

This and the following 18 pages are the Respondent's Submissions for publication pursuant to paragraph 27 of Practice Note NO SC CA 1

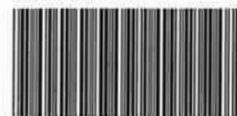
Signed:



Charles Baragawanath Thornley
Solicitor for the Respondent



Filed: 3 October 2025 9:14 AM



D00028J11R

Written Submissions

COURT DETAILS

Court	Supreme Court of New South Wales, Court of Appeal
List	Court of Appeal
Registry	Supreme Court Sydney
Case number	2025/00011620

TITLE OF PROCEEDINGS

First Appellant	Tanwar Institute of Professional Studies Pty Ltd ATF Tanwar Family Trust
First Respondent	Gordian RunOff Pty Ltd

FILING DETAILS

Filed for	Gordian RunOff Pty Ltd, Respondent 1
Legal representative	Charles Baragawanath Thornley
Legal representative reference	
Telephone	8020 7607
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ATTACHMENT DETAILS

In accordance with Part 3 of the UCPR, this coversheet confirms that both the Lodge Document, along with any other documents listed below, were filed by the Court.

Written Submissions (2025.10.02 - Respondent Submissions.pdf)

[attach.]

***Gordian Runoff Limited ats Tanwar Institute of Professional Studies Pty Limited atf
Tanwar Family Trust***

Respondent's Written Outline of Submissions

Introduction

1. By an Amended Notice of Appeal, Tanwar Institute of Professional Studies Pty Limited (**Appellant**) appeals from the orders of his Honour Judge Weber SC of the District Court of New South Wales made on 13 December 2024: [2024] NSWDC 586 (**Primary Judgment**). His Honour dismissed the Appellant's claim and ordered that the Appellant pay the Respondent's costs.
2. The Appellant's appeal should be dismissed including for two alternative reasons. **First**, the Pipes that were damaged formed part of the land and are not a 'Building' for the purposes of the Policy. **Second**, the Compliance Works performed changed the risks that the insurer had undertaken to accept and, on either the terms of the Policy or by operation of s 54(2) of the *Insurance Contracts Act 1984* (Cth) (**Act**), the insurer was entitled to reduce its liability in respect of the claim to nil.
3. This written outline is organised as follows:

	Section	Paragraphs	Pages
A	Background	[4] to [27]	1 to 7
B	Primary Judgment	[28] to [36]	8 to 10
C	Grounds of Appeal	[37] to [66]	10 to 18
D	Orders	[67] to [68]	18

A. Background

4. The following summary of events derives from the Primary Judgment and is supplemented so far as necessary by references to the evidence in the Blue Appeal Book.

Parties

5. The Appellant is the registered proprietor of a property at Lewisham (**Property**). The improvements to the Property include a gas station forecourt, 4 fuel pumps and related infrastructure, a main building shop front, and a mechanic's garage. The fuel lines are buried 300mm beneath the ground (**Pipes**).¹
6. The Property is leased to Tanwar Enterprises Pty Limited (**Tanwar Enterprises**) in consideration for a payment of \$12,500 per month (excluding GST).² Mr Rajesh Tanwar is the sole director and shareholder of each of these entities. Tanwar Enterprises operated a petrol station business station from the Property.³
7. The Appellant entered into a policy of insurance described as a Steadfast First Option Business Insurance Policy with number GA125012331BUSP with Calliden Insurance Limited, initially underwritten by Great Lakes Insurance SE trading as Great Lakes Australia (**Policy**). By a scheme confirmed by the Federal Court of Australia on 29 June 2020, Gordian Runoff Limited (**Gordian**) was substituted as insurer under the Policy.⁴ Accordingly, Gordian is the **Respondent**.

Chronology

8. On or about 30 June 2015, the Environmental Protection Authority (**EPA**) notified the Appellant that vapour one recovery control equipment (**Compliance Works**) must be fitted to petrol tanks by 1 January 2015 (**EPA Notice**).⁵ The EPA extended the time for compliance until November 2015.⁶
9. The Appellant renewed the Policy on **17 October 2015**. The Appellant did not disclose the receipt of the EPA Notice to the insurer at the point of renewal.
10. Because he could not engage any specialist firm to do this work, Mr Tanwar decided that the Appellant would do the work itself.⁷ By Mr Tanwar's own assessment of his abilities,

¹ Blue Appeal Book at pages 2 – 3 and 5; Tanwar Affidavit of 15.12.2023, [9] and [21].

² Blue Appeal Book at page 98.

³ Black Appeal Book at page 26, T26.41-50

⁴ Blue Appeal Book at pages 454 - 455; Butler Affidavit of 27.05.24, [8] to [10].

⁵ Blue Appeal Book at pages 139 - 140.

⁶ Blue Appeal Book page 5; Tanwar Affidavit of 15.12.2023, [20].

