IN THE SUPREME COURT OF NEW SOUTH WALES No 2017/126664

BETWEEN

MARGARET RITCHIE
Plaintiff

AND

ADVANCED PLUMBING AND DRAINS PTY LIMITED (IN LIQ)
Defendant

PLAINTIFF'S MOTION OF 12 APRIL 2018 FOR LEAVE TO PROCEED AGAINST INSURANCE AUSTRALIA LIMITED T/AS CGU INSURANCE

Submissions of Insurance Australia Limited t/as CGU Insurance

1. By motion filed on 12 April 2018 (**Motion**), the plaintiff seeks leave to proceed against Insurance Australia Limited t/as CGU Insurance (**CGU**) under s 5 of the *Civil Liability (Third Party Claims Against Insurers) Act 2017* (NSW) (**the Act**).

2. The Motion should be dismissed with costs.

3. CGU relies on its tender bundle, filed on 13 July 2018 (**TB**).

Background

4. For the purposes of this Motion, the facts outlined in the Plaintiff's Submissions dated 8 August 2018 (**PS**) at [10]-[16] are not in dispute, save for the following:

   (a) At PS [12], Mr Elliott is referred to as an apprentice, but he was not working with the Defendant as an apprentice when these events occurred[1]. Mr Orford

[1] BFP-1, p54 per Elliott's counsel, TB p10 Q102-122 per Orford, TB p26 [2]-[3] per Elliott, cf TB p48 Q197-198.

knew that Mr Elliott was not working at the time and asked him to come out and give him a hand.[2]

(b) At PS [13], it is said that Mr Elliott had been using the quick cut so that sparks were emitted over a distance of "some metres". Mr Orford's evidence was that he was standing about 2 to 2.5 metres from Mr Elliott when the sparks hit him.[3]

(c) At PS [15], it is said that Mr Elliott confirmed in his second interview that he had not operated the quick cut before. In fact, in that interview Mr Elliott said he could not remember whether he had used the quick cut on that particular day.[4] He did not confirm or deny whether he had ever used a quick cut before. Mr Orford's evidence was that Mr Elliott had used the quick cut before under his instruction.[5]

5. Further relevant facts are set out below.

The Act

6. If an insured person has an insured liability to a person (the claimant), the claimant may, subject to the Act, recover the amount of the insured liability from the insurer in proceedings before a court: s 4(1). The amount of insured liability is the amount of indemnity (if any) payable pursuant to the terms of the contract of insurance in respect of the insured person's liability to the claimant: s 4(2).

7. Proceedings may not be brought, or continued, against an insurer under s 4 except by leave of the court in which the proceedings are to be, or have been, commenced: s 5(1). Leave *must* be refused if the insurer can establish that it is entitled to disclaim liability under the contract of insurance or under any Act or law: s 5(4).

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[2] TB p10 Q108-109.

[3] TB p 24 Q96-Q98.

[4] TB p 42 Q116 to p 43 Q121.

[5] TB p 24 Q99 to p 25 Q102.

8. In proceedings brought under s 4, the insurer is entitled to rely on any defence or any other matter in answer to the claim or in reduction of its liability to the claimant (s 7):

   (a) that the insurer would have been entitled to rely on in a claim made by the insured person under the contract of insurance; or

   (b) that the insured person would have been entitled to rely on in proceedings brought by the claimant against the insured person in respect of the insured liability.

9. One purpose of the statute is to ensure that insurers are not exposed to "unnecessary", "inappropriate" or "unwarranted" claims.[6] The legislation provides "a filter against insurers being unjustifiably made parties in litigation that, apart from the grant of leave, they would be free to stay out of".[7]

10. It is well-established that, for leave to be granted under s 4:[8]

   (a) the plaintiff must have an arguable case of liability against the defendant;

   (b) there must be an arguable case that the policy responds to that liability; and

   (c) there must be a real possibility that if judgment is obtained, the defendant will not be able to meet it.

11. The Plaintiff bears the onus of demonstrating these matters on the evidence, because the Plaintiff must establish the jurisdictional foundation for the order she

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[6] *Moore v McKiernan* [2017] NSWSC 1520 at [46] and the authorities there cited.

[7] *Moore v McKiernan* [2017] NSWSC 1520 at [46], citing *Energize Fitness Pty Ltd v Vero Insurance* [2012] NSWCA 213 at [59].

