FEDERAL COURT OF AUSTRALIA

The Owners – Strata Plan No 91086 v Fairview Architectural Pty Ltd (No 3) [2023] FCA 814

File number(s):	NSD 940 of 2019
Judgment of:	**WIGNEY J**
Date of judgment:	20 July 2023
Catchwords:	**PRACTICE AND PROCEDURE** – representative proceedings pursuant to Pt IVA of the *Federal Court of Australia Act 1976* (Cth) – interlocutory application for an order pursuant to r 9.05 of the *Federal Court Rules 2011* (Cth) that the insurer of the respondent be joined to the proceeding as the second respondent – interlocutory application for leave pursuant to s 5 of the *Civil Liability (Third Party Claims Against Insurers) Act 2017* (NSW) to bring and continue the proceeding against the insurer of the respondent – application for leave to file and serve amended originating application and amended statement of claim – consideration of whether affixation of allegedly combustible cladding constitutes property damage within the scope of the second respondent's insurance policies – consideration of expert evidence regarding methods of cladding affixation and removal – found that cladding removal will cause damage to applicant's property, including requiring removal of top hat structure and remediation of building prior to affixation of replacement cladding – found that affixation of panels makes property less suitable for intended residential purpose – found that damage caused to building at moment of affixation of cladding – leave to proceed against insurer and to amend pleadings granted
Legislation:	*Competition and Consumer Act 2010* (Cth) sch 2 (*Australian Consumer Law*) ss 29, 33 *Corporations Act 2001* (Cth) ss 440D, 444E *Federal Court of Australia Act 1976* (Cth) pt IVA *Federal Court Rules 2011* (Cth) rr 8.21, 9.05, 16.53, 30.01 *Judiciary Act 1903* (Cth) ss 39B(1A)(c), 79 *Trade Practices Act 1974* (Cth) ss 53, 55 *Building Products (Safety) Act 2017* (NSW) s 9(1) *Civil Liability (Third Party Claims Against Insurers) Act 2017* (NSW) ss 3(1), 4, 5

Law Reform (Miscellaneous Provisions Act) 1946 (NSW) s 6

Cases cited:

Armstrong World Industries Inc v Aetna Casualty and Surety Co 45 Cal App 4th 1 (Cal Ct App 1996); 52 Cal Rptr 2d 690 (1996)

Austral Plywoods Pty Ltd v FAI General Insurance Company Ltd (1992) 7 ANZ Insurance Cases 61-110; [1992] QCA 4

Australian Securities and Investments Commission v Edensor Nominees Pty Ltd (2001) 204 CLR 559; [2001] HCA 1

Bundy Tubing Company v Royal Indemnity Company 298 F2d 151 (6th Cir, 1962)

Canadian Equipment Sales & Service Co Ltd v Continental Insurance Co (1975) 59 DLR (3d) 333

Carwald Concrete and Gravel Co Ltd v General Security Insurance Company of Canada (1985) 24 DLR (4th) 58

Chubb Insurance Australia Ltd v Giabal Pty Ltd; Caitlin Australia Pty Ltd v Giabal Pty Ltd [2020] NSWCA 309

Clough Engineering Ltd v Oil and Natural Gas Corp (2008) 249 ALR 458; [2008] FCAFC 136

DSHE Holdings Ltd (receivers and managers appointed) (in liq) v Abboud [2017] NSWSC 579

F & H Construction v ITT Hartford Insurance Company of the Midwest 12 Cal Rptr 3d 896 (2004)

Giabal Pty Ltd v Gunns Planations Ltd (in liq) [2020] NSWSC 1070

Hopkins (as trustee for the Hopkins Superannuation Fund) v AECOM Australia Pty Ltd (No 4) (2015) 328 ALR 1; [2015] FCA 307

Kraal v Earthquake Commission [2015] 2 NZLR 589; [2015] NZLR 589

Murphy, McCarthy & Associates Pty Ltd v Zurich Australian Insurance Limited [2018] NSWSC 627

Pilkington United Kingdom Ltd v CGU Insurance Plc [2005] 1 All ER (Comm) 283; [2004] EWCA Civ 23

R & B Directional Drilling Pty Ltd (ACN 163 164 234) (in liq) v CGU Insurance Ltd (No 2) (2019) 369 ALR 137; [2019] FCA 458

Re Wakim; Ex parte McNally (1999) 198 CLR 511; [1999] HCA 27

Ritchie v Advanced Plumbing and Drains Pty Ltd [2019] NSWSC 1028

Rizeq v The State of Western Australia (2017) 262 CLR 1; [2017] HCA 23

	Rushleigh Services Pty Ltd v Forge Group Limited (in liq) (receivers and managers appointed) (2018) 355 ALR 248; [2018] FCA 26 *Rushleigh Services Pty Ltd v Forge Group Ltd (in liq) (receivers and managers appointed); In the matter of Forge Group Ltd (in liq) (receivers and managers appointed)* [2016] FCA 1471 *Save the Ridge Inc v Commonwealth* (2005) 147 FCR 97; [2005] FCAFC 203 *Star Entertainment Group Ltd v Chubb Insurance Australia Ltd* (2022) 400 ALR 25; [2022] FCAFC 16 *Tallglen Pty Ltd v Pay TV Holdings Pty Ltd* (1996) 22 ACSR 130 *TKC London Ltd v Allianz Insurance PLC* [2020] EWHC 2710 (Comm) *The Owners – Strata Plan No 91086 v Fairview Architectural Pty Ltd* [2020] FCA 1892 *Toomey v Eagle Star Insurance Co Ltd* [1994] 1 Lloyd's Law Reports 516 *Transfield Construction Pty Ltd v GIO Holdings Pty Ltd* (1997) 9 ANZ Insurance Cases 61-336 *Traveller's Insurance Co v Eljer Manufacturing Inc* 197 Ill 2d 278; 757 NE 2d 481 (2001) *Weir Services Australia Pty Ltd v AXA Corporate Solutions Assurance* (2018) 359 ALR 314; [2018] NSWCA 100
Division:	General Division
Registry:	New South Wales
National Practice Area:	Commercial and Corporations
Sub-area:	Regulator and Consumer Protection
Number of paragraphs:	183
Date of hearing:	27 – 28 September 2022
Counsel for the applicant:	Mr P Braham with Mr J Entwisle
Solicitors for the applicant:	William Roberts Lawyers
Counsel for the second respondent:	Mr J Sexton with Mr C Colquhoun and Ms M Kearney
Solicitors for the second respondent:	Moray & Agnew

ORDERS

NSD 940 of 2019

BETWEEN:	**THE OWNERS – STRATA PLAN NO 91086** Applicant
AND:	**FAIRVIEW ARCHITECTURAL PTY LTD** First Respondent
	AAI LIMITED (ACN 005 297 807) Second Respondent

ORDER MADE BY: **WIGNEY J**

DATE OF ORDER: **20 JULY 2023**

THE COURT ORDERS THAT:

1. Pursuant to r 9.05 of the *Federal Court **Rules** 2011* (Cth), AAI Limited (ACN 005 297 807) (trading as Vero Insurance) be joined to the proceeding as the second respondent.
2. Pursuant to s 5 of the *Civil Liability (Third Party Claims Against Insurers) Act 2017* (NSW), the applicant have leave to bring and continue the proceeding against AAI Limited.
3. Pursuant to rr 8.21 and 16.53 of the Rules, the applicant have leave to file a further amended originating application and a further amended statement of claim in the form attached to the applicant's interlocutory application dated 17 December 2021.
4. AAI Limited pay the applicant's costs of and incidental to this application.
5. The proceeding be listed for further case management on 16 August 2023 at 9.30am.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

WIGNEY J:

1 The **Owners** – Strata Plan 91086 is the owners corporation of two high-rise residential buildings in Warwick Farm, New South Wales. The façades of those buildings incorporate Vitrabond PE and Vitrabond FR branded aluminium composite panels (together, **Vitrabond panels**). Those panels were manufactured and supplied by **Fairview** Architectural Pty Ltd. Owners has commenced representative proceedings against Fairview in which it is alleged, among other things, that the Vitrabond panels affixed to its buildings were not of merchantable or acceptable quality for the purposes of the *Trade Practices Act 1974* (Cth) (**TPA**) and the *Australian Consumer Law* (**ACL**) (schedule 2 to the *Competition and Consumer Act 2010* (Cth)). The relief sought by Owners includes compensation for loss or damage arising from the supply of the Vitrabond panels, including the costs of, and incidental to, the removal of the panels and the remediation of the buildings and parts thereof to remedy any damage caused by their affixation to the buildings.

2 For reasons that will be explained later, Fairview is unlikely to be able to meet any monetary judgment awarded against it and in favour of Owners. During the period that the Vitrabond panels were affixed to Owners' buildings, **AAI** Limited provided liability insurance coverage to Fairview pursuant to a series of insurance policies. Those policies provided, in summary, that AAI would cover Fairview for its liability to pay compensation in respect of "property damage" caused by an "occurrence".

3 Owners filed an interlocutory application in which it sought orders which included that AAI be joined to the proceeding, that it have leave pursuant to s 5 of the *Civil Liability (**Third Party Claims** Against Insurers) **Act** 2017* (NSW) to bring and continue the proceeding against AAI and that it have leave to file a further amended originating application and a further amended statement of claim. The central issue raised by Owners' application to join and proceed against AAI is whether some or all of the compensation claimed by Fairview is covered by the insurance policies provided by AAI. The resolution of that issue effectively turns on whether the affixation of the allegedly defective Vitrabond panels was an occurrence which caused property damage to Owners' buildings in circumstances where the panels will have to be removed and replaced by different panels.

THE PROCEEDING AGAINST FAIRVIEW

4 It is necessary to give a short overview of the nature of Owners' case against Fairview, including the factual allegations and relief sought. That is not only because it is necessary for Owners to demonstrate that it has an arguable case against Fairview, but also because it is necessary to determine whether Fairview's policies of insurance with AAI respond to or cover any compensation that Fairview may be found to be liable to pay Owners should the claim be successful.

5 As already noted, Owners is the owners corporation of two high-rise residential buildings in Warwick Farm, New South Wales. The buildings are 15 and 16 storeys high and contain approximately 185 apartments. They were built in 2013 to 2015.

6 Each of the buildings has a large number of Vitrabond PE and Vitrabond FR aluminium composite panels permanently affixed to its exterior. Aluminium composite panels are generally supplied for use, amongst other things, as cladding in the construction of commercial and residential premises. They generally consist of three laminates: two aluminium cover sheets and a core which may comprise of polyethylene or a combination of polyethylene and other materials. Vitrabond PE panels had a core of approximately 100% polyethylene, a highly flammable and combustible synthetic thermoplastic polymer. Vitrabond FR panels had an advertised core of approximately 30% polyethylene, though Owners alleges that the actual polyethylene content could vary up to 45% to 50%. Both Vitrabond PE and Vitrabond FR panels were used on the two buildings in question, though the precise proportion in which they were used is unclear.

7 The Vitrabond panels on the two buildings form part of their aesthetic design and provide a waterproof membrane. They are in that respect at least an essential component of the buildings.

8 The Vitrabond panels were affixed to the buildings by means of what is known as the "flat stick" method. That involved the installation of horizontal and vertical metal strips known as "top hats" onto the building structure. The "top hats" were nailed or screwed into the concrete and steel structure of the buildings using screws, masonry anchors or nails. The panels were then affixed to the top hats in flat sheets by means of industrial strength double-sided tape. The glue used in this tape was designed to be strong enough to hold the cladding panels in place for the life of the buildings. The means by which the panels were affixed to the buildings and, perhaps more significantly, the issues that may arise if and when the panels are required to be removed, is the subject of more detailed discussion later in these reasons.

9 The Vitrabond panels that were installed on the buildings were supplied by Fairview.

10 On 10 August 2018, the New South Wales Commissioner for Fair Trading issued a "Ban Notice" under s 9(1) of the *Building Products (Safety) Act 2017* (NSW) in respect of aluminium composite panels with a core of more than 30% polyethylene. That action was taken following fires that had ignited and spread in residential towers in London and Melbourne. Those fires were found to have been accelerated or worsened by the presence of aluminium composite panels on the façade of those buildings. Subsequent to that "Ban Notice" being issued, Owners received a legally binding direction from Liverpool City Council that required it to remove the Vitrabond panels on its buildings.