⁷ Blue Appeal Book page 4 - 5; Tanwar Affidavit of 15.12.2023, [19] – [20].

he was qualified to conduct the works.⁸ The Appellant commenced work in response to the EPA Notice in November 2015 and completed those works in either April⁹ or May 2016¹⁰. The works were significant¹¹ and included excavating concrete, cutting away the existing metal fuel lines and installing new UPP fuel lines (being the Pipes). Mr Tanwar had also, prior to undertaking the works, obtained a quote from Gilbarco-Veeder-Root, which estimated the cost of the Compliance Works to be \$261,418.¹²

11. Prior to re-opening of the petrol station to customers, it was necessary to recalibrate the petrol pumps because they had been turned off to undertake the works in response to the EPA Notice.¹³ It was at this point that a problem arose, specifically that the pumps were ‘sucking in air’.¹⁴ To determine the cause of the problem, the Appellant undertook exploratory works between 12 July 2016 and 29 July 2016, which it determined to be 24 holes across the Pipes.¹⁵ And on 27 July 2016, the Appellant notified the insurer of its intention to conduct that exploratory work.¹⁶
12. On or about 18 July 2016, the Appellant made a claim on the Policy in respect of the damage to the Pipes, which contended that the damage to the fuel lines was malicious.¹⁷
13. On or about 29 July 2016, Les Thorpe of Northcliff Claims, retained by the Appellant, provided lump-sum quote in the amount of \$261,500 to excavate the site, disconnect the pump equipment, disconnect the piping, reinstall new equipment and pumps and re-lay concrete. The quote is issued by Tanwar Enterprises to the Appellant (**Quote**).¹⁸ As Mr Tanwar accepted in cross-examination, the Respondent never approved the Quote.¹⁹
14. On 8 August 2016, Mr Tanwar directed his broker to notify the underwriter that “we must start work latest 11.08.2016 to mitigate losses”.²⁰ In response, Mr Morgan (a loss adjuster

⁸ Blue Appeal Book at pages 354 - 355; Interview between Paul Thrower and Ramesh Tanwar on 14.11.2016.

⁹ Blue Appeal Book at page 7; Tanwar Affidavit of 15.12.2023, [28].

¹⁰ Blue Appeal Book at page 735; Letter from Turks Legal to Rockliffs Solicitors dated 13 June 2017.

¹¹ Blue Appeal Book at page 7; Tanwar Affidavit of 15.12.2023, [21] – [27].

¹² Blue Appeal Book at page 759; Quote issued by Gilbarco Veeder Root date 16 April 2015.

¹³ Blue Appeal Book at page 7; Tanwar Affidavit of 15.12.2023, [29].

¹⁴ Blue Appeal Book at 7 – 9; Tanwar Affidavit of 15.12.2023, [30] – [38].

¹⁵ Blue Appeal Book at page 9; Tanwar Affidavit of 15.12.2023, [35] – [37].

¹⁶ Blue Appeal Book at page 150; Letter from Tanwar Institute of Professional Studies to Calibre Insurance Pty Limited dated 27 July 2016.

¹⁷ Blue Appeal Book at page 153

¹⁸ Blue Appeal Book at pages 155 - 175.

¹⁹ Black Appeal Book at page 46, T46.16-17.

²⁰ Blue Appeal Book at page 164; Email from Ramesh Tanwar to Les Thorpe on 8.8.2016.

handling the claim on behalf of Gordian) observed that a decision on indemnity was yet to be made; and that consistently with the Appellant's obligations as a prudent uninsured, the works performed must be performed to the applicable Australian Standard.²¹

15. On 15 August 2016, John Ewing and Simon Caples of GHD attended the Property. Mr Ewing prepared a report (**GHD Report**).²² Amongst other things, the GHD Report observed that "the general appearance of the pipelines inspected appeared to be inconsistent with normal industry standards" and described the quality of workmanship described as "low".²³ Further, Mr Ewing opined that the works did not comply with the UPSS Regulation and "in the absence of further information, should not be or have been commissioned".²⁴ In the final paragraph of the GHD Report, the author opines that the construction methodology that Tanwar Enterprises applied was "unusual" and inconsistent with the normal practice that Mr Ewing set out. Indeed, aspects of it were said to contravene the applicable Australian Standard.²⁵

16. On 13 September 2016, Mr Morgan emailed Mr Thorpe requesting further investigations be arranged and further documents in order of the damage to the Pipes and determine whether to grant indemnity.²⁶

17. On 30 September 2016, Mr Thorpe informed Mr Morgan that Mr Tanwar had completed the first stage of the exploration works and invited Mr Morgan to attend an inspection the next week.²⁷ That notice was insufficient for GHD or tank testing contractors to attend an inspection at the Property, a fact made known to Mr Thorpe on 5 October 2016.²⁸ On 6 October 2016, Mr Thorpe communicated that the Appellant had "*set the deadline for 10.00am tomorrow*".²⁹ That email covered an email from Mr Tanwar that contemplated that if the insurer's representatives did not attend then, "*we will be left with no further option but to continue with our repairs and replacement work*".³⁰ This the Appellant did.

²¹ Blue Appeal Book at page 534; Email from Charles Morgan to Les Thorpe dated 19 August 2016.

²² Beginning at Blue Appeal Book at page 487.

²³ Blue Appeal Book at page 489.

