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TRANSCRIPT OF PROCEEDINGS

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CI-17-04729

COUNTY COURT OF VICTORIA

CIVIL JURISDICTION

MELBOURNE

FRIDAY 5 JUNE 2020

(2nd day of hearing)

BEFORE HIS HONOUR JUDGE PILLAY

B E T W E E N

CAROL MARZOUK

Plaintiff

- and -

GIPPSLAND BUILDING SERVICES PTY LTD & ORS

Defendants

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1 HIS HONOUR: Mr Simpson, can I just confirm with you that you  
2 filed a set of submissions this morning and that's -  
3 there's no affidavit with your material?

4 MR SIMPSON: There's no affidavit with my material and I  
5 apologise for the typographical errors in the submission  
6 too, Your Honour. The flurry of activity hasn't ceased, if  
7 I may say, and so I'm in Your Honour's hands and subject to  
8 what my learned friend has to say about all of that, but we  
9 would be submitting that Your Honour hear the application  
10 for leave to amend and, subject to ruling, perhaps an  
11 opening from the plaintiff and then adjourn until Tuesday  
12 because of recent further material that's come, and in  
13 particular a supplementary witness statement from Damien  
14 O'Toole dated today, 5 June, which I haven't even read.

15 HIS HONOUR: Forgive me but Mr O'Toole would be said to be in  
16 which camp?

17 MR SIMPSON: Thank you, Your Honour. Mr Damien O'Toole is a  
18 fire officer, an investigator with the MFB, and he is now  
19 in the camp of the second defendant plasterer, having been  
20 in his own camp prior to (indistinct).

21 HIS HONOUR: Of course. All right, thank you. I might just ask  
22 Mr Muller now. Mr Muller, I've seen the plaintiff's  
23 submissions this morning. Do you still press your  
24 application?

25 MR MULLER: I do, Your Honour, and does Your Honour have  
26 submissions that were filed by my instructor earlier this  
27 morning? I take it that you might not.

28 HIS HONOUR: I don't, Mr Muller, but I'm sure that will be  
29 remedied shortly. Just in short form, do you still press  
30 your application?

31 MR MULLER: Yes, I do.

1 HIS HONOUR: Thank you. Mr Simpson, I note that the witness is  
2 still on the call. I might now have him placed in the  
3 waiting room.

4 MR SIMPSON: Good. Thank you Your Honour.

5 HIS HONOUR: Mr Muller, I'm going to invite you then to address  
6 me. I hopefully will receive a copy of the submissions in  
7 due course but perhaps you could proceed on the basis that  
8 I haven't - I don't have them in front of me and take me  
9 through them if you could.

10 MR MULLER: I will, Your Honour. They're quite detailed so what  
11 I might do if it's convenient is I'll make - if I could  
12 just let your associates know that there was an email at  
13 9.07 this morning, that was copied of course to the  
14 plaintiff and my learned friend.

15 HIS HONOUR: All right. My associate tells me that she's just  
16 looking for them at the moment. What will happen is she  
17 will find them and bring them up on screen and then you'll  
18 be able to talk to them. But for the moment can I just  
19 make sure that I understand the broad parameters of them.  
20 So you say, firstly, the amendment ought not be allowed  
21 because of the factual inconsistency which do you say is a  
22 major inconsistency in the plaintiff's case?

23 MR MULLER: I do. Can I start this way by noting that there are  
24 in fact five proposed amendments.

25 HIS HONOUR: Yes.

26 MR MULLER: Which are set out in paragraph 2 that unfortunately  
27 sounds very similar to the amendments to the US  
28 Constitution in the way that I've characterised them, but  
29 that's not meant to the case.

30 The first amendment is the proposal to delete  
31 paragraph 6, and that is opposed. The second proposed

1 amendment is to delete words in sub-paragraph (d) of the  
2 particulars to paragraph 8A.

