District Court

New South Wales

Case Name:	The Owners – Strata Plan No 55682 v W. R. Berkley Insurance (Europe), PLC & Ors
Medium Neutral Citation:	[2020] NSWDC 758
Hearing Date(s):	30 November-4 December 2020; 7-10 December 2020
Date of Orders:	17 December 2020
Decision Date:	17 December 2020
Jurisdiction:	Civil
Before:	Abadee DCJ
Decision:	See paragraphs 448-449
Catchwords:	INSURANCE – strata insurance policy for damage to property – property damaged by fire – occupation of a unit within the strata by an "outlaw motorcycle gang" ('OMCG') for use as its clubhouse – proposal form for insurance referred to nature of occupation of the unit as an 'office' – whether fact of occupation by OCMG disclosed by Insured, by its insurance broker, to underwriting agent for Insurer prior to the policy being entered into – materiality of non-disclosure of occupation by OMCG – whether Insurer entitled to reduce liability to nil under Insurance Contracts Act 1984 (Cth), s 21(3) TORTS – negligence – whether insurance broker negligently failed to disclose fact of OMCG's occupation to Insurer's underwriting agent – whether negligent failure to advise Insured of the risk of an unenforceable policy of insurance if OMCG's occupation not disclosed – whether broker's negligent failure to advise client of alternative options – causation – scope of liability where only part of the loss claimed premised upon Insurer's

breach of contract of indemnity – proportionate liability defence – whether author of earlier proposal form and earlier broker were 'concurrent wrongdoers'

TORTS – negligence – on contingent cross-claim whether insurance agent in breach of duty of care – whether negligence is said to be direct or vicarious

DAMAGES – assessment of value of indemnity if insurer liable for breach of policy

LIMITATION OF ACTIONS – Insurer's contingent cross-claim against underwriting agent – premise that OMCG's occupation was disclosed contrary to underwriter's representation to Insurer – concession that if OMCG's occupation was disclosed on the insured's behalf, there was breach by underwriter of strict contractual obligation – whether cause of action against underwriter in contract statute barred – whether cause of action fraudulently concealed – Limitation Act 1969 (NSW), s 55 – whether ordinary operation of s 14 may exclude period in which wrongful conduct prevents action being commenced

ESTOPPEL – conventional estoppel

EVIDENCE – common knowledge – whether occupation by OMCG of a tenancy was material fact requiring disclosure to Insurer

PRACTICE AND PROCEDURE – Brokers and Insured argue that duty of disclosure waived or modified by disclosure of information – no pleading of the contention – Insurer and Agent argue Owners Corporation had no standing to claim for financial loss asserted by lot owners – no pleading of absence of standing – whether arguments should be considered by the Court

Legislation Cited:

Civil Liability Act 2002 (NSW), ss 5B, 5C, 5D, 5E, 34
Civil Procedure Act 2005 (NSW)
Corporations Act 2001 (Cth), s 917F(2), Part 2D.1, Part 7.6
Crimes (Criminal Organisations Control) Act 2012

(NSW)
Crimes (Criminal Organisations Control) Bill 2009 (NSW)
District Court Act 1973 (NSW), s 134
Evidence Act 1995 (NSW), ss 140, 144
Insurance Act 1973 (Cth), s 17G
Insurance Contracts Act 1984 (Cth), ss 21, 28, 52, 57
Limitation Act 1969 (NSW), ss 14, 55
Privacy Act 1988 (Cth), s 66
Strata Schemes Management Act 1996 (NSW), ss 82, 83, 245
Uniform Civil Procedure Rules 2005 (NSW), r 14.14

Cases Cited:

Anthony v Morton [2018] NSWSC 1884
Apollo Shower Screens Pty Ltd v Building and Construction Industry Long Service Payments Corp (1985) 1 NSWLR 561
Argyropoulos v Layton & Anor [2002] NSWCA 183
ASIC v Cassimatis (No 8) (2016) 336 ALR 209
Breen v Williams (1996) 186 CLR 71
Brescia Furniture Pty Ltd v QBE Insurance (Australia) Ltd [2007] NSWSC 598
Cassimatis v ASIC (2020) 376 ALR 261
CGU Insurance Ltd v Porthouse (2008) 235 CLR 103
CIC Insurance Ltd v Bankstown Football Club Ltd (1997) 187 CLR 384
Commercial Union Assurance Co of Australia Ltd v Beard (1999) 47 NSWLR 735
Commonwealth Bank of Australia v Kojic (2016) 249 FCR 421; [2016] FCAFC 186
Commonwealth v Cornwell (2007) 229 CLR 519
Coote v Kelly; Northam v Kelly [2016] NSWSC 1447
Delor Vue Apartments CTS 39788 v Allianz Australia Insurance Ltd (No 2) [2020] FCA 588
Dovuro Pty Ltd v Wilkins (2003) 215 CLR 317
Faraday v Rappaport [2007] NSWSC 34
GC NSW Pty Ltd v Galati [2020] NSWCA 326
Gestmin SGPS SA v Credit Suisse (UK) Ltd [2013] EWHC 3560 (Comm)
Globe Church Incorporated v Allianz Australia Insurance Ltd (2019) 99 NSWLR 470
Gold Ribbon (Accountants) Pty Ltd (in liq) v Sheers & Ors [2006] QCA 335
Grundt v Great Boulder Pty Gold Mines Ltd (1937) 59

CLR 641
Hadley v Baxendale (1854) 156 ER 145
Hawkins v Clayton (1988) 164 CLR 539
Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd (2013) 247 CLR 613
Ingot Capital Investments Pty Ltd v Macquarie Equity Capital Markets (2008) 73 NSWLR 653
Ketteman v Hansel Properties [1987] 1 AC 189
Leggo v Brown & Dureau Ltd (1923) 32 CLR 95
Macquarie Bank Ltd v National Mutual Life Association of Australia Ltd (1996) 40 NSWLR 543
March v Stramare (E & M.H.) Pty Ltd (1991) 171 CLR 506
Monaghan Surveyors Pty Ltd v Stratford Glen-Avon Pty Ltd [2012] NSWCA 94
Moratic Pty Ltd v Gordon [2007] NSWSC 5
Onassis Calogeropoulos v Vergottis [1968] 2 Lloyd's Rep 403
Pell v The Queen (2020) 94 ALJR 394; [2020] HCA 12
Permanent Trustee Australia Ltd v FAI General Insurance Company Ltd (in liq) (2003) 214 CLR 514
Richtoll Pty Ltd v WW Lawyers Pty Ltd (in liq) [2016] NSWCA 308
Sanderson Motors Pty Ltd v Lindsay Bennelong Developments Pty Ltd [2014] NSWSC 846
Saul & Anor v Menon [1980] 2 NSWLR 314
Seymour v Seymour (1996) 40 NSWLR 358
State of New South Wales v Harlum [2007] NSWCA 120
Stealth Enterprises Pty Limited trading as The Gentleman's Club v Calliden Insurance Limited [2015] NSWSC 1270
Stealth Enterprises Pty Ltd t/as The Gentlemen’s Club v Calliden Insurance Ltd (2017) 19 ANZ Insurance Cases 62-131
Sybil Dawne Hintze v Ratna Tsering & Anor [2018] NSWSC 1190
Sydney Water Corporation v Turano (2009) 239 CLR 51
Tame v New South Wales (2002) 211 CLR 317
Textralian Enterprises Pty Ltd v Perpetual Trustees Victoria Ltd [2000] NSWCA 176
The Nominal Defendant v Cordin (2017) 79 MVR 210

	The Owners – Strata Plan 85044 v Murrell; Murrell v The Owners – Strata Plan 85044 [2020] NSWSC 20 Trajkovski v Simpson [2019] NSWCA 52 Walmsley v Cosentino [2001] NSWCA 403 Wardman v Hatfield [2003] NSWCA 283 Watson v Foxman (1995) 49 NSWLR 315 Williams v Natural Life Health Foods Ltd [1998] 2 All ER 577
Texts Cited:	J D Heydon, Cross on Evidence (electronic version, LexisNexis) J D Heydon, M J Leeming and P G Turner, Meagher, Gummow & Lehane's Equity: Doctrines & Remedies (5th ed, LexisNexis Butterworths)
Category:	Principal judgment
Parties:	The Owners – Strata Plan No 55682 (Plaintiff) W. R. Berkley Insurance (Europe), PLC (First Defendant/First Cross-Claimant) Berkley Insurance Company (Second Cross-Claimant) HHIA Pty Ltd (Second Defendant) Mr D Hynes (Third Defendant) Ms L Honeychurch (Fourth Defendant) Westcourt General Insurance Broker Pty Ltd trading as Westcourt General Insurance Broker Pty Ltd ACN 009401772 as trustee for the WGIB Trust (Fifth Defendant) QUS PTY LTD (Cross-Defendant)
Representation:	Counsel: Mr C Simpson for the plaintiff Mr M Friedgut for the first defendant/first cross-claimant and the second cross-claimant Mr J Sleight for the second to the fifth defendants Mr M Newton for the cross-defendant Solicitors: Baker Mannering & Hart for the plaintiff McInnes Wilson Lawyers for the first defendant/cross-claimant HBA Legal for the second to fifth defendants Gilchrist Connell for the cross-defendant
File Number(s):	2019/100722

Publication Restriction: Nil

JUDGMENT

INTRODUCTION

1 On 3 February 2014, a fire broke out in a 4-unit apartment block in Byron Bay (the '**Property'**). The Property was the subject of a strata scheme managed by the plaintiff (the '**Insured'**). The Insured was insured under a policy of commercial strata insurance to cover the period 14 April 2013 to 14 April 2014 with the first defendant (the '**Insurer'**). After the fire, the Insured made a claim for indemnity on the policy. On 14 February 2014, the Insurer declined indemnity and justified doing so on the basis that the Insured did not comply with its statutory[1] duty of disclosure of informing the cross-defendant (QUS Pty Ltd), its underwriting agent (the '**Agent'**) that one of the units in the block was occupied by the Nomads Motorcycle Club (the '**NMC'**) and used by that club (or, more precisely, the North Coast Chapter of the club) as its clubhouse.

The claims against each of the defendants

2 By its Statement of Claim filed on 1 April 2019, the Insured sues the Insurer under the contract of insurance for its costs of rebuilding the property, and consequential costs of delay in rebuilding, such as rent paid on other premises. It contends that it had no obligation to disclose the circumstance that Unit 2 of the property was occupied by the NMC but even if it did, (a) the non-disclosure did not entitle the Insurer to deny indemnity and (b) on or about 9 April 2013, Mr David Hynes, the third defendant, had disclosed to Ms Tania Holmes, an employed underwriter of the Agent, the NMC's occupancy.

[1] Insurance Contracts Act 1984 (Cth) (the 'IC Act'), s 21(1).

3 By its alternative claim, in the event that its claim against the Insurer fails, the Insured sues HHIA Pty Ltd ('**HHIA**'), the second defendant, and its directors, Mr Hynes and Ms Lindy Honeychurch (hereafter '**the Brokers**'), its brokers in professional negligence, in substance, for failing to effect an enforceable insurance policy and, in particular, for its failure to notify the Insured of the requirement for disclosure of the NMC occupancy and disclose other matters that might have meant that insurance cover might have been obtained on several alternative bases. The Insured claims the same loss as against the Brokers as it does against the Insurer, on the bases that it did not obtain a policy covering that loss, with the Insurer, or some other insurer. The Brokers were also 'authorised representatives' of the fifth defendant, a financial services licensee (the '**AFS Licensee'**). By operation of the provisions of Part 7.6 of Chapter 7 of the *Corporations Act 2001* (Cth), the AFS Licensee is jointly and severally liable for the remedies that the Insured might have personally had against the authorised representatives. There is no substantive difference in the position of the Brokers and the AFS Licensee so, hereafter, unless indicated otherwise, the reader should assume that the position of the AFS Licensee is no different to that of the Brokers.

The defences

4 The Insurer's position is that the Insured breached its statutory duty of disclosure, by failing to disclose that Unit 2 was occupied by the NMC and used by it as its clubhouse and justified its avoidance of the policy on that basis. It denies that any such disclosure was made on or about 9 April 2013.

5 The Brokers were jointly represented. The Brokers admitted that they knew of the NMC's occupancy as at 2 April 2012 but they deny any responsibility. The Brokers denied that they failed to disclose the NMC occupancy to the Insurer at any material time. They contended further that the Insurer already knew of the NMC occupancy by 11 April 2013. Further, they pleaded in their Defence that any breach of duty by any of them caused no loss to the Insured. This was because: (a) no insurer would have provided cover in the known circumstances of the NMC occupancy; (b) the Insured was in breach of other conditions in the policy with the Insurer so that the policy would not have responded to the claim in any event. For the latter, one of the owners in the units was conducting

building works in his unit in breach of the Insured's policy. The Brokers all claimed the benefit of proportionate liability under Part 4 of the *Civil Liability Act 2002* (NSW) (the '**CL Act**'). They nominated the Insurer and the Agent as 'concurrent wrongdoers', as well as other individuals. Further, the Brokers pleaded that the claims against them are statute-barred. Separately, the Brokers contended that even if there was non-disclosure and they were in breach, their liability would not extend to damages for delay because of the Insurer's failure to pay out.

The Insurer's cross-claim against the Agent

6 To meet the contingency that the Court accepted that the Insured had, through the Brokers, disclosed to the Agent the NMC occupancy by 9 April 2013, the Insurer filed a cross-claim against the Agent on 27 August 2020. On that premise, the Insurer asserted that the Agent should have referred to it the risks associated with the NMC occupying the premises and not bind the Insurer if it was aware of that circumstance. It asserted that the Agent breached of their Agency Agreement, committed a breach of fiduciary duty, and that its conduct was negligent. It contended that if had received such disclosure, it would not have underwritten the policy.

7 The Agent denied that the Insured, through the conduct of the Brokers, disclosed the fact of the NMC occupancy by 9 April 2013. That being so, although it admitted that it bound the Insurer, it says it was ignorant of the NMC occupancy up to the time of the fire. That being so, it contended that it was not in breach of any of its obligations as the Insurer's agent under the Agency Agreement, or of any fiduciary duty or breached its duty of care. It also contended that the Insurer's claims against it were statute-barred.

Issues

8 The parties agree that the critical question is whether the NMC's occupancy of Unit 2 was disclosed to the Agent, and therefore the Insurer. If it was, the Insured's case against the Insurer should succeed on the question of breach. The Insurer would then have rights against the Agent for binding it to a policy with the Insured which went beyond the Insurer's underwriting requirement that

only tenants with acceptable occupations be permitted to occupy (motor cycle clubs not falling within the listed category).

9 If the NMC occupancy was not disclosed, it would have several consequences. First, for it to establish liability in the Insurer, the question would arise whether there was a statutory requirement for disclosure of the NMC's occupancy and, if so, whether the Insurer was entitled to reduce its liability to zero (under s 28(3) of the IC Act). Secondly, if the claim against the Insurer failed, then the Insured's claim against the Broker, the authorised representatives and the AFS Licensee would come into play.

10 The paramount factual issue turns on what was said on 9 April 2013 when Mr Hynes, the third defendant, spoke for a second time by telephone to Ms Tania Holmes, who, at the time, was a development underwriter of the Agent. Both the Insured and the Brokers say that the effect of that conversation was disclosure to the Agent, and therefore the Insurer, that the NMC was in occupation of Unit 2. The Insurer and the Agent replied that although the subject matter of the conversation was in relation to a reduction in the premium for insurance coverage that had been quoted, the conversation did not rise to the level of disclosure about the occupancy of Unit 2, and certainly not the disclosure of the NMC as the tenant of that unit.

11 On the question of damages, the Agent questioned whether that, at the level of principle, the Insured would be entitled to the costs of rebuilding: further, quantum is not agreed. I indicated, from the outset, that if there was a real contest on quantum, that I would be inclined to refer the quantum of the costs of rebuilding to a referee.

12 A principal issue on damages is whether the Insured is entitled to the rent that was lost by the individual lot owners that extended beyond the recovery of lost rent obtained as a result of a promise in the insurance policy. The Insured contends that this would fall within one or both of the limbs of the rule in *Hadley v Baxendale* (1854) 156 ER 145 in its claim against the Insurer for breach of contract. The Insurer (and the Agent) disputed the entitlement in principle, and say that to the extent that rent was recoverable at all, the Insured had no standing to seek it since it was limited in its coverage of rights to individual lot

owners. They said that if it did arise, it could rise no higher than a capped sum of $75,000 under the policy.

THE INSURED'S CLAIM AGAINST THE INSURER

Basal Facts

13 A proposal for building insurance for the strata dated 11 March 2011 described Unit, or lot 2, as "an office". This policy was underwritten by (Queensland) Calliden Insurance Ltd ('**Calliden**') through the brokering of King Insurance Agents. Mr Ian Cooper, the brother to Ms Warne and co-owner of lot 4, and former owner of lot 1, authorised the form.

14 On 2 April 2012, Mr Anthony O'Neill, who at that time was the strata manager for the Insured, contacted the third defendant, Mr Hynes, director and co-owner of HHIA about obtaining insurance cover. Mr O'Neill advised Mr Hynes of the identity of the tenants of the building, including the occupancy of the NMC. According to his affidavit, around about this time, Mr Hynes visited the premises and had a conversation with Mr Triff, one of the lot owners to the apartment block. There was a discussion of the NMC occupancy. Mr Hynes' evidence about meeting Mr Triff on this occasion is disputed.

15 On 9 April 2012, the Insured signed a letter appointing HHIA for the purpose of obtaining insurance cover for the property. Ms Honeychurch emailed a copy of that letter of appointment to the Agent the next day.

16 On 10 April 2012, the Brokers arranged a policy of insurance, on the Insured's behalf, through the Agent, with Calliden for the period 14 April 2012 to 14 April 2013. Calliden apparently provided insurance on the basis of information provided in the Insured's 11 March 2011 proposal. It appears, though, that by 2013, Calliden was no longer accepting such insurance.

17 On 19 March 2013, Ms Stephanie Harvey, an employee of the Agent, sent an email to Ms Honeychurch, in which she noted the Insured's policy was due to expire on 14 April 2013; advised of a change of underwriter (from Calliden to the Insurer); and offered to arrange a new policy underwritten by the Insurer and enclosed a quote.

18 On 9 April 2013, the third defendant, Mr David Hynes, the other director and co-owner of HHIA, rang Ms Tania Holmes of the Agent, and asked her for terms of renewal of the policy. Ms Holmes sent an email at 12:13pm, attaching a quote previously forwarded by Ms Harvey.

19 At about 12:20pm on the same day, Mr Hynes rang Ms Holmes again and queried the premium in the quote. He sought a reduction in the premium. This part of the conversation is agreed. The balance of what was said during the call is hotly in dispute.

20 On 10 April 2013, Mr Hynes rang Ms Holmes again, seeking a response to his request for a reduced premium.

21 On 11 April 2013, Ms Holmes, purportedly on behalf of the Insurer, sent revised renewal terms, including, relevantly, a reduced premium.

22 On 12 April 2013, the Brokers completed arranging a policy of insurance on the Insured's behalf with the Agent.

23 On 19 April 2013, Ms Brook Trow, of the Agent, sent a certificate of currency to Mr Hynes.

24 On 3 February 2014, the fire broke out on the property. Not long thereafter, the Insured made a claim on the policy.

25 On 14 February 2014, the Insurer declined indemnity under the policy and declared its avoidance of the policy. Mr Mylton Burns, a Principal of McInnes Wilson Lawyers, solicitor for the Insurer, explained that the reasons for declinature were that Unit 2 was occupied by the NMC and used by it as its clubhouse. The Insurer had had an established history of declining policies for properties occupied by motorcycle clubs on the basis such occupants were considered 'high hazard tenants'. The NMC's occupancy and use of Unit 2 for its clubhouse was not a matter notified to the Insurer prior to the fire. The letter referred to the Insured's statutory duty of disclosure (s 21 of the IC Act) and s 28 of the IC Act which, it was asserted, reduced the Insurer's liability to nil, given that it would not have underwritten the policy but for the non-disclosure.

26 On 4 September 2014, the Coroner's Court issued a notice dispensing with holding a fire inquiry and noting that the cause of the fire was not determined, but there were no suspicious circumstances.

Lay evidence

Plaintiff's evidence of the individual lot owners

Ms Maree Warne

27 Ms Maree Warne is the sister of Mr Ian Cooper, the original owner of the land on which the Property sits. In 1995, she and her husband bought a half share interest in the land. She and her husband originally bought, and later sold, lots 2 and 3, but kept lot 4. Lot 3 was sold to Mr Tony O'Neill in 2001. Lot 2 was sold to Mr Darrin Field in 2008. She deposed in her affidavit that it became known to them that Mr Field was a member of the NMC, although she indicated that she and her husband had a workable relationship with him. Mr Field had collected funds for insurance and other common strata expenses.

28 She deposed that if she had been informed that the Insured could not obtain insurance because of the NMC's occupancy, she would have spoken to Mr Field and asked him for the NMC not to use his unit. The Brokers' Counsel took no objection to this evidence and it was not challenged.

29 Under cross-examination, Ms Warne accepted that from about June 2008, when Mr Field purchased lot 2, she was aware that the unit was being used by the NMC. This knowledge was based upon what Mr Cooper had told her. She might have visited the unit, but could not recall when.

30 It was suggested that she had informed Ms Honeychurch, in response to the latter's request for information as to insurance provided prior to 2011, that her brother would not be assisting and that she had justified this on the basis of his brother indicating that if it was not for him, there would not have been any insurance in the first place. Ms Warne accepted that she had said this, in effect, to Ms Honeychurch. She also accepted that the reason was Mr Cooper's response to a question in a proposal form (March 2011) describing Unit 2 as 'an office'. She acknowledged that this was written.

31 Counsel for the Agent suggested to Ms Warne that Mr Cooper had also led her to understand that the NMC's occupancy in Unit 2 meant that it was difficult for

her (and the other lot owners) to arrange insurance. She did not accept that any difficulty in obtaining insurance would have had anything to do with Unit 2.

32 No suggestion was made otherwise than that Ms Warne was a credible and reliable witness. I would generally be inclined to accept her evidence.

Mr Darrin Field

33 Mr Field swore two affidavits. Mr Field is the owner of lot 2. At the time of the fire, he held the office of President of the North Coast Chapter of the NMC. He deposed that ever since he had purchased lot 2 in June 2008 (as an investment property), it had been used as an office and meeting rooms for the NMC.

34 He deposed that no one had ever raised with him any issue with obtaining insurance for the Insured and that the NMC's occupancy might mean that such insurance coverage would not be obtained. If he had been informed, he deposed that he would have made sure that the NMC would not use Unit 2 and would have arranged another tenant to lease the space. The Brokers' Counsel did not object to that evidence. He was not challenged on this evidence.

35 In cross-examination by the Insurer's Counsel, he acknowledged that the NMC signage was outside the door and that it brandished a banner outside of it. He did not seek to conceal the NMC's occupancy. He said that there were gatherings of the NMC in Unit 2 each Friday night which ran into the early hours of Saturdays. Certain significant improvements were made to accommodate those gatherings including the installation of an industrial fridge, along with shower and change facilities, and other entertainment facilities, such as pool table and pinball machine, with a bar.

36 In cross-examination by the Agent's counsel, Mr Field indicated that the security which ANZ took for the loan finance for the lot came from his own personal residential property.

37 Mr Field was not shaken in cross-examination and no suggestion was made that his evidence was not credible or reliable. I accept his evidence.

Mr Anthony ('Tony') Walter Triff

38 Mr Tony Triff is the owner of lot 3. He purchased the unit in 2011. He uses the unit as his studio, he being an artist. He deposed in his affidavit to knowing that Mr Field was the local president of the NMC from the moment he became interested in buying lot 3. He came to observe the movement of people in and out of lot 2. He deposed that lot 2 was usually empty during the week, although was occasionally visited by men on bikes. He observed meetings on Fridays from about 4:00pm; at which time he would usually leave his lot. He never observed any problems with the group in using lot 2.

39 He deposed that on or about 12 April 2013, he was visited by Mr David Hynes, of the second defendant. Mr Triff said that during their conversation, he and Mr Hynes were standing outside lot 2, which carried the NMC sign displayed on the glass door. The main import of the conversation was Mr Triff asking for Mr Hynes to arrange to get the insurance as cheaply as possible. In response to this, Mr Triff deposed to Mr Hynes saying (whilst gesturing towards lot 2, with his head):

> "Well I don't think anybody else will touch this."

40 In his affidavit, Mr Triff denied that the fire was caused by the presence of comic books in the ceiling of Unit 3, with certain light fittings, though he accepted that some comic books (and other books) were placed on the shelves.

41 He deposed that at no time did Mr Hynes, or anyone else for the Brokers, inform him that the presence of the NMC would mean that the Insured could not obtain insurance cover. If he had been so informed, he deposed that he would have discussed the issue with Mr Field and requested that they immediately vacate Unit 2. The Brokers did not object to or challenge this evidence.

42 Under cross-examination by the Insurer's counsel, Mr Triff indicated that he had only initially become aware of the NMC's occupation through his agent. He said that although he did not see the signage for the club at or about the date of his purchase, signs began to subsequently emerge. He was referred to a

poster that was in evidence (at Exhibit 2, p 1204[2]), but he said he could not identify that as being the poster that he had deposed to in his affidavit. It was suggested that in this regard, his evidence was inconsistent with his affidavit evidence, where he deposed to the poster being prominently displayed on the sign; and he disputed that. At any rate, he accepted that the NMC never sought to conceal its signage.

43 He did not dispute speaking to Mr Hynes on 12 April 2013, although he did not recall the specific date. But if Mr Hynes was correct, he acknowledged that it was likely that he might have purchased lot 3 earlier than December 2012.

44 With reference to his conversation with Mr Hynes in April 2013, it was suggested that Mr Hynes had asked him if he knew who was the occupant of lot 2, and that he had indicated that it was the NMC. Mr Triff said that he could not recall conversation to that effect. It was also suggested that he went to speak to Mr Field and said that "we have a problem" in that the Insured could not get cheap insurance because of the NMC's occupancy. Mr Triff rejected this.

45 Under cross-examination by the Agent's counsel, Mr Triff was referred to the part of his affidavit (paragraphs 36-37) where he commented upon the content of a police statement he had given to Detective Senior Constable Parker. Mr Triff was silent on the part of the police statement where words were attributed to him as telling the officer that he could not get insurance because of the NMC being in the Property. Mr Triff denied that this was so. When it was suggested that this was in fact the position, Mr Triff distinguished between merely contemplating getting insurance and actually trying to get it. When it was suggested that Mr Hynes had told him it would be difficult to get insurance and that the NMC's presence was relevant, Mr Triff indicated that he was not aware of this.

46 I am cautious about accepting Mr Triff as a reliable witness where his evidence affected his personal interests. There were multiple inconsistencies in his evidence, and I formed the impression that he was conscious of the effect of the evidence upon his position.

[2] Page references are made to a 9 volume Court Book supplied to the Court.

Mr Leon King

47 Leon King was the owner of lot 1. He purchased it in December 2011, as an investment property.

48 He gave some evidence about loss of rent, which will be referred to later in these reasons in the Damages section.

49 He also deposed that if he had been informed that the Insured could not obtain strata insurance because of the NMC's occupation of lot 2, he would have asked Mr Field to remove the NMC from occupation. The Brokers' did not object to or challenge that evidence. For himself, he had never had trouble with the NMC.

50 Under cross-examination by the Agent's counsel, Mr King said he did not know that an electrician came around to investigate after the fire.

WAS THE NMC OCCUPANCY DISCLOSED BY MR HYNES TO MS HOLMES?

The Insurer's affidavit evidence

51 The Insurer adduced evidence of understandings and systems in place as between itself and the underwriter, the Agent, to show that the underwriters were unlikely to accept risk for strata insurance where an occupant was the NMC. This was not only relevant to the materiality of non-disclosure (for s 21(1) of the IC Act), but also relevant to the question whether there was a non-disclosure of a matter.

