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The Opal Tower is a product — the purpose of product liability policies: Icon Co (NSW) v Liberty Mutual Insurance

Laina Chan *SECOND FLOOR SELBORNE CHAMBERS and MELBOURNE TEC CHAMBERS*

In *Icon Co (NSW) Pty Ltd v Liberty Mutual Insurance Company Australian Branch (t/as Liberty Specialty Markets)*,[1] Icon sought declarations from the first respondent (Liberty), its contract works and third party liability insurer, and the second respondent (QBE), its product liability insurer that it was entitled to indemnity under the two policies of insurance. The case proceeded by way of agreed facts.

Background facts

Icon is in the business of designing, constructing and delivering buildings. When Icon is engaged, it supplies to its clients a completed building which it constructs and erects on the developer's land. That work includes subcontracting various works packages to third party subcontractors. Icon arranges for all of the materials and component parts to be manufactured in accordance with the requirements of the contract, supplied to the site and erected and installed into the building at the site. Icon is also responsible for testing the work under the contract to ensure it complies with the contract and to repair any defects.[2]

In October 2015, Icon had entered into a contract to design and build the Opal Tower, a 37 storey high rise mixed residential and commercial development at Sydney Olympic Park. Construction commenced on 16 November 2015. Practical Completion occurred on 8 August 2018 which triggered the 12-month defects liability period.[3] On Christmas eve of 2018, during the defects liability period, major cracks were observed across three floors in certain wall panels, floor slabs and hobs (Incident). The Incident led to an immediate evacuation on a short-term basis. However, 2 days later the residents were again evacuated. Icon then entered the building and undertook rectification works. The residents were allowed to return progressively over the course of 2019.[4]

The structural works at the Opal Tower were a separate package and stage of the works, completely separate and distinct from other packages and stages. The concrete structure of the Opal Tower consists of various elements, including columns, slabs, precast panels, reinforced concrete walls and hob beams, which were separately manufactured, assembled and installed by various subcontractors.[5]

The residents have made claims against Icon and a class action was commenced in the Supreme Court of New South Wales in July 2019 by certain lot owners of the Opal Tower against the Sydney Olympic Park Authority (SOPA), the owner of the land upon which the Opal Tower is built. SOPA has filed a cross claim against Icon in the class action. As at 28 February 2020, Icon had paid out in excess of $31 million as a result of the Incident, including approximately $17 million in property rectification costs, $8.5 million in alternative accommodation costs and $530,000 in legal fees associated with defending the class action.[6]

The QBE Policy

Icon had a QBE third party liability policy in place for the 3 months from 20 September 2018 to 31 December 2018. The Insuring Clause for the QBE Policy provided:

> The Insurer(s) agree to:
>
> 1. Indemnify the Insured in respect of all amounts which the Insured shall become legally liable to pay in respect of:
>   a. Personal Injury;
>   b. Property Damage;
>   c. Interference with traffic or to property or the enjoyment of use thereof by obstruction, trespass, loss of amenities, nuisance,
>   1.1 happening during the Construction Period as a result of an Occurrence in connection with the Insured's Business;
>   1.2 happening during the Period of Insurance as a result of an Occurrence in connection with the Insured's Product Liability and/or Completed Operations.[7]

Product was defined:

> Product shall mean any product or thing (including containers packaging or labelling) sold, supplied, erected,

repaired, altered, treated, installed, processed, grown, manufactured, assembled, tested, serviced, hired out, stored, transported or distributed by the Insured including any container thereof (after such goods and/or products cease to be in the possession and/or under the control of the Insured) in the course of the Insured's Business in or from Territorial Limits, including liability arising out of the Competition and Consumer Act 2010 or similar legislation.[8]

The only issue in relation to the QBE policy was whether the Opal Tower, the component parts pleaded, and/or the concrete structure of the Opal Tower (comprising columns, slabs, precast panels, reinforced concrete walls and hob beams) a "Product", as that term is defined in the QBE Policy.

