Industrial Special Risks Insurance Policy (Steadfast Mark V)"[11] (the policy).

[9] In early January 2011, Brisbane and other parts of Queensland experienced significant flooding. At some time in either the late evening of 11 January 2011 or the early hours of 12 January 2011, water entered through the wall of the basement of the premises damaging the second plaintiff's fitout and causing disruption to the second plaintiff's legal practice. As a result of the damage, rental payable to the first plaintiff by the second plaintiff was abated and the lost rental forms the basis of the first plaintiff's claim.

[10] Initially, the premises could not be accessed at all and the entire rent was abated. Later, parts of the premises were fit for occupation and use but the basement area was so badly damaged by water that the fitout was replaced. Rental calculated to relate to the basement was abated until repairs were completed. The first plaintiff claims against the policy for the lost rental. The second plaintiff claims against the policy for the cost of clean-up of the basement, replacement of the fitout, loss attributable to business interruption and some associated financial expenses.

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7 Tax invoices for rent and corresponding bank statements, Ex 6 ("Rent invoices and statements").

8 Bundle of photographs, Ex 3.

9 Transcript at 1-68, 1-69.

10 *New Zealand Government Property Corp v HM&S Ltd* [1982] QB 1145 at 1157 where Denning MR explained the notion of "tenants' fixtures", a principle long recognised; *Grimes v Boweren* (1830) 6 Bing 437; *Elwes v Maw* (1802) 3 E 38; [1775-1802] All ER Rep 320.

11 Agreed trial bundle, Ex 1, tab 4 at 17 and following ("Trial bundle").

[11] Although early indications from the defendant were to the effect that the claims under the policy would be met,[12] the defendant ultimately rejected the claims.[13] There is no plea by the plaintiffs that the initial indications by the defendant constituted a binding election. This seems to be a sensible approach by the plaintiffs, as there is no evidence of reliance by the plaintiffs upon the statements made by the defendant that the claims under the policy would be met.[14]

[12] The proper construction of the policy is in dispute. However, it is not contentious that the loss suffered here is of the type to which the policy would respond[15] subject to the operation of an exclusion clause upon which the defendant relies. It is common ground that the burden of proving the application of the exclusion clause falls upon the defendant.[16]

[13] The details of the plaintiffs' claims made in the amended statement of claim[17] are as follows.

The first plaintiff	
Loss of rent	$131,192.04[18]
Interest pursuant to s 57 of the *Insurance Contracts Act (Commonwealth)* 1984	not quantified[19]
The second plaintiff	
Costs of cleaning up from the flood (clean-up costs)	$52,953.53[20]

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12 Trial bundle, tab 6 at 69, tab 7 at 70.

13 Tab 8 at 72.

14 *Freshmark Ltd v Mercantile Mutual Insurance (Australia) Ltd* [1994] 2 Qd R 390.

15 With the exception of the overdraft interest and the interest payable on a facility held by the second plaintiff with the Macquarie Bank.

16 Transcript at 1-4 ll 10-20, 3-19, ll 30-45; Plaintiffs' written submissions, 7 December 2017 at [10]; Defendant's written submissions, 7 December 2017 at [4]; *Trickett v Queensland Insurance Co Ltd* [1936] AC 159 at 164; *Provincial Insurance Australia Pty Ltd v Consolidated Wood Products Pty Ltd* (1991) 25 NSWLR 541 at 545; *Pye v Metropolitan Coal Limited* (1934) 50 CLR 614 at 625.

17 Amended statement of claim, filed 12 August 2016, CFI 16 ("Amended statement of claim").

18 At [14(a)], Schedule A.

19 At [15(a)].

20 At [14(b)], Schedule B.

Costs of fitting out the basement of the premises (new fitout costs)	$457,530.86[21]
Interest incurred on an overdraft as a consequence of the damage (the overdraft interest)	$1,887.14[22]
Interest incurred as "facility interest" on a financial facility as a consequence of the damage (the facility interest)	$140,296.73[23]
Loss of income of the legal practice (loss of practice income)	$198,787.00[24]

[14] An amended defence was filed[25] that put various matters in contest. Importantly, it pleads that the plaintiffs' claim is excluded by a perils exclusion which operates to exclude the defendant's liability under the policy where the damage is caused by an inundation of water in certain circumstances[26] (the flood exclusion).

[15] The pleadings have, to a point, been overtaken by the filing of a "list of matters not in dispute"[27] and a "list of issues".[28] Both of these documents have been adopted by all parties.

[16] The list of matters not in dispute is really a list of mutual admissions. It is not in contest that water entered the basement of the premises and caused physical damage[29] to the second plaintiff's fitout.[30] It is common ground that the policy was in place.[31] There are admissions of the quantum of the clean-up costs, the new fitout costs, the overdraft interest and the facility

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21 At [14(c)], Schedule C. Schedule C shows the amount as $457,530.87.

22 At [14(d)], Schedule D.

23 At [14(e)], Schedule E. That amount is said to be still accruing and was $178,000 at the date of the hearing: see Plaintiffs' written submissions, 7 December 2017 at [78].

24 Amended statement of claim at [14(f)].

25 Filed 16 September 2016, CFI 17 ("Amended defence").

26 Amended defence at [4].

27 Filed 30 November 2017, CFI 30.

28 Filed 30 November 2017, CFI 31.

29 The amended statement of claim alleges damage to fitout and to the building (see [7]) but there is no claim by the first plaintiff for costs of repairs of the building (as opposed to the fitout).

30 List of matters not in dispute at [10] and [13].

31 At [7]–[9].

interest.[32] It is not in contest that the second plaintiff suffered loss as a result of business interruption.[33]

[17] The issues defined in the list of issues as "Primary Issues" are:

> " 1. Whether the insurance policy "flood exclusion", pleaded at paragraph 4 of the amended defence, applies to exclude the plaintiffs' claims.
>
> 2. Whether the first plaintiff had an entitlement to and lost rent as a result of the inundated basement, and if so, in what amount.
>
> 3. What was the amount of the loss which was suffered by the second plaintiff by way of business interruption resulting from the inundation of the basement in January 2011."[34]

[18] The list of issues identifies various "Sub Issues". It is not necessary to set all these out. Of some importance, though, are the following:

(i) whether the second plaintiff is entitled to claim overdraft interest;[35]

(ii) whether the second plaintiff is entitled to claim facility interest;[36]

(iii) the quantum of the loss of rent;[37] and

(iv) the quantum of the claim for business interruption.[38]

[19] Some of the Sub Issues are just a restatement of some of the Primary Issues.

[20] It can be seen then that apart from disagreement as to some aspects of the quantum of the claim, the real dispute between the parties is as to whether the flood exclusion is available to the defendant. Before turning to the terms of the policy and the flood exclusion in particular,

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[32] At [14]–[17].

[33] At [18].

[34] Agreed list of issues at [1]–[3].

[35] At [17].

[36] At [17].

[37] At [16].

[38] At [18].

it is necessary to consider the mechanism through which the water entered the basement of the premises.

How the basement flooded

[21] While there are matters in dispute between the various experts called in the case, the following seems not to be contentious. The premises is situated in Mary Street between Edward Street and Albert Street. Mary Street runs parallel to Margaret Street. The premises fronts onto Mary Street. There is a storm water drain which runs along the back of the premises and there is another drain running in Mary Street in front of the premises. Water from the land (local run off) which enters the drainage system through the drain in Mary Street in front of the premises travels into Albert Street, then into Margaret Street, and then on to a point of discharge into the Brisbane River just beyond Felix Street.[39] However, if the water levels in the Brisbane River are high enough, water in the river (river water) can impact the volume in the drains in different ways. Firstly, the river water can prevent the local run off from entering the river at the discharge point. The local run off will remain in the drains. Further, depending upon the river level, river water might leave the river and enter the drainage pipes. In that case, there will no doubt be some mixing of local run off and river water.[40] Naturally, in these conditions, the level of the river will determine the extent to which the river water travels up the drainage pipes.

[22] The drains are old and consist of vitrified clay pipes.[41] Inspection of the pipes utilising a device fitted with a camera showed the drains to be in fairly poor condition. Many are cracked or breaking. Pieces of the pipes are displaced from position and some joints are also displaced.[42] Tree roots have entered the drains at some points,[43] and at some points there is sediment present.[44] It is common ground between the hydrologists who gave expert evidence in the case that water which was in the pipes has been forced under pressure through cracks in the pipes and into the subterranean soils between the pipes and the basement. That water,

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[39] Map of stormwater drainage system, Ex 2.

[40] Trial bundle, tab 9 at 78.

[41] Trial bundle, tab 9 at 75 and tab 12 at 131.

[42] Trial bundle, tab 12 at 152–154.

[43] At 201, 209–211.

[44] At 212–213.

together with water already in the subterranean soils (groundwater), has been pushed into the basement.

[23] There were four experts: Dr Newton and Dr Connor were both called by the defendant and Mr Martin Giles was called by the plaintiff. Mr Winders, who provided reports for the plaintiff, joined in a joint report with Dr Newton, but Mr Winders did not give evidence before me.

[24] Joint expert statements were tendered; one by Dr Newton and Mr Winders[45] and one by Dr Connor and Mr Giles.[46] In the end there was much more in common between the experts than in contention.

[25] Before turning to the hydrologists' evidence in detail, I should record how the parties presented their respective cases. In the reports of both the hydrologists and the accountants,[47] there is reference to many facts upon which the various opinions are based. There was no formal proof of many of these facts and I was informed that I could accept as agreed the truth of the facts asserted in the various reports.[48]

[26] In their joint report,[49] Mr Giles and Dr Connor produced a graph which shows levels of water in the Brisbane River and in the basement of the premises at relevant times.[50] The graph is:

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[45] Trial bundle, tab 14 at 239.

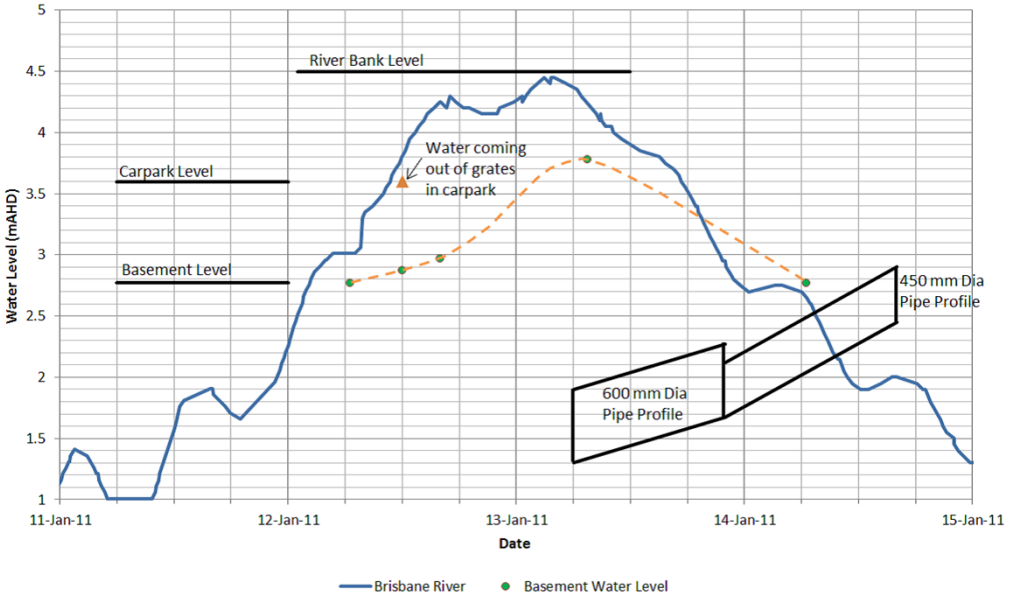
[46] Trial bundle, tab 9 at 74.

[47] Called as experts on the calculation of the business interruption claim of the second plaintiff.

[48] Transcript at 1-16 l 45 to 1-17 l 5.