Mr Hodgson's evidence

52 Mr Craig Hodgson was the CEO of the Agent at the material time. He had full underwriting authority granted by the Agent's underwriting guidelines, which he shared with Mr Ricky Cecil, the Underwriting Manager of the Agent.

53 He deposed that the Agent was the underwriting agent for Calliden, which had previously provided building insurance coverage in respect to the Property. He exhibited to his affidavit a proposal form, dated 6 April 2011, signed by Mr Ian Cooper, in which, relevantly, the occupancy of lot 2 was listed as 'Office".

54 Mr Hodgson explained that the Agent's occupation tables were based upon ANZSIC occupation tables and noted that for commercial buildings, several criteria were taken into account when rating risk, including but not limited to the

nature of the tenant. Through 2012, the description of a lot as an 'office' fell within the category of 'Consultants Office (N.O.C)' ('N.O.C' meaning office not otherwise specified in the guidelines) in the occupation table.

55 Mr Hodgson deposed that from about 10 April 2012, the Agent became aware that HHIA had replaced the Insured's broker. Amongst other communications on that day, Ms Lindy Honeychurch, a director of HHIA, sent an email attaching a closing advice for a period of insurance from 14 April 2012 to 14 April 2013.

56 He deposed that on 1 March 2013 new underwriting guidelines were introduced. They were based upon or adopted from ANZSIC Guidelines. Mr Hodgson explained that if an occupation was not listed in the occupation table or was designated a 'Referral', the Agent was required to seek instructions from the Insurer before any such risk could be accepted. Mr Hodgson deposed that whilst the guidelines did not specify 'outlaw motorcycle clubs' and/or 'motorcycle clubhouses'. Mr Hodgson regarded outlaw motorcycle clubs as being "high risk" tenants. The Agent, he deposed, had a history of insuring only low to medium hazard risks, something he indicated had been marketed, and known by insurance brokers.

57 Mr Hodgson exhibited redacted versions of a series of applications from 'outlaw motor cycle club' tenancies previously declined by the Agent and indicated that none of them had been referred to the Insurer.

58 Mr Hodgson also (annexed to his affidavit) correspondence sent to and received by the Agent representatives to the Insured's broker. This included documents which addressed the Insured's duty of disclosure. Mr Hodgson deposed that the only amendment requested by Mr Hynes, the broker, was a reduction in the premium. Since this did not affect the risk, he was able to make this request verbally.

59 After the fire occurred on 3 February 2014, and after the Agent was notified of the claim, Mr Hodgson deposed to a conversation, among others, with Ms Lorinda Brooking and Mr Ricky Cecil, on 1 March 2014. Ms Brooking was the NSW manager of the fifth defendant. Mr Hodgson's evidence was admitted subject to a limitation that it was relevant to establishing only whether or not the Insurer (by its agent) was notified of disclosure that the NMC was a tenant in

the building. It was not admissible for the truth of anything Ms Brooking intended to say. Ms Brooking was reported as saying that the broker did not disclose the NMC tenancy as it assumed that the Agent knew of it. When Mr Cecil indicated that the Agent had the tenancy disclosed as an office, Ms Brooking was reputed to have said that a 'bikie clubhouse' was 'sort of like an office'. A file note of this conversation was in evidence (Exhibit 1D-1, p 2465).

60 He deposed to a conversation substantially to the same effect on the same day with Ms Leanne Holeszko, National Manager of the fifth defendant. The same limitation was imposed in relation to the admissibility of this evidence. A file note was also taken of that conversation.

61 Under cross-examination, Mr Hodgson:

- accepted that he was unaware whether the Agent ever asked questions of the Insured about the occupancy of the premises;
- accepted that it was information in the proposal form which had been completed in March 2011 which was relied upon to approve cover for the April 2013-April 2014 year (T 99);
- did not accept that it was unusual, or inappropriate that the person who completed that proposal form identified himself as a 'previous secretary'; and
- said, with reference to the Agent's categories of risk assessment that 'office' use was a class 1 (being the lowest number on the risk scale of 1-10). Most offices would fall within that risk category.

62 No challenge was made to the credibility or reliability of Mr Hodgson's evidence. I accept he was credible and that his evidence was reliable.

Mr Cecil's evidence

63 Mr Cecil was the underwriting manager of the Agent as at April 2013. In his affidavit, he deposed to Mr Hodgson telling him during an early interview that the Agent had a long history of only insuring low to medium risk properties. As underwriting manager, part of his job involved training staff and inculcating them with the content of the Agent's underwriting guidelines.

64 Mr Cecil explained the process of considering applications for insurance from brokers, including the limits of authority for each underwriter. A similar process related to renewal of policies. In both categories of case, an underwriter would

rate the risk when offering cover for commercial buildings. The nature of the tenants was one of several circumstances relevant to the risk rating.

65 In his affidavit, Mr Cecil deposed to very similar evidence to that deposed to by Mr Hodgson. Thus, he said that only the risks specifically listed in the occupation table were underwritten by the Agent unless it appeared to be a low to medium risk suitable for referral to the supporting insurer. He indicated that given that risks generally could be regarded as acceptable or not, it was rare to refer a risk to the Insurer for further directions.

66 The ANZSIC occupation and the Agent's guidelines did not specifically proscribe 'outlaw' motorcycle clubs and/or motorcycle clubhouses from coverage, but Mr Cecil's opinion was that the Agent's personnel would not seek the Insurer's opinion about a 'high hazard' risk. Mr Cecil exhibited to his affidavit a series of requests for quotes for cover from other brokers refused on the basis that occupants of the property to be insured included an outlaw motorcycle club.

67 Mr Cecil deposed to his own involvement in the acceptance of risk in March and April 2013. Amongst other things, he was conscious of the tenant for lot 2 being listed as 'Consultants Office (N.O.C)', which was a type of occupation specifically listed in the Guidelines. He was unaware that lot 2 as occupied by the NMC. Had he been aware that the NMC was a tenant, he deposed that he would have declined the risk.

68 He deposed to Ms Tania Holmes, a development underwriter with the Agent, informing him shortly after 3 April 2013 that the broker, David Hynes, had contacted her, asking for a reduction in the premium. She asked Mr Cecil to re-visit the risk. Mr Cecil did not depose to Ms Holmes supplying any context for such request, for example information she had received from Mr Holmes. Exercising what he deposed to was a 'discretion', Cecil reduced the premium, as he explained it, as a 'gesture of goodwill'. This would not have occurred had he known of the NMC occupancy.

69 Mr Cecil deposed to a conversation with Ms Brooking on 1 March 2014 in relevantly the same terms as that referred to by Mr Hodgson in the latter's affidavit, whose content I have already referred to.

70 In cross-examination, Mr Cecil:

- indicated that he worked in relatively close proximity to underwriting managers, including, but not limited to, Tania Holmes;
- did not accept that he was her supervisor (notwithstanding that he had completed a performance appraisal form for her, covering the period 1 July 2013 to 30 June 2014);
- indicated that though there might have been something like 30-40 telephone calls a day from brokers that were put through to the group of underwriting managers, there was no protocol at the time (March 2013) in dealing with them, including any notation of information supplied by the broker;
- said that although he may have rated risks personally, more often he would review what was referred to him;
- indicated that in his experience, brokers seeking to negotiate alteration of a premium would be aware that certain occupations had a higher risk than others;
- accepted that the Agent's guidelines did not specifically exclude motorcycle clubs;
- said that although he signed Section B of a performance appraisal form concerning Tania Holmes, he did not recall whether he was her immediate supervisor or 'manager';
- indicated that as at March 2013, although Tania Holmes was capable of rating a risk, she did not have the authority to sign off on it; and
- accepted that without documentation, he had trouble recalling the events of March 2013.

71 I considered that Mr Cecil was a good witness, trying to do his best to give honest evidence; in a context where he acknowledged difficulty in recalling events which, at the time, did not have special significance for him.

Mr Garling's evidence

72 Mr Christian Garling was, at the material time, the National Facilities Manager for the Insurer. He deposed that he would have been, in effect, the point of contact for persons within the Agent who might wish to approach the Insurer, relevantly, if they had a query about the application of underwriting guidelines. He deposed to having dealt with both Mr Craig Hodgson and Mr Ricky Cecil, the general manager and underwriting manager of the Agent, respectively. He deposed to his recollection that at the material time, the Agent was a 'low to medium risk' underwriter of insurance for bodies corporate of strata title developments.

73 He deposed that Mr Hodgson and/or Mr Cecil might occasionally refer queries about underwriting to him. He deposed that he would have been surprised had they raised with him any query in relation to whether the Agent should insure a building wholly or partly occupied by a motorcycle club. If that matter had been raised with him, he would have directed them to decline the business.

74 Mr Garling was not required for cross-examination and, accordingly, was not called as a witness. I accept his evidence.

Ms Holmes' evidence

75 Ms Tania Holmes is an underwriter with the Agent, but from February 2013, she was a development underwriter. She deposed to understanding the need to perform her role in accordance with the Agent's guidelines and she said she received some training from Mr Cecil.

76 She deposed that when the Agent's new guidelines emerged in March 2013, she understood the ratings system for various occupations. She deposed that she would not write, renew or recommend risks in relation to 'outlaw motor cycle clubs'. This, she deposed to understanding, was consistent with her prior experience that general insurers did not cover 'high hazard' risk tenants.

77 She deposed that when she started, she had no authority to offer renewal of terms: she had to go to Mr Cecil or Mr Hodgson.

78 Ms Holmes became personally involved in the renewal of the plaintiff's strata insurance when, on 9 April 2013, she received two telephone calls from Mr David Hynes, director of the second defendant. The first call concerned discussion about re-sending renewal terms. She deposed to recalling that the second call concerned Mr Hynes ringing to request a reduction in the premium.

79 Ms Holmes deposed to receiving another call from Mr Hynes the next day, 10 April 2013. She could not recall the exact words used but said that it was on the subject of the request for a reduction in the premium. A record of that call appeared in the Agent's telephone records.

80 Ms Holmes deposed that at no time in any of the calls on 9 or 10 April 2013 did Mr Hynes inform her of the occupancy of the NMC at the property. She also

refuted evidence from Mr Hynes, to the extent that he suggested any mention of the nature of the tenant of Unit 2.

81 She deposed that had she been aware that the NMC was the tenant for one of the lots, she would have informed Mr Hynes that the risk was considered 'high hazard' and outside the Agent's underwriting guidelines and therefore could not be covered. But because of her limited authority, she would have needed to seek confirmation from either Mr Cecil or Mr Hodgson in writing that the risk could not be renewed, but only after asking Mr Hynes to confirm the tenancy in writing. This was because it was the Agent's standard practice to put any information relating to risk in writing (a reduction in premium was not required to be in writing as it did not affect the risk).

82 In the absence of disclosure of the NMC occupancy, she deposed to only approaching Mr Cecil to consider the request for a reduction in the premium. Mr Cecil authorised that request.

83 In a supplementary affidavit, prepared after the Brokers' evidence was served, Ms Holmes refuted Mr Hynes' evidence that the NMC occupancy was disclosed in the second call on 9 April 2013 and reiterated, in effect, that her dealings with him were limited only to fielding his request for a reduction in the premium. She denied every indication in Mr Hynes' evidence indicating such discussion and affirmed that at no stage in the telephone conversations on 9 or 10 April 2013 was there any discussion about the NMC's occupation. Specifically, she denied the reference in the file note to 'discussing tenants' with Mr Hynes and that (the Agent) was "already on risk".

84 Under cross-examination, Ms Holmes' accepted:

- that she had no recollection of what was said during her telephone conversations with Mr Hynes on 9 and 10 April 2013;
- that she could not dispute the correctness of Mr Hynes' evidence that the second call on 9 April 2013 was of 3 minutes, 47 seconds duration;
- that it was "possible" that Mr Hynes' accounts of what was said on those days was true, including (not least) that it was possible that he might have mentioned the occupancy by the NMC (T 167-169);

- that she was not in a position to positively refute what Mr Hynes had said on the subject of tenancies, in the sense of suggesting, as she had in one of her affidavits, that he had *not* made any mention of any tenant;
- that a broker calling her to negotiate a premium on a renewal might, in the course of that, raise with her various 'risk' factors, including the nature of the occupancy;
- that she liked to assist brokers to 'get the deal done';
- that when she referred to her 'extensive experience', as at March 2013, it was predominantly in motor vehicle underwriting;
- that as at April 2013, she could not sign off on underwriting, though she could rate risks;
- that, with reference to her understanding that motorcycle clubs were a 'no go' area of risk, and with reference to the Occupation Table (p 2715), there was nothing in the document, and nothing in her training, which would have led her to understand that motorcycle clubs were excluded; and such understanding as she had about outlaw motorcycle gangs was not evident from the guidelines or the training she had received;
- 'motorcycle clubs' fell within her interpretation of 'moral hazard', even though moral hazard was not referred to in the guidelines;
- that she could not specifically pinpoint what was it about a 'motorcycle club' that made it a 'no go';
- the significance of note-taking of interactions with brokers and that, contrary to her own understatement of its significance, she was aware that note-taking was a matter of importance to the Agent: she had subsequently been counselled about the matter in July 2018; and
- the importance of note-taking may have been elevated in her case because of her own limited recollections – she could not even recall the circumstance of being counselled for her 'deficiency' in note-taking which occurred just over two years before.

The brokers' affidavit evidence

85 The second to fifth defendants relied upon multiple affidavits of Mr David Hynes.

86 Mr David Hynes was a director of HHIA and jointly controlled it with Ms Honeychurch, his de facto partner. He swore affidavits dated 11 November 2019, 19 December 2019 and 14 October 2020.

Discovering the NMC Occupancy

87 In his first affidavit, Mr Hynes said he began his association with the Insured on 2 April 2012 when Mr Anthony O'Neill, then owner of lot 3 of the Property,

informed him of his intention to sell and indicated that he was the body corporate manager. Mr O'Neill was an existing client of HHIA. Mr Hynes deposed that Mr O'Neill had told him that the NMC was a tenant of one of the units and had been for some years. Mr Hynes deposed to approaching Mr Triff, who at that time was a tenant of Unit 3, and Mr Triff confirmed for him that the NMC attended Unit 2 on Fridays. Eventually, Unit 3 was transferred from Mr O'Neill to Mr Triff.

88 Mr Hynes elaborated on the conversations he said he had with Mr O'Neill (and Ms Holmes) in his third affidavit. He deposed to Mr O'Neill saying to him that he was "looking to get insurance for my unit...". Mr Hynes was challenged on the completeness of his statement of what was discussed and Mr Hynes accepted that there was more content in that conversation than that which was referred to in his third affidavit. He acknowledged that it was through Mr O'Neill that he learnt that the NMC was in occupation of unit 2.

89 In relation to Mr Triff, Mr Hynes deposed to not seeing any NMC signage on Unit 2 and asking Mr Triff who was in the unit and that, in response, Mr Triff told him "that's the Nomads. Usually they are just there on Fridays for beers and to play music. They don't do any other business there."

90 Under cross-examination, Mr Hynes was challenged as to the date of this conversation. It was suggested that it was, as Mr Triff had deposed, a conversation that occurred in April 2013 as the latter had only become an owner later in 2012. Mr Hynes maintained that it was in April 2012 and that Mr Triff had earlier been a tenant of the lot. He also said that he did not mention to Mr Triff that he had recently spoken to Mr O'Neill.

91 Counsel for the Agent put to Mr Hynes that it was only Mr O'Neill, and not Mr Triff, who was the source of information about the strata position in April 2012, and that Mr Hynes' conversation with Mr Triff had occurred only in April 2013. Mr Hynes was referred to the contentious handwritten note (see paragraph 0, below) which contained several entries, one being '10/4' (Annexure 'DVH1' to his affidavit 19/12/19). It was put to Mr Hynes, but denied by him, that he was recording what Mr O'Neill had told him on a phone conversation on 2 April 2012.

Unsuccessful attempt to place cover with Axis

92 Mr Hynes was also challenged as to the adequacy of disclosure to the Insurer when trying to arrange cover with a different insurer, Axis Underwriting Services Pty Ltd ('**Axis**'), in an email on 4 April 2012 (Exhibit 1D-8, p 3161). Unlike the other tenancies, whereby he had given a specific description, his only description of the tenancy for Unit 2 was "social club". It was suggested that this was inadequate in terms of the duty of disclosure for an insurer. Mr Hynes disagreed and said that he followed up with further information subsequent to the email. His evidence (T 222-223, 226) was that he told Ms Wesselman that the social club was Nomads. Axis declined to provide the cover.

93 It was also suggested to, but denied by, Mr Hynes that having failed to secure cover from Axis in April 2012, HHIA sought to get it from the Agent. Mr Hynes explained that HHIA was dealing with renewal. In relation to coverage for the period from April 2012 to April 2013, he said he did not know what steps he had undertaken to comply with the duty of disclosure.

94 On 5 April 2012, Ms Wesselman, an underwriter with Axis Underwriting, sent an email to Mr Hynes indicating that the underwriter was not interested in providing a quote. This was due to the "Nomads Social Club" reference. Counsel for the Agent put to Mr Hynes that having received rejection from Axis, after he had mentioned the NMC occupancy, he understood it would be difficult to place the risk with a different insurer and that he was required to disclose to the Agent the rejection by Axis. Mr Hynes was referred to what he informed the Agent on 10 April 2012. It was suggested that he had informed it that there was no change in tenancies and that HHIA was just taking over a policy. Mr Hynes said that the conversation on that day was about the Letter of Appointment signed by Mr O'Neill on 9 April 2012 (the '**LOA**'). It was put to, but denied by, Mr Hynes that as at 10 April 2012 he did not specifically know which tenant occupied which unit. He accepted, however, that he assumed that the Agent was aware of the nature of the tenants, including the NMC, at this time.

95 The Agent relied upon an email which Mr Clarke, of the Agent, sent to Mr Hynes at 2:00pm on 10 April 2012 which initially declined the LOA.

96 Counsel for the Agent put to Mr Hynes that the reference to '10/4' was actually a note of his conversation with Mr Clarke, of the Agent on 10 April 2012, the same day that cover had been finalised for the April 2012-April 2013 year. Mr Hynes denied this.

97 On 19 March 2013, Stephanie Harvey, an underwriter of the Agent, sent an email to Ms Honeychurch offering a quote cover from 14 April 2013 to 14 April 2014. In that covering email, amongst other things, Ms Harvey expressly invited the provision of information in accordance with the Insured's duty of disclosure. Mr Hynes accepted that at the time he spoke to Ms Holmes on 9 April 2013, he had had no idea what disclosure had been made by the Insured to the Agent and, to that point, had made no inquiry of the Insured.

Conversations with Ms Holmes in April 2013

98 On 9 April 2013, Mr Hynes had two telephone conversations with Tania Holmes. He said in his evidence that he might have spoken before, but accepted that he had no business relationship as such. This was contrary to what he had deposed to in his first affidavit (at para 50). He accepted that when he made his first call, he was not intent upon actually speaking to Ms Holmes.

<u>First affidavit</u>

99 In his first affidavit, Mr Hynes deposed that the first conversation with Ms Holmes, which was at 12:11pm and lasted for two minutes and 13 seconds, he requested terms. Holmes said terms had previously been forwarded but she would send a further email. Holmes sent an email at 12:13pm, which attached a quote (Exhibit 1D-1, p 2420). Mr Hynes deposed that after he had reviewed the quote, he rang Ms Holmes at 12:20pm and spoke to her for three minutes 47 seconds. (Among other documents, he exhibited phone records to prove the two phone calls on the day and the length of these calls).

100 During the second phone conversation on 9 April 2013, Mr Hynes deposed in his first affidavit to querying the premium contained in the quote and that Ms Holmes 'sought further underwriting information including the occupancy of the units'. In response to this, Mr Hynes deposed to confirming the occupancies which were that Unit 1 was a bedroom furniture wholesaler, and Unit 2 was a

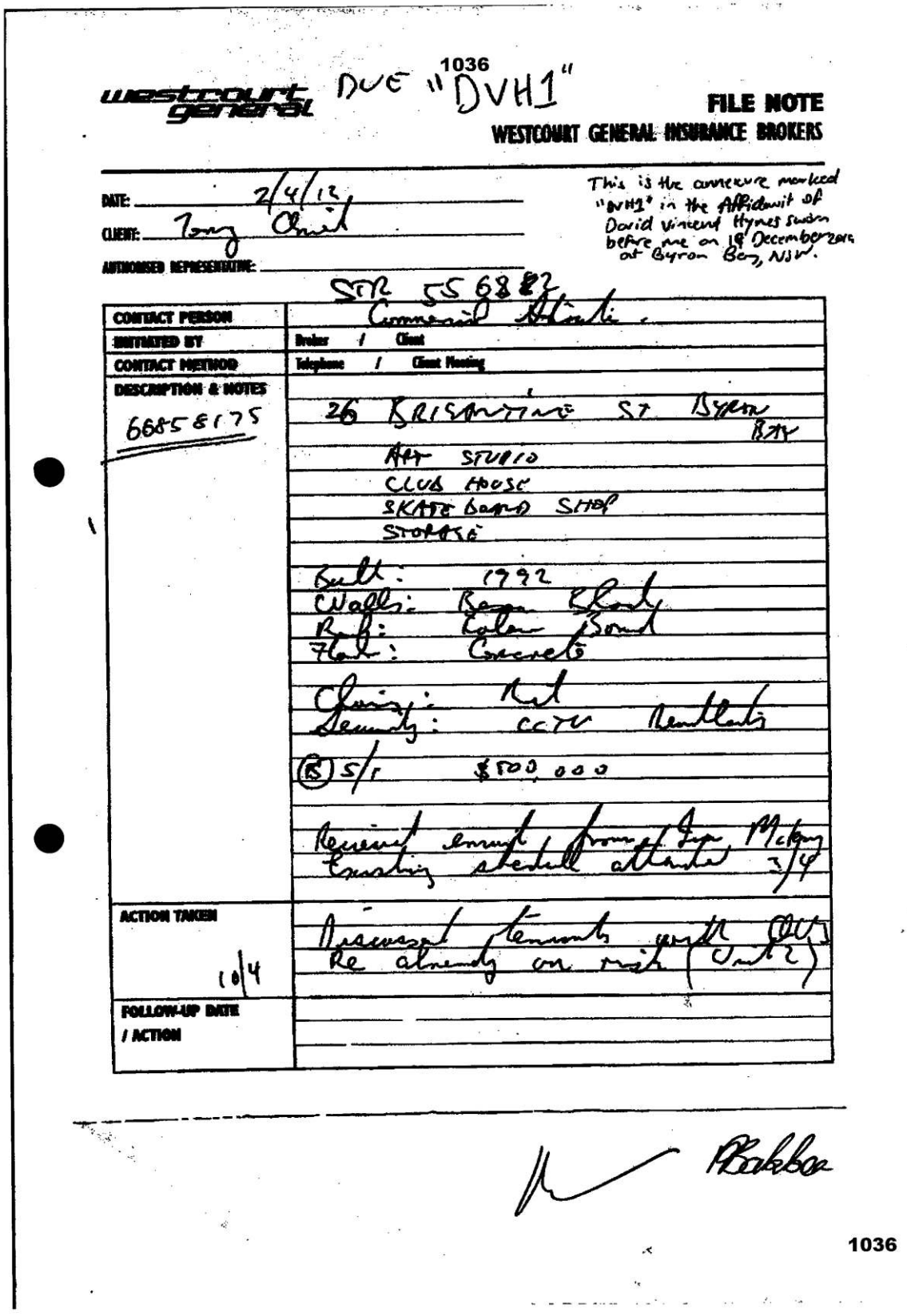
'local motorcycle social club', i.e. the NMC. He deposed that Ms Holmes said, in response, "we don't normally do this kind of thing." He deposed to replying with the words "but you are already on risk, and offering terms?" He explained that he said these words because of his belief that the NMC occupancy was always present during the time that the Agent was underwriting the situation. Mr Hynes deposed to explaining the content of his discussions with Mr O'Neill regarding the NMC's occupation and that the NMC was a well-known organisation in the Byron Bay area, which was not known for causing 'issues' in that area. He deposed that Ms Holmes responded with words to the effect that she would "see what we could do."

101 Mr Hynes was closely cross-examined by the Insurer's Counsel in relation to this account of the conversation with Ms Holmes. Mr Hynes explained that he preferred to speak with Ms Holmes, rather than Ms Harvey, after the quote had been re-sent by Ms Holmes. He understood, upon receiving the quote, that the Insurer had 'rated' the risk and that the nature of the occupancy was important to that rating. Mr Hynes sought to make at least two corrections to the sequence and content of what he said about the second conversation in his first affidavit: it was inaccurate for him to have deposed that it was *Ms Holmes* who sought further underwriting information – it was he who had offered it – and what he offered related to the subject of the occupancies. Further still, when he was explaining in his affidavit the basis of the information that he was conveying to Ms Holmes about the 'social' nature of the NMC's activities in lot 2, he was not only relying upon what Mr O'Neill had told him, but also Mr Triff.

102 Mr Hynes was challenged why he did not, subsequently, send a communication to the Agent confirming the matter of disclosure that deposed to making to Ms Holmes on 9 April 2013. It was not as if he had no further email correspondence with her. Mr Hynes accepted that he had not taken this opportunity to record the disclosure in writing to the Insurer and that he should have done so. Mr Hynes later indicated, when cross-examined by Counsel for the Agent, that he assumed on this date that the Agent was already aware of the Nomads' occupancy.

Second affidavit

103 In his second affidavit, Mr Hynes deposed to retrieving a hand written file note. It contained three entries relating to three distinct communications. Only the last of them were identified by Mr Hynes as being referable to the second conversation he says he had with Ms Holmes on 9 April 2013; he deposed that the first two entries related to events over a year before, on 2 and 3 April 2012. Because of its significance to the case, I now reproduce it in full:



westcourt general DVE "DVH1" 1036

FILE NOTE

WESTCOURT GENERAL INSURANCE BROKERS

DATE: 2/4/13

CLIENT: Tony Christie

AUTHORISED REPRESENTATIVE:

This is the annexure marked "DVH1" in the Affidavit of David Vincent Hynes sworn before me on 19 December 2014 at Byron Bay, NSW.

STR 55682

CONTACT PERSON	Commercial Atlantic
INITIATED BY	Broker / Client
CONTACT METHOD	Telephone / Client Meeting
DESCRIPTION & NOTES 6685 8175	26 Brisbane St Byron Bay ART STUDIO CLUB HOUSE SKATE BOARD SHOP STORAGE Built: 1992 Walls: Besser Block Roof: Colorbond Floor: Concrete Cleaning: Nil Security: CCTV Monitored (B) S/I $500,000 Renewal email from Tony McKay Existing schedule attached 2/4
ACTION TAKEN 10/4	Renewal remains with QBE Re already on risk (Unit 2)
FOLLOW-UP DATE / ACTION	

Rebbeca

1036

104 Mr Hynes was vigorously challenged on this note, on several levels. First, to the extent that it purported to record a conversation occurring on 9 April 2013,

it did not list that date (it contained an incomplete date reference to '10/4') or time; and did not record who the conversation was with or what was said. Mr Hynes accepted that the content was unclear on its face. He was challenged why he did not refer to the note in his first affidavit. Mr Hynes could not explain why it was not; although he did depose in his second affidavit to only "now" having located a file note, suggesting that this was at about the time he prepared his second affidavit. At any rate, it was suggested that it was strange that he would purport to make an entry of an April 2013 phone conversation on the same document that contained entries of conversations about a year earlier. Mr Hynes stated in reply "I had the same file – I didn't start a new page; I wrote it on the bottom of the existing file note." It was strange, in itself, that he would write an entry on 10 April when the conversation occurred on 9 April. Mr Hynes regretted that he did not insert the year, 2013, on the note.