²⁴ Blue Appeal Book at page 490.

²⁵ Blue Appeal Book at page 492.

²⁶ Blue Appeal Book at page 537; Email from Charles Morgan of Cunningham Lindsey to Les Thorpe dated 13 September 2016.

²⁷ Blue Appeal Book at page 546; Email from Les Thorpe to Charles Morgan dated 30 September 2016.

²⁸ Blue Appeal Book at page 548 – 549; Email from Priya Paquet to Les Thorpe dated 5 October 2016.

²⁹ Blue Appeal Book at page 550; Email from Les Thorpe to Priya Paquet dated 6 October 2016.

³⁰ Blue Appeal Book at page 184; Email from Ramesh Tanwar to Priya Paquet dated 5 October 2016.

18. On 7 October 2016, the Appellant executed a document by which it purported to accept the Quote issued by Tanwar Enterprises.³¹ From there began a lengthy period of correspondence between the Appellant's legal representatives and those appearing for the Respondent seeking additional information. The climax of this exchange arrived on **13 June 2017**: the Respondent declined to grant indemnity under the Policy.³²

19. By 31 October 2016, the Appellant completed its repair work and conducted an integrity test in relation to the repair work, which indicated that the works had been completed in a satisfactory manner.³³

Policy of insurance

20. The policy is found at pages 223 to 306 of the Blue Appeal Book. It includes twelve insuring clauses. Relevantly for the purposes of the Appellant's claim at first instance³⁴, the policy covered 'Property Damage' and 'Business Interruption Insurance' (**Policy**).

21. The General Definitions provide that 'Buildings' means:

Building means the Building[s] located at the Premises. Building includes 1) sheds; 2) customised and modified shipping containers or transportable buildings permanently located at the Premises used as workshops, lunchrooms or storage and which are permanently fixed to the ground with electrical or plumbing services, as necessary;

shipping containers in which the Stock Your Business distributes is delivered to the Premises or from which merchandise is either being loaded into, unloaded from or stored in before dispatch, provided that the container doors are secured when unattended with padlocks and the padlocked container is fully enclosed by a locked fenced area at the Premises after hours;

shipping containers in which the Stock or Contents of Your Business is stored, provided that the container doors are secured when unattended with padlocks and the padlocked container is fully enclosed by a locked fenced area at the Premises after hours

walls, foundations, storage tanks and sheds, awnings, exterior lights, masts, antennae and aerials, fixed external signs, gates, fencing, pavements, roads and other structural improvements pertaining to the Buildings;

property owner's fixtures and fittings, floor coverings, plant, plumbing or wiring services that are within the Buildings;

a. *carports, pergolas and canopies;*

³¹ Blue Appeal Book at page 198.

³² Blue Appeal Book at page 734 – 735.

³³ Blue Appeal Book at page 12; Tanwar Affidavit of 15.12.2023, [59] – [60].

³⁴ Red Appeal Book at page 1; Further Amended Statement of Claim filed and served 24 January 2024.

- b. *barns and outbuildings;*
- c. *external fixed items including swimming pools, saunas and spas, gangways between Buildings, lights and signs and air conditioning units;*
- d. *bridges, wharves, piers and jetties.*

22. The General Definitions expressly exclude the following from the definition of Buildings: plant and machinery, Stock, Contents; and:

property undergoing erection, construction, alteration or addition (including partial dismantlement of existing structures), where the total contract value of all work to be carried out at any one Premises exceeds \$500,000 or 20% of the total Sum Insured on Buildings and Contents, whichever is the lesser; provided that this limit shall only apply to the portion of the Property Insured which is subject to any such work and not to any other portion of the Property Insured; and

land, unsealed driveways, unsealed paths, topsoil and fill, dams, reservoirs, canals, tunnels and railway tracks (not at the Premises).

(the **Work Clause**)

23. Correspondingly, the Policy provides for the following definition of ‘Premises’ and ‘Property’:

- a. ‘Premises’ refers to the places listed in the Policy Schedule, being the Property at Lewisham.
- b. ‘Property Insured’ means the property shown in the Policy Schedule as specifically covered with a Sum Insured in each section.

24. ‘Sum Insured’ is \$500,000.

25. The Policy provides for the following in relation to changes to risk (**Change to Risk Clause**):

Change to risk

If You become aware of any changes to Your Business or other circumstances affecting the Premises during the Period of Insurance that may result in an increased risk of destruction, loss or damage to Your Property Insured under the Policy or liability to any third parties, You must notify us of these changes in writing as soon as possible.

26. The insuring clauses provide as follows in respect of ‘Property Damage’:

Your insurance under this cover section

Provided the Property Damage cover section is shown as insured in the Policy Schedule, then subject to the provisions of the Policy, We will cover You for physical loss of or damage to Your Property Insured at the Premises during the Period of Insurance.

