QBE UNDERWRITING LTD AS MANAGING AGENT FOR LLOYDS SYNDICATE 386 v SOUTHERN COLLIERY MAINTENANCE PTY LTD

[2018] NSWCA 55

Court of Appeal: Macfarlan, Leeming and Payne JJA

1–2, 28 March 2018

Insurance — Liability insurance — Exclusions — Where insured entered agreement with third party containing warranties and agreement to indemnify — Whether insured would have been liable in absence of such agreement.

Insurance — Insurance Contracts Act 1984 (Cth) — Duty of disclosure — Scope and duration — Where insurer disclosed to insured letter warning of possible obligations to indemnify third parties — Insurance Contracts Act 1984 (Cth), s 21.

Contracts — Construction — Interpretation — "For" — "In respect of" — Whether contract of insurance extended to indemnity for adverse costs order.

The insuring clause in an insurance policy between an insured (a labour hire company) and its insurer provided cover for "all sums which the Insured shall become legally liable to pay by way of compensation in respect of … Injury". The policy also contained exclusion clauses "[f]or Injury to any Worker" subject to certain provisos, and for liability that was assumed "under the terms of a contract, agreement or warranty unless the Insured would have been liable in the absence of such terms or warranty".

The insured provided a temporary worker to a mining company. The temporary worker was injured during his employment, and sued both the insured and the mining company for personal injury damages. The relationship between the insured and the mining company was governed by an agreement, which included warranties in favour of the mining company as well as a clause by which the insured agreed to indemnify the mining company for any liability, loss, or damage of any kind whatsoever, arising directly or indirectly from the injury of the insured's employee. The insured did not disclose this clause to its insurer, but it did disclose a letter it had received from its solicitor warning of the risks and effects of the indemnity in the context of another temporary worker it had provided to the mining company.

The mining company cross-claimed against the insured for breaches of warranty, contribution, and indemnity under the agreement. The insured then made a claim on its insurance policy.

The insurer declined cover on the basis that the liability to the mining company had been assumed by the insured under the terms of a contract, agreement, or warranty, and would not have arisen in the absence of such terms, and so was expressly excluded by the insurance policy. The insured cross-claimed against the insurer. At trial, the insurer further contended that the insured had breached its duty of disclosure under s 21 of the *Insurance Contracts Act 1984* (Cth).

At a mediation, all claims and cross-claims were settled, except for the claim the insured had against the insurer, which proceeded to trial. The trial judge allowed the insured's cross-claim against the insurer. The trial judge's award of indemnity included an amount for the mining company's costs paid by the insured on the basis that these costs were covered by the insuring clause.

Held: (1) The insured's liabilities to meet a claim of contribution for bodily injury to an employee, and to pay contractual damages whose measure was the liability to pay tortious damages for the same injury, were both a liability "in respect of" injury under the policy. The word "for" in the exclusion for injury to any worker was narrower than the words "in respect of" in the insuring clause having regard to the appearance of the two terms in the same contract. ([1]; [23]–[26]; [132])

Unsworth v Commissioner for Railways (1958) 101 CLR 73; [1958] HCA 41; *Allianz Australia Ltd v Wentworthville Real Estate Pty Ltd* (2004) 13 ANZ Ins Cas 61-598; [2004] NSWCA 100, applied.

(2) The insured's liability to the mining company was not excluded under the insurance policy. The mining company's liability to the injured worker was sufficiently causally connected to the insured's breaches of warranty, in the sense that it arose entirely in the usual course of things from those breaches, meaning the insured would have been liable in the absence of the indemnity between it and the mining company. ([1]; [35]–[42]; [132])

European Bank Ltd v Evans (2010) 240 CLR 432; [2010] HCA 6, applied.

Zurich Australian Insurance Ltd v Regal Pearl Pty Ltd (2007) 14 ANZ Ins Cas 61-715; [2006] NSWCA 328, considered.

(3) The insuring clause covered the adverse costs order. The words, "pay by way of compensation in respect of … Injury", were broad. Given the presumption that costs follow the event, the natural meaning of the words in the insuring clause extended the indemnity to the insured's liability to meet an adverse costs order. That natural meaning was reinforced by other parts of the policy that expressly covered the defence costs of the insured, and expressly permitted the insurer to take over the conduct of the defence. ([1]; [60]–[61]; [132])

Twentieth Super Pace Nominees Pty Ltd v Australian Rail Track Corporation Ltd (No 3) [2007] VSC 84, followed.

Government Insurance Office of New South Wales v Crowley [1975] 2 NSWLR 78, distinguished.

(4) The *Insurance Contracts Act 1984* (Cth), s 21, distinguishes between knowledge and disclosure. Knowledge and disclosure are different concepts. Knowledge connotes a state of mind; disclosure connotes an act of communication between insured and insurer. Knowledge imports a level of certainty, which may be distinguished from suspicion or belief. Where an artificial person is concerned, knowledge also requires a process of attribution. By contrast, the performance of a duty of disclosure merely requires the insured communicate the matter to the insurer. This may occur through communication to the insurer's agent, including a staff member of the insurer whose regular duties included receiving communications from or on behalf of the insured. Unlike knowledge, disclosure does not turn upon any issue of attribution to the appropriate individual within the insurer. ([1]; [93]–[100]; [132])

(5) The insurer had not shown that the insured breached its duty of disclosure. The scope of disclosure under s 21 of the *Insurance Contracts Act 1984* (Cth) was informed by case law prior to the Act, which included the principle that less than the whole of the relevant information may amount to disclosure — provided that what is conveyed fairly indicates to the insurer that there is more information to

be obtained if the insurer chooses to ask for it. The duty of disclosure could also be waived if the insurer failed to make further inquiries. The letter warning the insured about the risks of indemnity had been disclosed to the insurer and that was sufficient disclosure. ([1]; [103]–[110]; [132])

Roumeli Food Stores (NSW) Pty Ltd v The New India Assurance Co Ltd [1972] 1 NSWLR 227; *Jaggar v QBE Insurance (International) Ltd* [2007] 2 NZLR 336, applied.

Asfar & Co v Blundell [1896] 1 QB 123, considered.

CASES CITED

The following cases are cited in the judgments:

Advance (NSW) Insurance Agencies Pty Ltd v Matthews (1989) 166 CLR 606; [1989] HCA 22
Allianz Australia Ltd v Wentworthville Real Estate Pty Ltd (2004) 13 ANZ Ins Cas 61-598; [2004] NSWCA 100
Asfar & Co v Blundell [1896] 1 QB 123
Astley v Austrust Ltd (1999) 197 CLR 1; [1999] HCA 6
Australian Broadcasting Corporation v XIVth Commonwealth Games Ltd (1988) 18 NSWLR 540
Badawi & Badawi (Costs) [2017] FamCAFC 196
Berowra Holdings Pty Ltd v Gordon (2006) 225 CLR 364; [2006] HCA 32
Commercial Union Assurance Co of Australia Ltd v Beard (1999) 47 NSWLR 735; [1999] NSWCA 422
Coulton v Holcombe (1986) 162 CLR 1; [1986] HCA 33
Endeavour Energy v Precision Helicopters Pty Ltd (No 2) [2015] NSWCA 357
European Bank Ltd v Evans (2010) 240 CLR 432; [2010] HCA 6
Farah Constructions Pty Ltd v Say-Dee Pty Ltd (2007) 230 CLR 89; [2007] HCA 22
Federation Insurance Ltd v Wasson (1987) 163 CLR 303; [1987] HCA 34
Government Insurance Office of New South Wales v Crowley [1975] 2 NSWLR 78
Insurance Australia Ltd t/a NRMA Insurance v Milton (No 2) [2016] NSWCA 173
Jaggar v QBE Insurance (International) Ltd [2007] 2 NZLR 336
Marks v Commonwealth of Australia (1964) 111 CLR 549; [1964] HCA 45
Newman v Southern Colliery Maintenance Pty Ltd (District Court (NSW), McLoughlin ADCJ, 28 April 2017, unrep)
Permanent Trustee Australia Ltd v FAI General Insurance Company Ltd (in liq) (2003) 214 CLR 514; [2003] HCA 25
Prepaid Services Pty Ltd v Atradius Credit Insurance NV (2013) 302 ALR 732; [2013] NSWCA 252
Roumeli Food Stores (NSW) Pty Ltd v The New India Assurance Co Ltd [1972] 1 NSWLR 227
Stealth Enterprises Pty Ltd t/as The Gentlemen's Club v Calliden Insurance Ltd (2017) 19 ANZ Ins Cas 62-131; [2017] NSWCA 71
Tomlinson v Ramsey Food Processing Pty Ltd (2015) 256 CLR 507; [2015] HCA 28
Trident General Insurance Co Ltd v McNiece Bros Pty Ltd (1988) 165 CLR 107; [1988] HCA 44
Twentieth Super Pace Nominees Pty Ltd v Australian Rail Track Corporation Ltd (No 3) [2007] VSC 84
Unity Insurance Brokers Pty Ltd v Rocco Pezzano Pty Ltd (1998) 192 CLR 603; [1998] HCA 38
Unsworth v Commissioner for Railways (1958) 101 CLR 73; [1958] HCA 41
WISE (Underwriting Agency) Ltd v Grupo Nacional Provincial SA [2004] 2 Lloyd's Rep 483; [2004] EWCA Civ 962

Yacoub v Pilkington (Australia) Ltd [2007] NSWCA 290
Zurich Australian Insurance Ltd v Regal Pearl Pty Ltd (2007) 14 ANZ Ins Cas 61-715; [2006] NSWCA 328

APPEAL

This was an appeal from a decision of a judge of the District Court awarding indemnity in favour of an insured and against an insurer in respect of a third party's liabilities, as well as costs relating to the same.

AP Coleman SC and *G Ng*, for the appellant.

TD Castle, for the respondent.

Judgment reserved

28 March 2018

1 **MACFARLAN JA.** I agree with Leeming JA.

2 **LEEMING JA.** The principal issues in this appeal brought by the appellant insurer against its insured are the proper construction of an exclusion clause for "assumed liabilities" in a combined public and products liability policy and whether the insured breached its duty of disclosure under s 21 of the *Insurance Contracts Act 1984* (Cth).