Third affidavit

105 In his third affidavit, Mr Hynes elaborated on the content of the second conversation with Ms Holmes on 9 April 2013 at 12:20pm. His account was as follows:

> Hynes: "Why has a quote on this one gone up by so much. They have nil claims. Really need you guys to sharpen your pencil on this."
>
> Holmes: "Can you tell me who the tenants are?"
>
> Hynes: "You got a skate shop, an art studio, a motorcycle social club & a storage unit."
>
> Holmes: "What's that? The social club?"
>
> Hynes: "The Nomads. They are a local bike club. They usually have drinks there on a Friday night and that's about it."
>
> Holmes: "We don't normally do this sort of thing."
>
> Hynes: "You are already on risk, and have offered terms"
>
> Holmes: "I will see what we can do".

106 Under cross-examination, Mr Hynes was challenged whether, in this account, he had truly mentioned the name Nomads. Mr Hynes said he was 'certain' that he had and affirmed that he had informed the Agent (or Ms Holmes) who was the occupant and what they were about. Counsel for the Insurer drew the comparison between Mr Hynes' account of informing the other underwriter, Axis, about a year ago that the tenant was a (nameless) 'social' club' but his

affidavit evidence was indicating that he had informed Ms Holmes that it was Nomads and a bike club.

107 Mr Hynes was asked whether he was angry after the second telephone conversation on 9 April 2013 and whether he had said that he was "bloody pissed off". He did not dispute that he may have said those words to Ms Honeychurch, but in a context of a short period before renewal, and he apprehended that the Insurer might go off risk, he was 'frustrated'.

108 Mr Hynes was referred to later correspondence, which contained no assertion of his account of what he said to Ms Holmes. This included Ms Holmes' email to him shortly after, on 11 April 2013, which contained the template indication reiterating the need for disclosure. Mr Hynes accepted that he could have, but did not, take the opportunity of confirming the conversation in writing. He was also referred to a letter between solicitors for other parties, dated 6 May 2014, in which the author of the letter, apparently on the basis of information Mr Hynes had provided, asserted that disclosure was made on 10 April 2013 – not on 9 April 2013.

109 Mr Hynes deposed to having a further telephone conversation with Ms Holmes on 10 April 2013 in which he followed up a response to the request for a reduced premium. In his second affidavit he deposed to the conversation being in the following terms.

> Hynes: "Just following up on 55682. It falls due on Sunday"
> Holmes: "I will send you an email".

110 The next day, Ms Holmes sent an email attaching a quote, a Strata Select PDS and policy wording. Ms Holmes sent a further email that day.

111 Later in his first affidavit, Mr Hynes deposed that it was not unusual to provide underwriting information over the phone.

112 He also indicated that he was well aware that motorcycle clubs represented a moral risk for insurers, that he lived in the Byron Bay area for virtually the last 20 years and although the NMC had always been in the area, the club had not caused 'issues'. Had it been very active, with lots of parties and so forth, he says he would not have attempted to obtain ongoing cover.

Mr Hynes' conduct after the fire

113 Mr Hynes was cross-examined about what he had told others about his dealings with Ms Holmes after the fire had occurred. He accepted that he did not directly contact the Insurer after he had seen the declinature letter and did not take the opportunity to remonstrate with it that it was wrong to say that the Insured had not disclosed the NMC occupancy. He did not complain to his licensee that the Insurer's basis for rejection was wrong. He accepted that he did not remonstrate with the Insurer's solicitor. It was put to Mr Hynes, but he denied the proposition, that he had not informed the fifth defendant of his disclosure in February 2014. He was referred to affidavit evidence (which was not admitted for a hearsay purpose) of Messrs Hodgson and Cecil about what they had been told by personnel within the AFS Licensee. Mr Hynes accepted that if he was correct about disclosing to the AFS Licensee what he had said he had informed Ms Holmes, he would have expected the AFS Licensee to pass that on to the Agent.

114 Mr Hynes was referred to an account he had given to Ms Honeychurch about his conversations with Ms Holmes in May 2014, which was passed on to the Insured's lawyer. There were two aspects to this. First, an email he sent to Ms Honeychurch of his own recollections (23 May 2014) at a time when a claim had been lodged. Although that contained a reference to a 'local Motorcycle Social Club' the statement omitted reference to 'Nomads'. I note other parts of the email Mr Hynes sent to Ms Honeychurch contained reference to his account of discussing the tenancies with Ms Holmes, her explaining that the Motorcycle Social Club only used the premises on Friday evenings, Ms Holmes' response that 'we don't usually do that sort of thing' and his informing her that "You are already on risk".

115 Then he was referred to the email Ms Honeychurch had sent to the lawyers on 13 March 2014. It was suggested that there was an inconsistency between Mr Hynes reporting to Ms Honeychurch that he had merely disclosed to Ms Holmes a 'motorcycle social club' whereas by May 2014, it was being suggested that he had disclosed to Ms Honeychurch that it was the Nomads. Mr Hynes did not accept that these references were inconsistent.

116 Mr Hynes was also referred to correspondence in February 2014 in which Ms Honeychurch who, at that point, was advocating for the Insured for its claim, was making inquiries of the Agent about the policy schedule for the 2011-12 year. It was put that, in February 2014, the Brokers' 'strategy' was to ascertain whether, in the light of the 2011-12 policy schedule, the Agent had, for the purposes of the 2013-14 policy year, in fact waived any requirement for disclosure of the NMC occupancy and that it was only after it became clear that the Agent had not been informed of it that the Brokers had fastened upon the possibility that the NMC occupancy had been actually disclosed by Mr Hynes to Ms Holmes, for the Agent. Mr Hynes disagreed with this.

Handwriting expert opinion

117 The Insurer relied upon the opinion of Ms Melanie Holt, a Forensic Document Examiner (Exhibit 1D-5), which examined the handwritten note which Mr Hynes asserted was written on or around 10 April 2013. As I understand it, the opinion was not definitive against the assertions made by Mr Hynes about his writing the note, but it was relied upon to show that there was doubt that it was written on 10 April 2013. As will be shown (at [194] below) Counsel for the Agent argued that the expert's opinion supported the Agent's case that the entry was written on 10 April 2012.

The Agent's evidence

118 The Agent tendered or relied upon many documents about what the Brokers did before and after the fire, and after the Insurer had declined indemnity to the Insured.

Correspondence before the fire

<u>Coverage for 2011-12 year</u>

119 On 6 April 2011, Mr Tony Rodda, of King Insurance Brokers Pty Ltd ('**King Brokers'**) sent to the Agent a proposal form for strata insurance of the property (the '**2011 Proposal**') and requested an urgent quotation: Exhibit 1D-1, pp 2066-2070. At that time, the Agent was an underwriting agent for Calliden: Hodgson 17/10/19, [8]. The 2011 Proposal was dated 11 March 2011 and identified the occupancy for the units in the property as *"industrial"* and described the occupancy of Unit 2 as *"Office"*. The 2011 Proposal was signed

by Mr Ian Cooper on behalf of the plaintiff. The evidence identified Mr Cooper as the owner of Unit 1 at that time: Warne, 27/8/19, [7], [9]; King 23/8/19, [8]; T 49.20-.25.

120 The risk was rated by the Agent, based on the information contained in the 2011 Proposal and, on 7 April 2011, the Agent issued a quotation to King Brokers: Exhibit 1D-1, pp 2071-2074. On 14 April 2011, King Brokers requested the Agent to bind cover for the plaintiff with effect from 14 April 2011: Exhibit 1D-1, pp 2140-2144. On 18 April 2011, the Agent confirmed cover with Calliden, for the plaintiff, for the period from 14 April 2011 to 14 April 2012: Exhibit 1D-1, pp 2145-2148.

121 In December 2011, Mr King purchased lot or Unit 1 from Mr Cooper: King 23/8/19, [8]; T49.20-.25.

Coverage for 2012-13 year

122 On 7 February 2012, an officer of the Agent rated the risk for the purpose of providing renewal terms to the plaintiff. On the rating document, Unit 2 was described as a *"Consultants Office (N.O.C)"*: Exhibit 1D-1, pp 2149-2150. That designation signified that it was an office of a type not expressly otherwise identified or classified in the 'Occupation Table' used by the Agent: Hodgson 17/10/19, [19].

123 On 21 February 2012, the Agent issued a renewal quotation to King Brokers, noting then current policy was due to expire on 14 April 2012: Exhibit 1D-1, pp 2151-2153.

124 On 2 April 2012, Mr Hynes received a telephone call from Mr Tony O'Neill, who was the owner of lot or Unit 3. Mr O'Neill was an existing client of Mr Hynes and he needed the plaintiff to be insured: Hynes 11/11/19, [12]. Mr Hynes made a handwritten file note of the call (the '**File Note**'): Hynes 19/12/19, Annexure 'DVH1'. Mr O'Neill informed Mr Hynes of the occupancies of the plaintiff's property, including that one of the tenancies was the NMC's clubhouse: Hynes 11/11/19, [14]; T 302.26-.34. Mr Hynes's File Note included reference to *"CLUB HOUSE"* among the tenancies. Mr O'Neill informed Mr Hynes that the NMC would socialise at the clubhouse and have beers there

on Friday nights: T 250.25-.33. Mr O'Neill informed Mr Hynes that the NMC had been in occupation for some years: Hynes 11/11/19, [14].

125 Mr Hynes gave evidence that he would have asked Mr O'Neill when the plaintiff strata insurance was due to expire. Mr O'Neill told him that the insurance was due to expire shortly and Mr Hynes wrote *"DUE"* at the top of his file note: T 234.4-.6, 306.26-307.4.

126 On the afternoon of 3 April 2012, Ian McKay of Byron Legal emailed to Mr Hynes a copy of a King Brokers tax invoice dated 14 April 2011, which incorporated a Schedule of Insurance for the 2011/12 policy: Exhibit 2D-3, pp 877-902. Mr O'Neill arranged for this to occur and it is likely that he did so to give Mr Hynes the expiry date for the 2011/12 policy: T 307.6-9. Mr McKay's phone number had been written in the margin of the part of the File Note relating to the call from Mr O'Neill: p 1036. Mr Hynes added a note to his File Note stating, *"Received an email from Ian McKay Existing schedule attached 3/4"*: p 1036; T 263.14-26, 307.18-27. The Schedule for the 2011/12 policy confirmed to Mr Hynes that the 2011/12 policy was in fact due to expire shortly, namely on 14 April 2012. It confirmed that there were four commercial units, as Mr O'Neill had told him. It also showed that the expiring insurance was a cover by the Agent: T 307.11-308.13. Mr Hynes decided to see if he could get a quote from a different insurer: T 308.15-.19.

127 On 4 April 2012 at 11:04 am, Mr Hynes sent an email to Alana Wesselman of Axis asking her to quote and advise on terms for the plaintiff's strata insurance for 2012/13: Exhibit 1D-8, p 3161. In his evidence, Mr Hynes described what was set out in that email as a 'slip': T 308.48-309.5. The 'slip' email described the third of the occupancies as a *"Social Club"*. Mr Hynes followed that email up with a telephone call to Ms Wesselman: T 223.30, 229.5-7, 309.10-28. Ms Wesselman asked Mr Hynes what the 'social club' was. Mr Hynes told her it was the NMC's social club. Ms Wesselman told Mr Hynes the risk would have to be referred within Axis. Mr Hynes later gave evidence that this *"was the same theme of conversation"* he recalled having with Ms Holmes of the Agent in April 2013. It is likely that after learning that one of the occupancies was the NMC's social club, Ms Wesselman told Mr Hynes something to the effect that

she would have to refer the risk internally because Axis did not normally 'do that sort of thing': T 309.30-310.8.

128 In the meantime, on 4 April 2012 at 4:19 pm, the Agent sent amended renewal terms to King Brokers, quoting a reduced premium and taking out provision for a broker commission: Exhibit 1D-1, pp 2155-2157; Hodgson 17/10/19, [24]. On 5 April 2012 at 4:33 pm, King Brokers informed the Agent that the amended renewal terms had been forwarded to the plaintiff: Exhibit 1D-1, p 2158. King Brokers were dealing with Mr King at that time: Exhibit 1D-8, p 3192.

129 On 5 April 2012 at 9:08 am, Mr Hynes received an email from Ms Wesselman of Axis stating, *"I have referred this one and we are not interested in quoting this one due to the "Nomads Social Club"*: Exhibit 1D-8, p 3163.

130 Mr Hynes believed that it would be challenging to place the risk with an insurer other than the Agent in circumstances where Axis had declined the risk: T 310.30-38. There was only a short time before the renewal was due and Mr Hynes determined to seek a renewal quotation from the Agent.

131 Mr Hynes therefore obtained a letter of appointment from Mr Tony O'Neill so that he could deal with the Agent instead of the existing broker (King Brokers): T 310.48-311.2. He saw this letter of appointment as him simply taking over the existing policy that was already in force: T 236.5-27, 237.1-4, 311.5-7.

132 On 9 April 2012, Mr O'Neill signed the LOA on the letterhead of HHIA: Exhibit 2D-3, pp 903-905. The LOA stated that HHIA, as authorised representatives for the fifth defendant, Westcourt General Insurance Brokers, had been *"appointed to act on our behalf in relation to our following insurance policies"*, following which Mr Hynes had written *"Commercial Strata"*. It purported to direct its recipient to provide HHIA with all required information and to direct all further correspondence and enquiries to HHIA. Mr O'Neill purported to sign the LOA as the 'body corporate manager' but did not identify the body corporate of which he was a manager. Nothing on the face of the LOA identified who was purporting to provide directions and authority to HHIA, which authority would extend to agreeing to the binding of insurance cover.

133 On 10 April 2012 at 12:25 pm, Mr Hynes sent the LOA to the Agent and requested renewal terms as soon as possible: Exhibit 2D-3, p 906. On 10 April 2012 at 2:00 pm, David Clarke of the Agent sent an email to Mr Hynes stating that the Agent was unable to accept the LOA as it was on broker letterhead and did not comply with guidelines set out in the email: Exhibit XD-3. The email stated that LOAs should be signed either by identified officers of the strata entity, and that strata managers that are appointed by, or act on behalf, the strata entity may also sign the LOA provided that it states they are so appointed. Mr Hynes printed a copy of that email and put an asterisk beside a requirement that the document should state the position of the person signing the LOA: Exhibit XD-3.

134 By the time Mr Hynes received this email, the renewal was coming up on 14 April 2012 and was, by that stage, relatively urgent. As far as Mr Hynes was concerned, there had been no changes in tenancy and no change in the risk. All he was doing was simply taking over the existing policy that was already in force. In those circumstances, Mr Hynes described himself as “a bit ho-hum” about the email he had received from the Agent: T 312.39-313.11.

135 On 10 April 2012, Mr Hynes rang QUS, in which he discussed the LOA at length: T 312.28-.29, 313.16-.18. Telephone records show that on that day, there was a phone call of more than 23 minutes in duration from HHIA to the direct phone number of Mr Clarke: Exhibit 1D-8, pp 3300-3301. Mr Hynes gave evidence that in the discussion he had with the Agent, there was a “bit of argy-bargy” about the requirements stipulated by the Agent: T264.41-.50. The Agent submitted that it was not surprising that this would have occurred in circumstances where the Agent had been dealing with King Brokers just a few days earlier and had received binding instructions from them. King Brokers had indicated that they were obtaining instructions on behalf of the plaintiff. Now, by the LOA, HHIA were purporting to obtain instructions from a person holding himself out as the plaintiff’s body corporate manager. In circumstances where Mr Hynes regarded himself as simply taking over the existing policy that was already in force, for which the Agent was already on risk, with no changes in tenancy and no change in the risk, the Agent submitted that it was likely that Mr Hynes communicated those matters to the Agent during the ‘argy-bargy’.

The Agent also submitted as being likely that Mr Hynes communicated that Mr O'Neill was in fact one of the lot owners and not simply a 'body corporate manager'. The Agent submitted that it should be found that during or immediately following that call, Mr Hynes added a further note to his File Note stating, "10/4 Discussed tenants with QUS Re already on risk (Unit 2)": p 1036. The Agent submitted that it should be found that Mr Hynes had no clear idea about which unit numbers were occupied by which tenants at that time. In his 'slip' email to Axis of 4 April 2012, Mr Hynes had put "Art Studio" second in the list of occupancies. That was Mr O'Neill's unit: T 317.19-.21. The Agent submitted that it is likely that the reference to 'Unit 2' in the File Note was a reference to Mr Hynes communicating the fact that the signatory of the LOA was a lot owner.

136 On 10 April 2012 at 2:33 pm, Mr Hynes emailed to QUS a revised Letter Of Appointment under cover of an email stating, "As requested attached is to the LOA for strata 55682 with extra information added": Exhibit 2D-3, pp 909-913. The information added to the revised Letter Of Appointment was the address of the plaintiff's property and the strata plan number. This made it identifiable from the face of the Letter Of Appointment who Mr O'Neill was purporting to act on behalf of and who was providing authority to HHIA.

137 Mr Hynes' email appeared to assuage the Agent's concerns. On 10 April 2012 at 3:56 pm, Mr Clarke of the Agent forwarded renewal terms to Mr Hynes: Exhibit 1D-1, p 2176. The terms were identical to those provided to King Brokers on 4 April 2012 (Exhibit 1D-1, p 2156), save that the terms issued to HHIA added provision for a broker commission. The terms indicated that the insurer continued to be Calliden. On 10 April 2012 at 3:56 pm, Mr Clarke emailed King Brokers stating that the Agent had received a LOA from another broker: Exhibit 1D-1, p 2178.

138 Mr Hynes said in his evidence that throughout the placement of the 2012/13 policy he assumed that what the Agent had previously been told about the risk was accurate; assumed that the Agent was aware of the various tenancies, including that the NMC were in occupation of one of the units; and believed he

had no reason to and took no steps to change anything: T 320.23-.39, 236.33-.38, 237.10-.11, 237.23, 238.26-.38, 242.19-.21.

139 In about November 2012, the current owner of lot or Unit 3, Mr Triff, first became interested in purchasing that unit. He went and inspected the unit at about that time: T 34.44-35.6. On 27 December 2012, Mr Triff purchased Unit 3: T 34.37-.39; Exhibit C, p 1265, [3]. On 7 January 2013, Mr Triff became the registered proprietor of Unit 3: Exhibit C, p 167; Exhibit XD-8.

Coverage for 2013-14

140 With effect from 1 January 2013, the Agent was appointed an underwriting agent of the first defendant, Berkley: Exhibit 1D-4, pp 2942, 2945, 2962-2963.

141 On 15 March 2013, Graham Whitty, underwriter, of the Agent sent an internal email stating *"Commercial renewal for sign off"* for the plaintiff's strata insurance, including within his email a photograph and attaching a document headed 'Commercial Rater' and another headed 'Hazard Class Rater'. On the Hazard Class Rater, Unit 2 was described as a *"Consultants Office (N.O.C)"*, as it had been the previous year: Exhibit 1D-2, pp 2584-2589. Again, this indicated an office of a type not otherwise specified or classified in the Occupation Table: Cecil 18/10/19, [27]. The 'QUS Referrals' internal email was an email address to which Messrs Hodgson and Cecil had access to and checked to approve or amend terms for referred risks: Hodgson 17/10/19, [42]; Cecil 18/10/19, [25]; Holmes 18/10/19, [14a].

142 On 18 March 2013, Mr Cecil, Underwriting Manager of the Agent, reviewed the risk referred by Mr Whitty and sent an internal email stating, *"Ok to offer RNL per attached rater RC sign off 18/03/2013"*: Cecil 18/10/19, [26]; Exhibit 1D-2, pp 2590-2596. Mr Cecil altered the rating referred by Mr Whitty, increasing the renewal premium to be offered: Cecil 18/10/19, [26].

143 On 19 March 2013, a member of the Agent's staff sent an email to Ms Honeychurch stating, among other things, that the Agent was offering to arrange for the plaintiff a new policy underwritten by the first defendant, for the period 14 April 2013 to 14 April 2014. A quotation, expressed to be issued on behalf of the first defendant, was attached to the email: Exhibit 1D-1, pp 2323-2325; Exhibit 2D-3, p 917.

Mr Hynes' conversations with Ms Holmes on 9 April 2013

144 That email appears not to have come to the attention of Mr Hynes. At 12:11 pm on 9 April 2013, Mr Hynes phoned the Agent general line or '1300 number' and the call was answered by Ms Holmes: Exhibit 2D-3, p 922. At 12:13pm on 9 April 2013, Ms Holmes sent an email to Mr Hynes, forwarding a copy of the email of 19 March 2013: Exhibit 2D-3, pp 919-921. The Agent submitted that there is no doubt that, in the telephone call, Mr Hynes asked after renewal terms. So much is clear from the email sent by Ms Holmes immediately following the call.

145 Mr Hynes reviewed the quotation of 19 March 2013. He saw that the quoted premium had increased from the previous year and determined that he would seek a reduced quote from the Agent: T 321.37-.42; 322.3-.7. This was something he did from time to time. He was aware that insurers generally had commercial room to move on their quotations: T 322.13-.22.

146 On 9 April 2013 at 12:20 pm, Mr Hynes again phoned the Agent's '1300 number' and again spoke with Ms Holmes. The conversation appears to have lasted for three minutes and 47 seconds: Exhibit 2D-3, p 922. The contemporaneous material makes it plain that, at the very least, Mr Hynes asked for a reduction in the quoted premium. Everything else about the conversation is controversial. At this time, Mr Hynes accepted that he still assumed that the Agent was aware of the NMC occupancy: T 322.36-.39.

147 On 10 April 2013 at 3:17 pm, Mr Hynes spoke again with Ms Holmes, following up his request for a reduced quotation: Exhibit 2D-3, p 922.

148 On 11 April 2013 at 9:55 am, Mr Cecil sent an email to Ms Holmes stating (Exhibit 1D-2, pp 2641-2648):

> "Further to broker query re. renewal premium increase, can confirm ok to offer revised RNL with NIL loading on the liability section & only 25% loading on the property."

149 The email otherwise forwarded a copy of Mr Cecil's email dated 18 March 2013 approving renewal. It attached the 'Hazard Class Rater' document, in which Unit 2 continued to be described as a *"Consultants Office (N.O.C)"*. The Agent submits that it is plain from Mr Cecil's email of 11 April 2013 that Mr Cecil and Ms Holmes had communicated about what Mr Cecil described as the *"broker*

query re. renewal premium increase". That, the Agent submits, is supported by Mr Cecil's unchallenged evidence that Ms Holmes told Mr Cecil that she had been contacted by Mr Hynes asking for a reduction in the premium: Cecil 18/10/19, [30]. Mr Cecil said he reviewed the risk and exercised his discretionary authority to offer a reduced premium to the plaintiff: Cecil 18/10/19, [31].

150 On 11 April 2013 at 10:05 am, Ms Holmes sent an email to Mr Hynes attaching a revised quotation for a reduced premium: Exhibit 2D-3, p 929. Among other things, the email stated:

> "Thank you for your phone call of the 09/04/2013 requesting revised renewal terms for the above client.
>
> Please find attached our revised renewal terms for the coming 12 months noting the following requested amendments:
>
> • Reduction in premium…"

151 Mr Hynes visited the plaintiff's property seeking out someone to instruct him to accept the Agent's offer for strata insurance for the 2013/14 period. Mr O'Neill had sold his lot and could no longer provide those instructions: Hynes 11/11/19, [45]-[46]. Mr Hynes found Mr Triff, the recent new owner of Unit 3, at the Property. On Mr Hynes' affidavit evidence, he met Mr Triff the first time he attended the Property: Hynes 11/11/19, [15]. It was the first time Mr Triff met Mr Hynes: Triff 22/8/19, [20]. The Agent submitted that Mr Hynes could not have met Mr Triff at the property in April 2012. In their conversation, according to Mr Triff, Mr Hynes told Mr Triff that HHIA had arranged the strata insurance the previous year (which could only have been a reference to the 2012/13 policy) and that he needed somebody from the strata to tell him it was okay to continue the insurance: Triff 22/8/19, [20.1]. When Mr Triff said he was going to see if he could arrange insurance to get it as cheap as possible, Mr Hynes said to him *"Well I don't think anybody else will touch it"* and gestured towards the NMC clubhouse: Triff 22/8/19, [20.2]-[20.4].

152 On 12 April 2013, Mr Hynes issued a Closing Advice to the Agent, instructing the Agent to bind cover with effect from 14 April 2013: Holmes 18/10/19, [33]; Hynes 11/11/19, [44]; Exhibit 2D-3, pp 931-932. On 19 April 2013, the Agent confirmed that cover was bound with effect from 14 April 2013 and attached a

Certificate of Currency and Renewal Schedule dated 19 April 2013: Exhibit 2D-3, pp 933-936.

Correspondence after the fire

153 Mr Hynes received the Insurer's declinature letter by about 1:00pm on 14 February 2014.

154 Before 1:27pm on 14 February 2014, Mr Hynes spoke, by telephone, with the fifth defendant's National Business Development Manager, Ms Leanne Holeszko: T 335.44-.46, 336.8-.10. Ms Holeszko later indicated that she understood Mr Hynes to have informed her that Mr Hynes had assumed the Agent had known about the tenants at the property, as there had no change in tenants from when the Agent 'took over' the policy in force. This indication from Ms Holeszko was apparent in both an email (Exhibit XD-10) and in a conversation with Mr Hodgson. Mr Hodgson's account of that conversation with Ms Holeszko was not challenged: Hodgson 17/10/19, [71]; Exhibit 1D-1, p 2466. Ms Holeszko was not called on behalf of the Brokers and the Agent submitted that the Court should infer that Ms Holeszko's evidence would not have assisted the Brokers. The Agent submitted that this indication from Ms Holeszko is consistent with Mr Hynes's own evidence of the assumptions he made, at least up to 9 April 2013.

155 At 1:27 pm on 14 February 2014, Mr Hynes sent an email to Ms Holeszko, forwarding to her a copy of the email which he had received from Ian McKay of Byron Legal on 3 April 2012 and which attached the Schedule for the 2011/12 policy. The Agent submitted that the reason he did so was because he believed it to be important to look at what the Agent had been told before it came on risk for the 2011/12 year and before Mr Hynes and Ms Honeychurch were appointed as brokers.

156 On 14 February 2014, Mr Hynes phoned Mr Burns, the Insurer's solicitor, and asked him who the declinature letter had been sent to and said the matter was 'pretty urgent'. Mr Burns responded that he would have Mr Andrew Orr respond, as Mr Orr had the day-to-day conduct of the matter. The same day, Mr Orr called Mr Hynes back. Mr Hynes told Mr Orr that he did not want the declinature letter sent to his client. On 2:07 pm on 14 February 2014, Mr Hynes

made a file note of the call in the form of an email to himself. He recorded that the reason he requested McInnis Wilson Lawyers to refrain from sending the letter to the *"insured parties"* was *"due to safety reasons"*: Exhibit 1D-8, p 3152.

157 At 2:08 pm on 14 February 2014, Mr Hynes forwarded the email attaching the declinature letter to Ms Honeychurch: Exhibit XD-4. At 3:20pm on 14 February 2014, Ms Honeychurch sent an email to the Agent requesting a copy of the *"original proposal supplied to QUS in 2011 as soon as possible today"*: Exhibit XD-5, pp 829-830. At 4:48pm on 14 February 2014, Mr Hodgson of the Agent sent an email to Ms Honeychurch attaching a copy of the 2011 Proposal: Exhibit XD-5, pp 829-834.