27. The Insurance Schedule to the Policy provides:

Property Damage cover section

<i>Method of Settlement</i>	<i>Reinstatement or replacement</i>
	<i>Sum Insured</i>
<i>Buildings</i>	<i>\$500,000</i>
<i>Stock</i>	<i>Not Insured</i>
<i>Contents</i>	<i>Not Insured</i>
<i>Rewriting of records</i>	<i>\$50,000</i>
<i>Removal of debris</i>	<i>\$100,000</i>
<i>Specified Items</i>	<i>Not insured</i>
<i>Extra costs of reinstatement</i>	<i>Standard Policy Benefit</i>
<i>Playing surfaces</i>	<i>\$50,000</i>
<i>Optional covers</i>	
<i>Flood cover</i>	<i>Not Insured</i>
<i>Strata title mortgagee(s) interest</i>	<i>Not Insured</i>
<i>Applicable Excess</i>	
<i>Excess</i>	<i>\$250.00</i>

Business Interruption cover section

<i>Cover Type</i>	<i>Annual Revenue</i>
<i>Indemnity Period</i>	<i>12 months</i>
<i>Annual Revenue Amount</i>	<i>Not Insured</i>
<i>Annual Rental Amount</i>	<i>\$150,000</i>
	<i>Sum Insured</i>
<i>Annual Revenue</i>	<i>Not Insured</i>
<i>Loss of Rent Receivable</i>	<i>\$150,000</i>
<i>Claim preparation and proving expenses</i>	<i>\$20,000</i>
<i>Additional increase in cost of working</i>	<i>\$25,000</i>
<i>Accounts receivable</i>	<i>\$7,500</i>
<i>Documents</i>	<i>\$5,000</i>
<i>Optional cover</i>	
<i>Goodwill</i>	<i>\$20,000</i>

B. Primary Judgment

28. After reciting the uncontroversial facts, the primary judge set out the orthodox principles of contractual construction by reference to *Mount Bruce Mining Pty Limited v Wright Prospecting Pty Limited* (2015) 256 CLR 104; [2015] HCA 37, [46] – [47]; and [51], noting that those principles apply to contracts of insurance: *Todd v Alterra at Lloyd's Limited* (2016) 239 FCR 12, [2016] FCAFC 15, [42].³⁵
29. The primary judge recorded as fact that the Pipes are located 300mm below ground.³⁶ His Honour, with respect correctly, rejected the contentions that the Pipes are a “utility or structure in service of the business” or that they “form a necessary union with the storage tanks for the proper running of the business”, because those contentions were unsupported by the plain text of the Policy.³⁷ Further, his Honour concluded by reference to the Macquarie Dictionary that a building is a “substantial structure with a roof and walls, as a shed, house, department store, etc” and so could not extend to items located within the ground.³⁸ The Pipes, therefore did not fall within the definition of ‘Building’ for the purposes of the Policy.
30. Further, because the relevant property was undergoing the construction work described above, it was in the primary judge’s view excluded by virtue of clause 4 of the Work Clause set out in paragraph 22 above.³⁹ The total value of the Sum Insured in respect of Buildings was therefore \$100,000, being 20% of \$500,000.⁴⁰
31. His Honour found that the damage to the Pipes took place while the construction work was incomplete, because at the time of the damage, the forecourt had not been backfilled and the concrete not re-laid.⁴¹ His Honour concluded that the damage to the lines occurred during construction and the Work Clause therefore applied to exclude cover.⁴²

³⁵ Red Appeal Book at page 43; Primary Judgment at [43] – [44].

³⁶ Red Appeal Book at page 49; Primary Judgment at [55].

³⁷ Red Appeal Book at page 49; Primary Judgment at [56] – [57].

³⁸ Red Appeal Book at page 49; Primary Judgment at [59].

³⁹ Red Appeal Book at page 50; Primary Judgment at [62].

⁴⁰ Red Appeal Book at page 50; Primary Judgment at [63].

⁴¹ Red Appeal Book at page 50; Primary Judgment at [64].

⁴² Red Appeal Book at page 50; Primary Judgment at [65].

32. Further, and separately to the issues described above, his Honour considered a plea that if the Policy did respond, then by operation of s 54 of the *Insurance Contracts Act 1984* (Cth), the insurer was entitled to reduce its liability to the extent that its interests were prejudiced.⁴³ That must be so, because the Appellant received the notice from the EPA on 30 June 2015 and renewed the policy on 17 October 2015 after making inquiries as to the cost of the Compliance Works. In its Written Closing Submissions to the primary judge, the Appellant properly conceded that no notice had been given⁴⁴, and the primary judge regarded the increased risk of damage as being “self-evident”.⁴⁵ No exculpatory reason was advanced. The primary judge accepted the Respondent’s submission that the Appellant did not discharge its onus of establishing that no or part of the loss was not caused by its act.⁴⁶
33. Finally, on the question of liability, the primary judge rejected the Appellant’s pleaded allegation⁴⁷ that an unknown third party damaged the Pipes. His Honour found at [83] that the allegation was not established on the balance of probabilities. Tanwar led neither eyewitness evidence, CCTV footage nor evidence that the damage took place when the Property was secured.⁴⁸ His Honour also observed, consistently with the GHD Report, that the Pipes were exposed for a period of 4 months.⁴⁹ There is no challenge to this finding.
34. As for loss, the primary judge reviewed the invoices that the Appellant issued variously to Calibre Insurance; and that Tanwar Enterprises issued to the Appellant.⁵⁰ His Honour regarded the reasonableness of the amounts invoiced as unsubstantiated; observed that the invoices themselves were devoid of any particularisation; and the costs themselves were not established as being actually incurred.⁵¹ His Honour preferred the independent evidence of Mr Cloete, a quantity surveyor retained by the Respondent to assist the Court, who quantified the reasonable cost of the works as being in the amount of \$149,021.⁵² His Honour said that if he had otherwise found that the policy responded to Tanwar’s claim, he would have concluded that the prejudice

⁴³ Red Appeal Book at page 26; Defence [19(e) and (f)].