Overview

3 The respondent Southern Colliery Maintenance Pty Ltd (SCM) is a labour hire company providing temporary workers, mostly in the mining industry. In November 2008, SCM's employee, Mr Ryan Newman, was injured while working at the Dendrobium Colliery west of Wollongong operated by Endeavour Coal Pty Ltd (Endeavour). He received some $25,335 in workers compensation payments.

4 By statement of claim filed in the District Court on 26 July 2010, Mr Newman claimed damages for personal injury from SCM as his employer and Endeavour as the occupier of the site where he was injured. His claim against SCM reflected the preservation or restoration of "common law" rights by Pt 5 of the *Workers Compensation Act 1987* (NSW) (notably, s 151). The reference to "common law" is something of a misnomer, because the right availed of by Mr Newman included neither the common law doctrine of common employment nor that of contributory negligence, both of which in their forms unmodified by statute were apt to have been fatal to his claim. What was restored or preserved was, speaking generally, the position which had obtained prior to the commencement in 1987 of the *Workers Compensation Act* (that statute, until its amendment in 1989, had entirely extinguished a right to damages against an employer when workers compensation was payable: see *Berowra Holdings Pty Ltd v Gordon* (2006) 225 CLR 364; [2006] HCA 32 at [17]–[18]). Nothing turns on this for present purposes, save to note that (a) compulsory workers compensation insurance was required to include insurance against a common law claim against an employer: Workers Compensation Regulation 2003, cl 49, and (b) if damages were recovered from an employer, Mr Newman was required to repay the workers compensation he had received: *Workers Compensation Act*, s 151Z.

5 Relations between the two defendants SCM and Endeavour were governed by "Special Services Agreement P00243" (SSA), entered into in January 2005. Under that contract, SCM had promised to provide supplementary labour for five mines in the area, all owned by subsidiaries of BHP Billiton, including Endeavour.

6 The SSA contained warranties that SCM's labour services would be "performed by appropriately qualified and trained personnel", would be "performed with due care and skill" and would be fit for purpose. Those warranties were found in cll 2.4, 2.5 and 2.6 of the SSA, but there were many other provisions to similar effect (including cll 4.1, 4.5 and 11.1); the details are not presently relevant.

7 Clause 12.1(a) and (b) of the SSA required SCM to take out and maintain two policies of insurance, which may sufficiently be described as (a) a "comprehensive public and products liability policy" to cover all sums which an insured may become liable to pay as compensation consequent upon, relevantly, death or bodily injury to any person and (b) workers compensation insurance as required by law. Consistently with those obligations, SCM effected policies of insurance with a Lloyd's syndicate represented by QBE Underwriting Ltd (QBE) and with Coal Mines Insurance Pty Ltd (CMI). The latter extended to an employee's claim at common law such as that brought by Mr Newman, as indeed it was required to do.

8 In the case of the former, SCM retained Piranha Insurance Brokers, a Queensland-based broker. The underwriters comprising the Lloyd's syndicate for whom the appellant is the agent also acted through a broker, International Underwriting Services Pty Ltd (IUS), and it will be necessary to say more about the dealings between those parties when dealing with the non-disclosure case. Although QBE is correctly described in the notice of appeal as an agent, reflecting at least in part the obligation in s 95 of the *Insurance Act 1973* (Cth) imposed upon Lloyd's, I shall follow the course taken by the parties and refer somewhat loosely simply to QBE as both the appellant and the insurer. IUS later changed its name, and is now known as Sterling Insurance, but it will be convenient to refer simply to IUS.

9 Clause 13 of the SSA provided that SCM would be liable for, and would indemnify, Endeavour not only for any breach of the SSA (cl 13.1(a)) or any negligence on SCM's part (cl 13.1(d)), but also "any liability and/or any loss or damage of any kind whatsoever, arising directly or indirectly from … the illness, injury or death of any of [SCM's] employees …" (cl 13.1(b)). SCM accepted on appeal that the SSA had not been disclosed to QBE when it first obtained insurance in 2005, nor had it been disclosed in subsequent renewals. In each renewal form SCM had answered negatively the question "Do you assume liability under contract or other hold harmless?" (or words to that effect), and so it could not be suggested that s 21(3) of the *Insurance Contracts Act* applied. However, SCM said that there was sufficient disclosure when Piranha provided to IUS, on 7 January 2008, the "Access Warning Letter", being a letter from SCM's solicitors Access Business Law. QBE denied that the letter was attached to an email which had been sent to its agent, and maintained that even if it had been received, it did not discharge SCM's duty of disclosure.

10 I return to the litigation in the District Court. Endeavour brought a cross-claim against SCM, which alleged that SCM had been negligent, and had breached various warranties in the SSA. Endeavour sued on the indemnity in

cl 13, and also sought contribution or indemnity against SCM as a tortfeasor which had contributed to the same damage (it will not be necessary, save in one minor respect, to address the complexities here arising from different rules for assessing damages for a "common law" claim under Pt 5 of the *Workers Compensation Act* and under the *Civil Liability Act 2002* (NSW) or how s 151Z applies where apportionment is required). An amendment made in April 2011 added a prayer for relief for damages for breach of the contractual terms.

11 SCM claimed on both of its policies. QBE and CMI adopted quite different stances. CMI accepted that it was required to indemnify SCM for its tortious liability to Mr Newman, but not for its contractual liability to Endeavour. QBE declined cover, basing its decision on the exclusion in cl 7.6 of its policy. SCM brought cross-claims against CMI and QBE. At some stage, SCM's cross-claim against QBE was severed from the balance of the litigation.

12 A mediation was held in September 2011, following which all claims and cross-claims were settled, save that between SCM and QBE. Consent judgments were entered in late 2011. This occurred in two phases. First, by orders signed in late September 2011 and entered on 5 October 2011, judgment was entered in favour of Endeavour on its cross-claim, SCM was ordered to indemnify Endeavour and immediately assume the conduct of the claim against Endeavour, and SCM was to pay Endeavour's costs in the agreed amount of $40,000. Secondly, by consent judgments signed on 9 December 2011, both Endeavour and SCM were ordered to pay $375,000 to Mr Newman, noting that the sum would be reduced by $25,335.42 already received in workers compensation payments. As between SCM and CMI, there was judgment in favour of SCM, with SCM contributing $124,664.58 to the sum payable to Mr Newman, "representing a contribution of 40% to the settlement sum less workers compensation payments already paid".

13 It will be seen that the essence of the settlement, in which QBE did not participate, was that the plaintiff accepted $375,000, borne as to 40% by CMI and the balance by SCM, leaving SCM to prosecute its claim against QBE as the only unresolved issue in the proceedings.

14 Notwithstanding the relatively small amount in issue, the parties participated in a trial which seems to have occupied some eight days between June and August 2016. QBE briefed senior and junior counsel. The parties' written submissions occupied hundreds of pages (there were factual and legal issues at trial which were not repeated on appeal). It seems highly likely that the costs of the trial exceeded the amount at stake (which was $265,000, being 60% of $375,000 plus $40,000).

15 On 28 April 2017, the primary judge entered judgment on the third cross-claim in favour of SCM for the sum of $265,000 plus interest: *Newman v Southern Colliery Maintenance Pty Ltd* (District Court (NSW), McLoughlin ADCJ, 28 April 2017, unrep). On 19 October 2017 costs were ordered in favour of SCM, but its application for indemnity costs was refused. On 13 November 2017, some special orders were made concerning interest, to which I return below.

16 QBE's notice of appeal contained 11 grounds, which may be grouped in the following categories:

(1) whether an exclusion clause (cl 7.6) in the QBE policy for "assumed liabilities" was engaged (grounds 1–4)

(2) whether QBE's policy indemnified SCM for the $40,000 it paid towards Endeavour's costs (ground 5)

(3) whether SCM had failed to disclose to QBE the existence of a contractual indemnity granted by SCM in the SSA in breach of s 21 of the *Insurance Contracts Act* (grounds 6–8)

(4) whether the 60:40 split between SCM and CMI in late 2011 was a reasonable settlement (ground 9)

(5) whether the primary judge had erred in failing to find that the QBE policy was subject to a $50,000 excess (ground 11).

17 There was also a challenge to the adequacy of the primary judge's reasons (ground 10), but this ground was rightly abandoned on the first day of the appeal. Success on this ground could at best achieve a retrial, which both parties understandably disavowed. More importantly, if QBE succeeded on any of the grounds summarised above, it would obtain commensurate relief from this court, and if it failed on all of them, its appeal would necessarily be dismissed, irrespective of any inadequacy in the reasons at first instance. Like many other challenges to the adequacy of reasons, this ground is arid, in the sense that it could not improve the appellant's position. That said, the primary judge's reasons (which were delivered orally after a lengthy reservation) are deficient. In very large measure they repeat the parties' submissions, without engaging with them or disclosing much by way of reasoning process. For example, other than perhaps an elliptic adoption of SCM's submissions, there was no reasoning explaining why the judge had construed the insuring clause and the exclusion clause in the way he had. Other issues were left unresolved (for example, there was no finding as to when the policy had commenced).

18 Rather than summarising the relevant facts and submissions and then addressing each of the grounds of appeal, it will be more concise to proceed through the grounds, mentioning the salient evidence and submissions at the same time those grounds are resolved. It will not be necessary to say anything about the large majority of the eight volumes of blue appeal books, most of which were irrelevant to the issues raised on appeal.

Grounds 1–4 — Did the policy respond to SCM's claim?

19 The insuring clause of QBE's Public & Products Liability policy was cl 1:

> "**Insuring Clause**
>
> Subject to the terms of this Policy, Underwriters will pay to or on behalf of the Insured all sums which the Insured shall become legally liable to pay by way of compensation in respect of:
>
> 1.1 Injury
>
> 1.2 Damage
>
> 1.3 Advertising Liability
>
> happening during the Period of Insurance as a result of an Occurrence in connection with the Insured's Business."