158 On 15 February 2014 at 1:49pm, Ms Honeychurch spoke by telephone with Mr Field, owner of Lot 2, and made a handwritten file note: Exhibit XD-11, p 826. At 2:13pm on 15 February 2014, Ms Honeychurch sent an email to Mr Field attaching copies of the declinature letter and the 2011 Proposal: Exhibit 1D-8, p 3115. Among other things, her email stated, with regard to the disclosure in the 2011 Proposal that Unit 2 was an 'Office':

> "we would contend that "Office" is a very broad term and it would be highly unusual for an Insurer to not seek clarification regarding the description and also the description "Art/Craft Design" as usually this would indicate potentially indicate Flammable materials, solvents and the like. I note also that the Proposer has ticked "Industrial" but has noted three non-industrial occupations, which would normally flag to underwriters that more clarification and information would be required."

159 The note also recorded Mr Field's indication that the NMC had been in occupation of the subject unit for 5 or 6 years.

160 On 18 February 2014, Ms Honeychurch sent an email to Mr Hodgson stating, again with reference to the 2011 Proposal (Exhibit XD-5, p 828):

> "I am wondering if you are able to assist in advising if King Insurance Brokers provided further clarification regarding the Tenant's Occupations, as they are obviously quite broad disclosures in nature on the original proposal."

161 As recorded in the business records of the NSW Police Force, on 19 February 2014, Ms Honeychurch discussed the insurance position with a police officer: Exhibit C, p 1269. The record of that conversation states, *"Believed that unit 2 will not be paid out as did not declare that OMCG occupied that unit"*. The Agent submitted that the Court should infer 'OMCG' denotes outlaw motorcycle

gang and refers to the NMC. On 20 February 2014, Ms Honeychurch sent an email to the lot owners confirming that she had been in contact with the detective in charge from the NSW Police Force: Exhibit XD-6, p 837. The email also stated that Hynes Honeychurch was *"working on a strategy to move forward with your claim"* and was *"awaiting confirmation from QUS of further information which may assist"*. That was a reference to the request made to Mr Hodgson on 18 February 2014.

162 Later on 20 February 2014, Mr Triff replied to Ms Honeychurch's email, asking *"What disclosure made to whom?"*: Exhibit XD-6, p 836.

163 On 21 February 2014 at 6:31am, Ms Honeychurch sent a lengthy advice email to Mr Triff. The email was copied to Mr Hynes. It attached copies of the declinature letter and the 2011 Proposal: Exhibit XD-6, p 836. The email outlined a strategy for gathering information in support of an argument that from the 2011/12 placement, the Agent had waived any duty of further disclosure regarding the tenancies in the plaintiff's property. She also pointed out that Mr Hynes had had a lengthy conversation with the Agent 'regarding the renewal and the tenants and requested a discount'.

164 At 10:21am on 21 February 2014, Ms Honeychurch sent an email to Mr Hodgson of the Agent, requesting, purportedly under s 66 of the *Privacy Act 1988* (Cth), to be provided with *"any documentation regarding clarification of the Tenancy of the Units"*: Exhibit XD-5, p 827. That email was copied to both Mr Hynes and Ms Holeszko. The Agent submitted that it should be inferred that Ms Holeszko was aware of the strategy being adopted by HHIA to respond to the declinature.

165 By email dated 24 February 2014, Ms Honeychurch provided the lot owners with further copies of the declinature letter and 2011 Proposal and advised them that there was *"currently no cover"* and that Mr Hynes was trying to seek alternative cover on behalf of the strata: Exhibit XD-9, pp 841-848.

166 On 25 February 2014, McInnes Wilson Lawyers, the solicitors for the Insurer, emailed a letter to Ms Honeychurch indicating that a copy of the 2011 Proposal had been provided on 14 February 2014 and enclosing a further copy: Exhibit XD-9, pp 850-851. At 10:26am on 25 February 2014, Ms Honeychurch

replied to that email (copying Mr Hodgson of the Agent) and stating, *"I have a copy of the Proposal already and was requesting documentation regarding any clarification provided by the previous brokers as to the obviously broad disclosures on the Proposal"*: Exhibit XD-9, p 849.

167 At 11:13am on 25 February 2014, Mr Orr replied to Ms Honeychurch stating, *"I am instructed to advise you that no further clarification was provided by your client's former broker to QUS … with respect to the occupancy of the units"*: Exhibit XD-9, p 849.

168 On 1 March 2014, Lorinda Brooking, the Queensland State Manager of the fifth defendant, told Mr Cecil that HHIA did not disclose the 'bikie club' tenancy to the Agent as they assumed that the Agent knew about it. Mr Cecil made a file note of the conversation: Cecil 18/10/19, [34], Exhibit 1D-2, p 2649.
Ms Honeychurch had spoken to Ms Brooking, at least, on 3 February 2014: Exhibit XD-7, p 865. Shortly thereafter, Ms Holeszko told Mr Hodgson much the same thing, which she later confirmed by email: Hodgson 17/10/19, [71]; Exhibit 1D-1, p 2466; Exhibit XD-10.

169 On 12 March 2014, Ms Honeychurch spoke with Ms Warne about whether Mr Ian Cooper would be interested in speaking with Ms Honeychurch: Exhibit XD-11, [49]; p 861. Mr Cooper was the person who had signed the 2011 Proposal.

170 The first mention on the file of HHIA of the asserted fact of any disclosure to Ms Holmes of the NMC occupancy, or 'motor cycle social club occupancy', was on 13 March 2014: Exhibit XD-7, p 864. This was Ms Honeychurch's email to Mr Flint, of Warlow Scott Lawyers. The email provided a timeline of events. They included:

(a) from 14 April 2011 to 14 April 2012, cover was placed with the Agent (underwritten by a different insurer) by different brokers (King Brokers);

(b) on 2 April 2012, Mr O'Neill advising Mr Hynes that the NMC was the occupant of Unit 2 and had been present there for a number of prior years;

(c) on 10 April 2012, renewal terms provided by HHIA to the Agent;

(d) on 9 April 2013, Mr Hynes received renewal terms from Tania Holmes;

(e) on 10 April 2013, Mr Hynes discussed renewal terms with Tania Holmes requesting a discount to the large increase in premium:

> "Tania asked who are the tenants to clarify to allow a possible discount. Tenants, including Unit 2 Tenant (the NMC) was discussed at this stage to clarify the Risk. Tania said (sic) to the effect 'we don't normally do this kind of thing.' David (Hynes) said "You are already on Risk and offering terms, what do you mean?". Tania advised that she would "have a look at it."

171 By a letter dated 6 May 2014, the Insured's then lawyers, Warlow Scott Lawyers, wrote to McInnes Wilson Lawyers, the lawyers for the Insurer (Annexure MJB-2 to the affidavit of Mylton Burns, 31/1/20) and the communication relevantly included the following:

> "(f) On 10 April 2013, Mr Hynes by telephone discussed the renewal terms with Ms Tania Holmes of QUS in order to obtain a discount from the significantly increased premium on offer. We are instructed that in response to Ms Holmes' queries as to the identities of the tenants at the premises, Mr Hynes advised of the presence of the NMC. No objection was raised by Ms Holmes that she would be unable to write the risk, impose special terms or that she may need to refer the risk for (the Insurer) for further directions."

172 By a letter dated 16 May 2014, McInnes Wilson Lawyers provided contemporaneous evidence of the Agent's practice of declining risks involving motorcycle club occupancies: Exhibit C, pp 1139-1175.

173 On 23 May 2014, Mr Hynes sent an email to Ms Honeychurch, setting out his 'statement' of what was said in his call to Ms Holmes on 9 April 2013 (Exhibit 1D-8, p 3294). This was put in the following terms:

> "To the best of my recollection, on the 9th April around midday I phoned Tania Holmes to request renewal terms for the Strata. Tania then sent these terms through immediately after via email.
>
> I then called to discuss with Tania Holmes the fact that the premium had increased $946.18 in a 12 month period with nil claims associated and asked for a discount. I remember this conversation as I was quite shocked at the significant increase. Tania Holmes asked further underwriting information - for clarification regarding the tenants at which time I remember Tania indicating that they had limited information. I advised that the tenants were a bedroom furniture wholesaler (Unit 1), *a local motorcycle social club (Unit 2),* an artist studio (Unit 3) and a skateboard shop (Unit 4). These were the tenants that were present to the best of my knowledge as I have not been able to reach the Insured. *Tania Holmes asked more about the motorcycle social club and I advised that the previous owner of unit three advised that they only use the premises on a Friday evening.* Tania Holmes said "We usually don't do that sort of thing". I remember feeling annoyed as they tenants (sic) had been there for years prior to us taking over the policy by Letter of Appointment and I said "You are already on risk". Tania Holmes then said "I will see what I can do". I

> advised that it was now urgent because I have been having problems getting phone contact for the Strata and the cover was due on the Sunday and the renewal has to leave our office within the next three days. This ended the conversation.
>
> It is my recollection that on the 10th April, I called Tania to follow up on the renewal and Tania then called back to ask for further risk details in particular, confirming fire protection and security. From memory Tania advised she would have the terms back to me later in the day.
>
> I then received the revised premium terms on the 11th April after receiving an email with no attachment." (emphasis supplied)

Parties' submissions

The Insured's submissions

174 Counsel for the Insured submitted that the objective facts supported the inference that the identity of the tenants was discussed as between Mr Hynes and Ms Holmes in the second of the conversations on 9 April 2013. That is, the discussion centred upon discussion of renewal terms and the identity of the tenant was relevant to that. Ms Holmes' evidence that it was "possible" that the NMC was discussed eliminated any probative value from her affidavit evidence about what she would have done if she had been informed of the fact.

175 This meant that the Court was not left with competing evidence between two witnesses, but only really one witness' account. Mr Hynes' evidence that he disclosed the NMC occupancy was not shaken. His evidence was supported by a file note he took the next day, 10 April 2013. The file note relevantly recorded discussion about Unit 2 and the Insurer being 'on risk'. Even if (contrary to the Insured's submission) this file note was created on 10 April 2012, in a disclosure to Mr Clarke, even by that date, disclosure had been made to the Agent since it was unlikely that any discussion about the 'risk' associated with a particular tenancy (Unit 2) would pass without discussion about the identity of the occupant.

176 Contrary to what the Insurer and Agent submitted regarding his omission to spontaneously assert that he had disclosed the NMC occupancy to Ms Holmes, Mr Hynes' focus after the declinature letter upon what was previously disclosed was unsurprising. There were contrary inferences that could be drawn from his omission to instantaneously raise complaint, including that: (a) he continued to assume that the disclosure of the occupancy had been made

(by someone else other than him); and (b) he was naturally pessimistic that the Insurer would accept his assertion of oral disclosure and was endeavouring to bolster the case for the Insured. Further, to reject his evidence would require the Court to find that Mr Hynes created and put forward a file note in a fraudulent way.

177 Once it was accepted that he had disclosed the occupancy, and given her limited recollections, it would not be surprising if Ms Holmes, like Mr Hynes, assumed that the NMC occupancy had previously been disclosed to the underwriter: and that she accepted the correctness of what Mr Hynes was telling her that the underwriter was already 'on risk'. This would explain why she would not mention the matter to Mr Cecil and why Mr Cecil would proceed to approve the premium reduction without knowing that the NMC was in occupation.

The Brokers' submissions

178 Counsel for the second to fifth defendants supported the Insured's submissions. He submitted that Ms Holmes' concession that it was "possible" that Mr Hynes had disclosed the NMC's occupancy to her was the 'most important evidence' in the case. He added that Ms Holmes' could have, but did not, take her own file note of the second conversation with Mr Hynes. He also submitted that it would not be surprising if Ms Holmes said what Mr Hynes had attributed to her, given the absence of guidelines and advice as to the acceptance (or not) of 'social motorcycle clubs' as a risk was pressed by Mr Hynes as the reason for reduction in the premium. Further, given that the cover depended upon what such "clubs" actually did, and in circumstances where Mr Hynes said it was a social motorcycling club, it was not surprising that she would ask Mr Hynes what the 'motor cycle social club' was and, in response to that, Mr Hynes not only identified the NMC, but explained that it was a 'local bike club' and indicated the extent of its activities: that they had "drinks on a Friday night and that was about it". Having been told that it was a motorcycling social club, it was implausible that Ms Holmes would not have asked what, or who, it was. Mr Hynes' description of the NMC's activities was not inaccurate. Counsel for the Brokers echoed Counsel for the Insured's submission that given that Ms Holmes said that she could not recall what was discussed at all,

this must negate the value of her evidence about what she would have done after the event to the effect that the NMC was so notorious that, had it been mentioned, she would have taken a different course of action. Indeed, Ms Holmes' subsequent conduct in not mentioning the occupancy to Mr Cecil is also consistent with her understanding that the identity of the tenant had not changed (and it must previously have been acceptable) and, from her point of view, she had achieved her goal of a mutually beneficial outcome, in the sense of reaching accommodation with a broker.

179 It was not significant that Mr Hynes had been rebuffed by Axis back in April 2012 when he mentioned the name NMC. That event was quite different to the situation on 9 April 2013: in the former, he was trying to 'sell' to an underwriter a potential new risk; whereas in the latter, he was trying to reach a reduction on terms already proposed. Neither Counsel for the Insurer nor Counsel for the Agent had put to Mr Hynes the circumstance that having been 'burnt' before in April 2012, when he had mentioned NMC as the identity of the tenant, he would in April 2013 intend to conceal the identity of the tenant in his discussions with Ms Holmes. Having been asked by Ms Holmes who was the motorcycling social club, he openly disclosed that it was the NMC. Further, his evidence (not seriously challenged on this particular aspect) that he felt frustrated after his second conversation with Ms Holmes on the afternoon of 9 April 2013 reflected his concern that the underwriter might go off risk and that, having had the intention of seeking only a reduced premium, he may have unwittingly jeopardised the possibility of the Insured having any cover at all; at a point when the subsisting policy coverage was imminently due to expire. It would be unsurprising that he might be angry at that prospect because of his belief that the subsisting cover was obtained with the underwriter being aware as to who was in occupation.

180 Mr Hynes' evidence as to the *substance* of what he said to Ms Holmes, in multiple versions of his account, was consistent even if the words used may have changed. The authenticity of his file note was not impeached and although it was not exhibited in his first affidavit, that was because it had not been located by that time. The note was not prepared on 10 April 2012 – the Agent did not call Mr Clarke to give evidence of what Mr Hynes had said on

that occasion. Mr Hynes had good reason to prepare it on 10 April 2013. He had not heard from Ms Holmes by the afternoon of 10 April 2013, the day after Ms Holmes indicated that she (or those who were responsible for her) had considered his request and time was slipping away. It was a protective measure on his part faced as he was with the prospect of the terms of coverage being withdrawn. Had the underwriter reached a quicker decision than it did as to whether to reduce the premium, it might not have even been written at all. Further, although the file note may not have been a model of record keeping, or notation of important information, this may have been consistent with Mr Hynes' belief that disclosure of the identity of this tenant had already been made; so a brief, and perhaps what, in retrospect, might have been regarded as a cryptic note, would suffice. This was an instance where the Court had to exercise care in not exaggerating the significance of a note in hindsight: its brevity or incompleteness did not betoken any lack of frankness, particularly where Mr Hynes conceded that his record-keeping was not perfect.

181 After the fire, Ms Honeychurch's email to Mr Flint on 13 March 2014 (Exhibit C, p 1198) was consistent with Mr Hynes' statement to herself on 24 May 2014 in relation to his recollection of Ms Holmes "asking (Mr Hynes) more" about the 'motorcycle social club': even if it did not specifically mention 'Nomads', it was natural, or objectively probable, that in providing more information about it in response to a request by Ms Holmes, Mr Hynes might mention the identity of the occupant and describe its activities, which is what Mr Hynes said he did. There is no merit in pointing to Mr Hynes' omission to fire off a response to the declinature letter without engaging, as Mr Hynes' did, with the AFS Licensee. Only lawyers, after the event, could interpret what he, or his licensee, were doing after the fire as reflective of any 'strategy'.

The Insurer's submissions

182 Counsel for the Insurer submitted that it defied credulity to surmise that the Agent would insure knowing that the NMC was in occupation of the unit and using it as its clubhouse. This would be inconsistent with its policy and guidelines. Each of Mr Hodgson, Mr Cecil and Ms Holmes followed the guidelines here and it would have been absurd for Ms Holmes to depart from them.

183 As to Mr Hynes' account of the conversation in his third affidavit (one of multiple varying accounts of his recollections of what was said), Counsel for the Insurer submitted that it was unlikely that Mr Hynes would say to Ms Holmes that the Agent was 'already on risk'. The context suggested that he could only have been speaking about the 2013/14 year, when a new policy (with a different insurer) had been quoted. It was also unlikely for Ms Holmes, in particular, who having stated that "we don't normally do that", would then go ahead anyway and seek Mr Cecil's permission to reduce the premium without disclosing what Mr Hynes said that he told her about the NMC's occupancy. It would also have been absurd for her to have requested 'underwriting information' from Mr Hynes where the premises had previously been rated on the basis of information in the Agent's possession: she would have seen that lot 2 was rated as an 'office' – the lowest possible risk. Further, it was unsurprising that Ms Holmes would not have taken a note since the second conversation on 9 April 2013 with Mr Hynes was uneventful: he had only asked for a review of the premium. The conversation may have lasted for 3 minutes and 47 seconds, but that was not long (by comparison, the earlier conversation earlier on 9 April 2013 in which he simply asked to receive the quotation lasted for 2 minutes and 13 seconds).

184 It was very unlikely that Mr Hynes would himself not document disclosure of the NMC occupancy in circumstances where he knew that: (a) the NMC was a moral hazard for insurers generally; (b) it was a bikie gang; (c) that Axis had refused to even provide a quote once appraised that the NMC was an occupant; and (d) knew of the Agent's established history of only accepting low to medium risks. It would be contrary to proper broking practice to make such disclosure without documenting it.

185 The evidence of his dealings with Axis was said to be instructive. Mr Hynes consciously referred to the NMC as a 'social club'. Having not disclosed the presence of the NMC to Axis, it was unlikely that he would have described the risk to Ms Holmes in any different way in 2013 when seeking to negotiate a reduction of the premium. That is, if he said anything at all to Ms Holmes about the nature of the occupancy, he would only have said the tenant in lot 2 was a 'social club'. As it happens, the variations in Mr Hynes account of what was

said suggest that he may even have referred to it as a 'local bike club'[3] – a phrase Mr Hynes had not used since he first started giving accounts of what he had said to Ms Holmes in March and May 2014, and had not previously been referred to either his first or second affidavits. Counsel for the Insurer submitted that Mr Hynes would have made a conscious decision, before speaking with Ms Holmes for the second time on 9 April 2013, *not* to disclose the NMC's identity. Prior to his conversation with Ms Holmes on 9 April 2013, Mr Hynes was aware that the NMC represented a moral hazard for insurers generally and that disclosure needed to be made to the Insurer, and was aware of the Insurer being a low to medium risk insurer.

186 Mr Hynes' evidence of his handwritten note was unsatisfactory. To the extent that it carried the '10/4 notation', it did not state the year it was written and it was odd that it was inserted on the same page as entries inserted in 2012. It was deficient in failing to indicate that any disclosure was made that the NMC was a bikie gang or an outlaw motorcycle gang. It was also odd that if it purported to record a conversation occurring on 9 April 2013, that day and month would not have been recorded. It was more likely written on 10 April 2012, following a conversation he had with the Agent. If that was the case, it would mean that he had no note at all of a conversation on 9 April 2013. Further, his non-disclosure of the identity of the occupant to Axis was consistent with his later non-disclosure to the Agent in April 2012. The handwritten note relied upon was not even mentioned in his first affidavit.

187 Ms Holmes' email to Mr Hynes on 11 April 2013 was said to be significant. It did not refer to any amendment to the premium on the basis of disclosure of the NMC occupancy, and it was inconceivable that the premium might be revised *downward* on the basis of disclosure of that occupancy. Further, the email asked Mr Hynes to advise of further amendments and reminded him of the need to provide further information in relation to the 'duty of disclosure'. Mr Hynes could have, but did not, respond to this request. He could have done so when he sent his email to her on 12 April 2013 thanking her for the reduction in the premium.

[3] T 248.27, 250.14, 253.21, 254.30, 285.44.

188 The Agent's underwriting guidelines and practices deposed to by Mr Cecil and Mr Hodgson were also significant. Prior to the time that Mr Hynes rang Ms Holmes, the risk for the 2013-14 year had already been rated. A 'bike club' came under the category of a risk that would be declined or at least referred to Mr Cecil (or Mr Hodgson) and it defied credulity that if Mr Hynes mentioned the NMC, either (a) Ms Holmes would fail to mention that to Mr Cecil; and, on the assumption that she *did* mention it to Mr Cecil, (b) the risk would have been accepted with that knowledge; and (c) a reduction in the premium in the light of that disclosed risk would have been granted.

189 The Insurer submitted that Mr Triff's evidence of visiting the premises on 12 April 2013 should be accepted in preference to Mr Hynes' evidence. My Triff had not been challenged on his recollection, to this extent. That being so, it would not be right that Mr Hynes referred to Mr Triff's information when he spoke to Ms Holmes.

190 Further, Mr Hynes did not respond as one might expect that he would once he became aware of the content of the declinature letter, which he received at about 1:00pm on 14 February 2014. He was no shrinking violet. Yet, from 14 February 2014 through to 13 March 2014, the first occasion where he had asserted he had disclosed the NMC occupancy, the 'dog did not bark'. He did not respond 'indignantly', by informing Mr Andrew Orr (on 14 February 2014) his partner and co-director, Ms Honeychurch (on 15 February 2014), or representatives of the AFS Licensee (Ms Holeszko). He was preoccupied with trying to establish that the Agent already knew of the NMC occupancy. The first time the asserted disclosure was raised was in Ms Honeychurch's email, setting out the timeline of events, was on 13 March 2014.

The Agent's submissions

191 Counsel for the Agent supported the Insurer's position. Generally, he invoked the cautionary observations of McLelland CJ at Eq in *Watson v Foxman* (1995) 49 NSWLR 315 (at 318-319) regarding acceptance of evidence of recollections of oral statements unsupported by contemporaneous records. Reference was also made to similar observations of Leggatt J in *Gestmin SGPS SA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm) at [16]-[22] concerning the

phenomenon of false memories honestly believed[4]. Emphasis was placed in particular upon the observation that it is an error to place reliance upon a witness' stated confidence in the correctness of recollection, and further, that the appropriate course for a trial judge is to make fact findings on the basis of inferences drawn from documentary evidence and the known or probable facts. Counsel presented a contrast between the Insurer's 'strong' documentary case, consistent with an objective and logical sequence of events, against the Brokers' case reliant upon Mr Hynes' recollections, which, Counsel argued, was not supported by any contemporary document.

192 The documentary evidence between 9 and 12 April 2013 favoured acceptance of the Agent's case. In particular, after the calls which Ms Holmes had with Mr Hynes, on 11 April 2013, Mr Cecil indicated his position (in relation to the requested premium reduction) and asked Ms Holmes to go into the rating document. Ms Holmes must have come across the reference to the occupation of Unit 2 being categorised as a 'Consultant Office' and, if the second conversation with Mr Hynes occurred as he said it did, she must have noticed the discrepancy between that written description (an office) and what Mr Hynes' disclosed (a 'motorcycling social club', or 'local bike club'). It would have been implausible that she would not draw that to Mr Cecil's attention. Further, it would have been inconceivable that Mr Cecil would have decided to alter the premium if Ms Holmes referred the disclosed fact to him. On the same day, Ms Holmes sent proposed revised renewal terms to Mr Hynes with the bland reference only to a request for a reduction of premium. This was inconsistent with the tenor of Mr Hynes' evidence in his third affidavit whereby what started out as a request for a reduced premium 'morphed' into a possible scenario whereby, on the basis of his reference to the NMC, he was concerned that terms might be withdrawn altogether. For Ms Holmes to have said nothing to Mr Cecil, and nothing in her email acknowledging that transformed nature of the inquiry, was contrary to the logic of events.

[4] These observations were cited with approval by Davies J in Coote v Kelly; Northam v Kelly [2016] NSWSC 1447 at [101] and thereafter endorsed in the Court of Appeal in The Nominal Defendant v Cordin (2017) 79 MVR 210 per Davies J (Emmett AJA agreeing; Macfarlan JA dissenting) at [165]-[167]. To similar effect, see Onassis Calogeropoulos v Vergottis [1968] 2 Lloyd's Rep 403 per Lord Pearce at 431.

193 Further, although Ms Holmes, many years after the event, acknowledged the 'possibility' of the NMC being mentioned, it was still necessary for the Court to reckon with the evidence that she gave as to her practice, that if a request was made in relation to risk, it would need to be documented. Evidence of her practice was likely to be more probative than evidence of her recollection of what was said[5].

194 Against this documentary evidence supportive of the case against disclosure of the NMC occupancy, Mr Hynes could only rely upon the handwritten note which was only retrieved in December 2019 at the time he was preparing his second affidavit. The Court should disregard that note for many reasons. The opinion of the expert handwriting examiner was (at paragraph 16) that the letter of appointment (10 April 2012) was on top of the handwritten file note when the '10/4' entry was made. The context suggested it was also made on 10 April 2012. This context began with the Agent being dissatisfied with the original Letter of Appointment – as it was unclear who Mr Tony O'Neill, a lot owner, was authorising HHIA to act on behalf of. Mr Hynes was putting his case to the Agent (Mr Clarke) for acceptance of it. He likely referred Mr Clarke to the fact that the Agent was already on risk and he likely would have referred to Mr O'Neill as being not just a body corporate manager, but also a lot owner. At about this time, Mr Hynes had little idea which lot owner owned which unit: his email to Axis suggested he thought that Mr O'Neill owned lot 2, hence his description of it as an art studio. It was likely that in referring to Mr O'Neill, he (erroneously) identified him as being the owner of lot 2.

195 Contrary also to Mr Hynes evidence, the circumstances indicated that he could not have had any discussion with Mr Triff in April 2012: the latter had only bought his unit in November 2012; becoming registered as the owner in January 2013. The note should be treated for what it appears on its face to be, that is, written in 2012, with the other entries.

196 Counsel for the Agent supported the Insurer's submission that Mr Hynes did not take the opportunity to assert the disclosure of the NMC occupancy after the declinature letter. Whist it may have been understandable that he would

[5] On the probative value of evidence of practice, in comparison to actual recollection of events, see Pell v The Queen (2020) 94 ALJR 394; [2020] HCA 12 at [93].

not, initially, engage with the Insurer or the Insurer's lawyers, the Brokers had communications with the lot owners, the AFS Licensee and even the police in the one month period from the middle of February 2014 to the middle of March 2014 and they did not contain any assertion that Mr Hynes disclosed the NMC occupancy. The opposite was true. Minutes after he saw the declinature letter, he spoke to Ms Holeszko , during which he mentioned his assumption that the Agent already knew of the NMC's occupancy. It appears that he did not assert it to Ms Honeychurch, before she informed the police in a statement on 19 February 2014 that no disclosure had been made. Ms Honeychurch, thereafter, conveyed to Ms Lorinda Brooking, the Queensland State Manager of the AFS Licensee, her belief which was to the effect that Mr Hynes had not disclosed the NMC's tenancy to the Agent as he assumed that the Agent knew about it. Counsel submitted that *Jones v Dunkel* inferences could be raised from the Brokers' omission to call Ms Honeychurch, Ms Holeszko or Ms Brooking.

197 Counsel submitted that there were multiple problems with Mr Hynes's evidence. He maintained that the note was written in April 2013. He maintained that he met with Mr Triff in 2012. He had given multiple accounts of the second conversation on 9 April 2013 which contained material differences. The first of those accounts only emerged on 13 March 2014.

198 At the time that he made his second call to Ms Holmes, Mr Hynes assumed that the underwriter was aware of the NMC occupancy. That, essentially, was his position at all times from March 2012 until the middle of March 2014, based upon what he had been told Mr O'Neill in April 2012. The latter had given him an account that the NMC had been in occupation for years with the Agent knowing about it. He perceived that his role was simply to 'take over' an extant policy where there were no material changes. This was a textbook example of a witness who, though he sincerely believed and demonstrated his conviction in what he said to Ms Holmes on 9 April 2013, he actually had a very fallible recollection.