11 On 13 June 2019, Owners commenced a representative proceeding against Fairview pursuant to Part IVA of the *Federal Court of Australia Act 1976* (Cth) on behalf of itself and all other persons who, in summary, owned or had a leasehold interest in a building fitted with Vitrabond panels which had been supplied between 13 June 2009 and 13 June 2019. Owners claims that Fairview, as the deemed manufacturer of the Vitrabond panels for the purposes of the TPA and ACL, is liable to compensate it and group members for loss and damage they have suffered by reason of the affixation of panels on their buildings which were not of merchantable or acceptable quality as those terms are used in the TPA and ACL respectively. It also claims that Fairview engaged in misleading conduct in contravention of ss 53 and 55 of the TPA and ss 29 and 33 of the ACL by representing that the cladding was suitable and had certain fire performance and compliance qualities and by failing to provide adequate warnings as to the risks associated with use of the products.

12 The essence of Owners' allegations concerning the Vitrabond panels is that they have certain properties which make them unsuitable for use on buildings like those of which Owners is the owners corporation. In particular, it is alleged that the affixation of the panels to such buildings creates a material risk of the rapid spread of fire on and in the buildings with consequential risks to life and property. It is also alleged that there was a risk that the panels would be found to be non-compliant with the Building Code of Australia and banned by relevant regulatory authorities.

13 For the purposes of this joinder and leave application, AAI does not dispute that the Vitrabond panels affixed to the buildings in question have the alleged properties that make them unsuitable for such use. When there is a reference in these reasons to the Vitrabond panels being defective, combustible, unsafe or unfit for use, that statement is based on AAI's

concession. It should be noted that the concession does not apply to the final hearing and the properties of the panels and their acceptability or fitness for purpose will or may be in issue at that hearing.

14 In its existing pleading, Owners claims that the loss or damage it has suffered includes the cost of removing and replacing the Vitrabond panels that have been affixed to the two buildings in question. In the proposed amended pleading, Owners pleads that the loss or damage includes the cost of and incidental to the removal of the panels and the cost of and incidental to the remediation of the buildings and building parts so as to remedy any damage caused to the building by reason of the affixation of the panels. It is that loss or damage that Owners claims is covered by AAI's insurance policies. It accepts that any loss or damage relating to or arising from the need to supply and install replacement panels would not be covered by the policies.

FAIRVIEW'S ADMINISTRATION AND DEED OF COMPANY ARRANGEMENT

15 On 7 July 2020, Fairview was placed into voluntary administration by its director. That had the effect of staying Owners' proceeding against it: see s 440D of the ***Corporations Act*** *2001* (Cth). Fairview subsequently entered into a deed of company arrangement. The deed of company arrangement provided for the transfer of Fairview's business to a new company, FVA Group Pty Ltd, and the extinguishment of all unliquidated claims against Fairview except to the extent that Fairview held an insurance policy that responded to those claims.

16 On 27 November 2020, the Court granted Owners leave to proceed against Fairview pursuant to s 444E of the Corporations Act: *The Owners – Strata Plan No 91086 v Fairview Architectural Pty Ltd* [2020] FCA 1892. One of the factors that the Court took into account in granting leave to proceed was that Fairview had insurance policies that arguably covered Owners' claim. The finding that the policies arguably covered Owners' claim was made in circumstances where there was no contradictor and without any detailed consideration of the relevant facts and circumstances. It was noted that if AAI declined coverage, Owners may seek leave to join AAI pursuant to the Third Party Claims Act.

THE INTERLOCUTORY APPLICATION

17 Owners' interlocutory application seeks the following orders:

> 1. Pursuant to r 9.05 of the *Federal Court Rules 2011* (Cth) (**Rules**), AAI Limited (ACN 005 297 807) (trading as Vero Insurance) be joined to the proceeding as the second respondent.
>
> 2. Pursuant to s 5 of the *Civil Liability (Third Party Claims Against Insurers) Act*

2017 (NSW), the applicant have leave to bring and continue the proceeding against AAI Limited (the proposed second respondent).

3. Pursuant to rr 8.21 and 16.53 of the Rules, the applicant have leave to file a further amended originating application and a further amended statement of claim in the form of **Schedule A** and **Schedule B** to this interlocutory application.

4. AAI Limited (the proposed second respondent) pay the applicant's costs of and incidental to this application.

(Emphasis in original)

18 The interlocutory application was initially supported by an affidavit sworn by Owners' solicitor, Mr Blagoj (Bill) Petrovski, and a large volume of documents. Mr Petrovski's affidavit addressed, among other things, Fairview's deed of company arrangement, the Court's grant of leave to proceed against Fairview, Fairview's insurance policies issued by AAI, correspondence with AAI concerning a claim under those policies arising from the affixation of Vitrabond panels to Owners' buildings and documents relevant to Owners' application to amend its pleadings. The documentary exhibits included documents relevant to Owners' claim against Fairview and documents relating to the insurance policies AAI issued to Fairview and AAI's denial of liability under those policies. Mr Petrovski was not cross-examined.

19 The parties subsequently filed expert reports prepared by façade engineers and building consultants which addressed issues relating to the affixation and removal of the Vitrabond panels that had been affixed to the two buildings in question. That evidence was directed primarily at the question whether the affixation of the panels caused any relevant damage to the buildings, on the premise that the panels are defective and will at some point have to be removed. The experts in due course gave concurrent evidence and were cross-examined. Their evidence and the factual findings arising from it are discussed in detail later in these reasons.

THE POLICIES OF INSURANCE

20 AAI was Fairview's insurer pursuant to a series of four policies of insurance variously described as "Broadform Liability" or "Steadfast General and Products Liability Insurance" policies. Those policies covered the period from 14 February 2012 to 30 May 2016 and therefore covered the period during which the Vitrabond panels were affixed to Owners' buildings. The aggregate limit under each policy was $20 million. The relevant terms and conditions of the policies were essentially the same. The following clauses are extracted from the policy that covered the period 30 May 2014 to 30 May 2015.

21 The insuring clause relevant to this matter is clause 2.1 which provided as follows:

> **We [AAI] agree** (subject to the terms, Claim Conditions, General Conditions, Exclusions, Definitions and Limits of Liability incorporated herein) **to pay to You [Fairview]** or on Your Behalf **all amounts which You shall become legally liable to pay as Compensation in respect of**:
>
> (a) Personal Injury, and/or
>
> (b) **Property Damage**; and/or
>
> (c) Advertising Injury;
>
> **happening** during the Period of Insurance within the Geographical Limits, **in connection with** the Business or **Your Products** and/or work performed by You or on Your behalf **and caused by or arising out of an Occurrence**.
>
> (Emphasis added)

22 The words which are of particular significance to the facts of this matter have been emphasised. The words or expressions which are capitalised are defined in clause 1 of the policy.

23 The expression "Property Damage" is defined as follows:

> "**Property Damage**" means:
>
> (a) **physical loss, destruction of or damage to tangible property**, including the loss of use thereof at any time resulting therefrom; and/or
>
> (b) loss of use of tangible property which has not been physically lost, destroyed or damaged; provided that such loss of use is caused by or arises out of an Occurrence.
>
> (Emphasis added)

24 The words of particular significance to this matter are again emphasised.

25 The word "Occurrence" is defined as follows:

> "**Occurrence**" means **an event**, including continuous or repeated exposure to substantially the same general conditions, **which results** in Personal Injury and/or **Property Damage** and/or Advertising Injury **that is neither expected nor intended** (except for the matters set out in (f) of the definition of Personal Injury) **from Your standpoint**.
>
> (Emphasis added)

26 The words of particular significance are again emphasised.

27 Clause 3 of the policies excluded cover in respect of certain specified liabilities. AAI drew attention to the following exclusions.

28 Clause 3.7 excluded liability for "Property Damage to any Products where such damage is directly caused by a fault or defect in such Products; but this exclusion shall be interpreted to

apply with respect to damage to that part and only that part of such product to which the damage is directly attributable".

29 Clause 3.11 excluded liability for "the cost of performing, completing, correcting or improving any work undertaken by You".

30 Clause 3.14 excluded liability:

> [F]or loss of use of tangible property, which has not been physically lost, destroyed or damaged, directly arising out of:
>
> (a) a delay in or lack of performance by You or on Your behalf of any contract or agreement; or
>
> (b) failure of any Products or work performed by You or on Your behalf to meet the level of performance, quality, fitness or durability expressly or impliedly warranted or represented by You; but this Exclusion 3.14(b) shall not apply to Your liability for loss of use of other tangible property resulting from sudden and accidental physical loss, destruction of or damage to any Products or work performed by You or on Your behalf after such products or work have been put to use by any person or organisation other than You.

31 Clause 3.19 excluded liability for "damages, costs or expenses arising out of the withdrawal, recall, inspection, repair, reconditioning, modification, reinstallation, replacement or loss of use of any Products where such Products are withdrawn or recalled from the market or from use by the Named Insured because of any known, alleged or suspected defect or deficiency in such Products".

THE THIRD PARTY CLAIMS ACT

32 Section 4 of the Third Party Claims Act provides as follows:

> **4 Claimant may recover from insurer in certain circumstances**
>
> (1) If an insured person has an insured liability to a person (the claimant), the claimant may, subject to this Act, recover the amount of the insured liability from the insurer in proceedings before a court.
>
> (2) The amount of the insured liability is the amount of indemnity (if any) payable pursuant to the terms of the contract of insurance in respect of the insured person's liability to the claimant.
>
> (3) In proceedings brought by a claimant against an insurer under this section, the insurer stands in the place of the insured person as if the proceedings were proceedings to recover damages, compensation or costs from the insured person. Accordingly (but subject to this Act), the parties have the same rights and liabilities, and the court has the same powers, as if the proceedings were proceedings brought against the insured person.
>
> (4) This section does not entitle a claimant to recover any amount from a re-insurer under a contract or arrangement for re-insurance.

33 An "insured liability" is defined in s 3(1) of the Third Party Claims Act as "a liability in respect of which an insured person is entitled to be indemnified by the insurer". An "insured person" is defined in s 3(1) of the Third Party Claims Act as "a person who is, in respect of a liability to a third party, entitled to indemnity pursuant to the terms of a contract of insurance …".

34 The general effect of s 4 of the Third Party Claims Act is to allow a claimant to recover an insured liability directly from an insurer in proceedings in a court. Before doing so, however, the claimant must obtain the leave of the court pursuant to s 5 of the Third Party Claims Act.

35 Section 5 of the Third Party Claims Act provides as follows:

> **Leave to proceed**
>
> (1) Proceedings may not be brought, or continued, against an insurer under section 4 except by leave of the court in which the proceedings are to be, or have been, commenced.
>
> (2) An application for leave may be made before or after proceedings under section 4 have been commenced.
>
> (3) Subject to subsection (4), the court may grant or refuse the claimant's application for leave.
>
> (4) Leave must be refused if the insurer can establish that it is entitled to disclaim liability under the contract of insurance or under any Act or law.

36 A "court" is defined in s 3(1) of the Third Party Claims Act as meaning "a court or tribunal of New South Wales". As discussed later, however, ss 4 and 5 of the Third Party Claims Act may be picked up and applied in this Court pursuant to s 79 of the ***Judiciary Act*** *1903* (Cth).

37 The general effect of s 5 of the Third Party Claims Act is that the relevant court has a discretion to grant or refuse leave to bring or continue proceedings against an insurer in the court, but must refuse leave if the insurer can establish that it is entitled to disclaim liability under the policy.

38 To enliven the discretion, a claimant must generally establish: first, that there is an arguable case against the insured; second, that there is an arguable case that the relevant insurance policy responds to the arguable case against the insured; and third, that there is a real possibility that the insured would not be able to meet any judgment against it: ***Murphy****, McCarthy & Associates Pty Ltd v Zurich Australian Insurance Limited* [2018] NSWSC 627 at [17] and the cases there cited. There remains a residual discretion to refuse leave even if those three requirements are met: *DSHE Holdings Ltd (receivers and managers appointed) (in liq) v Abboud* [2017] NSWSC 579 at [20]-[21].