3 HIS HONOUR: Yes.

4 MR MULLER: That amendment is consented to.

5 HIS HONOUR: Let me just go through it. You'll see the  
6 submissions are now on the shared screen.

7 MR MULLER: Thank you, Your Honour.

8 HIS HONOUR: Yes.

9 MR MULLER: The third amendment seeks to add an allegation that  
10 the second defendant was negligent by carrying out the  
11 works, which is the plaster works and the insulation works,  
12 without ascertaining whether the power supply to the down  
13 lights had been connected.

14 Then the fourth and the fifth amendments can be  
15 bundled together because they are a proposed amendment to  
16 increase the amount of damages claimed in respect of a  
17 particular part of the damages, the damaged content  
18 from - - -

19 HIS HONOUR: Just go back to 8A at sub-paragraph (j), 'Carrying  
20 out the works without ascertaining whether the power supply  
21 to the down lights had been disconnected'. Do you consent  
22 to that or not?

23 MR MULLER: No, that is opposed.

24 HIS HONOUR: Yes, thank you. And then those last two.

25 MR MULLER: Are also opposed. So you'll see - that's in  
26 paragraph 3 of the written submissions that states the  
27 position. So other than the second amendment - - -

28 HIS HONOUR: Yes.

29 MR MULLER: - - - the other proposed amendments are opposed.

30 I've then set out the legal principles relying on the Civil  
31 Procedure Act, which includes the - in paragraph 6, I've

1 noted the certification requirements. That's important in  
2 this situation because while I haven't seen it, I presume  
3 that it was filed at the time of making the statement of  
4 claim, a proper basis certificate, and that would be by the  
5 lawyers certifying that the allegations made are made on a  
6 proper basis and on the factual and legal materials  
7 available. In my submission what the court can infer from  
8 that is that the allegation in paragraph 6 was made on a  
9 proper factual basis, that is the plaintiff having told her  
10 lawyers that she used the lights on the evening of 30  
11 April. I've also set out in paragraph 7 the case  
12 management provisions of Part 4.2 of the Civil Procedure  
13 Act and how that interacts with the principles that the  
14 High Court set out in Aon, and I note at paragraph 10 that  
15 Aon makes it clear that a party does not have an absolute  
16 right to raise an arguable claim or amend documents subject  
17 to the payment of costs, but there are other factors that  
18 have to be taken into account. And specifically here it is  
19 the prejudice that will be suffered or potentially suffered  
20 by the second defendant if the amendment is allowed.

21 What Aon also makes clear is the plaintiff needs to  
22 show that her application is brought in good faith and that  
23 she's also required to bring the circumstances giving rise  
24 to the amendment to the court's attention. That is usually  
25 shorthanded as the person proposing the amendment has the  
26 obligation to explain why the amendment is being made at  
27 such a late stage.

28 HIS HONOUR: On that point, what do you say about the fact that  
29 there's no affidavit material before the court?

30 MR MULLER: I say it this way, that the lack of an explanation  
31 is not fatal. It's the plaintiff's prerogative to decide

1       whether or not she wishes to explain the proposed  
2       amendments and the reason it's happening at a late point,  
3       but it is a powerful factor that Your Honour should take  
4       into account because what it means is that there is nothing  
5       to countervail the prejudices said to be suffered by the  
6       second defendant. So further on in the submissions I set  
7       out in some detail what the second defendant's prejudice  
8       that is likely to be suffered if the amendments are allowed  
9       and in my submission Your Honour taking account of that  
10      then looks to the other side and there is nothing to  
11      balance that against because no explanation has been put  
12      forward.

13   HIS HONOUR: Yes.

14   MR MULLER: I also draw the court's attention to the  
15      observations made by Their Honours Justices Dawson and  
16      Toohey in Commonwealth v Verwayen, which essentially is  
17      that there's never been an absolute right to amend just  
18      with the payment of costs, that healing medicine, as it is  
19      apparently called by Lord Justice Bowen, and that what the  
20      court has to consider is all of the circumstances and that  
21      includes the prejudice against other parties. That's  
22      essentially what is said by those judges in those two  
23      extracts that are paragraphs 12 and 13.