Consideration

Onus of proof

199 The Insurer bears the onus of proving non-disclosure under s 21 of the IC Act[6]. This includes whether a fact said to have required disclosure under the statutory duty was actually not disclosed. The fact said to be not disclosed is the NMC's occupancy of one of the lots in the premises; although the Insurer also said that the Insured was also required to disclose that lot 2 was being used as the NMC's clubhouse.

Credit

Tania Holmes

200 Ms Holmes accepted in her evidence her absence of recollection and willingness to accept the possibility that Mr Hynes' accounts of his conversations with her on 9 and 10 April 2013 were correct. But it must follow from her concessions that the evidence she deposed to in two affidavits, to the extent that they bear upon those conversations, was at best, unreliable. It was plain, during the course of her cross-examination, that Ms Holmes was visibly upset about the unravelling of the position depicted in her affidavit evidence. This reinforced my impressions of the earlier part of her evidence that, consciously or not, she was trying to hold the line in relation to evidence in her affidavits which, with the benefit of proper reflection, should not have been given in the terms that it had been. Her tone in the early part of her evidence was quite defensive. I am unable to accept the reliability of the recollections of what was said and done by her, unassisted by documents or evidence of her practices at the time unless it is corroborated or consistent with the objectively provable facts.

David Hynes

201 There were some odd aspects about Mr Hynes' evidence, including his evidence that he had not read evidence served in the proceeding (or even his Defence, being the original or the amended version) which showed a lack of curiosity, and which was puzzling. Of more concern was what struck me as a level of evasiveness with his explanations for why, in his email to Ms

[6] Commercial Union Assurance Co of Australia Ltd v Beard (1999) 47 NSWLR 735 per Davies A-JA (Meagher JA and Foster A-JA) at [9], [15] & [18].

Wesselman on 4 April 2012, he described the occupant of lot 2 to be a 'social club' when, by that stage, he was aware that it was occupied by the NMC and knew that a motorcycle club was regarded as a moral hazard to an insurer covering strata insurance and that an insurer would likely reject taking on risk with an occupant of that nature. I regarded his evidence that there was no need to disclose the identity of the tenant because of an understanding, sourced in information he had received from Mr Triff, that it had been engaging in benign activities in its 'clubhouse' on a Friday night, and that he did not know of the likelihood that that insurer would decline the risk, as straining credulity. I also considered that, up until 9 April 2013, the extent of his inquiry as to whether the Insured had disclosed the NMC occupancy to the Insurer was far from satisfactory. These matters weighed not only to some extent upon the probabilities of the fact of whether he disclosed the NMC occupancy to Ms Holmes, but also to his general credibility.

202 I am also concerned about the reliability of his recollections. He has given multiple explanations in his affidavits for what occurred in his conversations with Ms Holmes on or around 9 and 10 April 2013, and although allowance may be made on the basis that he was giving a retrospective account in his affidavit evidence many years after the event (itself partly the by-product of an inadequate system of record-keeping), there were also inconsistences in a variety of accounts of what was said even between February and March 2014, being much closer in time to the event. I acknowledge that some of this was in the detail (such as whether the second conversation with Ms Holmes occurred on 10, rather than 9, April 2013).

203 I did not, however, form the impression that he was dishonest when he prepared his affidavits or when he gave evidence. Nevertheless, I am cautious in accepting evidence of his recollections of what he did, and why he acted in the way that he did in April 2013 at face value.

Approach to fact-finding

204 On the main factual question at this trial, the Insurer was required to prove a negative – that a material fact (the NMC occupancy) was not disclosed to the Agent. Where a party is required to prove a negative, it has been said that

proof of the negative fact usually requires proof by circumstantial evidence because of the tendency for there to be some supporting facts which might be inconsistent with the fact sought to be disproved[7]. In this particular context, I do not regard this as a case where it might be said that one party (the broker) is, relative to another party (the underwriter), peculiarly positioned to know of the circumstances relating to the fact which might bring into play the type of considerations referred to in *Apollo Shower Screens Pty Ltd v Building and Construction Industry Long Service Payments Corp* (1985) 1 NSWLR 561 at 565.

205 I am mindful of the considerations that the Court ordinarily applies in civil cases, in s 140(2) of the *Evidence Act 1995* (NSW) when evaluating the level of satisfaction I must attain, as the trier of fact, whether the fact is proven.

206 I am also conscious of the desirability, when assessing evidence of an event – the second conversation between Mr Hynes and Ms Holmes that occurred on 9 April 2013 – to elevate the significance of contemporaneous documentary evidence and evidence of proven practice, or practices, by the participants to the conversation, and other objectively proven facts relating to the context in which the event occurred and also the course of conduct of the participants proximate to the first occasion when the content of the conversation first became forensically significant. I refer here to the Insurer's declinature letter, since it was that event which has triggered the litigation.

207 I also am cautious, when weighing the evidence of the recollections of those witnesses, about the fact that the event that had occurred well after 6 years before both Mr Hynes and Ms Holmes were asked to prepare affidavit evidence, and well after 7 years before they gave testimonial evidence about the conversation. If the natural tendency for memories to fade in people was not problematic enough, both Mr Hynes and Ms Holmes each had much at stake when giving evidence: Mr Hynes had his reputation for professional competence as broker in servicing a client, and Ms Holmes had her reputation for diligently adhering to the underwriting guidelines, procedures and processes under scrutiny. I accept further that a witness' personal conviction

[7] J.D. Heydon, Cross on Evidence (electronic version, LexisNexis) [7070].

that something was said many years before does not assist in the proof that it occurred without there being objective evidence, of substance, to support the belief.

Findings

208 I find, on balance, that it is more probable than not that Mr Hynes mentioned to Ms Holmes the *nature* of the occupancy of Unit 2 as being a 'social club', 'local bike club', or possibly (but less probably) even a 'motorcycling social club'.

Context

209 The context for this finding begins with Mr Hynes' involvement in relation to the Insured in early April 2012. I find that through his dealings with Mr O'Neill at that time, he learnt that the NMC was in occupation of lot 2 and had been for several years. He also learnt that its use of the unit was limited: it was used as a 'clubhouse' for social activities on Friday afternoons (I note and accept Mr Manning's evidence that the Byron Bay or 'North Coast Chapter' of the NMC's clubhouse resembled the clubhouses of other NMC branches).

210 He also knew, at least by April 2013, that, as a tenant, the NMC was 'high risk' for any insurer. Not to put too fine a point on the matter, I consider that although he may have been led to believe that this particular branch's activities within the unit were generally benign, he regarded the identity of the tenant as almost 'toxic', at least for a low to medium risk insurer. This was evident in what he told Mr Triff (to be considered below). It was apparent from what Axis told him in early April 2012 when he was attempting to find an alternative underwriter. Mr Hynes knew that the Agent was an underwriter that took on low to medium risk.

211 I also find that from April 2012, through to at least March 2014, Mr Hynes believed, if not assumed (these two states of mind not being mutually exclusive categories of mental state) that the Agent (the underwriter) already knew of the NMC's occupancy. When he was seeking to 'take over' the broking for the Insured from the previous broker, in April 2012, he believed that nothing had changed since the policy had been in place for the 2011-12 year, in terms of the tenant or the claims history. At the point when his firm was appointed, he did not consider it necessary to inquire of or check what the underwriter knew

about the occupant of lot 2. Had he turned his mind to the question, I expect that Mr Hynes would have regarded as curious that an underwriter like the Agent might have accepted a risk with a tenant with that identity. But in the circumstances that HHIA became involved, he did not consider it necessary to address that matter.

212 But what he did appreciate in April 2012 was the attitude of Axis when he was attempting to 'sell' to it a potential new risk. True it was, as Counsel for the Brokers submitted, that this prospective transaction was different to the event in April 2013 and the information which he was obliged to disclose may have differed, but the difference in transaction did not, in my view, dilute the significance that Axis had declined to offer a quote on the basis that he had mentioned the *NMC* as a tenant. This reference to the NMC, I would add, was not proffered by Mr Hynes immediately: his initial reference was only that it was a 'social club'. It was only after he had been pushed for further information, did he identify the NMC. I consider that of some significance when considering his approach to his discussion with Ms Holmes in April 2013.

213 On 9 April 2013, time was ticking away in terms of the expiry of the existing coverage. Mr Hynes noticed that the terms for what was effectively a 'renewal', but which, technically, was a 'new policy' (given the replacement of the insurer) were the same. He would likely have known that the risk had already been re-rated by the Agent. His only concern was the significantly increased premium that was stipulated. He continued to believe and assume that this risk had been rated by the Agent on the predicate that the NMC was in occupation. From his point of view, nothing had materially changed in the 2012-13 year.

214 So after Ms Holmes re-sent the proposed terms for 2012-13, as broker for the Insured, he rang her with the intention of seeking a reduction in the premium. This required an exercise of persuasion towards Ms Holmes. He would have known that the nature of the occupants and the claims history was relevant to the decision of the underwriter to reduce a premium and he would likely have foreseen that those topics might come up for discussion with the underwriter. But, in my view even if he believed that the Agent already knew that the NMC was in occupation, it is likely that he would have been very circumspect about

expressly identifying the NMC as a tenant. I find that even with his belief that the Agent knew about the identity of the tenant, he would have found it embarrassing to expressly refer to the NMC as being the tenant of lot 2, since it would have been curious to him, to say to the least, that an underwriter like the Agent would have accepted a risk based upon the NMC's presence. He had no incentive or *intention* to disclose the identity of the occupant of lot 2.

215 I find that in the second conversation at around midday on 9 April 2013, in reaction to Mr Hynes' request to reduce the premium, it is likely that Ms Holmes did ask him for a description of the tenants. Contrary to the submission advanced by the Insurer, it did not matter that the risk had already been rated, or even that the subject matter of the conversation might veer into the territory of 'underwriting information' for which she had no authority; (though this is relevant for what Ms Holmes might have done after the conversation, for reasons that I will later address). Having been told on the phone that Mr Hynes wanted a premium reduction, it would be artificial and unrealistic to suppose that Ms Holmes, in response to Mr Hynes asking for a premium reduction, would terminate the conversation there and then and simply ask Mr Hynes to make his request in writing. It was likely that she would ask him why the premium should be reduced.

216 I find that it is likely that Mr Hynes responded to that request by describing the *nature* of the occupancy of the each of the units, and, amongst other things, he would have referred to a skate shop, an art studio and a storage unit. I also find that it is more probable than not that he described the nature of lot 2 as being a 'social club'. As was pointed out by the Insurer, this is how he had described the nature of the occupation of that unit one year before to Axis. From Mr Hynes' point of view this was, in fact, how the NMC had *used* the unit; even if it was not a complete description of the activities of the club (or that branch) itself.

217 As indicated, I do not consider that Mr Hynes would have been keen to impress upon Ms Holmes the *identity* of the occupant, but it was hardly surprising if Ms Holmes would, on the basis that she was being asked to consider (or pass on to someone else the decision to consider) a premium reduction, want more

information than a vague description of a ‘social’ club. So she asked Mr Hynes. In response to this, Mr Hynes’ evidence varied at different times. In his affidavits, he more specifically described the nature of the club as a ‘local motorcycle social club’ (in his first affidavit, and in his statement of 24 May 2014) or ‘motor cycle social club’ (in his third affidavit) and at trial, on multiple occasions, he described it as a ‘local bike club’. I find, further, that in order to emphasise the benign or social nature of the activities, he likely mentioned that it had drinks functions on a Friday night.

218 On the basis *only* of the information which, I consider, Mr Hynes had conveyed to her on 9 April 2013, I find that Ms Holmes would not, through her training, have considered that an occupant of this kind was automatically disqualified, but it would very likely have engendered doubt as to whether it could be accepted, if (as it happens she was required to) she referred it to Mr Cecil. This explains why it is quite likely that she may have said to Mr Hynes “We don’t normally do this sort of thing”.

219 In response to that indication, and actuated by the belief – which he had at all material times – that the Agent had already placed cover for the Insured, on the basis of information it had (inter alia) about this tenant over the years, it is unsurprising that Mr Hynes would remark to, or perhaps remonstrate, with Ms Holmes that the Agent was “already on risk”. It does not matter, for this purpose, whether this was directed to the existing year, or was only a prospective reference to the 2013-14 year: Mr Hynes was aware that the Agent had placed cover for several years and, from his point of view, nothing had changed between April 2012 and April 2013.

220 It is also not surprising the conversation would conclude with Ms Holmes saying to Mr Hynes that she would ‘see what she could do’. That was a virtually inevitable indication that she would give to Mr Hynes whatever persuasive case that he might muster, in support of his request for a premium reduction. Plainly, she did not have the authority to approve it herself.

221 It may be seen, from what I have said, that I have accepted that much of what Mr Hynes identified as being said when he prepared his affidavits in 2019 and 2020 is not intrinsically plausible but also possible. Of course, as was

emphasised by both the Insured and the Brokers, Ms Holmes also accepted that it was "possible" that all of what I have found above was said by each of them.

222 Nevertheless, I am unable to accept that Mr Hynes disclosed the *identity of the NMC* as the occupant of Unit 2. This is because of the documentary evidence following the conversation, the correspondence and events which followed the declinature letter, and the lack of clarity in Mr Hynes' recollections.

Contemporary documentary evidence after the call

223 Whatever laxity that may have attended Mr Hynes' record keeping, I consider it very likely that the conclusion of the call on 9 April 2013 was likely to have prompted him to make a note if, as he says, he referred to the NMC. He was 'angry', or 'frustrated', after the call. Instead of a rudimentary request for a premium reduction, by his own account, he sensed the possibility that the underwriter might be moving away from terms that had already been offered; and just possibly, might even withdraw the terms altogether. That would leave him, his firm, and the Insured in a very invidious position. I do not consider it at all likely that he would refrain from making any note at all. To the contrary, if for no other reason than to have an historical paper trail recording his efforts, it would be expected that he would make a note about it.

224 I do not accept that the '10/4' entry which appears within the file note was taken by Mr Hynes on 10 April 2013. Missing from the entry is the very thing which was likely (and Mr Hynes would have appreciated) to have jeopardised the prospect of the terms continuing to be provided: his description of the nature of the occupation and the identity of the occupant of Unit 2. Moreover, other than a bare reference to subject matter – a 'discussion' with 'the tenants' – there was missing from the note of the content of what was said about that subject matter. It is true that the occupancy "Unit 2" was indicated, but the reference was at best ambiguous. I prefer the submissions advanced by Counsel for the Agent which provided a plausible explanation for how the note was created. That explanation was somewhat complicated, being referable to separate conversations with Mr O'Neill and later (on 10 April) with Mr Clarke and an email conversation with a solicitor, Mr Mackay (on 3 April 2012), but it

makes sense that all of these entries, recording events at a proximate point of time (in the same month in the same year), were recorded on the one page. It would be odd for Mr Hynes to record an entry for April 2013 on the same page as entries for 2012.

225 Against this, I do not accept that any adverse inference to the Insurer to fail to call Mr Clarke, of the Agent, can be drawn. His email communications make it pellucidly clear that he would not have entertained the notion that occupation by a motorcycle club (social or not) would be an acceptable risk to the Agent. The Agent had no fear from what he might say if he gave evidence. Further opinion evidence was adduced by a handwriting examiner. This is not a case of a complete evidentiary vacuum which it might be expected that one party might fill.

226 But I do not find persuasive the submission advanced by the Insurer that fulfilment of the Brokers' duty of disclosure (on the part of its client) meant that a note taken by Mr Hynes had to take a particular form, and that by the standard of a reasonable broker, this handwritten note did not comply with such standard, and that, in those circumstances, it could not be found that the NMC occupancy was disclosed. On or about 9 April 2013, I do not consider that Mr Hynes was, on behalf the Insured, purporting to assist the latter to discharge its duty of disclosure. Even if, technically, this was a new policy (with a new insurer), Mr Hynes was not even treating his inquiry as amounting to disclosure for the purpose of a renewal: his purpose was much more modest – to seek a reduction of the premium.

227 It plainly does not assist the Brokers that the note which, at best, was ambiguous on its face, was only retrieved by Mr Hynes in December 2019.

228 In the circumstances, therefore, I find that Mr Hynes took no contemporaneous note of his second conversation with Ms Holmes.

229 Whilst there may be cause to sceptically weigh what Ms Holmes said she did, or would have done if the NMC's occupancy was disclosed to her, in terms of her testimonial evidence, I accept the probative force of the documents emanating from the Agent soon after the 9 April 2013 conversation and also her evidence of past practice.

230 Before that, however, I accept Ms Holmes' unchallenged affidavit evidence that she knew of the Nomads group, from her background. Had this been mentioned, I consider it very likely that the conversation which occurred would have taken a much more negative turn, from Mr Hynes' perspective, than what it did.

231 The documentary evidence indicates that Ms Holmes communicated Mr Hynes' request to Mr Cecil. This was indicated in Mr Cecil's email to her (Exhibit 1D-2, p 2641). But Ms Holmes only conveyed the request verbally (Cecil, 18/10/19, para 30), and neither Mr Cecil nor Ms Holmes (18/10/10, para 29) gave evidence to suggest that Ms Holmes passed on to Mr Cecil anything specific, including reasoning, that Mr Hynes had given in support of the latter's request. Contrary to a submission made by the Agent, I do not accept that Ms Holmes was required to take any further step in implementing the decision to reduce the premium beyond notifying Mr Hynes of the decision (made by Mr Cecil) to approve the premium (Exhibit 2D-3, p 929). She did not depose to any further steps that she, as an underwriter, took. She was, in this regard, acting as a conduit for Mr Cecil. It is possible therefore that she did not twig to, or observe any discrepancy between the revised description of the nature of occupation of the tenant of lot 2 supplied by Mr Hynes in the second conversation on 9 April 2013, being a motorcycle social club or local bike club, and the 'rater document' which Mr Cecil had sent to her, which classified the occupancy as a 'Consultant Office' (Exhibit 1D-2, p 2648). Ms Holmes did not depose to seeing that reference and the underwriting guidelines did not indicate any prohibition upon occupancy of that nature. Further, in a context where I consider that Ms Holmes was likely to accept Mr Hynes telling her that the Agent had already been on risk, where it was implicit that the Agent had already rated the risk for the forthcoming year and where there was no new development, there was no particular occasion for her to observe the discrepancy between Mr Hynes' description of the nature of the occupancy and what the Agent's internal documents revealed at that point. Nevertheless, I have no doubt that if Mr Hynes had mentioned the NMC, then this would have set off a 'red flag' in her mind.

232 This in turn, would almost certainly have occasioned her referring the mention of the NMC to Mr Cecil before he made a decision on the request for the reduction in the premium. It is entirely inconceivable that mention of this fact would have resulted in Mr Cecil approving a *reduction* in the premium.

233 Further, I accept that the mention of the NMC as the tenant would almost certainly have prompted her to ask Mr Hynes to put his request for premium reduction in writing, at least to have recorded his reference to the NMC as the tenant. Put another way, her email to Mr Hynes was likely to have taken a different hue if the NMC's identity had been disclosed.

Correspondence after the declinature letter

234 Mr Hynes, in combination with Ms Honeychurch, would have been shocked by the stipulated reason for the declinature: the non-disclosure of the NMC Occupancy. But the evidence indicates that for a period of about a month, until about the middle of March 2014, their disbelief arose *only* because of a prior belief or assumption in (at least) Mr Hynes that the Agent already knew that the NMC was in occupation. It had nothing to do with any recollection in Mr Hynes about what *he* had *expressly* disclosed about the identity of the tenant to Unit 2 in a conversation with Ms Holmes on 9 April 2013.

235 It stood to reason, in Mr Hynes' mind, that because the NMC had been in occupation for several years, because it had been serviced by a (presumably) competent broker (King Brokers) up to early 2012 and because the underwriter of the 2013-14 policy was the same underwriter who had accepted the risk in 2011-12 and 2012-13, with scarcely any real involvement of HHIA in procuring renewal terms, that the Agent knew about the NMC's occupation. It is not necessary, at this point of these reasons, to analyse the reasonableness of that assumption. It is enough to find that he sincerely believed in it. So, in that period of about a month after the declinature letter was received, when effectively acting as the champion for the Insured, HHIA set out to prove the evidentiary trail to verify Mr Hynes' belief or assumption. This it did by making requisitions of the Agent about the 2011-12 proposal.

236 In that same period of about a month, HHIA made representations to its AFS Licensee, and even to the police, that its conduct was based upon the belief or

assumption that the Agent already knew that the NMC was in occupation of lot 2, without asserting that HHIA had done anything to positive assert the NMC occupancy.

237 I accept the submission advanced by Counsel for the Agent that where a party fails to raise a matter where there is natural occasion or occasions for doing so, this may bear upon the credibility of their evidence, that on later occasions, they raised it[8]. But the force of that proposition depends upon the nature of the occasion. It was understandable that the Brokers may not commit to, or be circumspect about, any assertion or position in terms of their dealings with the Insurer, or even the Agent, or their respective firms of solicitors. But it was altogether different in terms of providing an account to their own licensee: for an event such as this, I would have expected full and frank disclosure of the circumstances, to the extent that they could be recalled. That was also the case with Ms Honeychurch's assistance, through her statement, to the police. In this regard, Ms Honeychurch and Mr Hynes did not assert the latter's express disclosure of the NMC occupancy when not only the opportunity presented itself for him to do so, but the circumstances were such that it was very much in their interests and it would be expected to have been as fulsome as could be in providing an account of what occurred.

Mr Hynes' multiple accounts

238 Without the benefit (as I have found it) of a contemporaneous note of his second telephone call with Ms Holmes on 9 April 2013, Mr Hynes had to rely upon his recollections of what occurred to sustain his position that he disclosed to Ms Holmes the NMC occupancy. This was always an inherently difficult task given his powerful belief or assumption that he did not actually *need* to disclose that matter since it was already known to the Agent. The nature of the task of proving *that* particular matter did involve an element of reconstruction (no more and no less than that of Ms Holmes' reconstructions).

239 The nature of that task explains why he apparently seized upon the file note in December 2019 to provide support to his argument, even though there was nothing before that time to trigger in his mind that he may have recorded

[8] Sybil Dawne Hintze v Ratna Tsering & Anor [2018] NSWSC 1190 per Sackar J at [60], citing Textralian Enterprises Pty Ltd v Perpetual Trustees Victoria Ltd [2000] NSWCA 176 per Heydon JA at [85].

(wholly or partly) in writing what he said to Ms Holmes on 9 April 2013. That was always open to the forensic risk that, without clear indications on the face of the document as to when it was written, some other (competing) plausible explanation could be given to the relevant entry.

240 The nature of the task also explains why Mr Hynes erred in thinking that his conversation with Mr Triff occurred in 2012 where there is no objective evidence to suggest that he had any occupation, as owner or tenant, of any unit within the apartment block until January 2013.

241 Further, although I acknowledge that a deponent giving evidence about a conversation many years before is trying to recall the substantive effect of what is said, between March 2014 and October 2020, when he was turning his mind to the question, there is no consistent assertion that he expressly identified the tenant, the NMC, by name, to Ms Holmes, other than to give her descriptors of the nature of who they were (a 'social club', or 'motorcycling social club', or 'local bike club') and what they did (have regular social functions on Friday nights).

242 In my opinion, convinced as he was that the Agent already knew of the NMC's occupation, but surprised that from the middle of February 2014 by what he saw in the 2011-12 proposal form and stymied by Mr Cooper's lack of cooperation, Mr Hynes rationalised to himself that the Agent knew of the NMC's occupation because he told Ms Holmes of that fact.

243 As I have found, whilst I accept the likelihood in the circumstances of his providing descriptors of the occupant, I do not accept that he identified it by name.

244 I find that Mr Hynes did not disclose to Ms Holmes the NMC's occupancy of lot 2. Since there was no suggestion that anyone else did prior to the Agent accepting cover, I find that the matter of the NMC occupancy was not disclosed to the Insurer, through its Agent.

DID THE INSURED'S DUTY OF DISCLOSURE REQUIRE DISCLOSURE OF THE NMC OCCUPANCY AND USE OF THE UNIT AS ITS CLUBHOUSE?

245 I have referred earlier in these reasons to evidence of Mr Hynes of *his* knowledge that the NMC occupancy was relevant to the decision of the Insurer

to accept risk. That evidence was consistent with the evidence of Mr Manning. Mr Hynes did not dispute his obligation of disclosure that the NMC occupied Unit 2.

246 The Insurer relied upon unchallenged expert opinion evidence from Mr Anthony Macken, an intelligence analyst with the NSW Police. As I noted in an evidentiary ruling admitting his opinion (subject to a limitation that it not be used to prove the circumstance that the NMC was an 'outlaw' organisation), the activities of the NMC, no differently to a range of other bikie gangs, would be taken to present a danger in the sense of damage to property or personal injury; and, further, the North Coast branch of the NMC's use of lot 2 as its clubhouse presented no lesser risk of property damage. As Counsel for the Insurer contended, this evidence was no different, in effect, to other evidence supplied, and accepted, by other tribunals of fact when confronted with building insurance cases where the occupants were bikie gangs. Indeed, in another evidentiary ruling concerning Mr Macken's evidence, in *Stealth Enterprises Pty Limited trading as The Gentleman's Club v Calliden Insurance Limited* [2015] NSWSC 1270, that expert's evidence was admitted to prove what was 'common knowledge': relevantly, that the particular bikie gang in that case was known to engage in activity which may result in property damage or personal injury[9].

247 The Insurer also relied upon an assortment of bills and legislation from 2009 to 2013 concerning legislative attempts to regulate bikie gangs (Exhibit 1D-9), directed to the disruption, restriction and prevention of the activities of 'violent outlaw motorcycle gangs'[10]. This was most relevant to the question of whether a reasonable person in the circumstances would know that the NMC occupancy was relevant to the Insurer's decision to insure.

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[9] The judgment at first instance was set aside on appeal, but not on the basis of the wrongful admission of Mr Macken's opinion to this effect: see Stealth Enterprises Pty Ltd t/as The Gentlemen's Club v Calliden Insurance Ltd (2017) 19 ANZ Insurance Cases 62-131 per Meagher JA (Ward JA and Sackville AJA agreeing) at [13].

[10] See the Agreement in Principle speech referable to the Crimes (Criminal Organisations Control) Bill 2009 (NSW) – The Premier, Legislative Assembly, Hansard 2 April 2009. The ensuing legislation which was enacted was invalidated by the High Court, but Parliament re-enacted a modified form of legislation in the Crimes (Criminal Organisations Control) Act 2012 (NSW). Further legislation was passed in 2013.

Parties' submissions

The Insured's submissions

248 If, contrary to its submission, the NMC occupancy was not disclosed, the Insured submits that it was not aware of the materiality of that fact. Further, even if Mr Hynes knew of its materiality, his knowledge is not to be imputed to the Insured. It cites the *obiter dicta* of the plurality in the High Court in *Permanent Trustee Australia Ltd v FAI General Insurance Company Ltd (in liq)*[11] to the effect that it is the knowledge (actual or constructive) of the Insured, not of any insurance intermediary, which counts. The High Court left open the possibility that evidence of an Insured's broker will not suffice to establish what the Insured knew, personally, or what a person in the Insured's position would reasonably know. Counsel for the Insured fairly acknowledged that notwithstanding this reservation, the Court of Appeal, whose decision was set aside, had determined that knowledge of an agent could be imputed to the Insured, and that the view had similarly been expressed by Allsop CJ *in Delor Vue Apartments CTS 39788 v Allianz Australia Insurance Ltd (No 2)* [2020] FCA 588 (at [245]) favouring the minority view.

