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HIGHWAY HAULIERS PTY LTD -v- MATTHEW MAXWELL (The authorised, nominated representative on behalf of various Lloyds underwriters) [2012] WASC 53 (21 February 2012)

Last Updated: 17 April 2012

JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA

IN CIVIL

CITATION : **HIGHWAY HAULIERS** PTY LTD -v- MATTHEW MAXWELL (The authorised, nominated representative on behalf of various Lloyds underwriters) [2012] WASC 53

CORAM : CORBOY J

HEARD : 23-27 MAY, 22 & 30 JUNE 2011

DELIVERED : 21 FEBRUARY 2012

FILE NO/S : CIV 1775 of 2007

BETWEEN : **HIGHWAY HAULIERS** PTY LTD

Plaintiff

AND

MATTHEW MAXWELL (The authorised, nominated representative on behalf of various Lloyds underwriters)

Defendant

Catchwords:

Insurance - s 54(1) *Insurance Contracts Act 1984* (Cth) - Claims to be indemnified for damage to vehicles under commercial vehicle policy - Drivers had not satisfied policy requirements - Whether act or omission within the meaning of s 54(1) - Scope of the policy and whether policy requirements for drivers limitations inherent in claim

Damages - Whether plaintiff could claim loss of profit as damages for breach of contract of insurance - Whether plaintiff had proved loss of opportunity to earn profit - Impecuniosity of plaintiff and

remoteness

Legislation:

Insurance Contracts Act 1984 (Cth), s 54

Result:

Defendant liable to indemnify plaintiff under insurance policy and for damages for breach of the policy

Category: B

Representation:

Counsel:

Plaintiff : Mr G R Hancy

Defendant : Mr D J Higgs SC & Mr J A Thomson

Solicitors:

Plaintiff : WHL Legal Pty Ltd

Defendant : CLS Lawyers

Case(s) referred to in judgment(s):

CORBOY J:

The action and the result

1 The plaintiff (**Highway Hauliers**) carries on a trucking business. It operates a fleet of trucks and trailers that are used to transport freight to and from the eastern states (referred to as 'eastwest runs').

2 The defendant is the authorised and nominated representative of various Lloyds' underwriters. SRS Underwriting Agency (SRS), as agent for the defendant and the Lloyds' underwriters, effected an insurance policy in respect of certain risks associated with **Highway Hauliers**' business, including damage to its vehicles and trailers. It is convenient to refer to the policy as the 'SRS Policy', although the contract of insurance was made between **Highway Hauliers** and the defendant and the other Lloyds' underwriters (collectively, 'the Insurers'). The period of insurance was for one year, commencing on 29 April 2004.

3 Two prime movers and the trailers that they were hauling were damaged in separate accidents during the period of insurance. **Highway Hauliers** claimed under the SRS Policy for the cost of repairing or replacing the damaged vehicles. The Insurers rejected those claims on the grounds that the drivers of the trucks involved in the accidents:

(a) had not complied with an endorsement to the SRS Policy requiring drivers of particular types of vehicles used for eastwest runs to have achieved a minimum score on a driver test known as the 'PAQS test' (the 'PAQS endorsement'); and

(b) were 'nondeclared' (that is, non-approved) drivers for the purpose of an exclusion contained in the policy.

4 It was admitted that the drivers of the damaged vehicles were non-declared drivers and that they had not undertaken the PAQS test so that the PAQS endorsement had not been satisfied. At issue in this action was whether the Insurers were entitled to refuse to indemnify **Highway Hauliers** for those reasons having regard to s 54 of the *Insurance Contracts Act 1984* (Cth) (ICA). I have concluded that the Insurers were obliged to indemnify **Highway Hauliers** under the SRS Policy. The amount required to be paid under the policy was agreed during the trial at $299,807.09.

5 **Highway Hauliers** also claimed that it lost the opportunity to earn profits through the Insurers' breach of the SRS Policy. It alleged that, as a result of the Insurers' refusal to indemnify, it lost a weekly return freight run between Melbourne and Perth as it could not replace the prime mover and trailers involved in one of the accidents. It claimed that the value of the lost opportunity was to be assessed as the profit that would have been derived from continuing to operate the run, discounted for contingencies.

6 The defendant contended that:

(a) the Insurers were not liable for loss of profits having regard to the nature of the insurance provided by the SRS Policy;

(b) alternatively, the damages claimed were too remote;

(c) alternatively, **Highway Hauliers** had failed to prove that it had lost the opportunity to earn the profits claimed.

7 I have found that **Highway Hauliers** has established that it lost the opportunity to earn profits as a consequence of the Insurers' breach of the SRS Policy. I have assessed the value of that lost opportunity at $145,000.

The business of Highway Hauliers

8 **Highway Hauliers** has two directors: Mr Garry Sartori and his wife, Ms Janet Sartori. Mr and Ms Sartori formed a partnership in 1968 for the purpose of carrying on a transport and haulage business (witness statement of Garry James Sartori, exhibit 1, par 5). They operated the business in partnership until 1977, when **Highway Hauliers** was incorporated. Mr Sartori stated that the business commenced with one truck and over the years it grew to include further trucks and drivers. It was operated as a family business with his wife, two sons and a daughterinlaw working in the business.

9 Mr Sartori further stated in his witness statement that:

(a) **Highway Hauliers**' main client was Perth Freightlines. It had worked with Perth Freightlines since 1984 (exhibit 1, pars 8 and 9). The Melbourne/Perth freight run that it claimed to have lost as a result of the Insurers' refusal to indemnify had been operated for Perth Freightlines.

(b) By 2004, **Highway Hauliers** had seven or eight trucks and employed 14 to 16 drivers (in fact, by June 2004 **Highway Hauliers** operated 12 prime movers; Mr Sartori's statement was based on his recollection which he accepted was inaccurate when he was shown the schedule of insured vehicles relating to the SRS Policy (ts 40 43)). The company predominantly transported general freight between Perth and Melbourne, with some runs to Sydney. It used a variety of prime movers and had a number of trailers, dolly converters, Bdoubles and flat top trailers that were used in tandem with its prime movers. Each truck was operated by two drivers. That allowed one driver to sleep while the truck was driven by the other driver (exhibit 1, pars 10 to 13).

The SRS Policy The proposal

10 **Highway Hauliers** insured its prime movers and trailers with National Transport Insurance

Ltd (NTI) prior to April 2004. In about 2003, it engaged Mr Sergio Amaranti of Phoenix Insurance Brokers (Phoenix) to advise on and place insurance for its fleet of vehicles.

11 On 7 February 2004, Mr Amaranti completed, on behalf of **Highway Hauliers**, a proposal for SRS to provide commercial vehicle insurance (exhibit 144; TB 419 433). The proposal stated that:

(a) the business of **Highway Hauliers** was 'eastwest general freight, line haul operator';

(b) the freight hauled by **Highway Hauliers** comprised magazines, steel, computers, wood/timber, cars, machinery, paint, insulation and plastic pipes;

(c) freight was hauled on 'set runs on a weekly basis';

(d) freight was picked up from various locations in the metropolitan area and from Manjimup, Mandurah and Harvey and delivered to Melbourne, Sydney, Kerang (Victoria), Brisbane, Albury and Wodonga;

(e) the prime movers and trailers were the subject of finance provided by Esanda Finance, Westpac/AGC and Daimler/Chrysler;

(f) the current revenue of the business was $4.6 million and the projected revenue for the following financial year was $5 million.

12 Two further aspects of the proposal should be noted. In a section headed 'For Underwriting Purposes', it was stated that all drivers were required to submit a 'SRS driver declaration' and prospective insureds were asked in another section of the proposal to state whether the driver selection procedure included various checks and tests. The PAQS test was one of the tests nominated in the list. The proposal was completed in such a way as to indicate that the driver selection procedures adopted by **Highway Hauliers** included that test.

13 The proposal incorporated two schedules. The first schedule listed the prime movers and trailers for which insurance was sought and the second provided details of **Highway Hauliers**' claims history while insured with NTI. The schedule of trucks and trailers indicated that **Highway Hauliers** had 12 prime movers and 32 trailers.

14 Mr Amaranti accepted that **Highway Hauliers**' claims history as detailed in the second schedule to the proposal was poor and that it presented difficulties in renewing insurance (ts 191).

The SRS quotation

15 SRS provided to Mr Amaranti by facsimile transmitted on 29 April 2004 a quotation for commercial vehicle insurance for **Highway Hauliers** (exhibit 153; TB 451 452). The quotation stated that the offer was subject to the 'SRS First Guard commercial vehicle insurance 1/9/03 wording and any applicable endorsements listed below'. Reference was made to a website at which the full policy wording and endorsements were available for review. The endorsements listed in the quotation were:

> ANZ 8 plus the following WARRANTY applies: no drivers under 30 years or without five years' driving experience on articulated units. PAQS testing for all drivers doing the eastwest run.

(The prefix 'ANZ' was used in the documents provided by SRS to refer to particular endorsements to the policies that it issued.)

16 The quotation stated that a SRS request for cover form was required to bind cover and that the proposal, driver declarations and payment were to be submitted within 45 days.

17 It is to be noted that the endorsements stated in the quotation referred to a requirement for PAQS testing but did not specify a minimum score. However, the SRS '1st Guard Commercial Vehicle Insurance Policy' available on the website to which the quotation referred stated in ANZ 3 that a PAQS driver profile score of at least 36 was required.

Request for cover and closing advice

18 On 29 April 2004, Mr Amaranti transmitted a request for cover by facsimile to SRS (exhibit 159; TB 453 454). The request provided for interim cover for 45 days.

19 On 5 May 2004, Mr Amaranti sent a bundle of documents to SRS, including a closing advice and a motor vehicle fleet schedule (exhibit 159; TB 459 460). The covering letter stated among other things that, 'PAQS testing for all drivers will be carried out on 28 May 2004 by David Morley of Power Training Services with a minimum score being set at 36' and that a staff member was being trained by **Highway Hauliers** for ongoing PAQS testing of other staff at regular intervals.

20 The closing advice confirmed that the wording of the policy to be issued was 'insurer's motor vehicle fleet wording First Guard commercial'.

21 The motor vehicle fleet schedule provided particulars of the insurance that had been effected, including a statement that the interest insured comprised:

> Loss of and/or damage to all registered vehicles, trailers and motor propelled machinery owned, operated, hired, borrowed, leased or used by the Insured or in which the Insured has an insurable interest or for which the Insured has received instructions to insure, including those vehicles at inception listed in the attached schedule and legal liability in respect of third party property damage.

22 The insurance was described as covering loss or damage to vehicles referred to in the attached schedule and legal liability for third party property damage caused directly or indirectly by the use, ownership, care or control of the vehicles. Various policy extensions were noted, as were the principal uninsured property, perils and risks. That was done by a series of 'bullet' point descriptions. The principal uninsured perils and risks included loss of use, depreciation, drivers under the influence of alcohol and drugs and unlicensed drivers. There was no reference to drivers who had failed to undertake a PAQS test or who had not achieved a particular score on that test.

23 The schedule of vehicles forming part of the motor vehicle fleet schedule was the same as that which had been incorporated into the proposal.

The memorandum of insurance

24 On 27 May 2004, SRS issued a memorandum of insurance (exhibit 172; TB 579 598). The memorandum incorporated a schedule of cover which stated that:

(a) the insurance covered 'all vehicles, owned, leased or acquired by the Insured or for which the Insured is responsible';

(b) the policy wording was that contained in the SRS First Guard policy;

(c) the endorsements to the policy were:

> ANZ 8
>
> Aggregate deductible is adjusted at 64% of endorsement premium.
>
> Where broker's documentation differs to SRS issued documentation, SRS documentation

shall take precedence.

Dangerous goods limit 250,000.

Trailer in control not insured.

25 The endorsements made no reference to PAQS testing. However, SRS wrote to **Highway Hauliers**, care of Phoenix, by letter dated 12 July 2004 advising that it had come to SRS's attention that the policy that had been issued recently did not contain the relevant endorsements relating to drivers under the policy and their requirements (exhibit 184; TB 657 664). The letter enclosed an amended schedule to the memorandum of insurance. The schedule stated that it was agreed that the policy was endorsed to note that, among other things, 'no cover under the policy for drivers doing eastwest/westeast cartage who do not have a PAQS driver profile score of at least 36'.

26 Phoenix wrote to **Highway Hauliers** on 26 July 2004 enclosing an 'endorsement invoice amending your policy as requested by your insurers SRS' (exhibit 190; TB 676 677). The enclosed invoice was addressed to SRS and noted that the endorsement referred to in SRS's letter of 12 July 2004 applied to the policy, effective immediately.

The policy wording

27 There are a number of aspects of the SRS '1st Guard Commercial Vehicle Policy' wording that are relevant.

28 The policy commenced with a statement headed, 'SRS ensuring the wheels keep moving'. The statement indicated that SRS insured commercial motor vehicles across a diverse range of businesses within Australia and provided examples of the type of commercial operators for whom SRS provided insurance. It was said that strong links with Lloyds of London and Employers Reinsurance Corporation had 'boosted SRS's capacity to underwrite standard, nonstandard and specialty commercial motor protection'.

29 The definitions section of the policy wording included the following defined terms:

(a) 'Driver Declaration', which was defined to mean 'the form of that title, completed by each and every driver of Your Vehicle, which We use to determine whether the driver is an approved driver for the purposes of this insurance cover' (the expressions 'We/Our/Ourselves/Us' were defined to be references to the Insurers);

(b) 'Insurance Proposal', which was defined to mean 'the form of that title, completed by You, in application for insurance, which We use to determine whether to provide You with a policy, and if so, its terms';

(c) 'PAQS', which was defined as a reference to People & Quality Solutions Pty Ltd;

(d) 'Policy Schedule', which was defined to mean 'the most current Policy Schedule or Certificate of Insurance and attachments to them, issued to You by Us. It sets out Your policy number, the covers which apply and any special conditions and limits which will apply to each of them':

(e) 'Vehicle', which was defined to mean 'the motor Vehicle, mobile machine and/or trailers described in Your Policy Schedule'.

30 The following statement appeared under the heading 'Important Matters':

Our Agreement

After You have paid or agreed to pay the premium, including endorsement premiums, We

> will insure You against loss, damage or liability as described herein, occurring within the Commonwealth of Australia, during the Period of Insurance, subject to the terms and conditions of the policy and You being truthful in all Your statements.
>
> The Policy, together with the Insurance Proposal, Driver Declaration and any other statement or Endorsement, sets out Our agreement. All form part of this policy of insurance and are always to be considered together.

31 Section 1 of the policy described the 'policy benefits in respect of the insured's vehicle'. Section 1.1 identified the cover provided in respect of damage to or loss of a vehicle. It stated that the Insurers would at their option:

(a) pay the reasonable cost of repairing or replacing the vehicle;

(b) repair or replace the vehicle;

(c) pay the lesser of the sum insured or market value of the vehicle less any applicable excess.

32 Section 2 of the policy concerned third party liability. The section provided 'protection' for legal liability for third party property damage and personal injury arising out of the use of an insured vehicle.

33 Section 3 of the policy contained various exclusions. The preamble to the list of exclusions stated that the Insurers 'will not pay' if any of the exclusions applied. The excluded matters included the driver of a vehicle that was lost or damaged being under the influence of drugs or alcohol; the driver being unlicensed; the vehicle being overloaded or being driven without the correct permit for excess mass or overdimension; the vehicle being unroadworthy or unregistered; the vehicle being used in a motor sports event or the vehicle being used for hire or for an illegal purpose. The exclusions also included the following:

> We will not pay if
>
> ...
>
> **Non-declared drivers**
>
> If We have not received, and approved in writing, a Driver Declaration for the driver in control of Your Vehicle at the time of an occurrence.
>
> OR
>
> If We have not received a Driver Declaration for the driver in control of Your Vehicle at the time of an occurrence, unless we subsequently receive the Driver Declaration and determine, by applying Our underwriting guidelines and principles, that we would provided cover and on the same terms.
>
> If We do this an Excess in the sum of $2,500 in addition to the basic Excess and any other Excesses stipulated in the Policy Schedule and policy wording shall apply.

34 Section 5 of the policy contained endorsements to the policy. The preamble to the list of endorsements stated that the policy schedule would list any endorsements that were to apply to the policy. The list of endorsements in the policy issued to **Highway Hauliers** included the following:

> **B Doubles, Triples and Road Trains/ATrains and BTrains (ANZ 3)**

No indemnity is provided under the policy when Your Vehicle/s are being operated by drivers of B Doubles, B Triples or Road Trains as deemed under the Australian National Licence Category (MultiCombination) unless the driver

- is at least 28 years of age and has a minimum of three years proven continuous recent experience in B Double/B Triple/Road Train/ATrain/BTrain, and,
- has a PAQS driver profile score of at least 36, or an equivalent program approved by Us and
- does not have diabetes, whether or not diabetes caused or contributed to an accident, unless they have complied with the relevant licensing authority and is certified to drive by and Endocrinologist, or a medical specialist in the field of diabetes/related conditions and,
- has been approved in writing by Us to drive Your Vehicle.

The accidents

35 The circumstances surrounding each of the accidents the subject of **Highway Hauliers**' claims were not in dispute following a concession made by the defendant at the close of the evidence (ts 341). Consequently, it is necessary to only note in relation to the first of the two accidents that:

(a) The accident occurred on 16 June 2004.

(b) The accident occurred near Ceduna, South Australia. The truck involved in the accident was undertaking an eastwest run (Sydney to Perth). The truck was a Century Class Freightliner prime mover in a B Double combination, so that endorsement ANZ 3 applied. The registration number of the prime mover was WX 81AK.

(c) The truck was being driven by Ms Paula Battle at the time of the accident. She had not undertaken a PAQS test. Accordingly, it was accepted by **Highway Hauliers** that the requirements of ANZ 3 had not been satisfied.

36 In relation to the second accident, it is only necessary to note that:

(a) The accident occurred on 2 April 2005.

(b) The accident occurred on Great Eastern Highway between Merredin and Southern Cross. It was not in issue that the truck was undertaking an eastwest run.

(c) The truck involved in the accident was a freightliner C 120 prime mover, registration number WX 36AK. It was hauling two trailers. It was not in issue that ANZ 3 applied to that configuration.

(d) The driver at the time of the accident was Mr Paul Kelly. Mr Kelly had not undertaken a PAQS test and accordingly, it was accepted by **Highway Hauliers** that the requirements of ANZ 3 had not been satisfied.

37 Mr Sartori gave evidence which was not challenged and which I accept that:

(a) The prime mover that was damaged in the June 2004 accident was repaired by his sons (exhibit 1, par 43 and following).

(b) Two trailers were damaged in the June 2004 accident. They were capable of being repaired but only by converting them to flat top trailers. The repairs were undertaken by one of Mr Sartori's sons, commencing in July 2005. The trailers were then sold (exhibit 2, pars 4 6).

(c) **Highway Hauliers** purchased two secondhand trailers in about March 2005 (exhibit 2, par 17). The trailers were not purchased specifically as replacement trailers for the prime mover damaged in the June 2004 accident (exhibit 3, par 10). However, they would not have been purchased but for the accident (exhibit 3, par 8).

38 Mr Sartori also gave evidence (which is accepted) that the prime mover damaged in the June 2004 accident was returned to service to undertake runs between Perth and Melbourne in about April 2005 (exhibit 2, pars 1 and 18). It is relevant to what follows to note that the prime mover was re-registered prior to being returned to service. Its new registration number was WX 18AM (see the re-examination of Mr Sartori at ts 105).

39 The full extent of the damage to the prime mover and trailers involved in the April 2005 accident was not entirely clear from the evidence. Mr Sartori stated that **Highway Hauliers** could not afford to replace the damaged vehicles; that the trailers were sold in April 2007; that the damaged prime mover could not be sold and that only the engine and gearbox from the truck were subsequently sold (exhibit 1, pars 77, 84 and 91). It is to be inferred from that evidence that the vehicles involved in the April 2005 accident were damaged beyond repair. It was agreed by the parties that the trailers had a salvage value of $14,000 ($7,000 for each trailer) and the engine and gearbox had been sold for a total amount of $9,000. It was further agreed that the pre-accident market value of the prime mover involved in the April 2005 accident was approximately $157,000.

PAQS testing and the driver declarations

40 By his defence, the defendant alleged that:

(a) The Insurers had not received a driver declaration in respect of Ms Battle and had not approved her as an 'approved driver' under the SRS Policy at the time of the accident in which she was involved (16 June 2004) (pars 10(c) and (d));

(b) on or about 23 September 2004, the Insurers (by implication, through their agent, SRS) received from **Highway Hauliers** a driver declaration for Ms Battle (par 11(a));

(c) Ms Battle had not undertaken a PAQS test and had not achieved a PAQS driver profile score of at least 36 at the time that the driver declaration was received (par 24(b));

(d) applying the Insurers' underwriting guidelines and principles, the Insurers did not determine that they would have approved Ms Battle as an approved driver under the insurance policy and on the same terms (par 11(c)).