[49] Trial bundle, tab 9 at 74.

[50] At 75.



[27] No formal proof was attempted of much of what is recorded by the graph. The graph is not self-explanatory and was explained to me by counsel not by a witness. However, none of this was contentious and the parties agreed that the graph accurately depicts the movement of the water levels.[51]

[28] As already mentioned, the graph does require some explanation. Vertical lines can be seen above various stated dates between 11 January 2011 and 15 January 2011. These vertical lines depict midnight; so the vertical line above 12 January 2011 is midnight on 11 January 2011, so the next minute is the first minute in the morning of the 12th. The vertical lines between those lines above stated dates are at six hour intervals. The dotted line which represents the rise and fall of water in the basement of the premises therefore commences at about 6 am on 12 January 2011. The water leaves the basement at about 6 am on 14 January 2011. The solid line represents water levels in the Brisbane River. The graph shows that the river reached the level of the basement between about 1 am and 2 am on 12 January 2011 and fell below the level of the basement at about 11 pm on 13 January 2011.

[29] Rainfall on 11 January 2011 is recorded in Mr Giles' report[52] as:

Period	Rainfall (mm)
7:01 – 10:01	3

[51] Transcript at 1-26 ll 10–20.

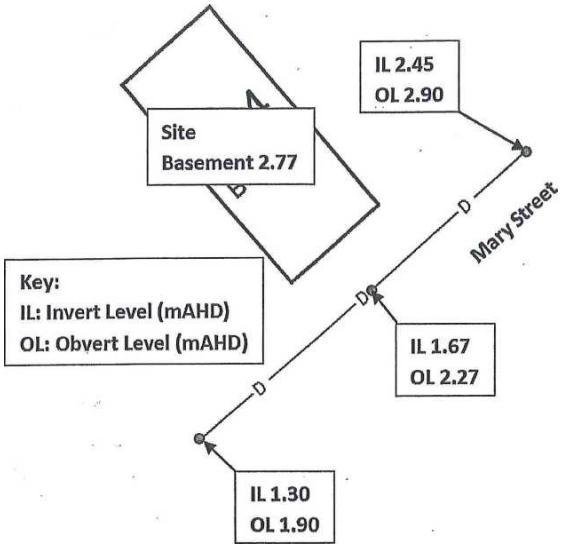
[52] Trial bundle, tab 10 at 100.

10:01 – 10:18	10
10:18 – 11:30	3
11:30 – 12:30	7
12:30 – 16:00	17

[30] While rain has fallen on 11 January 2011, there is a coincidence between the rise and fall of the level of water in the river and the rise and fall of water which has entered the basement. The inference is overwhelming that the rise in the water level in the river caused the inundation of the basement of the premises. All the experts agree that conclusion should be drawn. However, the flood exclusion is not engaged merely by such a causal connection.

[31] Mr Giles and Dr Connor were in agreement as to the levels of the drainage pipes within the ground. In this respect there are two relevant levels, the "obvert level" which is the level of the interior top of the pipe and the "invert level" which is the level of the interior bottom of the pipe.

[32] Again, the joint report of Mr Giles and Dr Connor[53] contains a very useful diagram.[54] It is:



[33] This diagram shows that the levels of the drainage pipes fall as the pipes heads towards Albert Street.[55] At some points (closer to Albert Street) the obvert level of the drainage pipes is

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[53] Trial bundle, tab 9 at 74.

[54] At 76.

[55] Trial bundle, tab 9 at 76. Albert Street is not depicted in the diagram but is to the left of the diagram as the diagram is oriented.

below the level of the basement. At points away from the intersection of Mary and Albert Streets, the obvert level is higher than that of the basement by about 13 centimetres.[56]

[34] All the hydrologists agree that the inundation of the basement occurred because water running under significant pressure in the drainage pipes was expelled into the subterranean soils between the drainage pipes and the wall of the basement of the premises. That water which entered the subterranean soils then drained into the basement. There is some disagreement between Mr Giles on the one hand and Dr Connor and Dr Newton on the other as to the movement of water beneath the surface of the land but before turning to that issue it is necessary to record other matters about which the experts agree.

[35] Mr Giles and Dr Connor agree that the groundwater level over the relevant period is uncertain but was not at a level to cause the inundation of the basement.[57] There was no overland flow from the river.[58] The graph which is replicated at para [26] of these reasons shows the level of the banks of the river and the graph shows that the water in the river did not reach that point. The experts further agreed that local runoff was insufficient to cause the pipes to surcharge and inundate the basement.[59] The water which actually entered the basement was river water, local runoff and groundwater which was in the subterranean soils having permeated down from the surface.

[36] There were two areas of disagreement between Mr Giles and Dr Connor. Firstly, Mr Giles' view was that the local runoff was sufficient to fill the drains to the coincident level in the Brisbane River.[60] Dr Connor disagreed with this view. In their joint report this was said:

> "**Local Runoff in Stormwater System**
>
> MG[61] considers that while the runoff from the local catchment in the period prior to the basement flooding was not sufficient to cause the stormwater system to surcharge, the volume of runoff would have been sufficient to fill the trunk

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[56] The difference between the obvert level of the pipes at 2.90 mAHD and the basement at 2.77 mAHD.

[57] Trial bundle, tab 9 at 77.

[58] Trial bundle, tab 9 at 77.

[59] Trial bundle, tab 9 at 78.

[60] Trial bundle, tab 9 at 79.

[61] A reference to Mr Giles.

> drainage system to the coincident level in the Brisbane River (Section 4.3 of MG Report).
>
> TC[62] considers that that one could not say that the pipe system was ever "full" on 11th January 2011 (that is that all the pipes were full to their Obvert Levels) but agrees that they would have filled at least to the level in the Brisbane River. As the rain fell, the water would be discharging from the pipe system to the river and TC is of the opinion, given that the rainfall intensity is about half of an ARI one year intensity, that the pipe system on this day would never have been full to the Obvert Levels along its length.
>
> MG agrees that the local runoff would have drained to the level of the river at the time the runoff occurred. The purpose of the calculation in the MG Report was to demonstrate that the runoff volume was in excess of the storage capacity of the pipe system and as a consequence local runoff would have occupied the stormwater pipes and then drained to the river. Based on levels in the Brisbane River, there was a slight reduction in water level until the main rise in water level in the river commenced. It is the local water that would have remained in the pipe system at the lowest level in the river that would have been pushed back up the pipe system as the river level rose. MG considers that the level of mixing of river water would have been minimal.
>
> Despite any disagreement above as to whether the system would ever have been 'full' on the day, MG and TC agree that even if it had reached capacity at some stage it did not cause the basement flooding.[63]

[37] In reality, there is not a great difference of opinion between Dr Connor and Mr Giles on this point. Mr Giles was cross-examined in these terms:

> "But, as I understand it, the main reason why water started coming out of the stormwater system was that the stormwater system was full, and that that's the way in which the pressure in the stormwater system built up, correct?---We do. We have to be careful with the word "full". I know Dr Connor took issue with my reference to the word "full" in the joint expert statement, and I – I understand and acknowledge where he's coming from, in that in an engineering the sense the context of "flying full" means that the water – the pipe is full of water and that water is moving down – down the pipe. He is of the opinion – he was – he was of the opinion, and I agree with him, that the water – the volume of run-off wasn't sufficient to create what you would call full conditions. It was running partially full. The entire purpose of the calculation and the reference to the word "full" was with reference to the ability for that rainfall to produce enough run-off that the area below – below the river level would have been capable of being filled with stormwater."[64]

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[62] A reference to Dr Connor.

[63] Trial bundle, tab 9 at 79-80.

[64] Transcript at 2-8 ll 32-45.

[38] Whether there is a significant disagreement on this point and whether Mr Giles is correct really does not matter. Mr Giles, Dr Connor and Dr Newton all agreed that the pressure which caused the water in the pipes to be pushed into the subterranean soils was caused by the rising river.[65] The "filling" of the pipes with local runoff (if that happened) did not create sufficient pressure to cause the discharge of the water into the subterranean soils. Mr Giles conceded that the majority of the water which entered the basement was water which had come from the river. Under cross-examination of Mr Giles this exchange occurred:

> "Can I then suggest – could I then direct your attention to what you call the remnant water, the 450 cubic metres?---Yes.
>
> And your evidence – and I don't wish to quarrel with this evidence – you say that the remnant water largely wouldn't have mixed with the river water, and would have moved up the pipeline system in an unmixed, sort of, state?---That's my – that's my belief, yes.
>
> Now, I suggest to you that only a small part of that 450 cubic metres of remnant water would have emerged near 130 Mary Street, on the same analysis?---I agree.
>
> Now, you've agreed that after the remnant water, river water would have entered the basement?---Correct, yes.
>
> Now, the surface area of the basement was about 520 square metres, correct?---That's correct, yes.
>
> And the basement filled to a depth of a metre?---Correct.
>
> So the volume of water which ended up being in the basement was about 520 cubic metres?---Correct.
>
> So could I suggest to you that only a very small part of that could have been remnant water?---Yes, I agree."[66]

[39] So on Mr Giles' evidence, water leaving the river was pushed up into the drainage pipes, meeting with local runoff, and the resulting pressure forced both local runoff and river water, but mainly river water, into the subterranean soils between the pipes and the basement wall, with the result that most of the 520 cubic metres of water that entered the basement was river water. Although Dr Connor and Dr Newton disagree with Mr Giles as to the extent to which the river water and the local water would have mixed, Dr Connor and Dr Newton agree with Mr Giles' evidence as I have just summarised it.

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[65] Trial bundle, tab 9 at 78; tab 14 at 259 [83].

[66] Transcript at 2-12 ll 18–41.

[40] Given the terms of the flood exclusion, it is not necessary to further resolve the difference between the experts on this first point of disagreement.

[41] The second point of disagreement between the hydrologists is whether Mr Giles is right when he opines that the first water to enter the basement was predominantly local runoff. Dr Connor and Dr Newton said that it was not possible to tell what water reached the basement first. This disagreement was recorded in the joint report as follows:

> "MG considers that there would have been minimal mixing of the first water that entered the basement and that the first water would have predominantly been local runoff.
>
> Regardless of the proportion of local runoff water in the water that entered the basement, TC reiterates that the cause of the basement flooding was clearly the rise of river levels as a result of the river flooding. Without the occurrence of the river flooding, the basement would not have flooded.
>
> TC considers that the peak flood level reached in the basement was determined by the peak level reached in the river, with the basement level being lower[67] due to pressure losses in the system in between. The level reached in the basement was unlikely to be influenced to any measurable degree by the presence or otherwise of local runoff water in the pipes or groundwater.
>
> MG agrees that without the occurrence of river flooding, the basement would not have flooded, and that the peak level reached in the basement was governed by the level reached in the Brisbane River. However, the river flooding prevented the drainage of the local runoff from the catchment that preceded the main peak in the river. It was this local runoff that was pushed back into the system and ultimately into the basement, followed by water from the Brisbane River."[68]

[42] Given the terms of the flood exclusion and the matters upon which the experts do agree, it does not matter to the outcome of the proceedings whether the first water to enter the basement was river water, local runoff or groundwater that had permeated down from the surface. However, for the reasons which follow, I prefer the evidence of Dr Connor and Dr Newton on this topic over that of Mr Giles.

[43] Mr Giles' reports were supplemented on this issue by oral evidence give in chief.[69] His theory is neatly summarised in this exchange.

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[67] This is shown in the diagram reproduced at [26].

[68] Trial bundle, tab 9 at 80-81.

[69] Mr Giles gave evidence after Dr Connor and Dr Newton.

"All right. And, Mr Giles, another matter that was raised yesterday, do you recall Dr Newton describing a process of a cone being formed as water came out of the pipe into the subsoil, and he described it spreading out from that cone – the saturation spreading out from that cone. Do you remember that?---Yes, I remember his – his words there.