39 The requirement in s 5(4) that leave be refused if the insurer can establish that it is entitled to disclaim liability is "one imposed to insulate insurers from exposure to untenable claims": *Murphy* at [16]. The onus of establishing an entitlement to disclaim is obviously on the insurer: ***Ritchie*** *v Advanced Plumbing and Drains Pty Ltd* [2019] NSWSC 1028 at [28]. It has been said that the onus imposed on the insurer by s 5(4) of the Act requires it to demonstrate "beyond argument" an entitlement to disclaim indemnity: *Ritchie* at [28]; ***Giabal*** *Pty Ltd v Gunns Planations Ltd (in liq)* [2020] NSWSC 1070 at [14]; ***Chubb*** *Insurance Australia Ltd v Giabal Pty Ltd; Caitlin Australia Pty Ltd v Giabal Pty Ltd* [2020] NSWCA 309 at [3] and [7]. That proposition would appear to flow from the interlocutory nature of an application for leave and the fact that the entitlement to disclaim may depend on unresolved and contestable questions of fact. It may be, however, that questions of construction arising under the policy of insurance may be determined on a final basis in advance of the trial: *Chubb* at [12].

40 AAI took issue with the suggestion that it was required to satisfy the Court that its entitlement to disclaim liability was "beyond argument". It submitted that the emphatic language of s 5(4) of the Third Party Claims Act pointed against such a conclusion, that the reasoning in *Ritchie* to the contrary was wrong, and that, because the parties in *Giabal* and *Chubb* were not in dispute as to the applicable legal threshold, they provide no real support for the proposition that the entitlement to disclaim must be beyond argument. AAI also submitted that there was nothing in the text of s 5 to suggest either that the court considering an application for leave was confined to determining whether the claimant had an arguable case, or that the court was precluded from determining on a final basis whether the insurance policy responded to the claimant's claim.

41 AAI submitted that the circumstances of this case were such that the Court should determine whether the policies respond to Fairview's claim on a final, not interlocutory, basis. AAI noted, in that regard, that the parties had each filed detailed and comprehensive expert evidence which addressed whether Fairview's claim under the policies arose from or related to property damage which happened during the period of insurance. The parties also advanced comprehensive submissions in respect of that issue. In AAI's submission, it was in all parties' best interests for the coverage issue to be determined on a final basis at this stage of the proceeding.

ISSUES

42 Owners' interlocutory application raises the following issues for consideration and determination.

43 First, whether the Court has jurisdiction to make the orders which relate to, or rely on, AAI's joinder to the proceeding. That issue arises because the Third Party Claims Act is a state Act that defines "court" in terms that do not include this Court. If the Third Party Claims Act does not permit this Court to grant leave to proceed directly against AAI, as insurer, it is at best questionable that there is a proper basis upon which to join AAI or grant leave to Owners to amend its claim to seek declaratory and other relief against AAI.

44 Second, in relation to the grant of leave under the Third Party Claims Act, does Owners have an arguable case against Fairview? Leave to proceed against AAI would not readily be granted unless Owners was able to demonstrate that it had an arguable case.

45 Third, in relation to the grant of leave under the Third Party Claims Act, is there an arguable case that AAI's policy responds to Fairview's claim or potential liability to Owners? Is AAI entitled to disclaim liability? This is perhaps the most contentious issue. As already noted, AAI contended that the Court should determine this issue on a final basis. That would mean that Owners would have to demonstrate that the policy responded to Fairview's claim. If it did, AAI would have to establish that it was entitled to disclaim.

46 Fourth, the question whether AAI's policy responds to Fairview's claim, or its potential liability to Owners, raises two issues. The first issue is whether Fairview's potential liability arises from any property damage (physical loss, destruction or damage to tangible property). The second issue is whether any such damage was caused by an occurrence (an event which results in property damage that is neither expected nor intended).

47 Fifth, is AAI entitled to disclaim liability on the basis that one or more of the exclusion clauses in the policies apply?

48 Sixth, is there a real possibility that Fairview would not be able to meet any judgment against it? This was not really an issue given the terms of Fairview's deed of company arrangement. There could be no doubt that Fairview would not be able to meet any judgment that Owners secures against it.

49 Seventh, if Owners establishes that it has an arguable case against Fairview, an arguable case that AAI's policies responds to Fairview's claim, and that there is a real possibility that Fairview would not be able to meet any judgment, should the discretion to grant leave to proceed against AAI be exercised? Are there any reasons why the discretion would not be exercised in Owners' favour in those circumstances?

50 Eighth, if it is open and appropriate to grant Owners leave to proceed against AAI, is it appropriate to also grant leave to Owners to amend its application and pleadings to seek relief against AAI? This is again somewhat of a non-issue. It would seem that, if it is considered appropriate to grant leave to proceed against AAI under the Third Party Claims Act, it would also be appropriate to make the other orders sought by Owners. AAI did not submit otherwise.

JURISDICTION

51 The issue relating to jurisdiction and power may be dealt with shortly as there was ultimately no dispute that the Court had both jurisdiction and power to make the orders sought by Owners.

52 The Court plainly has jurisdiction to entertain Owners' action against Fairview because the central allegations in that action are that Fairview contravened the TPA and ACL, both of which are laws of the Commonwealth. The Court has jurisdiction in any matter arising under laws of the Commonwealth: s 39B(1A)(c) of the Judiciary Act. Owners' application to join AAI may be regarded as forming part of the same "single justiciable controversy" as the underlying proceeding against Fairview: *Re Wakim; Ex parte McNally* (1999) 198 CLR 511; [1999] HCA 27 at [145] (Gummow and Hayne JJ). The joinder application, which involves the application of State law, accordingly falls within the Court's accrued jurisdiction, though that expression is best avoided given its imprecision; "there is but one matter and that matter is entirely within federal jurisdiction": *Rizeq v The State of Western Australia* (2017) 262 CLR 1; [2017] HCA 23 at [55].

53 There was also no real issue or dispute as to the basis upon which the Third Party Claims Act can apply in this Court, despite the fact that the "court" that may grant leave to proceed or continue proceedings against an insurer is, by virtue of the definition of "court" is s 3(1), a "court or Tribunal of New South Wales". In short, s 79(1) of the Judiciary Act operates to 'pick up' and apply ss 4 and 5 of the Third Party Claims Act in this Court: see *Rushleigh Services Pty Ltd v Forge Group Limited (in liq) (receivers and managers appointed)* (2018) 355 ALR 248; [2018] FCA 26 at [38] applying the reasoning of Foster J in *Rushleigh Services Pty Ltd v Forge Group Ltd (in liq) (receivers and managers appointed); In the matter of Forge Group Ltd (in liq) (receivers and managers appointed)* [2016] FCA 1471 at [94] and Nicholas J in *Hopkins (as trustee for the Hopkins Superannuation Fund) v AECOM Australia Pty Ltd (No 4)* (2015) 328 ALR 1; [2015] FCA 307 at [41]-[43] in respect of the operation of s 6 of the *Law Reform (Miscellaneous Provisions Act) 1946* (NSW). The Third Party Claims Act may, by virtue of s 79 of the Judiciary Act, apply as a source of remedies in this Court even though

it identifies only courts of New South Wales as the courts to provide those remedies: see *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2001) 204 CLR 559; [2001] HCA 1 at [68].

54 It is, for reasons that will become apparent, unnecessary to consider Owners' somewhat doubtful contention that the Court could make an order joining AAI, and could grant it leave to amend its pleadings to seek declaratory relief against AAI, irrespective of the outcome of its application for leave pursuant to s 5(1) of the Third Party Claims Act.

INTERLOCUTORY OR FINAL DETERMINATION

55 The question whether leave can and should be granted to bring or continue proceedings directly against an insurer pursuant to the Third Party Claims Act is ordinarily determined on an interlocutory basis. That is essentially why it is generally only necessary for a claimant to demonstrate that there is an arguable case that the policy in question responds to the claim. It is also presumably why it has been said that an insurer who opposes leave on the basis that it is entitled to disclaim liability under the policy must demonstrate "beyond argument" that it is entitled to disclaim.

56 AAI submitted that the Court should determine whether the policy responds to Fairview's claim on a final, not interlocutory basis. In AAI's submission, it was in the best interests of all parties for that issue to be determined separately and on a final basis. It was also said to be appropriate to consider that question on a final basis given that both it and Owners had adduced detailed expert evidence in respect of that issue. In those circumstances, it would not be appropriate to permit the parties to essentially re-agitate the issue at the final hearing. While AAI did not file an application for the separate determination of that issue pursuant to r 30.01 of the *Federal Court* ***Rules*** 2011, it indicated that it would do so if required or if the Court considered that to be necessary.

57 Owners' position in respect of whether the coverage issue should be determined on a final basis was somewhat ambiguous and equivocal. It appeared to accept that it would be in its best interests for the issue to be determined on a final basis. There would plainly be little point in it pursuing the proceeding if it was unable to recover from AAI under the policies. Owners nevertheless did not consent to the issue being determined on a final basis and many of its submissions appeared to be premised on the proposition that it need only demonstrate that there was an arguable case that the policies responded. Perhaps more significantly, Owners submitted that some of the factual issues that appeared to have some potential relevance to the

coverage issue were matters for determination at the final hearing. For example, the precise extent and nature of the damage allegedly caused to the buildings was a matter for determination at the final hearing.

58 The Court undoubtedly has the power to order that a question arising in a proceeding be heard separately and in advance of the trial: see r 30.01 of the Rules. In the ordinary course, however all issues of fact and law should be determined simultaneously: *Tallglen Pty Ltd v Pay TV Holdings Pty Ltd* (1996) 22 ACSR 130 at 141-142. Ordering that a particular question be determined separately and in advance of the trial has also been said to be a "procedure that should be adopted with caution and can be fraught with difficulties": *Save the Ridge Inc v Commonwealth* (2005) 147 FCR 97; [2005] FCAFC 203 at [15].

59 I am not inclined in all the circumstances of this case to make an order for the separate determination of the issue as to whether the AAI policies respond to Fairview's claim. Nor do I consider that it is appropriate in all the circumstances to make a final determination in respect of that issue at this early stage of the proceeding. While I accept that it may be in the parties' best interests for that issue to be determined as soon as possible, there are a number of factors which militate against determining that issue separately and in advance of the trial.

60 First, AAI did not identify with any precision the question that was capable of being determined separately, or identify the final order or declaration that should be made if the question was to be determined on a final basis. AAI formulated the question as simply being whether AAI's policies are responsive to Fairview's claim. It is at best doubtful that that is a sufficiently precise formulation of a separate question. It may be noted, in this context, that the declaration that Owners will seek against AAI, if granted leave to amend, is that AAI is "liable to indemnify [Fairview] for the Covered Loss and Damage pursuant to the AAI Liability Policies up to any applicable limits of indemnity". The expression "Covered Loss and Damage" is defined in expansive terms in the proposed amended pleading. It includes loss and damage claimed not only by Owners, but also by some group members. AAI did not suggest that it would be appropriate to separately determine whether that declaration should be made.

61 Second, the factual and legal basis upon which any question concerning insurance coverage could be determined separately was not fully explored and remained somewhat unclear. Any separate determination of a question concerning coverage would have to be answered on the premise that Owners' claim against Fairview was or would be made out. While AAI agreed, "for the sake of expedience", not to contest that the Vitrabond cladding affixed to Owners'

buildings had the properties alleged by Owners, it nevertheless reserved the right to contest that issue if it was joined and the matter proceeded to trial. Moreover, save for that concession, AAI did not agree or concede any other facts. Owners' claim against Fairview is factually and legally complex and has many limbs. AAI's concession addressed only one aspect of Owners' claim.

62 Third, the lack of precision with which the separate question was framed, and the uncertainty and lack of clarity concerning the factual and legal basis upon which the question was supposed to be determined, is rendered more problematic and acute given that this is a representative proceeding. While it is perhaps conceivable that the question of coverage could be determined separately in respect of any claim arising from alleged damage to Owners' buildings, the question plainly could not be answered with respect to any claims relating to buildings owned or leased by other group members. There was no evidence before the Court as to how Vitrabond panels were affixed to the buildings of other group members, or whether they could be removed without causing any damage to the buildings.

63 Fourth, while the parties each adduced detailed and comprehensive expert evidence concerning the question whether Owners' buildings were damaged as a result of the affixation of the Vitrabond panels in circumstances where they will need to be removed, I am not satisfied that other evidence that may in due course be adduced at the trial may not also bear on that issue. Owners will, for example, no doubt adduce evidence at trial which seeks to quantify the loss or damage it has suffered by reason of the need to remove the Vitrabond panels and remediate the buildings before replacement panels are affixed. It is difficult to imagine that that evidence will not bear on the question whether the affixation of the panels damaged Owners' property.