24           Then turning to the application of that which starts  
25      at paragraph 14 in respect of the second defendant if the  
26      opposed amendments are allowed, in respect of the first  
27      amendment paragraph 6 was present in the plaintiff's  
28      written statement of claim. So I make the proper basis  
29      submission, that there was a proper basis at the time, the  
30      court should assume that and the court can infer that was  
31      done on the instructions of the plaintiff. Then there's no

1 proper basis certificate that's been proposed in respect of  
2 the amendments and there's no explanation for why the facts  
3 have apparently, the underlying facts have apparently  
4 changed or the plaintiff's instructions have apparently  
5 changed.

6 Secondly, the second defendant, in its original  
7 defence, didn't admit the allegations because it properly  
8 said it didn't know. But understanding the case as it  
9 developed and documents were discovered and expert material  
10 was provided, it became clear the second defendant ought  
11 properly admit that fact and remove it from controversy.  
12 And it did that on the basis of what Mr Barnes said in his  
13 report.

14 HIS HONOUR: Mr Barnes is from Burgoyne's, is that right?

15 MR MULLER: No, Mr Barnes is being called by the plaintiff.

16 HIS HONOUR: Right.

17 MR MULLER: His report is found at p.315. It was prepared for  
18 Allianz Insurance and it was done on 2 May of 2014, so the  
19 day after the fire. One of the relevant facts about  
20 Mr Barnes' report is that of the experts, aside from the  
21 MFB people, he was the only person who actually attended  
22 the site and did a physical inspection.

23 The other experts, Mr Conroy, Mr Marco and  
24 Mr Cousens, they all did reviews based on material that our  
25 people had prepared.

26 It was also based on - admitting the fact was also  
27 based on what the second defendant came to understand as  
28 the MFB's evidence and that the main fire was a separate  
29 fire to the first and a much smaller fire, and that the MFB  
30 told the plaintiff's ex-husband not to turn the lights back  
31 on or the house could catch fire. That second fact is,

1 that second point is the subject of contested evidence but  
2 the second defendant, having regard to all of it, formed  
3 the view that that is the likely evidence that will be  
4 given and accepted.

5 So based on that, and based on the fact that the  
6 plaintiff conceded she turned the lights on on the evening  
7 of 30 April, the second defendant released the MFB from an  
8 apportional claim. That means, I think as I said to Your  
9 Honour yesterday, that Your Honour can't take the MFB into  
10 account for the purposes of determining apportionability  
11 under the Part 4AA regime. The second defendant, now  
12 having released the MFB from that allegation of current  
13 wrongdoer, is unable to rejoin them to the proceeding. So  
14 that is, in my submission, an incurable prejudice that the  
15 second defendant now faces if the first amendment is  
16 allowed.

17 That's not abstract. There is meat to that prejudice  
18 which is set out in the second half of paragraph 18.  
19 Because if the plaintiff is permitted to withdraw the  
20 admission the nature of the case changes, and it changes  
21 dramatically, because if what's ultimately accepted is that  
22 the lights were not turned on, then that puts in real issue  
23 the other possible cause of the main fire, which was that  
24 the first fire was not properly extinguished and that the  
25 risk of reignition was what - and the reignition was what  
26 caused the second fire. That, if made good, would give  
27 rise to a serious allegation that the MFB were concurrent  
28 wrongdoers because they failed to properly extinguish the  
29 first fire and to make safe the area. That is now lost to  
30 the second defendant as an avenue if the proposed amendment  
31 is allowed.