Yes, and I asked him questions about, well, as that spread in the way he described, would it not come into contact with other water – specifically groundwater we were talking about – and push it forward? He seemed to pause or to – or back from that. Well, not from the proposition, but, rather, he was suggesting it would mix with whatever water it came to. Do you have a view about that?---I'm firmly of the belief that, although I agree with Dr Newton's concept, I believe he – I'll use the same hand gestures he – he used the concept of the water being pushed away from the pipe.

Yes?---And I certainly agree with that. I also am of the belief, though, that any water that was between the pipe and the building, be it groundwater or – sorry, it's groundwater, would have been pushed before the advancing wave coming out of the pipe.

Well, I was asking him specifically – and maybe you mean the same thing, I'm not sure – but I was asking him specifically about that water that he says is spreading out from the cone, and I asked him about the contact at that perimeter, as it were, with other water, and put to him that it would push that water. Now, is that what you understood he was saying?---That was my - - -

Well, sorry, you tell me what you say about that expanding water, the saturation expanding from the cone?---My – my belief on the water expanding from the pipe is that the water would push before it any water already in between the pipe and – and the building. So any groundwater would have been pushed ahead of the water that was coming out of the pipe.

And why do you say that?

HIS HONOUR: Did you hear the cross-examination yesterday about the sponge example?---Yes.

All right. What do you say about that?---There – there are a few analogies where the sponge is referenced. In terms of considering it at a simplistic level, I – I'm of the view that I can't see how you could have water going into a sponge and not forcing out the water that's already in the sponge as it moves through. I can't see how it would leap frog – how it would actually, sort of, bypass. If you have water contained in – in the sponge and you introduce new water to it, the logic is that it pushes its way through and then comes out the other – other end, pushing the other water first."[70]

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[70] Transcript at 2-4 l 32 to 2-5 l 30 (in evidence-in-chief).

[44] My reference to the "sponge example" was a reference to Mr Ashton QC's cross-examination where he put to witnesses that the mechanics of the movement of the water operated as if a sponge full of water then had further water introduced into one side of it which, it was suggested, would then push water out of the other side. It can be seen that Mr Giles adopted the sponge example. Dr Connor and Dr Newton did not.[71] The evidence in chief of Mr Giles and the cross-examination of Dr Connor and Dr Newton concentrated on the question of whether groundwater, as opposed to local runoff, would be forced into the basement before water escaping from the pipe.[72] Theoretically, at least, water escaping from the pipe could have been local runoff or river water or a mixture of both. Mr Giles' opinion as expressed in the joint report with Dr Connor was that the first water that reached the basement was not groundwater but local runoff followed by river water.[73]

[45] Mr Giles' position was that the water entering the subterranean soil did not so much mix with the water already present but rather pushed the water already present towards the basement.[74] The impression I got from Mr Giles' explanation was that the water already in the soil remained as a block, and as water was forced into the soil between that block of water and the pipes, that block of water was pushed (as a block) towards, and ultimately into, the basement. If Mr Giles' reasoning is accepted, and the water did in fact behave in that way, then, logically, the first water that would have entered the basement was groundwater, followed by the water which left the pipes, be that river water or local runoff or a mixture of the two.

[46] In reality the experts are not far apart. Dr Connor, in cross-examination, said this:

> "MR ASHTON: That it had escaped into the surrounding groundwater, would have had a minor effect on the timing of the initiation of basement inundation and, again, you say negligible to nil effect on the peak level?---Yes.
>
> I'm just talking about the initiation of the inundation. What do you mean by a minor effect on the timing?---By the way I said 'could have' too. I didn't say would have.
>
> No, no, no?---If there is a slight difference.

---

[71] At 1-93 ll 40–48; 1-143 ll 22–40.

[72] At 1-80 l 35 to 1-83 l 25; 1-111 l 28 to 1-1114 l 30; 2-4 l 32 to 2-5 l 30.

[73] Trial bundle, tab 9 at 80.

[74] Transcript at 2-5 ll 13–30.

> No, but what – yes, could have, but what do you mean by that?---Yeah, exactly what I just tried to explain then, that if there was water in some of those voids when the other water was coming out, they would mix, but there would be a greater volume of water there ready to move towards the basement so that it would take less water coming out of the gaps in the pipeline before the first drip occurred in the basement.
>
> Yes?---It might be – you know, it might be a matter of minutes or seconds or whatever, but – and I'm not saying also that that groundwater was the first water in because there is the mixing process that goes on, but the initiation of the first drip may have been fractionally earlier in time than if the system was totally dry. That's what I was trying to say."[75]

[47] While I accept the expertise and honesty of all the hydrologists without reservation, I prefer the evidence of Dr Connor on this issue for a number of reasons. He is clearly the most experienced of the hydrologists called.[76] He answered questions with an assuredness that such vast experience no doubt gives. Dr Connor's explanation is to my mind more logical, with respect, than Mr Giles' theory. All the hydrologists accepted that the water escaped from the pipes under pressure. It stands to reason that water which has been forced from the pipe under pressure will by that process mix with, rather than push along, water which is not under pressure but sitting near the pipe. Dr Connor's opinion is supported by Dr Newton.

[48] The graph which is set out at [26] of these reasons shows that no water entered the basement until the river level met the basement level. I find that it was the pressure of the river water (mixed with local runoff) which caused the pipes to leak and the water then to enter the basement. It is therefore more likely than not that it was the river water, which (in the pipes) reached basement level and then, under pressure found its way from the pipes and ultimately, mixed with local runoff[77] and groundwater, [78] into the basement. As Dr Connor opined, the first drip into the basement could have been groundwater, or water which had left the pipes. After the initial inundation of the subterranean soils, the river level has risen a further 1.7 metres. This would have pushed the local runoff further up the pipes clearly justifying the hydrologists' unanimous view that most of the water that entered the basement was river water.

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[75] At 1-112 l 32 to 1-113 l 5.

[76] Trial bundle, tab 10 at 105–106; tab 11 at 122–129; tab 14 at 364–379.

[77] Mixed in the pipes before escaping.

[78] Mixed in the ground after the river water and local runoff escaped the pipes.

[49] I find that:

1. The river levels began to steadily rise from just before midday on 11 January 2011, although there was a slight drop at about 8 pm.[79]

2. Over the period 11 January 2011 to 15 January 2011, the groundwater table remained lower than the level of the basement of the premises.[80]

3. Some water was present in the subterranean soils between the pipes and the basement wall in the period prior to 6am on 12 January 2011 but that water was from precipitation leaching down through the soils.[81]

4. The local runoff did not fill the drainage pipes.[82]

5. There was no overflow from the river to the premises; the river level remained at all times below the level of its banks.[83]

6. As the river rose any local runoff which was in the pipes was pushed back up the pipes, although there was obviously some mixing of river water and local runoff where the two met in the pipes.[84]

7. As the river water came up the pipes, pressure built which forced water through cracks and defects in the pipes at a point near the basement wall but higher than the basement wall.[85]

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[79] The graph at [26] of these reasons.

[80] Trial bundle, tab 9 at 77.

[81] At 77.

[82] Transcript at 2-8 ll 32–45, reproduced at [36] of these reasons.

[83] Trial bundle, tab 9 at 77.

[84] At 78.

[85] At 78.

8. The first water to leave the pipes in this fashion may have been local runoff or river water but most likely river water mixed to an extent with local runoff.[86]

9. As the river rose, the proportion of river water in the pipes increased.[87]

10. The water from the pipes was forced under pressure towards the basement wall mixing with any groundwater.[88]

11. The first water to reach the basement wall and enter the basement may have been groundwater, local runoff, river water, and probably a mixture of all three.[89]

12. As the river continued to rise and the proportion of river water in the pipes increased so the proportion of river water entering the basement rose with the result that most of the water that entered the basement of the premises was river water.[90]

Terms of the policy

[50] The policy consists of a letter dated 4 November 2010, with an attached set of conditions and endorsements relating to the "Steadfast MK IV Industrial Special Risks Policy".[91]

[51] "The Insured" is defined as two plaintiffs namely, the first plaintiff as trustee for the Wiesac Trust, and the second plaintiff.[92]

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[86] Discussion at [41]–[47] of these reaons.

[87] Trial bundle, tab 9 at 80–81.

[88] At 78.

[89] At 81.

[90] At 80.

[91] Trial bundle, tab 4 at 17.

[92] At 19.

[52] "The Business" is defined as "principally law firm and any other occupation incidental thereto".[93]

[53] There are "Declared Values" in these terms:[94]

DECLARED VALUES:	**Section 1**	
(in accordance with the Basis of Settlement)	(all property insured)	$6,719,000
	Section 2	
	Gross Fees	$12,482,540
	Gross Rentals	$1,945,000
	Increased Cost of Working	$100,000
`	Professional Fees	$150,000

[54] There are two sections in the policy. Section 1 concerns physical loss and damage[95] and Section 2 concerns consequential loss.[96]

[55] In section 1, the Indemnity is in these terms:

> "**THE INDEMNITY**
>
> In the event of any physical loss, destruction or damage (hereinafter in Section 1 referred to as "damage" with "damaged" having a corresponding meaning) not otherwise excluded happening at the Situation to the Property Insured described in Section 1 the Insurer(s) will, subject to the provisions of this Policy including the limitation on the Insurer(s) liability, indemnify the Insured in accordance with the applicable Basis of Settlement.

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93 Ibid.

94 At 20.

95 At 29.

96 At 36.

Subject to the liability of the Insurer(s) not being increased beyond the Limit(s) of Liability already stated herein, the Insurer(s) will also indemnify the Insured for: [a list of heads of loss]"[97]

[56] The "Basis of Settlement" in Section 1 is relevantly in these terms:[98]

"**BASIS OF SETTLEMENT**

(a) On buildings, machinery, plant and all other property and contents (other than those specified below); the cost of reinstatement, replacement or repair in accordance with the provisions of the Reinstatement and Replacement and Extra Cost of Reinstatement Memoranda as set out herein.

Provided that if the Insured elects to claim the indemnity value of any damaged property, the Insurer(s) will pay to the Insured the value of such property at the time of the happening of the damage or at its/their option reinstate, replace or repair such property or any part thereof. In any event the Insurer(s) will pay costs incurred by the Insured in accordance with the provisions of the Extra Cost of Reinstatement Memorandum."

[57] In Section 1 is a clause concerning the Declared Values, in these terms:

"**DECLARED VALUES**

The Schedule of Declared Values at each location (in accordance with the applicable Basis of Settlement) attaches to and forms part of this Policy for the purpose of the application of Co- Insurance."[99]

[58] The definition of "Declared Values" concerns co-insurance. In that respect the policy provides as follows:

"(iii) Property insured under this memorandum is separately subject to the following Co-Insurance clause:

in the event of damage to any property insured hereunder at any situation caused by any event hereby insured against, the Insurer(s) shall be liable for no greater proportion of such damage than the amount that the Insured's declaration of value of property insured at such situation on the day of commencement of the Period of Insurance bears to the sum representing eighty-five per cent (85%) of the cost which would have been incurred in reinstatement if the whole of such property had been destroyed on that day, but not exceeding the Limit of Liability expressed in the Schedule;

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[97] At 29.

[98] At 31.

[99] At 32.

provided that if the sum actually incurred or expended in rebuilding or replacing the damaged property within the meaning of sub-paragraph (a) of the abovementioned definition of reinstatement, exceeds the amount which would have been payable under this Policy if this memorandum had not been incorporated herein, but is less than the cost of reinstatement as above defined, then the sum so actually incurred or expended shall, for all purposes of this memorandum, be deemed to be the cost of reinstatement of the property.