⁴⁴ Black Appeal Book at page 80; Defendant’s Written Closing Submissions at [66].

⁴⁵ Red Appeal Book at page 51; Primary Judgment at [74].

⁴⁶ Red Appeal Book at page 53; Primary Judgment at [80].

⁴⁷ Red Appeal Book at page 7; Further Amended Statement of Claim at [12].

⁴⁸ Red Appeal Book at page 54; Primary Judgment at [83].

⁴⁹ Red Appeal Book at page 54; Primary Judgment at [84].

⁵⁰ Red Appeal Book at page 54 - 55; Primary Judgment at [87].

⁵¹ Red Appeal Book at pages 54 – 56; Primary Judgment at [86] – [92].

⁵² Red Appeal Book at page 56; Primary Judgment at [90] – [91].

to the insurer for the purposes of s 54 of the Act was the difference between the sum which Tanwar agreed to pay to Tanwar Enterprises less the amount asserted by Mr Cloete.⁵³

35. In respect of the claim on the business interruption policy, this was limited to the cost of cleaning and removal of debris.⁵⁴ His Honour noted that the Appellant did not establish that the business was closed during the relevant period nor that rent was abated and for those reasons dismissed this aspect of the Appellant's claim.⁵⁵

36. As for the claim for damages by way of claims preparation, his Honour rejected the claim as the insurer had declined indemnity, in his view, correctly. Against the possibility that he was wrong, his Honour adverted to the fact that the claim had been prepared by Abhay Enterprises' casual account staff and that the amounts incurred were unsubstantiated.⁵⁶

C. Grounds of Appeal

37. This section does not address the submissions of the Appellant in the order that they appear in the Appellant's Submissions. Instead, the Respondent addresses those grounds that go to the responsiveness of the Policy first; and then addresses the grounds that go to reasons to reduce the Respondent's liability; and then those relevant to quantum. Save for Ground 3, nothing is said about the abandoned grounds.

Ground 3

38. The Appellant submits that it is "not relevant to this appeal" whether or not the damage to the Pipes was as a result of a malicious act. Ground 3 is therefore not pressed.⁵⁷ However, that was the sole pleaded case on liability,⁵⁸ and there is no challenge to the primary judge's finding at [83] that the pleaded allegation was not established.

39. If, by abandoning Ground 3, it is said that all the Appellant need prove is that the Pipes were damaged; that submission should be rejected. The Appellant is bound by the conduct of the case at trial. That case, including its factual predicate that the Pipes were damaged by an

⁵³ Red Appeal Book at page 56; Primary Judgment at [91].

⁵⁴ Red Appeal Book at page 8; Further Amended Statement of Claim at [21].

⁵⁵ Red Appeal Book at pages 57 - 58; Primary Judgment at [95] – [96].

⁵⁶ Red Appeal Book at pages 57 - 58; Primary Judgment at [98] – [99].

⁵⁷ Appellant's Submissions, [16].

⁵⁸ Red Appeal Book at page 7; Further Amended Statement of Claim at [12].

unknown third party (defined as “*Malicious Damage*” in the Further Amended Statement of Claim at [12])), was decided against the Appellant. It should not be permitted now to run an alternative case that all that the Appellant was required to establish in order for the Policy to respond was damage to the Pipes. If the Appellant wishes now to advance that alternative case, it must show some exceptional circumstance to justify taking that course⁵⁹; and it has not done so.

40. The consequence is that this appeal is to be conducted on the basis that; (a) the primary judge found that the Pipes were not maliciously damaged (i.e. were not damaged by an unknown third party; (b) the Appellant failed on its sole case on liability at trial; and (c) the Appellant does not seek an alternative finding in this Court.