The Liberty Policy

The Icon Construction Group (Icon Group) had annual "Material Damage Contract Works" and "Third Party Liability" insurance policies for the period 20 September 2015 to 20 September 2016 (the Liberty Policy).[9] There was a notification regime in place for the Icon Group to notify their Insurers of the projects undertaken by the Icon Group. Relevant notifications were made and on 9 December 2015, Chase Underwriting Agency[10] (Chase) relevantly confirmed that:[11]

(a) "cover" was in place for the Project from 16 November 2015 to 10 August 2018
(b) the base premium payable for Third Party Liability insurance cover for the Project was $92,050.73 (net) plus charges
(c) "all other terms and conditions were as per the annual policy" and
(d) an endorsement would be sent to Austbrokers for its records

The email was silent on whether cover was in place for the additional 12-month defects liability period.[12] Condition 15 of the Liberty Policy however provided for Run Off Cover "for all incomplete contracts as at date of expiry until completion of those contracts including any testing and/or defects liability and/or maintenance periods".[13]

The declarations sought

The following declarations were sought:

1. As against QBE, that the Incident reflected or was the result of an "Occurrence" in connexion with a "Product" of Icon within the meaning of the QBE Policy.
2. As against Liberty, that the Incident reflected or was the result of an "Occurrence" within the period of cover of the Liberty Policy.

Icon advanced three claims, framed in the alternative in support of its claim for relief against Liberty that:

1) its notification to Liberty of the Project engaged a provision of the Liberty Policy providing for "run off" cover, thus allowing for the insurance to cover the 12-month defects lability period which followed the contractual time period for the Project, during which the Incident occurred (Run off Claim)
2) by the operation of s 58 of the Insurance Contracts Act 1984 (Cth) (ICA), Liberty is precluded from denying indemnity for the period during which the Incident occurred (Statutory Extension of Coverage Claim)
3) the Liberty Policy should be rectified by the addition of an "endorsement" in terms that would entitle it to such cover (Rectification Claim)

The judgment

The Opal Tower and its constituent parts are a Product

The conflict between the parties was whether the word product should be given its plain meaning as opposed to its ordinary use. Icon relied upon the following three arguments in favour of its proposition that the Opal Tower and its constituent parts constitute a Product for the purposes of a product liability policy:

1. That the "plain" meaning of the words in the definition of "Product" includes the Opal Tower and its constituent parts as the Opal Tower and each of its parts is a "thing" that was "supplied", "installed", "manufactured" or "erected" by Icon in the course of Icon's business. Icon said that this was consistent with the purpose of the QBE Policy and that a construction contractor is in the business of producing things which come into existence to form part of the land.[14]
2. If its construction was not adopted then there would be a "significant and anomalous gap" in the QBE Policy as the QBE Policy would provide no cover for projects that had been completed and handed over to the principal/owner (necessarily prior to the commencement of the policy) but for which the maintenance/defects liability periods have not expired.[15]
3. Its interpretation is consistent with the decision of Hargrave J in *Metricon Homes Pty Ltd v Great Lakes Insurance SE*[16] (*Metricon Homes*).

At the end of the day, Lee J placed weight on the conclusions in *obiter* of Hargrave J in *Metricon Homes* but as a matter of construction came to an independent conclusion that the Opal Tower and its constituent parts

are Products within the meaning of the QBE Policy.[17] QBE had relied upon the two contra decisions of *Aspen Insurance UK Ltd v Adana Construction Ltd*[18] (*Aspen*) and *Bigby v Kondra*[19] *(Bigby).* It is the view of the writer that Hargrave J failed to apply the main purpose rule and also erred as a matter of principle in his construction of the definition of Product. Lee J appears to have been informed by the approach of Hargrave J and the finding in relation to the Opal Tower being a "Product" is therefore susceptible to challenge. As a preliminary matter, it is useful to analyse all three cases.