Provided further that the above clause shall not apply if the amount of the damage does not exceed five per cent (5%) of the amount of the Insured's declaration aforementioned."[100]

[59] The Indemnity in Section 2 is in these terms:

"In the event of any building or any other property or any part thereof used by the Insured at the Premises for the purpose of the Business being physically lost, destroyed or damaged by any cause or event not hereinafter excluded (loss, destruction or damage so caused being hereinafter termed "Damage") and the Business carried on by the Insured being in consequence thereof interrupted or interfered with, the Insurer(s) will, subject to the provisions of this Policy including the limitation on the Insurer(s) Liability, pay to the Insured the amount of loss resulting from such interruption or interference in accordance with the applicable Basis of Settlement.

Provided that the Insurer(s) will not be liable for any loss under this section unless the Insured's property lost, destroyed or damaged is insured against such Damage (loss arising out of destruction or damage by explosion of Boilers and/or Economisers excepted) and the insurer or insurers by which such property is insured shall have paid for, or admitted liability in respect of, such Damage unless no such payment shall have been made or liability shall not have been admitted therefore solely owing to the operation of a provision in such insurance excluding liability for loss below a specific amount."[101]

[60] The Basis of Settlement of Section 2 claims is relevantly in these terms:

"**BASIS OF SETTLEMENT**

Item No. 1

The Insurance under this item is limited to loss of Gross Profit due to (a) Reduction in Turnover and (b) Increase in Cost of working and the amount payable as indemnity thereunder shall be:

(a) In respect of Reduction in Turnover:

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[100] At 33.

[101] At 36.

the sum produced by applying the Rate of Gross Profit to the amount by which the Turnover during the Indemnity Period shall, in consequence of the Damage, fall short of the Standard Turnover,

(b) In respect of Increase in Cost of Working:

the additional expenditure necessarily and reasonably incurred for the sole purpose of avoiding or diminishing the reduction in Turnover which, but for that expenditure, would have taken place during the Indemnity Period in consequence of the Damage, but not exceeding the sum produced by applying the Rate of Gross Profit to the amount of the reduction thereby avoided;

less any sum saved during the Indemnity Period in respect of such of the charges and expenses of the Business payable out of Gross Profit as may cease or be reduced in consequence of the Damage.

Provided that if the Declared Value of Gross Profit at the commencement of each Period of Insurance be less than the sum produced by applying the Rate of Gross Profit to the Annual Turnover, (or its proportionately increased multiple thereof, where the Indemnity Period exceeds twelve (12) months) the amount payable hereunder shall be proportionately reduced."[102]

[61] Various definitions are given to terms in Item No 1 of the Basis of Settlement in Section 2. Relevantly, the following is provided under "Definitions":

"**Gross Profit**

The amount by which:

(a) the sum of the Turnover and the amount of the Closing Stock and Work in Progress shall exceed

(b) the sum of the amount of the Opening Stock and Work in Progress and the amount of the Uninsured Working Expenses as set out in the Schedule.

Note

The amounts of the Opening and Closing Stocks and Work in Progress shall be arrived at in accordance with the Insured's normal accountancy methods, due provision being made for depreciation.

Turnover

The money (less discounts, if any allowed) paid or payable to the Insured for goods sold and delivered and for services rendered in course of the Business at the Premises.

Indemnity Period

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[102] Ibid.

The period beginning with the occurrence of the Damage and ending not later than the number of months specified in the Schedule thereafter during which the results of the Business shall be affected in consequence of the Damage.

Payroll

The remuneration (including but not limited to payroll tax, bonuses, holiday pay, workers' compensation insurance premiums and/or accident compensation levies, superannuation and pension fund contributions and the like) of all employees.

Shortage in Turnover

The amount by which the Turnover during a period shall, in consequence of the Damage, fall short of the part of the Standard Turnover which relates to that period.

Rate of Gross Profit: The rate of Gross Profit earned on Turnover during the financial year immediately before the date of the damage

Annual Turnover: The Turnover during the 12 months immediately before the date of the damage.

Standard Turnover: The turnover during that period in the 12 months immediately before the date of the Damage which corresponds with the Indemnity Period.

Rate of Payroll: The rate of Payroll to Turnover during the financial year immediately before the date of the damage.

To which such adjustments shall be made as may be necessary to provide for the trend of the Business and for variations in or other circumstances affecting the Business either before or after the damage or which would have affected the Business had the damage not occurred, so that the figures thus adjusted shall represent as nearly as may be reasonably practicable the results which but for the damage would have been obtained during the relative period after the damage."[103]

The flood exclusion

[103] At 38.

[62] The flood exclusion clause is in these terms:

> "The Insurer(s) shall not be liable under Sections 1 and/or 2 in respect of:
>
> …
>
> 3. Physical loss, destruction or damage occasioned by or happening through:
>
> (a) flood, which shall mean the inundation of normally dry land by water escaping or released from the normal confines of any natural water course or lake whether or not altered or modified or of any reservoir, canal or dam;
>
> (b) water from or action by the sea, tidal wave or high water:
>
> Provided that Perils Exclusions 3(a) and 3(b) shall not apply if loss, destruction or damage is caused by or arises out of an earthquake or seismological disturbance."[104]

[63] There is no evidence of "earthquake or seismological disturbance".

[64] In construing the exclusion clause, the aim is to objectively discern the parties' intentions by reference to the words of the clause in the context of the whole document. As the policy is a commercial contract, regard should be had to "the commercial circumstances which [it] addresses and the objects which it is intended to secure".[105]

[65] While the clause must be construed as a whole, it is useful to consider the constituent parts of the flood exclusion.

Physical loss, destruction or damage occasioned by or happening through

[66] The flood exclusion identifies an event (here, relevantly, flooding) and then excludes liability for "physical loss, destruction or damage" which is "occasioned by or happening through" the "flood" as defined. The "flood" here is the "inundation" of "normally dry land", being the subterranean soils or the basement, by water which is "escaping"[106] from the "natural confines of [the Brisbane River]".

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[104] At 44.

[105] *McCann v Switzerland Insurance Australia Ltd* (2000) 203 CLR 579 at [22].

[106] There is no suggestion here of water being "released" from the river.

[67] In *Mercantile Mutual Insurance (Aust) v Rowprint Services (Victoria) Pty Ltd*,[107] the Court of Appeal of Victoria considered an insurance policy which excluded loss from damage "occasioned by or happening through" particular events. Callaway JA said this of that phrase:

> "[24] The words 'occasioned by or happening through' have a wide meaning: cf *Switzerland General Insurance Co Ltd v Lebah Products Pty Ltd* (1982) 2 ANZ Insurance Cases ¶60-498 at p77,826. A motor car may be stolen or a shop may be looted, the proximate cause of the loss being theft. The 'occasion' of the loss may nevertheless be riot or civil commotion: see, for example, *Cooper v General Accident Fire and Life Assurance Corporation Ltd* (1922) 128 LT 481 and *Spinney's (1948) Ltd v Royal Insurance Co Ltd* [1980] l Lloyd's Rep 406, esp at p44 l-p442. Loss or damage may also 'happen through' a cause that is not the proximate cause. It is a more difficult question whether, and if so in what circumstances, the words include a mere link in a chain of causation that began with the proximate cause, although it is true that such a link may be the immediate occasion of the loss or damage and in a sense the latter happens through it. It is easier to see how the words, and similar expressions, may refer to a cause or set of conditions anterior to the proximate cause or to a concurrent cause, less important than but operating together with the proximate cause. See also the cases referred to in Clarke, *The Law of Insurance Contracts* (3rd ed 1997), §25-7." [108]

[68] Reynolds AP, in *Switzerland General Insurance Co Ltd v Lebah Products Pty Ltd*[109] said this: "The expression 'occasioned by or happening through' provides for a very wide scope of causal relationships".[110]

[69] *Mercantile Mutual Insurance (Aust) Ltd v Rowprint Services (Victoria) Pty Ltd* has been followed consistently in Queensland.[111] Therefore, much of the difference of opinion between the competing experts in this case ceases to be relevant. The defendant's case is that the subterranean soils between the pipes and the wall of the basement of the premises is

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[107] [1998] VSCA 147.

[108] At [24].

[109] (1982) 2 ANZ Insurance Cases 60-498.

[110] At 77,826. Hutley J agreed with Reynolds AP at 77,827, Mahoney JA proceeded on the basis that the expression required a causal connection between the event and the loss and that was admitted, 77,827.

[111] Chesterman J (as his Honour then was) in *Prime Infrastructure (DBCT) Management Pty Ltd v Vero Insurance Ltd* [2004] QSC 356 at [14] and on appeal [2005] QCA 369 at [29] and by Mackenzie J in *Eastern Suburbs Leagues Club Ltd v Royal and Sun Alliance Insurance Ltd* [2003] QSC 413 at [41].

"normally dry land"[112] and that at least some of the water which leaked from the pipes was river water "escaping from the normal confines of [the river]". If that is established, then the damage is damage "occasioned by or happening through" the "flood",[113] because the river water leaking from the drainage pipes has made its way to the basement and/or has pushed groundwater into the basement. The entry of groundwater into the basement has been "occasioned by" or has "happened through" the river water being forced under pressure into the subterranean soils (the "normally dry land"). The local runoff is not water "escaping the normal confines of [the river]." Damage has no doubt been occasioned by local runoff. The legal effect of that is explained later.[114] However, as the river levels rose and the proportion of river water escaping the pipes rose, no doubt river water pushed local runoff (already expelled into the subterranean soils) into the basement.

[70] As later explained, there is a dispute as to what is potentially the "normally dry land" for the purposes of the flood exclusion; the basement itself, and/or the subterranean soils between the pipes and the basement. Firstly, the plaintiff submits (as later analysed) that neither the subterranean soils nor the basement are, relevantly to the policy, "normally dry land".

[71] River water has entered the subterranean soils. River water also entered the basement. As explained, the entry of river water into the subterranean soils has caused river water, local runoff and groundwater to enter the basement and cause damage. Therefore, if the "normally dry land" is (or includes) the subterranean soils, then the damage to the basement is loss "occasioned by or happening through" the escape of river water into the subterranean soils.

[72] However, local runoff has also entered the subterranean soils and contributed to the damage in the basement. Similarly, if the "normally dry land" is the basement, the damage is "occasioned by or happening through" the escape of river water,[115] and also local runoff.[116]

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[112] Or the basement itself is the "normally dry land"; see later discussion.

[113] As defined.

[114] See [72]–[80] of these reasons.

[115] Potentially covered by the flood exclusion.

[116] Not covered by the flood exclusion.

[73] Consequently, this is a case where there are multiple causes of the damage and only one of those causes is caught by the flood exclusion. That raises consideration of *Wayne Tank and Pump Co Ltd v Employers Liability Insurance Corporation Limited*.[117]

[74] There is, in the authorities, fairly regular reference to what is called the "*Wayne Tank* principle". That principle is said to be that where there are two proximate or substantial causes of the one loss and only one falls within an exclusion clause, the insurer may rely upon the exclusion and avoid liability. However, there must be some doubt that *Wayne Tank* establishes any general principle; rather, it establishes that the proper construction of most exclusion clauses will in fact lead to a result that an insurer will avoid liability under an exclusion clause where one or more proximate causes of the loss falls within the clause.

[75] In *McCarthy v St Paul International Insurance Co Ltd*,[118] Allsop J (as his Honour then was) considered the history and development of the *Wayne Tank* principle. His Honour identified circumstances where loss was caused by "joint" causes, and "causes operating concurrently, but independently". His Honour explained this as follows:

> "More difficulty arises, however, where one can discern two proximate or efficient causes and one falls within, and the other is excluded from, the policy. That is the circumstance to which *Wayne Tank* [1974] QB 57 was directed.
>
> *Wayne Tank* [1974] QB 57, the cases referred to in *Wayne Tank* [1974] QB 57 and other illustrations of the "principle" found in *Wayne Tank* [1974] QB 57 can be seen as the operation of ordinary contractual principles upon facts revealing two proximate causes which are concurrent and interdependent, in the sense that neither would have caused the loss without the other. In such cases the two causes can be seen as inseparable and so, in effect, as joint: see, in a somewhat different context, *Shipping Corporation of India Ltd v Gamlen Chemical Co Australasia Pty Ltd* (1980) 147 CLR 142 at 163-64."[119]

[76] And later:

> "More difficulty may be encountered in circumstances where a policy excludes one cause, includes another and the loss is occasioned by the two causes

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[117] [1974] 1 QB 57 at 67 per Lord Denning MR, 69 per Lord Cairns, 75 per Lord Roskill; See also *Kiriacoulis Lines SA v Compagnie d'Assurances Maritime Aeriennes et Terrestres Camat (v Demitrak*) [2002] 1 Lloyd's Rep IR 795 and *Provincial Insurance Australia Pty Ltd v Consolidated Wood Products Pty Ltd* (1991) 25 NSWLR 541 at 564.