Ground 4

41. Ground 4 is addressed first because it arises, logically, prior to the other grounds. It concerns, on a true construction, the scope of the word ‘Building’ and accordingly the responsiveness of the Policy to the damage to the Pipes.
42. No challenge is made to the primary judge’s articulation of the relevant principles of contractual construction as articulated in *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104; [2015] HCA 37. The true construction of the Policy is to be discerned having regard to the text of the relevant provision, having regard to interpreting the Policy as a whole⁶⁰, in light of its purpose, in the manner of a reasonable businessperson. To the extent that there was an ambiguity in the insuring clauses and its definitions, it was open to the Appellant at first instance to point to objective background material to resolve that ambiguity.⁶¹ No such evidence was adduced.
43. In this Court the Appellant re-agitates its contention that the term ‘Building’ as used in the Policy must be given such width as to include the Pipes, because they form a “necessary union” with the storage tanks on the Property, because “both are required for the proper running of the business’s primary function”.⁶² This argument is developed later to the effect that the

⁵⁹ *University of Wollongong v Metwally* (No 2) [1985] HCA 28; (1985) 59 ALJR 481, 483; *Coulton v Holcombe* [1986] HCA 33; 162 CLR 1, 8; *Larsen as trustee for the Larsen Superannuation Fund v Tastec Pty Ltd* (formerly *Wonders Building Company Pty Ltd*) (No 2) [2025] NSWCA 210 at [55]

⁶⁰ *Wilkie v Gordian Runoff Limited* (2005) 221 CLR 522; [2005] HCA 17 at [16].

⁶¹ *Cherry v Steele-Park* (2017) 96 NSWLR 548; [2017] NSWCA 295, [76]–[85] and [122]–[124].

⁶² Appellant’s Submissions, [21].

“fundamental infrastructure required for the business to operate ought to include the Pipes” and a reasonable businessperson would expect that the Policy would cover them.⁶³ Any other construction is said to be ‘nonsensical’.

44. The primary judge relied upon the Macquarie Dictionary to form an understanding of the word Building. No challenge is made to that approach, which is, with respect, entirely orthodox.
45. Further, no challenge is made to His Honour’s reasoning that an understanding of the metes and bounds of the term Building must be constrained by the words of the policy. It was on that basis that his Honour rejected the concept of a ‘necessary union’ as being the touchstone for determining the scope of the word ‘Building’. In submissions before this Court, that submission is embellished by reference to the nature of the business conducted at the Property. The Appellant places emphasis on the nature of the business conducted at the Property, and the commercial expectations of the Appellant, to assert that ‘Building’ should include the Pipes.
46. The extent to which the parties’ commercial purpose is operative as an aid to construction is relative to the extent to which the Policy admits of a constructional choice. Justice Gibbs expressed this sentiment in *Australian Broadcasting Commission v Australasian Performing Right Association* in the following passage⁶⁴: “*If the words used are unambiguous the court must give effect to them, notwithstanding that the result may appear capricious or unreasonable and notwithstanding that it may be guessed or suspected that the parties interceded something different.*” A warning given by Macfarlan JA is to similar effect, which is that there is no warrant to disregard “*unambiguous language simply because the contract would have a more commercial and businesslike operation if an interpretation different to that dictated by the language were adopted*”: *Jireh International Pty Limited v Western Export Services Inc.*⁶⁵ These statements speak against adopting the construction for which the Appellant contends.
47. Further, the textual context of the balance of the Policy suggests that the drafters of the Policy were aware of the existence of underground pipes and, had they wished to advert to them, would have done so. Two clauses are relevant. First, the term ‘Building’ is defined to include fixtures and fittings within a building, including wire and plumbing. Second, the text of clause

⁶³ Appellant’s Submissions, [23].

⁶⁴ *Australian Broadcasting Commission v Australasian Performing Right Association* (1973) 129 CLR 99, 109.

⁶⁵ *Jireh International Pty Limited v Western Export Services, Inc* [2011] NSWCA 137, [55].

7 of the Property Damage section, titled ‘Landscaping’. That clause expressly distinguishes between underground pipes (in the nature of sewers) and the Buildings.⁶⁶

48. Finally, and at a higher level of abstraction, the objective background to the parties’ agreement includes important matters of law.⁶⁷ One such matter is the status of pipes set into the land at common law, are regarded as fixtures to that land.⁶⁸ Accordingly, they ought not be regarded as Buildings within the meaning of the Policy. The drafter should be taken to have been drafting against the background of the common law.

49. For these reasons there is no basis to conclude that the primary judge was incorrect in construing the word ‘Building’ such as to excluding from its purview the piping under the ground at the Property.

Ground 5

50. The Appellant’s argument at trial was that the Respondent could not argue that both a) the pipes did not fall within the scope of the Buildings clause of the Policy; and b) the Policy did not respond by operation of the latter part of the Buildings clause, which specifically excluded “*property undergoing erection, construction, alteration or addition where the total contract value of all work to be carried out at any one Premises exceeds \$500,000 or 20% of the total Sum Insured*” (the full text of the clause is set out in paragraph 22 above). This was said to be impermissible because it required the Respondent to “accept that the Pipes constitute a building in the first place”, because it is to be “presumed to “cut out something already included by the general recitals and provisions”.⁶⁹ It is tolerably clear that the Respondent pleaded these as alternatives in its Defence.⁷⁰

51. The Appellant accepts in paragraph [32] of its Outline of Submissions that the Pipes were undergoing construction for the purpose of the exclusion set out in paragraph 22 above. Put another way, it accepts the Pipes, if indeed they are Buildings for the purposes of the exclusion, were under construction at the relevant time. For that reason it is unclear how the orders that

⁶⁶ Blue Appeal Book at page 245; Policy (‘7. Landscaping’).