20 It will be seen that the clause was expressed to apply "in respect of", relevantly, "Injury", and turned upon there being an "Occurrence" in connection with SCM's business. "Injury" was defined to mean, relevantly, death or bodily injury, and the "Insured's Business" was the business stated in the policy schedule, which (initially) provided:

> "Principally mine contractor (machine and equipment operation, maintenance and installation and repair), labour hire, dry hire, underground mining tools and equipment, property owners/occupiers and associated activities."

21 There was no dispute that the injury suffered by Mr Newman, one of SCM's employees, was an "Occurrence" as that term was defined.

22 Clause 7 provided some 31 exclusions (many of which included subparagraphs) of which two are presently relevant. Clause 7.9 excluded liability:

> "7.9 For Injury to any Worker.
>
> Provided that if the Insured:
>
> 7.9.1 Is required by law to insure or otherwise fund, whether through self insurance, statutory fund or other statutory scheme, all or part of any common law liability (whether limited in amount or not) for such injury; or
>
> 7.9.2 Is not required to so insure or otherwise fund such liability by reason only that the Injury is to a person who is not a Worker or 'employee' within the meaning of the relevant Workers' Compensation Law or the Injury is not an Injury which is subject to such Law;
>
> then this Policy will respond to the extent that the Insured's liability would not be covered under any such fund, scheme, Policy of insurance or self insurance arrangement had the insured complied with its obligations pursuant to such Law."

23 It may be noted that the exclusion in cl 7.9 contains two parts: a relatively simply drafted exclusion of liability "for" Injury to any Worker, followed by a more elaborate wording which, if it applied, extended the operation of the policy. (The latter part is not a true proviso, and locating extensions of cover in an exclusion clause may be thought to be less than ideal, but both these aspects may be passed over.)

24 The exclusion "for" Injury to any Worker is more narrowly drafted than the insuring clause, which is expressed more broadly in terms of "in respect of" Injury. It can be unsafe to construe such inchoate relational terms as "for" and "in respect of" in isolation, a point made by Spigelman CJ in *Zurich Australian Insurance Ltd v Regal Pearl Pty Ltd* (2007) 14 ANZ Ins Cas 61-715; [2006] NSWCA 328 at [43]–[45]. However, here the two terms appear in the same contract, and the narrower term excludes liability which otherwise would be caught by the more broadly worded insuring clause. In such a case, the reasoning in *Unsworth v Commissioner for Railways* (1958) 101 CLR 73; [1958] HCA 41 and *Allianz Australia Ltd v Wentworthville Real Estate Pty Ltd* (2004) 13 ANZ Ins Cas 61-598; [2004] NSWCA 100 — which is really just an example of the different breadth of the two terms in similar contexts — is available to support the natural meaning of the words.

25 In *Unsworth*, a claim for statutory contribution was held to fall within a statute limiting compensation payable by the commissioner in any action "to recover damages or compensation in respect of personal injury". In *Allianz Australia*, Mason P, with Sheller JA and Pearlman AJA agreeing, held that a claim for contribution and/or indemnity from a joint tortfeasor pursuant to s 5 of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW) arising out of the personal injury suffered by the tenant did not fall within an exclusion of claims against the insured "for" any alleged or actual bodily injury or property damage. Mason P said at [31]–[32] that a claim for contribution and/or indemnity with respect to the landlord's liability to the tenant was not a claim "against the Insured … for any alleged or actual bodily injury".

26 I did not understand QBE to have accepted that any of SCM's liability to Endeavour fell within the insuring clause, and QBE certainly denied that the liability to pay $40,000 by way of costs did so. But a liability to meet a claim for statutory contribution by another tortfeasor following bodily injury to an employee is plainly, and consistently with *Unsworth* and *Allianz Australia*, a liability "in respect of" Injury. What is more, so too is a liability to pay

contractual damages whose measure is the liability to pay tortious damages for the same injury. Indeed, the relationship is closer, because the liability is not some *proportion* (determined by the application of statute) of Endeavour's tortious liability to Mr Newman in respect of his personal injury; it is instead the *whole* of Endeavour's liability to Mr Newman in respect of that injury. The parties exchanged submissions on the construction of the extending words in the second part of cl 7.9, but in light of what has been said as to the insuring clause, those submissions need not be summarised still less resolved.

27 QBE declined cover based on exclusion cl 7.6. That clause provided that the policy did not cover liability:

> "Assumed:
>
> 7.6.1 Under the terms of a contract, agreement or warranty unless the Insured would have been liable in the absence of such terms or warranty;
>
> 7.6.2 Where the Insured may have been able to recover from another party(ies) but for an agreement between the Insured and such party(ies) where the Insured has waived, released or abandoned any right of recourse or recovery against such other party(ies)."

28 QBE relied on cl 7.6.1. It submitted that SCM's liability under cl 13.1(b) of the SSA was, and was pleaded as, the only basis upon which it was liable to indemnify Endeavour. QBE initially accepted that the onus was upon it to establish that the exclusion applied, although on the second day of the appeal it retreated from that position, asserting that although it was required to establish that the liability had been assumed under the terms of a contract, agreement or warranty, if it did so, then it fell to its insured to make out the qualification in the second half of cl 7.6.1, namely, that it would have been liable in the absence of such terms or warranty.

29 SCM advanced two broad submissions why QBE could not rely upon cl 7.6. The first turned upon its interrelationship with cll 3 and 4. Those clauses provided as follows:

> "**3. Indemnity to Others**
>
> The indemnity granted by this Policy will extend to:
>
> 3.1 Any principal in respect of the liability of such principal to third parties arising out of the performance by the Insured of any written contract or agreement with the Insured for the performance of work for such principal but this Policy shall only indemnify the principal to the extent that the Insured is required to insure such liability pursuant to such written contract or agreement, but subject always to the terms of this Policy.
>
> 3.2 Any director, executive officer or Worker of the Insured or, where the Insured is a partnership, any partner of the Insured, but only while acting within the scope of their duties in such capacity.
>
> 3.3 The officers, committee and members of the Insured's canteen, social, sports, first aid/medical, fire fighting and employee welfare organisations in their respective capacity as such.
>
> 3.4 The legal personal representative of any person entitled to indemnity under this Clause 3 in circumstances giving rise to indemnity under this Policy.
>
> Provided always that all such persons or parties shall, whilst not being a party to this contract, observe, fulfil and be subject to the terms of this Policy (insofar as they can apply) as though they were the Insured.
>
> **4. Cross Liabilities**
>
> Subject at all times to the terms of this Policy, each person or party indemnified is separately indemnified in respect of claims made by any of

> them against any other of them provided that the Underwriters' total liability shall not exceed the Limit of Indemnity for all claims under this Policy."

30 The second was that, accepting that *one way* in which SCM was liable to Endeavour was cl 13 of the SSA, SCM had also been sued for damages for breach of contract and for statutory contribution under both the *Law Reform (Miscellaneous Provisions) Act 1965* (NSW) and s 151Z of the *Workers Compensation Act*. It followed that the liability for which SCM sought indemnification from QBE was liability for which SCM "would have been liable in the absence of" cl 13. SCM denied that there was some shift of onus between the first and second halves of the clause, but in any event said that the appeal did not turn on onus, and that the nature of the liability for which it sought indemnity was clear.

SCM was entitled to indemnity for liability for which it would have been liable in the absence of cl 13.1

31 It is convenient to address SCM's submissions in reverse order.

32 SCM was sued by Endeavour for breach of contract. Indeed, around half of the first cross-claim (most of pages 4–9 in an 11-page pleading) contained allegations that it had breached the obligations in the SSA other than cl 13, to provide employees who were properly trained and who would perform the services with due care and skill. Endeavour claimed damages for breach of those obligations. Its damages were alleged to be the legal costs and disbursements in defending Mr Newman's claim, and its potential liability to him for damages, interests and costs.

33 There is no reason to doubt that Endeavour's claim for breach was well-founded. Mr Newman claimed he had been injured when retrieving a chain block from the roof of an underground tunnel, when he slipped from a stepladder. Mr Newman was a relatively untrained employee who was required to be accompanied. His supervisor ("Hans"), also an employee of SCM, had provided a statement to the effect that he could recall nothing of the incident. An internal email from SCM's solicitor, following a mediation, provided "some points on liability":

> "Endeavour were entitled to believe we had people who were experienced to do the work;
>
> We had a crew which had Hans who was very experienced working with Newman — who Hans knew was not experienced;
>
> We expected that Hans would be supervising Newman;
>
> The job was allocated — experienced guys knew the job was a bastard to sort out and no lifting platform could be used easily;
>
> Newman attacked the task — there was no JSA and no procedure dealing with it specifically only general lifting guidelines;
>
> Hans did not assume control or supervise Newman, in fact he has no recollection of the task nor an incident;
>
> It would have been reasonable for the senior guy to say 'look we better talk this through' 'have you done this before' etc etc — there is zero evidence of any of that;
>
> We look bad on the dunno what happened scenario — it seems that Hans is avoiding taking responsibility;
>
> The rest then flows against Newman as to how it occurred, the report, his history, his issues etc etc;
>
> The expert evidence is well against us in so far as we exposed him to a very foreseeable risk."

Those points highly plausibly speak of a breach of the contractual duty owed by SCM to Endeavour.

34 Endeavour undoubtedly had incurred some expense in defending the litigation brought by Mr Newman. And, if it were found to have been negligent as occupier, Endeavour would also be liable to pay Mr Newman's personal injury damages and costs.

35 To adopt the reformulation of principle in *European Bank Ltd v Evans* (2010) 240 CLR 432; [2010] HCA 6 at [13], the question was whether Endeavour's loss in the form of its liability to Mr Newman arose "naturally, that is, according to the usual course of things, from [SCM's] breach of contract, or such damages as may reasonably be supposed to have been in the contemplation of both parties concerned at the time they made the contract as the probable result of [SCM's] breach". If so, then that loss was recoverable by Endeavour as damages from SCM.