[8] *Murphy, McCarthy & Associates Pty Limited v Zurich Australian Insurance Limited* [2018] NSWSC 627 at [17]; *Moore v McKiernan* [2017] NSWSC 1520 at [45].

seeks.[9] This is distinguished from the position under s 5(4), which casts an onus upon the insurer.[10]

12. These three elements must be demonstrated "by the evidence available in the application".[11] These matters cannot be demonstrated by relying on the pleadings alone. As was observed by Campbell JA (with whom Allsop P and Meagher JA agreed) in *Energize Fitness Pty Ltd v Vero Insurance* [2012] NSWCA 213 at [59] (in relation to the predecessor provision, s 6(4) of the *Law Reform (Miscellaneous Provisions) Act 1946*):

> At the level of principle, it could not be right that all an applicant for leave need do is proffer a pleading that alleges facts that, if true, would show that the insured had a liability to the applicant, and that that liability fell within the scope of an insurance policy issued by the insurer, regardless of whether there was any arguable basis upon which those facts might be true. Ordinarily an insurer has the right under a policy to choose whether or not to take over the defence of proceedings brought against an insured. The purpose of s 6(4) is to provide a filter against insurers being unjustifiably made parties in litigation that, apart from the grant of leave, they would be free to stay out of. The standard for when it is justifiable to bring an insurer in is fairly low, namely that there is an arguable case, but an arguable case exists only when there is both an arguable case that certain facts exist, and an arguable case that those facts provide grounds for legal relief. This is reflected in the sort of certificate that s 347 *Legal Profession Act* 2004 requires before a legal practitioner files a claim for damages, namely that "there are reasonable grounds for believing on the basis of provable facts and a reasonably arguable view of the law that the claim or the defence (as appropriate) has reasonable prospects of success."

Whether plaintiff has demonstrated an arguable case of liability against Advanced

13. The Plaintiff alleges that Advanced was negligent in failing to identify certain risks and take certain precautions. It is further alleged that the negligence caused the fire which in turn caused damage to the Plaintiff.

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[9] *Mrdajl v Southern Cross Constructions (NSW) Pty Ltd (in liq)* [2018] NSWSC 161 at [19]; *Moore v McKiernan* [2017] NSWSC 1520 at [44], citing *Energize Fitness Pty Ltd v Vero Insurance* [2012] NSWCA 213 at [53].

[10] *Mrdajl v Southern Cross Constructions (NSW) Pty Ltd (in liq)* [2018] NSWSC 161 at [19]; *Moore v McKiernan* [2017] NSWSC 1520 at [47] and [69].

[11] *Moore v McKiernan* [2017] NSWSC 1520 at [49]-[50], citing *Energize Fitness Pty Ltd v Vero Insurance* [2012] NSWCA 213 at [48] and [58].

14. Advanced has filed a defence denying these matters (at [9], [15]-[17]) and putting causation and damage in issue (at [18]-[21]).[12]

15. In the absence of any evidence demonstrating that the risk of fire was reasonably foreseeable (SOC [9(b)]) and not insignificant (SOC [15(a)]); that Advanced had a duty to take the steps alleged (at SOC [16]); and that the negligence caused the fire and damage to the Plaintiff, CGU submits that the Plaintiff has not established that there is an arguable case that Advanced breached any duty of care causing loss.

16. Indeed the physical layout of the work site suggests to the contrary. An overview of the work site is provided by the photograph at TB p 42. The photograph shows that there was a large stretch of clear ground between the work site and the fire ring. Mr Orford's evidence was that the prepared house area was "dirt, free from vegetation"[13] and that the closest vegetation was about "15 metres or more" from where they were working.[14] This is consistent with Advanced's Defence at [15(a)]. It is for this reason that the submission at PS [51] – that "Mr Elliott...operated the quick cut in such a way as to direct sparks *into nearby vegetation*" (emphasis added) – is not a fair reflection of the evidence. This implies that the vegetation was close by, when in fact it was some distance from Messrs Orford and Elliott.

17. Further, if the sparks did indeed cause the fire, they must have travelled *more* than 15 metres because the evidence is that, when Mr Elliott first noticed the fire, there was unburned vegetation between him and the fire.[15] There is no evidence that the sparks from the quick cut were even capable of travelling that far (absent some unusual weather conditions, as to which again there is no evidence).