1           The second ground of prejudice is that it changes the  
2       - if the proposed first amendment is allowed, it  
3       potentially changes the second defendant's assessment of  
4       its liability and that in turn potentially would have  
5       changed its position in respect of the settlement. Now I  
6       accept that there are some hypotheticals in there but  
7       that's the difficulty that is faced by the second defendant  
8       at this point, is that the plaintiff settled against all  
9       the other defendants, and for value in respect of the first  
10      and third defendants, and what the second defendant has  
11      lost is the ability to be involved in those settlement  
12      discussions on the alternative factual basis. So it now  
13      finds itself potentially continuing a proceeding on a  
14      different risk profile that if it had known at the time  
15      that the settlement discussions were being had, it may have  
16      done things differently. I don't put it any higher than it  
17      may have, but that is again real prejudice that has been  
18      suffered or will be suffered if the amendment is allowed.

19           Thirdly, I note the lack of an explanation which I've  
20      already addressed Your Honour on.

21           That's in respect of the first amendment. In respect  
22      of the proposed third amendment, it's put as a further  
23      particular but it in fact raises a substantial allegation  
24      that would require further instructions to be obtained from  
25      the second defendant, consideration about whether a duty in  
26      fact falls on a plasterer to make those positive enquiries  
27      as alleged, or whether an assumption would be sufficient,  
28      and an amendment to the defence to add a corresponding  
29      allegation against the first defendant for failing to  
30      ensure that the works were sequenced in a particular way.

31      That is because what is I think accepted as a common

1 position is that the - ordinarily what would happen is that  
2 the builder would come and quote for the job and then the  
3 builder would line up the tradespeople, the subbies, in an  
4 appropriate order. What the plaintiff seeks to do by this  
5 amendment is to shift that responsibility from the builder  
6 to the second defendant and say essentially that the second  
7 defendant had an obligation to make sure things were  
8 properly sequenced. That will involve a factual inquiry  
9 about who knew what at what time. It will also involve a  
10 factual inquiry about what else was done prior to the  
11 second defendant plasterer attending the site. Again, all  
12 of those things affect the second defendant's potential  
13 risk profile. So the same application is made in respect  
14 of the lost opportunity to participate in settlement  
15 discussions.

16 Also the same submission is made in respect of the  
17 lack of an explanation.

18 In respect of the proposed fourth and fifth  
19 amendments, which are an amendment to quantum, all that has  
20 happened with this proposed amendment is that a line item  
21 in the particulars of damages has been increased from 47 or  
22 \$48,000 to \$68,000 approximately. That is an increase of  
23 just under 20 per cent on the plaintiff's original claim.  
24 Again, it comes at a time when the plaintiff settled  
25 against other defendants and, as I've set out in paragraph  
26 24, if the plaintiff is successful against the second  
27 defendant then Your Honour will almost certainly also have  
28 to decide on apportionability of the claim against various  
29 parties, the first, second and third defendants, and doing  
30 that in respect of the second defendant on a potentially  
31 increased quantum of damages, that will inflate the second

1 defendant's exposure against what the first and third  
2 defendants who have already settled for a sum certain, and  
3 that is again, in my submission, a prejudice that can't be  
4 cured as against in respect of the second defendant.

5 Can I make one further observation and it's in terms  
6 of the chronology of the pleading. The plaintiff's  
7 statement of claim, the amended statement of claim which  
8 the current version can be found at p.7 of the court book.

9 HIS HONOUR: This is - sorry, the current version, yes. So the  
10 one that was filed on 22 May?

11 MR MULLER: That's right, yes.

12 HIS HONOUR: Yes. Which paragraph?

13 MR MULLER: Paragraph 4, which is on p.11 of the court book.

14 The plaintiff pleads the allegations in respect of the  
15 fire, or the fires. The way that it pleads it is broadly  
16 chronological. It says firstly in paragraph 4 that various  
17 works were performed on 30 April. Then in paragraph 5,  
18 that when, as it turns out, the third defendant was leaving  
19 the property the plaintiff discovered a small fire in a  
20 ceiling cavity of the area where the down light had been  
21 located, and that's the first fire, and that fire was  
22 extinguished. Then it's alleged that the electrician  
23 advised the plaintiff that the down lights were safe to  
24 use.

25 Then next in the sequence is the allegation the  
26 subject of this application, that the plaintiff used the  
27 down lights on the evening of 30 April.