Aspen Insurance UK Ltd v Adana Construction Ltd

In *Aspen*, there had been a crane collapse when the crane base/pile cap had come away from the pile in one place. The crane base/pile did not fracture. None of the dowels (four per pile) were fractured. Instead, they were pulled intact out of their respective piles and remained attached to the base. The issue was whether the concrete base was a product.[20] The concrete base had been made by pouring concrete. Dowels had then been inserted into piles which were then incorporated into the base when concreting took place.

There was a claim for indemnity under s B of the Policy which covered public liability. At issue was whether the claim was excluded by either of the following two exclusion clauses that excluded liability arising from defective workmanship, material or design and liability from any product. Section C of the Policy covered product liability. Product was defined as:

> . . . any product or goods manufactured, constructed, installed, altered, repaired, serviced, processed, treated, sold, leased, supplied or distributed by or on behalf of the Insured from or within Great Britain . . . (including any advice, design, consultancy, plan, specification, formulae, labelling, packing or instructions for use given in connection therewith) but only after such item has left the Insured's care, custody or control.[21]

The court looked at the structure of the definition of Product and said that the words "manufactured, constructed, installed, altered, repaired, processed" related to the manner in which the insured came to provide the product and the words "sold, leased, supplied or distributed" refer to the transaction by which the product came to leave the care, custody or control of the insured. In order to be a Product, the item in question must therefore, have been provided by, and have left the Insured's control in one or other of the wide range of means specified. However, it does not necessarily follow that an item which was so produced, or which left the Insured's control in one of the specified ways, is on that account alone, a Product.[22]

The court noted that the word product with a small "p" can be given a very wide meaning and can encompass a building.[23] This is undeniable. The court said that whilst a meaning which had the result that a house or a roof was a Product is a possible one, this was not the intention of the Policy.[24] In concluding that a building did not fall within the definition of Product, the court took into account the fact that to find otherwise would engage the two exclusion clauses which would have the effect of very much reducing the coverage available under s B of the policy.[25]

The court said that:

> . . . without attempting a precise definition, I would regard a hallmark of a product, in this context, as being that it was something which, at least originally, was a tangible and moveable item which can be transferred from one person to another; and not something which only came into existence to form part of the land on which it was created.[26]

The court took into account the fact that it was construing an exclusion clause which supports a narrow rather than a broad interpretation. The court noted that there was cover for product liability but product liability was itself subject to a very significant exclusion clause.

The court in effect construed the Policy so as to give effect to the main purpose of the contract and settled on a construction that led to the Insured being covered by the Policy for the claim.

Bigby v Kondra

Bigby's house had suffered damage through improperly installed windows producing internal pressure. The windows were therefore not adequately secured for all weather conditions. During a weather event, the windows imploded.

The defendant sought cover pursuant to its product liability policy. There was an exclusion clause for damage to products which excluded cover for: "Property damage to products if the damage is attributed to any defect in them or to their harmful nature or unsuitability."[27]

Product was defined to mean:

> . . . anything which is or is deemed to have been manufactured, grown, extracted, produced, processed, sold, supplied, distributed, imported, exported, repaired, serviced, installed, assembled, erected or constructed by you (including packaging or containers) in the course of your business and after it has ceased to be in your physical custody or under your legal control.[28]

The arguments of the insurer were threefold:

1) the plaintiff's house was a product of the Insured
2) the damage was attributable to a defect in the house — the defectively installed windows, and
3) the exclusion clause for damage to products operated to relieve the insurer of liability to indemnify the Insured

Daubney J applied *Aspen* and concluded that a house is not a product. Daubney J found the existence of the following exclusion clause significant. The exclusion clause excluded cover for:

> Personal injury or property damage caused by the demolition, underpinning, removal of support, dewatering, alteration, renovation, construction, erection of and/or addition to any building, structure, plant or equipment by or on behalf of an insured person.[29]

While this exclusion clause did not apply as certain thresholds had not been met, the court found that the policy was intended to cover property damage to a building constructed by the insured provided that the contract price did not exceed the monetary threshold.[30]