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[12] BFP p 36.

[13] TB p 8 Q81-Q82.

[14] TB p 17 Q250-Q254.

[15] TB p 27 [8].

Whether plaintiff has demonstrated an arguable case that the Policy responds to the liability and, if so, whether CGU is entitled to disclaim liability under s 5(4) of the Act

18. Advanced Plumbing and Drains Pty Ltd, as its name suggests, conducted a plumbing business. It had taken out a public liability insurance policy with CGU for the period 29 March 2016 to 29 March 2017 (the **Policy**) to cover occurrences occurring in connection with its business or products.[16]

19. By letter of 16 March 2018, CGU denied cover for the Plaintiff's claim on two bases:[17]

    (a) the occurrence did not happen "in connection with the *Insured's Business* or Products" within the meaning of cl 1.1 of the Policy, because the work being undertaken was the construction of footings for a home, not plumbing work or work incidental thereto (the **Business Ground**); and

    (b) the Welding Endorsement applied and the work was not in strict compliance with AS 1674.1 (the **Welding Ground**).

20. As the Plaintiff accepts at PS [53], whether she has an arguable case in relation to the Business Ground and the Welding Ground is "critical" for the discretion to grant leave, as well as whether CGU is entitled to disclaim liability under s 5(4).

Relevant provisions of the Policy

21. Under the Policy, CGU agreed to indemnify the Insured against its legal liability to pay compensation in respect of injury to any person, property damage, and advertising injury (all as defined) "occurring within the Geographical Limits during the Period of Insurance as a result of an Occurrence happening in *connection with the Insured's Business or Products*": cl 1.1 (*emphasis* added).

22. There is no dispute that Advanced was the Named Insured in the Schedule.[18]

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[16] The policy is found in the Affidavit of Kathryn Amy Emeny sworn 12 April 2018 at page 12.

[17] KAE p 114.

23. "Occurrence" is defined as "any event including continuous or repeated exposure to substantially the same general conditions which results in Injury to any person, Property Damage or Advertising Injury where such Injury, Property Damage or Advertising Injury is neither expected nor intended from the standpoint of the Insured": cl 4.15. It includes "any intentional act by or at the direction of the Insured which results in Injury if such Injury arises solely from the use of reasonable force for the purpose of protecting persons or property": cl 4.15.

24. "Business" is defined in cl 4.4 as follows:

> *4.4.1 the Business specified in the Schedule*;
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> 4.4.2 the provision and management of canteens, social, sports and welfare organisations, educational and child care facilities primarily for the benefit of the Insured's Employees;
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> 4.4.3 first aid, medical, fire and ambulance services;
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> 4.4.4 the maintenance of the Insured's premises or property for which such responsibility exists;
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> *4.4.5 private work undertaken by the Insured's Employees for any director, partner or senior executive of the Insured;*
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> 4.4.6 any prior activities which have ceased or have been disposed of but for which the Insured may retain a legal liability;
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> 4.4.7 participation in exhibitions;
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> 4.4.8 hire or loan of plant to other parties;
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> 4.4.9 conducted tours of the Insured's premises;
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> *4.4.10 any other occupation ancillary or incidental to the Business stated in the Schedule.* (*emphasis* added)

25. For the purposes of cl 4.4.1 and 4.4.10, the Business specified in the Schedule is "Principally Plumbing and any other activities incidental thereto".[19]

26. The Policy contained the Welding Endorsement at KAE p 13, quoted at PS [23]. Its effect was that CGU's liability to indemnify would not extend to any liability

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[18] KAE p 12.

[19] KAE p 12.

"arising out of or in any way connected with any arc or flame cutting, flame heating, arc or gas welding, electric, oxy-acetylene, laser cutting and/or spark producing equipment by or on behalf of the Insured or similar operation in which welding equipment is used, unless such activity is conducted in strict compliance with", relevantly, AS 1674.1 (found at KAE p 35).

The Business Ground

27. CGU submits that the Plaintiff has no arguable case that the Policy responds to the liability. The Plaintiff has led no evidence to establish that an event occurred "in connection with the Insured's Business" that caused damage to the Plaintiff, as required by cl 1.1.