249 The Insured endorsed the proposition that knowledge of a broker should not be imputed to the Insured as a matter of law and as a matter of fact, for the purposes of s 21(1) of the IC Act. As to the former, the Insured submitted that the provision should not be construed in a way which might make it a charter for an insurer to avoid liability. As to the latter, it could not be found that the individual lot owners knew that the occupancy was *material* to the Insurer's decision to accept the risk: the proposition was not put to each of them. Perhaps Mr Triff might have had a suspicion or belief, based upon what Mr Hynes had told him about other insurers not wanting to cover the premises, but the evidence did not rise above that. Further, even if Mr Triff did know, there is no basis for saying that his knowledge should be attributed to the Insured. Where the insured is an Owners Corporation, one cannot automatically

[11] (2003) 214 CLR 514 at [30].

aggregate the knowledge of lot owners and no reason was advanced why s 21 of the IC Act mandated such outcome[12].

250 The plaintiff submitted that, in relation to s 21(1)(b) of the IC Act, the knowledge of a reasonable person "in the circumstances" involved awareness that the occupant had been using the unit for a clubhouse for a not insubstantial period (5 years) and then on a very limited basis – drinks on Friday night running into the early hours – without incident or prior claims. The implication was that this branch of the NMC may, in their activities, have been different from the general organisation. Further, none of the questions in the proposal form dealt, in any way, with the identity of the occupant, any criminal record, or associates of the lot owners, as against the kinds of occupations carried on at the premises. Counsel for the Insured also argued that the awareness of Mr Hynes, or other brokers at the time, cannot be taken into account when assessing the constructive knowledge of the Insured.

The Brokers' submissions

251 Counsel for the Brokers submitted that, if the NMC occupancy was material, for the purposes of s 21 of the IC Act, contrary to the Insured's submissions, for the purposes of s 21(1)(a), the knowledge (of the materiality of a matter requiring disclosure) of the broker could be imputed to the Insured. If that was right, then there was no need to consider s 21(1)(b).

The Insurer submissions

252 Counsel for the Insurer submitted, at a general level, that in most cases, or absent those occasions where the insured is idiosyncratic, or obtuse, the tests in s 21(1)(a) and (b) will produce the same result. His written submissions on this part of the case did not clearly delineate what was actually known by the Insured, and that which was constructively known by it.

253 But it was not necessary to decide the point because the evidence was overwhelming that the Insured knew of it. In this regard, Mr Triff should be accepted as the 'directing mind and will' of the Owners Corporation and he certainly knew, based upon what Mr Hynes had told him (which he says

[12] Commonwealth Bank of Australia v Kojic (2016) 249 FCR 421; [2016] FCAFC 186 per Edelman J (Allsop CJ and Besanko J generally agreeing) at [92]-[118].

occurred on 12 April 2013), that it was unlikely that an insurer would accept the risk with the NMC in occupancy. Mr Triff told the police that he was aware that the NMC was an outlaw motorcycle gang. There was evidence that police cars were parked outside the premises with the apparent purpose of monitoring the situation to ensure that no trouble was emanating from within the unit or, for that matter, from without. Further, it was plain for anyone to see that an insurer might be interested in knowing if the occupation of a tenant whose logo, or insignia, contained the *swastika* (Exhibit C, p 1204). Further, it was not the case that any of the lot owners could have been under the misapprehension that the premises were used as an 'office'.

254 If, contrary to being satisfied that s 21(1)(a) was satisfied, then the constructive, or objective, standard of knowledge in s 21(1)(b) was easily satisfied. Mr Hynes well knew of it. Mr Macken's evidence about the notorious and self-conscious identification of bikie gangs like the NMC for their lawlessness and reputation for engaging and being the object of violent activities, including 'turf wars' with rival bikie gangs, should be accepted. So too should his evidence that property owned by the NMC was at risk of significant property damage.

255 Counsel submitted that the Court should accept that it was common knowledge, within the meaning of s 144 of the *Evidence Act*, that the NMC was, between 2011 and 2014, a 'bikie gang' and, what is more, an outlaw motorcycle gang known to engage in activity which may result in property damage or personal injury. The opinion of Mr Macken, to this effect, was reflected in several judicial findings, including in the *Stealth Enterprises* case[13]. Mr Macken had given evidence in previous litigation involving the NMC and, in his evidence, Mr Macken had indicated that the North Coast (Byron Bay) branch of the NMC was not exempt or in any substantial way distinct from the organisation as a whole. Further, a bundle of legislation and bills enacted or considered by Parliament indicated widespread community concern about the harmful effects of activities of outlaw motorcycle gangs.

[13] Stealth Enterprises Pty Limited trading as The Gentleman's Club v Calliden Insurance Limited [2015] NSWSC 1270 per Schmidt J at [94]. Her Honour's factual finding was not overturned on appeal.

The Agent's submissions

256 Counsel for the Agent supported the Insurer's position and made three additional submissions. Firstly, he submitted that, notwithstanding dicta in the plurality's reasons in *Permanent Trustee Australia*, I was bound by the earlier authorities in the Court of Appeal approving of the minority's position that the broker's knowledge could be imputed to the insured[14]. If it was necessary, for the purpose of identifying the directing mind and will of the Insured, it was Mr Triff.

257 Secondly, he submitted that section 21(2)(b) of the IC Act was directed to the unique situation of the idiosyncratic or obtuse insured[15]. The knowledge of the broker can be taken into account under this standard.

258 Finally, in reinforcement of the Insurer's contention about the common knowledge, Counsel for the Agent submitted that the circumstance that other courts in other cases had taken 'judicial notice' of a factual matter, though not strictly amounting to a precedent, may give confidence to a court in taking judicial notice in the case before it[16].

Consideration

259 It is unnecessary to resolve any doctrinal question of whether, for the purpose of s 21(1)(a) a broker's knowledge can be imputed to the Insured. This part of the case may be resolved by reference to s 21(2)(b). I find that the hypothetical Owners Corporation should be taken to have known at the time of renewal:

(a) the insurance was of property and the risks associated with occupation of a strata commercial complex;

(b) the insurance was offered through an underwriter who specialised in low to medium risks. It was the antithesis of an underwriter who targeted motorcycle bikie gangs amongst its clients;

(c) the NMC was a bikie gang and it was common knowledge that it generally engaged in activities which may result in damage to property and personal injury;

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[14] Macquarie Bank Ltd v National Mutual Life Association of Australia Ltd (1996) 40 NSWLR 543 per Powell JA (Priestley and Clarke JJA agreeing) at 610B-611F; Commercial Union Assurance Co of Australia Ltd v Beard (1999) 47 NSWLR 735 per Davies AJA (Meagher JA agreeing) at [37].

[15] CGU Insurance Ltd v Porthouse (2008) 235 CLR 103.

[16] Saul & Anor v Menon [1980] 2 NSWLR 314 (per Moffitt ACJ, Hope AP agreeing) at 326C.

(d) police cars were observed hovering in the vicinity of the premises on occasion. All of the lot owners were likely to have seen the club's logo (featuring the swastika) or other symbols (such as a flag) and know of the club's reputation in connection with property damage was well known in the Byron Bay locality. This last matter was evidenced by the speculation in the local media as to whether the fire was the result of a turf war between the NMC and a rival bikie gang;

(e) the President of the North Coast Chapter of the NMC was the owner of one of the units;

(f) social gatherings of the NMC occurred most Fridays in which liquor was served, without any license to supply alcohol at the premises;

(g) the nature of the club and the characteristics of its members meant that there was an ever-present risk of the creation or escalation of violence which could pose a risk to the safety of the premises and its occupants; and such risk was itself heightened by the unlicensed supply of liquor within the premises;

(h) that, from the underwriter's perspective, occupation and use of one of the units in the building by the NMC was a 'high risk' of property damage, and also presented a 'moral hazard';

(i) that the Brokers had, in April 2012, been rebuffed when they had sought coverage from an underwriter (Axis) because of the identity of the NMC;

(j) according to Mr Manning, brokers would have known of the materiality of the circumstance of the NMC's occupation and plainly Mr Hynes knew of that; and

(k) the Insured was not, however, required to disclose matters of common knowledge that the insurer in the ordinary course of its business would know.

260 I acknowledge that the test in s 21(1) requires proof of *knowledge*, rather than lesser state of mind, such as suspicion.

261 I am comfortably satisfied, for the purposes of s 21(1) of the IC Act, that the NMC occupancy required disclosure as being relevant to the Insurer's decision to accept the risk.

262 I do not, in the circumstances, consider it necessary to consider the rather subsidiary question whether it was material to *also* disclose that the NMC was using the unit as its clubhouse. There is no suggestion, for example, that this added to the risk in the sense of its presenting any fire hazard; which was something that the Insurer was particularly astute to avoid.

WOULD THE INSURER HAVE BEEN ENTITLED TO AVOID THE POLICY

263 Again, this question need only be considered on the contingency that I am wrong in finding that the NMC occupancy was disclosed to the Insurer's Agent.

264 Again, the Insurer carried the onus of establishing on the balance of probabilities what its position would have been if the non-disclosure had not occurred. Although s 28(3) of the IC Act practically requires an insurer to adduce evidence of what it would have done in the event of disclosure of the relevant matter, the Court is notoriously astute to take care in evaluating that evidence, having regard to the circumstance that such evidence is given through the 'prism of hindsight', after the risk has eventuated. As Sackville AJA said in *Stealth*, evidence of what underwriters and the insurer say after the event is to be assessed not merely with reference to the credibility of the witnesses, but the objective probabilities[17].

265 Counsel for the Brokers submitted that typically in cases such as this, an insurer might point to express prohibitions in guidelines about placing cover for a certain risk. But in this case, the occupancy tables merely listed this club under the benign category of 'Social Club' with a low risk.

266 Counsel for the Insurer, supported by the Agent, referred to the numerous instances where the Agent declined to provide insurance cover to potential Insureds simply on the basis that there was a motorcycle club in occupation[18].

267 There was no serious challenge to the evidence of Messrs Hodgson, Cecil and Garling that had they known that the NMC was an occupant, the underwriter would have refused the risk.

268 I find that the Insurer was entitled to avoid the policy and reduce its liability to nil.

Consequences of findings

269 The plaintiff's claim against the Insurer therefore fails at the level of breach. That being so, the Insurer's contingent cross-claim against the Agent also fails. Later in these reasons, I will consider issues associated with the cross-claim on

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[17] Stealth Enterprises Pty Ltd t/as The Gentlemen's Club v Calliden Insurance Ltd (2017) 19 ANZ Insurance Cases 62-131 per Sackville AJA (Meagher JA and Ward JA agreeing) at [87].
[18] Referring, here to Exhibit 1D-1, pp 2288-2309.

the contingent basis that I am wrong in my essential findings in relation to the Insured's claim against the Insurer.

270 Because of my findings, it is necessary, shortly, to consider the Insured's case against the Brokers, but before doing so, it is appropriate to consider what damages that the Insured could have recovered against the Insurer had it succeeded in its case since they will, generally, represent what would be recoverable against the Brokers if the Insured succeeds in its case against the second to fifth defendants (inclusive). The brokers supported the Insured's position on quantum of the claim against the Insurer and the only distinction they drew in relation to the quantum of the claim against them was the consequential loss to lot owners exceeding the limits of the cap in the indemnity contract.

DAMAGES

Costs of rebuilding and repair of the building

271 The Insured relied upon the evidence of Mr Barker, who is a quantity surveyor and who, in a report dated 28 August 2019, opined that the estimated construction costs to rebuild part of the fire damaged building, as per the drawings, as at the date of the loss, was $463,347.41 (inclusive of GST).

272 Mr Barker was not required to attend for cross-examination, so his opinion was unchallenged. Neither the Insurer nor the Agent adduced their own evidence as to the costs of rebuilding and repair.

Parties' submissions

273 The Insurer made no written or oral submissions on the issue of the costs of the rebuild and repair. The Brokers made no submissions on this part of the damages claim either.

The Agent's submissions

274 The Agent submitted that subject to certain provisos, the Insured would be entitled to the cost of reinstatement. But the 2013-14 policy contained a proviso, being a 'Basis of Settlement clause', the effect of which was that the Insured had no entitlement until a sum equivalent to the cost of reinstatement

had been actually incurred[19]. That meant that the Insured was entitled to be paid the 'indemnity value' under cl 1 of Section 1, which amounted to the value of the damaged property at the time of the happening of the damage. Ordinarily, assessment of 'indemnity value' would involve a comparison between the difference in market value before and after the event giving rise to the claim[20]: an assessment which is relatively straightforward where the property is destroyed and has no ongoing value after the event. The Insured's expert did not however, try to determine market value as at the date of the event. Instead, the expert focussed on the cost of reinstatement, and then only at a later date, in 2019.

275 The Agent submits that the Insured has not proven the quantum of the indemnity value and, in the absence of valuation evidence, which should have been obtainable, the Court should not guess what that might be. The problem, Counsel submitted, would not affect the Insured's recovery against the Brokers.

276 The Agent further submits that by subclause 4.1, the Insured is entitled to recover costs and expenses for the removal of debris off the Property and its demolition. The Agent accepts that the Insured has proven the quantum for that component of loss in the sum of $10,955.

The Insured's submissions

277 In reply, Counsel for the Insured submitted that the plurality in *CIC Insurance Ltd* recognised that:

> "…in a suitable case the appropriate measure of indemnity may be the cost of reinstatement. That may be so where market value before and after the occurrence of the risk does not provide an accurate measure of the loss"[21].

278 He referred to the definition of 'indemnity value' (Exhibit 1D-1, p 2339) which equated the concept of indemnity to the cost of reinstatement which, properly construed, evinced an intention that the Insured should, so far as possible and no more, receive a sum of money that would put the Property back into the position it was in if the event had not occurred, taking into account wear and

[19] Compare CIC Insurance Ltd v Bankstown Football Club Ltd (1997) 187 CLR 384 at 398.
[20] CIC Insurance at 404.
[21] (1997) 187 CLR 384 at 397.

tear (amongst other things). But it would be impractical to rebuild in a fashion that would put the building into the condition it was in, say, 10 years ago, with wear and tear. It was particularly impractical where one of the units, Mr King's unit, was not destroyed at all.

279 Counsel referred me to the provisions of then applicable legislation, the *Strata Schemes Management Act* 1996 (NSW) (the '**SSM Act**'). In particular, section 83 obliged the Insured to insure the whole building and keep the building insured under a 'damage policy' with an approved insurer. 'Damage policy' (s 82(2)) was intended to provide for the rebuilding of the building, or its replacement by a similar building in the event of its destruction, so that every part of the rebuilt building or the replacement building is in a condition no worse or less extensive than that part of its condition when that part was new.

280 By s 245 of the legislation, it was not possible for an insurer to contract out of the provisions of the Act. Counsel submitted that the 'Basis of Settlement' proviso would have the effect of providing less coverage than conferred by s 82 and on that account was void.

Consideration

281 Although, perhaps strictly, it was appropriate for the Insurer and Agent to specifically plead in their Defences the point that the Agent now wishes to raise concerning the application and effect of the indemnity clause, in limitation of any liability under the policy, it raises only a matter of law and has been adequately responded to by the Insured. I therefore address it.

282 In my opinion, it is unnecessary to resort to application of any qualification or exception to the assessment of indemnity under general law principles identified in *CIC*. The matter is governed by the provisions of the policy, to the extent that they are affected by the subject legislation identified by the Insured. I accept the Insured's submissions that the effect of the proviso in cl 6 of the policy, the 'Basis of Settlement' section, would substantially derogate from the protection enshrined in s 82 of the SSM Act.

283 That being so, the Insured would be entitled to the costs of rectification. Mr Barker set out to estimate rectification costs, consistently with the appropriate

drawings, as at the date of the loss. In my view, that is an appropriate basis for valuing the breach of the promise of indemnity.

284 I find that the construction costs of rebuild and repair are $463,347.41 (including GST).

Claim for loss of rent (and consequential loss) suffered by lot owners

The pleading

285 At paragraph 15 of the Statement of Claim, as against the Insurer, the Insured alleged that "By reason of the said breach of the policy (by the first defendant) the plaintiff has suffered loss and damage".

286 In the particulars to that allegation, the Insured stated, among other particulars of the heads of loss that:

> "…The plaintiff claims all loss of rent from the site suffered by the lot owners for the period after 12 months from the date of the fire to the date 12 months after any judgement."

287 The Insurer's traverse of paragraph 15 in its Further Amended Defence averred simply that "The First Defendant denies the allegation in paragraph 15 on the basis it did not breach the policy but rather reduced its liability under the policy to nil pursuant to s 28(3) of the (IC Act) outlined in paragraph 7 of this Defence". As is apparent, that was merely a denial of breach and it followed that no entitlement to damage arose. Nothing was said on the question of what damages could be recoverable from any breach but the issue was implicitly joined. Nothing was said that the Insured lacked standing to agitate for claims for lot owners for loss of rent.

288 At paragraph 20 of the Statement of Claim, the same allegation was repeated against the Brokers and the AFS Licensee. The Brokers and AFS Licensee say that no loss of rent of individual lot owners (in excess of what was recoverable under the policy) was recoverable against them, but not because of any lack of standing in the Insured to claim for it on their behalf. They supported the Insured's position in this regard.

289 The Insurer, and the Agent, both contend that it is not open to the Insured to claim loss and damage suffered by the individual lot owners. The rights to claim for rent, if any, were those of the lot owners and they did not bring the

claims. The Insured had no standing to claim damages for the loss suffered by the lot owners.

290 In my opinion, such contention should have been pleaded, if not under r 14.14(1), then under r 14.14(2)(b) of the *Uniform Civil Procedure Rules 2005* (NSW) ('**UCPR'**). In a case relied upon by the Insurer, being the decision of Williams J in *The Owners – Strata Plan 85044 v Murrell; Murrell v The Owners – Strata Plan 85044* [2020] NSWSC 20, where an Insurer had raised a similar point about the absence of standing of an Owners Corporation to bring a claim on behalf of lot owners, her Honour noted (at [148]) that in that case, the defendant had raised in its pleading the question of standing. That did not occur in this case.

291 Counsel for the insurer justified his client's conduct on the basis that the Insurer was only required to plead to the facts, not the particulars; and the allegation was that the *plaintiff* suffered loss and damage. In effect, he was saying that the Insurer was entitled to ignore what was said in the particulars about the Insured advancing the claim for loss suffered by the individual lot owners. Counsel for the Agent submitted that if the wrong claimants, or not all claimants, were joined, it was not up to the defendant to point out the problem.

292 So far as is apparent, no clarification was sought by the Insurer as to whether, in the light of the particulars to the damages claim I have referred to, the plaintiff was wholly or partly bringing a claim for loss or damage exclusively in its own capacity or partly in its capacity of effectively representing the interests of the three lot owners who had suffered loss or rent.

293 So far as I am aware, the point about standing was first ventilated on the opening day of the trial. By then, it was futile for the Insured to apply for the joinder of the three individual lot owners as any rights in them to bring proceedings for their individual claims were statute-barred.

294 During the hearing, no objection was taken to evidence from the individual lot owners deposing to the loss of rent they had suffered on the basis that such evidence was irrelevant to the plaintiff's claim.

295 Having regard to modern case management objectives, the Insurer's position in taking a standing point, and that of the Agent who endorsed it, was unsatisfactory. Paragraph 15 of the Statement of Claim, read with the particulars I have referred to, clearly put the Insurer (and derivatively, the Agent) on notice that the Insured was partly advancing a claim for the benefit of individual lot owners. If there was any ambiguity as to the capacity in which the Insured brought a claim for damages, it was a straightforward expedient to seek clarification as to the capacity in which the Insured could bring a claim for loss or damage based upon the rental losses of individual lot owners. At least in the case of the Insurer (it would have been too late for the Agent, who only became subject to a claim in August 2020), had the Insurer raised the point in a timely fashion, it would have been possible for the Owners Corporation to consider whether application might be made to join the three affected lot owners as additional plaintiffs. The Insurer was not entitled to stay silent and raise the point nearly two years later.

296 In my view, in circumstances where the lot owners cannot now bring the claims themselves, it would be procedurally unfair to allow the Insurer, and therefore the Agent, to run the point which was not raised in their respective Defences.

297 I cannot gainsay the possibility that adherence to procedural fairness may produce the unfortunate result that I might be making a finding about entitlements for the indirect benefit of individual lot owners which, if the point was properly pleaded, would not be available. It is fair to say that the arguments, on the merits of the point, advanced by the parties, were not straight-forward. But the circumstance that findings might be made which would be contrary to the position that would have applied if a defence (or, more accurately, a limitation on liability) had been pleaded however, is not uncommon in other contexts where a procedural bar is not invoked by a defendant in a timely way to defeat or limit a claim, such as where a limitation period is not pleaded as a defence[22], or where a defendant fails to identify a concurrent wrongdoer in time to allow a plaintiff to join it as a defendant[23].

[22] Ketteman v Hansel Properties [1987] 1 AC 189 at 217B, 219E, 223D.
[23] Sanderson Motors Pty Ltd v Lindsay Bennelong Developments Pty Ltd [2014] NSWSC 846 at [54].

298 I proceed on the basis that as part of its claim for damages, the Insured is entitled to seek recovery for the loss of rent suffered by three of the lot owners; and/or consequential economic loss suffered by each of them.

Terms of the policy

299 The Insured relied upon clauses 3.1.A and 3.1.B of the policy (Exhibit 1D-1, p 2346), which posited that:

(a) for an owner occupied unit that becomes uninhabitable or unfit for its intended purpose, the insurer will pay the lot owner an amount equivalent to the rent it could have been rented for until it becomes inhabitable again for a maximum period of 24 months (cl 3.1.A, which was said to be applicable to Mr Triff's unit, being lot 3); and

(b) for a unit that is rented or would have been rented that becomes uninhabitable or unfit for its intended purpose, the insurer will pay the lot owner an amount equal to the rent the lot owner was receiving until it becomes inhabitable/fit, to a maximum period of 24 months (cl 3.1.B, which was said to be applicable to the other three units of Mr King, Mr Field and Ms Warne).

Evidence of lot owners

300 The lot owners gave evidence to the following effect:

(a) Mr King (lot 1) suffered a loss of rent from $33,750 in the period from February 2014 to 20 December 2017;

(b) Mr Field (lot 2) suffered a loss of rent of $141,050 in the period from February 2014 to the date of the hearing;

(c) Mr Triff (lot 3) suffered a loss of rent of $24,000 for the period of two years; and

(d) Ms Warne (lot 4) suffered a loss of rent of $93,000 in the period from February 2014 to the date of the hearing.

301 These amounts were calculated by reference to the allowance for rent available under cl 3.1.A (in Mr Triff's case) and 3.1.B (in the case of the other lot owners). However, the allowance for rent under the policy was, in the aggregate, capped at $75,000.

302 The evidence of these lot owners was not challenged when each of them gave evidence. Notwithstanding this omission, Counsel for the Insured made extensive written submissions on the factual aspects of their respective claims.

Submissions in relation to lot owners' claims for lost rent

Plaintiff's submissions

303 The plaintiff argued that cl 3.1.A was directed to someone like Mr Triff – an owner/occupier; whereas cl 3.1.B was directed to the other lot owners who used their unit for investment purposes.

304 For Mr Triff (lot 3), his property was uninhabitable and the best evidence for rent for his premises was that which pertained for the other units. The Insured took the lowest amount (referable to Ms Warne's rent), being $1,000 a month. For Mr King (lot 1), his property was only damaged and uninhabitable for only a month. For Mr Field (lot 2) and Ms Warne (lot 4), their properties were destroyed, and they were entitled for lost rent for 24 months. The total for lost rent under the policy exceeded the policy limit of $75,000 so this was the sum claimed.

305 Counsel for the Brokers supported the Insured's claim for lost rent arising from an entitlement under the policy itself.

Insurer's submissions

306 The Insurer contends that the owner of lot 1 (Mr King's unit) was not entitled to rent because there was no evidence that this unit was 'uninhabitable, unfit for intended purpose or inaccessible'. At its highest, Mr King could only refer to minor fire damage to the timber trusses, sarking, windows and framing in the roof offset and electrical wiring.

307 As to lot 2, Mr Field had no lease or rental agreement. At its highest, Mr Field licensed the NMC's occupation.

308 As to lot 4 (Ms Warne's unit), it was not clear that rent was being paid to the owner.

309 Further, or alternatively, if Mr King's unit is left out because it had been rented out from March 2014 (albeit on a reduced basis) so that the claim was only maintainable in relation to units 2 and 4, then the total claim would be $55,608, comprising $33,600 for unit 2 and $22,008 for unit 4.

310 As to lot 3, the Insurer's written submissions did not specifically challenge the factual basis for Mr Triff's claim for rent.

Consideration

311 As to lot 1, I accept that Mr King's inability to obtain rent was the result of his unit being any, or all, of the descriptors 'uninhabitable', 'unfit for intended purpose' or 'inaccessible'. Contrary to the Insurer's submission, I do not accept that the evidence Mr Lucena (Exhibit C, p 1222) or a note taken by the police (Exhibit C, p 1270) as being to contrary effect. The Insurer's challenge to his claim is rejected.

312 As to lot 2, Mr Field deposed to receiving payment of $350 per week as rent for the use of the premises. He was not challenged on that evidence. Contrary to the Insurer's submission, cl 3.1.B does not, by its terms, make it a condition precedent to recovery under that provision that the lot owner produce for the Insurer a written lease or rental agreement. It referred only, at most, to verification. Contrary to the Insurer's submission, it was open to the Insurer to investigate whether such verification could be established by other means. The Insurer's challenge to Mr Field's claim is rejected.

313 As to lot 4, Ms Warne annexed to her affidavit the front page of a written lease entered on 15 August 2013, which subsisted as at the date of the fire. She deposed to receiving rent of $1,000 a month. That evidence was unchallenged. The Insurer's challenge to her claim is rejected.

314 I therefore accept that each of the unit owners have made out their claim and accept the claims for rent made by the individual lot owners under the policy.

Consequential loss for lot owners

315 The balance of what Mr King, Mr Field and Mr Warne respectively claim is claimed under common law principles[24], being the consequential loss arising following an Insurer's breach of the insurance policy, by not fulfilling its promise to indemnify. It was said that it was within the contemplation of the parties, if not would ordinarily flow from the Insurer's refusal to reinstate, that lot owners would suffer a loss of rent.

316 The Insurer did not make specific submissions in response to this claim. Neither did the Agent. The Brokers made some submissions on the point in

[24] Brescia Furniture Pty Ltd v QBE Insurance (Australia) Ltd [2007] NSWSC 598.

terms of *their* liability, which I will address in the section dealing with the Insured's claim against the Brokers, but otherwise supported the Insured's submissions as to what was recoverable *against the Insurer* for lost rent beyond the $75,000 cap.

Consideration

317 I accept the Insured's submissions as to the losses of individual lot owners arising from breach of the policy, if such breach had been established.

318 I also accept the plaintiff's arithmetic, being $285,224, representing the cap of ($75,000) and the consequential loss for breach of the policy ($210,224).

319 When added to the cost of rebuilding and repairs, I accept that the quantum of the total claim for the Insured against the Insurer, if the Insurer was liable, is $748,571.41.

Interest

320 A claim for interest is made, but the pleading does not indicate whether it is claimed under the *Civil Procedure Act 2005* (NSW) or under s 57 of the IC Act. By s 57(4), if there is conflict with state law, s 57 will prevail. The plaintiff ultimately relied upon s 57 of the IC Act in relation to the damages for rebuilding and repair and loss of rent under the promise in the policy, but said that that could not be applicable in relation to the claim for consequential loss flowing from the Insurer's breach of policy, and interest under that head of loss was calculated in accordance with ordinary Court rules. Ultimately, the plaintiff sought to defer calculations until the Court made findings on what heads of loss were recoverable.