64 Fifth, the question whether AAI's policies respond to Fairview's claim in respect of any compensation it may be found liable to pay Owners arising from the affixation of the defective panels is a complex and difficult mixed question of fact and law. It involves questions of meaning, characterisation and degree. It is not a question ideally suited to separate determination. It would, of course, be different if the coverage issue simply turned on a question of construction of the AAI polices: cf *Chubb* at [12]. That, however, is not this case.

65 In all the circumstances, I consider that the separate and final determination of the coverage issue at this point in the proceedings would be inappropriate and fraught with difficulties. I do, however, propose to make clear and definitive findings in respect of the coverage issue, based on the detailed evidence before the Court, rather than resorting to findings based on what the

evidence arguably established. That is likely to assist the parties in considering the approach they may take to the proceeding going forward.

66 I should also note that, given the way that the hearing of this interlocutory application has proceeded, I would be inclined to permit the parties to tender the evidence which has been adduced in respect of the interlocutory application (the expert reports and transcript) at the trial without the need to recall the experts. It may also be appropriate to impose limits on any further evidence that the parties may adduce in respect of the issues dealt with by the experts. I am inclined to the view that the parties should be permitted to re-agiate those issues without regard to what has transpired in the course of the hearing of this interlocutory application. Those, however, are issues that can be addressed in due course during the further case management of the proceeding.

A PRIMA FACIE CASE

67 It is unnecessary to address in any great detail the question whether Owners has an arguable case against Fairview. AAI did not submit that Owners did not have an arguable case against Fairview and, as already noted, did not dispute, for the purposes of this application, that the Vitrabond panels in question had the properties alleged by Owners. That is tantamount to a concession that the panels were defective and not of merchantable or acceptable quality for the purposes of the TPA and ACL.

68 Putting AAI's concession to one side, Owners tendered, on this application, documentary evidence which established that it had a prima facie case that the Vitrabond panels affixed to its buildings were not of merchantable or acceptable quality and not fit for use on such residential buildings. That documentary evidence included reports into fires that had occurred in and on residential buildings in London and Melbourne onto which had been affixed aluminium composite panels similar to the Vitrabond panels in question. Those reports concluded that the panels had contributed to the intensity of the fires and the speed with which the fires had spread. The documentary evidence also established, on a prima facie basis, that relevant authorities in Australia considered that the Vitrabond panels were not safe or fit for use on Owners' buildings and had ordered Owners to remove the panels.

69 In all the circumstances, I am satisfied, for the purposes of this application, that Owners has a prima facie case against Fairview in respect of loss or damage that it suffered as a result of affixing to its buildings the Vitrabond panels supplied by Fairview.

COVERAGE – PROPERTY DAMAGE?

70 Owners contended that, once it is accepted that the existing Vitrabond panels will need to be removed because they are combustible and therefore not of merchantable or acceptable quality for use on the buildings in question, it must also be accepted that the affixation of the defective panels caused physical loss or damage to its tangible property. Owners put its case in that regard in four ways.

71 First, the affixation of the defective panels caused damage to the buildings because the panels created a fire risk and therefore made the buildings unsuitable, or less suitable, for their intended use, being habitation. Owners relied on authorities which, in its submission, established that the loss of use of a building in such circumstances constituted damage for the purpose of insurance clauses of the sort contained in the AAI policies.

72 Second, the process of affixing the defective panels to the buildings, using thousands of screws, caused damage to the structure of the buildings. That is because it was necessary to affix the top hats to the concrete and steel stud walls of the building by screws or masonry anchors. That physical interference with the structure of the buildings amounted to damage.

73 Third, the process of removing the panels will inevitably result in damage to the top hat subframes which were affixed to the buildings for the purpose of attaching the panels and were suitable for that purpose at the time of affixation. That constitutes damage to tangible property – the property in this respect being the top hat subframes.

74 Fourth, there was damage to the buildings or the top hat subframes because of the risk, which existed from the point in time when the panels were affixed to the buildings via the subframes, that the structural integrity of the buildings or the subframes would be damaged when the panels came to be removed.

75 AAI contended that none of the four ways in which Owners put its case amounted to physical damage to tangible property that occurred during the relevant periods of insurance.

76 In relation to the first way that Owners put its case, AAI submitted that there was no physical damage to the buildings simply because there is a risk that the buildings may be damaged by fire at some point in the future. As for the authorities concerning the loss of use, AAI submitted that some of the authorities relied on by Owners were wrongly decided and that for loss of use to constitute physical damage, the loss of use must result from damage to the property, not the mere risk of future damage.

77 In relation to the second way Owners put its case, AAI submitted that any damage to the buildings caused by the insertion of screws or nails, and the resulting holes in the exterior of the buildings, was not unintended or unexpected damage. Fairview knew that the top hats were to be affixed by way of nails or screws. The damage was therefore not caused by an occurrence as defined in the policies. AAI also submitted, in the alternative, that the damage was not caused by an event which was unintended or unexpected because the affixation of the panels was clearly intended.

78 In relation to the third way that Owners put its case, AAI submitted that any damage to the top hats that may result from the removal of the Vitrabond panels would not be damage that occurred during the periods of insurance. Rather, it is damage that may occur in the future, or amounts to no more than a risk that damage may occur in the future.

79 AAI's response to the fourth way that Owners put its case was similar. In its submission, the mere risk that some damage to the buildings or top hats may occur at some time in the future is not physical damage that occurred during the periods of insurance.

80 It is convenient to first consider the evidence and make factual findings concerning the affixation of the Vitrabond panels to the buildings and the likely effect of their removal. The authorities relied on by the parties, and the arguments that were advanced based on those authorities, can then be considered in light of the factual findings.

Evidence

81 As has already been noted, the parties each adduced expert evidence from façade engineers and builders concerning the manner in which the Vitrabond panels were affixed to the relevant buildings and the means by which the panels could be removed. The main issue which divided the experts in relation to that issue was whether the panels could be removed without damaging the "top hat" substructure on which the panels were affixed. The experts also addressed the means or method by which replacement panels could be affixed to the buildings. The main issue which divided the experts in relation to that issue was whether the existing top hat substructure, assuming that it would not be damaged during the removal process, could be re-used for the purpose of affixing the replacement panels.

82 Each of the experts furnished reports. They also gave oral evidence concurrently and were cross-examined.

Affixation of the panels

83 Before addressing the main issues which divided the expert witnesses, it is convenient to first address an aspect of their evidence in respect of which there was broad agreement. That issue was the means by which the existing Vitrabond panels had been affixed to the buildings. With the possible exception of one of AAI's witnesses, whose inspection of the panels on the buildings was very limited, there was ultimately broad agreement between the experts that the Vitrabond panels were affixed to the buildings by means of a subframe structure that comprised vertical and horizontal metal "top hats".

84 The top hats were affixed to the building in two ways.

85 First, some of the top hats were affixed directly to the concrete wall structure of the buildings using masonry anchors or concrete nails. The concrete wall was covered by sarking (foil backed sheeting used as a moisture barrier), so the affixation of the top hat structure involved piercing the sarking with the anchors or nails. Only horizontal top hats were directly affixed to the concrete. Vertical top hats were then screwed to the horizontal top hats. When affixed in this manner, the vertical and horizontal tops hats were not in the same plane.

86 Second, some (perhaps most) of the top hats were affixed to the vertical steel studs which comprised much of the wall structure in the building. The steel studs were also covered with sarking. Vertical and horizontal top hats were affixed to the metal studs by metal anchors or self-tapping screws. When affixed in this manner, the vertical and horizontal tops hats were in the same plane. The anchors or screws again pierced the sarking placed over the stud walls.

87 Once the top hat subframe was affixed to the buildings, the Vitrabond panels were then affixed to the top hats by means of a very high strength double sided tape. The double sided tape was intended to provide a permanent bond which was capable of withstanding significant wind pressure. Where the top hat subframe had been affixed to the concrete walls, the panels were only taped to the vertical top hats. Where the subframe had been affixed to the steel stud walls, the panels were mainly taped to the horizontal top hats.

88 It would appear that some panels may have been directly affixed to the concrete wall by double sided tape. It is tolerably clear, however, that this method of affixation was only used infrequently and on very small or minor parts of the buildings.

Owners' experts

89 Owners adduced evidence from Mr Colin **Lim**. Mr Lim was a structural engineer who since 2000 had specialised as a façade engineer. Mr Lim carried out two site visits to the buildings. During one of those visits an "intrusive investigation" was conducted. That included partially separating two panels from the existing subframe. Mr Lim observed that the separation of the panels was very difficult and time consuming.

90 Mr Lim's opinion in relation to the removal of the Vitrabond panels was that removal would almost inevitably result in some damage to the top hat subframe, as well as some damage to the screws and fittings that affixed the subframe to the steel studs or concrete which comprised the wall structure of the building. Mr Lim observed that, given the high strength of the double sided tape, removal of the panels from the top hats was difficult, time consuming and required significant force. As already noted, Mr Lim actually witnessed the partial removal of two panels during his site visit which included the intrusive investigation.

91 In Mr Lim's opinion, the significant force required to prise the panels from the top hats was likely to bend, dent or distort the top hats and also damage the screw connections between the top hats and steel studs or concrete. The damage to the screw connections was, in Mr Lim's opinion, particularly problematic because, while the damage to the top hats themselves would be observable, the damage to the screw connections would not necessarily be observable. That was problematic because, even if the top hat subframe was able to be reused, every individual screw connection would have to be physically tested and certified.

92 Mr Lim also expressed the opinion that, even if (contrary to his opinion), the Vitrabond panels could be removed from the top hat subframe without damaging the top hats and screw connections, or if the damaged components could be removed and replaced, it would still not be possible to reuse the existing top hat structure for any replacement panels. That was so for two main reasons.

93 First, in Mr Lim's opinion it would not be feasible or acceptable to use the existing top hat subframe for the affixation of replacement panels using the adhesive method as that method was no longer recommended or considered acceptable by façade engineers. A reasonable façade engineer was unlikely to certify panels affixed in that way. In any event, in Mr Lim's opinion, because the existing top hat subframe had been designed specifically for Vitrabond panels, affixation of different replacement panels to that subframe would be problematic and result in a different and unacceptable aesthetic outcome. While AAI's experts suggested the

possibility of affixing fibre cement panels to the existing top hat subframe, Mr Lim's opinion was that fibre cement panels generally utilise their own proprietary or bespoke affixation system.

94 Second, in Mr Lim's opinion, the existing top hat structure could not be used to support replacement panels affixed using a "cassette" system. The cassette system involves folding the panels at their edges and screwing them into brackets between the vertical top hats using screws or pop rivets. Mr Lim's opinion was that the existing top hat subframe could not be used to affix replacement panels using the cassette system or method because the current subframe was specifically configured to support an adhesively fixed system utilising the horizontal top hats as the primary structural support. The existing vertical top hats were in Mr Lim's opinion structurally inadequate to hold the weight of replacement panels using the cassette system.

95 Owners also adduced evidence from an experienced building consultant, Mr Stephen **Abbott**. Mr Abbott had over 40 years' experience in the building and construction industry and had been directly involved in a number of projects which utilised similar cladding to that used on Owners' buildings. Mr Abbott carried out one site inspection. He described the steps that a suitably qualified and reasonably competent building contractor would take to remove the Vitrabond panels from Owners' buildings in two scenarios. The first scenario, which Mr Abbott called the "replacement scenario", was where the contractor was instructed to remove both the Vitrabond panels and the top hat subframe. The second scenario, which Mr Abbott called the "reuse scenario", was where the contractor was instructed to retain the existing top hat substructure for reuse.

96 Mr Abbott's opinion was that damage to the underlying top hat subframe and concrete and steel stud substrate of the buildings was inevitable during the panel removal process regardless of whether the replacement or reuse scenario was adopted. The components of the existing top hat subframe would likely be bent or dislodged as a result of the significant force that would need to be applied to prise the panels off the subframe. The dislodgment of the top hats would then expose redundant screw and nail holes in the concrete walls, steel studs and sarking. If it was at all possible to reuse the existing components of the top hat subframe, it would be necessary to replace the damaged components and additional components would need to be affixed to stabilise the subframe. That would require the drilling of additional holes. The sarking would also be damaged during the removal process and there would be a need to patch and replace the sarking as required.