28. In addition, CGU submits that the available evidence establishes that CGU is entitled to disclaim liability, in which event leave must be refused under s 5(4).

29. Construction of cl 4.4.5: While the definition of "Business" at [25] above has various limbs, the Plaintiff only relies on cl 4.4.5 – "private work undertaken by the Insured's Employees for any director, partner or senior executive of the Insured": PS [56].

30. CGU submits that, on an ordinary and natural reading of the Policy, it is plain that the "private work" contemplated by cl 4.4.5 must be ancillary or incidental to the Business stated in the Schedule (ie "Principally plumbing and any other activities incidental thereto"). That is so for the following reasons.

31. First, the definition of "Business" in cl 4.4 commences with "the Business specified in the Schedule" and ends with "any *other* occupation ancillary or incidental to the Business stated in the Schedule" (*emphasis* added). This implies that the categories described in cll 4.4.2 to 4.4.9 are "ancillary or incidental to the Business stated in the Schedule".

32. Secondly, while some of the categories in cll 4.4.2 to 4.4.9 are expressly connected to the Business stated in the Schedule (such as cl 4.4.4), others are not, but it would make no sense for them to have no connection with the Business when they fall within the definition of the Business.

33. For example, cl 4.4.3 refers to "first aid, medical, fire and ambulance services". It is submitted that the only reasonable construction is that these emergency services are covered when provided in connection with the business, not at large, anywhere, any time. Similarly, clause 4.4.7 refers to "participations in exhibitions". It would make little commercial sense for the Policy to cover such activities unless they were ancillary or incidental to the Business stated in the Schedule. If, for example, Mr Hooper hosted an exhibition of local art at his private property and there was an accident causing injury to visitors, that would not be covered by the Policy. An incident at an Open Day where Advanced was exhibiting plumbing supplies or services would be different. In other words, the "exhibitions" must have some connection with the Business.

34. Thirdly and critically, the insuring clause refers to Occurrences happening in connection with the "*Insured's* Business". This qualification makes it plain that the "Business" – including the "private work" referred to in cl 4.4.5 – must be business *of the Insured* (relevantly, Advanced). This in turn confirms that the "private work" referred to in cl 4.4.5 must have some connection to Advanced's work (plumbing or activities incidental thereto) beyond it merely being work for a director of Advanced.

35. Application to facts: The Plaintiff bears the onus of demonstrating an arguable case that the work performed by Mr Orford and Mr Elliott on 17 February 2017 was plumbing work or work ancillary or incidental thereto. The Plaintiff has adduced no evidence at all in this regard.

36. The evidence adduced by CGU establishes it was not plumbing work or work ancillary or incidental thereto. The evidence establishes that, on Friday, 17 February 2017, Mr Orford and Mr Elliott were engaged in cutting trench mesh[20] with a quick cut[21] for the purposes of constructing concrete footings[22]. This is also

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[20] TB p 7 (Q&A 72-79) ("measuring the length of the footing...dropping in full lengths were I can, and then cutting off the others to suit"); TB p 11 (Q&A 163) ("installing the mesh"); TB p 16 (Q&A 216-218) ("I had to cut trench mesh"); TB p 22-23 (Q&A 79) ("got Harry to cut it and I stayed in the trench"); TB p 26 [5].

[21] TB p 7 (Q&A 77-78); TB p 16 (Q&A 216-219); TB p 26 [5].

[22] TB p 6-7 (Q&A 67-70) ("installing trench mesh...for the footings"); TB 27 [7] ("working on the vertical footing at the drop off to the house"): TB p 41 (Q&A 101-103) ("tying the steel on that vertical footing").

illustrated by the photographs at TB p 49-51. The footings were for a dwelling[23] on property owned by Mr and Mrs Hooper at 78 Brindabella Place, Carwoola.[24] The mesh was being cut and then installed in the trench in preparation for an inspection on the Monday prior to a concrete pour.[25]

37. This work did not involve plumbing work, nor was it in any way ancillary or incidental to plumbing work. There is no evidence that it was otherwise connected to Advanced's business (eg, for the purposes of constructing an office). The registered office of Advanced is Unit 2, 169 Newcastle Street Fyshwick ACT.[26]

38. The Plaintiff submits that the police interviews form "no basis to exclude the reasonable possibility that the works at the Property included plumbing related works (such as laying foundation for pipes)": (PS [56]). That submission throws the onus upon CGU to *disprove* that there was plumbing work. That submission is not in step with the authorities outlined above – again, it is for the Plaintiff to establish an arguable case on evidence adduced on this Motion that the Policy responds to the liability, which on this construction requires some evidence that Mr Orford and Mr Elliott were engaged in plumbing work or work ancillary or incidental thereto.

