AAI Limited v The Owners – Strata Plan No 91086 [2025] FCAFC 6

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| Appeal from: |  |
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| File number(s): |  |
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| Judgment of: | **MARKOVIC, HALLEY AND GOODMAN JJ** |
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| Date of judgment: | 4 February 2025 |
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| Catchwords: | **PRACTICE AND PROCEDURE** – application for leave to appeal from an order made under r 9.05 of the *Federal Court Rules 2011* (Cth) joining the applicant insurer as a respondent – operation of s 24(1AA)(b)(i) of the *Federal Court of Australia Act 1976* (Cth) prohibits any appeal – application dismissed  **PRACTICE AND PROCEDURE** – application for leave to appeal from an order made under s 5 of the *Civil Liability (Third Party Claims Against Insurers) Act 2017* (NSW) granting the first respondent leave to bring and continue the proceeding against the applicant – whether primary judge’s decision attended by sufficient doubt – whether substantial injustice would result if leave were refused – application dismissed |
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| Legislation: | *Corporations Act 2001* (Cth), s 444E  *Federal Court of Australia Act 1976* (Cth), s 24  *Civil Liability Act (Third Party Claims Against Insurers) Act* *2017* (NSW), s 5  *Law Reform (Miscellaneous Provisions) Act 1946* (NSW), s 6  *Law Reform (Miscellaneous Provisions) Ordinance 1955* (ACT), s 26 |
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| Cases cited: | *AFG Insurances Ltd v Andjelkovic* [1981] FCA 119; (1981) 54 FLR 398  *AFG Insurances v Andjelkovic* (1980) 47 FLR 348  *Andjelkovic v AFG Insurances Ltd* (1982) 58 ALJR 52  *Armstrong World Industries Inc v Aetna Casualty and Surety Co* 45 Cal App 4th 1 (Cal Ct App 1996); 52 Cal Rptr 2d 690 (1996)  *Austral Plywoods Pty Ltd v FAI General Insurance Co Ltd* [1992] QCA 4; (1992) 7 ANZ Insurance Cases 61-110  *Bundy Tubing Company v Royal Indemnity Company* 298 F2d 151 (6th Cir, 1962)  *Canadian Equipment Sales & Service Co Ltd v Continental Insurance Co*(1975) 59 DLR (3d) 333  *Capral Limited v Insurance Australia Limited t/as CGU Insurance* [2024] FCA 775  *Carwald Concrete & Gravel Co. Ltd v General Security Insurance Co. of Canada* (1985) 24 DLR (4th) 58  *Decor Corporation Pty Ltd v Dart Industries Inc* [1991] FCA 844; (1991) 33 FCR 397  *Dixon v Royal Insurance Australia Ltd* (1998) 90 FCR 390  *Energize Fitness Pty Ltd v Vero Insurance Ltd* [2012] NSWCA 213  *House v The King*[1936] HCA 40; (1936) 55 CLR 499  *Macquarie Underwriting Pty Ltd v Permanent Custodians Ltd*[2007] FCAFC 60; (2007) 240 ALR 519  *Pilkington United Kingdom Ltd v CGU Insurance plc* [2004] EWCA Civ 23; [2005] 1 All ER (Comm) 283  *R & B Directional Drilling Pty Ltd (in liq) v CGU Insurance Ltd (No 2)* [2019] FCA 458; (2019) 369 ALR 137  *Ranicar v Frigmobile Pty Ltd; Ranicar v Royal Insurance Pty Ltd* [1983] Tas R 113; (1983) 2 ANZ Ins Cas 60-525  *The Owners - Strata Plan No 91086 v Fairview Architectural Pty Ltd (No 3)* [2023] FCA 814  *The Owners – Strata Plan No 91086 v Fairview Architectural Pty Ltd* [2020] FCA 1892  *Travel Compensation Fund v FAI General Insurance Co Ltd*[1999] FCA 1214  *Weir Services Australia Pty Ltd v AXA Corporate Solutions Assurance* [2018] NSWCA 100; (2018) 359 ALR 314; |
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| Division: | General Division |
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| Registry: | New South Wales |
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| National Practice Area: |  |
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| Sub-area: |  |
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| Number of paragraphs: | 71 |
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| Date of hearing: | 28 May 2024 |
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| Counsel for the Applicant: | Mr J Sexton SC with Mr C Colquhoun SC and Ms C Ernst |
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| Solicitor for the Applicant: | Moray & Agnew |
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| Counsel for the First Respondent: | Mr P S Braham SC with Mr J K S Entwisle |
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| Solicitor for the First Respondent: | William Roberts Lawyers |
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| Counsel for the Second Respondent: | The second respondent did not appear |

ORDERS

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|  | | NSD 813 of 2023 |
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| BETWEEN: | AAI LIMITED (ACN 005 297 807)  Applicant | |
| AND: | THE OWNERS - STRATA PLAN NO 91086  First Respondent  FAIRVIEW ARCHITECTURAL PTY LIMITED (ACN 111 935 963)  Second Respondent | |

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| order made by: | MARKOVIC, HALLEY AND GOODMAN JJ |
| DATE OF ORDER: | 4 february 2025 |

THE COURT ORDERS THAT:

1. The application for leave to appeal filed on 3 August 2023 be dismissed.
2. The applicant pay the costs of the first respondent, as agreed or taxed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

THE COURT:

# A. Introduction

1. The applicant is the **insurer** pursuant to a series of **policies** of insurance in respect of which Fairview Architectural Pty Limited is the **insured**. The policies cover the period from 14 February 2012 to 30 May 2016. During the currency of the policies the insured manufactured and supplied aluminium composite **panels** which were affixed using a framework known as the top hat **subframe** to the exterior of two high-rise residential **buildings** at Warwick Farm owned by the first **respondent** during the construction of those buildings.
2. In March 2019 and thus subsequent to the expiry of the last of the policies on 30 May 2016 – and following fires in residential towers in London and Melbourne that were found to have been accelerated or worsened by the presence of aluminium composite panels – Liverpool City Council directed the respondent to remove the panels on the buildings.
3. On 13 June 2019, the respondent commenced a representative proceeding against the insured pursuant to Part IVA of the *Federal Court of Australia Act 1976* (Cth) on behalf of itself and other members of a class being, in summary, persons who owned or had a leasehold interest in a building fitted with panels that had been supplied between 13 June 2009 and 13 June 2019.
4. In November 2020, following the entry by the insured into voluntary administration in July 2020, the primary judge granted the respondent leave to proceed against the insured pursuant to s 444E of the *Corporations Act 2001* (Cth): *The Owners – Strata Plan No 91086 v Fairview Architectural Pty Ltd* [2020] FCA 1892.
5. On 20 July 2023, the primary judge made orders including the following:

1. Pursuant to r 9.05 of the *Federal Court* ***Rules*** *2011* (Cth), [the insurer] be joined to the proceeding as the second respondent.

2. Pursuant to s 5 of the *Civil Liability (Third Party Claims Against Insurers) Act 2017* (NSW), the [respondent] have leave to bring and continue the proceeding against [the insurer].

1. These orders will be referred to as the **joinder order** and the **Third Party Claims Act order** respectively. The primary judge’s reasons for making these orders are set out in (**J**, or the **primary judgment**).
2. The insurer seeks leave to appeal and, if leave is granted, to appeal the joinder order and the Third Party Claims Act order. For the reasons set out below, leave to appeal should be refused. It follows that it is not necessary to consider the appeal.