97 Mr Abbott also expressed the opinion that adoption of the reuse scenario would be extremely time consuming and more costly than the replacement scenario. That is because it would involve substantial additional labour in attempting to remove the existing panels without damaging the top hat subframe and concrete and steel substrate and additional work to install infills and repairs to top hats damaged during the removal of the existing panels. It would also require significant re-detailing of the existing top hat subframe.

AAI's experts

98 AAI adduced evidence from an engineer and licenced builder, Mr Ramy **Sorial**, who specialised in façade engineering design. While Mr Sorial was briefed with a copy of Mr Lim's report, somewhat curiously he was not asked to comment on or respond to Mr Lim's opinions. Nor was he specifically asked to express an opinion as to whether the Vitrabond panels could be removed from Owners' buildings without damaging the top hats or steel and concrete substrate. Mr Sorial nevertheless proffered an opinion, albeit in very general terms, that the existing panels could be removed from the existing top hat subframe without causing structural or other damage to the existing top hat subframing members, so long as that was carried out by someone sufficiently trained and experienced, or someone supervised by one sufficiently trained and experienced in the disassembly of adhesive residue. Mr Sorial's opinion in that regard was largely unsupported by any reasoning and appears to have been based on one site visit during which he inspected two panels that were affixed in an atypical manner. That issue is discussed in more detail later.

99 Mr Sorial was asked whether the Vitrabond panels could be removed from the buildings and replaced with a non-combustible replacement product using a tape fixing method while retaining the existing top hat subframe. Mr Sorial's report described the process that would be employed to remove the existing panels and remove the adhesive from the existing top hats. Mr Sorial also stated that once the top hat surface had been cleaned, tape installation of replacement panels should be carried out by trained and experienced persons in accordance with the manufacturer's requirements and methodologies. Mr Sorial's evidence in that regard was expressed at a very high level of generality.

100 Mr Sorial was also asked whether, had the Vitrabond panels been installed using the cassette method of affixation, the panels could be removed and replaced with a non-combustible replacement product, while retaining the existing top hat subframe. In answering that

somewhat hypothetical question, Mr Sorial described the process that would be employed to remove panels from a cassette system.

101 AAI also adduced evidence from an experienced building consultant, Mr Stan **Giaouris**. Mr Giaouris inspected the buildings on one occasion for the purposes of his first report. That was a visual inspection and did not include any "destructive testing". Mr Giaouris' opinion was that the existing Vitrabond panels could be removed and the existing top hats could be retained for the installation of a replacement product ('Fairview G2'). That replacement product was lighter than the existing panels and in Mr Giaouris's view could be installed as a "cassette style system", retaining the existing substructure. It should be noted, in that regard, that Mr Giaouris conceded that he was not a façade or structural engineer.

102 Mr Giaouris described what he regarded as a reasonable and appropriate methodology for removing the cladding. That methodology involved cutting away the sealant between the panels and prising off the panels with a small pinch or jimmy bar. In his opinion, that could be done without causing damage to the substrate.

103 Mr Giaouris provided a supplementary report in which he responded to Mr Abbott's report. He also conducted a further site inspection during which he inspected an area where two panels had been removed. Mr Giaouris's evidence was that he did not identify any damage, distortion, bending or dislodgment on his inspection of the top hats where the two panels had been removed. He disagreed with Mr Abbott's opinion that it would take more time to remove the panels while retaining the top hats and disagreed with Mr Abbott's opinion that the panels could not be removed without damaging the top hats. He described a different method of removal involving the use of a saw to cut sections out of the panels and the use of solvents and a "smart tool", affixed to an air chisel, to assist the process of prising the panels off the top hats.

Factual findings

104 As already noted, each of the expert witnesses provided a report (in Mr Giaouris's case, two reports) and gave oral evidence concurrently. I carefully considered each of the reports and had the benefit of seeing and hearing the witnesses give oral evidence in the concurrent sessions.

105 On the important topic of whether the existing Vitrabond panels could be removed from the buildings without causing any damage to the top hat subframe and concrete and steel stud

substrate, it would be fair to say that each of the witnesses essentially maintained and stood by the evidence in their reports. Mr Lim and Mr Abbott maintained that damage to the existing top hat subframe, the concrete and walls of the buildings and the fittings and connections between the subframe and the walls, was virtually inevitable. Mr Sorial and Mr Giaouris effectively maintained that it would be possible to remove the panels from the top hat subframe without causing any damage to the subframe, so long as reasonable and properly trained subcontractors were retained for that task.

106 Having read the witnesses' reports and observed their evidence during the concurrent session, I prefer and accept the opinions of Mr Lim and Mr Abbott that removal of the existing Vitrabond panels will inevitably result in some damage to the existing top hat subframe, the fittings and the concrete and steel stud wall structure. I consider it to be highly unlikely indeed that the panels could be removed without causing any damage to the top hats or the wall structure, irrespective of what removal method is employed.

107 In relation to the façade engineers, I found Mr Lim to be a particularly impressive witness. He gave his evidence in a frank, forthright and considered manner and made concessions where appropriate. His opinions concerning the likelihood of damage resulting from the removal process were based on his considerable experience as a façade engineer as well as his more extensive site inspections. One of the inspections involved witnessing attempts to remove panels. None of the questioning during the concurrent evidence session cast any doubt on the reliability or cogency of Mr Lim's evidence that some damage to the top hats and fittings was inevitable. I accept his opinion that, whichever process of removal of the Vitrabond panels was ultimately adopted, the process was likely to result in at least some of the top hats being bent, warped, or dislodged. It was also likely that at least some of the screw fittings and some of the connections achieved by the screw fittings would be damaged or compromised. Every fitting or connection would need to be checked to ensure that no such damage had occurred. That would be a particularly time consuming and costly exercise.

108 In contrast, Mr Sorial's opinion concerning the ability to remove the panels without causing any damage was expressed at a very high level of generality and appeared to be based on a single site visit which involved the visual inspection of only one small area where a panel or two had been removed. That area was atypical. The top hats in that area had been affixed directly to the concrete wall and the panels had been affixed to the vertical top hats in such a way that the edges of the panels aligned with the vertical top hats. That was atypical because

the edge of the panels did not always align with the vertical top hats in that way. Mr Sorial did not inspect any area where the top hats had been affixed to the steel stud walls. The panels in those areas were almost invariably affixed to the horizontal top hats, not the vertical top hats. Mr Sorial did not appear to have any real knowledge or appreciation of that more common method of affixation. That significantly undermined the reliability of his opinion. Overall, I was considerably less impressed both with Mr Sorial's report and his oral evidence concerning the prospect or likelihood of damage caused by the removal process.

109 In relation to the building consultants, I also prefer the evidence and opinion of Mr Abbott over the evidence of Mr Giaouris in respect of the likelihood of damage. Like Mr Lim, Mr Abbott was an impressive witness. His evidence concerning the difficulty of removing the Vitrabond panels without damaging the top hat subframe remained relatively consistent and was not shaken at all during the questioning in the concurrent session. In contrast, Mr Giaouris's evidence concerning the appropriate method of removal shifted somewhat. He initially referred to simply cutting away the sealant and prying the panels off with a pinch or jimmy bar. Later, in apparent response to Mr Abbott's report, he referred to the use of a solvent and a proprietary tool which could fitted to an air chisel. Mr Abbott's response to that refinement of Mr Giaouris's evidence, in particular the inappropriateness of using a flammable solvent which left a residue, was compelling. It would also appear that the proprietary tool referred to by Mr Giaouris was primarily designed to separate overlapping panels, as opposed to removing panels affixed to top hats by way of high strength adhesive. The overall impression I gleaned was that Mr Giaouris's evidence concerning the relative ease of removing the panels was fairly speculative and hypothetical, whereas Mr Abbott's opinion was more grounded in experience.

110 On the whole, I accept the evidence and opinions of Mr Lim and Mr Abbott that, whatever method may be employed to remove the existing Vitrabond panels, some damage to the existing top hat subframe, including the screw fittings and connections, and some damage to the concrete and steel stud substrate of the building, was effectively inevitable. In my view, the force that would need to be applied to prise the Vitrabond panels free from the top hat structure would be highly likely to cause at least some damage to the top hat subframe, screws and fittings. I also consider it be to be highly likely that the screw and anchor connections in the concrete and steel stud walls would most likely be damaged or compromised during the panel removal process. I reject or give little, if any, weight to the evidence of Mr Sorial and Mr Giaouris to the contrary.

111 In relation to the issue whether, on the assumption that the Vitrabond panels could be removed without damaging the existing top hat subframe, that subframe could be utilised for the purpose of affixing replacement non-combustible panels, I again prefer the evidence of Mr Lim and Mr Abbott to that of Mr Sorial and Mr Giaouris. While it may be have been acceptable to use an adhesive tape or face fixing method of affixation of Vitrabond panels back in 2014 and 2015 when the panels were affixed to Owners' buildings, I accept the evidence of Mr Lim and Mr Abbott that this method is no longer considered permissible or appropriate. It is certainly not the recommended method. I also prefer and accept Mr Lim's evidence that the use of the adhesive method of fixing panels to a subframe, if available in respect of the replacement panels, would result in a different and unacceptable aesthetic outcome. It may be noted, in that regard, that Mr Giaouris did not suggest that it would be appropriate to affix replacement panels using the adhesive tape method and that Mr Sorial's apparent suggestion that such a method could be utilised was expressed in highly general and unpersuasive terms.

112 There essentially also appeared to be broad agreement between the experts that it could not be assumed that the existing top hat subframe could be utilised to affix replacement fibre cement panels to the buildings in question. That is because such panels were likely to have different weight or heat characteristics to the Vitrabond panels. Such panels also tend to have their own proprietary subframe affixation systems or requirements, or would require an affixation system to be specifically designed.

113 As for the suggestion that the existing top hat subframe could be utilised for the purpose of affixing replacement panels using the cassette system, I prefer and unequivocally accept the opinion of Mr Abbott and Mr Lim that the existing top hats could not be so utilised and that a new "bespoke" system would have to be designed to affix the replacement panels using a cassette system. I give little, if any, weight to Mr Giaouris's opinion that replacement panels could be affixed to the existing top hats using a cassette system, particularly given that he was not a façade engineer, and did not profess to have any particular expertise in respect of panelling systems. As for Mr Sorial, while he did not suggest, in his report, that the existing top hat structure could be reused as a cassette system, he appeared to initially embrace that possibility in his oral evidence in the concurrent session. Any such suggestion, however, was completely undermined by the fact that Mr Sorial erroneously assumed that all of the panels were affixed in the same way as the two panels that he had seen during his site visit. Those panels were affixed to vertical top hats. Most of the panels on the buildings, however, had

been affixed to horizontal tops hats. Mr Sorial ultimately accepted that he could not say that the existing top hats could be used for the purposes of a cassette affixation system.

114 It follows that I accept the opinion of Mr Lim that, once it is accepted that the existing Vitrabond panels must be removed, the existing top hat subframe will also have to be removed and disposed of. A new subframe would then need to be installed to support or provide a means of affixing the new replacement panels. I also accept Mr Abbott's ultimate opinion that the appropriate course for a competent building contractor to adopt in respect of the removal of the Vitrabond panels is the course he described as the "replacement scenario", which involved the removal of both the panels and the existing top hat subframe. That course would not only be the most cost and time effective method, it would also effectively be the only feasible method.

115 In summary, having regard to the whole of the evidence, I make the following factual findings concerning the removal of the existing Vitrabond panels from Owners' buildings.

116 First, the panels will not be able to be removed without causing some damage to the existing top hat subframe that is affixed to the concrete wall and steel stud walls of the buildings. The removal of the panels is also likely to damage some of the screws fixing the vertical and horizontal top hats together and some of the screws or anchors fixing the top hats to the cement and steel stud walls and compromise the connections achieved by those fittings or fixings.