The Welding Ground

39. Again, on this ground, CGU submits that the Plaintiff has no arguable case that the Policy responds to the liability. CGU is also entitled to disclaim liability under s 5(4).

40. Construction of Welding Endorsement: The Welding Endorsement applies in relation to liability arising out of "spark producing equipment". It is clear that the

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[23] TB p 5-6 (Q&A 56-59) (references to "the house"); TB p 8 (Q&A 81) ("the prepared house area"); TB p 15 (Q&A 206-207) ("facing at the house"); TB p 26 [4] ("we were working on footings for a house [Mr Hooper] is building").

[24] TB p 3 (Q&A 31); TB p 52-53 (title search).

[25] TB p 4 (Q&A 42-44) ("get all the meshes for the footings...so that we could pour them on the Monday"); TB p 27 [6].

[26] KAE p 9.

quick cut, when applied to metal, generally produces sparks.[27] It is also clear that the use of the quick cut by Mr Elliott on this occasion did in fact produce sparks.[28]

41. However, the Plaintiff submits that the phrase "spark producing equipment", when construed in light of the relevant "genus", does not include a quick cut: PS [57]-[63]. It is said that the other processes referred to in the Welding Endorsement involve the "direct application of heat to metal to shape, cut or weld" (which is the relevant "genus"), whereas the operation of the quick cut involves the application of friction to create a cut: PS [60]. It is then said that "spark producing equipment" should be read down in light of the "genus", such as only to refer to tools that generate sparks by the direct application of heat (and exclude tools which generate sparks by friction).

42. That construction is not sound as a matter of text, context and purpose.

43. The ordinary, and obvious, meaning of "spark producing equipment" is any equipment that produces sparks. There is no textual indication that that concept should be read down to refer only to equipment that produces sparks by the direct application of heat. That might be a feature common to all of the other processes listed in the Welding Endorsement ("arc cutting" through to "laser cutting"), but there is nothing in the text of the clause to indicate that the meaning of "spark producing equipment" should be narrowed accordingly.

44. The Plaintiff's invocation of the *ejusdem generis* principle does not advance matters: PS [40] and [61]. As the Plaintiff accepts, that principle is a guide but not a mechanical rule of reasoning: PS [40]. It is relevant where the drafter has indicated the "main specific matters or conduct within a broad category" to which a provision is to apply such that "any general words will be read down to embrace only those things or conduct falling within that category".[29] It is "another way of

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[27] Expert Report of Dale Rankin, 1 June 2018, eighth paragraph under Question (j).

[28] TB p 22 Q78 to p 23 Q85.

[29] Pearce and Geddes, *Statutory Interpretation in Australia* (8th ed, 2014) [4.25].

saying that the words derive their meaning from the context in which they appear".[30]

45. That principle does not assist the Plaintiff because:

(a) While the use of the word "other" is not a prerequisite to the attraction of the rule[31] (eg "horses, cows, sheep and *other* animals") there still needs to be some textual indication that the "general words are to be read as a continuation of the preceding specific words".[32] Here, there is nothing linking the alleged "specific" items (arc cutting etc) to the alleged "general" item (spark producing equipment).

(b) The words "spark producing equipment" are not "general" as compared to the earlier matters (arc cutting etc). They are as specific as the earlier matters, it is just that they refer to equipment of a certain kind as opposed to a process.

(c) It is "rarely justified" to give the "immediate verbal context determinative weight in the process of construing general words"; rather, "whether or not general words ought to be read down is to be determined by the whole of the relevant context, including other provisions of the statute [or, here, the contract] and the scope and purpose of the statute".[33] The broader context and purpose is considered below.

46. The Plaintiff is also not assisted by the words "or similar operation in which welding equipment is used". This is said to emphasise that the endorsement is directed to "welding and similar activities": PS [61]. This submission seems to advance a new "genus" of activity – namely welding. But it is clear that the endorsement covers *both* welding (involving the fusion of metal) *and* cutting (involving the removal of metal) – for the endorsement expressly refers to welding

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[30] Ibid.