41 By its reply and defence to counterclaim, **Highway Hauliers**:

(a) admitted that it had not submitted a driver declaration in respect of Ms Battle at the time of the accident (par 6);

(b) further admitted that it had submitted a driver declaration in respect of Ms Battle on or about 23 September 2004 and that Ms Battle had not undertaken a PAQS test at that time (par 7);

(c) alleged that the Insurers did not at any time assess the driver declaration submitted for Ms Battle or notify **Highway Hauliers** of any decision regarding her driver declaration (par 7).

42 The defendant further alleged that the Insurers had not approved Mr Kelly as an approved driver under the SRS Policy by the time of the accident in which he was involved and that he had not attained a PAQS driver profile score of 36 (pars 18(c) and (d)). **Highway Hauliers** did not plead to those allegations in its reply and defence to counterclaim but it did not dispute those matters at trial.

43 By par 24 of his defence, the defendant further alleged that the Insurers were prejudiced by the failure of Ms Battle and Mr Kelly to have undertaken a PAQS test in that:

(a) Ms Battle and Mr Kelly would have scored less than 36 had they undertaken the test;

(b) the Insurers would have refused to approve Ms Battle and Mr Kelly as drivers under the SRS Policy;

(c) in the circumstances, the Insurers would not have been on risk whilst any vehicle identified in the schedule to the policy was being driven by Ms Battle or Mr Kelly.

44 **Highway Hauliers** denied those matters and alleged that the Insurers 'would have taken any action regarding Ms [Battle] and Mr Kelly or that they had any right to "approve" drivers' (reply and defence to counterclaim, par 11). It further alleged that (par 10 of the reply and defence to counterclaim):

> ... in the case of each of Paula Battle and Paul Kelly the failure to submit a driver declaration, the underwriters' failure to determine that they 'would have provided cover', and the conduct of driving a vehicle without having been PAQS tested and having a PAQS of 36:
>
> (a) could not reasonably be regarded as being capable of causing or contributing to the losses and liabilities the subject of the first claim and of the second claim;
>
> (b) did not cause any loss or liability;
>
> (c) had not prejudiced the underwriters.

45 Those allegations were directed to the application of s 54 ICA.

The claims made by Highway Hauliers

46 Phoenix, on behalf of **Highway Hauliers**, notified SRS of the first accident by letter dated 28 June 2004 (exhibit 177; TB 624636). It further advised SRS of the terms on which a claim made by a third party against **Highway Hauliers** and Ms Battle had been compromised by an email sent on 5 August 2005 (exhibit 299; TB 974978).

47 The second accident was notified to SRS by an email sent by Phoenix on 4 April 2005 (exhibit 270; TB 848). A claim notification form was sent on the following day by Phoenix (exhibit 271; TB 849860).

48 Neither party considered that it was necessary to trace in evidence the detail of the dealings between **Highway Hauliers** and the Insurers (through SRS) over the claims made by **Highway Hauliers** for each accident. The correspondence that was exchanged in the course of those dealings and which was referred to by the parties at trial comprised:

(a) Letter dated 13 September 2005 from CLS Lawyers, acting on behalf of SRS, advising that they had been instructed to investigate the possibility of arriving at a resolution of the claims made by **Highway Hauliers** (exhibit 306; TB 992993). The letter requested further information in respect of each claim.

(b) Letters dated 10 November 2005 from Phoenix to CLS Lawyers providing details of the amounts claimed in respect of each accident (exhibit 320; TB 10301031 and exhibit 321; TB 10321033). The letters were written in response to the letter dated 13 September 2005 from CLS Lawyers.

(c) Letter dated 16 May 2006 from CLS Lawyers to Mullins Hancock Lawyers (acting for **Highway Hauliers**) (exhibit 357; TB 10981108).

49 The letter of 16 May 2006 from CLS Lawyers was headed with a reference to the April 2005 accident but it was plainly intended to refer to both accidents (see the final sentence of the passage

reproduced below and see pars 14 and 17 of the statement of Craig Cullum dated 1 October 2009 (exhibit 14); I accept the evidence given by Mr Cullum in those paragraphs that the Insurers declined each claim by the letter dated 16 May 2006 from CLS Lawyers - there was no cross-examination on that evidence). The letter referred to the PAQS endorsement and stated that:

> Our client considers that ... until your client has produced a PAQS driver profile score of at least 36 the driver is not an approved driver. Clause 3.17 of the policy requires all drivers to be approved by SRS.
>
> ...
>
> Our client's position is that on a true construction of the clear words in the Schedule of Cover incorporated in the policy of insurance, it is a precondition that unless the driver has been PAQS Tested in accordance with the terms of the policy then any vehicle being driven by an untested driver is not covered by the policy.
>
> We understand that the driver involved had not been PAQS Tested and in these circumstances the terms and conditions of cover have been reached. In other words, there is an absence of relevant cover between our client and your client by virtue of the fact that the vehicle was being driven by an untested driver.
>
> Our client takes the view that the scope of cover provided is clear and your client is not entitled to the indemnity provided by the policy. Our instructions are that indemnity in respect of both claims has been declined by your client's underwriters.

50 The amounts claimed by **Highway Hauliers** in the letters from Phoenix dated 10 November 2005 were $48,882.85 in respect of the June 2004 accident and $264,447.74 for the April 2005 accident (net of excesses in each instance). The amounts claimed by way of indemnity under the SRS Policy at trial were $24,153 for the June 2004 accident and $289,290.27 for the April 2005 accident. The amounts agreed between the parties at trial were $12,335 and $287,472.09 respectively (net of excesses; ts 335). The agreed amounts are the amounts that the Insurers will be required to pay if they are held to be liable to indemnify **Highway Hauliers** under the SRS Policy in respect of each accident.

Were the Insurers liable to Highway Hauliers? The issues

51 As previously noted, the defendant contended that the Insurers were not liable to indemnify **Highway Hauliers** for any loss of or damage to the vehicles involved in the accidents as:

(a) endorsement ANZ 3 applied to exclude liability because the drivers involved in the accidents had not attained a PAQS driver profile score of at least 36;

(b) the policy excluded liability as the drivers were 'non-declared drivers'.

52 **Highway Hauliers** relied on s 54 ICA to argue that the Insurers could not deny liability on either of those grounds.

53 Section 54 ICA provides:

> (1) Subject to this section, where the effect of a contract of insurance would, but for this section, be that the insurer may refuse to pay a claim, either in whole or in part, by reason of some act of the insured or of some other person, being an act that occurred after the contract was entered into but not being an act in respect of which subsection (2) applies, the insurer may not refuse to pay the claim by reason only of that act but his liability in respect of the claim is reduced by the amount that fairly represents the extent to which

the insurer's interests were prejudiced as a result of that act.

(2) Subject to the succeeding provisions of this section, where the act could reasonably be regarded as being capable of causing or contributing to loss in respect of which insurance cover is provided by the contract, the insurer may refuse to pay the claim.

(3) Where the insured proves that no part of the loss that gave rise to the claim was caused by the act, the insurer may not refuse to pay the claim by reason only of the act.

(4) Where the insured proves that some part of the loss that gave rise to the claim was not caused by the act, the insurer may not refuse to pay the claim, so far as it concerns that part of the loss, by reason only of the act.

...

(6) A reference in this section to an act includes a reference to

(a) an omission; and

(b) an act or omission that has the effect of altering the state or condition of the subjectmatter of the contract or of allowing the state or condition of that subjectmatter to alter.

54 **Highway Hauliers** contended that the relevant 'acts' for the purpose of the section were:

(a) the act of the drivers driving the vehicles involved in each accident without having obtained a PAQS score of at least 36 (ts 391; reply and defence to counterclaim, pars 2(b) and 10);

(b) the failure of **Highway Hauliers** to submit driver declarations for each of the drivers (reply and defence to counterclaim, par 10).

55 The defendant's position on the issues relevant to the application of s 54 ICA requires some explanation. In closing, senior counsel for the defendant stated that its primary argument on the application of s 54(1) concerned the PAQS endorsement. It was said that the defendant did not concede that the section applied to the non-declared driver exclusion but he was content to rely on his written submissions in that regard (ts 354). However, the defendant's written submissions in opening and closing did not analyse why s 54(1) did not apply to the exclusion. Rather, the submissions focussed on the defendant's contention that the section did not apply to the PAQS endorsement.

56 It will, of course, be necessary to consider whether s 54(1) applied to the nondeclared driver exclusion given the defendant's position but the analysis must necessarily anticipate what the defendant might have contended about why the section did not apply. Consistent with the parties' submissions, much of the discussion that follows is directed to the application of s 54(1) to the PAQS endorsement.

57 The defendant contended that s 54 ICA did not apply for two closely related reasons. First, the failure of the drivers to have obtained the required minimum score on a PAQS test was not an act or omission within the meaning and for the purpose of s 54(1); rather, it constituted a state of affairs (defendant's opening submissions, par 76). Second, the defendant did not agree to insure vehicles on the eastwest run being driven by any driver. Rather, the scope of the cover provided by the policy was to insure drivers operating particular combinations of vehicles on those runs who had obtained a minimum score on the PAQS test. Section 54 was not intended to and did not alter the scope of the 'insured risk' as agreed between the insured and the insurer at the time that the contract of insurance was made (defendant's opening submissions, pars 79 81).

58 Two concessions were made at trial that narrowed the issues to be determined on whether the

Insurers were liable to indemnify **Highway Hauliers** under the SRS Policy. First, as previously noted, the memorandum of insurance originally issued to **Highway Hauliers** did not contain the PAQS endorsement. The omission was noted by SRS some time in about July 2004 and after the June 2004 accident had occurred. There was an issue on the pleadings as to whether the PAQS endorsement formed part of the SRS Policy at the time of that accident. The defendant contended that the endorsement formed part of the policy on its proper construction but sought rectification of the contract of insurance in the alternative. **Highway Hauliers** accepted at the commencement of the trial that the PAQS endorsement formed part of the policy at all relevant times so that it was not necessary to further consider the proper construction of the policy and its possible rectification (ts 8 9).

59 The second concession was made by the defendant at the close of the evidence. He accepted that the fact that the drivers involved in the accidents were nondeclared drivers and that they had not undertaken a PAQS test and, therefore, had not attained a driver profile score of 36 could not reasonably be regarded as being capable of causing or contributing to any losses incurred by **Highway Hauliers** as a result of the accidents and that the Insurers were not prejudiced by either of those matters (ts 341). Accordingly, the defendant's case on s 54 ICA was confined to his contention that the section did not apply to the nondeclared driver exclusion and the PAQS endorsement in the SRS Policy.

The meaning and effect of s 54 ICA

Some general comments

60 The defendant's submissions regarding the meaning and effect of s 54 ICA were derived from the reasons of Chesterman JA (with whom Holmes and White JJA agreed) in ***Johnson v Triple C Furniture & Electrical Pty Ltd*** (2010) 243 FLR 336; [2010] QCA 282. It was said that the reasoning and result in that case established by analogy that s 54 did not apply to the claims made by **Highway Hauliers**. It will be necessary to consider the decision in some detail given the emphasis placed on the reasoning by the defendant. However, it is convenient to first refer to some other matters relevant to the interpretation of s 54.

61 The explanatory memorandum to the *Insurance Contracts Bill 1984* stated in respect of cl 54:

> The existing law is unsatisfactory in that the parties' rights are determined by the form in which the contract is drafted rather than by reference to the harm caused. The present law can also operate inequitably in that breach of the term may lead to termination of the contract regardless of whether or not the insurer suffered any prejudice as a result of the insured's breach. The proposed law will concentrate on the substance and effect of the term and ensure that a more equitable result is achieved between the insurer and the insured. [182]

62 The concern with matters of substance rather than form was succinctly explained in the recommendation made by the Australian Law Reform Commission about the subject matter of s 54 (ALRC Report No 20, *Insurance Contracts*, Appendix A, cl 54):

> Where the effect of a contract is to impose an obligation on the insured, the insurer may not refuse to pay a claim because of a breach of the obligation unless:
>
> - the breach caused the insurer prejudice ... ; and
> - the insured could not reasonably have complied with the obligation ...
>
> A contract may impose an obligation on the insured in a number of ways:
>
> - by imposing an obligation directly (eg, 'the insured is under an obligation to keep the motor

vehicle in a roadworthy condition');

- by a continuing warranty (eg, 'the insured warrants he will keep the motor vehicle in a roadworthy condition');
- by an exclusion from cover (eg, 'this cover does not apply while the motor vehicle is unroadworthy');
- by defining the risk (eg, 'this contract provides cover for the motor vehicle while it is roadworthy').

> The clause operates in the same way however the obligation is created.

63 The long title to the ICA describes it as an Act to 'reform and modernise the law relating to certain contracts of insurance so that a fair balance is struck between the interests of insurers, insureds and other members of the public and so that the provisions included in such contracts, and the practices of insurers in relation to such contracts, operate fairly'. In ***East End Real Estate Pty Ltd v C E Heath Casualty & General Insurance Ltd*** (1991) 25 NSWLR 400, Gleeson CJ observed that:

> It would hardly be consistent with the purposes thus described to construe the language of s 54 in such a way as to make its operation depend upon the choice that is made between various available drafting techniques (404).

64 That observation was made in the course of his Honour explaining why he rejected a submission that s 54 covered 'such matters as warranties, conditions, and perhaps exclusions, but not matters directly affecting the ambit of the insurance cover' (403).

65 That does not, however, mean that s 54 operates to modify the 'scope of cover' afforded by an insurance policy. The section is not directed to instances where an insurer was entitled to refuse to pay a claim because it fell entirely outside the cover provided by the contract of insurance. Rather, the section is concerned with a claim that was within the scope of the cover provided by the insurance contract but which the insurer was entitled to refuse to pay, according to the effect of the contract, 'by reason of' some act or omission of the insured.

66 The difficulty of distinguishing between provisions defining the scope of cover and, for example, conditions affecting an insured's entitlement to be paid on a claim was expressly acknowledged by Gleeson CJ in ***FAI General Insurance Co Ltd v Perry*** (1993) 30 NSWLR 89. His Honour emphasised that the difficulty was not to be resolved (and the application of the section was not to be avoided) by incorporating a condition into the insuring clause (for example, a requirement for notification of an occurrence during the period of insurance in a claims made and notified policy). Similarly, in ***FAI General Insurance Co Ltd v Australian Hospital Care Pty Ltd*** [2001] HCA 38; (2001) 204 CLR 641, McHugh, Gummow and Hayne JJ observed (656):

> No distinction can be made, for the purposes of s 54, between provisions of a contract which define the scope of cover, and those provisions which are conditions affecting an entitlement to claim. The substantive effect of the contract can be determined only by examination of the contract as a whole.

67 The following propositions regarding the interpretation of s 54 are also relevant:

(a) The section is remedial in character and its language should be construed so as to give the most complete remedy that is consistent with the actual language employed and to which the words are fairly open: ***Antico v Heath Fielding Australia Pty Ltd*** [1997] HCA 35; (1997) 188 CLR 652, 675.

(b) The section operates only where, but for the section, the effect of a contract of insurance according to its terms would be that the insurer may refuse to pay a claim. Consequently, if the section applies, the parties to a contract of insurance will necessarily have different rights and duties from those for which their contract of insurance provided: ***FAI General Insurance Co Ltd v Australian Hospital Care Pty Ltd*** [2001] HCA 38; (2001) 204 CLR 641 [20].

(c) It is necessary to pay close attention to the elements with which the section deals: the effect of the contract of insurance between the parties; the claim which the insured has made and the reasons for the insurer's refusal to pay that claim: ***Australian Hospital Care*** [39].

(d) The section directs attention to the effect of the contract of insurance on the claim that the insured has, in fact, made on the insurer. It requires the precise identification of the event or circumstance in respect of which the insured claims payment or indemnity from the insurer: ***Australian Hospital Care*** [40].

(e) The section does not permit, let alone require, the reformulation of the claim that the insured has made. It operates to prevent an insurer from relying on certain acts or omissions to refuse to pay the particular claim. The actual claim made by the insured is one of the premises from which consideration of the application of the section must proceed. The section does not operate to 'relieve the insured of restrictions or limitations that are inherent in that claim': ***Australian Hospital Care*** [41].

Johnson v Triple C

68 In ***Johnson v Triple C*** the respondent owned an aircraft. The aircraft crashed, allegedly through the negligence of the pilot. A passenger was injured. She claimed damages for personal injury against the respondent. The respondent had effected a policy of aviation insurance with the appellant insurer. The appellant refused to indemnify the respondent, claiming that the circumstances of the accident fell within an exclusion contained in the policy.

69 The exclusion provided that the policy did not apply while the aircraft was operated with the knowledge of the respondent in breach of an 'Appropriate Authority's Communications ... issued from time to time'. The *Civil Aviation Regulations 1988* (Cth) were such a 'Communication'. Regulation 5.81 provided that a private aeroplane pilot could not fly an aeroplane as pilot in command if the pilot had not satisfactorily completed an aeroplane flight review within two years immediately before the day of the proposed flight. The appellant alleged that the pilot involved in the crash had not satisfactorily completed a review within two years preceding the flight so that the aircraft had been flown in breach of a 'Communication' within the terms of the policy. Accordingly, its liability to indemnify was excluded.

70 It was not at issue that the pilot had not undertaken a flight review in the two years prior to the crash. However, the respondent contended that s 54 ICA applied so that the appellant could not refuse to indemnify it for the passenger's claim.

71 Chesterman J rejected the respondent's contention. He characterised the act or omission relied on by the respondent for the purpose of s 54(1) as the pilot's failure to have satisfactorily completed a flight review. However, his Honour considered that the prohibition on the pilot flying in those circumstances could not be characterised as an omission:

> The word carries with it an implication or connotation that the thing omitted, the thing not done, was something which was within the power of the omitter to have done. An omission may be deliberate or inadvertent, but whatever its cause one cannot, I think, be said to omit to do something which is beyond one's capacity to do. [70]

72 The relevant regulation required a pilot to have satisfactorily completed a flight review. Whether the pilot satisfactorily completed the review depended upon the instructor's assessment of the pilot's performance:

> [The pilot] did not omit to comply with regulation 5.81(1). The circumstance that he had not satisfactorily completed a flight review was not an omission as the word is ordinarily understood and as it is, in my opinion, used in s 54. He may have omitted to undergo the review but what was required was that he complete the review to someone else's

> satisfaction. Obtaining that satisfaction was something [the pilot] might achieve, or fail to achieve, but it was not something he could omit [72].

73 His Honour considered that there was a further reason why s 54 ICA did not apply. After referring to ***Ferrcom Pty Ltd v Commercial Union Assurance Co of Australia Ltd*** [1993] HCA 5; (1993) 176 CLR 332; (1993) 7 ANZ Ins Cas 61156 and ***Australian Hospital Care***, he stated:

> As I understand the exegesis in ***FAI Insurance***, for the purposes of applying s 54 one looks to see whether some act or omission entitles an insurer to refuse the claim actually made on it. If the claim was for indemnity in respect of a loss which the policy did not cover s 54 will not apply. The act or omission, assuming one is identified, cannot operate to reformulate the claim or, in this case, convert the claim from one in respect of the loss caused by a pilot who had not completed the flight review into a loss caused by a pilot who had completed a flight review [78].

74 The respondent unsuccessfully applied for special leave to appeal from the decision of the Court of Appeal of Queensland. Counsel for the respondent conceded at the hearing of the special leave application that it would be necessary for a further finding of fact to be made before the respondent could ultimately succeed in its claim. That finding concerned whether the pilot's failure to have satisfactorily completed a flight review could not reasonably be regarded as being capable of causing or contributing to the loss claimed. It is clear from the transcript that the High Court was not prepared to entertain an appeal in those circumstances.

75 However, it is to be noted that (admittedly as a matter of first impression) Gummow J considered that the relevant act for the purposes of s 54(1) was the act of flying the aircraft or possibly, the act of flying the aircraft without 'the regulatory observance' (***Triple C Furniture & Electrical Pty Ltd v Rural & General Insurance Ltd*** [2011] HCATrans 125 (13 May 2011); see also G Pynt, 'Everything you always wanted to know about s 54 but were afraid to ask' (2010) 21 *ILJ* 197, fn 30 where it is suggested that, arguably, it was not an inherent limitation or restriction in the claim that allowed the appellant to refuse to pay but rather, the pilot's act of flying the aircraft without having successfully completed a flight review in the previous two years; and for the contrary view, see G Newton SC and M Hickey, 'Section 54 where are you?' (2011) 22 *ILJ* 110).