⁶⁷ *Maggbury Pty Limited v Hafele Australia Pty Limited* (2001) 210 CLR 181; [2001] HCA 70 at [11].

⁶⁸ *Holland v Hodgson* (1872) LR 7 Ch CP 328, 334; *Conexa Holdings Pty Limited v Chief Commissioner of State Revenue* [2025] NSWCA 20, [69] per Payne JA (Ward P, Stern, McHugh JA agreeing); and [185] (per Basten AJA).

⁶⁹ Black Appeal Book at page 72; Plaintiff’s Closing Submissions, [27]

⁷⁰ Red Appeal Book at page 25; Defence at [16(a) and(b)].

his Honour made would be different if his Honour had correctly applied the principle said to be articulated in *Lane v Simmons*.⁷¹

Ground 6

52. This ground asserts that the trial judge could not have found that the exclusion clause set out in paragraph 22 above applied, because there was no evidence that the work performed cost any more than \$100,000 and further, that the primary judge was wrong to rely upon the report prepared by Mr Cloete.⁷² Further, it is said that because the clause is concerned with only valuing the works by reference to the contract, and there was no contract between the Appellant and Tanwar Enterprises, only an implied contract, the clause cannot apply.
53. The attack on Mr Cloete's report is unsustainable. The Appellant did not cross-examine Mr Cloete and his report was received into evidence without objection. No real challenge was made to Mr Cloete's report in the Appellant's Closing Submissions at trial.
54. The second submission, namely that there was only an implied contract, should also be rejected as reading a distinction (between contract and restitution) into the parties' agreements for which there is no textual foundation and which is self-evidently not the approach of a reasonable businessperson.

Grounds 2 and 2A

55. Because s 54 of the Act takes as its starting point a responsive policy, Grounds 2 and 2A are dealt with at this point although they come first in the Amended Notice of Appeal.
56. These grounds allege that the primary judge erred in applying s 54(2) of the Act. Insofar as the grounds are illuminated by the Appellant's Submissions, they appear to contend that either **first**, that "notice or lack thereof, on its own cannot be the triggering act" [. . .] as the mere announcement of an act that never comes into fruition does not increase the risk".⁷³ Alternatively, **second**, it is said that the performance of the works could not be the triggering act, because the works were "necessary to preserve property and or could not be reasonably avoided".

⁷¹ *Lane v Simmons* [1927] AC 487, 507.

⁷² Appellant's Submissions, [33] and [34].

⁷³ Appellant's Submissions, [12].

57. Section 54 of the Act provides as follows:

- (1) Subject to this section, where the effect of a contract of insurance would, but for this section, be that the insurer may refuse to pay a claim, either in whole or in part, by reason of some act of the insured or of some other person, being an act that occurred after the contract was entered into but not being an act in respect of which subsection (2) applies, the insurer may not refuse to pay the claim by reason only of that act but the insurer's liability in respect of the claim is reduced by the amount that fairly represents the extent to which the insurer's interests were prejudiced as a result of that act.
- (2) Subject to the succeeding provisions of this section, where the act could reasonably be regarded as being capable of causing or contributing to a loss in respect of which insurance cover is provided by the contract, the insurer may refuse to pay the claim.
- (3) Where the insured proves that no part of the loss that gave rise to the claim was caused by the act, the insurer may not refuse to pay the claim by reason only of the act.
- (4) Where the insured proves that some part of the loss that gave rise to the claim was not caused by the act, the insurer may not refuse to pay the claim, so far as it concerns that part of the loss, by reason only of the act.
- (5) Where:
 - (a) the act was necessary to protect the safety of a person or to preserve property; or
 - (b) it was not reasonably possible for the insured or other person not to do the act;the insurer may not refuse to pay the claim by reason only of the act.
- (6) A reference in this section to an act includes a reference to:
 - (a) an omission; and
 - (b) an act or omission that has the effect of altering the state or condition of the subject-matter of the contract or of allowing the state or condition of that subject-matter to alter.

58. Section 54 of the Act is concerned with the specific claim in fact made by the insured; and accordingly requires specific identification of the event or circumstance giving rise, so the insured says, to an obligation upon the insurer to grant indemnity.⁷⁴ Sub-section 54(2) may apply where an insured's act or omission prejudices the interests of the insurer by reducing the insurer's liability by an amount that fairly represents the extent to which the relevant interest were prejudiced. An "act" for the purposes of s 54 must be one by reason of which the insurer is entitled to refuse to pay the claim.⁷⁵

⁷⁴ *FAI General Insurance Company Limited v Australian Hospital Care Pty Limited* 659; [40]

⁷⁵ *Gibbs Holdings P/L v MMI & Anor* [2000] QCA 524; [34(a)].