[31] See the examples at Pearce and Geddes at [4.26], but also [4.27].

[32] Pearce and Geddes at [4.27].

[33] *Deputy Commissioner of Taxation v Clark* (2003) 57 NSWLR 113 at [127] per Spigelman CJ (Handley and Hodgson JJA agreeing).

and cutting processes.[34] The words "or similar operation in which welding equipment is used" is intended to pick up other forms of welding, not to limit the operation of the remainder of the endorsement to welding type activities. Further, the heading "Welding Endorsement" is to be disregarded, because headings do not form part of the context or affect the interpretation of the Policy: cl 5.1. It is clear that the Schedule forms part of the Policy, or at least that it should be construed in the same way as the Policy (especially since the Policy refers to the Schedule a number of times: see eg cl 4.4.1 and cl 8).

47. The context confirms that "spark producing equipment" should be given its ordinary meaning, and should not be read down to processes involving the direct application of heat (or welding). The endorsement refers to three standards. AS 1674.1, while titled "Safety in Welding and Allied Processes", in fact applies to work extending *beyond* welding and allied processes. Clause 1.1 provides:

> SCOPE This Standard specifies precautions to be taken prior to and during *hot work (including welding and allied processes)*, to prevent the possibility of fire or explosion, which may result in harm to persons or property. In particular, such precautions apply to hot work during manufacturing, construction, maintenance, repairs, demolition and where plant or equipment has contained flammable, combustible or explosive material.

48. "Hot work" is defined as "grinding, welding, thermal or oxygen cutting or heating, and other related heat-producing or spark-producing operations": cl 1.3.3. "Grinding" is not defined in AS1674.1, but its ordinary meaning is "to perform the operation of reducing to fine particles": *Macquarie Dictionary Online*. It would encompass the process of applying friction to a steel bar (such as trench mesh) such as to reduce enough of it to fine particles to form a cut. Alternatively, such a process would be a "related heat-producing or spark-producing operation".

49. If "spark producing equipment" took its ordinary meaning, this would better promote the purpose of the endorsement. It is clear that it was intended to require the Insured to take the precautions required by the Standards in order to prevent fires or explosions, or to reduce their likelihood and magnitude. "Spark producing

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[34] See the definitions of "welding" and "cutting" given by Mr Rankin at para 7.

equipment" has been included in the endorsement because the very act of producing sparks is a fire hazard. It is a fire hazard regardless of whether those sparks result from the direct application of heat, or the application of friction. The parties were primarily concerned with the fire risk arising from sparks, not the particular method by which those sparks are generated. The Plaintiff's construction would undermine the purpose of the endorsement by allowing an activity which (on the Plaintiff's own case) constitutes a fire risk to be done without compliance with applicable standards.

50. Application to facts: AS 1674.1 requires a number of different fire precautions to be adopted. Under cl 2.1, a responsible person is to, inter alia, ensure that "hazards of the location are identified" and "means of managing the hazards are in place". Under cl 5.1, "adequate precautions shall be taken to prevent fire or explosion". These include having available an extinguisher that meets certain requirements: cl 5.1(c).

51. The Plaintiff has not demonstrated an arguable case that Advanced complied with this standard. Indeed, the Plaintiff advances a positive case that Advanced failed to "have in place adequate fire suppression systems and equipment to control and suppress the fire": PS [50], citing SOC [17(d)].

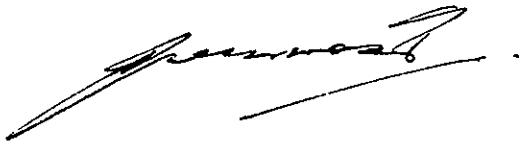
Conclusion

52. The plaintiff has not demonstrated an arguable case of liability against Advanced, or that the Policy responds to that liability.

53. Further or alternatively, CGU is entitled to disclaim liability under the Policy because the occurrence did not happen "in connection with the Insured's Business" within the meaning of cl 1.1 of the Policy and/or Advanced did not strictly comply with AS 1674.1. The Court is therefore required to refuse leave to proceed against CGU: s 5(4).

54. The Motion should be dismissed with costs.

15 August 2018



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