28 Then in paragraph 7 in the early hours of 1 May a  
29 further fire started.

30 Then in paragraph 7A, during the day of 1 May a  
31 further fire started.

1           In my submission what the plaintiff's lawyers have  
2       done is to plead out chronologically what happened. That's  
3       important because paragraph 6 falls between the end of the  
4       first fire and the advice that the down lights were safe to  
5       use, and the commencement of the second fire. So it is an  
6       admission that the plaintiff - in my submission that the  
7       plaintiff used the down lights after the first fire and  
8       before the second fire.

9   HIS HONOUR: Mr Muller, can I just stop you there? What's put  
10   by Mr Simpson in his submissions is that paragraph 6  
11   doesn't specify which down lights, for example, the  
12   plaintiff used. Are you suggesting to me that  
13   chronologically paragraph 6 must refer to the down lights  
14   in question in paragraph 5?

15   MR MULLER: No, I'm not, Your Honour. And I'm not because the  
16   evidence seems clear that it was - there were one of two  
17   possibilities that caused the second fire. The first was  
18   the energising of a down light by reason of the plaintiff  
19   turning the light back on. That's the way the second  
20   defendant puts the defence. That requires a down light  
21   having been turned on. Now the evidence that the MFB will  
22   give is that the source of that second fire was in an area  
23   other than where the plasterer had performed the work. So  
24   it was a different down light.

25           The evidence is unclear as to in fact which down  
26   light is said to have caused the first fire and that's a  
27   matter that will need to be explored in the trial. But it  
28   is, in the second defendant's case, the fact that the  
29   plaintiff turned on the lights which re-energised or  
30   energised a or more halogen lights that was the source of  
31   the second fire. And having been told not to do that,

1 which is what the MFB says, that that is a break in the  
2 causal change between anything the second defendant did and  
3 the cause of the second fire.

4 HIS HONOUR: All right. I just wanted to take you to a couple  
5 of points if I could, and probably just anticipating  
6 Mr Simpson. Firstly, if I was not to - well, if I was  
7 allowed - if I granted the plaintiff leave to amend in this  
8 form, what do you say should then happen with the trial?

9 MR MULLER: It's very difficult for me to answer that at this  
10 point because what it means is that the second defendant  
11 would have to reconsider the alternate position and look at  
12 what evidence it might need to lead or what further expert  
13 evidence it might need to obtain to meet the alternate  
14 case, that it had discounted because of the admission.

15 HIS HONOUR: Are you saying that if I granted the amendment the  
16 second defendant would not be in a position to proceed with  
17 the trial immediately?

18 MR MULLER: Yes, I think that is the outcome of it.

19 HIS HONOUR: Is the delay you would require to either obtain  
20 instructions or further prepare the case likely to mean  
21 that the case would have to go away for several months?

22 MR MULLER: I think the second - I don't know, Your Honour. I  
23 would need to take instructions about what further evidence  
24 would need to be led and that would involve speaking to an  
25 expert again about their time frame and then there is, of  
26 course, the court's availability as well.

27 HIS HONOUR: All right.

28 MR MULLER: To re-hear the matter.

29 HIS HONOUR: If I was to deny the amendment you would say, from  
30 the second defendant's perspective, that you could proceed  
31 immediately?

1 MR MULLER: Subject to one thing, Your Honour. The plaintiff  
2 now says that she's intending to give evidence herself. I  
3 don't know if that is only if the amendment is allowed, so  
4 maybe it gets wrapped up. But the orders have been for  
5 witness statements or witness outlines. There has not been  
6 a witness statement or a witness outline filed by the  
7 plaintiff, so if the plaintiff is now intending to give  
8 evidence then before anyone was cross-examined I would, as  
9 a matter of fairness, want to see what it is that, what the  
10 evidence is that she said she's going to give. So that  
11 could be - that would be a short adjournment and it  
12 probably would mean that the case could proceed on Tuesday  
13 if I received the outline at some point today. But  
14 otherwise it would require a more substantial adjournment.