# B. Background

1. The background to the issues requiring determination involves the terms of the policies and provisions of the *Civil Liability (Third Party Claims Against Insurers) Act 2017* (NSW) (**Third Party Claims Act**).
2. The salient terms and conditions of each of the policies are essentially the same. The primary judge addressed the issues raised before him by reference to the policy that covered the period 30 May 2014 to 30 May 2015 and it is convenient to adopt the same course.
3. The insuring clause, cl 2.1, provides:

We [the insurer] agree (subject to the terms, Claim Conditions, General Conditions, Exclusions, Definitions and Limits of Liability incorporated herein) to pay to [the insured] or on [the insured’s] Behalf all amounts which [the insured] shall become legally liable to pay as Compensation in respect of:

(a) Personal Injury, and/or

(b) Property Damage; and/or

(c) Advertising Injury;

happening during the Period of Insurance within the Geographical Limits, in connection with the Business or [the insured’s] Products and/or work performed by [the insured] or on [the insured’s] behalf and caused by or arising out of an Occurrence.

1. The expression “Property Damage” is defined in the policies as follows:

“Property Damage” means:

(a) **physical loss, destruction of or damage to tangible property**, including the loss of use thereof at any time resulting therefrom; and/or

(b) loss of use of tangible property which has not been physically lost, destroyed or damaged; provided that such loss of use is caused by or arises out of an Occurrence.

(emphasis added)

1. The word “Occurrence” is defined in the policies as follows:

“Occurrence” **means an event**, including continuous or repeated exposure to substantially the same general conditions, **which results** **in** Personal Injury and/or **Property Damage** and/or Advertising Injury **that is neither expected nor intended** (except for the matters set out in (f) of the definition of Personal Injury) **from [the insured’s] standpoint**.

(emphasis added)

1. The Third Party Claims Act makes provision with respect to claims by third parties against insurers. In particular ss 3 to 5 provide:

**3   Definitions**

(1) In this Act:

*...*

***insured liability*** means a liability in respect of which an insured person is entitled to be indemnified by the insurer.

***insured person*** means a person who is, in respect of a liability to a third party, entitled to indemnity pursuant to the terms of a contract of insurance, and includes a person who is not a party to the contract of insurance but is specified or referred to in the contract, whether by name or otherwise, as a person to whom the benefit of the insurance cover provided by the contract extends.

***liability*** means a liability to pay damages, compensation or costs.

...

**4   Claimant may recover from insurer in certain circumstances**

(1) If an insured person has an insured liability to a person (the ***claimant***), the claimant may, subject to this Act, recover the amount of the insured liability from the insurer in proceedings before a court.

(2) The amount of the 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.

(3) In proceedings brought by a claimant against an insurer under this section, the insurer stands in the place of the insured person as if the proceedings were proceedings to recover damages, compensation or costs from the insured person. Accordingly (but subject to this Act), the parties have the same rights and liabilities, and the court has the same powers, as if the proceedings were proceedings brought against the insured person.

(4) This section does not entitle a claimant to recover any amount from a re-insurer under a contract or arrangement for re-insurance.

**5   Leave to proceed**

(1) Proceedings may not be brought, or continued, against an insurer under section 4 except by leave of the court in which the proceedings are to be, or have been, commenced.

(2) An application for leave may be made before or after proceedings under section 4 have been commenced.

(3) Subject to subsection (4), the court may grant or refuse the claimant’s application for leave.

(4) 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.

# C. The reasons of the primary judge

1. After identifying the background to and terms of the application, and the salient parts of the policy and the Third Party Claims Act, the primary judge expressed the following views as to s 5 of the Third Party Claims Act (J[37] to [41]):

37 The general effect of s 5 of the Third Party Claims Act is that the relevant court has a discretion to grant or refuse leave to bring or continue proceedings against an insurer in the court, but must refuse leave if the insurer can establish that it is entitled to disclaim liability under the policy.

38 To enliven the discretion, a claimant must generally establish: first, that there is an arguable case against the insured; second, that there is an arguable case that the relevant insurance policy responds to the arguable case against the insured; and third, that there is a real possibility that the insured would not be able to meet any judgment against it: ***Murphy****, McCarthy & Associates Pty Ltd v Zurich Australian Insurance Limited* [2018] NSWSC 627 at [17] and the cases there cited. There remains a residual discretion to refuse leave even if those three requirements are met: *DSHE Holdings Ltd (receivers and managers appointed) (in liq) v Abboud* [2017] NSWSC 579 at [20]-[21].

39 The requirement in s 5(4) that leave be refused if the insurer can establish that it is entitled to disclaim liability is “one imposed to insulate insurers from exposure to untenable claims”: *Murphy* at [16]. The onus of establishing an entitlement to disclaim is obviously on the insurer: ***Ritchie*** *v Advanced Plumbing and Drains Pty Ltd* [2019] NSWSC 1028 at [28]. It has been said that the onus imposed on the insurer by s 5(4) of the Act requires it to demonstrate “beyond argument” an entitlement to disclaim indemnity: *Ritchie* at [28]; ***Giabal*** *Pty Ltd v Gunns Planations Ltd (in liq)* [2020] NSWSC 1070 at [14]; ***Chubb*** *Insurance Australia Ltd v Giabal Pty Ltd; Caitlin Australia Pty Ltd v Giabal Pty Ltd* [2020] NSWCA 309 at [3] and [7]. That proposition would appear to flow from the interlocutory nature of an application for leave and the fact that the entitlement to disclaim may depend on unresolved and contestable questions of fact. It may be, however, that questions of construction arising under the policy of insurance may be determined on a final basis in advance of the trial: *Chubb* at [12].

40 [The insurer] took issue with the suggestion that it was required to satisfy the Court that its entitlement to disclaim liability was “beyond argument”. It submitted that the emphatic language of s 5(4) of the Third Party Claims Act pointed against such a conclusion, that the reasoning in *Ritchie* to the contrary was wrong, and that, because the parties in *Giabal* and *Chubb* were not in dispute as to the applicable legal threshold, they provide no real support for the proposition that the entitlement to disclaim must be beyond argument. [The insurer] also submitted that there was nothing in the text of s 5 to suggest either that the court considering an application for leave was confined to determining whether the claimant had an arguable case, or that the court was precluded from determining on a final basis whether the insurance policy responded to the claimant’s claim.

41 [The insurer] submitted that the circumstances of this case were such that the Court should determine whether the policies respond to [the insured’s] claim on a final, not interlocutory, basis. [The insurer] noted, in that regard, that the parties had each filed detailed and comprehensive expert evidence which addressed whether [the insured’s] claim under the policies arose from or related to property damage which happened during the period of insurance. The parties also advanced comprehensive submissions in respect of that issue. In [the insurer’s] submission, it was in all parties’ best interests for the coverage issue to be determined on a final basis at this stage of the proceeding.