[118] (2007) 157 FCR 402.

[119] At [92]–[93].

> operating concurrently, but independently, in the sense that each would have caused the loss without the other. At the outset, it may be doubted that the solution in any given case is to be found in the application of any principle of insurance law, other than one which states that the rights of the parties to the policy are to be determined by reference to the terms of the contract as found. This was the principle applied by all three Lords Justices in *Wayne Tank* [1974] QB 57. Thus, it is always essential to pay close attention to the terms of any policy and the commercial context in which it was made, for it is out of these matters that the answer to the application of the policy to the facts will be revealed."[120]

[77] Then by way of conclusion, his Honour said as follows:

> "In these cases, even though it could be posited that the damage may or would have occurred in any event by the cause that was not excluded, the fact is that the policy in each case was construed as excluding damage caused in a particular way. As a matter of fact the damage was caused in that way (whether or not there was another concurrent cause). Thus, recognising the limits of the cover agreed upon, the loss fell outside the terms of the policy. *Wayne Tank* [1974] QB 57 has become the best known illustration of this result. But the result is not the consequence of the application of a principle other than that which truly underlay *Wayne Tank* [1974] QB 57 - the ascertainment and application of the contractual intentions of the parties."[121]

[78] Here, all the damage to the basement is loss "occasioned by or happening through" the escape of water from the river. This is because it was the back up of water from the river which caused the pressure in the pipes to rise to a point where water was forced into the subterranean soils. However, it is not the escape of river water into the pipes which activates the exclusion. It is the escape of water into "normally dry land", here the subterranean soils or the basement.

[79] The majority of the water that entered the basement was river water. It follows then that the majority of the water which entered the subterranean soils was river water. Certainly then, the dominant cause of the loss is the "inundation of normally dry land by water escaping from the normal confines of [the river]".[122] There is only one loss, being the damage caused by the body of water which entered the basement.

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[120] At [104].

[121] At [109]. Kiefel J (as her Honour then was) and Stone J agreed: [56] and [58] respectively; see also *Caine v Lumley General Insurance Ltd* (2008) 15 ANZ Insurance Cases 61-756 at 76,529 [84], *Kyriackou v Ace Insurance Ltd* [2013] VSCA 150 [102]; *Baulderstone Hornibrook Engineering Pty Ltd v Gordian Runoff Ltd* [2008] NSWCA 243 [263].

[122] Whether the "normally dry land" is relevantly the subterranean soils or the basement.

[80] The loss, then, has concurrent causes, namely the damage by the river water, and that by other water. Policies containing such flood exclusion clauses have been construed to exclude liability of the insurer in those circumstances.[123] Here, on a proper construction of the exclusion clause, as the river water was a cause, and indeed the dominant cause of the loss occasioned by the damage to the basement, then assuming that the clause otherwise applies, the exclusion clause is engaged and will defeat the plaintiffs' claim.

Inundation of normally dry land

[81] As already observed, there was some dispute as to what, on the facts of this case, was the allegedly "normally dry land" for the purposes of the flood exclusion. There are three possibilities: the subterranean soils between the drainage pipes and the basement wall, the basement itself or neither. Mr Ashton QC for the plaintiff contends that on a proper construction of the flood exclusion the basement (being the Property Insured) is not "normally dry land" for the purposes of the flood exclusion. His submission is that, on a proper construction of the flood exclusion the "normally dry land" cannot be one and the same as the Property Insured. This is important to the plaintiff's case as Mr Ashton QC then submits that, for various reasons, the leakage into subterranean soils is not contemplated as an "inundation of normally dry land". He submits that any inundation must be overflow across the surface of land. The flood exclusion, he submits, does not apply to the escape of water into subterranean soils.

[82] It is worth setting out Mr Ashton's written submissions:

> "36. The requirement that there be 'inundation of normally dry land' it is submitted, cannot be satisfied by reference to the insured property itself. That is to say that the inundation of the insured property itself is not the relevant inundation of normally dry land.
>
> 37. First, the exclusion engages two separate concepts 'Property Insured' and 'normally dry land'. It offends logic and language to contend that, although they are juxtaposed in the policy as different concepts and are expressly given different names they are in fact the same thing. They are not the same thing. They are different things and the definition of flood requires that the one must be 'occasioned by' or 'happen through' the other.

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[123] *Elilade Pty Ltd v Nonpareil Pty Ltd* (2002) 124 FCR 1 at [55]; *Countrywide Finance Ltd v State Insurance Ltd* [1993] 3 NZLR 745 at 756; *Prosser v AMP General Insurance Ltd* [2003] NTSC 80 at [12] and [13]; *Eastern Suburbs Leagues Club Ltd v Royal & Sun Alliance Insurance Australia Ltd* [2003] QSC 413 at [42]–[44].

> 38. Secondly, to treat the inundation of the insured property itself as the requisite 'inundation of normally dry land' for purposes of the definition would introduce incongruity and redundancy.
>
> 39. All insured premises will always be 'normally dry land'. Insurers do not insure buildings or other property in swamps or rivers or underwater. Thus, if it were in contemplation that inundation of the insured building was the only necessary object of attention, the definition of flood should simply read:
>
> > …*the inundation of the insured property by water escaping or released from the normal confines of any natural watercourse*…
>
> The expression of normally dry land would simply have no work to do."[124]

[83] However, one can imagine circumstances where at least part of the Property Insured (a building) might not be on "normally dry land". A building might stand on land with features such as creeks, dams, a swimming pool, etc. However, the real difficulty with the submission is that it assumes that the notions of "normally dry land" and "the property insured" are mutually exclusive. The term "normally dry land" includes in this case the land occupied by the buildings and also includes other land which is "normally dry". In other words, the reference to "normally dry land" extends the flood exclusion to circumstances where there is not direct inundation of the insured property, but loss to the insured property is "occasioned by or [happened] through" the inundation of other "normally dry land".

[84] It is necessary to consider the purpose of the clause viewed against its presence in a commercial contract. It would be a very curious result if the relevant loss is damage caused to the "Property Insured", but the "Property Insured" is not "normally dry land" for the purposes of the flood exclusion. What is intended is to exclude liability in circumstances of "flood". The flood exclusion does this by excluding liability where the loss is occasioned by or happens through the inundation of normally dry land which may include the premises insured. This conclusion is consistent with *Eliade Pty Ltd v Nonpariel Pty Ltd*[125] and *LMT Surgical Pty Ltd v Allianz Australia Insurance Ltd*.[126] Therefore, the entry of river water into the basement was entry of water into "normally dry land".

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[124] Plaintiff's written submissions, 7 December 2017. He then referred to *LMT Surgical Pty Ltd v Allianz Australia Insurance Ltd* [2014] 2 Qd R 118; *Provincial Insurance Australia Pty Ltd v Consolidated Wood Products Pty Ltd* (1991) 25 NSWLR 541 and *Eliade Pty Ltd v Nonpariel Pty Ltd* (2002) 124 FCR 1.

[125] (2002) 124 FCR 1 at [50].

[126] [2014] 2 Qd R 118 at [1], [5].

[85] I should, however, deal with the issues that arise from Mr Ashton QC's submission that the leakage into the subterranean soils was not relevantly "inundation" and secondly the subterranean soils were not in any event "normally dry".

[86] I reject the submission that the subterranean soils were not "normally dry". There was certainly groundwater at some level in the subterranean soils. The groundwater level in the vicinity of the basement was usually between 1.5 and 2.7 AHD. While the experts agreed that the heavy rainfall may have raised the level, that level was impossible to ascertain. Any significant leakage of water from the pipes would only occur when the pipes were under pressure; that is when there was significant rainfall or other events to fill them. There was therefore generally not water present in the soils at the level of the pipe or the basement.

[87] In *Eliade Pty Ltd v Nonpariel Pty Ltd*,[127] Mansfield J dealt with the operation of a flood exclusion similar to the present but where there had been two inundations of the insured premises. For reasons which do not matter here, the first was an event to which the policy obviously responded. However, the insurer argued that the second inundation which was caused when the river broke its banks was caught by the flood exclusion. The flood exclusion was in similar terms to the flood exclusion here. The insured argued that the second inundation was not a flood, because the flooded area (including the insured premises) was not "normally dry land", it having been flooded the previous day. In rejecting that submission, his Honour said:

> "I reject that submission. In my view the Katherine area, including the premises, was 'normally dry land'. That was its normal state. The fact that, on 26 and 27 January 1998, the heavy rainfall in the area somehow caused the initial inundation does not change the character of the area. It may be accepted that the onus is upon CIC to prove that the second inundation was a 'flood' so as to fall within the exception to the indemnity granted under the policy: *Pye v Metropolitan Coal Co. Ltd* (1934) 50 CLR 614 at 625. However, that onus in my view is readily satisfied. The expression 'normally dry land' must be construed in its context. The context is in the definition of 'flood' for the purposes of the exemption and in the context of the policy as a whole. 'Flood' is defined by a particular event or process - the inundation of land of a certain character by water overflowing from a particular source - and by reference to the character of the land inundated. The character of the land inundated is intended, in my view, to have a more or less constant character. That is indicated by the use of the word 'normally'. It suggests the character of the land is measured not by reference to its particular (and, on the

[127] (2002) 124 FCR 1.

> evidence, very occasional) character following very abnormal rainfall but by its usual or normal character."[128]

[88] In one sense, once it is accepted that rainfall is "normal", no land other than that in completely arid areas would be "normally dry land" as the land would not be dry during periods of rainfall. His Honour's approach to the construction of the term "normally dry land" must, with respect, be correct. The usual character of the subterranean soils between the pipes and the basement wall, at least at the relevant level is usually dry. It is "normally dry land".

[89] Mr Ashton QC's other submission on this topic is that leakage into the subterranean soils is not contemplated by the flood exclusion. In other words, leakage into the subterranean soils is not "inundation of … land by water".

[90] No authority was cited to me where there had been judicial consideration of the term "inundation" in a way that is helpful here. Dictionary definitions include:

> "**inundate**
>
> 1. To overspread *with* a flood of water to overflow, flood.
>
> …
>
> **inundation**
>
> 1. The action of inundating; the fact of being inundated with water; an overflow of water; a flood.[129]
>
> **escape**
>
> …
>
> 3. to issue from a confining enclosure, as a fluid.
>
> …
>
> 15. leakage, as of water, gas, etc.[130]

[91] Dictionary definitions perhaps give some support for the plaintiffs' contention that inundation of land with water envisages the flooding of only the surface of the land. However, the mechanism of the flooding here is relevant to the question. The subterranean soils are

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[128] At [50].

[129] Collins English Dictionary.

[130] Macquarie Dictionary.

compacted only to a level where there exist gaps between the millions of soil particles. Water under pressure was forced into the soils and filled the gaps. As the gaps filled with water, the water then flowed into other gaps moving its way towards the basement wall. That process in my view constitutes an "inundation" of the subterranean soils. There is no reason to think that the subterranean soils are not "land".

[92] The purpose of the exclusion is to exclude liability for damage caused by flooding, namely the damage caused by water escaping from, relevantly here, the river. There is no room to limit the meaning of the term the "inundation" of "normally dry land" to mean "the inundation of the surface of normally dry land".