15 HIS HONOUR: Thank you, Mr Muller. Is there anything else you  
16 wish to put?

17 MR MULLER: No, thank you Your Honour.

18 HIS HONOUR: Thank you. Mr Simpson.

19 MR SIMPSON: If the court pleases. Your Honour, it's submitted  
20 there's an element of misconception in my learned friend's  
21 submissions on the first amendment. The misconception  
22 arises from three matters. The first is my learned friend  
23 doesn't seem to accept that the plaintiff admits that the  
24 lights were turned on and so the allegation in paragraph 6  
25 of the proposed pleading is sought to be amended so as to  
26 read 'the down lights were used on the evening of 30 April  
27 2014'. Can Your Honour still hear me?

28 HIS HONOUR: Yes.

29 MR SIMPSON: The second misconception, with respect, is that my  
30 learned friend hasn't given any relevant weight to the fact  
31 that his client has a claim for contributory negligence

1 against the plaintiff which only recently, as in the second  
2 defendant's amended defence dated 2 June that was sent to  
3 the court on 3 June at 9.47, paragraph E of the particulars  
4 which are in evidence against the plaintiff, are as  
5 follows: turning on the down lights after the first fire  
6 contrary to the advice provided by the MFB. So the  
7 defendant, the second defendant already fairly and squarely  
8 has that allegation in its sights as a contributory  
9 negligence.

10 The third matter is that the second defendant has  
11 recourse to cross-examine Mr Neil Barnes, who we've  
12 mentioned, the plaintiff herself, and we are bereft in not  
13 having provided an outline and we will do that, and the  
14 plaintiff's former husband who is proposed as the first  
15 witness.

16 Can I just say that although there is no affidavit  
17 material, the explanation, as far as I'm instructed, for  
18 the reason behind the brief paragraph 6, and as Your Honour  
19 has noted - when I say brief, it's in the lack of specific  
20 materiality that those few, that that sentence is framed,  
21 but it appears to have been drawn on a misapprehension of  
22 Mr Barnes' view at court book 317, Your Honour. At court  
23 book 317, it's the third-last paragraph, just above the  
24 heading 'Fire damage'.

25 HIS HONOUR: Yes, we'll just get that up.

26 MR SIMPSON: Thank you, Your Honour. Your Honour, I don't have  
27 that dexterity of use at this stage to do something like  
28 that but I'm reading from the hard - - -

29 HIS HONOUR: I can see it. It says the lights were used on the  
30 evening before the fire was noticed.

31 MR SIMPSON: That's it. That's precisely it. That appears to

1 be the source of adoption and misconception that attributes  
2 that use to the plaintiff who now wishes to give evidence  
3 that it was not her.

4 HIS HONOUR: (Indistinct words) Mr Simpson because pleadings - I  
5 mean the first point Mr Muller raises is he says, 'Look, on  
6 what basis was it pleaded this way?', and I note that the  
7 pleadings were first filed in this form in October 2017.

8 MR SIMPSON: Yes.

9 HIS HONOUR: Who signed the pleading at that time?

10 MR SIMPSON: Well, it was my predecessor, whose name I can't  
11 recall, but my instructor will tell me via text no doubt.  
12 But it was - well, I'm actually not even sure if it was  
13 signed by counsel at that time as opposed to an amendment.

14 HIS HONOUR: But it remains in that form even a year later, in  
15 August, when it's amended to join the second defendant.  
16 I'm interested in this because by that stage at least I  
17 would have thought that there would have been direct  
18 instructions taken from the insured.