36 That question should be answered affirmatively. To the extent that the occupier was sued for injury by one of SCM's employees in circumstances where SCM had breached its contractual obligations to Endeavour and those breaches were of the nature summarised above, then Endeavour's liability as occupier is readily seen to be sufficiently causally connected with the breach of contract by SCM. What is more, there was every incentive upon Mr Newman to sue Endeavour, and to seek to shift as much of the liability as possible upon Endeavour as opposed to SCM. In most cases, "personal injury damages" under Pt 2 of the *Civil Liability Act* for the same injury will exceed, and perhaps substantially exceed, so-called "modified common law damages" under Pt 5 of the *Workers Compensation Act*, because of statutory restrictions in the latter (of which the most significant is s 151G confining claims for damages for past loss of earning and future loss of earning capacity); for an extreme case, see *Endeavour Energy v Precision Helicopters Pty Ltd (No 2)* [2015] NSWCA 357 at [38]. Thus it was entirely in the usual course of things for a breach of SCM's warranties leading to personal injury suffered by one of SCM's workers to lead to that person suing Endeavour.

37 Contrary to a submission advanced by SCM at first instance and repeated in this court, Endeavour did *not* sue SCM for breach of a tortious duty owed directly to Endeavour. If it had done so, that would not have been a basis for the whole of the liability to be shifted to SCM. But the allegation of negligence in the cross-claim, fairly read, was made solely in support of qualifying SCM as a person from whom statutory contribution might be sought.

38 It was not suggested that the contractual obligations alleged to have been breached were concurrent and co-extensive with a duty of care in tort, so as to engage the extended definition of *wrong* in the *Law Reform (Miscellaneous Provisions) Act 1965*, enacted following *Astley v Austrust Ltd* (1999) 197 CLR 1; [1999] HCA 6.

39 The entry into the consent judgment as between SCM and Endeavour had the effect of merging Endeavour's rights not only under cl 13.1(b), but also for its other causes of action in contract and for statutory contribution in that judgment: *Tomlinson v Ramsey Food Processing Pty Ltd* (2015) 256 CLR 507; [2015] HCA 28 at [20]. It was not said that the agreement which led to the consent judgment *itself* engaged the exclusion in cl 7.6. To the contrary, when this was raised, QBE disavowed any such submission, correctly acknowledging "that would have brought in perhaps s 41 and all sorts of other issues".

40 The consequence is that the liability for which SCM sought indemnity included liability for which SCM would have been liable in the absence of cl 13. It was a liability which had arisen as a matter of general law following the breach of the ordinary terms of the SSA (that is, those aside from cl 13.1(b)). The fact that Endeavour's cause of action had merged in the judgment in its favour did not alter the position.

41 In *Zurich Australian Insurance v Regal Pearl* at [117]–[118], Spigelman CJ addressed an exclusion clause worded similarly to cl 7.6, save that it referred to liability *accepted* by the insured, rather than *assumed* by the insured. The Chief Justice said:

> "[117] … The commercial purpose of providing cover against risks in a product liability policy should, absent clear words to the contrary, be understood to encompass the range of obligations normally associated with such liability in Australian law. The wording of the policy presently under consideration does not contain any clear words to the contrary.
>
> [118] The use of the words 'accepted by', where twice appearing, together with the reference to any such contract 'requiring acceptance' indicates that something distinctive and out of the ordinary, by way of additional liability, must arise before the exclusion clause takes effect. The implied terms of merchantable quality and fitness for purpose with respect to product liability are so common that only clear words will be found to exclude them in a policy purporting to give cover for product liability. Clause 12(b) does not contain any such clarity."

42 Likewise, there is no basis for reading an exclusion for liability *assumed* by the insured to exclude the liability it incurs for supplying services which breach its contractual obligation to provide services which are fit and proper, by an employee who was properly trained and supervised, as promised in the SSA.

43 It follows that it is not necessary to address questions of onus. However, once the force of "assumed" is fully appreciated (as to which see below), I favour the view that this clause does not contain an exception from the exclusion, entailing a shift of onus, but rather denotes a single concept — liability voluntarily taken on by the insured which it would not otherwise bear.

44 Finally on this point, I would reject QBE's submissions based on the way SCM pleaded its case against it. SCM alleged (by a late amendment) in its third cross-claim that:

> "55A The liability incurred by Endeavour and SCM to Newman under the Settlement of $225,000 represented the liability of Endeavour to Newman which was not covered under the statutory policy with CMI (being CMI's contribution to the Settlement Sum of $124,664.58 and prior workers compensation payments of $25,335.42)."

45 The way in which the insured pleaded its case against the insurer as to the nature of the liability for which it sought indemnity is not dispositive. The cross-claim was required to plead material facts, while the nature of the liability is a question of law. But in any event (a) the allegation in the cross-claim is substantially correct, and (b) QBE elaborately disputed the allegation in paragraph 40A of its defence, and so the nature of the liability was in issue at trial. The question is not how liability had been alleged by SCM, but instead turns on the legal nature of the liability, and whether it fell within the exclusion on the proper construction of QBE's policy.

Was exclusion cl 7.6 confined to "external" assumptions of liability?

46 Although in light of the above it is not necessary to resolve the point, I now turn to the first way in which SCM sought to avoid the operation of cl 7.6.

47 SCM submitted, correctly, that the premises of cl 3.1 were threefold: (a) the existence of a written contract or agreement for the performance of work, (b) liability of the principal to a third party, and (c) such liability arising out of the performance of that work. SCM submitted that in circumstances where cl 3.1 *extended* the indemnity to SCM to certain third parties (principals of a written contract with SCM for the performance of work), cl 7.6 could not be construed so as to take away the whole of the extension of indemnity granted by cl 3.1. SCM said that cl 7.6.1 was to be read as referring to "external" contracts, agreements or warranties falling outside those contemplated by cl 3.1. By way of example, SCM instanced:

> "[W]here an insured or principal was undertaking work near electricity lines, and as a term of its entry onto the land underneath those lines the insured or principal granted an indemnity to the electricity provider for any damage resulting from the actions of a supplier delivering goods or equipment to the insured or principal at the site. Such an indemnity is *external* to the arrangements existing between the insured and principal and would be excluded by clause 7.6 in a manner which involved no inconsistency with clause 3.1."

48 Finally, SCM invoked the unlikelihood of the consequences of QBE's construction, pointing to the fact that if QBE were correct, a principal could rely upon the extension of indemnity pursuant to cl 3.1, but the insured would be unable to do so by reason of the exclusion in cl 7.6. SCM maintained that the policy plainly reflected a recognition that non-parties to the agreement could enforce rights conferred upon them, notwithstanding the absence of privity, consistently with *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107; [1988] HCA 44 and s 48 of the *Insurance Contracts Act*.

49 The large majority of the exclusions in cl 7 of QBE's policy are introduced by the words "arising from" or "arising out of". Clause 7.6 is the only clause which uses the word "assumed". Exclusion for liability assumed by an insured is familiar. Spigelman CJ observed in *Zurich Australian Insurance v Regal Pearl* at [91] that this was a "well-known form of exclusion clause" and that there is a substantial body of case law, albeit a body which is "of limited assistance because the terminology employed varies and different considerations may arise for different kinds of liability insurance". Many decisions are noted in par 10–63 of Derrington and Ashton, *The Law of Liability Insurance* (3rd ed, 2013, Chatswood, LexisNexis Butterworths).

50 The point of cl 7.6 is to exclude liability which is voluntarily *assumed* by SCM, as opposed to liability arising out of various specified circumstances. But liability will only be *assumed* under a contract, agreement or warranty if the only reason the insured is liable is that assumption of liability. That is to say, the words "unless the Insured would have been liable in the absence of such terms or warranty" are to be read with the word "assumed" and confirm that the exclusion is directed to liability which only rests with the insured because of its voluntary act of assumption.

51 I regard this question as quite finely balanced. On the one hand, there is no clear textual basis to exclude from cl 7.6 an indemnity granted to a principal to whom labour services are provided by the insured, as opposed to a third party, save for the extension in cl 3.1. On the other hand there is force in SCM's

submission that, in light of the extension in cl 3.1, it makes no commercial sense if a principal could claim on the policy in circumstances where the insured could not.

52 It is not necessary to reach a concluded view on this aspect of SCM's submissions. That is because it is clear that the liability claimed by SCM against QBE is liability which was not assumed by it, but rather was liability for which SCM would have been liable in the absence of cl 13 of the SSA, within the meaning of the second half of cl 7.6.1. Further, the court was told that a claim by SCM based on its being subrogated to Endeavour's rights under cl 3.1 had been raised at first instance without having been dealt with by the primary judge, and was not the subject of a notice of contention, so that this court did not have the benefit of full argument as to the operation of the clause. Because expressing a concluded view may have consequences in other litigation in which the point is dispositive, I think it is preferable not to decide this issue in this appeal.

Resolution of grounds 1–4 of the appeal

53 The foregoing enables me to resolve the particular arguments in grounds 1–4 concisely.

54 In answer to ground 1, which turned on what was said to be "the failure of [SCM] to plead in its [cross-claim] any duties owed by it to [Endeavour]", the question is as to the nature of SCM's liability to Endeavour, not how SCM's cross-claim was pleaded. Of course, the nature of SCM's liability to Endeavour would be affected by how *Endeavour's* cross-claim was pleaded, which I have addressed above, but that is quite different. During oral submissions, QBE conceded, correctly, that the form of the pleading was not dispositive of the question of construction. Either exclusion cl 7.6 applied or it did not. Although as this ground states the amount paid by way of settlement was in discharge of SCM's obligations under the indemnity in cl 13, it was also in discharge of SCM's obligations for breach of numerous other warranties in the SSA. That means that the exclusion in cl 7.6 did not apply.

55 Ground 2 asserted error by the primary judge in finding that SCM's liability to Endeavour arose, not under contract, but out of SCM's negligent performance of the SSA, as well as under statutory contribution. This is a reference to the finding by the primary judge at 25 that SCM's obligations owed to Endeavour "arise whilst under contract but out of the negligent performance of that contract". The wording is infelicitous, but should fairly be read as amounting to the performance of SCM's obligations under the SSA in contravention of its warranties to provide services with due care and skill. Even if that not be so, for the reasons earlier given, SCM's liability is one to which QBE's policy responds.

56 Ground 3, which was that exclusion cl 7.6 applied, is rejected for the reasons already given. Ground 4 in substance restated ground 1.