1. The primary judge then identified the following principal issues for resolution (J[43] to [50]):
2. the Court’s jurisdiction to make orders referable to the Third Party Claims Act;
3. whether the respondent had an arguable case against the insured;
4. whether there was an arguable case that the policies respond to the insured’s claim or potential liability to the respondent, and as part of that question, whether the insurer was entitled to disclaim liability, including whether:
   1. the insured’s potential liability arises from “Property Damage” (i.e. physical loss, destruction or damage to tangible property);
   2. such damage was caused by an “Occurrence” (i.e. an event which results in “Property Damage” that was neither expected nor intended from the insured’s standpoint);
5. whether the insurer was entitled to disclaim liability on the basis of one or more of the exclusion clauses in the policies;
6. whether there was a real possibility that the insured would not be able to meet any judgment against it (which the primary judge noted (at J[48]) was a matter beyond doubt); and
7. whether – assuming the respondent established that: (a) it had an arguable case against the insured; (b) there was an arguable case that the policies respond to the insured’s claim; and (c) there was a real possibility that the insured would not be able to meet any judgment – there were any reasons why the discretion would not be exercised in favour of the respondent.
8. After determining that the Court had jurisdiction to make orders under the Third Party Claims Act (J[51] to [54]), the primary judge considered whether the question of leave should be determined on an interlocutory or final basis and decided to do so on an interlocutory basis. At J[55] to [66], the primary judge reasoned as follows:

55 The question whether leave can and should be granted to bring or continue proceedings directly against an insurer pursuant to the Third Party Claims Act is ordinarily determined on an interlocutory basis. That is essentially why it is generally only necessary for a claimant to demonstrate that there is an arguable case that the policy in question responds to the claim. It is also presumably why it has been said that an insurer who opposes leave on the basis that it is entitled to disclaim liability under the policy must demonstrate “beyond argument” that it is entitled to disclaim.

56 [The insurer] submitted that the Court should determine whether the policy responds to [the insured’s] claim on a final, not interlocutory basis. In [the insurer’s] submission, it was in the best interests of all parties for that issue to be determined separately and on a final basis. It was also said to be appropriate to consider that question on a final basis given that both it and [the respondent] had adduced detailed expert evidence in respect of that issue. In those circumstances, it would not be appropriate to permit the parties to essentially re-agitate the issue at the final hearing. While [the insurer] did not file an application for the separate determination of that issue pursuant to r 30.01 of the *Federal Court* ***Rules*** 2011, it indicated that it would do so if required or if the Court considered that to be necessary.

57 [The respondent’s] position in respect of whether the coverage issue should be determined on a final basis was somewhat ambiguous and equivocal. It appeared to accept that it would be in its best interests for the issue to be determined on a final basis. There would plainly be little point in it pursuing the proceeding if it was unable to recover from [the insurer] under the policies. [The respondent] nevertheless did not consent to the issue being determined on a final basis and many of its submissions appeared to be premised on the proposition that it need only demonstrate that there was an arguable case that the policies responded. Perhaps more significantly, [the respondent] submitted that some of the factual issues that appeared to have some potential relevance to the coverage issue were matters for determination at the final hearing. For example, the precise extent and nature of the damage allegedly caused to the buildings was a matter for determination at the final hearing.

58 The Court undoubtedly has the power to order that a question arising in a proceeding be heard separately and in advance of the trial: see r 30.01 of the Rules. In the ordinary course, however all issues of fact and law should be determined simultaneously: *Tallglen Pty Ltd v Pay TV Holdings Pty Ltd* (1996) 22 ACSR 130 at 141-142. Ordering that a particular question be determined separately and in advance of the trial has also been said to be a “procedure that should be adopted with caution and can be fraught with difficulties”: *Save the Ridge Inc v Commonwealth* (2005) 147 FCR 97; [2005] FCAFC 203 at [15].

59 I am not inclined in all the circumstances of this case to make an order for the separate determination of the issue as to whether the AAI policies respond to [the insured’s] claim. Nor do I consider that it is appropriate in all the circumstances to make a final determination in respect of that issue at this early stage of the proceeding. While I accept that it may be in the parties’ best interests for that issue to be determined as soon as possible, there are a number of factors which militate against determining that issue separately and in advance of the trial.

60 First, [the insurer] did not identify with any precision the question that was capable of being determined separately, or identify the final order or declaration that should be made if the question was to be determined on a final basis. [The insurer] formulated the question as simply being whether [the insurer’s] policies are responsive to [the insured’s] claim. It is at best doubtful that that is a sufficiently precise formulation of a separate question. It may be noted, in this context, that the declaration that [the respondent] will seek against [the insurer], if granted leave to amend, is that [the insurer] is “liable to indemnify [the insured] for the Covered Loss and Damage pursuant to the AAI Liability Policies up to any applicable limits of indemnity”. The expression “Covered Loss and Damage” is defined in expansive terms in the proposed amended pleading. It includes loss and damage claimed not only by [the respondent], but also by some group members. [The insurer] did not suggest that it would be appropriate to separately determine whether that declaration should be made.

61 Second, the factual and legal basis upon which any question concerning insurance coverage could be determined separately was not fully explored and remained somewhat unclear. Any separate determination of a question concerning coverage would have to be answered on the premise that [the respondent’s] claim against [the insured] was or would be made out. While [the insured] agreed, “for the sake of expedience”, not to contest that the Vitrabond cladding affixed to [the respondent’s] buildings had the properties alleged by [the respondent], it nevertheless reserved the right to contest that issue if it was joined and the matter proceeded to trial. Moreover, save for that concession, [the insurer] did not agree or concede any other facts. [The respondent’s] claim against [the insured] is factually and legally complex and has many limbs. [The insurer’s] concession addressed only one aspect of [the respondent’s] claim.

62 Third, the lack of precision with which the separate question was framed, and the uncertainty and lack of clarity concerning the factual and legal basis upon which the question was supposed to be determined, is rendered more problematic and acute given that this is a representative proceeding. While it is perhaps conceivable that the question of coverage could be determined separately in respect of any claim arising from alleged damage to [the respondent’s] buildings, the question plainly could not be answered with respect to any claims relating to buildings owned or leased by other group members. There was no evidence before the Court as to how Vitrabond panels were affixed to the buildings of other group members, or whether they could be removed without causing any damage to the buildings.

63 Fourth, while the parties each adduced detailed and comprehensive expert evidence concerning the question whether [the respondent’s] buildings were damaged as a result of the affixation of the Vitrabond panels in circumstances where they will need to be removed, I am not satisfied that other evidence that may in due course be adduced at the trial may not also bear on that issue. [The respondent] will, for example, no doubt adduce evidence at trial which seeks to quantify the loss or damage it has suffered by reason of the need to remove the Vitrabond panels and remediate the buildings before replacement panels are affixed. It is difficult to imagine that that evidence will not bear on the question whether the affixation of the panels damaged [the respondent’s] property.

64 Fifth, the question whether AAI’s policies respond to [the insured’s] claim in respect of any compensation it may be found liable to pay [the respondent] arising from the affixation of the defective panels is a complex and difficult mixed question of fact and law. It involves questions of meaning, characterisation and degree. It is not a question ideally suited to separate determination. It would, of course, be different if the coverage issue simply turned on a question of construction of the AAI polices: cf *Chubb* at [12]. That, however, is not this case.

65 In all the circumstances, I consider that the separate and final determination of the coverage issue at this point in the proceedings would be inappropriate and fraught with difficulties. I do, however, propose to make clear and definitive findings in respect of the coverage issue, based on the detailed evidence before the Court, rather than resorting to findings based on what the evidence arguably established. That is likely to assist the parties in considering the approach they may take to the proceeding going forward.

66 I should also note that, given the way that the hearing of this interlocutory application has proceeded, I would be inclined to permit the parties to tender the evidence which has been adduced in respect of the interlocutory application (the expert reports and transcript) at the trial without the need to recall the experts. It may also be appropriate to impose limits on any further evidence that the parties may adduce in respect of the issues dealt with by the experts. I am inclined to the view that the parties should be permitted to re‑agiate (sic) those issues without regard to what has transpired in the course of the hearing of this interlocutory application. Those, however, are issues that can be addressed in due course during the further case management of the proceeding.