The act or omission in this instance

76 The act or omission to which s 54(1) ICA refers is an act or omission of the insured or a third party by reason of which the insurer is entitled to refuse to pay a claim according to the effect of the contract of insurance. Consequently, the characterisation of the relevant act or omission will reflect the circumstances of the claim, the effect of the contract of insurance and the basis upon which the insurer refused to pay the claim.

77 I consider that, in this instance, the relevant act is to be characterised by reference to the use of the vehicles involved in the accidents rather than the attributes of the drivers concerned. **Highway Hauliers** claimed under the SRS Policy for damage to its insured vehicles and its legal liability to third parties arising out of the use of those vehicles (sections 1 and 2 of the policy). The Insurers refused to pay the claim because the vehicles were being operated at the time of the accidents by drivers who were non-declared drivers (the exclusion in section 3) and who had not obtained a PAQS driver profile score of 36 (the PAQS endorsement).

78 Consequently, the relevant act or omission for the purpose of s 54(1) was the act of **Highway Hauliers** operating the vehicles on the particular eastwest run in which each accident occurred with drivers who did not satisfy the requirements of the policy; it allowed the insured vehicles to be driven by non-declared drivers who had not attained the minimum PAQS score. Characterising the relevant act for the purpose of s 54(1) in that way focuses on the substance of the contract of insurance and the acts of **Highway Hauliers** as the insured.

79 The relevant act was characterised by **Highway Hauliers** as the act of the drivers in driving the vehicles without having obtained the minimum PAQS score and while driver declarations had not been submitted on their behalf. It makes no difference if the act for the purpose of s 54(1) is defined in that way on the view that I take of the application of the section. However, I consider that it is more appropriate to define the relevant act as an act by **Highway Hauliers** as the insured under the contract of insurance rather than the act of the drivers who were not parties to the contract. That analysis of the relevant act or omission more readily corresponds with the focus of s 54(1) on the effect of the contract of insurance and the reasons why the Insurers were entitled to refuse to indemnify **Highway Hauliers** according to the effect of that contract in circumstances where:

(a) the SRS Policy insured **Highway Hauliers** for damage to or liability arising out of the use of its vehicles; and

(b) the claims were for damage to insured vehicles and third party property damage.

80 The drivers were not insured by the SRS Policy for their acts and omissions in driving vehicles for **Highway Hauliers**. The policy was for 'commercial motor vehicle' insurance (the description of the insurance class in the memorandum of insurance). The policy was a '1st Guard Commercial Vehicle Insurance' policy aimed at 'ensuring the wheels keep moving' by providing cover for commercial motor vehicles. The policy benefits were principally for:

(a) accidental loss or damage to 'Your Vehicle' (section 1.1);

(b) legal liability for damage to 'someone else's property as a result of an accident ... arising out of the use of Your Vehicle' (section 2.1);

(c) legal liability 'incurred by You for death or bodily injury caused by You arising out of the use of Your Vehicle' (section 2.2).

81 Consequently, the focus of the cover provided by the policy was **Highway Hauliers**' commercial vehicles and/or the use of those vehicles in its business. That, in my view, provides the context in which the relevant act or omission for the purpose of s 54(1) is to be characterised.

82 Consistent with the purpose of the policy, the exclusions were largely concerned with the use of the insured vehicles. For example, the policy provided in section 3 that the Insurers would not pay if:

(a) the vehicle was 'being used' on a journey that was outside the radius or freight task printed on the policy schedule;

(b) the loss or damage was caused while the vehicle was 'being driven' by any person impaired by or under the influence of any drug or alcohol;

(c) the vehicle was 'operated' while in an unroadworthy condition.

83 The nondeclared driver exclusion was not expressed in terms of the use of an insured vehicle. Rather, it imposed an obligation on the insured to submit driver declarations. However, the purpose of imposing that obligation was to enable the Insurers to approve drivers for the purpose of using the insured vehicles. Similarly, the PAQS endorsement was expressed in terms of the use of an insured vehicle: 'no indemnity is provided under this policy ... when Your Vehicles are being operated by drivers of B Doubles, B Triples or Road Trains ... unless the driver ... '.

84 The reasons given by the Insurers for refusing to indemnify **Highway Hauliers** in the letter of 16 May 2006 from their lawyers were reproduced earlier. It was said that 'it is a precondition that unless the driver was PAQS Tested ... then any vehicle being driven by an untested driver is not covered by the policy'. That, in my view, captured the substance of the Insurers' refusal to indemnify

having regard to the effect of the SRS Policy - the Insurer was entitled to refuse the claims made by **Highway Hauliers** because the insured vehicles were being used by drivers who had not attained the required PAQS score.

85 The defendant's submissions were expressed in terms of the failure of the drivers to have obtained a PAQS driver profile score of at least 36. The defendant characterised the failure as a state of affairs rather than as constituting an act or omission for the purpose of s 54(1). Consistent with the reasoning in ***Johnson v Triple C***, that state of affairs was said to be created by more than the drivers' omission to undertake the PAQS test, or **Highway Hauliers**' failure to make arrangements for them to do so, as the endorsement required the drivers to not just perform the test but also to obtain a minimum score.

86 I do not consider that the reason why the Insurers were entitled to refuse **Highway Hauliers**' claims according to the effect of the SRS Policy can be described as a 'state of affairs' so as to avoid the operation of s 54(1). The SRS Policy did not impose an obligation on drivers to undertake the PAQS test or to submit driver declarations. The fact that the drivers concerned were non-declared drivers who had not completed the test and obtained the required score was not, by itself, the reason why the Insurers were entitled to reject the claims made by **Highway Hauliers**. The Insurers were entitled to refuse the claims because the vehicles were being used by drivers who had not satisfied those requirements. The policy was not concerned with drivers as such as they were not covered; rather, it was concerned with the vehicles and their use. In my view, it was the act of **Highway Hauliers** operating the vehicles by allowing them to be driven by drivers who were nondeclared and who did not satisfy the PAQS endorsement or the act of those drivers driving the vehicles in those circumstances that entitled the Insurers to refuse the claims under the policy.

87 It does not assist the defendant to recast his submissions so as to refer to a state of affairs involving the use of the vehicle rather than the failure of the drivers to have obtained a minimum PAQS score a state of affairs in which the vehicles were being driven at the relevant times by drivers who were nondeclared and who had not obtained the specified driver profile score. That state of affairs was merely the result of **Highway Hauliers**' act in permitting the vehicles to be driven by the particular drivers who were involved in the accidents. Indeed, in my view recasting the defendant's submission in that way illustrates how his contention rests on adopting a particular form of words to express the characterisation required by the section rather than on an analysis of the substantive effect of the contract of insurance, the claims made by **Highway Hauliers** and the reasons why the Insurers were entitled to reject the claims.

88 It was suggested at one point in the trial that the court was bound by the decision of the Court of Appeal of Queensland in ***Johnson v Triple C*** to reach a different conclusion on the principles expressed in ***Australian Securities Commission v Marlborough Goldmines Ltd*** [1993] HCA 15; (1993) 177 CLR 485. However, the finding that the failure of the pilot in ***Johnson v Triple C*** to have satisfactorily completed a flight review was not an act or omission within the meaning and for the purpose of s 54(1) was a finding about the application of the section to the facts of that matter. It was not a conclusion about the proper construction of the section. What constitutes the relevant act or omission for the purpose of s 54(1) will depend on the particular circumstances of the case.

The scope of cover

89 The defendant contended that the scope of what it referred to as the 'insured risk' under the SRS Policy for eastwest runs was 'limited to insuring drivers' who had satisfied the PAQS endorsement; 'the scope of the insured risk did not extend to any driver of a nominated vehicle' (defendant's opening submissions, pars 85 and 86). It was submitted (correctly in my view) that the scope of the policy was a question of construction. It was said that the construction for which the defendant contended was evident from the following matters:

(a) The risk that was insured was the risk of accidental damage caused by a driver.

(b) The eastwest runs were high risk, particularly relative to the runs undertaken by **Highway Hauliers** to which the PAQS endorsement did not apply. Independent and objective measures concerning driver capacities and attitudes were relevant and significant in determining the risk for which the Insurers were prepared to provide cover.

(c) The PAQS test was recognised in the insurance industry and a minimum score on the test was a legitimate consideration for the Insurers in determining whether they accepted the risk and if so, on what terms.

90 **Highway Hauliers** contended that the defendant's construction impermissibly placed form over substance: 'the remedial effect of s 54(1) cannot be avoided by drafting a term as, or as if it were, part of the definition of 'cover' [ALRC], Report 20, *Insurance Contracts*, par 229 and Appendix A, pages 289290' (plaintiff's closing submissions, par 8). However, the requirement that a driver be an approved driver and that, in certain circumstances, the driver must have obtained a minimum PAQS test score were not incorporated in any insuring clause in the policy documents; rather, they were expressed to be an exclusion and an endorsement respectively. Further, I did not understand the defendant to cavil with the proposition established by the authorities to which reference has already been made that the 'restrictions or limitations inherent' in a claim were to be determined by the substantive effect of the contract of insurance rather than its form.

91 As the defendant recognised, the argument that the claims made by **Highway Hauliers** fell outside the scope of the policy can be seen in some ways as a reformulation of the submission that the failure of the drivers to have achieved a minimum PAQS test score constituted a state of affairs for the purpose of applying s 54. As for that submission, the focus of the defendant's argument was on the drivers of the vehicles involved in the accidents in particular, the insured risk was defined in terms of accidental damage caused by a driver (rather than, simply, damage to an insured vehicle or legal liability arising out of the use of an insured vehicle).

92 As explained earlier in the reasons, the SRS Policy was, in substance, concerned with insuring **Highway Hauliers** for loss of or damage to its vehicles and third party liability arising out of the use of those vehicles. Further, the Insurers' liability in respect of loss of or damage to a **Highway Hauliers**' vehicle was not confined to the risk of accidental damage caused by a driver. Cover was also provided for:

(a) any 'happening or event, not otherwise excluded, which is unexpected or unintended' (defined as 'Accidental Damage');

(b) damage caused by fire, hail, flood, storm or earthquake;

(c) malicious damage; and

(d) loss through theft.

93 It is also to be noted that several exclusions in the SRS Policy concerned driver or vehicle safety: driving while under the influence of drugs or alcohol; unlicensed drivers; overloaded or overdimensional vehicles; unroadworthy vehicles; underage and inexperienced drivers and dangerous goods. Did each of those matters define the scope of the policy? If not, what was the difference between those matters and the PAQS endorsement?

94 The defendant sought to answer those questions by emphasising the significance of the PAQS test for assessing risk in insuring a haulier that operated eastwest runs as part of its business. Evidence about the PAQS test and its use by insurers providing commercial vehicle insurance was given by John Bottomley, a risk manager who had been employed by SRS and NTI; Mr Cullum, an underwriter

employed by SRS at the time that the SRS Policy was issued; Nicholas Hogarth, an underwriter who was also employed by SRS at the time that the policy was issued and Carl Reams, the managing director of People & Quality Solutions Pty Ltd. Their evidence was adduced for more than one purpose: in connection with the defendant's claim for rectification of the SRS Policy, on the causation and prejudice issues that formed part of the defendant's case on the application of s 54 at the commencement of the trial and in support of the submissions made by the defendant concerning the scope of the cover that were summarised earlier. To the extent that the evidence was relevant to the last of those matters, it was to the following effect.

95 Mr Bottomley stated that eastwest runs were generally regarded within the insurance industry as 'high risk' (exhibit 17, par 4). It was common practice to seek some form of driver declaration in order to ensure that drivers were appropriately qualified and/or tested to enhance road safety, particularly with higher risk accounts (exhibit 16, par 5). It was also common practice in the insurance industry at the time that the SRS Policy was effected to require PAQS testing for high risk runs (exhibit 16, pars 5 and 6; and exhibit 17, par 6). Mr Bottomley understood that the purpose of the PAQS test was to make sure that drivers had 'an attitude of safety awareness'; the 'right attitude' would indicate that they would 'perform better in a high risk environment' (ts 258 and see also at ts 264).

96 Mr Hogarth's evidence was received provisionally into evidence subject to objections that are not relevant to the issue presently being considered. His evidence of the practice regarding issuing policies incorporating a requirement for PAQS testing was similar to that given by Mr Bottomley (exhibit 20P, pars 3436).

97 There were also objections to the evidence of Mr Cullum. However, his evidence was similar to that given by Mr Bottomley and Mr Hogarth to the extent that it was relevant to the defendant's submissions concerning the scope of the policy (see exhibit 14, par 6). Mr Cullum stated that the SRS underwriting manual provided in 2004 and 2005 that all quotations for commercial motor fleet insurance were to include endorsement ANZ 3 (ts 243; exhibit 152; TB 441 450). Mr Cullum also indicated that it was now very rare to include requirements for PAQS testing and driver declarations in policies as the insurance market subsequently 'went hard' and so it became difficult to market policies incorporating those requirements (ts 245 and 249).

98 I accept that the evidence adduced by the defendant established that there was an industry practice at the time that the SRS Policy was made of requiring PAQS testing for drivers of commercial vehicles where the insured's business involved eastwest runs. I also accept that this was a matter that was important to SRS and the Insurers. I make that finding having regard to the evidence of Mr Hogarth and Mr Cullum, the contents of the SRS underwriting manual and the terms of the policy documents.

99 However, that evidence does not assist in ascertaining the scope of the policy; that is, in identifying the 'restrictions or limitations that are inherent' in a claim for the purpose of applying s 54 ICA. The scope of the policy is to be determined by what, in substance, was the insurer's promise to insure under the terms of the contract of insurance. It is not to be determined by reference to industry understandings or practices among insurers concerning why a particular provision might be incorporated into a class of insurance policies or the terms on which an insurer might be prepared to insure certain types of risk. Clearly, the scope of the policy cannot be ascertained from the subjective views of an insurer about the importance to it of a particular provision in a policy. That is so regardless of whether the insurer's views and practice accords with those held by other insurers or was informed by the views and practices of other industry participants.

100 Moreover, the evidence does not assist the defendant even if industry understandings and practices regarding the use of particular policy endorsements were relevant to ascertaining the scope of the SRS Policy. That is because the effect of the evidence was that insurers writing commercial vehicle policies considered at the relevant time that requiring drivers to achieve a minimum PAQS score enhanced the likelihood that insured vehicles would be driven safely. Consequently, the requirement was directed to reducing the risk of an occurrence happening rather than to defining the scope of cover provided for

an occurrence that had happened and for which a claim had been made. The driver declaration exclusion and the PAQS endorsement were not intended to define the scope of cover provided in respect of any particular claim but rather, they were intended to reduce the likelihood of claims being made.

101 In my view, the scope of the SRS Policy was defined by reference to **Highway Hauliers**' vehicles (the vehicles identified in the schedule to the policy documents), the benefits conferred by the policy in sections 1 to 3 of the policy and the period of insurance. The scope of the policy was not defined by reference to the attributes of the driver at the time of an occurrence. Again, not every occurrence for which cover was provided would involve a driver. As has been emphasised, the substance of the policy was the provision of cover for vehicle damage or loss and third party liability arising out of the use of an insured vehicle. The PAQS endorsement conditioned the Insurers' obligation to meet a particular claim that otherwise fell within the scope of cover; it did not form part of the way in which the scope of the policy was defined.

102 Finally, it was clear from the provisions of s 3 of the SRS Policy concerning non-declared drivers that the exclusion did not form part of the scope of the policy. The insured could submit a driver declaration after an occurrence and the Insurers could impose an additional excess if they concluded that they would have provided cover had the declaration been submitted prior to the occurrence.

Damages The claims made by **Highway Hauliers**

103 **Highway Hauliers** claimed that it was entitled to:

(a) an indemnity under the SRS Policy for insured losses suffered as a consequence of each accident;

(b) damages for the Insurers' alleged breach of the SRS Policy by refusing to indemnify for the losses said to have been sustained as a result of the accident that occurred in April 2005.

104 As has already been noted, the amount for which **Highway Hauliers** was entitled to be indemnified under the policy was agreed at trial. The only issue to be determined was the Insurers' liability to indemnify.

105 The claim for damages for breach of the SRS Policy was pleaded as 'loss of profit (lost revenue less variable and fixed costs)' (statement of claim, particulars to par 14). The amount claimed was $826,738.

106 In opening, **Highway Hauliers** described the loss as 'consequential losses arising from the loss of a contract or contracts to cart freight on the eastwest run' (plaintiff's opening submissions, par 26). In particular, **Highway Hauliers** claimed that had it lost a regular weekly Melbourne/Perth freight run that had been undertaken for Perth Freightlines by the prime mover that was damaged in the April 2005 accident. It was unable to continue to service the run as a result of the Insurers' refusal to indemnify as it could not replace the vehicles that had been damaged in the accident.

107 It was submitted that consequential loss was recoverable for breach of an insurance contract where it was contemplated by the parties that financial loss would be a likely consequence of the breach, reference being made to the judgment of Hammerschlag J in ***Brescia Furniture Pty Ltd v QBE Insurance (Australia) Ltd*** [2007] NSWSC 598; 14 ANZ Ins Cas 61740. It was said that the defendant knew at the time when the Policy was made that:

(a) **Highway Hauliers** operated a commercial fleet of prime movers and trailers and that a number of the insured vehicles were subject to finance arrangements;

(b) insurance was required to meet the risk of losses to the business of operating a commercial fleet that earned income from its road transport business; and

(c) **Highway Hauliers** would be likely to suffer financial loss if an insured vehicle was damaged as it would be unable to earn revenue from operating the repaired or replaced vehicle if the defendant wrongfully refused to indemnify it for the cost of repair or replacement and it would continue to incur liabilities in respect of the vehicle under its finance arrangements (plaintiff's opening submissions, pars 29 and 30).

108 It is convenient in the discussion that follows to refer to **Highway Hauliers**' claim to be indemnified under the SRS Policy for the cost of repairing and replacing the vehicles damaged in each accident as the 'indemnity claim' and the claim for 'consequential loss' (that is, the claim for damages for breach of the policy by the Insurers' refusal to indemnify) as the 'damages claim'.

An overview of the evidence

109 An issue emerged in the course of **Highway Hauliers**' closing concerning the assumptions on which it had based its damages claim. Subsequently, the parties made joint submissions on how that claim was to be assessed on the evidence adduced at trial. The effect of the joint submissions was that the parties agreed that **Highway Hauliers**' claim for consequential loss was to be assessed as 'a claim for the lost chance to earn contract income from cartage work for a Melbourne to Perth run for Perth Freightlines Pty Ltd from August 2005 until June 2008' (further joint submissions dated 30 June 2011, par 1). It was further agreed that the damages awarded, if any, had to be less than the sum of $289,387, representing the 'maximum potential value of lost contracts' to 30 June 2008 (further joint submissions, par 2).

110 It will be immediately apparent from the amount referred to as the maximum potential value of lost contracts that the joint submissions represented a significant change in **Highway Hauliers**' damages claim from that submitted during its opening. How that change occurred and the genesis of the parties' further joint submissions can be explained by a précis of the evidence relied on by **Highway Hauliers** to support its claim.

Mr Sartori

111 In his witness statement (exhibit 1), Mr Sartori stated that **Highway Hauliers** could not afford to repair or replace the truck and trailers that were damaged in the April 2005 accident. However, the company was obliged to continue to make finance repayments on the vehicles. The damaged prime mover and trailers were not repaired or replaced as **Highway Hauliers** had insufficient funds 'especially since the income that was being generated from the damaged truck was now gone' (par 77).

112 The prime mover was the subject of a finance agreement with Daimler Chrysler for a fiveyear term, expiring on 2 July 2007 (exhibit 1, par 86). The trailers were the subject of a finance agreement with CBFC that expired in September 2007 (par 84). Payments were made until expiry of the finance agreements. It was then necessary for **Highway Hauliers** to pay out the residual amount of $73,412 on the finance agreement for the prime mover. That was achieved by **Highway Hauliers** entering into a further finance agreement with Daimler Chrysler (pars 87, 89 and 90). The trailers were eventually sold in April 2007 and the engine and gearbox from the prime mover were also sold (pars 84 and 91).

113 Mr Sartori stated in his supplementary witness statement (exhibit 2) that **Highway Hauliers** had commenced transporting freight for Perth Freightlines in 1981 (that statement was inconsistent with what was stated in Mr Sartori's initial witness statement but nothing turned on the difference). Perth Freightlines had been established at that time by Barry Ladd and Wally McArthur (par 20). There was no written contract between **Highway Hauliers** and Perth Freightlines; all jobs for Perth Freightlines were arranged by 'oral order and a system of documents'.