Ground 5 — Did indemnity extend to the obligation to pay Endeavour's costs

57 Ground 5 addressed a different subject, namely, the $40,000 by way of Endeavour's costs which SCM paid pursuant to the settlement. The primary judge found that "the $40,000 costs are moneys that the insured was legally liable to pay by way of compensation in respect of injury and is a valid claim under the policy": at 26.

58 QBE said, correctly, that the basis of this claim was the cross-liability provision in cl 4 of the policy (although it will be seen that the reasoning of the primary judge is consistent with the claim for costs being one which flows directly from the insuring clause). In this court, SCM's written submissions sought once again to invoke the cross-liability provision. However, this was abandoned on the second day of the hearing, in my view rightly: cl 4 is directed to rendering the policy one that is composite: see *Federation Insurance Ltd v Wasson* (1987) 163 CLR 303 at 309–311; [1987] HCA 34. Instead reliance was placed on the insuring clause. The question is one of law, and QBE did not object to SCM's reformulation of its response to this ground of appeal.

59 To the extent that this ground is distinct from its submission based on cl 7.6, QBE contended that while its policy made special provision for defence costs, it was silent as to the liability to pay a costs order adverse to the insured. QBE submitted that such liability fell outside its policy. As it was put orally, "We say that that's too broad a reading of the insuring clause and those costs are not by way of compensation in respect of injury, that's a separate thing, it's costs to a third party claiming against the insured."

60 The authorities in this area do not speak with one voice, as is noted by Enright and Merkin, *Sutton on Insurance Law* (4th ed, 2015, Pyrmont, Lawbook Co) at par 23.670. There are decisions which hold that an insuring clause which is not expressed to extend to costs does not indemnify the insured for liability from an adverse costs order. (Care must be taken with United States decisions, where party–party costs orders are unusual.) There are also decisions to the contrary, including that of Helsham J in *Government Insurance Office of New South Wales v Crowley* [1975] 2 NSWLR 78 at 81. Although all must ultimately turn on the particular contract, there is much to be said for the conclusion reached by Gillard J in *Twentieth Super Pace Nominees Pty Ltd v Australian Rail Track Corporation Ltd (No 3)* [2007] VSC 84 at [27], after dealing with some of the insurance cases, that:

> "[27] … indemnity means full indemnity for the loss suffered. If that involves the victim in the payment of legal costs, then as a general rule a full indemnity would include those legal costs reasonably incurred."

61 In my view, there is no reason to construe the broad insuring clause "pay by way of compensation in respect of Injury" to extend to common law damages awarded against SCM but not to include that successful party's costs awarded against SCM. Only in unusual circumstances, where the presumption in Uniform Civil Procedure Rules 2005 (NSW) (UCPR), r 42.1 that costs follow the event has been displaced, will a judgment not be accompanied by a costs order. The natural meaning of the words in the insuring clause extends to an indemnity for the insured's liability to meet an adverse costs order. The natural meaning is all the stronger when it is seen that the policy expressly covered the defence costs of an insured, and expressly permitted QBE to take over the conduct of a defence (cl 8.1). This ground is not made out.

62 It is as well to note two matters that were not argued. QBE did not say that the entry into the obligation to pay $40,000 in September 2011 was not a reasonable compromise, nor did it seek to invoke cl 7.6 in respect of that decision.

Grounds 6–8 — Non-disclosure by SCM

63 SCM accepted that it did not disclose the SSA, or the fact that it included an indemnity in cl 13, to QBE in the various questionnaires it completed. It also accepted that that was material to QBE's decision to insure. QBE submitted that SCM had failed to discharge its duty to disclose in accordance with s 21 of the *Insurance Contracts Act*. It did not suggest that the non-disclosure had been fraudulent, but maintained that, in light of the evidence, unchallenged on appeal, that QBE would have excluded the risk had it known of the indemnity in cl 13, it was entitled under s 28(3) to reduce its liability to zero.

64 SCM accepted what followed pursuant to s 28 in the event that it were found to have breached its duty of disclosure. Section 28(3) and the applicable principles are reproduced in *Prepaid Services Pty Ltd v Atradius Credit Insurance NV* (2013) 302 ALR 732; [2013] NSWCA 252 at [70]–[71].

65 SCM's primary answer to the non-disclosure case was that it disclosed a letter from its solicitor concerning a claim by another employee, Mr Shane MacDonald. His claim arose in much the same way as Mr Newman's, although in a different policy year. SCM made a claim on its workers compensation insurer CMI, and the firm Sparke Helmore was retained to act on SCM's behalf to the extent that it was indemnified by CMI. It was in that context that SCM's own solicitor from "Access Business Law" wrote to his client on 21 December 2007:

> "[The solicitor from Sparke Helmore] is concerned to ensure that you have other liability cover for damages which arise under contract. For example, in the service agreement which you have with Billiton, it may well contain clauses [in] which you give an indemnity to Billiton for any loss or damage which is claimed against it by one of your employees. As you know these types of claims normally arise in the case of a coal mine directly from mining operations and in the case of Mr MacDonald he is suing BHP as the occupier [of] premises albeit his injuries are not related directly to the cutting of coal or any direct mining activity.
>
> The concern which Sparke Helmore has is that because of this MacDonald will sue or has sued BHP as an occupier and as a matter of contract BHP can seek an indemnity from SCM. This means that to the extent that it is liable for any injury or loss caused to MacDonald that SCM will have to pay for it. That is the unfortunate impact of an indemnity and that liability arises purely because of promises which you have made in the contract to indemnify BHP.
>
> With that in mind we recommend you notify your liability insurer about the claim."

66 This was referred to as the "Access Warning Letter". The primary judge dismissed QBE's case based on non-disclosure by finding that the Access Warning Letter had been provided on 7 January 2008. That finding carried with it conclusions that (a) the insurance contract had not commenced by 7 January 2008, or alternatively had been varied after that time, and (b) the Access Warning Letter was sufficient disclosure. QBE challenged the express finding, and each of the conclusions implicit in it.

When did the contract come into existence?

67 QBE maintained that a contract came into existence on 20 December 2007. It referred to a renewal invoice issued by Piranha to SCM dated 20 December 2007, following internal processing by the underwriters, including consideration of the material disclosed in SCM's Liability Renewal Questionnaire earlier that month. QBE submitted that "The mere fact of an invoice being issued rather suggests there was, as at 20 December 2007, an existing

obligation that SCM pay the relevant premium, and therefore that there was on that date an insurance contract".

68 This submission is readily rejected. The issue is resolved by reference to the parties' intentions, objectively manifested, including the following matters.

1. First, it was not how the parties regarded the position at the time. Mr Emerson from IUS who sent the invoice to Piranha concluded his email "I look forward to hearing back from you on the Insured's decision to bind cover".
2. Secondly, an internal checklist discovered by QBE stated that although renewal terms had been provided on 20 December 2007, an invoice was not sent until 7 January 2008, the same date it was placed on the bordereau. Although not clear on its face, the document was tendered as coming from the IUS file. It may be that the document was completed subsequently, but that does not preclude its use on the issue of whether, as at 20 December 2007, the parties had been bound.
3. Thirdly, the document provided by Piranha to SCM contained the following in bold italicised capitals:

> "***CHEAPER CAN INVARIABLY MEAN INFERIOR.***
>
> ***PIRANHA INSURANCE BROKERS OFFER THIS PRODUCT FOR YOUR CONSIDERATION FROM ONE OF OUR AVAILABLE UNDERWRITERS.***
>
> ***WE STRONGLY RECOMMEND THAT YOU DO NOT CHANGE SIMPLY ON THE BASIS OF PRICE.***
>
> ***CALL US AND WE WILL HAPPILY EXPLAIN THE DIFFERENCE IN COVER AND ALLOW YOU TO MAKE AN INFORMED DECISION.***"

4. Fourthly, Piranha's letter to SCM attached a "NOTICE TO INTENDING INSURED" advising SCM as to its obligations, including its duty of disclosure. The description "intending insured" and the advice about SCM's obligation to disclose were otiose if SCM were already bound.
5. Fifthly, there was no commercial imperative for the parties to be bound in late December 2007. Although it was a term of the SSA that $10,000,000 public liability insurance be in place, the previous policy was in force until 10 January 2008.
6. Sixthly, the first time SCM's agent Piranha learned of the premium (which was $100,396) was on 20 December. The premiums in the previous two years (including GST and stamp duty) had been $69,401 and $66,000. How could it possibly be that SCM was bound upon receipt of that invoice?

69 Test the matter this way. On 21 December 2007, after SCM and Piranha learned of the premium and other terms proposed by the insurer, were they free to explore the possibility of alternative cover? Were they free to write back to protest the 60% increase, and seek to negotiate a lower rate (perhaps, with fewer endorsements or a higher deductible)? Was SCM free to make sure that, prior to the formation of a contract, it had complied with its duty of disclosure? Was it free to take up Piranha's invitation to have explained the difference in cover so that it could make an informed decision? The answers to those questions are, with respect, obvious.

70 As SCM pointed out, QBE's submission conflates the distinction noted by Gleeson CJ in *Australian Broadcasting Corporation v XIVth Commonwealth Games Ltd* (1988) 18 NSWLR 540 at 548 between reaching agreement on contractual terms and expressing an intention to be bound by those terms.

71 The parties debated the question whether the new policy was entered into on 7 January 2008 (which is when IUS's document states it was placed on the bordereau and an invoice issued) or on 11 January 2008 (when the invoice was paid). SCM caused the premium to be paid on 11 January 2008, having secured a facility with a bank for monthly payments of some $10,637. The funding was not approved until 11 January 2008 (the bank's internal notes on that date record "Exposure high Veda clear ASIC clear Good credit" and "Loan approval authorised by Peter Cassidy").

72 It is not necessary to resolve this point, because even if, favourably to QBE, the 7 January date be accepted, it is reasonable to proceed on the basis that it was later than 9:15 in the morning in Queensland, which as will be seen below is the finding which this court should make, in accordance with s 75A(10) of the *Supreme Court Act 1970* (NSW), when the Access Warning Letter was provided to IUS.