[93] In any event, for the reasons already explained, the insured premises may be the "normally dry land" for the purposes of the exclusion. The basement of the premises is "land", it being a fixture on land, and clearly, the basement is "normally dry".

Escaping or released from the normal confines of any natural water course whether or not altered by any reservoir, canal or dam

[94] The Brisbane River is obviously a natural water course. There is no submission that the pipes themselves are part of the natural water course or are a canal.

[95] Mr O'Shea QC for the defendant firstly submits that run off which is unable to drain into the river because of back up of river water in the pipes is water "escaping [the river]".[131] He also submits that river water which was in the river but moves up the pipes and into the subterranean soils and ultimately into the basement of the premises is water "escaping [the river]".[132] Mr Ashton QC for the plaintiff submits that only river water (water that was once in the river) is capable of being caught by the flood exclusion. He further submits that river water leaking from the pipes is not water "escaping [the river]"; rather it is water that has already escaped the river and is now escaping the pipes.[133]

[96] Mr O'Shea QC's first submission is potentially important. If he is right, then if a proximate cause of the damage is from local runoff then the flood exclusion would apply. Mr Ashton

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[131] Defendant's written submissions at [46].

[132] At [36].

[133] Plaintiff's written submissions at [27].

QC's argument that river water backing up in the pipes is not water "escaping [the river]" and therefore does not engage the flood exclusion would become irrelevant.

[97] Mr O'Shea QC relies upon *Hams & Anor v CGU Insurance Limited*.[134] In that case, the relevant exclusion provided that liability of the insurer was excluded where "destruction, loss or damage [was] caused by … flood". Flood was defined as follows:

> "Flood means inundation following the escape of water from the normal confines of any lake, reservoir, dam, river, creek or navigable canal, as a result of a natural phenomenon which has some element of violence, suddenness or largeness about it but does not mean inundation by water from fixed apparatus, fixed tanks, fixed pipes or run off of surface water from surrounding areas."[135]

[98] The insured premises in *Hams* were located in a low-lying geographical area called the Koralta depression. In that general area were various watercourses and lakes, including catchments described as "swamps". The evidence was that water, which, but for the fact that the swamps were filled with water, would have entered the swamps, contributed to the damage. The swamps were not caught within the geographical features described in the exclusion in the policy.

[99] However, Einstein J said:

> "160. I reject the plaintiffs' submission that upon its true construction the word 'escape' as used in the flood exclusion, only applies where water was at one time within a lake. To my mind the reasoning of Mahoney JA in *Provincial Insurance* is pervasive[136] and any event[137] arguably binding upon a first instance judge. Notwithstanding the slight differences in the wording of the provision there being construed, the same approach requires to be taken in relation to the present provision:
>
> > 'For the exclusion to apply, it is not necessary that the precise water which escaped from the water course or canal be identified as having actually entered the insured's premises. The exclusion is of loss or damage 'occasioned by or happening through' the inundation of normally dry land 'by

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[134] (2002) 12 ANZ Insurance Cases 61-525.

[135] At 76,144.

[136] This is presumably a misprint in the reported case for the word "persuasive".

[137] This is presumably a misprint in the reported case for the phrase "in any event".

> water escaping . from …' a water course or canal. If, by reason of the inundation of normally dry land by water so escaping, other water was forced into the insured's premises and occasioned loss or damage that would, in my opinion, be loss or damage 'occasioned by or happening through' the escape caused by such a flood.''
>
> [*Provincial Insurance Australia Pty Limited v Consolidated Wood Products Pty Limited* (1991) 6 ANZ Insurance Cases ¶61-066 at 77,193;(1991) 25 NSWLR 41 at 564]

161. Had the courts decision in relation to the proper construction of the word 'lake' been otherwise such that the sumps fell within the meaning of that word, my view would have been that once all or some of the water which in the ordinary course of events would have fallen into the sumps vertically (or being surface water run off from surrounding areas, would have collected in the sumps), could not be accommodated within the sumps, that water, whether or not some of it had at one time been within the sumps, in ordinary and natural language should be regarded as escaping or as overflow. This approach seems consistent with the holding in *K Sika Plastics Limited v Cornhill Insurance Co Limited* [1982] 2 NZLR 50 where policies had indemnified the insured in respect of 'destruction or damage to the property insured directly due to - Water not being water which through flood had overflowed beyond the normal boundaries of river, watercourse, lake or sea'. After extremely heavy rainfall flooding damaged the plaintiffs' premises and equipment. Water had come down the gorge in a torrent. The cumulative rainfall had been so heavy that the normal banks of the stream could not accommodate all the water that would otherwise have entered them either directly from rainfall or run off. The insurer was held not liable under the policies. Cooke J put the matter as follows:

> 'There is no dispute that the damage to the plaintiff's premises and equipment was through flooding. The issue is as to the remaining words of the clause already read. In ordinary and natural language, I think that a watercourse is said to overflow its normal banks when all the water that would otherwise drain or fall into it cannot be contained in it because it is full. All the surplus water is then overflow, no matter whether or not some of it has at one time been within the banks and then forced out.
>
> The question is one of the ordinary use of words rather than one of law, but the approach just mentioned obtains some support for *Oakleaf v Home Insurance Ltd* (1958) 14 DLR (2d) 535 in the Ontario Court of Appeal, where the obstruction of a drain by debris and its consequent inability to accommodate all the water discharged by a downpipe was regarded as resulting in 'overflow'. Porter CJO said at pp 537-538:

> 'I agree with the trial Judge that there was 'overflow'. This is not a technical word but one which is in common ordinary use. It should be interpreted in its broadest sense. I think that it obviously applies to water flowing over the window sill as happened in this case.' ([1982] 2 NZLR at 53)"

[100] The passage quoted by Einstein J from *Provincial Insurance* doesn't help resolution of the correctness of O'Shea QC's submission. The passage is on a different point. Both *K Sika Plastics Limited v Cornhill Insurance Co Limited* and *Oakleaf v Home Insurance Ltd* concerned flood exclusions which focused on "overflow".

[101] Here the flood exclusion applies to water "escaping from or released from [the river]". In context, both "escaping" and "released" "from" the river assumes that the water has at one time been in the river. Therefore it is the river water, and not the local runoff, which is caught by the flood exclusion. The exclusion does not apply to damage done by water that could not reach the river unless the damage caused by that water was damage "occasioned by or happening through" the "inundation of normally dry land by [the river water]". I reject Mr O'Shea's submission that water that could not reach the river was water escaping the river.

[102] Mr Ashton QC's submission that water escaping from the pipes is not water escaping from the river relies heavily on a decision of Jackson J in *LMT Surgical Pty Ltd v Allianz Australia Insurance Ltd*.[138] That was also a case which arose from the 2011 Brisbane floods. There, drainpipes were situated close to the insured's premises. The pipes held both run off and river water, which backed up when the levels in the flooding river rose. The water from the pipes "was mostly river water"[139] and that inundated the insured's premises.

[103] The flood exclusion clause in *LMT* was in these terms:

> "Physical loss, destruction or damage occasioned by or happening through:
>
> (a) flood, which shall mean the inundation of normally dry land by water overflowing from the normal confines of any natural watercourse or lake (whether or not altered or modified), reservoir, canal or dam."[140]

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[138] [2014] 2 Qd R 118.

[139] At [40].

[140] At [6].

[104] His Honour, after observing that there were different possible interpretations of the clause open, held that "water overflowing from the natural confines [of the river]" restricted the flood exclusion to damage done by water that had flowed over the banks. His Honour said:

> "[44] An alternative and narrower view is that the requirement, that the inundation be by water overflowing from the normal confines, restricts the operation of the flood exclusion to inundation by water which has overflowed the banks where those banks are the normal confines. On this approach the phrase 'normal confines' may be seen as wider than 'banks' because of the possibility of artificial works comprising part of the normal confines such as levees or because 'normal confines' also qualifies the other water sources identified in the flood exclusion, namely a reservoir, dam or canal.
>
> [45] The ordinary meaning of the text supports the narrower view. That view gives effect to the syntax of the provision that the inundation is by 'water overflowing from the natural confines'. The prepositional phrase 'from the natural confines' modifies 'overflowing', not 'water'. The ordinary meaning of the words is directed to the place from where the overflowing occurred, not the place from where the water was sourced."

[105] There is only one word which is different in the present flood exclusion to that considered in *LMT*. In *LMT*, the flood exclusion applied to water that is "overflowing from the normal confines of [the river]".[141] The flood exclusion here applies to "water escaping from the normal confines of [the river]".[142] Water may escape "the normal confines of [the river]" through drainage pipes. The flood exclusion in *LMT* only applied to water escaping the normal confines of the river in a particular way, ie by overflowing the banks.

[106] "Escaping" is obviously "the act of the escape".[143] Mr Ashton QC's submission that water is not "escaping" but has "escaped" once it leaves the confines of the river must be rejected. Only water which has actually left the confines of the river can do damage and cause loss, relevantly by "inundating normally dry land". Therefore, for the exclusion clause to have any operation to exclude loss caused by escaping water, the water must be, for the purposes of the clause, still in the act of escaping after leaving the confines of the river. The point at which water ceases to be "escaping" and has "escaped" obviously is a matter of fact. However, here all the experts say that river water entered the subterranean soils between the pipes and the

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[141] My emphasis.

[142] My emphasis

[143] The Oxford English Dictionary, 2nd edition, Clarendon Press.

basement wall and entered the basement. That water was therefore "escaping from the confines of [the river]" and inundated "normally dry land", namely the subterranean soils and the basement of the premises.

Conclusions on the exclusion clause

[107] In the context of the present case, the exclusion clause operates as follows.

[108] The damage to the basement was caused by water from various sources:

1. River water in the pipes;

2. Local runoff in the pipes; and

3. Groundwater in the subterranean soils between the pipes and the basement.

[109] The river water entered the subterranean soils ("normally dry land"), and the basement ("normally dry land"), and in the process pushed groundwater into the basement. The river water was water "escaping the confines of [the river]". The entry of the river water into subterranean soils and the basement was an inundation of the two places.

[110] Damage done by the river water and the groundwater pushed into the basement by the river water was damage "occasioned by or happening through" the escaping river water.

[111] Damage done by local runoff entering the basement is not damage caused by "flood",[144] but on a proper construction of the flood exclusion, the exclusion is available to the defendant.

[112] The plaintiffs' claims are excluded by the flood exclusion.

[113] I should, though, deal with the other issues raised in the case.

What was the amount of the loss which was suffered by the second plaintiff by way of business interruption resulting from the inundation of the basement in January 2011?

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[144] Except to the extent that local runoff was forced into the basement by river water.

[114] There is no contest that the second plaintiff's practice was interrupted by the damage caused by water entering the basement. The disagreement[145] is as to the quantum of the loss.[146]

[115] The policy responds to the business interruption through "Section 2: Consequential Loss". The "Basis of Settlement" provision dictates the calculation of any indemnity. This and all the relevant provisions are set out in paragraphs [50] to [62] of these reasons.

[116] As I explain later, under the heading "Can the plaintiff recover overdraft interest and facility interest?", there is an important distinction between a claim for indemnity under an insurance policy and a claim for damages for breach of it. The claim for business interruption is a claim for indemnity, not a claim for damages for breach. Consequently, the second plaintiff has a contractual entitlement to indemnity in a sum properly calculated in accordance with the "Basis of Settlement" provision in the policy, but on no other basis.[147]

[117] The exercise which should be undertaken in order to calculate the indemnity sum under the policy is as follows:

1. Identify the period over which the business was adversely affected by the physical damage caused by the inundation of the water. This period is defined in the policy as the "indemnity period".[148] The identification of the "indemnity period" is necessary because the definition of "shortage in turnover" requires a comparison of "standard turnover" with actual turnover achieved during a period where turnover is affected by the physical damage.[149] That "period" is then the "indemnity period" which commences with the occurrence of damage and must not exceed 12 months.

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[145] Apart from the question of the flood exclusion.

[146] Agreed list of issues at [18].