114 Perth Freightlines was eventually taken over by Lindsay George, who became the general manager. In 2005, Mr Sartori usually dealt with Laurie George, who was the operations manager for Perth Freightlines. Mr Laurie George and Mr Sartori spoke regularly and Mr George told Mr Sartori when **Highway Hauliers** trucks 'were to leave on their trips' (exhibit 2, pars 25 to 27). According to Mr Sartori, three **Highway Hauliers** trucks were regularly operating weekly runs between Melbourne and Perth transporting freight for Perth Freightlines immediately prior to the April 2005 accident (exhibit 1, par 99 read with par 100). The prime mover damaged in the accident was one of those trucks. **Highway Hauliers** lost one of the regular Melbourne/Perth weekly runs following the accident as it had not been indemnified by the Insurers for the replacement of the vehicles involved in the accident and it could not afford to replace the vehicles from its own resources (exhibit 1, par 100; exhibit 2, par 29). Mr Sartori stated that (exhibit 2, par 32):

> I know that Laurie had to contract the Perth to Melbourne (return) run to another company, as he kept asking me whether he could use another truck of ours to replace the truck and trailers involved in the second accident, and that if I could not then he would have to use another company.

115 Mr Sartori gave evidence, which was elicited in cross-examination and which I accept, that **Highway Hauliers** had more truck/trailer combinations available than were required to undertake the runs that it regularly operated for Perth Freightlines - see, for example, at ts 49 and 77. The additional combinations were referred to as 'floaters'. According to Mr Sartori, **Highway Hauliers** could not allocate another truck/trailer combination to undertake the 'lost' run from Perth to Melbourne and return 'as there was no spare capacity in the trailers' (exhibit 2, par 36). Each trailer that left **Highway Hauliers**' yard or Perth Freightlines' yard was filled to its maximum capacity so that another load could not be transferred to another prime mover and trailer' (exhibit 2, pars 34 to 36).

116 Mr Sartori estimated that by the end of July 2006, **Highway Hauliers** had lost income totalling $377,388 from not being able to replace the truck that was damaged in the second accident. His wife had made a schedule showing the loss for the period May 2005 to July 2006 (exhibit 1, par 103 and attachment 'GS 70'). The schedule stated that the 'unit' involved in the accident had undertaken the same weekly PerthMelbournePerth run since 2 May 2003. The lost income was the amount that it was assumed that **Highway Hauliers** would have earned by continuing to undertake the run after the April 2005 accident. Mr Sartori did not state when and in what circumstances Mr Sartori prepared the schedule.

Mr Lindsay George and Mr Laurie George

117 Mr Lindsay George gave evidence that he was the general manager of Perth Freightlines from 1995 until October 2005. As Mr Sartori indicated, **Highway Hauliers** had been a subcontractor with Perth Freightlines prior to Mr George commencing to work at Perth Freightlines (exhibit 9, par 7). Perth Freightlines generally used the same subcontractors to do its runs. A routine developed over time between Perth Freightlines and particular subcontractors. For example, **Highway Hauliers** had a regular Monday and Friday run out of Melbourne and a regular run out of Sydney.

118 Mr Laurie George gave evidence to the similar effect. However, neither Mr Lindsay George nor Mr Laurie George could recall the April 2005 accident or **Highway Hauliers** losing a Melbourne/Perth run at about the time of the accident.

The expert report of Ms Lindsay

119 Ms Lindsay is a forensic accountant. She was asked to provide an opinion on the profit said to have been lost as a result of SRS failing to indemnify **Highway Hauliers** following each of the

accidents (it appears that the decision to confine **Highway Hauliers**' damages claim to the consequences of the Insurers' refusal to indemnify in respect of the April 2005 accident was only made shortly prior to the commencement of the trial). She stated that she understood that the measure of damages for loss of profit was the amount of profit that would restore **Highway Hauliers** to the level of profit that it would have achieved if it had been indemnified by the Insurers for its property damage losses sustained through the accidents.

120 The facts that she was instructed to assume, or had assumed from the information that was provided to her, included that the vehicle involved in the April 2005 accident undertook Melbourne/Perth return trips on a weekly basis for Perth Freightlines (although, in some cases the trip from Perth to Melbourne was undertaken for Perth Freightlines and in some cases it was undertaken for another customer). She further assumed that **Highway Hauliers** had four prime mover/trailer combinations regularly undertaking Perth/Melbourne return trips each week at the time of the accident (a different assumption to Mr Sartori's evidence that there were three regular weekly runs).

121 Ms Lindsay also assumed that:

(a) **Highway Hauliers** lost the 'Perth Freightlines MelbournePerth return contract' that was being performed by the prime mover and trailers involved in the April 2005 accident;

(b) Perth Freightlines would not agree to **Highway Hauliers** retaining a subcontractor to perform 'the contract' and 'the contract' was awarded to another trucking company;

(c) but for the Insurer's failure to indemnify in respect of the second accident, **Highway Hauliers** would have continued to perform the 'PerthMelbourne return contract' for Perth Freightlines subject to availability of freight;

(d) had the Insurers indemnified **Highway Hauliers**, it would have had sufficient funds to replace the prime mover and trailers damaged in the accident and would have undertaken an additional Melbourne/Perth return trip each week.

122 Ms Lindsay estimated the profit that **Highway Hauliers** would have earned from operating an additional weekly Melbourne/Perth return trip following the April 2005 accident for a period commencing on 5 August 2005. The commencement date for estimating the loss was chosen to allow four months for SRS to investigate **Highway Hauliers**' claim and discharge its indemnity. The loss was estimated up to 30 June 2011.

123 I accept for the purpose of assessing the value of the lost opportunity claimed that allowing four months for SRS to process the claims made by **Highway Hauliers** was reasonable. There was no challenge to that assumption made by Ms Lindsay and there was no evidence adduced by the defendant to indicate that it was unreasonable.

The status of Perth Freightlines

124 It emerged in the final moments of the trial that the company that operated Perth Freightlines had been placed in voluntary liquidation in December 2008: see ***Sartori v BM2008 Pty Ltd*** [2009] FCA 467 and ***Re BM2008 Pty Ltd (in liq)*** [2010] VSC 337; (2010) 244 FLR 17. The circumstances in which that occurred were not disclosed in court but it appears from the facts recounted by Davies J in ***Re BM2008*** that prior to being placed into voluntary liquidation, the company had sold the business of Perth Freightlines by an agreement made in June 2008.

125 It will be apparent that the liquidation of the company operating the business of Perth Freightlines in 2008 might have been relevant to the assessment of **Highway Hauliers**' claim for damages given Ms Lindsay's assumption that **Highway Hauliers** would have operated an addition

weekly run for Perth Freightlines until 30 June 2011. The parties were permitted to file further submissions on what, if any, effect the liquidation of the company might have on **Highway Hauliers**' damages claim. Two sets of submissions were provided; each set of submissions was a joint submission from the parties.

126 The parties sought to clarify the issues that they considered arose for determination in **Highway Hauliers**' claim for damages in their first joint submission. Much of the submission contained further argument by each party on their respective cases. However, the joint submission recorded that **Highway Hauliers** no longer claimed damages beyond the year ending 30 June 2008. There was a difference between the parties over the relevance of the liquidation of the company that operated the business of Perth Freightlines but they agreed that the concession made by **Highway Hauliers** recognised that:

(a) The relevant depreciation period for a replacement truck was 3.5 years.

(b) Ms Lindsay's report indicated that **Highway Hauliers** had incurred operating losses for the years ending 30 June 2009 and 2010. Those losses 'underscore[d] the vicissitudes of business' (joint further submissions of the parties, par 39).

127 The parties also agreed in their further joint submission that:

(a) **Highway Hauliers**' damages claim was a claim for the lost chance to earn contract income from cartage work for a Melbourne/Perth run for Perth Freightlines from August 2005 until 30 June 2008.

(b) The amount of damages awarded had to be less than $289,387 which represented 'the maximum potential value of lost contracts to 30 June 2008'. That amount was the 'benchmark' from which the lost chance (if any) should be calculated.

(c) The court could act on the figures set out in Ms Lindsay's report and was not required to verify those figures by reference to source documents.

The issues and the relevant principles

128 **Highway Hauliers**' claim for damages was expressly formulated by reference to the principles identified by Hammerschlag J in ***Brescia***. In summary, his Honour held that:

(a) An insured was entitled to maintain a claim for breach of a contract of insurance regardless of whether it had terminated the contract ([509] and [511] and see his Honour's review of the relevant authorities preceding the conclusions expressed in those paragraphs).

(b) Damages for breach by an insurer of its obligation to indemnify were to be assessed according to the principles that apply generally to all contracts. The object of an award of damages was to put the insured in the position that it would have been in if the contract of insurance had been performed [510].

(c) The ordinary principles that apply to the assessment of damages for breach of a contract of insurance include the rule in ***Hadley v Baxendale*** [1854] EngR 296; (1854) 9 Exch 341 [511].

129 The defendant accepted those statements of principle. However, he contended that:

(a) the loss claimed fell outside the indemnity granted by the SRS Policy recognising **Highway Hauliers**' damages claim would 'convert' the SRS Policy into a policy that provided cover for business interruption losses;

(b) the loss was too remote;

(c) **Highway Hauliers** had not proved that it had lost a chance to earn profits.

The SRS Policy and the damages claim

130 The defendant contended that the 'scope of the risk' insured did not extend to lost profits. It submitted that (supplementary closing submissions, par 65):

> The principle is that insurance for property, and loss of profits from destruction of property, concern different subject matters and insurable interests. Hence, a policy which insures property does not extend to also provide insurance for loss of profits from destruction of the property. See ***MacKenzie v Whitworth*** (1875) LR 1 Ex D 36 at 43, approved in ***Maurice v Goldsbrough Mort & Co*** [1939] AC 452 at 461.

131 ***MacKenzie v Whitworth*** (1895) LR 1 Ex D 36 and ***Maurice v Goldsbrough Mort & Co*** [1939] AC 452 concerned the scope of the risk insured on a proper construction of the policies in issue. The effect of the decision in those cases was that the 'subject matter of an insurance must be properly described' so that 'though profits may be insured, they must be described as such' (***Maurice v Goldsbrough Mort***, 461 (Lord Wright)). That is, it must be apparent from the express wording of the policy that profits formed part of the insured risk. The principle is stated in R Merkin (ed), *Colinvaux's Law of Insurance* (7th ed, 1997) at 414:

> It also follows that where the assured desires to cover himself against loss consequential on the loss of property, he must be careful to ensure that the subject matter of the desired insurance is properly described in the policy. Thus, where the policy simply covers loss of goods, their value alone can be recovered and nothing can be recovered in respect of loss of profits. Though profits may be insured, they must be described as such.

132 The principle is, accordingly, one of construction concerning the insurer's obligation to indemnify *under* the terms of the contract of insurance. It is not a principle that is relevant to the insured's entitlement to damages caused by the insurer's refusal to indemnify in breach of the insurance contract.

133 The defendant contended that the effect of the claim by **Highway Hauliers** for damages was to 'convert a property insurance claim into a claim for loss of profits due to business interruption' (defendant's opening submissions, par 105). It was said that this:

> ... attempt should be rejected because it would alter the underlying nature of property insurance. If the plaintiff wished to obtain business interruption insurance for loss of profits, it should have sought such a policy.

134 That submission was expressed as a conclusion about the effect of **Highway Hauliers**' claim. In my view, the submission conflates the indemnity provided by a contract of insurance with the consequences of a breach of that contract. **Highway Hauliers**' damages claim did not rely on altering the effect of the SRS Policy ('converting' the policy) as it was not a claim to enforce the indemnity provisions of the policy; it was a claim for damages caused by a breach of the contract (a refusal to indemnify).

135 The damages claim is to be determined according to ordinary principles: the amount of compensation that would put **Highway Hauliers** in the position that it would have been in had the insurance contract been performed, limited by what was reasonably contemplated by the parties at the time that they made their contract. The terms of the SRS Policy will obviously be relevant but they do not govern the types of loss for which damages for breach can be awarded in the way that was suggested by the defendant.

Impecuniosity and remoteness

The parties' submissions

136 The defendant contended (on the assumption that Mr Sartori's evidence that **Highway Hauliers** could not afford to replace the vehicles damaged in the April 2005 accident was accepted) that **Highway Hauliers**' claim for damages was too remote for the following reasons (defendant's opening submissions, pars 94 105):

(a) The circumstances of **Highway Hauliers**' claim were to be distinguished from cases such as ***Victoria Laundry (Windsor) v Newman Industries*** [1949] 2 KB 528 (which involved the late supply of equipment) as an insured was presumed to be able to purchase its own equipment where an insurer refused to indemnify for the loss or destruction of the equipment.

(b) The inability of the insured to replace the equipment concerned due to impecuniosity was a 'separate and concurrent cause' of the insured's loss according to the principle in ***Liesbosch Dredger v SS Edison*** [1933] UKHL 2; [1933] AC 449. Although that involved a claim in tort, the same principles were said to apply to a claim for breach of contract, reference being made to ***Monarch Steamship Co Ltd v A/B Karlshamns Oljefabriker*** [1949] AC 196.

(c) To the extent that there was 'some doubt about whether the bare statement of principle in ***Liesbosch*** continues with full force after ***Lagden v O'Connor*** [2003] EWCA Civ 927; [2004] 1 AC 1067', there was nothing in ***Lagden*** that suggested that lost profits were recoverable in the circumstances of the claim made by **Highway Hauliers**.

(d) The decision of the High Court in ***Burns v MAN Automotive (Aust) Pty Ltd*** [1986] HCA 81; (1986) 161 CLR 653 'strongly' supported the contention that lost profits were not recoverable in this instance.

The conclusion in summary

137 It was not in issue that remoteness of loss and damage following a breach of an insurance contract is determined by the rule in ***Hadley v Baxendale***. The issue was whether the impecuniosity of **Highway Hauliers** limited the damages that could be claimed as it operated as a separate and concurrent cause of the loss suffered. In my view, it did not for the following reasons (in summary):

(a) No authority was cited for the proposition that an insured was presumed, in fact, to be able to purchase its own equipment to replace damaged equipment in the event that an insurer wrongfully refused to pay or indemnify under a contract of insurance. No policy reason was advanced for the presumption and I can see no rationale for why the common law would presume that, as a matter of fact, an insured could repair or replace damaged property where an insurer had wrongfully refused to indemnify the insured for that damage.

(b) The question of remoteness in contract is determined by what the parties reasonably contemplated would flow from a breach of their contract at the time that the contract was made. The principle identified by Lord Wright in ***Liesbosch*** does not apply to further limit the damages that may be recovered by the innocent party following a breach: see ***Muhammad Issa el Sheikh Ahmad v Ali*** [1947] AC 414. The decision of the House of Lords in ***Monarch Steamship*** did not establish that the principle in ***Liesbosch*** applied in contract cases.

(c) In any event, the House of Lords in ***Lagden*** expressly held that Lord Wright's statement in ***Liesbosch*** was no longer good law. ***Lagden*** has been accepted and applied in Australia. To the extent that the principle in ***Liesbosch*** might have been relevant to the determination of remoteness in contract, the reasoning of the House of Lords in ***Lagden*** would apply.

(d) Remoteness and mitigation are closely related. The impecuniosity of the plaintiff is not relevant to mitigation. There is no reason in principle or policy why questions of remoteness should be analysed differently.

The authorities

138 It is convenient to trace chronologically the relevant authorities, noting where, in my view, they support the conclusions that have been summarised above.

139 In ***Clippens Oil Co Ltd v Edinburgh and District Water Trustees*** [1907] AC 291, Lord Collins stated that:

> In my opinion the wrongdoer must take his victim *talem qualem*, and if the position of the latter is aggravated because he is without the means of mitigating it, so much the worse for the wrongdoer, who has got to be answerable for the consequences flowing from his tortious act.

140 Although expressed in an action in tort, *McGregor on Damages* (18th ed, 2009) at 7088 notes that Lord Collins' dictum has been applied variously, including in cases in which the issue was whether the plaintiff had failed to mitigate its loss following a breach of contract: see, for example, ***Robbins of Putney v Meek*** [1971] RTR 345.

141 The plaintiffs in ***Liesbosch*** acquired a dredger for the particular purpose of performing a construction contract. Subsequently, the dredger was lost at sea due to the negligence of the defendants. The plaintiffs were unable to immediately acquire a replacement dredger that was available due to their financial position and as a result, the cost of making alternative arrangements was increased. They sued for that cost.

142 The principle relied on by the defendant in this matter appeared in the following wellknown passage from the judgment of Lord Wright:

> The respondents' tortious act involved the physical loss of the dredger; that loss must somehow be reduced to terms of money. But the appellants' actual loss insofar as it was due to their impecuniosity arose from that impecuniosity as a separate and concurrent cause, extraneous to and distinct in character from the tort; the impecuniosity was not traceable to the respondents' acts, and in my opinion was outside the legal purview of the consequence of those acts. (460)

143 Lord Collins' statement in ***Clippens Oil*** was cited by Lord Wright in ***Liesbosch*** but distinguished on the ground that it was 'dealing not with the measure of damage, but with the victim's duty to minimise damage, which is quite a different matter' (461). As will be seen, the House of Lords in ***Lagden*** considered that the distinction drawn by Lord Wright had been eroded by subsequent developments in the law and Gibbs CJ observed in ***Burns v MAN Automotive*** that, 'the reason for [the] distinction is not altogether clear and the distinction has not always been observed' (659). It is relevant to note that the defendant does not allege in this case that **Highway Hauliers** failed to mitigate its loss.

144 In ***Muhammad v Ali***, the Privy Council held that remoteness for the purpose of a claim on a contract of indemnity was to be determined according to what might reasonably be in the contemplation of the parties as likely to flow from a breach of the obligation to indemnify. The loss claimed was on a forced sale of land following the breach. The vendor's impecuniosity was held not to be a separate and concurrent cause of the land being sold on execution (427).

145 In ***Monarch Steamship***, Lord Wright observed:

> In ***Liesbosch*** ... it was held that loss due to the party's impecuniosity was too remote and therefore to be neglected in the calculation of damages: it was a special loss due to his financial position. A different conclusion was arrived at in ***Muhammad v Ali***, where damages consequent on impecuniosity were held not too remote, because, as I understand it, the loss was such as might reasonably be expected to be in the contemplation of the parties as likely to flow from breach of the obligation undertaken ... The difference in result did not depend on the differences (if any) between contract and tort in this connection. The 'reasonable contemplation' as to damages is what the court attributes to the parties ... These general statements could be multiplied but the question in a case like the present must always be what reasonable business men must be taken to have contemplated is the natural or probable result of the contract was broken. As reasonable business men each must be taken to understand the ordinary practices and exigencies of the other's trade or business. That need not generally be the subject of special discussion or communication. (224)

146 That statement and Lord Wright's observations concerning ***Liesbosch*** generally do not support the defendant's submission that the decision of the House of Lords in ***Monarch Steamship*** endorsed the application of the principle in ***Liesbosch*** to cases in contract. That was the view taken by Gibbs J in ***Burns v MAN Automotive***: '[n]otwithstanding the much criticised decision in ***Liesbosch*** ..., any damage which resulted from a breach of the contract, and was reasonably within the contemplation of the parties when the contract was made, is recoverable even though the appellant's impecuniosity contributed to it: ***Monarch Steamship*** ...; ***Trans Trust SPRL v Danubian Trading***...' (14).

147 In ***Trans Trust SPRL v Danubian Trading Co Ltd*** [1952] 2 QB 297, the Court of Appeal rejected an argument that the plaintiff's loss of profit on a contract by which the defendants agreed to purchase steel was too remote despite the loss being 'consequent upon the plaintiffs' impecuniosity'. Somervell LJ accepted the trial judge's conclusion that it must have been in the contemplation of the parties that, in the event of a breach of contract, the loss to the plaintiffs would be their profit on the transaction and therefore, the plaintiffs were entitled to recover the lost profit even though the loss resulted from their impecuniosity. The Court of Appeal referred to ***Liesbosch*** but applied Lord Wright's dicta in ***Monarch Steamship***, Somervell LJ observing that 'the real question is what was the loss contemplated by the parties rather than the reason for it' (302).

148 I consider that the reasoning in ***Muhammad v Ali, Monarch Steamship*** and ***Trans Trust SPRL***, and the comment of Gibbs J in ***Burns v MAN Automotive***, all support the view that a plaintiff's impecuniosity does not operate in contract as a separate and concurrent cause of loss so as to provide an additional limitation on the damages that may be recovered following a breach. That conclusion accords with the principles on which remoteness of loss and damage is determined in contract.