73 The parties also debated the effect of the events in late January and early February 2008, when SCM advised that it wished to provide labour hire to Blue Scope Steel in Wollongong. The new contract involved "mechanical" work, and in a factory rather than an underground coal mine. IUS advised that "we wouldn't have any issues with it", and proceeded to issue an endorsement in February, under cover of an email stating "Please find attached a nil premium endorsement for your records noting the additional sector the Insured is now supplying labour to". The endorsement stated "Noting Labour Hire of Mechanical Trades to Metal Manufacture". An updated statement of "Policy Particulars" was supplied, noting the expanded scope of SCM's business. Prior to this, by email dated 24 January 2008, Piranha advised SCM that "Cover is in place" and attached an email from IUS as follows:

> "As the Insured already has labour hire noted as an occupation on the policy I will just do a nil premium endorsement to note the additional sector (mechanical trades to steel manufacture.) We will pick up any adjustment at expiry but I don't think this will be likely due to the additional $100k compared with an overall declared T/O of $11.6m for the forthcoming term.
>
> I will get the paperwork out to you within the next couple of days but confirm the cover is in place wef today's date."

74 Section 11(9)(b) of the *Insurance Contracts Act* provides that a reference to the entering into of a contract of insurance includes a reference to "the making of an agreement by the parties to the contract to renew, extend or vary the contract". It was accepted that the deemed entry into a contract upon renewal, extension or variation within the meaning of s 11(9) engaged the temporal element of the duty of disclosure imposed by s 21 ("an insured has a duty to disclose to the insurer, *before the relevant contract of insurance is entered into*, every matter …" (emphasis added)).

75 In its written submissions, QBE denied that there was a renewal, extension or variation in January and February 2008. It submitted that the endorsement was "in substance, confirmatory of the position under the 2008/2009 Policy rather than a variation to that policy". Alternatively, it submitted that "to the extent that there was a variation, the fact that it was effected by a nil premium endorsement further indicates that any agreement to vary the 2008/2009 Policy

was not supported by consideration from SCM, and therefore was not legally efficacious". These submissions were not developed orally, and indeed, I had understood QBE to have abandoned this point when its counsel said during his address:

> "There was an issue as to the date that the contract of insurance was entered into. Our position was it was late December as we said in our submissions. Our learned friend's primary case is that it's 11 January or otherwise 4 February. We say it doesn't matter because on any view our position is, your Honours, that the matters said to have constituted disclosure just don't constitute disclosure."

76 Counsel for SCM understood this in the same way that I had. However, during his address counsel for QBE advised that the point was pressed.

77 Contrary to QBE's submission, the question is not whether the endorsement was "in substance confirmatory of the position". Rather, it is the question posed by statute, namely, whether there was a renewal, extension or variation of the contract. Both insured and insurer, and their agents, all proceeded on the basis that supplying of labour to a metal manufacturer gave rise to a different risk from supplying labour to an underground coal mine. There was a different risk at a different site owned by a different company. The fact that the risk was considered not to involve any additional premium (presumably reflecting an assessment that working in a factory was less dangerous than working in a mine) does not mean that the terms of the contract of insurance were neither extended nor varied. To the contrary, the insuring clause turned on an "Occurrence in connection with the Insured's Business". Since the Insured's Business was defined by reference to being a mine contractor, it was to say the least arguable that the insurance did not extend to liability following an Occurrence in a factory involved in metal manufacture, until the definition of Insured's Business was agreed to be expanded.

78 I would not lightly accept that what was done, formally and unequivocally in late January and February 2008, failed to achieve the goal of making QBE liable for the additional class of risk. It was plain from the email of 24 January 2008 that the underwriters reserved the right to charge an adjustment at the end of the period. This reflected the fact that the premium was provisionally based on SCM's estimates in accordance with cl 8.9, and it seems probable that the promise to pay the adjustment calculated by reference to the altered definition of "Insured's Business" would be sufficient consideration for the variation to be effective. However, this was not argued and I do not express a concluded view. But even if no consideration moved from SCM, it is quite plain that both QBE and SCM and their agents IUS and Piranha all regarded the contract as having been varied. That is sufficient to give rise to an estoppel by convention and in equity, and, if QBE's submission were correct, it would render what was said formally by it (when providing an amended certificate) and on its behalf (by IUS) not merely misleading and deceptive, but false. However, in light of what has already been said as to the inception of cover after 9.15am on 7 January 2008, it is not necessary to express a view on whether s 11(9) would apply to an extension or variation which was only effective as a matter of estoppel, rather than contract, and I refrain from doing so.

Was the Access Warning Letter disclosed?

79 QBE maintained that SCM had failed to establish that the letter had been sent to IUS. It submitted that "There is no evidence that the Access Warning Letter was in fact forwarded to Mr Perks or to any other employee of Sterling

and thereafter to QBE". It relied on IUS's file having been discovered and Piranha's file having been produced on subpoena, and no document having been tendered to demonstrate that the Access Warning Letter had been forwarded. Once again, I do not agree.

80 The relevant communications were between Mr de Leeuw, a director of SCM, Mr Lambert-Barker of Piranha, and Mr Perks of IUS.

81 First, QBE accepted that the Access Warning Letter was sent by Mr de Leeuw to Mr Lambert-Barker at Piranha by email dated 7 January 2008 at 7:47am. That email was in evidence and concluded "Please see attached correspondence and call me if required". The email stated that it had an attachment (SKMB_C25005010707340.pdf) and the letter was reproduced in the appeal books as the following page.

82 Secondly, Mr Lambert-Barker responded to Mr de Leeuw, copying in Mr Perks of IUS, at 9:17am that morning, saying:

> "I have sent your e-mail on to the insurer. Please complete and return the attached claim form as soon as possible".

83 Thirdly, the evidence was clear that the appropriate contact for Piranha for dealings on this policy, whether by way of renewal or claim, was Mr Perks in the Queensland office.

84 If Mr Lambert-Barker sent a separate email to Mr Perks, forwarding Mr de Leeuw's email attaching the Access Warning Letter, it was not in evidence. This was the gravamen of QBE's submissions. There was no direct documentary evidence establishing beyond all doubt that Mr Lambert-Barker had in fact done what he had been asked to do and what he said he had done on the morning of 7 January 2008.

85 There is no error in the judge's finding that the Access Warning Letter was sent to Mr Perks, for these reasons:

1. First, a broker received a letter advising the insured client to notify the client's insurer. The letter was from the client's solicitor and concerned a claim that had been made against the client. It is to my eyes the most natural thing in the world to expect the broker to send the letter to the insurer (by its nominated agent IUS). It is hard to see how there would not be a breach of duty if the broker failed to do so.
2. Secondly, that is what the broker contemporaneously said he did ("I have sent your e-mail on to the insurer"). What is more, this occurred at a time when the broker was acutely aware that its insured was in the process of renewing its policy with the same insurer.
3. Thirdly, the broker then took the further step of asking the client to complete and return a claim form, and copied that request to the insurer's agent. That is entirely consistent with an earlier response from the insurer's agent, advising the broker to tell his client to complete a form.
4. Fourthly, QBE chose not to call Mr Perks to deny the obvious inference arising from the foregoing.
5. Fifthly, QBE admitted that its (former) solicitors received copies of the SSA on or about 16 January 2008, which is some nine days later. How that occurred is not disclosed. The solicitors' costing records show that they were examining the SSA in connection with Mr MacDonald's claim no later than the first week of February,

having received a file on 16 January and having provided preliminary advice in the last week of January. Once again, it is wholly consistent with QBE being provided with the SSA in early January.

6. Sixthly, it is plain from the emails exchanged in short succession on the morning of 7 January 2008 that the communications between Mr Lambert-Barker and Mr Perks were electronic. The fact that there was no *physical* document in the files discovered years later by Sterling or produced on subpoena by Piranha does not undermine the inference derived from the emails.

86 The evidence is, with respect, overwhelming. And the onus lay with QBE to establish that the Access Warning Letter had not been sent. QBE's submission to the contrary is, with respect, at the outer limit of submissions which could properly be put.

Was the Access Warning Letter provided to the right person at QBE?

87 Ms King, who was an officer of IUS based in Sydney called by QBE, gave undisputed evidence that Mr Perks was the appropriate person for SCM's broker to contact, that IUS was a small organisation with eight employees in Sydney and one (Mr Perks) in Brisbane, that Mr Perks' practice was to pass on information to IUS in Sydney, that claims were unusual at the time, that the claims officer at the time was another man who was not called by QBE, and that the appropriate response on receiving notification of a claim was to send a claim form back to the broker.

88 QBE insisted that it was not sufficient for SCM's agent Piranha to provide the letter to Mr Perks at IUS. Mr Perks was not an underwriter. It relied on propositions from cases and texts to the effect that knowledge has to be established on the part of the officers who were responsible for the decision whether to contract.

89 As SCM pointed out, QBE's submission confused disclosure and knowledge. It is best to return to first principles.

90 In the form it took at the time, s 21 of the *Insurance Contracts Act* provided:

"**21 The insured's duty of disclosure**

(1) Subject to this Act, an insured has a duty to disclose to the insurer, before the relevant contract of insurance is entered into, every matter that is known to the insured, being a matter that:

(a) the insured knows to be a matter relevant to the decision of the insurer whether to accept the risk and, if so, on what terms; or

(b) a reasonable person in the circumstances could be expected to know to be a matter so relevant.

(2) The duty of disclosure does not require the disclosure of a matter:

(a) that diminishes the risk;

(b) that is of common knowledge;

(c) that the insurer knows or in the ordinary course of the insurer's business as an insurer ought to know; or

(d) as to which compliance with the duty of disclosure is waived by the insurer.

(3) Where a person:

(a) failed to answer; or

(b) gave an obviously incomplete or irrelevant answer to;

a question included in a proposal form about a matter, the insurer shall be deemed to have waived compliance with the duty of disclosure in relation to the matter."

91 Section 21 is a code insofar as it replaced the antecedent common law regulating, inter alia, non-disclosure: *Advance (NSW) Insurance Agencies Pty Ltd v Matthews* (1989) 166 CLR 606 at 615; [1989] HCA 22.