1. The primary judge’s decision to proceed on an interlocutory basis is the subject of the first ground of appeal in the draft notice of appeal.
2. The primary judge then addressed, in turn, the remaining issues and determined, in summary, that:
3. the respondent has an arguable case against the insured (J[44], [67] to [69]);
4. there is an arguable case that the policies respond to the insured’s claim or potential liability to the respondent and the insurer had not established an entitlement to disclaim liability under the policies (J[45], [46], [70] to [171] and [178] to [179]);
5. the insurer is not entitled to disclaim liability on the basis of any exclusion clauses (J[47], [172] to [177]); and
6. there was no reason not to exercise the discretion favourably to the respondent (J[49], [180]).
7. The primary judge identified the second of these issues as the central issue for determination and it is that issue to which most of the primary judgment was, and the proposed grounds of appeal are, addressed. The primary judge’s analysis of that issue is considered below.
8. The primary judge considered first whether there was “Property Damage” (i.e. physical loss, destruction or damage to tangible property). At J[70] to [79] the primary judge noted the four different species of “Property Damage” for which the respondent contended and the insurer’s contentions in response.
9. *First*, the respondent contended that the affixation of the panels caused damage to the buildings because the panels created a fire risk and therefore made the buildings unsuitable, or less suitable, for their intended use as habitation. In response, the insurer contended that there was no physical damage to the buildings merely by reason of a risk that the buildings may be damaged by fire at some point in the future.
10. *Secondly*, the respondent contended that the process of affixing the panels to the buildings caused damage to the structure of the buildings, because the panels were affixed to the subframes, and the subframes were in turn affixed to the concrete and steel stud walls of the building by screws or masonry anchors. In response, the insurer contended that any damage to the buildings caused in this way was not “unintended or unexpected” damage because the insured knew that the subframe was to be affixed in this way. Thus, the insurer contended, the damage was not caused by an “Occurrence” as defined in the policies. The insurer also submitted, in the alternative, that the damage was not caused by an “event” which was unintended or unexpected because the affixation of the panels was clearly intended.
11. *Thirdly*, the respondent contended that the process of removing the panels will inevitably result in damage to the subframes. In response, the insurer contended that any damage to the subframes that may result from the removal of the panels would not be damage that occurred during the periods of insurance, and instead is damage that may occur in the future (or amounts to no more than a risk that damage may occur in the future).
12. *Fourthly*, the respondent contended there was damage to the buildings or the subframes because of the risk, which existed from the point in time when the panels were affixed to the buildings via the subframes, that the structural integrity of the buildings or the subframes would be damaged when the panels came to be removed. In response, the insurer contended that the mere risk that some damage to the buildings or the subframes may occur at some time in the future is not physical damage that occurred during the periods of insurance.
13. At J[81] to [103], the primary judge considered the evidence, including expert evidence, concerning the contended “Property Damage”. That evidence was directed primarily at the question whether the affixation of the panels caused any relevant damage to the buildings, on the premise – conceded by the insurer for the purposes only of the application – that the panels are defective and will at some point have to be removed. At J[104] to [118] the primary judge made a series of factual findings. It is sufficient for present purposes to reproduce J[115] to [118]:

115 In summary, having regard to the whole of the evidence, I make the following factual findings concerning the removal of the existing Vitrabond panels from [the respondent’s] buildings.

116 First, the panels will not be able to be removed without causing some damage to the existing top hat subframe that is affixed to the concrete wall and steel stud walls of the buildings. The removal of the panels is also likely to damage some of the screws fixing the vertical and horizontal top hats together and some of the screws or anchors fixing the top hats to the cement and steel stud walls and compromise the connections achieved by those fittings or fixings.

117 Second, the inevitable result of the removal of the panels is that the existing top hat structure will also have to be removed from the buildings and disposed of. That is so for at least two reasons. The first reason is that the top hat subframe and associated screws and fittings will be damaged in the course of the removal of the panels. It would not be feasible to remove the panels in such a way as to preserve the top hat subframe for reuse. The second reason is that, even if it was possible to remove the panels without damaging the top hat subframe, that subframe could not, in any event, be utilised for the purpose of affixing any replacement panels, either by means of some type of adhesive system or via a cassette system. A new bespoke affixation system will have to be designed for the purpose of affixing the replacement panels. In short, the existing top hat structure, which was fit for purpose at the time of the original affixation of the Vitrabond panels, would effectively have to be destroyed or otherwise disposed of.

118 Third, once the panels and existing top hat subframe are removed from the building, there will almost inevitably be a need to remediate parts of the building before any new subframe or affixation system and replacement panels are affixed to the building. That remediation is likely to involve, at the very least, the filling of holes in the concrete and steel stud wall frames and the repair or replacement of the existing sarking.

1. At J[119] the primary judge noted the following:

The parties each relied on authorities concerning the scope and application of property damage clauses in insurance contracts. It is, however, unnecessary to address the authorities in painstaking detail. That is because both parties acknowledged that it is not possible to distill from the authorities “a simple coherent definition or universally applicable rules capable of being applied to varied factual circumstances to reach deduced logical results”: cf ***R & B Directional Drilling*** *Pty Ltd (ACN 163 164 234) (in liq) v CGU Insurance Ltd (No 2)* (2019) 369 ALR 137; [2019] FCA 458 at [101]. Ultimately the question whether a property damage clause of the sort in issue in this case responds to the claim against [the insured] is a question of fact and degree. Many of the authorities referred to by the parties turned on their own unique and distinguishable facts. The more contentious cases are those where the physical damage is alleged to be a loss of functionality. It is, nevertheless, useful to provide a brief summary of some of the relevant authorities.

1. The primary judge then considered those authorities and in particular ***Bundy Tubing*** *Company v Royal Indemnity Company* 298 F2d 151 (6th Cir, 1962); *Canadian Equipment Sales & Service Co Ltd v Continental Insurance Co* (1975) 59 DLR (3d) 333; ***Carwald*** *Concrete & Gravel Co. Ltd v General Security Insurance Co. of Canada* (1985) 24 DLR (4th) 58; ***Austral Plywoods*** *Pty Ltd v FAI General Insurance Co Ltd* [1992] QCA 4; (1992) 7 ANZ Insurance Cases 61‑110; *Armstrong World Industries Inc v Aetna Casualty and Surety Co* 45 Cal App 4th 1 (Cal Ct App 1996); 52 Cal Rptr 2d 690 (1996); *Pilkington United Kingdom Ltd v CGU Insurance plc* [2004] EWCA Civ 23; [2005] 1 All ER (Comm) 283; and *R & B Directional Drilling Pty Ltd (in liq) v CGU Insurance Ltd (No 2)* [2019] FCA 458; (2019) 369 ALR 137 (at J[120] to [148]).
2. Having done so, the primary judge reasoned (at J[149] to [157]):

**Analysis and finding – there has been physical damage to tangible property**

149 As was the case in *R & B Directional Drilling* (see [134]), the resolution of the question concerning the engagement of the coverage clause in the AAI policy or policies is not easy. The question involves matters of degree and characterisation and the answer is by no means straightforward. The authorities are not entirely consistent and certainly do not supply any coherent rule or rules that can simply be applied to the present circumstances.