149 The defendant contended that the decision of the majority in ***Burns v MAN Automotive*** supported its position. That was a case in contract (breach of a warranty given in a contract made between the parties) in which the majority held that the appellant's claim for lost profits was too remote. The decision is further considered in the next part of the reasons. However, in my view it does not establish that impecuniosity operates as a separate and concurrent cause of loss in contract or any other principle of general application that would deny **Highway Hauliers**' claim for damages as a matter of law.

150 In ***Lagden***, Lord Walker of Gestingthorpe referred to the observation of Oliver J in ***Radford v De Froberville*** [1977] 1 WLR 1262; [1978] 1 All ER 33 that, 'no doubt the measure of damages and the plaintiff's duty and ability to mitigate are logically distinct concepts (see for instance, the speech of Lord Wright in ***Liesbosch*** ...). But to some extent, at least, they are mirror images ... ' (1272). His Lordship noted that those observations had been endorsed by Megaw LJ and Browne LJ in ***Dodd Properties (Kent) Ltd v Canterbury City Council*** [1979] EWCA Civ 4; [1980] 1 WLR 433; [1979] 2 All ER 118 and after a further review of the authorities concluded that:

> In the light of the development of the law in the 70 years since ***Liesbosch*** was decided, it has in my view become apparent that Lord Wright's sharp distinction between mitigation of damage and measure (meaning, as I understand it, heads) of damage is not helpful. Nor do I think his general classification of impecuniosity as 'extraneous' or 'extrinsic' is consistent with the modern state of the law (although loss attributable to impecuniosity, on a claim in contract or tort, may on examination prove to be too remote). Many recent cases, both in England and in the Commonwealth, have noted that ***Liesbosch*** has been distinguished so often that its authority has been greatly attenuated. [102]

151 Lord Walker concurred with what was stated by Lord Hope of Craighead in ***Lagden*** (with whom Lord Nicholls of Birkenhead also agreed) concerning whether the principle stated by Lord Wright in ***Liesbosch*** should still be regarded as good law. Lord Hope noted that the rule established by ***Liesbosch*** was generally understood to be that the damages for which a defendant was liable could not be increased by reason of the claimant's impecuniosity. However, that rule was difficult to reconcile with the principle identified by Lord Collins in ***Clippens Oil*** and the distinction made by Lord Wright in ***Liesbosch*** (as to why the principle in ***Clippens Oil*** should not apply) 'seems to be a distinction without a difference' [51]. His Lordship concluded:

> It is not necessary for us to say that the ***Liesbosch*** was wrongly decided. But it is clear that the law has moved on, and that the correct test of remoteness today is whether the loss was reasonably foreseeable. The wrongdoer must take his victim as he finds him: *talem qualem*, as Lord Collins said in the ***Clippens Oil*** case ... This rule applies to the economic state of the victim in the same way as it applies to his physical and mental vulnerability. It requires the wrongdoer to bear the consequences if it was reasonably foreseeable that the injured party would have to borrow money or incur some other kind of expenditure to mitigate his damages. [61]

152 The decision in ***Lagden*** was noted by Handley JA in ***Tyco Australia Pty Ltd v Optus Networks Pty Ltd*** [2004] NSWCA 333 as effectively overruling the principle expressed in ***Liesbosch*** [192]. In ***NEA Pty Ltd v Magenta Mining Pty Ltd*** [2005] WASC 106 EM Heenan J observed:

> It can be said immediately that the impecuniosity of Magenta which constrained its opportunities to deal with the situation which had arisen at Hawkins Find after 23 October 1995 cannot be regarded as breaking any chain in causation or relieving Nea from the consequences Magenta suffered as a result of the misleading or deceptive conduct. This is explained in ***Burns v MAN Automotive*** ... and in particular, by the passages in that case which explain why the decision of the House of Lords in [***Liesbosch***] see per Gibbs CJ at 658, 659, 660 and per Brennan J at 674 no longer applies in its full rigour. Furthermore, the principle that losses which have been aggravated, or contributed to by a plaintiff's impecuniosity cannot be recovered, for which the decision in the ***Liesbosch*** is regarded as standing, has now been authoritatively rejected by the House of Lords in ***Lagden*** ... per Lord Hope at [45] [62]. This disapproval of the decision in ***Liesbosch*** was expressly endorsed by Lord Nicholls at [8], by Lord Slynn at [12], by Lord Scott at [82] and by Lord Walker [102] who, incidentally, expressly approved of the approach taken by Gibbs CJ in ***Burns v MAN Automotive*** ... at [97]. [316]

153 ***Lagden*** was also regarded as having overruled ***Liesbosch*** by Newman AJ in ***Waratah Smash Repairs Pty Ltd v Sonenco (No 92) Pty Ltd*** [2005] NSWSC 1283.

154 The discussion of ***Liesbosch*** in *McGregor on Damages* also notes that the principle identified by Lord Wright had been 'distinguished nearly out of existence' (6110). The difficulty was in ascertaining the point at which Lord Collins' statement in ***Clippens Oil*** took over from ***Liesbosch***; that is, the point at which mitigation took over from remoteness (7089). However, following the decision in ***Lagden***, 'it matters not by which route the impecunious claimant is protected, the crossover point need no longer be investigated' (7090). That statement, in my view, correctly expresses the position in Australian

common law.

155 ***Lagden*** involved a claim in tort. Accordingly, Lord Hope referred in the passage reproduced earlier to the wrongdoer being required to bear the reasonably foreseeable consequences of its wrong. Reasonable foreseeability and what was in the reasonable contemplation of the parties at the time that a contract was made are different tests of remoteness: see the discussion in NC Seddon & MP Ellinghaus, *Cheshire & Fifoot's Law of Contract* (9th Aust ed, 2008) at [23.39]. Consequently, it might be suggested that ***Lagden*** did not affect the application of the principle in ***Liesbosch*** (as the defendant submitted). That, of course, assumes that the principle applies in contract. I do not consider that the principle has been adopted in contract cases for the reasons already stated. Further, I note that ***Liesbosch*** has been consistently analysed through successive editions of *McGregor on Damages* as a principle applied as a matter of policy to limit damages in tort. However, if the principle in ***Liesbosch*** was applied or was capable of being applied generally to questions of remoteness in tort and contract, then the abandonment of the principle by the House of Lords in ***Lagden*** was, in my view, complete. I can see no reason in principle or policy for concluding otherwise.

Was the lost chance claimed by **Highway Hauliers** too remote?

156 The defendant did not expressly submit that **Highway Hauliers**' claim for damages was too remote when considered independently of the principle taken from ***Liesbosch*** on which he relied. However, he contended that the decision in ***Burns v MAN Automotive*** strongly supported his contention that **Highway Hauliers** could not recover lost profits (defendant's opening submissions, par 101).

157 The parties in ***Burns v MAN Automotive*** made a contract in July 1977 by which the respondent agreed to supply a prime mover to a finance company for hire to the appellant. The respondent falsely warranted that the engine of the prime mover had been fully reconditioned, knowing that the appellant intended to use the vehicle for interstate haulage. The appellant knew after the first year of hire that the vehicle could not be used for that purpose because of the unreconditioned state of its engine. However, he was unable to fund the reconditioning of the engine and he used the prime mover to make shorter intrastate trips for a further year. He then sued the respondent for damages assessed as the profits that he would have earned in interstate haulage over four years (the useful life of a reconditioned engine). He succeeded in his claim at trial but the award of damages was reduced on appeal.

158 The High Court granted special leave on the basis that the appeal raised for consideration the question of the effect of the appellant's impecuniosity on his failure to mitigate his losses. However, the majority of the High Court held that the appeal could be determined on the facts without deciding that question (662). They endorsed the view expressed by Connolly J in the Full Court that it was not reasonably foreseeable that a person in the position of the appellant, exercising good commercial sense, would persist over a period of years with a prime mover which, to his knowledge, was not as represented and which did not meet his requirements (665 666). Significantly, the appellant was not locked into a situation from which he could not escape at the time that he learnt that the warranty was untrue: '[i]f he was then unable to have the engine fully reconditioned, he could have terminated the hiring' (668).

159 The defendant emphasised in his submissions a passage in the majority decision in which their Honours explained that the case did not involve a question of mitigation. Rather:

> [i]t called simply for a determination of that point in time, beyond which any damage suffered by the appellant could not be said to have been within the reasonable contemplation of the parties as flowing from the breach. The effect of impecuniosity upon an injured party's obligation to mitigate the damage flowing from a breach of contract was indeed irrelevant to that question (668).

160 That passage does not express any point of principle but merely reflects an analysis of the relevant facts. Their Honours had noted earlier in their reasons that there was evidence suggesting that the appellant had been told within a month of acquiring the vehicle that the engine had not been fully reconditioned and that the vehicle had broken down a few months later. The Full Court had held that the appellant was not fixed with knowledge that the warranty was false at that time despite the evidence. The majority of the High Court observed in that context:

> It [the appellant's impecuniosity] may have been a relevant consideration if the Full Court had found that the appellant was to be fixed with knowledge of the breach of warranty in August 1977 [when the appellant was first told that the engine had not been fully reconditioned] or at the latest after the breakdown in November 1977. In substance their Honours held that the stage at which the appellant's position had finally crystallised from the point of view of the assessment of damages under the ordinary principles of contract law was reached in July 1978. By then, the damages had come home in that it was obvious that the vehicle should either have been made good or the appellant's possession of it relinquished. Connolly J aptly summed up the matter by saying:

'The ... appellant ... was not ... entitled to hang on and charge the [respondent] with the profits of a business which he himself had abandoned and with losses which he need never have incurred.' (668 669)

161 Accordingly, in my view the decision of the majority in ***Burns v MAN Automotive*** turns simply on an application of the rule in ***Hadley v Baxendale*** to the particular facts of the case. It does not embody any principle that modifies the application of that rule and there are significant differences between the facts in ***Burns v MAN Automotive*** and the circumstances in this matter. As has already been noted, the gist of the majority's reasoning was that it could not reasonably have been contemplated by the parties that the appellant would persist in operating a prime mover once he became aware of the state of the engine in circumstances where he had a choice as to what to do on learning the true position and where he had abandoned the business for which the truck had been acquired (and see *Cheshire & Fifoot's Law of Contract* at [23.40]). In this case, the question of remoteness falls to be determined according to what was reasonably contemplated by the parties at the time that the contract of insurance was made if the Insurers wrongfully refused to pay the plaintiff the replacement cost or the insured or market value of insured vehicles that were damaged in circumstances where, on **Highway Hauliers**' case, it lost a profitable freight run that it would have been able to continue to service had it been indemnified by the Insurers.

162 The formulation of the rule in ***Hadley v Baxendale*** that was expressed by Lord Reid in ***C Czarnikow Ltd v Koufos*** [1969] 1 AC 350 has been adopted in many cases:

> The crucial question is whether, on the information available to the defendant when the contract was made, he should, or the reasonable man in his position would, have realised that such loss was sufficiently likely to result from the breach of contract to make it proper to hold that the loss flowed naturally from the breach or that loss of that kind should have been within his contemplation (385).

163 In my view, **Highway Hauliers**' claim for damages was not too remote applying that test. The policy was for the insurance of commercial vehicles, including truck/trailer combinations. The Insurers knew through their agent, SRS, that **Highway Hauliers** operated a haulage business using the insured vehicles. The policy document commenced with a statement by SRS that it was 'ensuring the wheels keep moving' by underwriting 'standard, nonstandard and specialty commercial motor protection'. Further, the proposal prepared by Phoenix and submitted to SRS disclosed that the business of **Highway Hauliers** comprised interstate haulage of certain specified commodities, 'all set runs on a weekly basis' (exhibit 144; TB 419 - 433). Obviously, the Insurers knew that a prime mover and any trailers that it might have been hauling could be so severely damaged in an accident as to require replacement. The SRS policy provided that, in those circumstances, the Insurers could either

replace the damaged vehicles or pay to **Highway Hauliers** their insured or market value. It was, in my view, reasonably contemplated by the Insurers that **Highway Hauliers** could lose a 'set run' if they breached the contract of insurance by not replacing a vehicle that was 'writtenoff' in an accident or by not paying its insured or market value within a reasonable time after a claim was made. More generally, I consider that it was within the reasonable contemplation of the Insurers that **Highway Hauliers** could lose the opportunity to operate a repaired or replacement vehicle as part of its haulage business and earn income by doing so if they wrongfully refused to provide the benefits specified by s 1 of the SRS Policy when an insured vehicle was damaged.

164 That conclusion is broadly consistent with the observations made by Gallen J in ***Harris v The New Zealand Insurance Company Ltd*** (1987) 4 ANZ Ins Cases 60817. In that case, the plaintiff had insured a tractor that he hired out to earn income. The defendant refused to indemnify the plaintiff when the tractor was destroyed by fire. On the question of what was reasonably contemplated by the parties, Gallen J stated:

> I think that it is important to point that in the case of insurance of a particular item used for a particular purpose known to the insurer, it must be contemplated that the insurance would be designed to replace the item to continue the purpose for which it was required. I accept therefore the contention of counsel for the plaintiff that the insurer being aware of the nature of the equipment insured and the purpose for which it was employed by the insured, must be said to have been able to foresee that if payment was not made in terms of the policy that the consequences include a loss of those benefits which the insured attempted to provide by insuring ...that is, a tractor available for use (75,028).

The defendant's contentions on the proof of the lost chance

165 The defendant contended that **Highway Hauliers** had not proved that:

(a) it had lost a Melbourne/Perth run as a result of and following the April 2005 accident (defendant's opening submissions, par 31 to par 35, and further joint submissions, par 5.1);

(b) it had not used other trucks to undertake Melbourne/Perth runs for Perth Freightlines after April 2005 so as to maintain the same number of trips (after allowing for seasonal fluctuations in freight volumes) (par 36 to par 43 and par 5.2);

(c) it was unable to replace the prime mover damaged in the April 2005 accident (par 49 to par 52 and par 5.3); and

(d) any lost run was fully utilised (par 44 to par 48 and par 5.4).

166 The defendant further submitted that:

(a) the availability of all runs fluctuated so that whether an extra run was lost 'depended on whether the run was available and whether there were extra trucks and trailers ('floaters') available to do this extra run' (further joint submissions, par 5.6);

(b) any profit lost could not be established by 'simply assuming there would always have been an extra run' but rather the overall operation of the business conducted by **Highway Hauliers** needed to be examined as there would have been occasions where the additional prime mover and trailers (that is, the prime mover and trailers that would have replaced the damaged vehicles if the Insurers had met **Highway Hauliers**' claim) would not have been utilised and earning income (par 5.7).

167 The defendant's assertion that **Highway Hauliers** had failed to prove that it had lost a chance to earn profits focussed on the assumptions made by Ms Lindsay in her report and whether they were established by the evidence. Ms Lindsay 'measured' the cash profit lost by **Highway**

Hauliers ceasing to operate one Melbourne/Perth run. The lost cash profit was estimated as the difference between:

(a) The gross revenue that would have been derived from an additional Melbourne/Perth trip each week using the rates paid by Perth Freightlines to **Highway Hauliers** for Melbourne/Perth trips. Different rates were paid by Perth Freightlines for each leg of the run.

(b) The direct (fixed and variable) costs that would have been incurred in undertaking an additional weekly run using information provided by **Highway Hauliers** about its operating costs (par 38). The principal fixed cost was the amount payable under the finance agreements entered into by **Highway Hauliers** for the hire of a prime mover and trailers.

168 The general effect of the assumptions made by Ms Lindsay in measuring lost cash profits has already been noted. Specifically, she assumed that:

(a) the vehicles involved in the June 2004 and April 2005 accidents operated a Melbourne/Perth return trip weekly for Perth Freightlines (although some return trips from Perth to Melbourne were undertaken for another customer) (par 18);

(b) at the time of the April 2005 accident, **Highway Hauliers** had four prime mover/trailer combinations regularly undertaking weekly Melbourne/Perth return trips (par 18);

(c) all of **Highway Hauliers**' trailers were filled to capacity on every trip (par 18);

(d) **Highway Hauliers** did not lose the 'Perth Freightlines contract' that was being performed by the prime mover involved in the June 2004 accident (par 20);

(e) **Highway Hauliers** lost the Perth Freightlines 'Melbourne/Perth return contract' that was being performed by the prime mover involved in the April 2005 accident (par 21);

(f) but for the Insurers' refusal to indemnify **Highway Hauliers** for the damage sustained by the vehicles involved in the April 2005 accident and subject to availability of freight, **Highway Haulier**s would have continued to perform the Melbourne/Perth return 'contract' for Perth Freightlines as it would have had the funds to replace the damaged prime mover and trailers (par 21). It was assumed that the run would have been available throughout the period over which lost profits were assessed (August 2005 to 30 June 2008).

The issue to be determined and the relevant principles

169 In ***Tyco Australia Pty Ltd v Optus Networks Pty Ltd*** [2004] NSWCA 333, Handley JA observed that:

> The principle that damages can be recovered for the loss of a chance is well established: ***Chaplin v Hicks*** [1911] 2 KB 786 Corporations Act 2001 (Cth); ***Sellars v Adelaide Petroleum NL*** [1994] HCA 4; (1994) 179 CLR 332. The plaintiff who has established a wrong is assisted in the assessment of damages for the loss of a chance by the principle referred to by Dixon and McTiernan JJ in ***Fink v Fink*** [1946] HCA 54; (1946) 74 CLR 127, 143:

'Where there has been an actual loss of some sort, the common law does not permit difficulties of estimating the loss in money to defeat the only remedy provided for breach of contract, an award of damages.' [195]

170 The plaintiff must, of course, prove on the balance of probabilities that some loss or damage had been sustained as a result of the defendant's breach; otherwise, it is entitled to no more than nominal

damages. Damage might be established by showing that the defendant's wrongful conduct caused the loss of a commercial opportunity that had some value (not being a negligible value). The value to be ascribed to the lost opportunity is then to be assessed by reference to the degree of probabilities or possibilities: see ***Sellars v Adelaide Petroleum NL*** [1994] HCA 4; (1994) 179 CLR 332, in which Mason CJ, Dawson, Toohey and Gaudron JJ stated:

> ...acceptance of the principle in [***Malec v J C Hutton Pty Ltd*** [1990] HCA 20; (1990) 169 CLR 638] requires that damages for deprivation of a commercial opportunity, whether the deprivation occurred by reason of breach of contract, tort or contravention of s 52(1), should be ascertained by reference to the court's assessment of the prospects of success of that opportunity had it been pursued...
>
> On the other hand, the general standard of proof in civil actions will ordinarily govern the issue of causation and the issue whether the applicant has sustained loss or damage. Hence the applicant must prove on the balance of probabilities that he or she has sustained *some* loss or damage. However, in a case such as the present, the applicant shows *some* loss or damage was sustained by demonstrating that the contravening conduct caused the loss of a commercial opportunity which had *some* value (not being a negligible value), the value being ascertained by reference to the degree of probabilities or possibilities (355). (original emphasis)

171 However, as Chernov JA (with whom Buchanan JA agreed) observed in ***Longden v Kenalda Nominees Pty Ltd*** [2003] VSCA 128 (a case concerning the lost opportunity to earn profits):

> But such a plaintiff 'is not entitled, by the award of damages upon breach, to be placed in a superior position to that which he or she would have been in had the contract been performed'. Thus, it is for the plaintiff to prove both the *fact* of loss arising from the defendant's breach *and* the *amount* of the loss. Moreover the plaintiff is required to establish both matters with as much certainty and particularity as is reasonable in the circumstances. Consequently, where a plaintiff could have produced evidence of loss but has simply failed to do so, it ordinarily means that it has failed to prove its case on damages (so that, where the claim is based on breach of contract, the plaintiff would only recover nominal damages). There are, of course, situations where a plaintiff cannot adduce precise evidence of the amount of loss, in which case the court will do its best in that regard and will estimate the damages and, where appropriate, will engage in a certain amount of guesswork [33]. (original emphasis)

172 In my view, it was clear that **Highway Hauliers** lost a commercial opportunity as a result of the Insurers' refusal to indemnify for the vehicles damaged in the April 2005 accident. The real issues raised by the defendant were whether that opportunity was the opportunity that **Highway Hauliers** claimed it had lost (the opportunity to undertake an additional weekly Melbourne/Perth run from August 2005 until 30 June 2008) or some other opportunity that was not the subject of direct evidence and if the latter, whether **Highway Hauliers** had proved a loss or a loss for which more than nominal damages could be awarded. Those issues were not easily resolved on the evidence that was adduced. Accordingly, I have set out in some detail the matters that I have taken into consideration in deciding whether **Highway Hauliers** has proved its loss and if so, how that loss should be assessed.