[147] *Russell Young Abalone Pty Ltd v Traders Prudent Insurance Ltd* (1993) 7 ANZ Insurance Cases 61-182 at 78,040.

[148] Trial bundle, tab 4 at 38; [60]–[61] of these reasons.

[149] Trial bundle, tab 4 at 38: definitions of "Indemnity Period, "Standard Turnover" and "Shortage in Turnover".

2. Once the indemnity period has been identified there must be a comparison of turnover over that period to "standard turnover". The term "standard turnover" is defined in the policy. It requires the identification in the 12 months before the damage of "that period … which corresponds with the indemnity period". Therefore the second step is to identify that period and calculate turnover over that period.

3. Once the "standard turnover" is identified, that is compared to the turnover in the indemnity period. The difference is, in effect, a provisional "shortage in turnover" figure.

4. Then adjustments are made to that figure "so that the figures thus adjusted shall 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".[150] The "relevant period after the damage" must be the "indemnity period".

[118] Mr Brian McDonald is a chartered accountant and has been so qualified for some 30 years. There is no doubt about his expertise. He provided a report[151] and was called to give evidence in support of the second plaintiff's case.

[119] Mr McDonald records his instructions as "to undertake an assessment of the consequential loss resulting from interruption of the practice of Murphy Schmidt solicitors (the practice) in January 2011".[152] That is the wrong question, unless Mr McDonald's reference to "consequential loss" is a reference to "consequential loss as calculated in accordance with the formula in the Basis of Settlement provisions in Section 2 of the policy". Mr McDonald did not approach the assessment in compliance with the policy.

[120] The first problem is in relation to identification of the "indemnity period". It is common ground that the premises could not be utilised at all for the nine days from 11 January 2011 to 21 January 2011 (the nine day period). There was then some ongoing disruption while the

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[150] At 38.

[151] Trial bundle, tab 21 at 414.

[152] At 414 [1.1].

basement offices were being repaired. Those repairs were completed and the basement offices again became available to the second plaintiff on 1 July 2011 (the January to July period). Mr McDonald noted in his report:

> "3.5 Further, for the first two months after regaining entry to the premises, a significant part of the working day of the managing partner, Tricia Schmidt was spent in dealing with builders, consultants and the like and organising the staff to work around the compromised conditions."[153]

I refer to those two months as "the January February period".

[121] There is no identification by Mr McDonald of the "indemnity period" for the purpose of the policy. Loss which is suffered in the nine day period is the subject of assessment by Mr McDonald, but, for reasons I shall explain, this was not an assessment in terms of the policy. Loss in the broader January to July period is mentioned but no assessment is attempted of that loss in terms of the calculation required by the policy. While there is mention of Ms Schidmt's professional opportunities being compromised in the January–February period, there is no analysis of reduction in the practice turnover over that period. Instead, it is observed that Ms Schidmt's billings are down over that period.

[122] Potentially then there are three periods which could possibly be identified as the "indemnity period" for the purpose of the policy: (i) the nine day period; (ii) the January to July period; (iii) the January February period.

[123] If the nine day period is the indemnity period then the approach mandated by the policy is to compare the turnover of the practice in the period 11 January 2011 to 21 January 2011 (the nine day period) with the turnover of the practice in the period 11 January 2010 to 21 January 2010. That was not done. Instead, Mr McDonald adopted the methodology which he expressed in his report in this way:

> "6.3 I have calculated the loss of income by:
>
> a) Adopting the actual chargeable time recorded;
>
> b) Dividing that amount by the number of working days in the period; and

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[153] At 414 [3.5].

c) Multiplying the result of a) and b) by the number of working days that were effected (sic)."[154]

[124] The reference in Mr McDonald's formula to "actual chargeable time recorded" was calculated by considering the turnover in three periods, July to December 2009, January to June 2010, and July to December 2010. He then took the turnover for July to December 2010, divided it by the number of working days in that period to obtain an average daily rate over that period. He then multiplied that average daily rate by nine (by reference to the nine day period) and then deducted the value of the work which was achieved by the second plaintiff in the nine day period. By that method he came to a loss of income of $212,570.[155]

[125] That approach was completely contrary to the terms of the policy. Mr McDonald ought to have compared the turnover in the nine day period to the turnover of the period 11 January to 21 January 2010 and then made the necessary "adjustments" mandated by the "Basis of Settlement" provision in Section 2 of the policy.

[126] There was no attempt by Mr McDonald to calculate an indemnity figure for the January to July period.

[127] There was also no attempt by Mr McDonald to calculate an indemnity figure for the January–February period. If it was the case that the physical damage had the consequence that the practice had suffered as a result of Ms Schidmt being occupied with builders rather than professional work, that loss had to be calculated in terms of the policy. That required a comparison of the turnover of the practice from 11 January 2011 to the end of the relevant two month period, with the turnover of the practice from 11 January 2010 and the following two months. That was not done. Instead, Mr McDonald calculated a different figure. He compared the actual time charged by Ms Schidmt in six month blocks ending 30 June 2010 and 31 December 2010 to the time charged by her in the six months ended 30 June 2011. Calculation of consequential loss in this way was simply not authorised by the policy.

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[154] Trial bundle, tab 21 at 418.

[155] Trial bundle, tab 21 at 419–420.

[128] A report was prepared on behalf of the defendant by Mr Jonathan Dooley, a chartered accountant with more than 25 years' experience. Mr Dooley also calculated an amount purporting to be the loss suffered by the second plaintiff due to business interruption.

[129] Mr Dooley was of the opinion that Mr McDonald's report was deficient in that it failed to address a likely decrease in income between December and January.[156] Mr Dooley's methodology adopted two alternative bases to come to two alternative figures to quantify the reduction in chargeable time that occurred in January 2011, each calculating the decrease in income between December and January differently.[157] Each methodology was utilised to calculate a "Reduction in Chargeable Time" figure for the entire month of January.

[130] The figures in Mr Dooley's reports are of no relevance. Mr Dooley's methodologies each related to the entire month of January and not to the more limited indemnity period. This method of calculation was also not authorised by the policy.

[131] In the ordinary course, it is up to the Court to calculate loss the best it can with whatever evidence it has been provided.[158] However, there comes a point where there is simply no evidence upon which to make an assessment.[159] Here, the second plaintiff's only entitlement is to indemnity calculated pursuant to the terms of the policy. Any calculation or assessment must be done in accordance with the Basis of Settlement provisions in Section 2. If the indemnity period is the nine day period, then what is necessary is a comparison of turnover in that period with the turnover of the practice in the period 11 January 2010 to 21 January 2010. While there is evidence of the turnover of the practice in the whole of January 2010,[160] there is no evidence of the turnover of the practice in the relevant nine days. There is therefore no evidentiary basis upon which the calculation could be made.

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[156] Trial bundle, tab 22 at 439–440.

[157] At 447.

[158] *Fink v Fink* (1946) 74 CLR 127 at 143; *Ted Brown Quarries Pty Ltd v General Quarries (Gilston) Pty Ltd* (1977) 16 ALR 23 at 26; *HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd* (2004) 217 CLR 640 at [47].

[159] *Ted Brown Quarries Pty Ltd v General Quarries (Gilston) Pty Ltd* (1977) 16 ALR 23 at 31, where the issue is identified, 36–37 and also 38; *Coalex Pty Ltd v Commercial Union Assurance Co of Australia Ltd* (1988) 5 ANZ Ins Cas 60-858.

[160] See Trial bundle, tab 22 at 466. The figures for January 2011 are at 475.

[132] If the relevant "indemnity" period is the period from 11 January 2011 to 1 July 2011, then no calculation can be made unless there is evidence of the turnover of the practice in the period 11 January 2010 to 1 July 2010.

[133] If the "indemnity period" is the two month period, then that two month period must start on 11 January 2011 and end on 10 March 2011. Again, for such an assessment to be performed there must be evidence of the turnover of the practice in the period 11 January 2010 to 10 March 2010. Again, there is no such evidence.

[134] The second plaintiff's claim for indemnity under the policy for business interruption loss therefore fails.

[135] Even if the second plaintiff's claim was for damages,[161] the damages would equate to the amount of the indemnity not paid. Again, there is no evidence upon which that assessment could be made.

[136] Although the second plaintiff's claim based on business interruption fails, I should mention a matter raised by the defendant. It was submitted that against any sum assessed for business interruption under the policy there would have to be deducted the rental which was not paid by the second plaintiff to the first plaintiff for the period from 11 January 2011 to 1 July 2011. That figure is $131,192.02. Mr McDonald conceded that any rental not paid by the second plaintiff to the first plaintiff as a result of the damage to the premises would have to be deducted from the second plaintiff's business interruption claim.[162] That was a proper concession. The abated rental would be an adjustment against the second plaintiff on any right to indemnity for business interruption that may have been proved.

Whether the first plaintiff had an entitlement to claim lost rent as a result of the inundated basement, and if so, in what amount

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[161] The amended statement of claim leaves this open: [13] to [15].

[162] Trial bundle, tab 21 at 416 [4.2].

[137] As already observed, the premises were damaged on 11 or 12 January 2011. Even though the basement was the only area inundated, the premises were totally unusable until Friday, 21 January 2011. Access to the reinstated rooms in the basement occurred on 1 July 2011.[163]

[138] The claim for rental is made in the sum of $131,192.02.[164] That claim is made on the basis that the rental lost on the areas which could not be accessed by the second plaintiff was $580 per square metre.

[139] The defendant does not contest the calculation, but challenges the applicability of a base rental of $580 per square metre.

[140] There is no doubt that a rental of $580 per square metre per annum was struck between the plaintiffs, which rate applied to the entire floor area including the basement. While there was no formal lease, invoices were raised monthly by the first plaintiff to the second plaintiff who paid them. That the rental was in fact abated in the amounts and for the periods claimed by the second plaintiff is evidenced in invoices[165] and seems beyond doubt. There was no suggestion that the rental ought not have been abated.

[141] Ms Schidmt gave evidence on this issue and I unhesitatingly accept her evidence as truthful and reliable. She said there was no formal lease agreement.[166] She said that the first plaintiff sought advice from its accountant as to the appropriate rental.[167] The rental was originally struck between the plaintiffs at $477 per square metre when the building was first occupied by the second plaintiff,[168] and was increased over time, again on the advice of the accountant.[169] Although the area that was ultimately damaged by the inundation was the basement of the premises, photographs tendered through Ms Schidmt,[170] which were in the main taken after

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[163] Trial bundle, tab 21 at 415.

[164] Amended statement of claim at Schedule A.

[165] Rent invoices and statements, Ex 6.

[166] Transcript at 1-64 ll 35–40.

[167] At 1-65 l 15 to 1-66 l 25.

[168] At 1-66 ll 35–45.

[169] At 1-67 ll 5–10.

[170] Bundle of photographs, Ex 3.

repairs had been effected,[171] showed what was obviously a sophisticated professional office. Ms Schidmt explained that the repairs were, in effect, a reinstatement of the fitout of what was present in the basement area before the inundation.[172]

[142] The defendant accepts:

(i) that the premises could not be used as offices in the period 11 to 21 January 2011; and

(ii) that the basement could not be used as offices in the period 21 January 2011 to 1 July 2011; and

(iii) that there was an agreement in place before the premises were damaged whereby the second plaintiff paid to the first plaintiff rental at the rate of $580 per square metre; and

(iv) that the tenancy was a legitimate arrangement entered into bona fide;[173] and

(v) that it was appropriate for the first plaintiff to abate the rental; and

(vi) that if the rental was properly abated at the rate of $580 per square metre then the first plaintiff's claim is properly calculated.

[143] The defendant's position at the trial was that:

(i) there was no evidence that the rate of $580 per square metre is a commercial rate;

(ii) that the market rental for the basement should be less than the higher (apparently more valuable) floors of the building;

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[171] Transcript at 1-68 ll 30–40.

[172] At 1-68 to 1-69.