150 I have nevertheless concluded that the facts and circumstances of this case are such that the better view is that the affixation of the defective Vitrabond panels to [the respondent’s] buildings caused “physical damage … to tangible property”, that property being the buildings (specifically the concrete walls, steel struts and sarking that together comprise the walls of the buildings), as well as the top hat subframe that was affixed by nails and screws to the walls of the buildings and upon which the panels were themselves affixed in a manner that was intended to be permanent. The affixation of the defective panels therefore caused or resulted in “property damage” for the purposes of cl 2.1 of AAI’s insurance policies.

151 There is no dispute, at least for the purposes of the current application, that the Vitrabond panels that were affixed to [the respondent’s] buildings had qualities or characteristics that made them defective and unsuitable for affixation to residential buildings. The panels were and are, in summary, combustible. As a result, they fail to comply with relevant building codes and increase the risk of loss of life and damage to the building in the event of a building fire. Two considerations flow from the fact that the panels are defective and unsuitable for those reasons.

152 First, the affixation of the panels to the buildings made the buildings less suitable, in a substantial and material way, for the purpose for which the buildings were intended, being for use as residential housing. That is not to say that the buildings are uninhabitable. People are still residing in them. They are, however, undoubtedly less suitable for ongoing habitation because, while the panels remain affixed to the buildings, the buildings are essentially unsafe because there is a risk that if there is a building fire, the fire will spread more rapidly and will be more severe than would otherwise be the case. It could not seriously be suggested that the affixation of combustible panels to a residential building in such circumstances does not make the building less suitable for use as a residential building.

153 Second, the panels will have to be removed. There is no dispute that [the respondent] has been ordered to remove the panels.

154 The fact that the affixation of the panels made the buildings substantially and materially less suitable for their intended use does not alone establish that the affixation caused property damage. It is necessary to have regard to two further important facts.

155 First, the means by which the panels were affixed to the buildings caused physical damage to the buildings themselves. The panels were affixed by first affixing a top hat subframe to the buildings. That top hats were affixed by means of nails or screws to both the concrete walls and steel stud walls of the buildings. That resulted in nail or screw holes in the concrete and steel walls of the buildings, as well as holes in the sarking that covered the walls. If and when the top hat structure is removed, as a result of the need to remove the panels from the buildings, the nails and screws will also inevitably have to be removed, leaving possibly thousands of holes throughout the buildings’ structural walls.

156 [The insurer’s] assertion that the damage to the building structures caused by the insertion of nails and screws was trivial or superficial and does not constitute any change to the physical state of the buildings, or involve any interference with the integrity of the building, is unsupported by any cogent evidence. It is also unsupported by authority. The insertion of nails and screws into the concrete and steel walls of the buildings could fairly be said to have changed or altered the physical state of the buildings in a harmful or deleterious way. Even if the authorities supported the application of a *de minimis* rule or principle, there is no sound basis upon which to find that the creation of possibly thousands of redundant holes in the walls of a building was *de minimis*.

157 Second, for the reasons given in detail earlier, the evidence before the Court establishes, on the balance of probabilities, that the removal of panels will result in damage to, if not the destruction of, at least some of the top hat subframe. [The insurer’s] contention that the panels can be removed from the top hats without damaging the top hats has no merit and must be rejected. The same can be said concerning [the insurer’s] contention that the existing top hat structure could be retained and reused to support replacement panels. Even if, contrary to that finding, it was possible to remove the panels without damaging the top hats, the top hats would not in any event be able to be used as a means by which replacement panels could be affixed to the buildings. The result is that the existing top hat structure will have to be removed and disposed of and a new bespoke system will have to be designed to affix the replacement panels.

1. The primary judge then reasoned as follows:

158 Having regard to those factual findings, the circumstances of this case are relevantly indistinguishable from the circumstances considered in *Austral Plywoods*. The defective plywood panels in *Austral Plywoods* were affixed to the boat’s hull by screws and glue. That means of affixation interfered with the integrity of the hall (sic). Likewise, the defective Vitrabond panels were affixed to the buildings by means of top hats which were nailed or screwed into the structural walls of the buildings and the panels were glued, in a manner that was intended to be permanent, to the top hats. The affixation of the defective plywood panels in *Austral Plywoods* made the hull unsuitable, or less suitable, for its purposes and required the restoration of the physical state of the hull upon the removal of the defective plywood. Likewise, the affixation of the defective Vitrabond panels made the buildings less suitable for their intended use as residential premises. Removal of the Vitrabond panels will require restoration of the damage caused by the affixation and removal of the existing top hats and panels.

159 There are also significant parallels between the circumstances of this case and both *Carwald* and *Bundy Tubing*. In *Carwald*, the pouring of defective concrete over equipment which rendered the equipment useless for its purpose was held to have constituted physical injury to that tangible property. In *Bundy Tubing*, the installation of defective tubing in a heating system in a house was held to have caused damage to the house, because a house with a heating system which did not work was not suitable for habitation. In this case, the installation of defective (combustible) panels damaged the top hat subframe because, once the panels were removed, that structure was useless for its purpose and could not be reused. The installation of combustible and therefore dangerous panels also had a serious impact on the suitability of the buildings for ongoing habitation. It made long term occupation of the buildings dangerous.

160 While it is true that the policy in Bundy did not state that the injury had to be “physical” injury, as Allsop CJ noted in *R & B Directional Drilling*, “the home [in *Bundy Tubing*] could be seen to be physically injured by being made unsuitable for winter habitation” (at [83]). It is also true that the buildings in this case are still occupied. That, however, does not alter the fact that the affixation of the panels makes the buildings less suitable for occupation because of the danger that they pose. That is why [the respondent has] been ordered to have the panels removed from the building.

161 The affixation of combustible panels to a residential building can also, broadly speaking, be compared with the integration of a dangerous or toxic substance, such as asbestos, into a building. Just as the integration into a building of a potentially hazardous material such as asbestos results in physical injury to the building at the time of installation (even if at that time the dangers were not realised, or the toxic substances had not been released: cf *Armstrong* at [32] and [43]), so the affixation to a building of potentially hazardous combustible panels can be seen to result in physical damage to the building at the point of installation. It is immaterial that the dangers posed by the combustible panels were not appreciated at the time of affixation. The panels posed an immediate danger to the occupants of the buildings and made the buildings substantially less suitable for their intended use at the point of affixation. It is equally immaterial that the panels may have served their architectural and waterproofing purposes or functions. They were nonetheless unsuitable because they were combustible and created an immediate danger to the occupants of the building.

162 While I consider that this case is somewhat analogous to the cases involving the incorporation of asbestos into buildings, my conclusion does not rely heavily on those cases. The asbestos cases concern a rather unique circumstance, and the various courts’ findings in the asbestos cases are not always consistent. In *Pilkington*, the critical feature of the asbestos cases was said to be that the properties of asbestos was such that its incorporation into a building had an “instant and damaging effect on the property” as opposed to a propensity to cause damage in the future. In *Armstrong World Industries*, however, the California Court of Appeal held that the incorporation of asbestos in a building resulted in a physical injury to the building, even if asbestos fibres were not immediately released. There would appear to be at least some analogy between the danger posed by the incorporation of asbestos in a building in those circumstances, and the affixation to a building of combustible panels which heightened the risk of a serious fire. The affixation of the panels had an instant and damaging effect on the building because the panels posed an immediate and unacceptable danger to the residents of the building.