117 Second, the inevitable result of the removal of the panels is that the existing top hat structure will also have to be removed from the buildings and disposed of. That is so for at least two reasons. The first reason is that the top hat subframe and associated screws and fittings will be damaged in the course of the removal of the panels. It would not be feasible to remove the panels in such a way as to preserve the top hat subframe for reuse. The second reason is that, even if it was possible to remove the panels without damaging the top hat subframe, that subframe could not, in any event, be utilised for the purpose of affixing any replacement panels, either by means of some type of adhesive system or via a cassette system. A new bespoke affixation system will have to be designed for the purpose of affixing the replacement panels. In short, the existing top hat structure, which was fit for purpose at the time of the original affixation of the Vitrabond panels, would effectively have to be destroyed or otherwise disposed of.

118 Third, once the panels and existing top hat subframe are removed from the building, there will almost inevitably be a need to remediate parts of the building before any new subframe or

affixation system and replacement panels are affixed to the building. That remediation is likely to involve, at the very least, the filling of holes in the concrete and steel stud wall frames and the repair or replacement of the existing sarking.

Relevant authorities

119 The parties each relied on authorities concerning the scope and application of property damage clauses in insurance contracts. It is, however, unnecessary to address the authorities in painstaking detail. That is because both parties acknowledged that it is not possible to distill from the authorities "a simple coherent definition or universally applicable rules capable of being applied to varied factual circumstances to reach deduced logical results": cf ***R & B Directional Drilling*** *Pty Ltd (ACN 163 164 234) (in liq) v CGU Insurance Ltd (No 2)* (2019) 369 ALR 137; [2019] FCA 458 at [101]. Ultimately the question whether a property damage clause of the sort in issue in this case responds to the claim against Fairview is a question of fact and degree. Many of the authorities referred to by the parties turned on their own unique and distinguishable facts. The more contentious cases are those where the physical damage is alleged to be a loss of functionality. It is, nevertheless, useful to provide a brief summary of some of the relevant authorities.

120 It should also be noted that the general principles applicable to the construction of insurance contracts are well-known and were not in issue between the parties. In short summary, the Court is to give effect to the common intention of the parties as manifested in the language they have chosen, and in the absence of any contrary intention, should approach the construction of the contract on the basis that the parties intended to produce a commercial result: see *Star Entertainment Group Ltd v Chubb Insurance Australia Ltd* (2022) 400 ALR 25; [2022] FCAFC 16 at [8]-[14]. In appropriate cases, the Court may have regard to the fact that the parties may be taken to have contracted against a background which includes previous decisions concerning the construction of similar clauses: *TKC London Ltd v Allianz Insurance PLC* [2020] EWHC 2710 (Comm) at [104]-[106]; *Toomey v Eagle Star Insurance Co Ltd* [1994] 1 Lloyd's Law Reports 516, 520; *Clough Engineering Ltd v Oil and Natural Gas Corp* (2008) 249 ALR 458; [2008] FCAFC 136, [81].

Austral Plywoods

121 Owners relied on the decision of the Supreme Court of Queensland (Court of Appeal) in ***Austral Plywoods*** *Pty Ltd v FAI General Insurance Company Ltd* (1992) 7 ANZ Insurance Cases 61-110; [1992] QCA 4. In that case, the insured supplied plywood to a boat builder

who affixed to the hull of a boat by screws and glue. The plywood turned out to be defective and had to be removed from the hull of the boat. The glue also had to be chiselled or scraped off the hull and the screw holes filled. The insured's policy covered it for all amounts which it became legally liable to pay as compensation for "property damage caused by an occurrence in connection with the insured's business". The court held that the affixation of the defective plywood caused physical injury to the hull of the boat and that the policy therefore covered the insured in respect of its liability to pay for the cost of removal of the defective plywood and the restoration of the hull to a state in which new plywood could be affixed. The Court of Appeal reasoned as follows (at 77,524):

> The tangible property to which the appellant had to prove physical injury was the hull of the boat in the condition in which it was immediately prior to the affixation of the defective plywood. The question is whether the affixation of that plywood to the hull caused physical injury to the hull. If that question is answered in the affirmative it is then necessary to identify that physical injury for it is only that physical injury which is compensible. The measure of that compensation would ordinarily be, and we think here is, the cost of remedying that physical injury.
>
> In one sense any affixation of plywood to a hull by means of screws and glue causes physical injury to the hull. It causes holes to be drilled in the hull for the screws and the glue may also damage the surface of the hull. In order to restore the hull to its original condition, the plywood would have to be removed, the glue chiselled or scraped off and the screw holes filled. Compare *Wyoming Sawmills Inc. v. Transportation Insurance Company* Or.578 P.2d 1253 at 1257. But, of course, if the plywood is not defective there is no physical injury which would give rise to a legal liability in the supplier to pay compensation for it.
>
> Upon the permanent affixation of the defective plywood to the hull, the hull was not only physically injured by the screw holes and glue but was rendered unsuitable, or less suitable, for the purpose for which it was constructed. Compare *Carwald Concrete & Gravel Co. Ltd. v. General Security Insurance Co. of Canada* 24 D.L.R. (4th) 58 at 63; *Canadian Equipment Sales & Service Co. Ltd. v. Continental Insurance Co.* 59 D.L.R.(3d) 333 at 336.
>
> To remedy that injury the plywood had to be removed and the hull restored to a state in which new plywood could be affixed.

122 The judgment in *Austral Plywoods* was referred to with apparent approval, or at least without apparent disapproval, by Allsop CJ in *R & B Directional Drilling*. In the Chief Justice's view, the "proper reading" of the above extract from *Austral Plywoods* was that "the physical injury to the hull was the fixing of the defective plywood by physical means of screws and glue making the hull unsuitable or less suitable for its purposes and requiring the restoration of the physical state of the hull upon removal of the plywood": *R & B Directional Drilling* at [91]-[92]. His Honour similarly noted that in *Austral Plywoods* the "affixing of the defective

plywood physically affected the hull, not just because of screw holes, but also because with such physical change it was unsuitable to use as a hull" (at [101]).

123 It is readily apparent, both from the reasoning of the Court of Appeal in *Austral Plywoods* and Allsop CJ's analysis of that reasoning in *R & B Directional Drilling*, that the relevant physical damage to the hull occurred at the time the defective plywood was affixed to the hull, not at the time it was removed.

124 Before considering the decision and reasons in *R & B Directional Drilling* in more detail, it is perhaps worth briefly referring to two of the decisions cited by the Court of Appeal in *Austral Plywoods*.

125 In ***Carwald*** *Concrete and Gravel Co Ltd v General Security Insurance Company of Canada* (1985) 24 DLR (4th) 58, the insured was contracted to supply and pour a concrete pad over rebar and reinforcing steel. Electrical ducting, grounding wire and plumbing was also to be embedded in the concrete, as well as anchor bolts for positioning equipment on the pad. The concrete was required to have a specified strength. Subsequent testing, however, revealed that the concrete that was poured did not have the required strength, due to a defect in the supplied cement, meaning it had to be removed. The insured's policy provided coverage for "property damage caused by an occurrence". "Property damage" was defined to mean "physical injury to or destruction of tangible property … or … loss of use of tangible property" (at [13]-[14]).

126 The Alberta Court of Appeal held that the insured's liability arising from the need to remove and repour the concrete pad was based on damage to property. The court reasoned that "where … the pouring of defective concrete made the rebars, reinforcing steel, ducting, wiring, plumbing and anchor bolts useless for the purpose for which they were installed as the pad could not be used … this constituted physical injury to tangible property" (at [20]).

127 In *Canadian Equipment Sales & Service Co Ltd v Continental Insurance Co* (1975) 59 DLR (3d) 333, a subcontractor of the insured allowed a section of pipe, a "coupon", to fall into a water pipeline which was under construction. The coupon had to be removed to ensure that the pipe could function without being damaged. The insured's policy covered it in respect of liability incurred "because of injury to or destruction of property, including loss of use". The court held that the "dropping of the coupon into the pipe … was an injury to the pipeline, and [the pipeline's owner], from that moment, had an imperfect or impaired pipeline" and that

"[t]he attempt to locate the coupon was a direct and natural consequence of the injury to the pipeline".

R & B Directional Drilling

128 AAI relied on the decision of Allsop CJ in *R & B Directional Drilling*. In that case, the insured was contracted to construct or install a tunnel for a cable crossing. The tunnel was comprised of a metal sleeve surrounding a void. Five conduit pipes fed through the void and the cabling was fed through the conduit pipes. Concrete grouting was then pumped into the tunnel void to fix the conduit pipes in place. During that grouting process, concrete entered a hole or break in one of the conduit pipes rendering it useless to carry a cable. The grouting and conduits were subsequently required to be removed from the tunnel.

129 The insured's policy covered it for all sums that it became legally liable to pay for compensation in respect of physical injury to or loss of or destruction of tangible property, including loss of use of that property as a result of any such injury, loss or destruction, which happened during the period of insurance as a result of an occurrence in connection with its business. The issue was whether the insured's claim in respect of the cost of removing the conduits and grouting was covered by that clause in the policy. That effectively depended on whether the insured's actions had caused any physical injury to the tunnel. The applicants had, for whatever reason, contended that the relevant tangible property was the tunnel, not the metal sleeve alone, nor the conduit pipes or the grouting. The Chief Justice found that there had been no injury to the tunnel (see [134]-[135]).

130 The Chief Justice reasoned that the question was "a matter of degree, of meaning and of characterisation". His Honour ultimately accepted the following characterisation of what had occurred (at [135]-[136]):

> … the tunnel is not injured; it is and remains sound once the defective work is removed. The tunnel has not been damaged because it can be used again. The cost and consequences of getting to that point again are no meaningfully characterised as the consequences of physical injury to the tunnel, but as the cost and consequences of defective work: the removal of defective work from inside the undamaged sleeve, from inside an otherwise uninjured tunnel. On this view, it can be seen that there has been a (temporary) loss of use of tangible property (the tunnel) but that loss of use has not been caused by physical injury to the tunnel, but by the placement of defective work in the tunnel. It has been filled with concrete and conduit pipes (as it was intended to be), but one of the pipes was defective (as it was not intended to be). The defective work can be, and was, removed, leaving the tunnel in the same physical state that it was in before the placement of the defective work. The position may have been different had the concrete not been able to be removed, or not been able to be removed without damaging the integrity of the sleeve.

> … I would characterise what occurred … as the placement of materials within the tunnel that were defective, requiring their removal from the tunnel. The tunnel itself was not physically injured; its temporary loss of use was not caused by physical injury, but by defective works.

131 It can readily be seen that the critical finding was that the defective work (the defective conduit and concrete) which temporarily rendered the tunnel useless for its intended purpose was able to be removed without damaging the integrity of the steel sleeve.

132 Before arriving at that conclusion, Allsop CJ conducted a comprehensive review and analysis of cases that had been decided in a number of common law countries concerning similar insurance clauses. It is both unnecessary and undesirable to repeat or repackage his Honour's detailed discussion and analysis of the authorities. The authorities addressed a wide variety of factual scenarios and, as his Honour ultimately recognised, it was in any event not possible to extract from the authorities any universal definitions or rules which were able to be applied to any given fact scenarios so as to produce a logical answer to the coverage question. Ultimately the proper characterisation of any given scenario involves issues of fact and degree. Each case must be addressed having regard to its own unique facts and circumstances and the answer is not always easy or straightforward. Nevertheless, the following points can be discerned from Allsop CJ's analysis of the authorities.

133 First, his Honour's analysis largely focussed on the circumstances in which the loss of use, or temporary loss of use, of tangible property may constitute physical injury or damage. That was largely because of the manner in which the insured had articulated its case. The insured accepted that the tunnel (the steel sleeve and void), which was the relevant tangible property, had not been physically damaged by injury to its physical condition. Its case was that the damage was the rendering of the tunnel useless for its intended purposes by the grout hardening to fill the tunnel with five conduit pipes, only four of which were useable: see [69]. The insured had submitted that the fact that the conduit and pipes could be removed without causing any damage to the sleeve was not decisive: see [135].

134 Second, the authorities which addressed that issue certainly did not speak with one voice. There were, on just about any view, apparent conflicts and inconsistencies between the authorities concerning the circumstances in which an occurrence or event which resulted in property being unable to be used for its intended use could or would constitute physical damage to that property.