THE INSURED'S CLAIM AGAINST THE BROKERS

Evidence on liability of brokers in relation to non-disclosure

321 The Insured relied upon unchallenged expert opinion evidence from Mr Allan Manning, the Managing Director of LMI Group. Mr Manning has a deep reservoir of experience in the insurance industry, which has been recognised by his receiving honorary life membership of the Australian and New Zealand Institute of Insurance and Finance. He holds a significant number of academic qualifications, and is a lecturer and author of texts concerning insurance.

322 Mr Manning was instructed to opine on whether the Brokers' actions here were in line with a competent broker acting with reasonable care and skill.

323 After explaining what he regarded as the proper practices for brokers, Mr Manning considered a variety of factual scenarios principally directed to whether or not the Brokers visited the proposed premises to be insured and, if not discovered for itself, was informed, that the NMC was in occupation of one of the units.

324 The upshot of Mr Manning's opinion, which was unchallenged, was that a reasonable broker in the position of these brokers would have had to have put itself in a position to identify the occupants of the building; whether that be by way of a personal visit to the premises or reliance upon what the client had informed it. Thus, even if it had not visited the premises before the Insurer accepted the risk and had not been told about the occupancy of one of the units by the NMC, reasonable care required that the broker would not seek to arrange insurance without knowing the occupation of all tenancies. Once appraised of the circumstance of the tenancy of Unit 2, reasonable care and skill would have required it to disclose the occupancy of a bikie club to the Insurer.

325 Further, he opined that although a broker may not necessarily be aware of the risk appetite of every single insurer and underwriting agency in Australia, a broker acting with reasonable skill and care would have accurately disclosed the occupation to the underwriter to allow it to make a meaningful decision. If the Insurer in this case elected not to insure, and no other insurer elected to accept the risk, then reasonable care would have required the broker to convey this information to the client urgently.

326 Mr Manning's opinion was unchallenged. Indeed, Mr Hynes essentially endorsed his basic outline of a broker's duties in relation to disclosure when he was cross-examined. As Mr Hynes had said in his first affidavit, he understood that motorcycle clubs represented a moral risk for insurers and accepted it could be generally challenging for a broker to obtain insurance for that class of occupant. Indeed, his position in the Defence filed on his behalf was that no

insurer would provide coverage if the NMC's occupancy in this case was disclosed to it.

327 Mr Manning was eminently well qualified to express his opinions. I accept them.

Duty of care and breach

Duty

328 There was no issue that Mr Hynes owed a duty of care to the Insured. His firm would also be vicariously liable for the conduct of its director.

Ms Honeychurch's position

329 To my mind, there is nothing that Ms Honeychurch personally did in trying to place cover for the Insured in April 2013. She had essentially delegated the task to Mr Hynes after receiving Ms Harvey's email in about the middle of 2013. There was no suggestion that this was unreasonable. I do not see her conveying to the Insured any assumption of responsibility, and in the absence of any assumption of responsibility by her for placing cover for the 2013-14 year, she had no personal duty of care to the Insured[25].

Preliminary issue – content of the duty of disclosure

330 The Brokers submitted, as a starting point, that in their defence generally to the claim against them, they are not confined by the way that the plaintiff pleaded and ran its case against the Insurer. That means, amongst other things, that if there was conduct by the Insurer that might have amounted to a waiver, for the purposes of s 21 of the IC Act, then although the Insured may not have relied upon the point, it remained open for the Brokers to rely upon it if the circumstances which might have established a waiver could also dilute or qualify the Insured's duty of disclosure. Thus, if the Court found that Mr Hynes had disclosed that a 'motorcycle social club' to Ms Holmes, or if he had discussed the nature of the activities of that club to her, or someone else who was the employee or agent for the Insurer, then the Insurer's failure to follow through and seek further information militated against a requirement in the Insured for further disclosure. Counsel for the Brokers submitted that in April 2013, a new policy was sought in relation to a new Insurer; and that where the

[25] Williams v Natural Life Health Foods Ltd [1998] 2 All ER 577.

Insurer did not ask questions as to the identity of the occupant, the Insured's duty was to do no more than to answer the questions raised of it.

331 Although no claim was brought against the Insurer by the Brokers, Counsel for the Insurer took objection to this point on the basis that it was not pleaded. But to meet the contingency that the Brokers were allowed to run this point, Counsel for the Insured, in his closing address in reply, raised the argument that when considering the insurance policy (Exhibit 1D-1, p 2335), the policy was a 'New Policy' in the sense that the Insurer had taken the risk after Calliden decided not to re-insure, but it was practically treated by all parties as if it was a 'Renewals' policy. That made a difference in the content of the Insured's duty of disclosure: it was simply a matter of answering questions raised by the Insurer honestly. Counsel referred to s 52 of the IC Act, which sanctioned the parties to the contract varying rights, unless that might work to the prejudice of the Insured. Here, however, the Insurer might be taken to have accepted a dilution of the duty of disclosure applicable to what was strictly a 'new policy'.

332 The Insurer also objected to this argument, arguing that had it been raised, it would likely have set in train a very different course of inquiry and evidence.

333 Although the Brokers did plead in their Defence that the Insurer was already aware of the NMC occupancy and that there was no further information which the Brokers *could* have passed on to the Insurer (sub-paragraph 9(c)), that factual contention has been rejected and it is a qualitatively different contention to asserting that in view of the information that the Insurer already had, it had waived the duty of disclosure. *That* contention was not pleaded in their defence as amended, as r 14.14(1) and r 14.14(2)(a)-(c) of the UCPR required it to be pleaded, and no application to amend was brought by the Brokers. Had it been pleaded prior to Counsel for the Brokers advancing the point at trial, it is likely that the Insured would have taken up the same point, and sought to amend its own claim against the Insurer and if such amendment were permitted, the Insurer would very likely have sought to have run a case consistent with the waiver argument. It now cannot do so. If, as I apprehended, Counsel for the

Brokers, and thereafter, Counsel for the Insured were bringing a point that exceeds their respective pleadings, the Court should not entertain the point.

Breach of duty

334 The Insured submitted that the risk of harm, for the purposes of s 5B of the CL Act, was that the Insured would be left with an unenforceable policy by reason of the non-disclosure of the NMC occupancy.

335 In my view, which is not dissimilar in effect to the Brokers' formulation, the 'risk of harm' here was the risk that, absent the exercise of care by the Brokers in assisting the Insured to fulfil its statutory duty of disclosure to identify the identity and nature of the tenancy in all of the lots to the building, the Insurer would purport to avoid the policy.

336 There is little doubt in my mind that such risk was foreseeable and not insignificant.

The alleged reasonable practice

337 By paragraph 19 of its Statement of Claim, the Insured effectively pleaded the precautions which it said that the Brokers failed to take in preventing the risk of harm. They were:

(a) failing to disclose to the Insurer (or its agent) the NMC occupancy, or failing to advise the Insured to make that disclosure;

(b) failing to advise the Insured that non-disclosure of the NMC occupancy meant there was a substantial risk that the Insurer could decline indemnity;

(c) failing to make any inquiries of other alternative insurers who might be prepared to take on the risk with the NMC occupancy;

(d) failing to advise the plaintiff to obtain a policy of insurance from an alternative insurer, with the NMC occupancy disclosed; and

(e) in the event that insurance could not be placed because of the NMC occupancy, failing to advise the Insured that insurance could only be obtained if the NMC occupancy was brought to an end.

Parties' submissions

The Brokers' submissions

338 The Brokers made no submissions in writing, or verbally, on the issue of breach.

The Insured's submissions

339 For the purposes of ss 5B(2) and 5C of the CL Act, the Insured submitted that Mr Hynes accepted, under cross-examination, that a broker had a duty to ensure that what the Insurer was told was fair and accurate. Prior to 9 April 2013, Mr Hynes had made no inquiry of either the Insured or the Agent of what had been disclosed to the latter about the identity of the tenants and how and when that tenants had taken occupation. There was, moreover, no reasonable basis for Mr Hynes to assume or believe information that the Agent had was correct. It was an act of complacency on his part to assume or believe that the former brokers, or former occupants within the apartment building, would have acted in a way as to ensure that the Insured had complied with its duty of disclosure. Not least is that so because circumstances concerning the identity of the occupants and nature of its activities may have changed. Although Mr Hynes may have been under some pressure to obtain coverage for the Insured for the 2012-13 year, no such pressure was on him in relation to the 2013-14 year. The obligation to inquire was not onerous.

340 Section 5B(2) is not exhaustive of the list of relevant factors in determining the response of a reasonable person in the defendant's position to the risk of harm. That being so, in the context of professional liability claims, it is well-established that the general practice of competent professionals is powerful, if not necessarily conclusive, evidence that what was done or not done was negligent[26]. Mr Manning's evidence, which I have accepted as a relevantly accurate description of proper competent and prudent practice of insurance brokers, is apposite.

341 I have found that Mr Hynes did not disclose the NMC's occupancy to Ms Holmes. I accept each and every one of the allegations the Insured made in its pleading about the precautions which Mr Hynes should have undertaken. As

[26] Dovuro Pty Ltd v Wilkins (2003) 215 CLR 317 per McHugh J at [34].

indicated, there was, I note, no resistance by the Brokers to such finding in their Counsel's written or oral submissions. By these omissions, Mr Hynes failed to take the reasonable precautions against the risk that the plaintiff would be left with an unenforceable policy, thereby exposing the Insured to substantial financial loss if an insurable event, like fire, occurred. Further, by acting only upon a belief or assumption that the Insurer already knew of the NMC's occupancy, without more, Mr Hynes denied his client the opportunity of ascertaining whether insurance could be obtained from a different insurer with the NMC occupancy disclosed, and denied his client the opportunity to remove the impediment – the NMC occupancy – to obtaining such insurance. Although there may have been some time pressure operating upon Mr Hynes in early April 2013, his firm had received the Insurer's proposed terms in the middle of March 2013. Objectively, there should not have been time pressure. Further, it was not inherently burdensome for a broker in Mr Hynes' position to ascertain what other insurers, particularly with a different appetite for risk than the Insurer in this case, might accept the risk of the NMC occupancy. I accept Mr Manning's evidence (at paragraphs 6.27 and 6.38) about this alternative avenue. No evidence was adduced to the contrary on behalf of the Broker.

342 I also accept Mr Manning's evidence that if no alternative insurer could be located, a reasonable broker in Mr Hynes' position would have informed the plaintiff of this circumstance in a sufficient period of time so that the Insured could alter the circumstances of the NMC's occupation of lot 2 and demonstrate to the Agent, or a potential new underwriter, that the NMC's occupation was merely a historical fact which would not be repeated. There does not appear to be any insuperable burden or obstacle upon Mr Hynes from doing so.

343 By failing to take these reasonable precautions, I find that Mr Hynes was negligent and also in breach of the implied term in his retainer, to exercise reasonable care and skill. Accordingly, HHIA was also negligent and in breach of the implied term of care and skill.

Breach by the insured of a condition in the policy

344 By its Defence, the Brokers pleaded a further causation point that if the underwriter here had accepted the risk, the policy would not have responded to the claim, since the Insured had breached a term of the policy. However, Counsel for the Brokers abandoned this part of the defence in closing addresses.

Causation & Damages

345 By ss 5D and 5E of the CL Act, the Insured bears the onus of proving that the relevant negligent conduct of Mr Hynes and HHIA caused the Insured loss or damage.

346 The first requirement is factual causation. Factual causation depends upon the Insured proving that it would not have suffered harm but for the defendant's breach[27]. It is not made out where the same harm would have happened anyway regardless of whether there was any breach of duty.

Factual causation

347 The Insured submitted that if the NMC occupancy had been disclosed, it was likely that the Agent would not have accepted the risk. I accept that submission, based as it is upon the evidence of Mr Hodgson (and Ms Stenning). Communication to the Brokers of that indication would practically have required the Brokers to advise the Insured that attempts should be made to try to obtain coverage elsewhere. That might, as Mr Hynes said, have been very challenging but 'doable'. If it turned out to be 'doable', cover was likely to have been placed on similar terms (price) as that which the Agent had offered. But if not, then the inability to place cover would have had to have been disclosed and the Owners Corporation would have had a choice: either remain uninsured, or take pro-active steps to remove the source of the problem – the NMC occupancy. As to the former, there was actually no real choice because the Owners Corporation was under a statutory obligation to insure (s 83 of the SSM Act). In the latter event, evidence from the lot owners, and particularly, Mr Field, would suggest that the NMC would have moved. Being an investment property, Mr Field was likely to have gotten a replacement tenant but if not, it

[27] Section 5D(1)(a) of the CL Act.

would have been unoccupied. This evidence, which was not objected to by the Brokers, was in my view admissible since the negligence relates to the Brokers' effective failure to obtain effective cover, and that cover was relevantly coverage *for the Owners Corporation*; even if, incidentally, there was also a promise to pay individual lot owners for a loss of rent associated with disruption to the occupancy of the building following an event like a fire. In my view, for the purposes of s 5D(3)(b) of the CL Act, it is not inadmissible for tenants to give evidence as to what they would have done if they were informed, as they should have been informed, as to the various possible scenarios, since for the purposes of the statutory provision the "person" who has suffered the legal wrong and the harm by reason of not having an enforceable insurance policy was the Owners Corporation[28]. Of course, although admissible, such evidence is to be assessed with caution, but in circumstances where the Brokers did not challenge any of it, I accept the evidence from the lot owners.

348 A question becomes what would *this* underwriter, or some other underwriter, have done if informed, in early April 2013, that although the NMC had previously been in occupancy of lot 2, it had moved out. There was little attention given to this hypothetical in the evidence; which leaves the Court in the realm of possibilities. But it does not follow that the plaintiff may fail to make out causation, since the Court may infer the likely behaviour of a third party in hypothetical circumstances[29]. Having regard to the absence of claims history, the apparent absence of 'trouble' or acrimonious dealings between the lot owners, those circumstances would powerfully favour the Insured. The Agent and/or the Insurer would have been likely perturbed about the circumstance that for several years in the past, it had been misled about the nature and extent of the occupancy. But weight should be given to the possibility that the Agent would wish to continue good relations with the Brokers and I consider that the Agent would probably take a sympathetic view, at least, of the Brokers' position (if not the conduct of the former brokers). Further, the person apparently responsible for the 2011 proposal form upon which the Agent relied, was also no longer a tenant (even if his sister, Ms Warne, was). This was also

[28] Richtoll Pty Ltd v WW Lawyers Pty Ltd (in liq) [2016] NSWCA 308 at [53]-[55].
[29] Gold Ribbon (Accountants) Pty Ltd (in liq) v Sheers & Ors [2006] QCA 335 per Keane JA (Williams JA and Wilson J generally agreeing) at [281].

a factor likely to work in favour of the Insured. The underwriter would plainly wish to know of the identity and occupation of a replacement tenant if one might have been found in early April 2013. It is hard to see that how a replacement tenant could have been anything but less of a risk than the NMC.

349 If the Agent, on account of being misled about the risk in the past, declined to accept a risk with the NMC occupancy having been brought to an end, then the attitude of other underwriters would have to be ascertained. As indicated, Mr Manning indicated that there were other such underwriters, in Australia and outside Australia, who might be able to tolerate the NMC occupancy. Mr Hynes said in his evidence that with the NMC occupation, although it would be challenging, it was 'do-able' to obtain coverage. I infer that it would have been even more do-able if the NMC was not in occupation. It is not apparent that any terms offered by a different insurer, without the NMC being in occupation, would have been so much more disadvantageous to the Insured than the terms it accepted in April 2013 as to impel the Owners Corporation to reject them. This is an area in which it might have been expected that the Brokers could have adduced some evidence of, but they did not.

350 I consider that it is more probable than not that with the NMC gone, if Unit 2 was left vacant or if it became occupied by a tenant whose activities were legal and did not bear the characteristics of its predecessor, an insurer would have accepted the risk.

351 Other than where it relates to the breach by failing to disclose the NMC occupancy, factual causation is therefore made out. Subject to the aspect of causation to be next considered, regarding the recovery of lost rent suffered by individual lot owners in excess of what was recoverable under the indemnity policy, there is no suggestion that the scope of liability requirement would not be satisfied in this scenario.

Quantum

Parties' submissions

352 The Brokers took no issue that they were liable to the extent of the financial consequences that would have followed from the policy being enforceable. That is, they do not dispute the Insured's entitlement to the sum reflecting the

cost of rebuilding $463,347.41 and the $75,000 cap on what was recovered by the individual lot owners under the policy. That is, they do not dispute that the quantum of damages against it should be *no less than* the sum of $538,347.41.

353 The Brokers submitted, however, that they cannot be responsible for any loss associated with the Insurer not meeting the claim for loss flowing from the Insurer's breach of the policy, as this was not caused by the Brokers or within the Brokers' and Insured's contemplation at the date of breach.

354 The Insured submitted that this head of loss fell within the scope of the retainer and the co-extensive duty of care.

Consideration

355 By s 5D(1)(b), the 'scope of liability' requirement for causation requires a normative evaluation and, as the High Court said in *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* (2013) 247 CLR 613, where appropriate, it is guided by common law precedent. A limiting principle, the plurality indicated (at [24]) is that the scope of liability does not normally extend beyond the occurrence of harm, the risk of which was the duty of the negligent party to exercise reasonable care and skill to avoid. The plurality instanced the situation that a person under a duty to provide information on which someone else will decide upon a course of action will only be responsible for the consequences of the information being wrong. The same principle applies where a person is under a duty to disclose information on which someone else will decide upon a course of action will only be responsible for the consequences of the information not being disclosed.

356 Here, Mr Hynes and HHIA were under a duty to disclose to the Agent that the NMC was in occupation of Unit 2. The consequences of the non-disclosure, as I have found, is that the Insurer avoided the policy. Mr Hynes and HHIA are only responsible for the loss occasioned by the avoidance of the policy. That loss is the value of the loss of the promise of indemnity in the insured event, being the rebuilding and repair after the fire, and the loss of the promises to individual lot owners for their rent, capped at the sum of $75,000.

357 To hold Mr Hynes and HHIA responsible for losses occasioned to individual lot owners by *the Insurer* breaching the contract of insurance would go beyond the

occurrence of the harm the risk of which it was their duty to exercise care and skill to avoid.

358 I find that the second and third defendants are liable in damages for the sum of $538,347.41.

Limitation Period

359 Ultimately, the Brokers made no submission, written or oral, in support of this defence, but it was not, in terms, withdrawn. The real focus of the Brokers' conduct the subject of complaint was on or around 9 April 2013. The proceeding against the Brokers commenced on 1 April 2019, less than 6 years after the conduct. The actions against the Brokers, in tort or contract, were not statute-barred under s 14 of the *Limitation Act 1969* (NSW).

Proportionate liability

360 There is no dispute that with the claim being for economic loss arising from negligence (however the cause of action was framed), the claims against Mr Hynes and HHIA would have been 'apportionable', within the meaning of s 34(1)(a) of the CL Act.

361 The Brokers identified a range of alleged 'concurrent wrongdoers'. It would be necessary for the Brokers to establish that each of them committed some legal wrong against the plaintiff[30]. It would also be necessary to show that the loss or damage caused by each of the concurrent wrongdoers was the same loss or damage that was the subject of the plaintiff's claim[31]. The test for causation, in relation to the latter requirement, is contained in s 5D of the CL Act, importing both factual causation and the scope of liability element[32]. The 'scope of liability' element embraces, amongst other things, considerations such as whether the harm suffered was foreseeable at the time of the breach of duty[33] and whether there have been supervening causes[34].

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[30] Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd (2013) 247 CLR 613 at [47] & [91]; Trajkovski v Simpson [2019] NSWCA 52 at [56], [195].
[31] Hunt & Hunt Lawyers at [21].
[32] Hunt & Hunt Lawyers at [22].
[33] Hunt & Hunt Lawyers at [24].
[34] Monaghan Surveyors Pty Ltd v Stratford Glen-Avon Pty Ltd [2012] NSWCA 94 per Basten JA at [70].

The Broker's pleading

362 At paragraph 15 of their Amended Defence, the Brokers identify the concurrent wrongdoers and the wrongs which they allege contributed to the loss suffered by the Insured. They were:

(a) the Insurer, for offering insurance coverage on the basis of a defective basis. This was said to be based upon the allegation, which I have rejected, that the Insurer already knew of the NMC occupancy. The Brokers accordingly did not press its contention that the Insurer was a concurrent wrongdoer;

(b) the Agent, for failing to inform the Insurer, of the NMC Occupancy and placing the insurance on the basis of a defective proposal. The factual substratum for this contention was plainly removed and the Brokers did not press its contention that the Agent was a concurrent wrongdoer;

(c) Tania Holmes, for failing to inform the Insurer of the NMC occupancy. Plainly, also, the factual substratum for this allegation was removed and the Brokers did not press its contention that she was a concurrent wrongdoer;

(d) Ian Cooper, for failing to disclose the NMC occupancy to the Brokers, for purporting to execute a proposal dated 11 March 2011 when he had no legal standing to do so (for being only a previous secretary of the Insured) and for not disclosing the NMC occupancy in the proposal form and by mis-describing it as an 'office' in the form; and

(e) McLardy McShane and Associates, formerly known as King Insurance Brokers Pty Ltd (the '**former brokers**'), for failing to inform any party (or more relevantly, the Agent) of the NMC occupancy and for placing insurance on the basis of a defective proposal signed by Mr Cooper on 11 March 2011.

363 As indicated, only the positions of Mr Cooper and the former brokers merit further consideration.

Parties' submissions

The Brokers' submissions

364 Counsel for the Brokers submitted that Mr Cooper had committed a tort against the Insured. It was foreseeable that if, in March 2011, he misrepresented the nature of what the NMC was doing (i.e. using the premises as a clubhouse rather than as an 'office'), then any subsequent policy renewal reliant upon the same description of the occupation would not have been made, or that the policy would not respond to the insured event. It matters not, for this purpose,

whether the Insured would have suffered a different loss, in terms of its quantum, if the Insurer denied liability for non-disclosure, then it would if the policy did not respond because of a misrepresentation.

365 In relation to the former brokers, its duty, in tort and in contract, was no different to that of the HHIA in this case. A cursory inspection (something which at least Mr Hynes had undertaken) would have indicated that the NMC was in occupation, and was generally 'obvious', but it was apparently not known by the former brokers or, if it was, it was not disclosed to the Agent.

The plaintiff's submissions

366 Counsel for the Insured submitted that there was no evidence that either Mr Cooper or the former brokers were negligent. Both were based in Melbourne and it was not unreasonable for him or the former brokers (respectively) to rely upon what they had been informed.

367 Indeed, it was not possible to say which one of them may have been at fault at all: either Mr Cooper told the broker to try to place it with the misstated description of the occupation or vice versa.

368 At any rate, it was for the Brokers to establish that the former brokers' or Mr Cooper's wrongful conduct caused the same loss or damage as sustained by the Insured through the negligence of the Brokers. The loss or damage suffered by the Insured was the economic consequences of the Insurer's denial of indemnity because of a non-disclosure of the NMC occupancy. That could be different to the loss or damage sustained because of the Insurer's posited denial of indemnity on the basis of a misrepresentation as to the use of the lot.

Consideration

369 I find that the loss or damage here was the inability to recover an insurance payout following the fire in February 2014.

370 The central contention for the proportionate liability defence is that others, who breached their own legal obligations to the Insured, were also responsible for causing the same loss. In the way it which it relies upon this defence, the Brokers' first implied contention is that the Insurer and Agent continued to rely

upon the statement of the occupation of the tenant of Unit 2, being 'office', made for the 11 March 2011 policy.

371 As to the position of Mr Cooper and the former brokers, their positions may be somewhat different at a factual level. Mr Cooper did not give evidence in the trial. There is no direct evidence to suggest what Mr Cooper knew about the NMC occupancy. It appears that after the fire, Mr Cooper was conscious of the ramifications as to what he did after the fire, based upon what Ms Warne later said to Ms Honeychurch in 2014 after the fire had occurred, but care needs to be given to the weight attributable to that evidence. No party objected to it on the ground of hearsay but Mr Cooper was not a witness.

Mr Cooper

372 There are several issues concerning Mr Cooper. First is the identification of any wrong committed by him *against the Insured*. This, in turn, requires analysis of the obligation said to have been owed by him to the Insured. This was not identified in the Brokers' Defence and it was not articulated in Counsel for the Brokers' written or closing address, beyond the statement that it was 'foreseeable' that any misrepresentation which Mr Cooper made might harm the Insured. However, it is well-established that foresight of harm alone, although necessary, is insufficient to ground a duty of care[35]. The Defence indicates that the conduct by Mr Cooper occurred in March 2011. It appears to be suggested that, contrary to what was stipulated in the proposal form, Mr Cooper was not, in fact, an officer of the Insured. Officers have statutory[36] and general law obligations to companies, but it was not suggested that Mr Cooper owed any such obligations to the Insured in March 2011. Conceivably, if he made the misstatement *as an officer* of the Owners Corporation causing it to breach its statutory duty of disclosure or make a misrepresentation to the Insurer, he may arguably have breached a duty of care and diligence, but authority indicates that there are a potentially large range of factual considerations which would need to be assessed before that conclusion could be reached[37], including, probably, what other lot owners knew about his

[35] For example, Tame v New South Wales (2002) 211 CLR 317per Gleeson CJ at [12], per Hayne J at [241].
[36] Corporations Act 2001 (Cth), Part 2D.1.
[37] ASIC v Cassimatis (No 8) (2016) 336 ALR 209 (appeal dismissed in Cassimatis v ASIC (2020) 376 ALR 261).

conduct. On the proposal form, he was described as a 'previous' secretary. If Mr Cooper had no authority to represent the Insured, it seems to me that it would follow that he had no obligation to disclose the NMC occupancy to the Agent either. This means that the only wrong he would have committed was a breach of warranty of authority and in stating that Unit 2 was being used as an 'office'. But the former is a wrong against the person induced to believe he was authorised[38] and any misrepresentation is also usually actionable by the representee induced to act on the faith of it. I am not persuaded that Mr Cooper perpetrated any wrong against the Insured.

373 A second difficulty is that one of allegations concerning Mr Cooper, that he did not disclose the *NMC's* occupancy (for whatever use), is not susceptible of proof. He was not a witness and no one from the former brokers was called to give evidence about what Mr Cooper said to them beyond what appeared on the face of the proposal form. The Court cannot speculate on what he told, or did not tell, the former brokers. The case against him, therefore, must be restricted to what he wrote, or represented, on the 11 March 2011 proposal form. That form (Exhibit 1D-1, p 2068) asked him to express the occupancy of each unit and he wrote (or represented that he wrote) 'Office' for Unit 2.

374 If I am wrong about the absence of legal obligation to the Insured, then even if Mr Cooper breached an obligation to the Insured by mis-describing the nature of the occupation in unit 2, it would still be necessary for the Brokers to establish that his wrongful conduct caused the same loss as that which was suffered by the Insured as a result of the Brokers' breaches of duty: some financial loss consequential for having an unenforceable policy of insurance for the April 2013 – April 2014 year. As indicated, the causation requirement is set by s 5D of the CL Act, and one of the two requirements requiring proof by the Brokers is that the scope of any liability in Mr Cooper extended to the identified loss sustained by the Insured (s 5D(1)(b)). Arguably, it is not reasonably foreseeable[39] that harm would result in February 2014 from Mr Cooper's conduct in March 2011. In this regard, insurance of this kind needs to be

[38] Leggo v Brown & Dureau Ltd (1923) 32 CLR 95 at 99.

[39] Hunt & Hunt Lawyers at [24]. As to the request of reasonable foreseeability, see Sydney Water Corporation v Turano (2009) 239 CLR 51 at [52].

renewed on an annual basis and, each and every time, the Insured is expected to comply with its statutory duty of disclosure. Such compliance might be satisfied by what it informs the underwriter itself or, as here, its reliance upon its broker to assist it to provide that information. The duty of disclosure practically requires the Insured, and/or its broker, to turn its (collective) mind afresh to considering whether the duty of disclosure has been complied with. Arguably, it is not *reasonably* foreseeable that any non-disclosure of the NMC occupancy or mis-description of the nature of the occupancy of lot 2 in March 2011 would cause a policy entered into in April 2013 to become unenforceable, having regard to the continuing duty of disclosure.