173 It is convenient to commence with some matters raised by the defendant.

Exhibit 4 and Mr Davidson's report

174 Ms Lindsay was cross-examined on her assumption that **Highway Hauliers** had used four prime movers per week on Melbourne/Perth runs prior to the April 2005 accident and that it could only use three prime movers after the accident (at ts 171 and following). She emphasised that the

critical assumption was not the absolute number of vehicles used to undertake the Melbourne/Perth run each week (and consequently, the number of runs) but rather, that **Highway Hauliers** had one less truck/trailer combination with which to undertake a Melbourne/Perth run that would otherwise have been available (ts 172). That necessarily followed from the other assumptions that Ms Lindsay made and the manner in which she was instructed to assess **Highway Hauliers**' lost profit (the profit lost from one 'set' or 'dedicated' run per week over time rather than any profit lost from the conduct of the whole of **Highway Hauliers**' business or from all of its Melbourne/Perth runs over that time).

175 Mr Sartori was crossexamined on the number of prime movers available to **Highway Hauliers** for the Melbourne/Perth run prior to and following the April 2005 accident by reference to a document prepared by the defendant and which summarised information about the vehicles used by **Highway Hauliers** on Melbourne/Perth trips between the weeks ending 22 August 2004 (approximately ten weeks after the June 2004 accident) and 14 August 2005 (19 weeks after the April 2005 accident) (exhibit 4). The information summarised in the exhibit was extracted from a bundle of 'recipient created tax invoices' (RCTIs) issued by Perth Freightlines to **Highway Hauliers** during the relevant period. Ms Sartori (who was responsible for **Highway Hauliers**' book-keeping) gave evidence that Perth Freightlines issued a subcontractor's payment advice after each run. That was followed by a weekly RCTI that contained information about all runs undertaken for Perth Freightlines in the relevant week. The RCTIs summarised the details of the deliveries that **Highway Hauliers** had been contracted to perform, the manifest numbers that correlated with the subcontractor's payment advices and the amount paid for each run (exhibit 5, pars 12 and 13). The RCTIs also stated the quantity of fuel that had been provided by Perth Freightlines' Melbourne and Sydney depots to **Highway Hauliers** and in doing so, identified the trucks that had been refuelled by their registration numbers, cross-referenced to the trip manifest. That information enabled the trucks performing Melbourne/Perth runs in any particular week to be identified.

176 The defendant submitted in closing that the information summarised in exhibit 4 established that **Highway Hauliers** regularly used five trucks on weekly Melbourne/Perth runs prior to and following the April 2005 accident (supplementary closing submissions, par 33). Accordingly, he contended that **Highway Hauliers** had failed to establish that it had lost a Melbourne/Perth run following the accident or even that it had less trucks available to undertake that run. It was said that the number of trucks available after the accident did not change as the prime mover that had been damaged in the June 2004 accident was returned to service immediately prior to the April 2005 accident; the returned vehicle replaced the damaged vehicle (supplementary closing submissions, pars 35 37).

177 The defendant also led evidence from an accountant, Mr Davidson. He provided a report (exhibit 21) which commented on aspects of Ms Lindsay's analysis of the profit that **Highway Hauliers** claimed it would have derived from operating an additional Melbourne/Perth run.

178 It is necessary to describe the information contained in exhibit 4 and the cross-examination of Mr Sartori on the exhibit in some detail to explain the findings that have been made about the information summarised in the exhibit. There were aspects of Mr Davidson's evidence that were also relevant to the issues raised by the defendant's submissions concerning exhibit 4.

179 Exhibit 4 recorded for each week in the period 22 August 2004 to 14 August 2005, the registration numbers of **Highway Hauliers**' trucks said to have, or possibly have, undertaken Melbourne/Perth runs for Perth Freightlines (possibly, as one column listing trucks in exhibit 4 was headed 'probable incorrect entries'). The exhibit also recorded the number of trips taken each week. That was calculated by adding together the number of runs identified by truck registration numbers, including those trips shown as having been undertaken by a truck in the 'probable incorrect entries' column.

180 Exhibit 4 also highlighted by the use of red columns those prime movers that were said by the defendant to have 'primarily' undertaken Melbourne/Perth runs after the April 2005 accident (ts 57). Four prime movers were highlighted (WX 80AK, WX 79AK, WX 18AM and WX 39AM). Other prime movers were identified in the exhibit as having undertaken a particular ('non-regular') Melbourne/Perth trip and the total number of trips varied between weeks.

181 Mr Davidson also summarised the number of Melbourne/Perth trips undertaken by **Highway Hauliers** in his report (appendix 3). He extracted the information from the RCTIs issued by Perth Freightlines. His summary spanned the period 11 January 2004 to 1 January 2006. However, the number of trips that he recorded in the period 22 August 2004 to 14 August 2005 did not always correspond with the number of trips identified in exhibit 4 for that period. No explanation was provided for the difference. Mr Davidson was cross-examined by reference to exhibit 4 but not on any difference between the number of trips recorded in that exhibit and the number of trips referred to in his report. Mr Sartori was not cross-examined on the information contained in Mr Davidson's report. There was also no explanation provided for, or crossexamination on, the 'probable incorrect entries' column in exhibit 4.

182 As with most statistical data, the inferences to be drawn from exhibit 4 and appendix 3 to Mr Davidson's report depended on how the data was analysed and the conclusions expressed. For example, Mr Davidson noted at par 4.14 of his report that according to his calculations of the number of Melbourne/Perth trips:

(a) four trips per week were undertaken by **Highway Hauliers** in five of the six weeks immediately prior to the April 2005 accident;

(b) only three trips per week were undertaken in the two weeks immediately following the April 2005 accident but four trips per week were undertaken in the next 17 weeks.

183 Mr Davidson concluded from those observations that **Highway Hauliers** had sourced other trucks to make Melbourne/Perth trips in substitution for the vehicles damaged in the April 2005 accident (par 4.15) and that the 'basis for the calculation...of loss of profits' adopted by Ms Lindsay in her report was not reasonable as she had assumed that one regular run had been lost because the damaged vehicles were not (and could not) be replaced (par 4.18).

184 However, a different - although, not entirely inconsistent - inference might be drawn if the number of Melbourne/Perth trips undertaken by **Highway Hauliers** prior to the April 2005 was considered for the full period summarised in exhibit 4 rather than for just the preceding six weeks. Exhibit 4 covered 31 weeks prior to the April 2005 accident and 19 weeks following the accident. Appendix 3 recorded 137 trips in the 31 weeks prior to the accident; an average of 4.42 trips per week. There were 74 trips recorded in appendix 3 for the 19 weeks following the accident, giving an average of 3.89 trips per week.

185 The equivalent figures for exhibit 4 were 137 trips prior to the April 2005 accident (although the weekly breakdown was different to that contained in Mr Davidson's report) and 66 trips following the accident, an average of 3.47 trips per week. My review of the relevant RCTIs suggested that appendix 3 to Mr Davidson's report more accurately summarised the information contained in those documents than exhibit 4. However, the information summarised in both exhibit 4 and appendix 3 indicated that there had been a fall in the number of Melbourne/Perth trips undertaken in the 19 weeks following the April 2005 accident when compared with the number of trips completed in the 31 weeks prior to the accident.

186 There were further aspects about the use of the data recorded in exhibit 4 that are relevant. They concern the pattern of runs disclosed by the exhibit and the cross-examination of Mr Sartori on the exhibit. In summary:

(a) As the defendant submitted, exhibit 4 indicated that five prime movers were regularly used on the Melbourne/Perth run prior to the April 2005 accident, including the prime mover that was involved in the accident (WX 36AK, WX 80AK, WX 43AK, WX 00AN and WX 79AK; and see at ts 57).

(b) The exhibit further disclosed that:

(i) Prime mover WX 18AM (the vehicle damaged in the June 2004 accident) commenced operating a regular Melbourne/Perth run in the week following the April 2005 accident. The prime mover, in effect, replaced the truck damaged in the April 2005 accident. That was consistent with the defendant's submission in closing.

(ii) Prime mover WX 00AN was regularly used for the Melbourne/Perth run prior to the April 2005 accident. The prime mover continued to be used on the Melbourne/Perth run after the accident in April and May. However, the prime mover was not used for a Melbourne/Perth run after the week ending 22 May 2005 (through to the week ending 14 August 2005).

(iii) Prime mover WX 39AM commenced operating a regular Melbourne/Perth run the week after WX 00AN apparently ceased undertaking the run. In effect, prime mover WX 39 AM replaced prime mover WX 00AN. However, that was not raised with Mr Sartori in cross-examination.

(iv) Prime mover WX 43AK, which was one of the prime movers identified by the defendant as operating a regular Melbourne/Perth run prior to the April 2005 accident, did not undertake that run after 16 January 2005.

(c) The defendant included prime mover WX 00AN among the vehicles that had regularly undertaken a Melbourne/Perth run following the April 2005 accident when making his submission in closing that **Highway Hauliers** had available and regularly used the same number of trucks for the Melbourne/Perth run prior to and following the April 2005 accident. However, he added at par 34 of his supplementary closing submissions that:

> It may be observed that the truck with registration number WX00AN ceased carrying out the PerthMelbourne run in about late May 2005. However, perusal of a number of the recipient created tax invoices from about that time demonstrate that this vehicle commenced the Sydney to Perth run ... No doubt this occurred as this was the most profitable deployment of the vehicle within the operation of the overall business of the plaintiff.

(d) Much of the cross-examination of Mr Sartori on exhibit 4 was directed to whether two prime movers shown as having regularly undertaken a Melbourne/Perth run after the April 2005 accident (WX 18AM and WX 39AM) were actually operated by sub-contractors to **Highway Hauliers** rather than by the company (at various points between ts 57 75). The proposition was based on what was recorded in the schedule of insured vehicles forming part of the memoranda of insurance that had been issued by SRS (the relevant vehicle registration numbers were extracted from the RCTIs; there was no reference to vehicles bearing those registration numbers in the schedules). It was established in re-examination that the prime movers were insured vehicles hired and operated by **Highway Hauliers**. The discrepancy between the registration numbers recorded in the schedules of insured vehicles and the RCTIs was due to the vehicles being issued with fresh registration numbers (ts 101 and following). It is clear that Mr Sartori found this part of his cross-examination confusing as it was based on documents with which he had little familiarity and it did not accord with his general (and correct) understanding.

(e) It was suggested to Mr Sartori in cross-examination that following the April 2005 accident, **Highway Hauliers** had regularly used four prime movers for the Melbourne/Perth run and that this was the same number of trucks as had regularly undertaken the run prior to the April 2005 accident (ts 53 -54; the equivalent number submitted by the defendant in closing was five prime

movers). That suggestion was made to foreshadow a line of questioning; Mr Sartori did not and was not required to respond to the suggestion at the time that it was made.

(f) It was also suggested to Mr Sartori that in the period between the June 2004 and April 2005 accidents, the number of Melbourne/Perth runs fluctuated from week to week between three and six trips (ts 77); that the minimum number of trips was 'three and sometimes four trips a week' (ts 78) and that following the April 2005 accident, **Highway Hauliers** had the same number of trucks and trailers available to undertake the Melbourne/Perth run as it had prior to the accident (ts 79). Mr Sartori answered the last of those suggestions in way that was not responsive. That was not, in my view, because he was attempting to be evasive but rather, because he had difficulty in following the questioning by reference to exhibit 4.

(g) Mr Sartori was not directly cross-examined about the number of Melbourne/Perth trips regularly undertaken following the April 2005 accident. At most, it was put to him that the number of trucks and trailers available to undertake the run had not changed following the accident.

Other aspects of exhibit 4, appendix 3 and the RCTIs

187 There were other matters concerning the number of Melbourne/Perth trips undertaken by **Highway Hauliers** following the April 2005 accident that I have noted from the evidence but which were not referred to by the parties in their submissions and on which none of the witnesses were examined.

188 First, there was no other prime mover recorded in exhibit 4 that apparently 'replaced' prime mover WX 43AK in undertaking a regular Melbourne/Perth run. However, Mr Sartori was not examined about the reason why the prime mover seemingly ceased operating a regular Melbourne/Perth run in January 2005 or whether another prime mover effectively replaced WX 43AK on the run and if not, why that had not occurred.

189 Second, a review of the RCTIs tendered in evidence indicated that in the period from 12 March 2006 to 30 June 2008 **Highway Hauliers** only operated Melbourne/Perth runs for Perth Freightlines.

190 Third, an analysis of number of trips recorded in appendix 3 to Mr Davidson's report disclosed that:

(a) in the 23 weeks prior to the June 2004 accident, **Highway Hauliers** completed 65 Melbourne/Perth trips, an average of 2.83 trips per week;

(b) in the 39 weeks between the week after the June 2004 accident and the week in which the April 2005 accident occurred, **Highway Hauliers** undertook 169 Melbourne/Perth trips, an average of 4.33 trips per week;

(c) in the 40 weeks between 10 April 2005 and 1 January 2006, **Highway Hauliers** completed 181 Melbourne/Perth trips, an average of 4.525 trips per week.

191 Fourth, according to the information summarised in exhibit 4, **Highway Hauliers** operated:

(a) 33 Melbourne/Perth trips in the 31 weeks prior to the April 2005 accident using prime movers that were not identified as regularly undertaking that run (including trips that were recorded in the 'probable incorrect entries' column) - the total number of trips completed during that period was 137 according to exhibit 4;

(b) 13 Melbourne/Perth trips in the 19 weeks following the accident using prime movers that were not identified as regularly undertaking the run (again, including trips that were recorded in the 'probable incorrect entries' column) - the total number of trips completed during that period was 66 according to

exhibit 4. The number of 'non-regular' trips in this period included 6 trips undertaken by prime mover WX 00AN in April and May.

192 That comparison indicated a fall in the use of 'non-regular' prime movers ('floaters') to undertake the Melbourne/Perth run following the April 2005 accident. The fall was particularly evident if the trips undertaken by prime mover WX 00AN were excluded.

Mr Sartori's evidence generally

193 I found Mr Sartori to be an honest witness who gave his evidence in a straight forward manner. There were occasions during his crossexamination where senior counsel for the defendant was critical of Mr Sartori's evidence. However, I think those instances reflected difficulties that Mr Sartori had in following documents (and the crossexamination of Mr Sartori was primarily directed to the reliability of his memory rather than the veracity of his testimony). It was apparent from Mr Sartori's evidence that the paperwork involved in the business of **Highway Hauliers** was left to his wife and that he was not at ease in giving evidence about some of the documents that it was necessary for counsel to put to him. Moreover, he was shown exhibit 4 for the first time in the course of cross-examination. The exhibit was a compilation of information extracted from a large quantity of source documents routinely issued by Perth Freightlines and processed by Ms Sartori. It was apparent that Mr Sartori had not reviewed those documents prior to giving evidence. Further, as has already been noted, Mr Sartori was plainly confused by the cross-examination concerning whether **Highway Hauliers** had utilised sub-contractors following the April 2005 accident.

194 However, it was clear that Mr Sartori's evidence was based on a less than perfect recall of the detail of **Highway Hauliers**' position in 2004 and 2005 and what had occurred at that time. That is relevant in assessing Mr Sartori's evidence concerning the loss of a regular Melbourne/Perth run following the April 2005 accident and what was disclosed by the contemporaneous documents as summarised in exhibit 4 and appendix 3 to Mr Davidson's report.

Possible gaps in the evidence

195 **Highway Hauliers** did not claim at trial any consequential loss caused by the Insurers' refusal to indemnify in respect of the damage sustained to the prime mover and trailers involved in the June 2004 accident. An inference that the court was invited to draw was that **Highway Hauliers** had not lost the opportunity to earn profits following the June 2004 accident so that the return to service in about April 2005 of the prime mover involved in that accident enabled it to continue with whatever arrangements had been made following the June 2004 accident to ensure that profits had not been lost.

196 No evidence was adduced by **Highway Hauliers** about those arrangements. Further, there was no documentary evidence produced to confirm that **Highway Hauliers** had lost a run regularly undertaken for Perth Freightlines as a result of the April 2005 accident; in particular, no documents created by Perth Freightlines were produced that might have shown that another haulier had commenced operating the run that was said to have been lost by **Highway Hauliers**.

The deployment of **Highway Hauliers**' fleet

197 Mr Sartori was crossexamined on how **Highway Hauliers** allocated its fleet of vehicles between runs. Propositions were put to Mr Sartori, which he accepted, to the effect that trucks were, or would have been, allocated to the most profitable runs: see, for example, at ts 45 (Mr Sartori accepted that he would allocate vehicles to a run that was more lucrative than a Melbourne/Perth run if such a run was available) and at ts 78 (Mr Sartori agreed that trucks were allocated to runs according to the most profitable use of the trucks). Mr Sartori also indicated that the volume of freight for regular runs could fluctuate resulting in trucks being reallocated to different runs from time to time and 'floater' truck/trailer combinations were available to be used on different runs as the volume of

freight varied.

The evidence of Mr Lindsay George and Mr Laurie George

198 Mr Lindsay George stated that Perth Freightlines specialised in road freight between the east coast and Perth (exhibit 9, pars 2 and 3). He confirmed that Perth Freightlines did not enter into written contracts with its subcontract hauliers but rather, only issued subcontractor's payment advices. However, most of its subcontractors, including **Highway Hauliers**, had an ongoing relationship with Perth Freightlines and the same subcontractors were generally used to undertake its runs. A routine was followed by which a subcontractor undertook a regular run out of a particular depot (exhibit 9, pars 12 14). The trip from the eastern states to Western Australia was regarded as the forward leg and was the 'highest paying margin leg' as most of the freight was generated in the eastern states (ts 149).

199 A haulier such as **Highway Hauliers** would occasionally be used for an 'irregular run' but they generally operated particular runs on a regular basis (ts 149). Another subcontractor would be used if a haulier was unable to service a regular run because one of its vehicles had been damaged. However, the regular run would be reallocated to the original subcontractor once the damaged vehicle had been returned to service at least, where there was a longstanding relationship between the subcontractor and Perth Freightlines. **Highway Hauliers** had such a relationship with Perth Freightlines (ts 151).

200 Mr Lindsay George had no recollection of the accidents in June 2004 and April 2005 and what, if any, arrangements were made for the runs undertaken by **Highway Hauliers** for Perth Freightlines after each of those accidents. However, he agreed that it would have been possible to ascertain whether a regular run had been serviced by another subcontractor in lieu of **Highway Hauliers** following either accident from records that were maintained during the time that he was the general manager of Perth Freightlines (ts 152).

201 Mr Laurie George was the operations manager for Perth Freightlines. It was his responsibility to allocate 'what jobs were required to go where' and to contact subcontractors to allocate work (exhibit 10, pars 2 and 4).

202 He gave similar evidence to that given by Mr Lindsay George regarding Perth Freightlines using preferred subcontractors he termed them 'a guaranteed subby' (ts 158). Those subcontractors had their trucks loaded in preference to other 'ad hoc subcontractors'. **Highway Hauliers** was a preferred subcontractor (ts 158).

203 Mr Laurie George had no recollection of a regular run operated by **Highway Hauliers** being reallocated to another subcontractor in 2005 (ts 159).

204 Mr George also gave evidence that the volume of freight fluctuated with seasonal and other factors. That could result in a contractor such as **Highway Hauliers** being provided with work on a different run to a regular run on which there was less freight to be transported (ts 161 162). Different rates were paid for different runs.

205 However, Mr George stated that 'during my time at Perth Freightlines, it was constantly busy' (exhibit 10, par 9; Mr George was the operations manager for Perth Freightlines until February 2010); 'the amount of freight at the Melbourne branch of Perth Freightlines fluctuated from time to time during the year, but from year to year the freighting business grew' (par 18) and 'we were always generally busy at Perth Freightlines' (par 19). Mr George also indicated that the Melbourne depot of Perth Freightlines forwarded freight Australia-wide but the 'bulk' of the freight handled was for transport to Perth (ts 157). He estimated that the Melbourne branch had 'more than 60 trucks running back and forth all the time every week, and we were loading 4060 loads per week' (exhibit 10, par 10). He accepted that a 'significant number' of those trucks and loads were for the Melbourne/Perth run (ts

158).

206 I accept the evidence of Mr Lindsay George and Mr Laurie George summarised earlier in the précis of evidence and as recounted in this part of the reasons.

The capacity of **Highway Hauliers** to replace the damaged vehicles

207 The defendant's submission that **Highway Hauliers** had not proved that it was unable to replace the vehicles damaged in the April 2005 accident rested on evidence that was said to establish that the fleet of prime movers owned by the plaintiff increased from 12 to 13 between April 2004 and February 2005 (defendant's supplementary submissions, par 50). Reference was made to the schedules of insured vehicles that were incorporated into the memorandum of insurance issued by SRS on 27 May 2004 (exhibit 172; TB 579 598) and a further memorandum provided on 7 February 2005 (exhibit 246; TB 794 800). A comparison of the schedules indicated that **Highway Hauliers** had disposed of one prime mover and acquired two prime movers in the period between when the memoranda were issued. That was confirmed by the depreciation schedule for **Highway Hauliers** Trust No 2 for the year ended 30 June 2005 (exhibit 479; TB 930 933). The depreciation schedule disclosed that **Highway Hauliers** disposed of a prime mover on 30 September 2004 and acquired prime movers on 16 September and 18 November 2004.