Metricon Homes v Great Lakes Insurance

In *Metricon Homes*, a house had subsided by reason of defective design and construction of the slab leading to slab movement. There was a combined building contracts insurance policy. There was products liability insurance for the insured's products which was defined to mean:

> . . . any goods and/or products (including food and/or drinks) manufactured, assembled, processed, grown, extracted, imported, constructed, erected, installed, altered, repaired, serviced, treated, sold, bottled, labelled, supplied, hired, leased, exchanged, and/or transport[ed] and/or distributed by the Insured including any container thereof (after such goods and/or products cease to be in the possession and/or under the control of the Insured).[31]

The Insurer contended that the house, in the sense of the completed house when it was handed over to the owners fell within the definition of Insured's Products and that as a result, some of the exclusion clauses in the policy applied to defeat the claim.[32] Hargrave J accepted the arguments of the Insurer.

Hargrave J said that the courts in both *Aspen* and *Bigby* had erred. It appears that Hargrave J rejected the reasoning in *Aspen* on the basis that the Court in *Aspen* had not given effect to the literal meaning of the word products but had instead sought to give effect to the intention of the parties.[33]

Hargrave J said that the words of the definition of "Insured Product" make it clear that the completed house and each of its components, was intended to be included as a product. The contextual matters within the policy support this conclusion, including the write back provision.[34] Hargrave J said that whether or not a house may be a product within a definition in a particular case will depend upon the precise form of the definition in that case, the context of the policy as a whole and, where admissible, evidence of surrounding circumstances.[35] This is not incorrect. However, this appears to overlook a basic tenet of construction — the "main purpose" rule.

Hargrave J said that:

> Daubney J did not rest his decision on his acceptance of the reasoning in *Aspen v Adana* alone. His Honour decided that other exclusions in the relevant policy gave rise to an 'unacceptable tension' between the relevant product exclusion clause and another exclusion clause, which would be rendered 'completely meaningless' if the product exclusion clause included the house as a product. *With respect, I do not agree that this approach is consistent with the principles discussed below concerning the resolution of internal inconsistency in contracts. His Honour did not in his reasons first endeavour to resolve the inconsistency before concluding that the two exclusions could not be read together. Further, as appears below, the inconsistencies in the relevant exclusions at issue in this case can be resolved by an available process of interpretation, thus preserving the ordinary meaning of the definition of Insured's Products*.[36] (emphasis added)

With respect, Hargrave J erred. As JW Carter says:

> A policy must be construed in light of commercial purpose. The 'main purpose' rule in relation to exclusion clause invokes commercial context as an aid to construction. The classic example is *Glynn v Margetson & Co.* A liberty to deviate clause in a charterparty conferred on the defendant-carriers the liberty to proceed and stay at a wide range of ports 'for the purpose of delivery . . . cargo or passengers, or for any purpose whatsoever'. Lord Halsbury LC said that looking at the 'whole of the instrument, and seeing what one must regard . . . as its main purpose, one must reject words, indeed whole provisions, if they are inconsistent with what one assumes to be the main purpose of the contract.[37] (footnotes omitted.)

Daubney J of the Queensland Supreme Court was not obliged to resolve any inconsistencies between the exclusion clause so as to give effect to every single clause of the policy. If the parties can apply the contract without resolving any internal inconsistencies between two exclusion clauses in the Policy then it matters not if this has the effect of causing one of the two exclusion clauses to be meaningless. Instead, Daubney J was obliged to give effect to the main purpose of the policy of insurance which he determined was to provide cover to damage to houses built by the Insured. Daubney J did this and his Honour did not err in doing so. Instead, Hargrave J was mistaken in his attack on the reasoning of Daubney J.

Further, Hargrave J did not seek to identify the purpose of or objective intention of the parties in relation to the policy of insurance. In both *Aspen* and *Bigby,* the courts sought to give effect to the intention of the parties to the policy of insurance. This was the correct approach. Hargrave gave effect to the literal meaning of the word "Product" but did not check whether the literal meaning was consistent with the "main purpose" rule or intention of the parties.