92 In the present case, SCM stated in each renewal form that it had not entered into any "hold harmless" provisions, and so s 21(3) is inapplicable. Further, in light of the construction of cl 7.6, it is clear that the non-disclosure was material. There was unchallenged evidence from QBE that had the existence of cl 13 of the SSA been disclosed to the underwriter, he would have excluded that risk from the policy. That would have entitled QBE, pursuant to s 28(3), to reduce its liability to zero in the event that it could show that SCM had not discharged its duty of disclosure under s 21.

93 Section 21 consistently distinguishes between knowledge and disclosure. By subs (1), the duty is imposed on the insured to *disclose* matters which are *known* to the insured to be relevant to the insurer's decision. However, by subs (2), the duty does not require the *disclosure* of a matter which the insurer *knows* or ought to *know.*

94 Disclosure and knowledge are two quite different concepts. One connotes an act of communication between insured and insurer; the other connotes a state of mind. The distinction may be illustrated by the different issues which arise in relation to the different concepts.

95 Knowledge imports a level of certainty, which may be distinguished from suspicion or belief. In *Permanent Trustee Australia Ltd v FAI General Insurance Company Ltd (in liq)* (2003) 214 CLR 514; [2003] HCA 25 at [30] it was said that "the word 'knows' is a strong word. It means considerably more than 'believes' or 'suspects' or even 'strongly suspects' ". See for example *Stealth Enterprises Pty Ltd t/as The Gentlemen's Club v Calliden Insurance Ltd* (2017) 19 ANZ Ins Cas 62-131; [2017] NSWCA 71 at [50]–[56]. Knowledge on the part of an artificial person, such as a corporation, also requires a process of attribution. Thus it was said in *Commercial Union Assurance Co of Australia Ltd v Beard* (1999) 47 NSWLR 735; [1999] NSWCA 422 at [62], by reference to s 21(2), that:

> "[62] … The relevant matter must be known to an appropriate officer or agent of the insurer or contained in current official records. Ordinarily, the appropriate officers will be those who are handling the particular insurance on behalf of the insurer: see *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500."

96 There is a deal of law governing the attribution of knowledge of an agent to a principal: see for example *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89; [2007] HCA 22 at [126]–[127].

97 On the other hand, the performance of the duty of disclosure requires merely that the insured communicate the matter to the insurer. It is perfectly possible for that to occur by communication to the insurer's agent.

98 There may be a question as to whether the matter has been fairly disclosed. See for example the divergent views expressed as to the application of this principle in the Court of Appeal in *WISE (Underwriting Agency) Ltd v Grupo Nacional Provincial SA* [2004] 2 Lloyd's Rep 483; [2004] EWCA Civ 962 at [63]–[68], [114]–[117] and [130]–[133], where, perhaps through a mistranslation of *relojes*, a shipment to a Cancun retailer which included Rolex watches was described as "clocks". There may also be questions of fact as to whether a particular document was provided (as in this appeal).

99 But issues of disclosure turn on the communication of a matter. Critically for this appeal, disclosure in contradistinction to knowledge does not turn upon any issue of attribution to the appropriate individual within a corporate insurer.

100 In the present case, the renewal questionnaires and other documents were provided by Piranha on behalf of SCM to IUS (Mr Perks in Queensland) on behalf of QBE. The Access Warning Letter was likewise provided to Mr Perks. Disclosure was provided to QBE in accordance with the arrangements specified by QBE and its broker. QBE's submission that it was necessary, in order to comply with SCM's duty of disclosure, to ensure that the disclosure was made to the appropriate people within QBE confuses disclosure with knowledge. This ground is not made out.

Was the Access Warning Letter sufficient to discharge SCM's duty of disclosure?

101 QBE's non-disclosure case was based on what it said was the failure to disclose the indemnity in the SSA. It will be recalled that the Access Warning Letter stated that SCM had entered into a contract with BHP, and had said that "it may well contain clauses" in which an indemnity was given. It was put thus orally:

> "Now if our learned friends are right and it's right that a letter such as the Access Warning Letter in those terms which is not disclosing definitively the terms of a contract with a contractual indemnity, if it is right that that means that the insurer then has to go off, regardless of the renewal forms, and seek information from the insured as to whether or not that contract exists and whether or not it contains a clause which has the contractual indemnity, that is shifting the obligation of disclosure, which lies under statute on the insured to an obligation on the insurer to make investigations. And we say that that's not the position at law and your Honours would reject any such submission."

102 I do not accept that that submission accurately states the law.

103 It is well established that, prior to the *Insurance Contracts Act*, an insured could discharge its duty of disclosure even if it fell short of disclosing the entirety of the information in its possession. In *Asfar & Co v Blundell* [1896] 1 QB 123 at 129–130, Lord Esher MR emphasised that he was not laying down any new law by holding that "assuming that there is a material fact which [an assured] is bound to disclose, the rule is satisfied if he discloses sufficient to call the attention of the underwriters in such a manner that they can see that if they require further information they ought to ask for it": at 129. Lopes LJ (at 131) and Kay LJ (at 133–134) wrote to the same effect. In *Asfar & Co v Blundell* there had been a total loss of part of the cargo (namely, a shipment of dates, which were condemned having been impregnated with sea water and sewage) but part of the cargo was landed and sold, such that the lump sum freight became payable. The non-disclosure, which was accepted to have been material, was that freight payable under the charterparty was a lump sum and not a tonnage freight (if it had been a tonnage freight, it would only have been payable on so much of the cargo as was landed). All members of the court rejected the submission, on the basis that the charterparty itself had been disclosed, and the lump sum freight provision was not an unusual clause. There is some resemblance with the present case, insofar as the Access Warning Letter disclosed the existence of the contract with BHP, which it was said "may well contain" the indemnity, being a provision which, it may be inferred, was not uncommon.

104 Macfarlan J reviewed authorities to the effect of those propositions, including *Asfar & Co v Blundell*, in *Roumeli Food Stores (NSW) Pty Ltd v The New India Assurance Co Ltd* [1972] 1 NSWLR 227 at 233–234, concluding:

> "In my opinion these authorities state that a proponent may discharge his duty to disclose by giving the insurer information which amounts to less than the whole sum of the relevant facts of which the proponent knows. This opinion, though, is not to say that the proponent may discharge his duty by providing the insurer with no more than the means of knowledge. The principle is that less than the whole of the relevant information may amount to disclosure, provided that what is conveyed fairly indicates to the insurer that there is more information to be obtained if he chooses to ask for it, or to have it."

105 There is no need to review the more recent authorities comprehensively, although it may be noted that William Young P, writing for the New Zealand Court of Appeal in *Jaggar v QBE Insurance (International) Ltd* [2007] 2 NZLR 336 at [35], said that:

> "[35] … Where the insured discloses facts and circumstances which reasonably indicate the possible existence of further material facts, the insurer will have waived disclosure if it fails to make further inquiry."

106 Professor Clarke writes to similar effect in *The Law of Liability Insurance* (2013, Routledge) at 35, par 5.7.2:

> "If information has been disclosed of a kind to put an insurer on enquiry, the insurer should seek out the rest of the information; and if the insurer does not do so, disclosure of the latter is regarded as having been waived by the insurer."

107 Of course, the question in this appeal falls to be determined by reference to the *Insurance Contracts Act.* However, the statute uses the word "disclose", the metes and bounds of which term is apt to be informed by the previous law: see (albeit in a very different context) *Marks v Commonwealth of Australia* (1964) 111 CLR 549 at 573; [1964] HCA 45. Further, the statute expressly picks up, in s 21(2)(d), the concept of waiver by an insurer. Still further, the principles developed at common law have been treated by the leading Australian texts as applicable to s 21. Derrington and Ashton write at par 4-75 that:

> "The proponent may discharge the duty by giving the insurer information which amounts to less than the total known material facts, provided that what is conveyed fairly indicates that there is more information to be obtained if the insurer chooses to seek it.
>
> …
>
> If the insured discloses facts and circumstances which reasonably indicate the possible existence of other material facts, the insurer will have waived disclosure if it fails to make further inquiries, but not if the matter is so unusual that the insurer is not put on notice." (Footnote omitted)

108 The authors of *Sutton on Insurance Law* write at par 7.550 that:

> "[Section 21(2)(d)] is a codification of the common law rule that an insurer who, having been put on inquiry by what has been said by the insured, proceeds to issue a policy without further investigation, will be deemed to have waived further specific information."

109 In any particular case of partial disclosure there may be scope for debate as to whether sufficient has been disclosed. That is a question of degree. In the present case, the Access Warning Letter was written by SCM's solicitor, in the context of a claim being made by an employee, and recommended disclosure to QBE. It referred in terms to BHP seeking an indemnity from SCM and to the existence of the contract between SCM and BHP. It was short and to the point and came from the insured's solicitors and was written in connection

with a potential claim. And QBE's underwriter Mr Jones gave very clear evidence:

> "Q. If this letter had been provided to you at the time of renewal of the Southern Collieries contract it would have alerted you to the circumstance that Southern Collieries was at risk of being sued in the context of what you called earlier today the workers compensation subrogation claim?
>
> A. Absolutely …"

110 I conclude that QBE has not discharged its onus of showing that SCM breached its duty of disclosure. For completeness, it may be noted that no separate point was taken as to the time — very shortly before renewal — at which the disclosure of the Access Warning Letter was made (quite possibly because of Mr Jones' evidence referred to above).

Ground 9 — Reasonableness of settlement

111 Ground 9 of the appeal challenged the finding of the primary judge that the apportionment of the settlement sum as between SCM and CMI was reasonable. No issue was taken with the overall settlement amount of $375,000 paid to the plaintiff. Rather, it was said that SCM had failed to establish that it was reasonable to make the offer to the plaintiff which ultimately led to the settlement of the entirety of the litigation save for the third cross-claim on the basis that SCM would bear 60% liability and CMI 40% of the liability.