208 That evidence was coupled with evidence that during the period 2004 to 2007, **Highway Hauliers** acquired various other vehicles (the evidence was identified in pars 51 and 52 of the defendant's supplementary closing submissions). The depreciation schedule for **Highway Hauliers** Trust No 2 for the year ended 30 June 2006 indicated that the trust disposed of a prime mover on 15 August 2005 and acquired another prime mover on 22 September 2005 (exhibit 367; TB 1121 1124). The depreciation schedule for **Highway Hauliers** Trust No 2 for the year ended 30 June 2007 disclosed that a prime mover was acquired on 29 December 2006 and a prime mover was disposed of in March 2007. However, the truck that was acquired was purchased for only $20,000 ($55,068 was received on the disposal of the prime mover in March 2007).

209 Ms Lindsay was asked to comment in her report on 'what the financial records [of **Highway Hauliers**] indicate in relation to [its] ability to replace the prime mover and trailers damaged or destroyed in the [April 2005] accident' (par 26). It is not necessary to recount the detail of her comments as she was not cross-examined on this aspect of her report. It is sufficient to note her conclusion at par 31 of the report:

> In my opinion, [**Highway Hauliers**] did not have a strong balance sheet as at 30 June 2005. Its total liabilities exceeded the book value of its business assets, and its current liabilities exceeded the book value of its current business assets. It had no cash on hand. In my opinion, [**Highway Hauliers**] did not have the liquidity on hand as at 30 June 2005 to purchase equipment to the value of $360,000. Further, although I am not a financier, I consider it more likely than not, that on the face of [**Highway Hauliers** '] balance sheet as at 30 June 2005, questions would have been raised by any potential financier (if one could have been found) as to whether [**Highway Hauliers**] would have been able to afford to incur any further debt at that stage. Based on my experience as an accountant, I consider it likely that the financier would have required cash flow forecasts for the business for the ensuing 12 to 24 months and possibly other security in addition to the equipment itself.

Ms Lindsay's evidence on the profitability of a Melbourne/Perth run

210 Ms Lindsay was not cross-examined on the detail of her estimates of the profit that would have been derived from undertaking a Melbourne/Perth run; that is, there was no challenge to the contract rates that she used to calculate the revenues that would have been generated from the run or the costs

that would have been incurred. Mr Davidson did not analyse or comment on those matters. His review of Ms Lindsay's report focussed on the assumption that **Highway Hauliers** had lost a regular Melbourne/Perth run following the April 2005 accident.

211 Further, the defendant's submissions on the methodology employed by Ms Lindsay to estimate the lost profit claimed by **Highway Hauliers** concerned whether it was necessary to consider the operation of the business of **Highway Hauliers** as a whole over the relevant period to ascertain how the replacement of the vehicles damaged in the April 2005 accident would have affected **Highway Hauliers**' profits. It was said by the defendant that this was necessary as various other factors could have impacted on the number of Melbourne/Perth runs undertaken after April 2005; in effect, how any replacement vehicles might have been utilised over the period for which damages were claimed could only be ascertained by looking at the whole of the **Highway Hauliers** operations. However, there was no challenge to Ms Lindsay's estimate of the profit that would have been derived by **Highway Hauliers** operating a Melbourne/Perth run considered in isolation.

212 Ms Lindsay estimated that **Highway Hauliers** would have derived the following profits from an additional weekly Melbourne/Perth run (see sch 11 to Ms Lindsay's report):

(a) 5 August 2005 to year ended 30 June 2006 $ 17,751

(b) year ended 30 June 2007 $151,298

(c) year ended 30 June 2008 $120,338

213 Those amounts total $289,387; that is the maximum amount of the value of lost contracts claimed by **Highway Hauliers**.

214 Ms Lindsay was instructed to assume that a Melbourne/Perth run would have been made every week of the year (see sch 2 to her report). Consequently, the amount of profit per trip estimated by Ms Lindsay was:

(a) 5 August 2005 to 30 June 2006 $ 377.68

(b) year ending 30 June 2007 $2,909.58

(c) year ending 30 June 2008 $2,314.19

215 I accept Ms Lindsay's estimates of the profit per trip that **Highway Hauliers** would have made by undertaking a Melbourne/Perth run during each of the periods referred to above and how those estimates were derived. That does not mean I have accepted her estimates of the total profit that would have been earned as that is dependent on the findings to be made about the assumptions on which Ms Lindsay's estimates were based.

Findings

216 I find that **Highway Hauliers** was unable to replace the vehicles damaged in the April 2005 accident from its own resources and without the benefit of a payment by the Insurers under the SRS Policy. I make that finding having regard to the following matters:

(a) I accept Mr Sartori's evidence to that effect. His evidence that **Highway Hauliers** could not afford to replace the damaged vehicles was only challenged by reference to the schedules of insured vehicles incorporated into the memoranda of insurance and the depreciation schedules for **Highway Hauliers** Trust No 2 (see at ts 70). Those matters do not demonstrate that **Highway Hauliers** could afford to replace the damaged vehicles:

(i) The fact that **Highway Hauliers** replaced a prime mover after the April 2005 accident was not inconsistent with Mr Sartori's evidence. The depreciation schedule for **Highway Hauliers** Trust No 2 for the year ended 30 June 2006 disclosed that a prime mover was disposed of in that financial year for consideration of $125,500. That amount would have been available to assist in funding the prime mover that was acquired in the same year. There was only the salvage value of the engine and gearbox from the damaged prime mover to assist with the possible acquisition of a replacement truck following the April 2005 accident.

(ii) I do not consider that any inference can be drawn from the fact that **Highway Hauliers** acquired an additional prime mover several months prior to the April 2005 accident.

(iii) The prime mover acquired in the year ended 30 June 2007 was purchased for a comparatively modest amount which was significantly less than the amount that was received on the disposition of a prime mover a few months later.

(b) Mr Sartori's evidence accorded with commercial reality. The finance agreements on the prime mover and trailers damaged in the April 2005 accident remained in force until their expiry and indeed, it was necessary for **Highway Hauliers** to enter into a new agreement to finance the residual payable on the damaged prime mover. Obviously, it would have been in **Highway Hauliers**' commercial interest to have repaired or replaced the damaged vehicles if it was able to do so in order that it could earn income that might be applied against the continuing liabilities incurred under the finance agreements or to enable new finance arrangements to be negotiated.

(c) Consistent with the last point, **Highway Hauliers** repaired the vehicles damaged in the June 2004 accident from its own resources. It is to be inferred that it would have done likewise in relation to the vehicles damaged in the April 2005 accident if it had been able to do so.

(d) Ms Lindsay's comments on the financial position of **Highway Hauliers** were consistent with Mr Sartori's evidence.

217 I further find that **Highway Hauliers** would have replaced the vehicles damaged in the April 2005 accident had the Insurers paid the benefits which were provided by the SRS Policy. It is possible that the insurance proceeds could have been used to pay out the financial agreements for the damaged vehicles. However, that was not put to Mr Sartori and it was not suggested that there was excess capacity within **Highway Hauliers**' fleet at the time of the April 2005 accident. I accept Mr Sartori's evidence to the effect that there was no spare capacity in the fleet at that time; the evidence was not challenged. Further, Mr Laurie George's evidence suggested that there was freight work available for **Highway Hauliers**. Mr Sartori referred to Mr George enquiring after the April 2005 accident about **Highway Hauliers**' ability to undertake a Melbourne/Perth run and **Highway Hauliers** repaired and returned to service the prime mover involved in the June 2004 accident.

218 It is selfevident that **Highway Hauliers** lost some capacity to undertake eastwest runs as a result of not being able to replace the vehicles damaged in the April 2005 accident. I accept that the lost capacity was in relation to performing Melbourne/Perth runs for Perth Freightlines having regard to the following matters:

(a) Although Mr Sartori's recollection of the relevant detail was fallible, I accept his evidence that the effect of not being able to replace the damaged vehicles was on **Highway Hauliers**' capacity to service the Melbourne/Perth run. The damaged prime mover operated a regular Melbourne/Perth run and most of **Highway Hauliers**' eastwest runs for Perth Freightlines around April 2005 were Melbourne/Perth.

(b) I have found in the reasons that follow that **Highway Hauliers** has not established that it

lost a regular or 'set' Melbourne/Perth run following the April 2005 accident. That finding is made on the basis of the evidence summarised in exhibit 4 and appendix 3 to Mr Davidson's report. However, the finding is not, in my view, inconsistent with the general effect of Mr Sartori's evidence that **Highway Hauliers** lost some capacity to service the Melbourne/Perth run as a result of losing vehicles in the April 2005 accident.

(c) The RCTIs that were tendered indicated that all east-west runs undertaken by **Highway Hauliers** for Perth Freightlines between midMarch 2006 and 30 June 2008 were Melbourne/Perth runs.

(d) Exhibit 4 and appendix 3 to Mr Davidson's report indicated that there was an appreciable fall in the number of Melbourne/Perth runs undertaken by **Highway Hauliers** immediately following the April 2005 accident.

219 It follows from the findings that have been made that **Highway Hauliers** has established that it lost a commercial opportunity that had some value that was not negligible as a result of the Insurers' failure to discharge their obligations under the SRS Policy:

(a) The Insurers were obliged to pay **Highway Hauliers** either the replacement cost of the damaged vehicles or their insured or market value. That payment would have enabled **Highway Hauliers** to replace the damaged vehicles. The Insurers knew that the insured vehicles were commercial vehicles used to operate a trucking business.

(b) **Highway Hauliers** would have replaced the damaged vehicles had it been indemnified by the Insurers.

(c) The fact that **Highway Hauliers** could not replace the damaged vehicles meant that it lost some capacity to service Melbourne/Perth runs for Perth Freightlines as part of its business.

(d) Ms Lindsay's evidence established that it was profitable for **Highway Hauliers** to undertake Melbourne/Perth trips for Perth Freightlines.

220 I further find that **Highway Hauliers** has established that the opportunity that was lost should be assessed by reference to the depreciation period for a replacement truck. That represented the period during which **Highway Hauliers** lost capacity to transport freight as a result of the Insurers not paying the benefits provided for by the SRS Policy; that is, the period for which **Highway Hauliers** would have had the use of a replacement prime mover.

221 I consider that the findings that have been made are sufficient to establish the existence of a loss suffered as a result of the Insurers' breach of the SRS Policy and to enable the amount of that loss to be quantified having regard to what was said by the High Court in ***Sellars*** about assessing the value of a lost commercial opportunity. In my view, the requirement emphasised by Chernov JA in ***Longden*** that the amount, as well as the existence, of a loss must be proved will ordinarily be satisfied in the case of a lost opportunity by evidence that is sufficient to identify and prove the opportunity and establish that it had a more than negligible value. Evidence about those matters will normally be sufficient to provide the evidentiary framework within which the court can undertake the assessment of the probabilities and possibilities inherent in determining the value of an unrealised opportunity.

222 However, I do not consider that **Highway Hauliers** has established that the value of its lost opportunity is to be assessed on the basis that it would have operated an additional weekly Melbourne/Perth run throughout the period August 2005 to 30 June 2008 had the Insurers discharged their obligations under the SRS Policy. I am not satisfied about that matter having regard to the following:

(a) I accept Mr Sartori's evidence that the prime mover damaged in the April 2005 accident did operate a regular weekly Melbourne/Perth run prior to the accident. That was confirmed by exhibit 4. However, the source documents summarised in exhibit 4 disclosed that the prime mover damaged in the June 2004 accident commenced operating a regular Melbourne/Perth run in the week following the April 2005 accident. I accept the defendant's submission that the RCTIs summarised in exhibit 4 established that the prime mover damaged in the June 2004 accident replaced the prime mover damaged in the April 2005 accident at the time of the accident.

(b) Some care is required in assessing Mr Sartori's evidence against the evidence that was contained in the RCTIs summarised in exhibit 4 and appendix 3 to Mr Davidson's report. The defendant submitted in closing that the exhibit established that **Highway Hauliers** operated five regular Melbourne/Perth runs prior to the April 2005 accident. Although that was not what was put to Mr Sartori in cross-examination, I accept that the RCTIs summarised in the exhibit support that submission. It was further submitted in closing that exhibit 4 also established that **Highway Hauliers** had operated five regular Melbourne/Perth runs following the April 2005 accident. However, senior counsel for the defendant referred to the exhibit as showing that four prime movers were 'primarily' involved in Melbourne/Perth runs following the accident when exhibit 4 was first explained to Mr Sartori; those prime movers that were highlighted by the red columns (that was the purpose of the highlighting). The change in interpretation was explained by the categorisation of prime mover WX 00AN. The prime mover was included in the defendant's closing submissions as one of the prime movers that regularly completed a Melbourne/Perth run following the April 2005 accident despite the fact that it did not undertake the run after mid May 2005; it was not, however, one of the prime movers highlighted by a red column in exhibit 4. I have taken the shift in the defendant's position into account as a matter that was favourable to **Highway Hauliers**. I have also taken into account the matters referred to earlier in the reasons about the way in which Mr Sartori was cross-examined on exhibit 4. Those matters included, however, that it was put to Mr Sartori that the same number of truck/trailer combinations were available to service the Melbourne/Perth run before and after the April 2005 accident. It is also relevant that there was no further clarification about these matters in the re-examination of Mr Sartori.

(c) It is possible that the Melbourne/Perth run operated by prime movers WX 43AK or WX 00AN was the run to which Mr Sartori was, in effect, referring as having been lost as a consequence of the April 2005 accident. However, I am not satisfied that the run that had been operated by either of those prime movers was the run that Mr Sartori claimed had been lost by **Highway Hauliers** or more relevantly, that it has been shown that either of those runs had been lost as a consequence of the April 2005 accident:

(i) The RCTIs as summarised in exhibit 4 disclosed that the last Melbourne/Perth run conducted by prime mover WX 43 AK was in the week ending 16 January 2005.

(ii) The RCTIs as summarised in exhibit 4 disclosed that prime mover WX 00AN continued to operate a Melbourne/Perth run until mid May 2005.

(iii) Mr Sartori stated that he considered that the run that was lost was lost on the day of the accident (ts 50). I did not take that evidence too literally but it did emphasise that **Highway Hauliers**' case at trial was that the Melbourne/Perth run that was lost was the run that had been performed by the prime mover involved in the April 2005 accident or perhaps more accurately, that the run that was lost was lost immediately following the accident.

(iv) There was no evidence concerning either of the Melbourne/Perth runs that had been performed by prime movers WX 43 AK and WX 00AN. In the light of Mr Sartori's evidence and the way **Highway Hauliers** formulated and conducted its damages claim, the question of whether the runs that had been undertaken by either of those prime movers was lost as a result of **Highway Hauliers**' diminished capacity to service the Melbourne/Perth run after the April 2005 accident

was a matter of speculation and conjecture. It was not a question on which **Highway Hauliers** provided proof.

(d) The commercially sensible course for **Highway Hauliers** to pursue following the April 2005 accident was to preserve the runs that it regularly performed for Perth Freightlines by re-allocating a 'floater' truck/trailer combination to a regular run if required. There was no evidence in the RCTIs that the contract rates for occasional runs was different to those paid for regular runs. The inference that **Highway Hauliers** would have adopted that course is supported by Mr Sartori's evidence concerning the allocation of its fleet of vehicles between runs.

223 The effect of those findings is that **Highway Hauliers** has not established that it lost a regular or 'set' weekly Melbourne/Perth run following the April 2005 accident and as a result of the Insurers' refusal to indemnify. However, I am satisfied that, in the period covered by exhibit 4, **Highway Hauliers** 'lost' occasional Melbourne/Perth runs following the April 2005 accident; that is, that there would have been trips available to **Highway Hauliers** in that period had it had a truck/trailer combination that could have been used to undertake the trips. That is to be inferred from the RCTIs summarised in exhibit 4 and appendix 3 to Mr Davidson's report, considered with the evidence of Mr Sartori and Mr Laurie George. There was no evidence that suggested that the fall in the number of Melbourne/Perth trips following the April 2005 accident that was recorded in exhibit 4 and appendix 3 to Mr Davidson's report was explained by some factor other than the loss of the vehicles damaged in the accident.

224 **Highway Hauliers**' fleet was reduced by one truck/trailer combination as a result of the April 2005 accident. Mr Sartori's evidence was that there was no excess capacity in the fleet prior to the accident. He agreed that **Highway Hauliers**' fleet of vehicles were utilised in a way that endeavoured to maximise profit. As has been noted, a commercially sensible allocation of the fleet of vehicles would have ensured that any regular run that was available was serviced, if necessary by reallocating a 'floater' prime mover to the run. In my view, the capacity lost as a result of the damage to the vehicles involved in the April 2005 accident was reflected in the ability of **Highway Hauliers** to undertake nonregular Melbourne/Perth runs using a 'floater' truck/trailer combination. That inference was consistent with the pattern of prime mover movements recorded in exhibit 4 - the diminished use of 'non-regular' or 'floater' prime movers following the accident as well the fall in the number of trips.

225 It would, of course, be no answer to **Highway Hauliers**' damages claim to demonstrate or infer that **Highway Hauliers** had chosen not to allocate vehicles within its fleet to ensure that it maintained the same level of service for the Melbourne/Perth run following the April 2005 accident because it was more profitable to maintain other runs. It would still have suffered the lost opportunity about which it complains. Further, the findings that have been made and which follow indicate that I do not consider that it was necessary for **Highway Hauliers** to adduce evidence about the whole of its operations to prove that it had lost the opportunity that was the subject of its damages claim or to establish that the opportunity lost had a more than negligible value that was susceptible to assessment and quantification on the principles identified in ***Sellars***. Moreover, the defendant's submissions on the methodology by which **Highway Hauliers** sought to prove its loss apparently overlooked that **Highway Hauliers** only operated Melbourne/Perth runs for Perth Freightlines for much of the period for which damages was claimed.

226 It is clear that the assessment of the value of a lost opportunity according to the 'probabilities and possibilities' involves speculation and guesswork. In my view, the value of **Highway Hauliers**' lost opportunity is to be assessed by reference to the following matters:

(a) It is appropriate to commence the assessment with the information drawn from the RCTIs that was summarised in exhibit 4 and appendix 3 of Mr Davidson's report for the period covered by the exhibit.

(b) The defendant was content to contest **Highway Hauliers**' damages claim by reference to the limited period covered by exhibit 4. As previously noted, I consider that Mr Davidson's summary most accurately captured the information recorded in the RCTIs. He was not cross-examined on the accuracy of his summary. The summary disclosed that the difference between the number of weekly Melbourne/Perth trips undertaken in the 31 weeks prior to the April 2005 accident and the number of trips completed in the 19 weeks following the accident was approximately a half a trip per week; one trip a fortnight (the actual difference in trips was 0.53).

(c) Applying that figure to the estimate of the profit that **Highway Hauliers** would have earned from a Melbourne/Perth run produces the following:

(i) 5 August to 30 June 2006

(23.5 trips at $377.68 profit per trip) $ 8,875

(ii) year ended 30 June 2007

(26 trips at $2,909.58 profit per trip) $75,650

(iii) year ended 30 June 2008

(26 trips at $2,314.19 profit per trip) $60,169

The sum of those amounts is $144,694; the total amount may be rounded up to $145,000 to reflect the fact that the actual difference in the average weekly trips undertaken by **Highway Hauliers** before and after the April 2005 accident was slightly higher than 0.5 on Mr Davidson's summary in appendix 3.

(d) I accept the evidence of Mr Laurie George that there was some seasonal fluctuation in freight volumes but that Perth Freightlines was busy during the time that he was the operations manager and that the business grew throughout that period. That evidence was consistent with the summary of trips in appendix 3 of Mr Davidson's report up to 1 January 2006. I accept Mr George's evidence that the practice of Perth Freightlines was to prefer established subcontractors in allocating work and that **Highway Hauliers** was such a contractor.