At the end of the day, policies of insurance have to be construed in light of their commercial purpose. Unfortunately, Hargrave J erred when he failed to do this and

instead embarked on an exercise that was contrary to established principles of construction.

The QBE Policy — an error is revealed

With respect, Lee J appears to have fallen into the same error as Hargrave J. In construing the definition of Products, Lee J seemed concerned to ensure that the definition of Products would not render redundant the definition of "Construction Operations".[38] Lee J was also concerned that the exclusion clause excluding liability for Property Damage to any Product where such damage is directly caused by a fault or defect in such a Product, (Exclusion 5) would not be rendered inoperative.[39] This reflected the approach of Hargrave J in *Metricon Homes*.[40] However, it is not a tenet of construction that all words in the instrument must be given operative effect.

The contrary view is that instead of focussing upon a construction that would not render the definition of Construction Operations redundant or Exclusion 5 inoperative, the focus ought to have been construing the words in the definition of Product to ensure that the construction was consistent with the main purpose of the QBE Policy, with such purpose to be determined objectively from the words of the instrument. The writer notes that Icon submitted that the purpose of the contract was the "spreading the risk insured against".[41] The writer accepts that this is the general purpose of all insurance contracts but not necessarily the main purpose of a product liability policy. Contrary to the view of Icon, the writer suggests that identifying the main purpose of the QBE Policy requires an identification of the very risk insured against.

The issue is the intended scope of application of the word "product" as well as the words of the definition properly informed by the main purpose of the QBE Policy. With respect, the focus ought not to have been upon the contrast between the "plain" or "ordinary" meaning of the word "product".[42] Further, contrary to the argument of Icon, whether or not the QBE Policy would provide illusory cover if "Product" is not defined to include a building[43] is not necessarily a relevant consideration given the fact that the Icon Group had incepted cover over a suite of insurance products. It is suggested that the determination of the issue ought to come down to the main purpose of the QBE Policy. It is possible that this may involve a consideration of the context in which the QBE Policy was written with such context to include the entire suite of cover that Icon had incepted in respect of the Opal Tower project. Given that the QBE Policy is not reproduced in full and the Court was only asked to address one issue, this is an exercise that cannot be undertaken by the writer.

The Liberty Policy must be rectified — the parties intended the Liberty Policy to cover the defects liability period

The judgment focused mainly upon the Rectification Claim and whether there was a common intention that the Liberty Policy was to apply on a "contracts commencing" basis and thus the cover was in place during the defects liability period.[44] The court accepted evidence that public and products liability insurance for the construction industry, when purchased on an annual basis is purchased either on a "contracts commencing" basis or on a "turnover" basis. Contracts commencing policies provide cover for the project until works are completed plus the relevant defects liability period, even if this occurs after the annual period of insurance has expired. Turnover policies cover projects which are commenced or are on hand during the annual period of insurance (including those projects which are complete and in the defects liability period) but only during the annual period of the insurance policy.[45]

The Run off Claim

Lee J said that reference could only be made to extrinsic material when construing condition 15 when there was ambiguity.[46] Lee J therefore proceeded on the basis that much of the evidence adduced by the parties was irrelevant to the disposition of the construction of the Liberty Policy. That evidence was only relevant for establishing the common intentions of the parties of the purposes of the Rectification Claim.[47] However, Lee J found that ambiguity existed in relation to what the parties had agreed in respect of the "additional premium" payable under the Liberty Policy for run off cover.[48] Lee J therefore referred to the evidence of surrounding circumstances known to both parties in relation to the nature of the construction insurance market, the parties' conduct in arranging endorsements to the Liberty Policy and the calculation of premium.[49]