59. The Respondent pleaded in its Defence to the claim that s 54(2) of the Act applied such as to reduce its liability to nil.⁷⁶ It particularised that allegation by reference to the letter dated 13 June 2017, which appears on page 734 – 737 of the Blue Appeal Book. In that letter the insurer identified the EPA Notice and the Compliance Works that it necessitated as significantly changing the business that the Appellant operated; and further explained that it was incumbent upon the Appellant to have given notice to the insurer, which it did not. The Appellant conceded expressly in its written submissions that no notice was given to the insurer prior to undertaking the Compliance Works⁷⁷ and it has not sought to withdraw this concession or characterise it as incorrectly made.
60. As indicated in paragraph 32 above, the trial judge accepted as “self-evident” that the EPA Notice and the Compliance Works that it necessitated would tend to increase the risk of destruction, loss or damage to the Property. The notice that the Appellant should have given, but did not give, was notice of the EPA Notice and the work that it required. The EPA Notice necessarily changed the activities conducted at the Property. Intermediate appellate authority supports the proposition that a change in the activities conducted at a premises is capable of causing or contributing to the loss: *Alexander Stenhouse Limited v Austcan Investments Limited*.⁷⁸ There, the relevant trigger for the purposes of s 54(2) of the Act was an increase in the quantity of inflammable lacquer stored at the premises.⁷⁹ That increase in risk engaged s 54(2) of the Act. Here, the Compliance Works conducted at the Property increased the risk, because the new activities conducted at the Property exposed the Pipes. The construction activities are the relevant activities that could be regarded as causing or contributing to the loss, not the malicious damage, because the construction activities exposed the Pipes; and without that exposure there could not have been any damage, malicious or otherwise.
61. Finally, it is said that because the Compliance Works were required by law, they “could not be reasonably avoided”.⁸⁰ It cannot be maintained that this fact excuses compliance with the Change to Risk Clause. If that contention were correct, it would create an exception to that clause not found in the text of the Policy. No attempt has been made to imply such an exception

⁷⁶ Red Appeal Book at page 26; Defence, [19(e)].

⁷⁷ Black Appeal Book at page 80; Plaintiff’s Closing Submissions, [66].

⁷⁸ *Alexander Stenhouse Limited v Austcan Investments Pty Limited* (1991) 57 SASR 343.

⁷⁹ *Alexander Stenhouse Limited v Austcan Investments Pty Limited* (1991) 57 SASR 343, 362 per King CJ; an appeal to the High Court of Australia was upheld on other grounds: (1993) 67 ALJR 421.

⁸⁰ Appellant’s Submissions, [13].

in accordance with the principles relation to the implication of terms. Further, it would impermissibly relegate the Change to Risk Clause to mere surplusage in circumstances where the risks have changed on account of regulatory action, contrary to the principle that no part of the parties' agreement is to be interpreted as redundant.⁸¹

62. For all of these reasons, Grounds 2 and 2A should be dismissed.

Ground 7

63. It is not clear how the Appellant's Submissions under the heading 'Ground 7' fit within the scope of Ground 7, which provides that "*by virtue of ground 6, the primary judge erred in his assessment of the value of the contract work being in excess of \$100,000*". The Appellant's Submissions assert a different error in the primary judge's reasoning, which is that his Honour was wrong to reject the claim for loss of rental income. That claim appears in the Further Amended Statement of Claim at paragraphs 21 to 22.⁸² The primary judge determined this claim in paragraphs 95 and 96 of the Primary Judgment.

64. The Appellant's Submissions contend that the learned primary judge was wrong to conclude that the Appellant was not in receipt of rent during the period 12 July 2016 to 4 November 2016.⁸³ The argument is that the primary judge should have accepted Mr Tanwar's assertions regarding the loss of rent in his affidavit, because the evidence was unchallenged. The primary judge appears to have rejected the claim because Mr Tanwar's evidence rose no higher than to the level of assertion.

65. Inferentially, the learned primary judge rejected the claim because, although Mr Tanwar asserted the loss there was no objective evidence to support it. Such evidence could reasonably have been expected to be in the Appellant's possession, yet it was not adduced. It was open to the judge to draw an inference is that the documents, if they exist, would not assist the Appellant.⁸⁴

66. Separately, but no less importantly, it was open to the primary judge, as he did, to find that he was not actually persuaded by Mr Tanwar's account of the rent abatement. A judge is entitled

⁸¹ *LCA Marrickville Pty Limited v Swiss Re International SE* (2022) 290 FCR 435; [2022] FCAFC 17, [331].

⁸² Red Appeal Book at page 8 – 9; Further Amended Statement of Claim, [21] – [22].

⁸³ Appellant's Submissions, [40] – [41].

⁸⁴ *Jones v Dunkel*; *Burke v LFOT Pty Limited* (2002) 209 CLR 282; [2002] HCA 17, [134].

to reject a witness's evidence to the extent that it is regarded as inadequate.⁸⁵ No reason has been offered as to why it was not open to the primary judge to reject this aspect of Mr Tanwar's evidence.

D. Orders

67. The appeal should be dismissed.

68. The Appellant should pay the Respondent's costs in this Court and in the Court below.

2 October 2025

A handwritten signature in black ink, appearing to read 'D F Elliott', with a large, sweeping flourish extending to the right.

D F Elliott

Nine Selborne Chambers

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⁸⁵ *Cubillo v Commonwealth* (2000) 103 FCR 1; [2000] FCA 1084, [118].