112 The basis of the challenge focused upon the failure to call both the counsel then retained by SCM (who had attended the mediation and participated in the negotiations at the time), and the solicitor, who, as appears from the documents, was even more closely involved. But SCM tendered, in order to establish the reasonableness of the settlement, extensive contemporaneous records as to the negotiations between it and CMI. The tender included both internal documents between SCM and its own lawyers as to their assessment of the strength of the case, and external without prejudice correspondence between it and CMI. It must be said that some of this correspondence was either ambiguous or confused (or both). That is not surprising. CMI had at all times made it plain that it would indemnify SCM for its tortious liability in respect of its employee's claim for common law damages, but not for any contractual liability under the SSA, while by November 2011, SCM had already entered into a compromise with Endeavour. Thus, when SCM was negotiating with CMI as to the settling of the entirety of the litigation (save for SCM's severed cross-claim against QBE) it became necessary to distinguish between such of SCM's liability for which CMI was liable to indemnify it, and the balance, including SCM's liability to QBE, noting that by this time SCM had consented to judgment against it by Endeavour and was conducting Endeavour's defence of Mr Newman's claim. There was debate in this court as to the meaning to be given to some of the emails.

113 It is not necessary to summarise the detail of the negotiations between SCM and its workers compensation insurer. That is because SCM pointed to the contemporaneous documents, which, following the mediation and a series of positions advanced in negotiations, represented CMI's final offer.

114 It appears that by 7 November 2011, Mr Newman had made an offer of settlement. It became necessary, in order to respond, for SCM and CMI to apportion their shares of a counteroffer. A counteroffer of $375,000 was proposed. As to the proportions to be borne by them, CMI appears to have been adamant. On 8 November 2011, it maintained that 40%, exclusive of

costs, was a reasonable offer. In response to a lengthy analysis setting out the weaknesses in SCM's own case as employer (which included sending out a relatively inexperienced and unqualified worker classed as an "accompanied miner" and failing to ensure that he was accompanied by a supervisor, also an employee of SCM), CMI's solicitors said firmly:

> "In summary, our client would be more than content to contribute 30% to the settlement plus your client's costs of issuing a cross-claim as agreed or assessed (which we cannot imagine would approach $5,000), or alternatively, 40% on an inclusive of costs basis. We consider the latter proposal to be more generous.
>
> …
>
> Our position in relation to contribution will not increase, and is only available if the matter resolves prior to the end of this month."

115 That offer was accepted by SCM's solicitor on 16 November 2011. It is difficult to see what could have been said, six years later, by the barrister and solicitor then acting for SCM, assuming that they had any recollection of the negotiations, which would be more reliable than the contemporaneous documents recording the perception of liability within SCM and the negotiations with CMI.

116 One final consideration is that SCM established, in relation to the settlement of a similar claim (when QBE contrary to its stance in the present litigation did not decline cover), that QBE and CMI entered into an equal apportionment of their liability. Of course the weight to be given to that depends on the particulars of the claim, as to which no submissions were made in this court. However, and broadly speaking, the fact of a 50:50 settlement in which QBE participated tends to tell against the unreasonableness of a 60:40 settlement in a case where SCM did not have the benefit of an insurer which had accepted liability.

117 True it is that the onus of establishing the reasonableness of the settlement was borne by SCM: *Unity Insurance Brokers Pty Ltd v Rocco Pezzano Pty Ltd* (1998) 192 CLR 603; [1998] HCA 38. For the reasons set out above, there was no error in the primary judge regarding that onus as having been discharged. This ground is not made out.

Ground 11 — The $50,000 deductible

118 The QBE policy schedule provided for a $5,000 deductible, but subject to an exception:

> "Except:
>
> $50,000 Each and Every Claim/Occurrence as applicable in respect of Injury to Contractor/Worker's Compensation Subrogation (Defence Costs and Additional Expenses inclusive)."

119 Clause 8.4 provided that the deductible was "the first amount for all claims arising out of any one Occurrence which is to be [borne] by the Insured".

120 That SCM had to pay the first $50,000 of its claim as a deductible was pleaded in QBE's defence. Throughout eight days of the trial, and some 270 pages of written submissions, no mention was made thereafter of the deductible. The primary judge cannot be faulted for calculating a judgment amount which did not allow for the deductible. No attempt was made until around a month after judgment had been handed down to correct the error. There was no evidence explaining the oversight. QBE's solicitors said that when (some five months later as it turned out) there were further orders as to costs and interest they would raise the matter then. Whether or not that

happened is not plain from the material in this court. By that time, a notice of appeal including this ground had been filed.

121 The only question arising in this appeal, which is by way of rehearing, is whether QBE should be permitted to advance this submission. That turns upon whether there could have been, by way of evidence or submission, some answer to it.

122 SCM responded to this ground on the basis that it had originally claimed some $96,000 by way of costs said to have been directed to defending Endeavour's cross-claim as part of its claim upon QBE's indemnity. That claim was withdrawn during the hearing, on the basis that QBE was not prepared to pay the costs thrown away which was the order made by the primary judge as the price of permitting it to rely upon its expert report (which had been provided only around a fortnight before the hearing contrary to the rules of court: see UCPR, r 31.28 and *Yacoub v Pilkington (Australia) Ltd* [2007] NSWCA 290 at [51]–[68]). The only basis upon which SCM sought to bind QBE to the way in which it had run the trial in accordance with the principles in *Coulton v Holcombe* (1986) 162 CLR 1; [1986] HCA 33 was the possibility of relying upon the *fact* of having paid some $96,000 of assessed costs on the cross-claim as swallowing up the whole of the deductible.

123 The deductible had been pleaded, and QBE's claim to it had certainly not been abandoned at the time SCM chose not to press its claim to an additional $96,000. It follows that SCM has failed to point to anything sufficient to prevent this court from correcting, in this appeal which is by way of rehearing, an obvious slip so that the parties' rights may be determined in accordance with the terms of their contract. SCM's claim must be reduced to reflect the deductible applicable to this policy. In this respect, but only in this respect, must QBE's appeal be allowed.

Orders

124 For those reasons, none of QBE's grounds of appeal is made out, save for ground 11 concerning the deductible, which should have been raised either during the trial or before orders were made.

125 By an amended notice of appeal supplied at the conclusion of the second day of the appeal, QBE extended its appeal to the substantive order made on 28 April 2017 and the order for costs made on 19 October 2017. On that latter date, the matter was adjourned again on the question of interest (the order records that "parties have not made their calculation"). On 13 November 2017 orders were made by consent (although they were signed on 27 October 2017). The orders deal with prejudgment interest in a way that reflects a compromise, insofar as prejudgment interest of $50,000 was agreed, save that (relevantly) if the judgment is reduced to $215,000, the parties were agreed that the amount of prejudgment interest would be reduced to $40,556. This is expressed as an agreement noted in the orders, rather than orders which cause the amendment of existing orders.

126 The parties' agreement is insufficient to alter the final orders of a court. However, I see no reason to doubt that the parties' agreement will bind them at least insofar as concerns the execution of those orders. It follows that it is sufficient, in order to reflect the reasoning above, to set aside the judgment of $265,000 and substitute for it a judgment in the amount of $215,000. The consequence will be that prejudgment interest will be $40,556, in accordance with the parties' agreement.

127 I turn to costs. I have considered whether an appropriate exercise of the discretion as to costs would be to order that QBE pay, say, 90% of the costs of the appeal. However, on balance, I do not consider that QBE's very limited success in an appeal which occupied two days because of the quantity of points raised by it, some of which were at best borderline arguable, and where such success as there was arose because of QBE's failure to correct an obvious error before the primary judge in a timely fashion, warrants a partial costs order.

128 The orders made on 13 November 2017 suggest there may have been correspondence between the parties of which the court is unaware. If there is some basis for a special costs order, application may be made within the time specified by UCPR, r 36.16.

129 Finally, were a different order as to costs to be made, I would have favoured making a special order as to the costs of the appeal books, so as to ensure that no part of the cost of preparing volumes 1–6 of the Blue Books or the appellant's supplementary Blue Book was borne by the respondent. The Blue Books appear to include almost every document tendered at trial, including swathes which on no view could be "relevant and necessary" for the determination of the appeal: cf UCPR, r 51.29(1)(b). Even so, QBE found it necessary to tender a separate document which had not found its way into the books. No attempt was made to comply with r 51.29(4)(a), placing the documents in chronological order, which in a case such as the present is of some importance. And there has been enormous duplication of the documents which are necessary (for example, almost all of the central documents in the appeal are contained in both volume 1 — from which the appellant's counsel worked, and volume 3 — from which the respondent's counsel worked). Excluding the index, the six Blue Books comprised 2,723 pages, with a further 230 pages in two supplementary books. My impression is that the large majority of those books was unnecessary — most of the pages contain documents which were not referred to by the primary judge or by either party in the course of its oral or written submissions. The cost of preparing four copies for the court, and three for SCM, as well as those for QBE's lawyers, was apt to have been significantly greater than it should have been had the rules been complied with. I appreciate that there may be occasions when the cost of a lawyer spending time to reduce the bulk of appeal books exceeds the saving in photocopying. But in the present case, *many* thousands of photocopied pages were unnecessary.

130 I would respectfully endorse what Bryant CJ, Aldridge and Johnston JJ recently said in *Badawi & Badawi (Costs)* [2017] FamCAFC 196 at [16]–[17], by reference to what this court had said in *Insurance Australia Ltd t/a NRMA Insurance v Milton (No 2)* [2016] NSWCA 173:

> "[16] … The automatic inclusion in appeal books of all of the documents that were before the trial judge without a consideration as to whether they are necessary for the disposition of the appeal is to be greatly deprecated. It is essential that the parties bring a rational mind to what is to be included in the appeal books. All too often voluminous appeal books are produced and then not referred to at all during the hearing of the appeal. It must be borne in mind also that if a document necessary to the argument of one of the parties has been omitted from the appeal books, copies of it can always be handed to the court during the appeal hearing.

[17] Parties and their lawyers should understand that even if successful they cannot assume that any costs order would extend to cover the preparation of unnecessary appeal books."

131 I propose these orders:

1. Appeal allowed in part.
2. Vary the judgment entered in favour of Southern Colliery Maintenance Pty Ltd on 28 April 2017 by replacing $265,000 with $215,000.
3. Otherwise dismiss the appeal.
4. The appellant to pay the respondent's costs of the appeal.

132 **PAYNE JA.** I agree with the reasons of Leeming JA and the orders his Honour proposes.

Orders as per [131]

Solicitors for the appellant: *Mills Oakley*.

Solicitors for the respondent: *HWL Ebsworth*.

EBS BALL

Barrister