As a matter of construction, Lee J held that there was no run off cover.[50] Lee J was not persuaded that evidence pointing to similarities between various policies, the way that the parties had conducted themselves, was sufficient for the conclusion to be drawn that the Liberty Policy covered the defects liability period.[51] The endorsement relied upon by Icon was also expressed to be for the period that ended at 4 pm on 10 August 2018.[52] Further, Lee J was not satisfied that additional premium had been paid for the purposes of the run off cover.[53] Lee J was not satisfied that s 54 claim had any merit either.[54] As there was not a project specific policy of insurance, s 58 of ICA was also not engaged.[55]

Rectification Claim

In relation to the Rectification Claim, Lee J found that the common intention of the parties had been to

have the Liberty Policy cover the defects liability period. The intention of Icon was expressed through the Icon Group insurance broker who had been authorised by the Icon Group to enter into the Liberty Policy.[56] The intention of Liberty was expressed through Chase as Chase had actual and ostensible authority to finalise the Liberty Policy.[57] Lee J did not accept the submissions of Liberty that ostensible authority is not relevant in a suit for rectification. Lee J relied upon Davies J in *Hawksford Trustees Jersey Ltd v Stella Global UK Ltd*[58] to find otherwise.[59] Lee J could:

> . . . see no reason in principle why, if the scope of an agent's actual authority is relevant to the determination of who is the proper decision maker, then any ostensible authority that is established cannot also be relevant.[60]

After a lengthy analysis of the evidence, Lee J was satisfied that the parties had a common intention that the Liberty Policy would cover the defects liability period[61] and that the disclosure of this intention could be inferred by their mutual understanding that the business practices concerning contracts commencing policies in the insurance industry would apply, in circumstances where there was no evidence that anything was said between the parties about those practices not applying.[62] Lee J granted rectification of the Liberty Policy so as to reflect the common intention of the parties.[63]

Conclusion

Product liability policies are typically sold to cover third party liability for loss or damage caused by the inherent nature of the product in circumstances where the product typically does not fulfil its intended purpose. This is the fifth case in the Commonwealth world[64] that the writer has been able to identify that has considered the issue of whether a completed building may constitute a product for the purposes of a product liability policy. This is the controversial aspect of the judgment. Arguments on both sides of the equation are persuasive. If a product liability policy is sold to a construction company then it is arguable that the objective intention of the parties is that the policy was intended to cover the completed building. Otherwise, what else might the Policy have been intended to cover. Query also why such a policy had been sold to Icon if cover for the completed building had not been intended. Would the policy have enough work to do if it only covered the constituent parts of a building? The breadth of the definition of "Product" in most product liability policies supports a construction that the completed building is a "Product". However, such a construction is also counter intuitive. The intuitive or ordinary meaning of "Product" is that it is only intended to over chattels or the constituent parts of a building rather than a completed building as a whole. Ultimately, determination of the issue requires a determination of the main purpose of a product liability policy. At the end of the day, if Insurers are of the view that the construction of Lee J and Hargrave J is not consistent with the main purpose rule, then product liability policies have to be rewritten to make the objective intention of the parties clear.

Even though the construction of the Liberty Policy took up the majority of the judgment, the construction of the Liberty Policy is not controversial. Lee J gave effect to the common intention of the parties that the contracts works policy would provide coverage during the defects liability period. This was consistent with policies of this nature even though this common intention had not been translated in the policy wording as endorsed.

It will be interesting to see if Liberty and QBE lodge an appeal from the decision of Lee J.

Laina Chan
Barrister
Second Floor Selborne Chambers and Melbourne TEC Chambers
laina.chan@selbornechambers.com.au
www.2selborne.com.au and https://mtecc.com.au/

About the author

Laina Chan is a barrister at Second Floor Selborne Chambers and Melbourne TEC Chambers specialising in property, construction and insurance law. She is also the Chair of the Society of Construction Law Australia.