375 At any rate, any wrong perpetrated by Mr Cooper lost any causative effect once, as I have found, Mr Hynes disclosed to Ms Holmes that the occupant was a 'social club' or 'local bike club'. This may be regarded as a superseding cause[40], which, as indicated, may defeat causation under the 'scope of liability' requirement. Whatever the complete accuracy of that disclosure by Mr Cooper was, Mr Hynes' disclosure to Ms Holmes would, or should, have dispelled any erroneous assumption in the Agent that the unit was used as an 'office' created by the content of the March 2011 proposal form prepared by Mr Cooper.

376 Accordingly, I find that Mr Cooper was not a 'concurrent wrongdoer'.

The former brokers

377 The Brokers contend that the former brokers permitted a proposal to be advanced which clearly did not disclose the NMC occupancy and that this fact could have been ascertained by a cursory inspection of the premises.

378 On 6 April 2011, Mr Rodda, of the former brokers, sent the proposal form (completed by Mr Cooper in March 2011) to the Agent which, at that time, was the underwriting agent for Calliden. The evidence suggests that the Agent rated the risk on the basis of the proposal form and on 7 April 2011, the Agent issued a quotation to the former brokers.

379 Unlike the position with Mr Cooper, in the absence of evidence to the contrary, I am prepared to infer that the former brokers had common law obligations, in

[40] March v Stramare (E & M.H.) Pty Ltd (1991) 171 CLR 506 per Mason CJ at 517.

contract and in tort, to the Insured. No evidence was adduced on behalf of the Insured which might have contradicted that inference being drawn, in terms of such things like limitations upon the contract for the supply of professional services, or negation of the responsibility that the former brokers would have had in relation to their duty of care.

380 I find that the risk that the 2013-14 policy may be unenforceable because of non-disclosure of the former brokers in the 2011-12 year, up to the point where the Brokers became appointed in April 2012 (the 2012-13 year), was both foreseeable and not insignificant. Although there is no direct evidence of what any of the occupants informed the former brokers, even if one was to take the most favourable (to the former brokers) scenario considered by Mr Manning – that the former brokers did not visit the premises themselves and were not informed or knew that Unit 2 was occupied by the NMC – Mr Manning's unchallenged view was that the broker's obligation required it *not* to seek to arrange the insurance without knowing of the exact occupation of all the tenancies[41]. Mr Manning had earlier said (in relation to an alternative scenario) that a broker acting in accordance with reasonable practice would carry out an inspection itself or otherwise 'confirm the true' occupation of the lot[42]. I accept Mr Manning's evidence in these respects.

381 This presents an evidentiary difficulty for the Brokers. There is no evidence of whether or not the former brokers actually knew, or did not know, of the NMC occupancy, or whether or not the unit was being as an 'office', as was stated in the March 2011 proposal form. If they did not know of the NMC occupancy, or the nature of the use of lot 2, they could not have disclosed it to the Agent.

382 The Brokers' argument must be that the negligence consists of not taking reasonable steps to find out about the NMC occupancy or its use of lot 2. Whilst I consider it likely that if the former brokers had inspected the premises, they would have discovered for themselves the NMC occupancy (as Mr Hynes had done), there is no evidence to indicate whether or not they did in fact conduct an inspection, to what extent the former brokers did seek to 'confirm the true' occupation, or even what that requires in a context where, I was

[41] Exhibit A, p 103 (paragraphs 6.18-6.19).
[42] Paragraph 6.13.

informed, the former brokers were based in Melbourne. Mr Manning was not asked by Counsel for the Brokers whether, for the example, it would be sufficient from the perspective of reasonable broker practice that the former brokers sought a statutory declaration from someone on behalf of the Insured to say that the true occupation was as represented by Mr Cooper in the proposal form.

383 In this evidentiary vacuum, I am unable to find that the former brokers committed any wrongful act as against the Insured.

384 There is a further difficulty for the Brokers' case that the former brokers were concurrent wrongdoers, and this relates to the requirement of proof of causation of the same loss. However, as was the case with Mr Cooper, it is hard to see that causation could be established where, as I have found, Mr Hynes stated to Ms Holmes on 9 April 2013 that the occupant was a social club or local bike club. That description of the occupancy also severed any nexus between the loss suffered by the Insured and any non-disclosure or misrepresentation of the former brokers as to the nature of the occupancy or the identity of the occupant (which had not earlier been disclosed).

385 The proportionate liability defence (or limitation of liability) is therefore unsuccessful.

Responsibility of the AFS Licensee

386 Counsel for the fifth defendant (who represented the second to fourth defendants) did not dispute that if (contrary to what I have found) Mr Hynes, and, vicariously, HIHA, had breached duty of care (or implied term in a retainer) then the AFS Licensee would also have been responsible for the loss.

387 By the operation of s 917F(2) of the *Corporations Act*, in particular the AFS Licensee is jointly and severally liable in respect to remedies that the client could obtain against the representatives.

THE INSURER'S CROSS-CLAIM AGAINST ITS AGENT

388 I have already indicated that the Insured's failure to establish the Insurer's liability means that the cross-claim must fail. If that conclusion is wrong, however, it is appropriate to briefly consider issues on the cross-claim.

389 As Counsel for the Agent submitted, if the Court had found that the Insurer had merely not discharged its onus of *proving* that the NMC occupancy was not disclosed then the cross-claim would fail on that factual predicate. The cross-claim only arises upon a judicial finding that the NMC occupancy was, *in fact*, disclosed by Mr Hynes to Ms Holmes on or about 9 April 2013. That is the premise upon which the remainder of the analysis in this section of the reasons is based.

Evidence

Ms Stenning's evidence

390 The Insurer relied upon evidence of Ms Barbara Stenning. She is the 'National Head of Claims' for the Insurer. She deposed that the first time she had learnt of the NMC's occupancy of the premises was on or about 3 February 2014.

391 The thrust of her evidence was that she, and the Insurer, had every confidence and expectation that the Agent's personnel, being Mr Hodgson, Mr Cecil and Ms Holmes, were not informed of, and did not otherwise know of, the NMC's occupancy prior to the fire. She relied, in particular, upon a verbal representation by Mr Hodgson to herself on or about 7 February 2014, to the effect that the Agent had not been told that a motor cycle club was in occupation of the subject property and that there were numerous examples of the Agent having declined such risk. If she had any doubt as the Insurer's representative, she deposed that she would have caused the Insurer to commence a conditional cross-claim against the Agent of the kind that it ultimately issued, on 12 August 2020. She effectively deposed that it was only from December 2019, when Mr Hynes' second affidavit was served (which annexed his 'file note' with the '10/4 entry') that further consideration was given to filing a conditional cross-claim.

Legal basis for bringing the cross-claim

392 It was undisputed that the first cross-claimant (the first defendant in the main proceeding) transferred its business of the second cross-claimant and that from 1 November 2016, the latter has succeeded to the rights of the former pursuant to scheme approved in connection with the Berkley Insurance Company by the

Federal Court on 28 October 2016. Once approved, the scheme became binding on all persons[43].

393 Further, in any legal proceeding after 1 November 2016, any judgment or determination for or against the Insurer (the first cross-claimant) will have effect as and between it and the second cross-claimant as if such judgment or determination had been made for or against the second cross-claimant and the second cross-claimant indemnified the Insurer accordingly (cl 5.1 of the Scheme for transfer of the business of the Insurer) (Exhibit 1D-4, p 2885). Further any person having a claim or an obligation to the Insurer under or in respect of an Insurance Contract will have the same claim or obligation to the second cross-claimant in substitution for the claim or obligation to the Insurer regardless of when the claim or obligation arose.

Liability issues

Breach of the Agency Agreement

394 Counsel for the Agent conceded that if the Court positively found that the NMC occupancy was disclosed to it then it was in breach of its strict contractual obligations under the Agency Agreement. He did not accept, however, that in that result there was any breach of the implied term that it would exercise due care and skill.

395 Counsel for the Insurer cited a range of express obligations in the Agency Agreement (ccl 5.1.3, 5.1.4, 5.1.6 and 5.1.8) that were breached.

396 In view of the Agent's concession, it is unnecessary to analyse the details of these terms. It is enough to find that if the Court had found that the NMC occupancy had been disclosed, then by failing to unilaterally decline the cover, or by failing to refer the matter to Mr Hodgson and thereafter for Mr Hodgson to fail to convey the disclosure to the Insurer, the Agent breached the Agency Agreement.

[43] Insurance Act 1973 (Cth), s 17G(a).

Breach of duty of care

The Agent's submissions

397 The Agent admitted a duty of care but took issue with the scope of the duty as alleged by the Insurer. It contended that the scope of the duty of care was simply coterminous with its obligation in contract. That is, the scope of any obligation in tort was to take reasonable steps to perform its obligations under the agreement. It is unnecessary in this case for the Court to wade into the controversy whether, or to what extent, a professional's obligation may extend beyond the scope of its contract.

398 The Agent submitted that, for the purposes of s 5B of the CL Act, the 'risk of harm' may be identified as the risk that the Insurer may be liable under a policy which it was not within the Agent's authority to issue.

399 No submission was directed to the question whether that risk was foreseeable or not insignificant. But the reasonable precautions which it would have taken were to implement guidelines, practices and guidelines of the kind which were in evidence in the substantive proceeding. This, the Agent says, is what happened. If there was a miscommunication between personnel within the Agent, such as between Ms Holmes and Mr Cecil, after the former's call with Mr Hynes on 9 April 2013, it is unlikely anything else that was actually done may have prevented that misfortune. The Agent was only required to exercise *reasonable* care and there was no expert opinion evidence from an underwriter as to what extent this Agent's processes, practices and guidelines did not conform with those which would have been reasonably expected from a competent underwriter.

The Insurer's submissions

400 Counsel for the Insurer accepted that scope of the duty of care needed to accommodate the terms of the contract which he had identified. He submitted that if the NMC occupancy had been disclosed, it was obvious 'as night following day' that there was a breach of duty. This argument was based upon the steps that: (a) it would have been negligent for Ms Holmes, having received the disclosure of the NMC occupancy, to have not referred that to Mr Cecil; and (b) the Agent was vicariously liable for such negligence. There was no

suggestion that Ms Holmes' conduct fell outside the scope of her employment. He added that the allegation of vicarious liability was pleaded, in sub-paragraph 2(k) of the Reply.

The Agent's submissions in reply

401 Counsel for the Agent submitted that no case was put that Agent was negligent on account of its *vicarious* liability for Ms Holmes' negligent conduct. Sub-paragraph 2(k) of the Reply dealt only with the Insurer's allegation of fraudulent concealment in reply to the Agent's limitation point. He submitted that the case in negligence had always been one of direct liability against the Agent. That being so, the Court's attention needed to be directed to the processes, procedures and policies that the Agent had undertaken (the very same ones that the Insurer relied upon in its Defence in the primary proceeding) and he reiterated that expert opinion evidence would be required to illuminate how what the Agent did, as an entity, in discharge of its direct duty of care, would ground a finding that the Agent had not taken reasonable precautions in response to the risk of harm.

Consideration

402 I accept the Agent's submission that the case in negligence was put against the Agent by reason of its purported direct liability, and not for its vicarious liability for the conduct of its employee, Ms Holmes. The bare reference in the Insurer's Reply to Ms Holmes acting within the scope of her employment did not lead to any further contention that the Agent was liable in tort for any wrongful conduct by her. This is not a case where it is appropriate that facts pleaded for one cause of action may be relied upon for another[44].

403 That being so, I also accept the Agent's submission that the Insurer did not seek to establish what precaution that it should have taken to guard against the risk of harm materializing which it had not already taken. In truth, as the Agent submitted, the Insurer's case against the Agent was substantially centred upon its breach of strict contractual obligations.

[44] Ingot Capital Investments Pty Ltd v Macquarie Equity Capital Markets (2008) 73 NSWLR 653 per Ipp JA at [359]; followed in GC NSW Pty Ltd v Galati [2020] NSWCA 326 per Gleeson JA (White JA and Emmett AJA agreeing) at [42].

Breach of fiduciary duty

404 In view of the finding I have made about breach of contract, it is unnecessary to consider the alternative claim for equitable compensation arising from an alleged breach of fiduciary duty; even if this Court had jurisdiction to make such award[45]. But some observations might be made.

405 There was no factual basis to sustain the action. The evidence rose no higher than the suggestion, advanced by Counsel for the Brokers, that Ms Holmes may have acted as she had simply to 'get the deal done' with Mr Hynes. That said nothing about any personal advantage or benefit, in contradistinction to her duty to her employer, and indirectly, any responsibility to the Insurer, she may have preferred. As I was reminded, the posited duty is proscriptive in nature; not prescriptive[46]. As it is, it is unnecessary, for the purpose of this case, to examine that distinction[47].

406 In my view, this cause of action should not have been brought in the cross-claim or, at any rate, maintained.

Limitation defence

407 It follows, from my earlier finding that the only action available (on the stated premise) against the Agent was breach of contract, which caused the Insurer to breach a contract of indemnity to the Insured; although I also propose to consider the defence to the tort claim.

408 The Agent bore the onus of proving that the common law action in contract was statute-barred. The limitation period for actions for contract is 6 years. Actions in contract run from the date of breach[48]. In tort, the period is also 6 years, but it runs from the date when damage has been suffered[49].

409 An agreed fact, as between the first cross-claimant and the cross-defendant, (Exhibit XD-2) is that by 11 March 2014, the first cross-claimant had incurred and paid legal expenses in relation to the plaintiff's claim under its policy

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[45] District Court Act 1973 (NSW), s 134(1)h). The cross-defendant took no point about any absence of jurisdiction for the claim for equitable compensation arising from a breach of fiduciary duty.
[46] Breen v Williams (1996) 186 CLR 71.
[47] See the critique of the proposition in J.D Heydon, M J Leeming and P G Turner's Meagher, Gummow & Lehane's Equity: Doctrines & Remedies (5th ed, LexisNexis Butterworths) [5.380]-[5.440].
[48] Hawkins v Clayton (1988) 164 CLR 539 at 583.
[49] Hawkins v Clayton at 543, 587, 599; Commonwealth v Cornwell (2007) 229 CLR 519 at [5].

numbered QUSS014207 arising from the fire which occurred on or about 3 February 2014 at the Property. Such costs and expenses may be regarded, at least, as measurable damage.

The Agent's submissions

410 Counsel for the Agent submitted that the action in contract was statute-barred. The breach of contract occurred when the Insurer was bound to provide the cover. That was on 12 April 2013. The cross-claim was filed (August 2020) more than 6 years after that date.

411 It did not assist the Insurer that there may arguably have been on-going breaches of contract by the Agent since, for contracts of indemnity generally, the cause of action accrues once, and only once, even if further losses may be incurred[50].

412 In relation to the action in tort, the Agent submitted that the Insurer stood in no better position. Based upon the Agreed Fact, arguably, time began to run from when the Insurer paid out costs and expenses, which was 11 March 2014. The cause of action for negligence was filed more than 6 years after that date. The better view, so it was submitted, however, was that the Insurer suffered loss when it became liable under the policy and that occurred when the fire happened, in February 2014, at which point (in the absence of any some condition precedent to the contrary) the Insurer became liable on a claim for unliquidated damages[51], being the point when its liability (to the Insured) crystallized[52].

The Insurer's submissions

413 Counsel for the Insurer, as first cross-claimant, contended that it was only after December 2019, when a file note was the subject of affidavit evidence from Mr Hynes, relevantly identifying an entry apparently written on 10 April 2013 which, when combined with an assertion made by Mr Hynes before the proceeding commenced (that the NMC occupancy was disclosed to Ms

[50] Globe Church Incorporated v Allianz Australia Insurance Ltd (2019) 99 NSWLR 470 per Bathurst CJ, Beazley P and Ward JA at [132].
[51] Globe Church Incorporated at [209]-[210].
[52] Wardman v Hatfield [2003] NSWCA 283 at [22]-[23]; followed in Anthony v Morton [2018] NSWSC 1884 per Ward CJ in Eq at [681].

Holmes on 10 April 2013) that the Insurer started to become concerned. Thereafter it required a reasonable period to investigate (such as obtaining phone records of the Agent and/or the Brokers) and phone records produced on subpoena revealed a long telephone conversation which the Insurer apprehended might have occurred on 10 April 2013. This explained why it brought the claim when it did only in August 2020.

Consideration

414 The Insurer's arguments may explain why the cross-claim was brought when it was, and the reasonableness of any delay, but it did not substantially address the Agent's points as to when the actions in contract or tort first accrued.

415 In my view, subject to a qualification, the action in contract became statute-barred on 12 April 2019 being 6 years after the cover was placed. The qualification is the Insurer's invocation of observations made by Deane J in *Hawkins v Clayton* (1988) 164 CLR 539 at 590, which I will address a little later in these reasons.

416 If it was necessary, the action in tort ran from when damage was suffered by the Insurer. The damage was suffered by the Insurer when it became liable to indemnify and, consistent with what was determined in *Globe Church*, that was when property damage was suffered by the Insured. This was the date of the fire, on 3 February 2014. At any rate, damage was also suffered when the Insurer incurred expenses and costs on 11 March 2014. The limitation period for any action in tort was statute barred after 3 February 2020, or, alternatively, 11 March 2020.

417 Prima facie, the actions in contract and tort were both statute-barred when the cross-claim was commenced on 27 August 2020.

The Insurer's reliance upon s 55 and conventional estoppel

The Insurer's argument

418 Against the possibility that the limitation periods for the actions in contract and tort may run in the conventional way, against it, the Insurer made three further arguments. First, it relies upon s 55 of the *Limitation Act*. The Insurer argued that the combination of Mr Hodgson's verbal representations on 7 and 10 February 2014, a written representation on 7 February 2014, and the Agent's

continued adherence to its position that the NMC occupancy had not been disclosed to it throughout the course of the proceeding, amounted, collectively, to a representation that the NMC occupancy had not been disclosed. This, it was said, induced the Insurer not to bring a cross-claim against the Agent shortly after the Insured made its claim. The Insurer says that the representation was crystal clear and unequivocal.

419 The Insurer argues that if the Court should find that the NMC occupancy was disclosed to the Agent, then it follows that the Agent fraudulently concealed the existence of the causes of action in the cross-claim, for the purposes of s 55 of the legislation, so that the time bar only commences to run from the time that the Insurer actually or constructively (i.e. with reasonable diligence) discovered the fraud or concealment. The Insurer defines this as the time when the Insurer ascertained that the representation made to it was false. That would only be at the time that this Court determined that the NMC occupancy was disclosed since it was that determination which would operate to falsify the representation continually made since February 2014 (after the fire).

420 In particular, the Insurer argues that if the NMC occupancy fact was disclosed by Mr Hynes to Ms Holmes on 9 Aril 2013, then not only did she know of it, but the Agent also knew of it and, further, she, and therefore the Agent, knew of the falsity of the representation (that the Agent had not been notified of the NMC occupancy) made to the Insurer.

421 The Insurer's second argument was that conventional estoppel arose against the Agent, in that the Agent could not seek to take advantage of a judicial finding that the NMC occupancy had been disclosed to it when it had not represented that fact to the Insurer.

The Agent's submissions

422 The Agent submits that s 55 cannot apply. The authorities posited a very high standard to establish the application of that provision, described variously as a "consciousness that what is being done is wrong or (taking) advantage of the situation (in a way that) involves wrongdoing"[53], or "moral turpitude or

[53] Seymour v Seymour (1996) 40 NSWLR 358 per Mahoney A-CJ (Meagher JA and Abadee A-JA agreeing) at 372E.

dishonesty"[54]. Counsel for the Insurer did not put to Ms Holmes, or any other witness called by the Agent, that anything that was done, or not done, could be marked with the character of these descriptions.

423 To the extent that the Insurer relied upon conventional estoppel, even if it may be accepted that the Agent had represented to the Insurer and that they shared the common assumption that there was no disclosure of the NMC occupancy in April 2013, the Insurer had not made out the element of the doctrine which posits that the representor seeks to resile from the assumption in the Insurer engendered by the Agent's representation, to the Insurer's detriment[55]. In no way has the Agent ever sought to resile from the assumption. If the true position is that the NMC occupancy was disclosed, that is the result of the exercise of judicial power of this Court.

Consideration

424 I accept the submissions of the Agent on s 55. The result is that the provision is not engaged in a way that can extend the operation of the ordinary limitation period applicable to the causes of action in tort and contract.

425 I also accept the Agent's argument in relation to conventional estoppel for the reason its Counsel advanced. There has never been any conduct of the Agent indicating a desertion of the assumption its 'representation' engendered[56].

Deane J's observations in Hawkins v Clayton

Parties' submissions

426 As a third and final argument favouring the effective suspension of the ordinary limitation period, Counsel for the Insurer referred to the observations of Deane J in *Hawkins v Clayton* (1988) 164 CLR 539 at 590 to the effect that s 14 of the *Limitations Act*, to the extent it sets out the operation of time bar for an action for breach of contract (and in tort), is to be construed as excluding any period during which the wrongful act itself effectively precluded the institution of the proceeding, on the rationale that it may promote hardship and injustice, and yield no compensating benefit, if a claimant's action could be precluded.

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[54] Faraday v Rappaport [2007] NSWSC 34 per White J (as his Honour then was) at [127].
[55] See, for example, Moratic Pty Ltd v Gordon [2007] NSWSC 5 per Brereton J (as his Honour then was) at [31].
[56] Grundt v Great Boulder Pty Gold Mines Ltd (1937) 59 CLR 641 per Dixon J at 674.

427 The Insurer's Counsel argued that this case presented the situation of the kind that Deane J envisaged: because the Agent had, at all times, represented maintained that the NMC occupancy was *not* disclosed to it, axiomatically, the Insurer could not have known that (in accordance with the stated premise of the cross-claim) it was in fact disclosed and that thereby the Insurer was bound to indemnify the Insured. The Insurer's Counsel referred the Court to a number of decisions in the Court of Appeal in which Deane J's observations were considered[57].

428 Counsel for the Agent argued that the observations of Deane J in *Hawkins v Clayton* were not endorsed by the other members of the majority in *Hawkins* (Brennan J and Gaudron J), or indeed, had authoritatively been subsequently endorsed by the High Court or at the level of an intermediate appellate court[58] and that I should not follow them.

Consideration

429 To reiterate, the cause of action against the Agent in contract, conventionally, became statute-barred on 12 April 2019. The action in negligence became statute barred on 3 February 2020 (or, alternatively, 11 March 2020).

430 It could not be said that this was a case, like *Hawkins*, where it was impossible for the claimant (in that case, the beneficiary under a will) to have discovered a potential claim against the provider of the professional services prior to the expiry of the limitation period. In this case, on 6 May 2014, the Insurer's lawyers, McInnes Wilson Lawyers, received notice of an assertion on behalf of the plaintiff that the NMC occupancy had been disclosed to the Agent. That knowledge is to be imputed to the Insurer.

431 Contrary to the Insurer's submissions, it is not to the point that the Insurer did not believe the Insured's assertion made on 6 May 2014, or thought it prudent to make further investigations, including those of its Agent. Nor does it matter that the Insured asserted that the disclosure occurred on 10 April 2013 rather

[57] These decisions were Cheney & Wilson v Duncan [2001] NSWCA 197, Walmsley v Cosentino [2001] NSWCA 403, Argyropoulos v Layton & Anor [2002] NSWCA 183, and State of New South Wales v Harlum [2007] NSWCA 120.

[58] None of the decisions to which Counsel for the Insurer referred the Court indicated an application of the exception identified by Deane J to the facts of the particular case.

than 9 April 2013. The point is that if the substance of the assertion that was made on 6 May 2014 was later found to be correct, then the Insurer was taken to have been on notice of the possibility that the Agent had breached its contract by binding the Insurer to coverage contrary to its various obligations to the Insurer. Unlike the claimant beneficiary in *Hawkins v Clayton*, the Insurer was not denied the possibility of bringing a cross-claim to contend that, in the contingency that the NMC occupancy had been disclosed, the Agent had breached its contractual obligation.

432 In other words, the extreme factual circumstances of the kind alluded to by Deane J in *Hawkins v Clayton* would not have arisen here to prevent a claim against the Agent based upon tort.

433 This makes it unnecessary to determine the legal status of Deane J's observations in relation to s 14 of the *Limitation Act*.

434 If it was necessary, I would have found that the Insurer's claim against the Agent was statute-barred.

SUMMARY

435 To recapitulate, I have made the following findings in this proceeding.

436 First, although it is likely that Mr Hynes did mention to Ms Holmes that a 'social club' and 'local bike club' was in occupation in his second telephone conversation with her on 9 April 2013, he did not disclose to her that it was the NMC which was in occupation of Unit 2.

437 Secondly, the NMC's occupation was a matter that was, for the purposes of s 21(1) of the IC Act, known by a reasonable person in the circumstances, to be relevant to the decision of the Insurer to accept the risk and therefore required disclosure.

438 Thirdly, the non-disclosure of the NMC's occupancy entitled the Insurer to avoid the policy and reduce its liability to nil, pursuant to s 21(3) of the IC Act.

439 Fourthly, the cross-claim against the Agent fails.

440 Fifthly, if, contrary to what I have found, the Insurer had been in breach of the contract for insurance, it would have been liable to pay the Insured the sum of $748,571.41.

441 Sixthly, the second and third defendants (but not the fourth defendant) were negligent and in breach of the implied term of the retainer (to exercise reasonable care and skill.

442 Seventhly, the negligence, or breach of the implied term of care and skill, caused the Insured's loss or damage.

443 Eighthly, I find that the second and third defendants are liable in damages only in respect of the consequences of the Insured not having an enforceable policy, so that the quantum of such claim is $538,347.41.

444 Ninthly, the proportionate liability defence does not succeed in limiting the second and third defendants' liability.

445 Tenthly, the AFS Licensee is also responsible, jointly or severally, for the same monetary remedy obtained against the second and third defendants.

446 Eleventh, had I found that the NMC occupancy actually was disclosed to the Agent, I would have found that the Agent was liable to the Insurer only in contract, for breach of a strict contractual obligation, or obligations, and not in negligence for failing to disclose the same to the Insurer.

447 Twelthly, on the same premise, I would have found that the Insurer's causes of action for breach of contract and in tort against the Agent were statute-barred, that s 55 of the *Limitation Act* was not engaged, there was no conventional estoppel which arose, and that there was no basis for extending the limitation period under s 14 on the basis that any conduct by the Agent precluded the Insurer from bringing a claim for breach of contract.

ORDERS

448 By 22 January 2021, and after consulting with all parties, the plaintiff should bring in short minutes of order to give effect to these reasons, which should deal with the interest recoverable on the basis of the findings that I have made, and the issue of costs. If the parties are agreed, orders can be made in chambers.

449 If, however, the parties are or remain in disagreement, I direct the following:

(a) the plaintiff, the first and fourth defendants, and the cross-defendant are to file and serve any submissions as to appropriate dispositive orders, not exceeding 5 pages (excluding relevant attachments), by 22 January 2021;

(b) the second and third defendants are to file and serve submissions in response, not exceeding 5 pages (excluding relevant attachments), by 29 January 2021;

(c) the plaintiff, first and fourth defendants, and cross-defendant may serve any submissions in reply, not exceeding 3 pages, by 2 February 2021;

(d) at the time of service, parties are to email electronic versions (in both PDF and Microsoft Word format) of their respective submissions to my Associate; and

(e) dispositive orders will be made by me in chambers on the papers, absent any further notice to the parties.

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Amendments

17 December 2020 - Correction of minor typo.