[173] At 1-65 ll 35–45.

(iii) I should assess "general market rental" rather than accept the rental nominated by the first plaintiff's accountant which might be distorted by taxation considerations; and

(iv) the loss of rental claimed should be reduced by 30%.[174]

[144] However, it is difficult to see where there is a clear obligation upon the defendant to indemnify the first plaintiff for loss of rental. Section 1 of the policy deals with physical damage. Section 2 deals with consequential loss. However, the indemnity[175] in section 2 refers to loss flowing from the interruption of "the business". The term "the business" is defined as the second plaintiff's legal practice.[176] On the other hand, "gross rentals" are specified in the letter of 4 November 2010, which suggests that loss of rental was a risk insured.

[145] When considering the matter and being unable to see clearly how the first plaintiff's rental loss was the subject of indemnity under the policy, I sought further written submissions on the point from the parties. Three responses were received, one from the plaintiffs and two from the defendant. In the circumstances, it is appropriate to admit those three emails together with the email from my Associate to the parties collectively as exhibit 8. I will so order.

[146] The plaintiffs, in their further written submissions, point to the "Aust Cover Coverage Summary". That is obviously an insurance broker's document. It contains the endorsement:

"Section 2 - Consequential Loss of Profit

(a)	gross fees	$11,500,000
(b)	loss of rent	$1,945,000

…"[177]

[147] The status of that document is unclear to me. It was not referred to in oral evidence. It is not part of the policy.

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[174] Defendant's written submissions at [62], [67].

[175] Trial bundle, tab 4 at 36.

[176] At 19.

[177] Trial bundle, tab 5 at 67.

[148] The defendant in its first further submission submitted, "There is no basis under the policy for the first plaintiff to claim for loss of rent". Shortly after receipt of the defendant's first further submission, the defendant's second further submission was received. That is in these terms:

> "We refer to our earlier email. On reflection, we consider that the content of that email does not fully align with the position taken by the defendant at trial. The defendant did not contend that indemnity for loss of rent was not available. It did contend that in the absence of a basis of reinstatement, a genuine market value should be the measure of any indemnity …"

[149] The position is quite curious. The policy is obviously an amalgam of printed standard forms and schedules and tailor-made documents. That part of the policy which was prepared specifically for the plaintiffs' contract of insurance contains a reference to "gross rentals $1,945,000" and it is clear that is intended to relate to section 2 of the standard conditions of the policy which concern consequential loss. If the consequential loss provisions relate only to the second plaintiff's business, then the inclusion of a gross rentals figure in the policy is pointless.

[150] There have been many cases where there have been inconsistencies between terms in insurance policies which consist of pre-printed conditions and those conditions which have been drawn specifically for the particular contract of insurance. Often those inconsistencies are resolved by adopting the specific provisions over those in the pro-forma conditions.[178]

[151] The only way to make sense of the policy is to read it so that a loss which is consequential[179] to physical damage to the property[180] by way of lost rental to the first plaintiff is to be the subject of indemnity. That approach is urged by both parties.

[152] However, the policy is then silent as to the basis of the calculation of the indemnity to the first plaintiff for loss of rent. The defendant says that only market rental could be recovered. I reject that submission. The policy can only be interpreted so as to indemnity the first plaintiff for rental actually lost. There obviously was a tenancy arrangement in place well before the

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[178] *Homburg Houtimport BV v Agrosin Private Ltd* [2004] 1 AC 715 at [11] (not an insurance case), *Robertson v French* (1803) 102 ER 779, *Techni-Chemicals Products Co Ltd v South British Insurance Co Ltd* [1977] 1 NZLR 311.

[179] Section 2.

[180] Section 1.

damage to the basement. That tenancy arrangement was entered into and acted upon by the plaintiffs bona fide and the tenancy arrangement was that rental would be paid at $580 per square metre per annum without distinguishing between different floors or parts of the building. I assess the first plaintiff's lost rental at $131,192.02, but, of course, that, like the plaintiffs' other claims, is defeated by the flood exclusion.

Can the plaintiff recover overdraft interest and facility interest?

[153] The plaintiffs' case as pleaded includes a claim for overdraft interest for a period roughly from March to July 2011 and then what is described as "facility interest" from December 2011 to now.

[154] The amount claimed for facility interest in the amended statement of claim is $140,296.73 and the plaintiffs submit that figure now stands at $178,000.

[155] The defendant points to s 57 of the *Insurance Contracts Act* 1984 (Cth) and says that the plaintiffs are restricted to interest claimable under that section. The defendant submits that the policy does not, by its terms, indemnify the plaintiffs in relation to interest on monies owing by the defendant to the plaintiffs under the policy.

[156] Section 57 of the *Insurance Contracts Act* 1984 is in these terms:

> "**57 Interest on claims**
>
> (1) Where an insurer is liable to pay to a person an amount under a contract of insurance or under this Act in relation to a contract of insurance, the insurer is also liable to pay interest on the amount to that person in accordance with this section.
>
> (2) The period in respect of which interest is payable is the period commencing on the day as from which it was unreasonable for the insurer to have withheld payment of the amount and ending on whichever is the earlier of the following days:
>
> (a) the day on which the payment is made;
>
> (b) the day on which the payment is sent by post to the person to whom it is payable.
>
> (3) The rate at which interest is payable in respect of a day included in the period referred to in subsection (2) is the rate applicable in respect of that day that is prescribed by, or worked out in a manner prescribed by, the regulations.

(4) This section applies to the exclusion of any other law that would otherwise apply.

(5) In subsection (4):

'law' means:

(a) a statutory law of the Commonwealth, a State or a Territory; or

(b) a rule of common law or equity."

[157] That has to be looked at in terms of section 7 which is as follows:

"**7 Effect of Act on other laws**

It is the intention of the Parliament that this Act is not, except in so far as this Act, either expressly or by necessary intendment, otherwise provides, to affect the operation of any other law of the Commonwealth, the operation of law of a State or Territory or the operation of any principle or rule of the common law (including the law merchant) or of equity."

[158] Nowhere in the policy is there any agreement by the defendant to indemnify the second plaintiff for interest on any money not paid under the policy.

[159] As observed by the New South Wales Court of Appeal in *CIC Insurance Ltd v Bankstown Football Club Ltd*,[181] there are separate and distinct remedies available to an insured where an insurer refuses to honour its obligation to indemnify the insured. An insured may sue for damages flowing from the breach or may sue for a liquidated sum for money owing under the policy. Alternatively, in an appropriate case, an insured may terminate the contract, if there has been repudiation, and sue for damages.[182] Here, the prayer for relief in the amended statement of claim is as follows:

"15. The plaintiffs claim as follows:

(a) the first plaintiff …

(b) the second plaintiff:

- indemnity for the sum of $851,455.27 for clean-up costs, new fitout, overdraft interest, facility interest and loss of income;
- alternatively damages in that sum."

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[181] [1994] NSWCA 359; (1995) 8 ANZ Insurance Cases 61-232.

[182] *CIC Insurance Ltd v Bankstown Football Club Ltd* (1995) 8 ANZ Insurance Cases 61-232 at 75,596 and 75,597 and the cases there cited.

[160] Paragraphs 13 and 14 of the amended statement of claim appear under the heading "Breach of contract". However, as already observed, the prayer for relief seeks indemnity as the primary position. There is no plea in the statement of claim of either repudiation by the defendant or rescission by the plaintiff. Therefore, I have approached the matter on the basis that the claims under the various heads are for indemnity not damages. However, there cannot be a claim for indemnity in relation to the claims for overdraft interest and facility interest because there is nothing in the policy which indemnifies for that loss. Consequently, if that loss is to be compensated, it must be by way of a damages claim.

[161] The common law denied the recovery of damages flowing from late payment of a sum due under a contract.[183] However, as explained in *Hungerfords v Walker*,[184] the claim for damages as compensation for loss for delayed payment of either a liquidated sum or damages will often be available under the first limb of the rule in *Hadley v Baxendale*[185] as "arising naturally" from the late payment, although there may be cases where the expense is unusual and reliance must be had to the second limb. Here, there is in principle no reason why the overdraft limit or the facility interest would not be recoverable if they were proved to be losses flowing from the failure of the defendant to indemnify the second plaintiff under the policy.

[162] The only evidence led in proof of the overdraft interest claim is a written calculation which is part of the trial bundle, exhibit 1.[186] That document lists a number of payments made by the second plaintiff, nominates the balance of the overdraft after each payment has been made and calculates interest at 9.40%. That document, as already observed, formed part of exhibit 1 which was the agreed trial bundle, which was received into evidence by consent. There is nothing to suggest that the document ought not be regarded as evidence of the truth of what is asserted in the document. The various payments can be reconciled with the schedules to the amended statement of claim which detail the payments made by the second plaintiff by way of repair costs. The defendant admits those payments were made and admits that they were incurred in repairing the damage. The calculation of interest document can be

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[183] *Shevill v Builders Licensing Board* (1982) 149 CLR 620 at 637; *President of India v La Pintada Compagnia Navigacia SA* [1985] AC 104, although the strictures of such a rule were doubted in *Trans Trust SPRL v Danubian Trading Co Ltd* [1952] 2 QB 297 at 360, which met with some approval in *Wenham v Ella* (1972) 127 CLR 454 at 463.

[184] (1989) 171 CLR 125.

[185] (1854) 9 Ex 341.

[186] Trial bundle, tab 23 at 486.

reconciled to those admitted payments. Therefore, I find the overdraft interest proved at $1,887.14.

[163] In proof of the facility interest claim, the plaintiff has tendered a series of bank statements from an account held by the second plaintiff at the Macquarie Bank.[187] That evidence shows an opening balance loan advance of $400,000 and various interest charges which all total $140,296.73 which is the sum claimed for facility interest in the amended statement of claim.[188] In the amended defence, the defendant pleads a non-admission in relation to the allegations concerning the facility interest.[189]

[164] There is no evidence which links the Macquarie Bank statements to the claim. Ms Schidmt gave no evidence for instance that the facility was drawn upon to pay the repair costs.

[165] However, in the list of matters not in dispute there appears:

> "17. The second plaintiff incurred facility interest in the amount set out in schedule E of the amended statement of claim".

[166] Schedule E of the amended statement of claim particularises the facility interest claim in the sum of $140,296.73.

[167] In the list of issues this appears:

> "17. The parties do not agree that the second plaintiff is entitled to claim overdraft interest and facility interest".

[168] The admissions made by the defendant in the list of matters not in dispute, in the context of the list of issues, is to the effect that the claim for facility interest is made out subject to two matters for argument:

1. Whether the exclusion applies; and

2. Whether there is a legal basis for the claim for facility interest.

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[187] Trial bundle, tab 24 at 487.

[188] At [14(e)] and schedule D.

[189] Amended defence, [15(d)].

[169] Having found that there is a legal basis to claim facility interest by way of damages, I accept the admission that the facility interest is in the sum of $140,296.73.

[170] I have concluded that the exclusion provision applies to defeat the plaintiffs' claim. But for that, I would have found that the facility interest was recoverable.

Conclusions

[171] But for the flood exclusion, I would have assessed the sums either payable by way of indemnity under the policy or due as damages as follows:

1. The first plaintiff:

   (a) Loss of rent $131,192.04

2. The second plaintiff:

   (a) Clean up costs[190] $52,953.53

   (b) New fitout costs[191] $457,530.86

   (c) Overdraft interest [192] $1887.14

   (d) Facility interest[193] $140,296.73

[172] For reasons explained:

1. I do not find any loss of practice income proved;

2. I hold that the flood exclusion defeats the plaintiffs' claims.

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[190] Quantum admitted.

[191] Quantum admitted.

[192] Damages.

[193] Damages.

[173] The orders of the Court are as follows:

1. The emails between the parties and my Associate dated 2 March 2018 and 5 March 2018 are collectively admitted and marked exhibit 8.

2. The claims of both plaintiffs are dismissed.

3. I will hear the parties on costs.