135 Third, Allsop CJ ultimately found "unpersuasive the proposition that *any* material impairment of functionality or purpose amounts to physical injury": at [134] (emphasis added). His Honour's view in that regard appears to have been informed by various cases where machinery or equipment was rendered temporarily unusable as a result of defective work, but where that defective work had not caused any physical damage to the machinery or equipment and the functionality of the equipment was able to be restored without causing any damage to the equipment or machinery.

136 The cases which influenced the Chief Justice in that regard included: *Transfield Construction Pty Ltd v GIO Holdings Pty Ltd* (1997) 9 ANZ Insurance Cases 61-336 (which concerned a defect in the construction of a silo which caused fumigation pipes in the silo to be blocked, but where no pipes were damaged or destroyed); *Kraal v Earthquake Commission* [2015] 2 NZLR 589; [2015] NZLR 589 (which did not concern equipment, but rather concerned an undamaged building which was nevertheless deemed inhabitable because of its proximity to an area which was prone to falling rocks); *Traveller's Insurance Co v Eljer Manufacturing Inc* 197 Ill 2d 278; 757 NE 2d 481 (2001) (which concerned houses in which functioning plumbing systems had been installed, but those plumbing systems were viewed as defective because of a tendency to leak); *F & H Construction v ITT Hartford Insurance Company of the Midwest* 12 Cal Rptr 3d 896 (2004) (which concerned defective pile caps which had been welded onto steel piles, but the functionality of the steel piles was able to be restored without removing or replacing the caps or damaging the piles); and ***Pilkington*** *United Kingdom Ltd v CGU Insurance Plc* [2005] 1 All ER (Comm) 283; [2004] EWCA Civ 23 (another case relied on by AAI and addressed in further detail later in these reasons): see *R & B Directional Drilling* at [95], [97], [120], [130] and [136].

137 Fourth, Allsop CJ equally found "difficult the exclusion from consideration the effect of the serious or complete destruction of utility of a physical structure by the introduction of the defective work": at [134]. In other words, his Honour appeared to accept that, at least where the defective work effectively destroyed the utility of a structure, such as a building or house, that result could properly be characterised as physical injury to that structure. ***Bundy Tubing*** *Company v Royal Indemnity Company* 298 F2d 151 (6th Cir, 1962) was given as an example of such a case.

138 In *Bundy Tubing*, the insured manufactured a heating system which was installed in the concrete floor of a house. The tubing in the heating system turned out to be defective because

it leaked. The removal of the heating system required the concrete to be dug up. The relevant insurance clause provided indemnity for "all sums which the insured shall become legally obligated to pay as damages because of injury to or destruction of property, including loss of use thereof, caused by accident". The Sixth Circuit Court of Appeals held that "property was damaged by the installation of defective tubing in a radiant heating system which caused the system to fail and become useless" and that "a home with a heating system which did not function would certainly not be suitable for living quarters in the wintertime" (at 153).

139 The Chief Justice characterised the finding in *Bundy Tubing* as being that the "home could be seen to be physically injured by being made unsuitable for winter habitation": *R & B Directional Drilling* at [83]. Such an injury to property was to be "distinguished from the consequences of the mere inclusion of a defective component into a whole where there is no physical harm to the other parts": at [89]; see also [100].

140 It is perhaps also worth noting that the facts and circumstances in *Bundy Tubing* were similar to those in *Carwald*, the case considered earlier in these reasons in the context of *Austral Plywoods*. The Chief Justice regarded *Carwald* as authority for the proposition that "the making (by covering with defective concrete) of equipment, being tangible property, useless for the purpose for which it or they were installed (if it or they had been covered by non-defective concrete) constitutes physical damage to that equipment": *R & B Directional Drilling* at [89]. His Honour also noted that *Austral Plywoods*, by its reference to, inter alia, *Carwald*, could be seen as "support for the proposition that making, by defective work, tangible property useless or unsuitable for its purpose is physical injury to tangible property", though his Honour also noted that in *Austral Plywoods* there was "actual interference with the integrity of the hull (the screw holes and glue)": *R & B Directional Drilling* at [92].

141 Fifth, as has already been noted, Allsop CJ referred at some length to the decision in *Austral Plywoods*. There is nothing to suggest that his Honour disapproved of or disagreed with that decision or the reasoning that led the Court of Appeal to conclude that the affixation of the defective plywood to the hull constituted physical damage to the hull at the time of installation.

Pilkington

142 AAI relied on the judgment of the Court of Appeal in England in *Pilkington*. In that case, heat-soaked toughened glass panels manufactured by the insured were installed in the roof and vertical panelling of the Eurostar Terminal at Waterloo. A very small number of those panels proved defective and prone to facture. The owner of the terminal elected not to remove the

panels and instead installed safety features which prevented any fractured glass falling into the terminal. There was no damage to the fabric of the terminal itself. The insured made a claim under a policy which covered physical loss to property. The court held that the policy did not cover the cost of the remediation scheme.

143 Lord Justice Potter (with whom Parker LJ and Charles J agreed) responded as follows to the insured's submission (noted at [48]) that "in every case where a defective component is incorporated in a building to the extent of needing substantial work to extract and repair it, physical damage has occurred to the building" (at [49]):

> I do not agree for several reasons. In particular, it does not seem to me that, where a product is supplied for incorporation into a building and it is so *incorporated without damage of any kind* and in a condition such that it and the other components of the building function effectively, subject only to the possibility of some future failure or malfunction, that is in any ordinary sense an Occurrence or event which gives rise to physical damage in those other components or to the building as a whole. At best, it creates the possibility of some fracture or malfunction occurring in the future. To take precautions at that stage is simply to anticipate the occurrence and/or damage covered by the policy and the costs of such measures do not in my view fall within its terms without specific provision which makes that clear.
>
> (Emphasis added)

144 After noting that in English law, "damage" usually refers to a "changed physical state" (at [50]), Potter LJ continued (at [51]):

> As already observed, generally speaking, damage requires some altered state, the relevant alteration being harmful in the commercial context. This plainly covers a situation where there is a poisoning or contaminating effect upon the property of a third party as a result of the introduction or intermixture of the product supplied ... However, it will not extend to a position where the commodity supplied is installed in or juxtaposed with the property of the third party *in circumstances where it does no physical harm* and the harmful effect of any later defect or deterioration is contained within it.
>
> (Emphasis added)

145 Lord Justice Parker's reference to cases involving "a poisoning or contaminating effect upon the property" was a reference to a number of American cases which involved the installation or incorporation of asbestos in a property. His Lordship had earlier noted that those cases afforded no useful parallel or guidance in respect of the case which the Court of Appeal was considering. That was said to be because the asbestos cases involved "the installation of a contaminant or toxic substance taking instant and damaging effect on the property", which was different to a case (like the proceeding before the Court of Appeal) which involved "the

installation of a component not alleged to contain any such substance the defect in which simply consisted of a propensity to cause damage in the future": *Pilkington* at [44].

Armstrong World Industries

146 It is perhaps appropriate, given the brief observations of Potter LJ in *Pilkington* concerning the American asbestos cases, to briefly consider one of those cases that was relied on by Owners. It should, however, be noted that this is a rather difficult area to delve into. Most of the asbestos cases are decisions of state courts in the United States of America. There are some inconsistencies and conflicts between the cases and, as Allsop CJ noted in *R & B Directional Drilling*, there is not one common law in America (see [104]).

147 In *Armstrong World Industries Inc v Aetna Casualty and Surety Co* 45 Cal App 4th 1 (Cal Ct App 1996); 52 Cal Rptr 2d 690 (1996), the California Court of Appeal considered appeals arising from a number of trial court rulings concerning the obligations of insurers in cases where asbestos was present in building materials. The appeal addressed a number of issues, only one of which is of present relevance. That issue was, in short, whether injuries allegedly suffered by building owners as a result of the presence of asbestos in their buildings consisted or "property damage" or, more specifically, "physical injury".

148 The Court of Appeal concluded that the incorporation of asbestos in a building constituted physical injury to the building because "the mere presence of [asbestos] in buildings is a health hazard because of the potential for *future* releases of asbestos fibres": *Armstrong World Industries* at [31]. The Court of Appeal concluded that "because the potentially hazardous material is physically touching and linked with the building, and not merely contained within it, the injury is physical even without a release of toxic substances into the building's air supply" (at [32]).

Analysis and finding – there has been physical damage to tangible property

149 As was the case in *R & B Directional Drilling* (see [134]), the resolution of the question concerning the engagement of the coverage clause in the AAI policy or policies is not easy. The question involves matters of degree and characterisation and the answer is by no means straightforward. The authorities are not entirely consistent and certainly do not supply any coherent rule or rules that can simply be applied to the present circumstances.

150 I have nevertheless concluded that the facts and circumstances of this case are such that the better view is that the affixation of the defective Vitrabond panels to Owners' buildings caused

"physical damage … to tangible property", that property being the buildings (specifically the concrete walls, steel struts and sarking that together comprise the walls of the buildings), as well as the top hat subframe that was affixed by nails and screws to the walls of the buildings and upon which the panels were themselves affixed in a manner that was intended to be permanent. The affixation of the defective panels therefore caused or resulted in "property damage" for the purposes of cl 2.1 of AAI's insurance policies.

151 There is no dispute, at least for the purposes of the current application, that the Vitrabond panels that were affixed to Owners' buildings had qualities or characteristics that made them defective and unsuitable for affixation to residential buildings. The panels were and are, in summary, combustible. As a result, they fail to comply with relevant building codes and increase the risk of loss of life and damage to the building in the event of a building fire. Two considerations flow from the fact that the panels are defective and unsuitable for those reasons.

152 First, the affixation of the panels to the buildings made the buildings less suitable, in a substantial and material way, for the purpose for which the buildings were intended, being for use as residential housing. That is not to say that the buildings are uninhabitable. People are still residing in them. They are, however, undoubtedly less suitable for ongoing habitation because, while the panels remain affixed to the buildings, the buildings are essentially unsafe because there is a risk that if there is a building fire, the fire will spread more rapidly and will be more severe than would otherwise be the case. It could not seriously be suggested that the affixation of combustible panels to a residential building in such circumstances does not make the building less suitable for use as a residential building.

153 Second, the panels will have to be removed. There is no dispute that Owners has been ordered to remove the panels.

154 The fact that the affixation of the panels made the buildings substantially and materially less suitable for their intended use does not alone establish that the affixation caused property damage. It is necessary to have regard to two further important facts.

155 First, the means by which the panels were affixed to the buildings caused physical damage to the buildings themselves. The panels were affixed by first affixing a top hat subframe to the buildings. That top hats were affixed by means of nails or screws to both the concrete walls and steel stud walls of the buildings. That resulted in nail or screw holes in the concrete and steel walls of the buildings, as well as holes in the sarking that covered the walls. If and when

the top hat structure is removed, as a result of the need to remove the panels from the buildings, the nails and screws will also inevitably have to be removed, leaving possibly thousands of holes throughout the buildings' structural walls.

156 AAI's assertion that the damage to the building structures caused by the insertion of nails and screws was trivial or superficial and does not constitute any change to the physical state of the buildings, or involve any interference with the integrity of the building, is unsupported by any cogent evidence. It is also unsupported by authority. The insertion of nails and screws into the concrete and steel walls of the buildings could fairly be said to have changed or altered the physical state of the buildings in a harmful or deleterious way. Even if the authorities supported the application of a *de minimis* rule or principle, there is no sound basis upon which to find that the creation of possibly thousands of redundant holes in the walls of a building was *de minimis*.

157 Second, for the reasons given in detail earlier, the evidence before the Court establishes, on the balance of probabilities, that the removal of panels will result in damage to, if not the destruction of, at least some of the top hat subframe. AAI's contention that the panels can be removed from the top hats without damaging the top hats has no merit and must be rejected. The same can be said concerning AAI's contention that the existing top hat structure could be retained and reused to support replacement panels. Even if, contrary to that finding, it was possible to remove the panels without damaging the top hats, the top hats would not in any event be able to be used as a means by which replacement panels could be affixed to the buildings. The result is that the existing top hat structure will have to be removed and disposed of and a new bespoke system will have to be designed to affix the replacement panels.