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Footnotes

1. *Icon Co (NSW) Pty Ltd v Liberty Mutual Insurance Company Australian Branch (t/as Liberty Specialty Markets)* [2020] FCA 1493; BC202010173.
2. Above n 1, at [288].
3. Above n 1, at [29] and [40].
4. Above n 1, at [4].
5. Above n 1, at [289]
6. Above n 1, at [5].
7. Above n 1, at [283]
8. Above n 1, at [286].
9. Above n 1, at [23] an [26].
10. The Icon Group placed its insurances with Liberty and QBE through Chase Underwriting Agency, a specialised construction underwriting agency (Chase) see above n 1, at [6].
11. Above n 1, at [33].
12. Above n 1, at [34].

13. Above n 1, at [28].
14. Above n 1, at [291].
15. Above n 1, at [292].
16. *Metricon Homes Pty Ltd v Great Lakes Insurance SE* [2017] VSC 749; BC201710876.
17. Above n 1, at [311]–[312].
18. *Aspen Insurance UK Ltd v Adana Construction Ltd* [2015] EWCA Civ 176; [2015] Lloyd's Rep IR 511.
19. *Bigby v Kondra* [2017] QSC 037; BC201701597.
20. Above n 18, at [46] and [47], Clarke LJ was satisfied that the dowels were Products. However, as the dowels neither broke nor fractured but were pulled out intact, the dowels had not failed to do what dowels are supposed to do. It could not be said that any liability of Adana Construction had been caused by the dowels.
21. Above n 18, at [16].
22. Above n 18, at [36].
23. Above n 18, at [37].
24. Above n 18, at [39].
25. Above n 18, at [40].
26. Above n 18, at [42].
27. Above n 19, at [170].
28. Above n 19, at [161].
29. Above n 19, at [177].
30. Above n 19, at [79].
31. Above n 16, at [50].
32. Above n 16, at [61].
33. Above n 16, at [124]–[126]
34. Above n 16, at [120].
35. Above n 16, at [127].
36. Above n 16, at [129].
37. See JW Carter, *The Construction of Commercial Contracts*, Hart Publishing, 2013 at [17.33] (footnotes excluded).
38. Above n 1, at [305].
39. Above n 1, at [306].
40. Above n 16, at [129].
41. Above n 1, at [291].
42. Above n 1, at [291], [295] and [302].
43. Above n 1, at [292]
44. Above n 1, at [43].
45. Above n 1, at [45].
46. Above n 1, at [61].
47. Above n 1, at [64].
48. Above n 1, at [74].
49. Above n 1, at [76].
50. Above n 1, at [90].
51. Above n 1, at [80].
52. Above n 1, at [81] and [84].
53. Above n 1, at [87].
54. Above n 1, at [95].
55. Above n 1, at [98] and [99].
56. Above n 1, at [131] to [133]
57. Above n 1, at [146] such that Chase could not be said to be a "mere negotiator" within the meaning of *Perpetual Ltd v Myer Pty Ltd* [2018] VSC 2; BC201800239 at [106] per Croft J and [156] respectively.
58. *Hawksford Trustees Jersey Ltd v Stella Global UK Ltd* [2011] EWHC 503 (Ch) at [109], [115] and [127].
59. Above n 1, at [148] to [152].
60. Above n 1, at [152].
61. Above n 1, at [265].
62. Above n 1, at [269] and [270] applying *Simic v New South Wales Land and Housing Corp* (2016) 260 CLR 85; 339 ALR 200; [2016] HCA 47; BC201610423 at [104] and *Franklins Pty Ltd v Metcash Trading Pty Ltd* (2009) 76 NSWLR 603; (2009) 264 ALR 15; [2009] NSWCA 407; BC200911627 at [281].
63. Above n 1, at [278] and Annexure A of the Judgment.
64. *Arrow International Ltd v QBE Insurance (International) Ltd* [2009] 3 NZLR 650 is the only other case but to which no reference was made in the judgment of Lee J. In that case, the court held that an apartment building fell within the literal meaning of the definition of Product in a QBE Products Liability Policy. However, the exclusion clause for defective products applied to exclude liability for the claim. The writer was unable to locate any cases on the issue in the United States of America either.