163 It should also be emphasised that, insofar as the physical damage to property comprised or included the damage to the top hat substructure, that damage, contrary to [the insurer’s] submission, occurred at the time of the affixation of the defective panels. While the top hat substructure remains in place and will not be actually damaged until the panels are removed, the damage may nevertheless relevantly be taken to have been caused when the defective panels were affixed to the top hats by means of high strength double-sided tape that was intended to provide a permanent bond.

164 By way of analogy, the affixation of the defective plywood to the hull in *Austral Plywoods* would not have been considered to have caused damage to the hull until it was realised that the plywood was defective and had to be removed. The damage was nonetheless considered to have been caused at the point of affixation. Similarly, in *Carwald* the equipment was taken to have been damaged when the defective concrete was poured, and in *Bundy Tubing* the damage to the house was taken to have occurred when the defective tubes were installed in the hearing system. So too here. The damage to the buildings and the top hats caused by the affixation of the panels may only materialise at the point when the panels are removed, yet the damage may be considered to have occurred at the point of the affixation.

165 It follows that the physical damage to the top hat substructure may effectively be taken to have occurred during the period of insurance. Even if that were not the case, for the reasons already given, there could be no doubt that the damage to the buildings, including the damage to their concrete and steel stud walls, plainly occurred at the time the panels were affixed and therefore during the period of insurance.

166 The circumstances of this case are distinguishable from the circumstances in both *R & B Directional Drilling* and *Pilkington*. In *R & B Directional Drilling*, the insertion and subsequent removal of the defective conduit pipes and concrete grouting did not cause any physical damage to the tangible property in question, being the steel sleeve. In *Pilkington*, the defective glass panels were not removed and the safety measures that were taken so as to avoid the risk of shattering glass caused no damage to the terminal building. In this case, the affixation of the panels resulted in damage to the buildings (because it involved the affixation of a top hat structure, which involved the need to drive nails or screws into the concrete and steel stud walls of the buildings) and the panels are not able to be removed without causing injury to the property. Removal of the panels and the top hats will ultimately result in buildings which are impacted by potentially thousands of redundant nail or screw holes, as well as damaged and redundant top hats.

1. The primary judge next turned to the question of whether there had been an “Occurrence” (i.e. an event which results in “Property Damage” that was neither expected nor intended from the insured’s standpoint). His Honour identified that the words “neither expected nor intended” refer to the “Property Damage”, not the “event”, citing *Weir Services Australia Pty Ltd v AXA Corporate Solutions Assurance* [2018] NSWCA 100; (2018) 359 ALR 314 at 336 to 337 [103] (Barrett AJA, Meagher and White JJA agreeing). At J[170] to [171] his Honour reasoned:

170 ... there could be no doubt that [the insured] did not expect or intend that the affixation of the panels would cause any relevant damage to the buildings. That is because it did not expect or intend that the panels would be combustible and defective and therefore did not expect or intend that they would have to be removed from the buildings. The court in *Bundy Tubing* disposed of an argument akin to the one advanced by [the insurer] in this case as follows (at 153):

The failure of the tubing in the heating system in a relatively short time was unforeseen, unexpected and unintended. Damage to the property was therefore caused by accident.

171 [The insurer’s] contention that the relevant property damage was not caused by an occurrence must similarly be rejected. [The insured] plainly did not expect or intend that the panels which were affixed to the buildings were combustible and therefore defective, or that they would need to be removed, or that the removal of the panels would expose and cause damage to the buildings and top hat subframe, or that the affixation of the defective panels would render the buildings substantially less suitable for occupation.

1. After considering some exclusion clauses in the policies and deciding that none were applicable, the primary judge expressed the following conclusions as to whether the policies respond (at J[178] to [179]):

178 For the detailed reasons that have been given, it is at the very least arguable that [the insurer’s] policies respond to [the insured’s] claim in respect of the compensation it may be found liable to pay [the respondent] arising from the affixation of defective Vitrabond panels to its buildings. On the basis of the evidence currently before the Court, I am satisfied that [the insured’s] claim could properly be characterised as a claim in respect of amounts which it might become liable to pay as compensation in respect of “property damage” happening during the period of insurance and caused by an “occurrence”. The property damage comprised physical loss, destruction or damage to [the respondent’s] tangible property, that property being its buildings, as well as the top hat subframe which had been affixed to the buildings. The occurrence was the affixation of the panels. The loss, destruction or damage was not expected or intended from [the insured’s] standpoint.

179 I am not satisfied, on the basis of the evidence currently before the Court, that [the insurer] has established that it is entitled to disclaim liability under its policies.

1. The primary judge then noted that there were no discretionary reasons for refusing leave and concluded that the respondent had established that leave should be granted under s 5 of the Third Party Claims Act (J[180] to [181]).

# D. The application for leave to appeal

1. As noted above, the insurer seeks leave to appeal the joinder order and the Third Party Claims Act order.
2. It was common ground that both orders were interlocutory and thus that leave to appeal is necessary. Leave is sought on the grounds that: (1) by reason of the grounds of appeal stated in the draft notice of appeal, the primary judgment is attended by sufficient doubt to warrant the granting of leave to appeal; and (2) the orders made by the primary judge would cause substantial injustice to the insurer if they were allowed to stand. These grounds reflect the views expressed by the Full Court of this Court (Sheppard, Burchett and Heerey JJ) in *Decor Corporation Pty Ltd v Dart Industries Inc* [1991] FCA 844; (1991) 33 FCR 397 at 398 to 399 which have been followed on many occasions as to the considerations to be taken into account on an application for leave to appeal from an interlocutory decision. Both grounds must be proven and they are inter-related.

## D.1 The joinder order

1. The respondent filed a notice of objection to the competency of the appeal by which it objected on the basis that no appeal is available from the joinder order, by dint of s 24(1AA)(b)(i) of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**), which provides relevantly that an appeal must not be brought from a judgment of the Court constituted by a single Judge exercising the original jurisdiction of the Court to join a party.
2. As s 24(1AA)(b)(i) of the FCA Act operates so as to prohibit any appeal from the joinder order, it would be inappropriate to grant leave from that order in respect of any of the proposed grounds of appeal. It follows that the application seeking leave to do so should be refused. Section 24(1AA)(b)(i), however, does not prohibit any appeal from the Third Party Claims Act order.

## D.2 The Third Party Claims Act order

1. It is convenient to consider whether the Third Party Claims Act order is attended by sufficient doubt by reference to the first draft ground of appeal; and then by reference to the remaining draft grounds of appeal.

### D.2.1 The first draft ground of appeal – should the primary judge have determined on a final basis that the insurer was entitled to disclaim liability?

1. The first draft ground of appeal is that the primary judge ought to have determined on a final basis that the insurer was entitled to disclaim liability under the contract of insurance within the meaning of s 5(4) of the Third Party Claims Act.
2. His Honour’s reasons for determining the application on an interlocutory basis are set out at J[55] to [66] (see [16] above). As his Honour’s decision whether to determine the application on either an interlocutory or a final basis involved the exercise of a discretion, the insurer must demonstrate that the primary judge erred in the manner described in *House v The King*[1936] HCA 40; (1936) 55 CLR 499 at 505 (Dixon, Evatt and McTiernan JJ, Starke J agreeing).
3. The primary judge’s approach of considering whether the respondent’s claim that the policies respond was arguable is consistent with a strong line of authority.
4. In *AFG Insurances v Andjelkovic* (1980) 47 FLR 348, Blackburn CJ, sitting in the Supreme Court of the Australian Capital Territory, considered an application pursuant to s 26 of the *Law Reform (Miscellaneous Provisions) Ordinance 1955* (ACT), which was the analogue of s 6 of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW), being the predecessor to s 5 of the Third Party Claims Act. At 355 to 356, his Honour said:

The main purpose of the provision requiring leave to commence the statutory action is to prevent the substitution of a statutory claim for a claim against the insured where the latter is available and will apparently be effective. Leave may also be refused where the applicant’s claim is unarguable, that is, where the applicant’s contention that the statutory conditions for the vesting in him of a right of action have been fulfilled could not possibly succeed. But if on such an issue there is an argument in the applicant’s favour which could be seriously put, then in my opinion, on the proper construction of the Ordinance, leave should be granted and the issue should be determined in the action in any available way.