158 Having regard to those factual findings, the circumstances of this case are relevantly indistinguishable from the circumstances considered in *Austral Plywoods*. The defective plywood panels in *Austral Plywoods* were affixed to the boat's hull by screws and glue. That means of affixation interfered with the integrity of the hall. Likewise, the defective Vitrabond panels were affixed to the buildings by means of top hats which were nailed or screwed into the structural walls of the buildings and the panels were glued, in a manner that was intended to be permanent, to the top hats. The affixation of the defective plywood panels in *Austral Plywoods* made the hull unsuitable, or less suitable, for its purposes and required the restoration of the physical state of the hull upon the removal of the defective plywood. Likewise, the affixation of the defective Vitrabond panels made the buildings less suitable for their intended

use as residential premises. Removal of the Vitrabond panels will require restoration of the damage caused by the affixation and removal of the existing top hats and panels.

159 There are also significant parallels between the circumstances of this case and both *Carwald* and *Bundy Tubing*. In *Carwald*, the pouring of defective concrete over equipment which rendered the equipment useless for its purpose was held to have constituted physical injury to that tangible property. In *Bundy Tubing*, the installation of defective tubing in a heating system in a house was held to have caused damage to the house, because a house with a heating system which did not work was not suitable for habitation. In this case, the installation of defective (combustible) panels damaged the top hat subframe because, once the panels were removed, that structure was useless for its purpose and could not be reused. The installation of combustible and therefore dangerous panels also had a serious impact on the suitability of the buildings for ongoing habitation. It made long term occupation of the buildings dangerous.

160 While it is true that the policy in Bundy did not state that the injury had to be "physical" injury, as Allsop CJ noted in *R & B Directional Drilling*, "the home [in *Bundy Tubing*] could be seen to be physically injured by being made unsuitable for winter habitation" (at [83]). It is also true that the buildings in this case are still occupied. That, however, does not alter the fact that the affixation of the panels makes the buildings less suitable for occupation because of the danger that they pose. That is why Owners have been ordered to have the panels removed from the building.

161 The affixation of combustible panels to a residential building can also, broadly speaking, be compared with the integration of a dangerous or toxic substance, such as asbestos, into a building. Just as the integration into a building of a potentially hazardous material such as asbestos results in physical injury to the building at the time of installation (even if at that time the dangers were not realised, or the toxic substances had not been released: cf *Armstrong* at [32] and [43]), so the affixation to a building of potentially hazardous combustible panels can be seen to result in physical damage to the building at the point of installation. It is immaterial that the dangers posed by the combustible panels were not appreciated at the time of affixation. The panels posed an immediate danger to the occupants of the buildings and made the buildings substantially less suitable for their intended use at the point of affixation. It is equally immaterial that the panels may have served their architectural and waterproofing purposes or functions. They were nonetheless unsuitable because they were combustible and created an immediate danger to the occupants of the building.

162 While I consider that this case is somewhat analogous to the cases involving the incorporation of asbestos into buildings, my conclusion does not rely heavily on those cases. The asbestos cases concern a rather unique circumstance, and the various courts' findings in the asbestos cases are not always consistent. In *Pilkington*, the critical feature of the asbestos cases was said to be that the properties of asbestos was such that its incorporation into a building had an "instant and damaging effect on the property" as opposed to a propensity to cause damage in the future. In *Armstrong World Industries*, however, the California Court of Appeal held that the incorporation of asbestos in a building resulted in a physical injury to the building, even if asbestos fibres were not immediately released. There would appear to be at least some analogy between the danger posed by the incorporation of asbestos in a building in those circumstances, and the affixation to a building of combustible panels which heightened the risk of a serious fire. The affixation of the panels had an instant and damaging effect on the building because the panels posed an immediate and unacceptable danger to the residents of the building.

163 It should also be emphasised that, insofar as the physical damage to property comprised or included the damage to the top hat substructure, that damage, contrary to AAI's submission, occurred at the time of the affixation of the defective panels. While the top hat substructure remains in place and will not be actually damaged until the panels are removed, the damage may nevertheless relevantly be taken to have been caused when the defective panels were affixed to the top hats by means of high strength double-sided tape that was intended to provide a permanent bond.

164 By way of analogy, the affixation of the defective plywood to the hull in *Austral Plywoods* would not have been considered to have caused damage to the hull until it was realised that the plywood was defective and had to be removed. The damage was nonetheless considered to have been caused at the point of affixation. Similarly, in *Carwald* the equipment was taken to have been damaged when the defective concrete was poured, and in *Bundy Tubing* the damage to the house was taken to have occurred when the defective tubes were installed in the hearing system. So too here. The damage to the buildings and the top hats caused by the affixation of the panels may only materialise at the point when the panels are removed, yet the damage may be considered to have occurred at the point of the affixation.

165 It follows that the physical damage to the top hat substructure may effectively be taken to have occurred during the period of insurance. Even if that were not the case, for the reasons already given, there could be no doubt that the damage to the buildings, including the damage to their

concrete and steel stud walls, plainly occurred at the time the panels were affixed and therefore during the period of insurance.

166 The circumstances of this case are distinguishable from the circumstances in both *R & B Directional Drilling* and *Pilkington*. In *R & B Directional Drilling*, the insertion and subsequent removal of the defective conduit pipes and concrete grouting did not cause any physical damage to the tangible property in question, being the steel sleeve. In *Pilkington*, the defective glass panels were not removed and the safety measures that were taken so as to avoid the risk of shattering glass caused no damage to the terminal building. In this case, the affixation of the panels resulted in damage to the buildings (because it involved the affixation of a top hat structure, which involved the need to drive nails or screws into the concrete and steel stud walls of the buildings) and the panels are not able to be removed without causing injury to the property. Removal of the panels and the top hats will ultimately result in buildings which are impacted by potentially thousands of redundant nail or screw holes, as well as damaged and redundant top hats.

COVERAGE – AN "OCCURRENCE"?

167 The coverage clause, read together with the definition of "occurrence", also requires that the relevant property damage be caused by "an event … which results in … Property Damage … that is neither expected nor intended … from [Fairview's] standpoint". AAI contended that, whether the clause was construed as requiring the event to be unexpected or unintended, or as requiring the damage to be unexpected or unintended, that element of the coverage clause was not satisfied in the case of any damage to Owners' buildings. If it was the damage that had to be unexpected or unintended, AAI submitted that Fairview clearly expected and intended that the panels were to be affixed to the buildings. If it was the event that had to be unexpected or unintended, in AAI's submission it must be inferred that Fairview expected and intended that nails or screws would be used to affix the top hat structure to the buildings. Therefore, the damage comprising the nail or screw holes was expected and intended.

168 Those submissions may be dealt with shortly.

169 First, the proper construction of the definition of "occurrence" in the policies is that the words "neither expected nor intended" refer to the "property damage", not the "event". That was the construction given to a similarly worded clause in ***Weir*** *Services Australia Pty Ltd v AXA Corporate Solutions Assurance* (2018) 359 ALR 314; [2018] NSWCA 100 at [103]. That construction of the definitional clause followed "[a]s a purely semantic matter" because the

"word 'which' obviously refers back to 'event', so that an essential characteristic of the relevant 'event' is that it 'results in' Property Damage" and "[i]f it were intended that another essential characteristic of the 'event' should be that it was not expected or intended by the insured, the words 'and which is' (or, at least, 'and is') would necessarily appear before 'neither expected nor intended by You'": *Weir* at [103]. The clause in question in this case includes the words "that is" before the word "neither", but does not include the word "and". It follows that the reasoning in *Weir* applies equally to the wording of the clause in this matter.

170 Second, there could be no doubt that Fairview did not expect or intend that the affixation of the panels would cause any relevant damage to the buildings. That is because it did not expect or intend that the panels would be combustible and defective and therefore did not expect or intend that they would have to be removed from the buildings. The court in *Bundy Tubing* disposed of an argument akin to the one advanced by AAI in this case as follows (at 153):

> The failure of the tubing in the heating system in a relatively short time was unforeseen, unexpected and unintended. Damage to the property was therefore caused by accident.

171 AAI's contention that the relevant property damage was not caused by an occurrence must similarly be rejected. Fairview plainly did not expect or intend that the panels which were affixed to the buildings were combustible and therefore defective, or that they would need to be removed, or that the removal of the panels would expose and cause damage to the buildings and top hat subframe, or that the affixation of the defective panels would render the buildings substantially less suitable for occupation.

COVERAGE – EXCLUSION CLAUSES

172 The question whether AAI is entitled to disclaim liability under the polices by reason of any exclusion clause may be dealt with shortly. Ultimately AAI only faintly pressed its contention that any of the exclusion clauses applied.

173 AAI failed to demonstrate that it was entitled to rely on any of the exclusions clauses in the policies. None of the exclusion clauses apply to the particular facts and circumstances of Fairview's claim.

174 As for clause 3.7, that clause excludes liability for damage to Fairview's own products. Fairview's claim and potential liability to Owners arising from the affixation of the defective panels does not relate to or arise from any damage to Fairview's own products. Owners does not claim any loss or damage arising from damage to the Vitrabond panels themselves.

175 As for clause 3.11, AAI ultimately did not suggest that this clause was applicable to Fairview's claim. Owners did not seek any loss or damage arising from any faulty workmanship performed by Fairview. Its claim was, in substance, that Fairview had supplied defective products.

176 As for clause 3.14, that clause only applies where the insured's claim is in respect of "loss of use of tangible property, *which has not been physically* lost, destroyed or *damaged* …" (emphasis added). That clause does not apply to Fairview's claim because Owner's claim for compensation from Fairview is in respect of damage to tangible property, namely its buildings and the top hat substructure. While Owners' claim that its property was damaged or injured relies, to some extent, on the contention that the affixation of the defective panels meant that its property was unsuitable for use, or less suitable for use, for its intended purpose, the fact remains that its claim was in respect of property which had, in its contention, been physically damaged.

177 Finally, as for clause 3.19, that clause excludes liability in respect of damages arising out of the insured's "withdrawal, recall, inspection, repair, reconditioning, modification, reinstallation, replacement or loss of use" of its products. There is, however, no evidence that Fairview did any of those things in respect of any of its products. AAI contended that it may be inferred that Fairview had withdrawn or recalled Vitrabond panels from the fact that the authorities had ordered Owners to remove the panels from its buildings. That submission is rejected. No such inference can be drawn.

CONCLUSION IN RESPECT OF COVERAGE

178 For the detailed reasons that have been given, it is at the very least arguable that AAI's policies respond to Fairview's claim in respect of the compensation it may be found liable to pay Owners arising from the affixation of defective Vitrabond panels to its buildings. On the basis of the evidence currently before the Court, I am satisfied that Fairview's claim could properly be characterised as a claim in respect of amounts which it might become liable to pay as compensation in respect of "property damage" happening during the period of insurance and caused by an "occurrence". The property damage comprised physical loss, destruction or damage to Owners tangible property, that property being its buildings, as well as the top hat subframe which had been affixed to the buildings. The occurrence was the affixation of the panels. The loss, destruction or damage was not expected or intended from Fairview's standpoint.

179 I am not satisfied, on the basis of the evidence currently before the Court, that AAI has established that it is entitled to disclaim liability under its policies.

DISCRETION – LEAVE TO PROCEED AGAINST AAI SHOULD BE GRANTED

180 AAI did not identify any factors or considerations that could or should lead to the discretionary refusal of leave under s 5 of the Third Party Claims Act if Owners was able to establish that AAI's policies responded to Fairview's claims. Nor am I able to discern any discretionary reasons for refusing leave.

181 Owners has established that it is appropriate to grant it leave to proceed against AAI pursuant to s 5 of the Third Party Claims Act.

OTHER ORDERS – JOINDER AND LEAVE TO AMEND

182 AAI's opposition to the interlocutory orders sought by Owners rested entirely on the proposition that the Court must or should refuse Owners leave to proceed against it pursuant to s 5 of the Third Party Claims Act. For the reasons already given, it is appropriate to grant Owners leave to proceed against AAI. AAI did not submit that, if the Court granted Owners leave to proceed against it, the Court should nonetheless refuse to grant Owners leave to amend its originating application and pleading. It is, in all the circumstances, appropriate to order that AAI be joined to the proceeding as a respondent and appropriate to grant Owners leave to file the further amended originating application and further amended statement of claim in the form annexed to its interlocutory application.

DISPOSITION

183 The Court will make the orders sought by Owners in its interlocutory application filed on 17 December 2021. That includes an order that AAI pay Owners' costs of and incidental to the interlocutory application.

I certify that the preceding one hundred and eighty-three (183) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Wigney.

Associate:

Dated: 20 July 2023