(e) It is necessary to consider positive and negative contingencies. In my view, the gist of Mr Laurie George's evidence was that the volume of freight that would have been available to **Highway Hauliers** to transport in the period after August 2005 (the end of the period covered by exhibit 4) was unlikely to have diminished from that which was available in 2004 and 2005; it may have increased given his evidence that the business of Perth Freightlines grew but what that might have meant for **Highway Hauliers** would be speculation. There was no evidence that the pattern of seasonal fluctuations had varied across the years 2004 to 2008. In my view, no adjustment should be made for the contingency that the number of trips that would have been available to an additional truck/trailer combination across the period August 2005 to 30 June 2008 would have fluctuated significantly from the one trip per fortnight that has been derived from exhibit 4 and appendix 3 to Mr Davidson's report. I also consider that no further discount for contingencies should be applied as I have adopted the most conservative estimate of the effect of the April 2005 accident on **Highway Hauliers**' capacity that was available on the evidence. Exhibit 4, which was the defendant's document, indicated a larger fall in the number of trips following the accident than appendix 3 to Mr Davidson's report if the 'probable incorrect entries' are included.

227 Accordingly, the value of the lost opportunity claimed by **Highway Hauliers** assessed on that basis is $144,694, rounded to $145,000 for the reason previously given. **Highway Hauliers** is also entitled to the sum of $299,807.09 by way of indemnity under the SRS Policy.

228 Counsel for **Highway Hauliers** was to have provided schedules relating to interest calculations in the course of his closing. That did not occur as a result of the matter that arose concerning the status of the company that operated the business of Perth Freightlines. I will hear further from the parties on the question of interest generally.

JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA

IN CIVIL

CITATION : **HIGHWAY HAULIERS** PTY LTD -v- MATTHEW MAXWELL (The authorised, nominated representative on behalf of various Lloyds underwriters) [2012] WASC 53 (S)

CORAM : CORBOY J

HEARD : 23-27 MAY, 22 & 30 JUNE 2011

DELIVERED : 21 FEBRUARY 2012

SUPPLEMENTARY

DECISION : 17 APRIL 2012

FILE NO/S : CIV 1775 of 2007

BETWEEN : **HIGHWAY HAULIERS** PTY LTD

Plaintiff

AND

MATTHEW MAXWELL (The authorised, nominated representative on behalf of various Lloyds underwriters)

Defendant

Catchwords:

Practice and procedure - Costs - Indemnity costs - Whether unreasonable conduct by party or its legal advisors

Practice and procedure - Costs - Special costs order - Removal of limit in scale - Whether requirements of s 280(2) *Legal Profession Act 2008* (WA) satisfied

Legislation:

Insurance Contracts Act 1984 (Cth), s 54
Legal Practice Act 2003 (WA), s 215(2)
Legal Practitioners (Supreme Court) (Contentious Business) Determination 2010 (WA)
Legal Profession Act 2008 (WA), s 280(2)
Rules of the Supreme Court 1971 (WA), O1 r 4B

Result:

Application for indemnity costs refused
Application for special costs allowed and plaintiff's costs to be taxed without limit imposed in item 17 of the Supreme Court Scale of Costs

Category: B

Representation:

Counsel:

Plaintiff : Mr G R Hancy

Defendant : Mr D J Higgs SC & Mr J A Thomson

Solicitors:

Plaintiff : WHL Legal Pty Ltd

Defendant : CLS Lawyers

Case(s) referred to in judgment(s):

CORBOY J:

(These reasons were delivered orally on 4 April 2012 and have been edited from the transcript.)

Introduction

1 The plaintiff, **Highway Hauliers** Pty Ltd, carries on a trucking business. Two prime movers and the trailers they were hauling, leased by **Highway Hauliers**, were damaged in separate accidents. **Highway Hauliers** claimed that it was indemnified for the loss and damage caused by the accidents by an insurance policy issued by the defendant and various Lloyds underwriters through their agent, SRS Underwriting Agency (SRS). The underwriters refused to indemnify **Highway Hauliers** on the grounds that the drivers involved in the accidents:

(a) had not complied with an endorsement to the policy requiring drivers of particular types of vehicles used for interstate trips to have achieved a minimum score on a test known as the PAQS test; and

(b) were 'non-declared' drivers for the purpose of an exclusion contained in the policy.

2 **Highway Hauliers** contended that the underwriters were not entitled to refuse to indemnify on those grounds by reason of s 54 *Insurance Contracts Act 1984* (Cth) (ICA). It claimed in this action both the benefit of the indemnity provided by the insurance policy and damages for breach of the policy.

3 It was found that the underwriters had breached the policy by refusing to indemnify **Highway Hauliers** for the losses suffered as a result of the accidents. The indemnity claimed by **Highway Hauliers** was for the cost of repairing and replacing the damaged vehicles. That cost was agreed during the trial at $299,807.09.

4 **Highway Hauliers** also claimed that it had lost the opportunity to earn profits as a result of the underwriters' refusal to indemnify. That claim was variously described during the trial as a claim for loss of profit or a claim for the lost chance to earn profit. The amount claimed for that loss at the commencement of the trial was $826,738. **Highway Hauliers** amended that amount in supplementary submissions following the close of the evidence to claim $250,000 as the value of the lost chance, subject to a discount for contingencies. Damages were awarded and assessed at $145,000.

5 **Highway Hauliers** has applied for an order for costs to be awarded on an indemnity basis, alternatively for a special costs order lifting the maximum amount allowed for getting up a case for

trial under the Supreme Court Scale of Costs (item 17 cl 11 *Legal Practitioners (Supreme Court) (Contentious Business) Determination 2010* (WA)). I have concluded that an order for indemnity costs should not be made but that an order for special costs should be made. Whether that order results in **Highway Hauliers** being allowed more than the maximum amount specified under the relevant scales will be a matter for the taxing registrar to determine.

The principles relevant to an application for indemnity costs

6 There was no issue between the parties on the principles to be applied in determining whether an order for indemnity costs should be made. Those principles were summarised by the Court of Appeal in ***Swansdale Pty Ltd v Whitcrest Pty Ltd*** [2010] WASCA 129 (S) [10]. Three points should be noted from the summary provided by the Court of Appeal:

(a) An indemnity costs order may be appropriate where there has been improper, or at least unreasonable, conduct by a party or its legal advisors.

(b) Persisting in a hopeless case may be unreasonable conduct that would justify an indemnity costs order. However, competing principles need to be balanced in making an order on that basis as a party should not be discouraged by the prospect of an unusual costs order from maintaining a claim or defence where its success is not certain. Uncertainty is inherent in many areas of the law and the law changes over time and with different circumstances. Nevertheless, where a party has by its conduct unnecessarily increased the cost of litigation it is appropriate for that party to bear that cost.

(c) A properly crafted special costs order may obviate the need for an indemnity costs order where components of costs scale items are allowed above the applicable scale limit.

7 It is also relevant to note what was said by Pullin J (as his Honour then was) in ***Flotilla Nominees Pty Ltd v Western Australian Land Authority*** [2003] WASC 122 (S); 28 WAR 95:

(a) An order for indemnity costs will only be made if there is some special or unusual feature in the case to justify departure from the ordinary practice of awarding party and party costs [8].

(b) There ought not to be a significant gap between party and party costs and solicitorclient costs having regard to the basis upon which the scale of costs is determined in this jurisdiction. However, there is still a place for indemnity costs orders; such orders would be appropriate in cases where there had been improper or unreasonable conduct on the part of a party or its legal advisors so that the order would be a mark of disapproval on the part of the court about that conduct even though there should not be much difference in the costs recovered [25].

The principles relevant to a special costs order

8 Section 215(2) of the *Legal Practice Act 2003* (WA) (LPA 2003) provided that:

> Despite subsection (1), if a court or judicial officer is of the opinion that the amount of costs allowable in respect of a matter under the legal costs determination is inadequate because of the unusual difficulty, complexity or importance of the matter, the court or officer may do all or any of the following -
>
> (a) order the payment of costs above those fixed by the determination;
>
> (b) fix higher limits of costs than those fixed in the determination;
>
> (c) remove limits on costs fixed in the determination;
>
> (d) make any order or give any direction for the purposes of enabling costs above those in the determination to be ordered or taxed.

9 Section 280(2) of the *Legal Profession Act 2008* (WA) (LPA 2008) is in identical terms. In ***Heartlink Ltd v Jones as liquidator of HL Diagnostics Pty Ltd (in liq)*** [2007] WASC 254 (S), the Chief Justice considered the application of s 215(2) LPA 2003 and concluded that:

(a) The court was required to form an opinion about two matters to make an order under the subsection: first, that 'the amount of the costs allowable in respect of a matter under a legal costs determination is inadequate' and second, that the inadequacy arose because of the 'unusual difficulty, complexity or importance of the matter' [11].

(b) The question posed under the section will almost always arise before a taxation has occurred. Further, the section fell to be construed and applied in the context of the well-known principle that at least in respect of costs as between party and party, the successful party is entitled to be compensated by the unsuccessful party for their costs [12].

(c) Those considerations provided a guide to the proper approach to be taken in determining an application under s 215(2). The policy considerations that should guide a court under the section were first, that the court should not usurp the role of the taxing officer and second, that at least where party and party costs are concerned, the court should make an order that would give effect to the general principle of allowing the successful party to be compensated for their costs by the unsuccessful party [13].

(d) The requirement of inadequacy for the purpose of s 215(2) will be satisfied if the applicant shows that there is a fairly arguable case that the bill to be presented to the taxing officer may tax out at an amount that is greater than the limit that would be imposed by the relevant costs determination. It would then be for the taxing officer to determine whether the costs allowed under the relevant court scale were, in fact, inadequate [15] [16].

(e) The word 'unusual' when used in s 215(2) only qualified the word 'difficulty' and did not qualify the words 'complexity' or 'importance' [17].

(f) The reference to 'importance' in the section enabled the court to consider the question of whether the work done was appropriate to the significance of the issues that arose in the litigation. An issue might be significant because it was significant to the parties or because it was significant to the public [19].

(g) An application under s 215(2) will be determined as a matter of impression rather than by a detailed evaluation of the successful party's costs. That is because the application will ordinarily be determined in advance of a taxation. It will not be necessary for the court to embark upon a detailed evaluation of a draft bill of costs for taxation [20].

The grounds on which Highway Hauliers seek an indemnity costs order

10 Two broad reasons were advanced by **Highway Hauliers** for why an indemnity costs order ought to be made in this case:

(a) the defendant's conduct of his defence; and

(b) the use by the defendant of these proceedings as a vehicle to test the construction of its policy wordings.

11 In relation to the first of those grounds, five matters were identified about the defendant's conduct of his defence that either together or separately were said to justify an indemnity costs order:

(a) the defendant's reliance on a defence that was not supported by evidence and was ultimately abandoned;

(b) the inadequacy of the defendant's discovery;

(c) the late introduction by the defendant of a large amount of evidence and non-compliance with the court's directions regarding pretrial disclosure of evidence;

(d) the defendant's use of an exhibit (exhibit 4) that was created by the defendant's legal advisors and which summarised a number of other documents that were admitted into evidence; and

(e) the defendant's unwillingness to compromise prior to trial.

12 It is convenient to separately consider each of the grounds identified by **Highway Hauliers**, recognising that an order for indemnity costs might be justified by a combination of those grounds even if it was concluded that justice did not require such an order on any of the grounds advanced when considered in isolation.

The defendant's defence under s 54 ICA

13 One of the primary issues in this action concerned the proper construction and application of s 54 ICA. **Highway Hauliers** contended that the underwriters were not entitled to refuse to indemnify it on either of the grounds on which they relied by reason of that section. The defendant contended until the close of his case that:

(a) on its proper construction, s 54 did not apply to the claims made by **Highway Hauliers**;

(b) alternatively, if the section did apply, the acts relied on to refuse to pay the claims could reasonably be regarded as being capable of causing or contributing to the losses claimed by **Highway Hauliers**: see s 54(2).

14 **Highway Hauliers** argued in response to the second of those contentions that no part of the losses claimed was caused by the fact that the drivers involved in each accident had not sat a PAQS test and were nondeclared drivers for the purpose of the policy: see s 54(3).

15 In his closing submissions, the defendant abandoned any defence based on s 54(2). His argument in closing was confined solely to the proper construction of s 54(1) and its application to the circumstances of the claims made by **Highway Hauliers**. The construction and application of s 54 fell to be determined on facts that were not controversial once that concession had been made.

16 The PAQS test was designed to assess the attitudes of drivers on safety matters. While it can be readily appreciated why an insurer of commercial vehicles would be interested in monitoring driver behaviour and attitudes about safety, it is more difficult to see how a failure to take a PAQS test (that might or might not have disclosed a propensity to take risks while driving) or to have submitted a driver declaration could be reasonably regarded as being capable of causing or contributing to a loss arising out of a particular occurrence.

17 More fundamentally, the information available to the defendant's agent and subsequently, his legal advisors did not suggest that either of the accidents that were in issue was caused by the carelessness or other fault of the **Highway Hauliers** drivers who were involved. As to the first accident that occurred on 17 June 2004, SRS was provided with statements by Ms Battle and her husband made contemporaneously with the accident that apparently indicated that she was not at fault but rather, that the accident was caused by the unroadworthy condition of another vehicle. Ms Battle's witness statement in this action was consistent with her contemporaneous statement. Although she was cross-examined on her evidence concerning the accident, it was not put to her that any aspect of her contemporaneous statement or her witness statement in this matter was unreliable or should be rejected for any other reason.

18 As to the second accident that occurred on 2 April 2005, Mr Kelly provided a written statement

that was submitted to SRS with the notification of the claim. He advised in that statement that he misjudged the edge of the road while driving in rain and when visibility was poor. That explanation for the accident was not challenged. Rather, the cross-examination of Mr Kelly was directed to a medical condition from which he suffered but which was not said to be in any way connected to the cause of the accident. At best, the crossexamination of Mr Kelly could be said to have been directed to establishing that he might not have been accepted by the underwriters as a declared driver had **Highway Hauliers** submitted a driver declaration for him. That could only be relevant to causation for the purpose of s 54(2) in the most crude 'but for' way. Sections 54(2) and (3) appear to contemplate a more proximate relationship between the act and the loss than such a gross 'but for' approach to causation would suggest.

19 Nevertheless, after careful consideration I have concluded that it cannot be said that this aspect of the defendant's case was so hopeless that the court should mark its disapproval by making an indemnity costs order. The defendant's position apparently reflected a view that **Highway Hauliers** carried the onus on the issues raised by ss 54(2) and 54(3). It appeared from argument during this application that **Highway Hauliers** took a different view of the question of onus under s 54(2). In the event, it was unnecessary for that issue to be determined in this action. However, I consider that the construction apparently contended for by the defendant was not so untenable as to say that his position was 'hopeless' in the sense of being so unreasonable that it invited the court's sanction. It follows that it was not unreasonable in that sense for the defendant to require the plaintiff to establish that the failure of the drivers to have taken the PAQS test and/or **Highway Hauliers** ' failure to have submitted driver declarations played no part in the cause of each accident.

Discovery

20 **Highway Hauliers** made three closely related complaints about the discovery given by the defendant. First, it had been necessary to make numerous requests of the defendant for documents relating to PAQS testing. Second, no documents were discovered about why the defendant chose to require PAQS testing and why the requirement was subsequently deleted from the policy issued by the underwriters and no explanation was provided for the failure to discover such documents. Third, the defendant's agent had disposed of documents relating to PAQS testing after proceedings had been commenced.

21 In my view, none of those matters justify an indemnity costs order being made:

(a) The complaints about the adequacy or otherwise of discovery were not such as to warrant the sanction of the court by making such an order. They reflect interlocutory differences that are not to be encouraged but there was no evidence of impropriety by the defendant or his legal advisors.

(b) The failure to discover documents or the destruction of relevant documents after proceedings have been commenced is a serious matter. Solicitors have an obligation as officers of the court to ensure that the parties for whom they act in litigation preserve all documents that might be discoverable. However, I do not consider that the apparent disposal of the four documents referred to in Part 1 of the first schedule to the supplementary list of documents verified by Mark McKinnon by affidavit sworn on 29 July 2008 was so serious as to justify an indemnity costs order. The documents concerned were created by People And Quality Solutions Pty Ltd and appeared from their description to be general guides concerning the application of the PAQS test. It would seem that the documents were discoverable but they were of such a general kind that it was perhaps understandable, although regrettable, that their relevance in the possession of SRS might not have been fully appreciated at the time of their disposal. Again, there was no evidence of impropriety or deliberate destruction of evidence.

Late disclosure of evidence

22 The defendant served statements from Mr Reams, Mr Cullum and Mr Bottomley on 1 October

2009. **Highway Hauliers** objected to aspects of those statements. The defendant served supplementary statements from Mr Reams, Mr Cullum and Mr Bottomley shortly prior to the trial and after the last date by which the parties had been directed to file and serve witness statements. A statement from Mr Hogarth was also served at the same time. **Highway Hauliers** complained that there was no explanation as to why the statements were introduced at such a late stage and contrary to the directions that had been made by the court.

23 It is important that parties adhere to the court's directions which are intended to promote the case management objectives identified in O 1 r 4B of the *Rules of the Supreme Court*. The provision of witness statements in advance of a trial may facilitate the proper management of proceedings in several ways, including by providing a means of pretrial disclosure that avoids surprise and by affording an opportunity for the parties to agree facts and confine the issues to be litigated. However, I do not consider that the late statements of Mr Hogarth, Mr Cullum, Mr Bottomley and Mr Reams so seriously undermined those objectives in this instance that an order for indemnity costs is required to be made having regard to the content and subject matter of the statements.

Exhibit 4

24 I accept that it would have been preferable for the defendant to have provided a copy of exhibit 4 to **Highway Hauliers**' legal advisors in advance of the trial. The exhibit summarised information extracted from numerous primary accounting records that formed part of the trial bundle. The legal advisors to **Highway Hauliers** would have had an opportunity to check the information summarised against the source documents and obtain any further instructions that might have been necessary had the document been provided in advance. That might also have facilitated an agreement between the parties over the information recorded in the exhibit.

25 However, the genesis of the document was as an aid to crossexamination. It did not contain evidence and ordinarily would have been marked for identification. It was received as an exhibit given the course of the crossexamination of Mr Sartori. In the circumstances, I do not consider that the court is required to mark its disapproval over the failure to provide a copy of the document in advance of the trial by ordering indemnity costs.

Willingness to compromise

26 **Highway Hauliers** contended that the defendant made no genuine attempt to compromise the claim prior to trial. That was disputed by the defendant. However, it was apparent that the defendant had a firm view regarding the merits of his position, no doubt based on what was thought to be an analogy with the reasoning of the Queensland Court of Appeal in ***Johnson v Triple C Furniture & Electrical Pty Ltd*** [2010] QCA 282; 243 FLR 336. It would also appear that the defendant regarded the issue raised by **Highway Hauliers** as being important for the application of the endorsements and exclusions contained in its policies.

27 Those matters indicate that the defendant's attitude to a possible compromise of the action was not infected by some improper or collateral purpose. Further, I do not consider that the defendant's position was untenable or capable of being characterised as 'hopeless'.

28 Finally, I do not consider that the various grounds identified by **Highway Hauliers** when considered collectively establish that it is appropriate that costs be awarded on an indemnity basis.

Special costs order

29 However, in my view the matters identified by **Highway Hauliers** do justify a special costs order being made under s 215 LPA 2003 and s 280 LPA 2008 having regard to how those sections are to be interpreted and applied according to the judgment of the Chief Justice in ***Heartlink***. The proceedings were important to the parties in the sense identified by his Honour - particularly, to the

defendant because of the implications of the s 54 ICA issues for the underwriters' policy wordings and claims management. The importance attached to those issues obviously affected **Highway Hauliers**' position in the proceedings. Further, the action was no doubt important to it as the operator of a small business for whom its insurance arrangements are significant because of the nature of its business. It may also be inferred that the amount involved was significant for its financial position.

30 The case also concerned another issue that would appear to have some importance for insurers and insureds generally the availability of damages where an insurer wrongfully refuses to indemnify and factors relevant to the assessment of those damages. As best as I was able to ascertain, the case law on those matters was limited for reasons connected with the approach that courts have historically taken to the application and enforcement of insurance policies.

31 **Highway Hauliers** provided only limited evidence on the question of whether the costs that might be awarded under item 17 cl 11 of the Supreme Court Scale of Costs was likely to be inadequate. However, I am satisfied that it has demonstrated that the costs allowable for getting up might be inadequate having regard to the comments of the Chief Justice in ***Heartlink***. I make that finding taking into account the evidence relied on by **Highway Hauliers** as to the adequacy of the relevant scales of costs and from my knowledge of the issues that were litigated at trial. I also take into account the possibility that the late disclosure of evidence, the pursuit of further discovery and the need for **Highway Hauliers** to prepare and adduce evidence relating to the issues raised by ss 54(2) and (3) ICA may result in the amount allowed under the scale item for getting up being inadequate. That will be a matter for the taxing registrar to determine, consistent with the reasoning of the Chief Justice in ***Heartlink***.

32 The order that will be made is that **Highway Hauliers**' costs are to be taxed without regard to the limit imposed by item 17.

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