In the case before me the applicant relied in the alternative on a construction of the contract which, on the facts, entailed that the insured was indemnified against her claim. I am of opinion that this contention cannot be said to be an unarguable one. I therefore expressly refrain from expressing any further opinion on it, notwithstanding that a substantial argument on each side was put to me.

1. Blackburn CJ found that the claim presented by the third party in that case was arguable. An appeal to the Full Court of this Court (Franki, McGregor and Kelly JJ) succeeded on the basis that the Full Court considered that the claim presented by the third party was not arguable: see *AFG Insurances Ltd v* ***Andjelkovic***[1981] FCA 119; (1981) 54 FLR 398. At 399 to 400, the Full Court set out the above passage from the judgment of Blackburn CJ. At 400 the Full Court stated that:

Section 26(3) commands the court not to grant leave in certain circumstances. It is not easy to decide precisely what is embraced in the words which describe the circumstances where the court is not to grant leave. In our opinion the court has a general power to grant leave in all cases which do not fall within the provision that it shall not grant leave and in which it is made to appear by evidence available in the application that there is an arguable case of liability against the insured, being a liability against which the insured is indemnified by a contract of insurance in force at the time of the happening of the event said to give rise to the claim. **We accept the relevant test proposed by the respondent which is really the test formulated by the primary judge, namely, has the respondent presented a case which is at least arguable?**

(emphasis added)

1. An appeal to the High Court of Australia was dismissed, with Mason ACJ, Murphy, Wilson, Deane and Dawson JJ agreeing with the Full Court’s conclusion that the case advanced was not arguable: *Andjelkovic v AFG Insurances Ltd* (1982) 58 ALJR 52.
2. The passage from the Full Court in *Andjelkovic* set out at [42] above has been adopted and applied numerous times in this Court and in the Court of Appeal of the Supreme Court of New South Wales: see e.g., ***Dixon*** *v Royal Insurance Australia Ltd* (1998) 90 FCR 390 at 398 to 399 (Miles, Lee and Lehane JJ); *Travel Compensation Fund v FAI General Insurance Co Ltd*[1999] FCA 1214 at [2] (Burchett, Lehane and Hely JJ); *Macquarie Underwriting Pty Ltd v Permanent Custodians Ltd*[2007] FCAFC 60; (2007) 240 ALR 519 at 521 to 522 ([10] to [15]) (Allsop and Buchanan JJ); and *Energize Fitness Pty Ltd v Vero Insurance Ltd* [2012] NSWCA 213 at [48] to [49] (Campbell JA, Allsop P and Meagher JA agreeing). In *Dixon*, after setting out the above passage from *Andjelkovic*, the Full Court continued (at 399):

Nothing was said by the High Court, on further appeal *Andjelkovic v AFG Insurances Ltd* (1982) 49 ALR 245, which cast any doubt on those propositions (the appeal to the High Court was dismissed). **The effect of what this Court said was that, apart from one set of circumstances (the boundaries of which are uncertain) in which the Court is bound to refuse leave, leave will be granted to a plaintiff whose case against an insurer is “arguable”, having regard to matters (plainly enough) both going to the insured’s liability to the plaintiff and relevant to the insurer’s liability under the policy**. That reasoning has been applied, or referred to with approval, on numerous occasions.

(emphasis added)

1. The insurer contended, in its reply submissions, that the primary judge misdirected himself as to the statutory test applicable on a joinder application and in particular applied a test in which it was sufficient for the respondent to establish an arguable case, without engaging with s 5(4) of the Third Party Claims Act which section required the refusal of the application if the insurer established an entitlement to disclaim liability.
2. The insurer’s submission posits a false dichotomy. The question whether an insurer is entitled to disclaim a liability is not separate from, but forms part of, the inquiry as to whether there is an arguable case. If the insurer can establish such an entitlement then there can be no arguable case. *Andjelkovic* is an example. It is clear in any event that the primary judge recognised the effect of s 5 of the Third Party Claims Act including that the Court “must refuse leave if the insurer can establish that it is entitled to disclaim liability under the policies” (J[37]) and considered whether the insurer had established an entitlement to disclaim liability but concluded that it had not done so.
3. The insurer also submitted that the primary judge erred in making “clear and definitive findings in respect of the coverage issue, based on the detailed evidence before the Court, rather than resorting to findings based on what the evidence arguably established” (J[65]) and that this approach risks prejudicing the insurer’s conduct of its defence. As noted above, the primary judge made detailed findings as to the effect of removing the panels. This course was available to his Honour and he did not err in doing so. Further, as the primary judge explained at J[66] no final decision had been made as to the evidence that may be adduced at a final hearing; and as the primary judge noted at J[179] his determination that the insurer had not established an entitlement to disclaim liability had been made on the evidence “currently before the Court”.
4. Thus, the primary judge’s decision to determine the application before him on an interlocutory, rather than a final, basis is not attended by sufficient doubt to warrant a grant of leave to appeal.

### D.2.2 The remaining draft grounds of appeal - grounds 2 to 11

1. It is important to note that the primary judge made the Third Party Claims Act order on the basis of his resolution of the issues identified at [15] above including – relevantly for the purposes of the present application – that it was *arguable* that the policies respond. The primary judge did not purport finally to determine the question of whether the policies in fact respond and expressly limited his determination to whether such a proposition was *arguable*: see in particular J[38], [45] and [55].
2. We note that the primary judge stated at J[65] that he proposed to make “clear and definitive findings” in relation to the “coverage issue”, based on the detailed evidence before the Court, rather than “resorting to findings based on what the evidence arguably established”. As explained above, his Honour then considered the expert evidence that the parties had adduced from façade engineers and builders concerning the manner in which the insured’s panels were affixed to the buildings and the means by which they could be removed (J[81] to [103]) and then made factual findings based on the experts’ reports and cross-examination (at J[104] to [118]).
3. The significance of the “clear and definitive” factual findings made by the primary judge needs to be assessed in the context of his Honour’s observations at J[66] that while he would be “inclined to permit” the parties to tender the expert reports and transcript of their cross‑examination at trial, without the need to recall the experts, and that it “may also be appropriate” to impose limits on any further evidence in respect of the issues addressed by the experts, he was “inclined to the view” that the parties should be permitted to “re-agitate those issues without regard to what had taken place in the course of the hearing of the interlocutory application”. His Honour also observed at J[63] that he was not satisfied that further evidence bearing on whether the buildings were damaged as a result of the affixation of the panels might not also be adduced at trial. On balance, we consider that the better view is that these observations make plain that the “clear and definitive” findings were made for the purposes of the interlocutory hearing, namely whether it was arguable that the policies respond, and his Honour did not proceed on the basis that the parties were precluded from seeking to revisit or re-agitate these issues at the final hearing.
4. His Honour ultimately found that it was “at the very least arguable” that the policies respond (J[178]) and that he was not satisfied “on the basis the evidence currently before the Court”, that the insurer had established an entitlement to disclaim liability under the policies (J[179]).
5. Thus, the assessment of sufficiency of doubt must be made as against the primary judge’s conclusion that it is *arguable* that the policies respond (including by reason of the non‑establishment of an entitlement to disclaim liability) and not whether the policies in fact respond, a question which is yet to be determined.
6. It is convenient – and consistent with the manner in which the application was argued – to consider proposed appeal grounds 2 to 11 together, in determining whether the primary judge’s conclusion that the proposition that the policies respond is arguable is attended by sufficient doubt to warrant a grant of leave to appeal.
7. The starting point is that the insuring clause responds when (relevantly) there is “Property Damage ... happening during the Period of Insurance ... caused by or arising out of an Occurrence”.
8. The insurer’s submissions focus upon two species of damage and contend that the insuring clause does not respond to either. The *first* is the damage to the buildings caused by the insertion of nails and screws into the outside of the buildings so as to support the subframes and in turn the panels (see J[155] to [156]).
9. The insurer accepts that such damage occurred during a period of insurance and that it was property damage. However, the insurer contends that such damage was expected and intended from the insured’s standpoint, and as such the definition of “Occurrence” is not satisfied.
10. The *second* species of damage upon which the insurer’s submissions focus is the damage flowing from the need to replace the panels (see J[157]). On the primary judge’s approach, such damage was physical damage which occurred during a period of insurance because the need to remove the panels was immediate and would cause damage to the subframes (see J[150], [163] and [165] to [166]). The insurer contends that no such damage occurred in a period of insurance; that during the periods of insurance there was only a risk of such damage; and that no property damage will be suffered unless and until the panels are removed (which will necessarily occur outside of any period of insurance).
11. The insurer’s submissions take an overly narrow view of the primary judge’s conclusions as to property damage caused by the installation of the panels, by focussing upon particular passages of the primary judgment, at the expense of a fair understanding of the whole of that judgment. Read as a whole, it is plain that the primary judge considered it to be at least arguable that the policies respond because, *inter alia*, there had been an immediate physical alteration or change to the buildings by dint of the affixation of the panels which affixation had caused a physical alteration to the buildings *and* had rendered the buildings less suitable for their use as residential buildings (see, e.g., J[119], [151] to [152], [154], [158], [161] and [162]).
12. The proposition that the primary judge considered the relevant property damage to include the buildings having been rendered less suitable for use as residential buildings is underscored by his Honour’s detailed analysis of the authorities considered at J[120] to [148], which addressed various scenarios in which property damage had (or had not) been suffered when an object was rendered unsuitable or less suitable for its intended use.
13. It is unnecessary (and undesirable) for the purposes of this application for leave to appeal to address these authorities or the parties’ submissions concerning them in any detail, particularly as the facts in the present case are yet to be finally determined and the authorities considered at J[120] to [148] to some extent depend upon their particular facts. As the primary judge noted at J[119] “[m]any of the authorities referred to by the parties turned on their own unique and distinguishable facts. The more contentious cases are those where the physical damage is alleged to be a loss of functionality”. Nevertheless, those authorities underscore the proposition that the second category of damage is *arguable*. In particular, the primary judge indicated at J[158] that he considered the circumstances in the present case to be relevantly indistinguishable from the circumstances in the decision of the Court of Appeal of the Supreme Court of Queensland in *Austral Plywoods*, which the primary judge had discussed at J[121] to [123]; and at J[159], the primary judge considered there to be “significant parallels” between the present case and each of *Carwald* and *Bundy* *Tubing*, which the primary judge had discussed at J[125] to [126] and [137] to [140] respectively. The insurer contended that these authorities were variously wrong, distinguishable, or ought not be followed, which rather demonstrates the arguability of the proposition, based upon such authorities, that the policies respond.
14. Consistent with the authorities considered by the primary judge, it is at least arguable that damage to property occurs when there is “a physical alteration or change, not necessarily permanent or irreparable, which impairs the value or usefulness of the thing said to have been damaged”: see ***Ranicar*** *v Frigmobile Pty Ltd; Ranicar v Royal Insurance Pty Ltd* [1983] Tas R 113 at 116; (1983) 2 ANZ Ins Cas 60-525 at 78,000 (Green CJ). As Jackman J noted in *Capral Limited v Insurance Australia Limited t/as CGU Insurance* [2024] FCA 775 at [91], this conception of property damage has been applied or cited with approval by intermediate appellate courts. It is at least arguable that the affixation of the panels effected an immediate physical alteration or change to the buildings which impaired their usefulness as residential buildings and as such caused property damage to those buildings in the sense described in *Ranicar*.
15. Although it is arguable that the policies respond, whether or not they will ultimately be found to do so is not presently discernible.
16. The insurer also faintly contended that the insured knew that the panels were combustible and thus damage in the form of impairment to the use of the building was expected and intended from the insured’s standpoint. This contention was based upon certain paragraphs of the insured’s defence and upon a certificate issued by the CSIRO which identified the insured as the sponsor of the panels and described the panels as combustible.
17. These matters *may* establish knowledge on the part of the insured that the panels were combustible. However, it does not necessarily follow that impairment to the use of the building was expected and intended from the insured’s standpoint. Further, questions of corporate attribution of knowledge may arise. In short, the insurer’s contention is arguable but the insurer has not established a right to disclaim at this stage.
18. Thus, the primary judge’s conclusion that it is arguable that the policies respond is not attended by sufficient doubt to warrant a grant of leave to appeal.

## D.3 Substantial injustice

1. In any event, the insurer has not established – on the premise that the primary judge erred and thus that the insurer was wrongly joined to the proceeding – that a refusal of leave to appeal would cause substantial injustice to the insurer.
2. No substantial injustice would follow from a refusal to grant leave to appeal in circumstances where: (1) the question whether the policies respond has not been determined on a final basis and the insurer will have the opportunity at the final hearing to contend that the policies do not in fact respond; (2) if the insurer ultimately establishes that it ought not to have been joined to the proceeding because the policies did not respond, then it will have a *prima facie* entitlement to payment of its costs; and (3) the insurer has not suggested that it is unable to bear its costs of the proceeding – which it estimates to be in the order of $1.6 million – or that the bearing of such costs would cause it any difficulty. It is, after all, a substantial insurance company and litigation forms part of its business. Of course, the insurer may be unable to recover its solicitor and client costs, but this would not be a substantial injustice.
3. Although, as the insurer submitted, courts may be more willing to grant leave and thus to spare a party the time and trouble of a trial in circumstances where the appeal has substantial prospects of success, for the reasons earlier discussed, this is not such a case.
4. The insurer also submitted that it would be substantially prejudiced if the primary judgment were allowed to stand because the primary judge provisionally indicated that it may be appropriate to impose limits on further evidence to be adduced on the issues that were dealt with by the expert witnesses (J[66]); and that such a prejudice could not be cured by costs orders. That submission is rejected. The primary judge’s indication is expressly provisional and the insurer will have the opportunity to make submissions to the primary judge as to whether any such limitation ought be imposed. It is also clear that the primary judge did not purport to make a final determination on any issue before him and it remains open to the insurer to establish at the final hearing that the policies do not respond.

# F. Conclusion

1. For the reasons set out above, leave to appeal should be refused. Costs should follow the event.

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| I certify that the preceding seventy-one (71) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices Markovic, Halley and Goodman. |

Associate:

Dated: 4 February 2025