19 MR SIMPSON: Your Honour, the pleading was actually signed by  
20 the principal of my instructing solicitors, or a principal  
21 of Sparke Helmore, so it wasn't settled by counsel. But as  
22 Your Honour's identified it was not altered in subsequent,  
23 clearly in subsequent versions. But, Your Honour, there's  
24 a court book reference I'd like to take you to on this  
25 particular point about the defendant's reliance or not on  
26 that pleading and it's court book 608, Your Honour, and at  
27 608 - thank you, Your Honour - that's a letters Colin  
28 Biggers & Paisley, the second defendant's solicitors,  
29 identifying their understanding on what the MFB  
30 investigation analysis finds and Your Honour you see  
31 there's four dot points, none of which are referable to



1 really who or when the lights were on, or in fact whether  
2 they were on, but if Your Honour goes to the second page,  
3 the essence of the second defendant's defence is this:  
4 it's that we are instructed that our client had completed  
5 all plastering works on the day before the electrician  
6 attended the premises to perform the actual works. That's  
7 not quite accurate but that doesn't matter. 'Accordingly,  
8 our client was not present at the premises on 30 April 2014  
9 as alleged by the plaintiff at paragraphs 4 and 5 of her  
10 statement of claim. Our client was not responsible for the  
11 fire which appears to have occurred by reason of the  
12 electrical works and inadequate safety inspection conducted  
13 by the electrician after our client had finished the  
14 insulation and plaster work.' That's what we understand  
15 the substantive defence in this case is. And that's what  
16 the MFB witnesses and their amending statements are  
17 intended to advance, as we apprehend it.

18 HIS HONOUR: What is the date of that letter?

19 MR SIMPSON: That letter dated 21 November 2018. It's  
20 historically quite old but when you cross-reference that  
21 amendment, that letter, if Your Honour pleases, of 21  
22 November 2018 with the recent particular of contributory  
23 negligence against the plaintiff at particular E of 13 of  
24 the second defendant's defence, turning on the down lights  
25 after the first fire contrary to the advice provided by the  
26 MFB, there's a huge gulf of time between the asserted  
27 defence of November 18 and then the aspect of a  
28 contributory negligence recent event.

29 HIS HONOUR: Can I just say to you that that letter is written  
30 at around the time when Avanzo, the second defendant, first  
31 comes into the case. They plead at that time that they did

1 not know and could not plead to the allegation at paragraph  
2 6, which I would have thought is entirely appropriate given  
3 that they'd just come into the matter and the position of  
4 their client as a plasterer. I would have thought that  
5 over time, and even until this day, that information  
6 continues to fly between the parties. So it doesn't  
7 surprise me that they would take a preliminary view like  
8 this at that particular time but it was subject to change.

9 MR SIMPSON: Yes. But, Your Honour, if one goes to the rule of  
10 pleadings, as Your Honour's well familiar, and this is  
11 general - well, this is rule 13.12 sub-rule 1, it's not  
12 enough for a party just to make a mere denial of a pleading  
13 or a fact. If it wishes to put some affirmative evidence  
14 in issue under rule 13.12 sub-rule 2 or 3 - I can go to it  
15 in a moment - there's an obligation on a party to plead  
16 affirmatively the facts they intend to rely upon. I ask  
17 Your Honour - I'll just bring up that rule, Your Honour.  
18 As I say, it's a common rule of pleading at - - -

19 HIS HONOUR: I have it here in front of me.

20 MR SIMPSON: Thank you, it's rule 13.12 sub-rule 2, 'Where the  
21 party pleading intends to prove facts which are different  
22 to those pleaded by the opposite party, it shall not be  
23 sufficient for the party merely to deny or not to admit the  
24 facts but the party shall plead the facts the party intends  
25 to prove'. So you would think that if this was a  
26 significant matter for the second defendant it would have  
27 sought to have elaborated upon it in its defence.

28 HIS HONOUR: All right. I've heard your argument about that.

29 MR SIMPSON: Your Honour, as to the second amendment so-called  
30 by my learned friend, that's consented to and I don't wish  
31 to say anything further about that.

1           As to the so-called third amendment, which is  
2       objected to, this again, in our submission, is - this whole  
3       position is misconceived because the allegation that the  
4       plasterer, the second defendant, carried out the works, or  
5       carrying out the works without ascertaining whether the  
6       power supply to the down lights had been disconnected, has  
7       been a part and parcel of the case for a number of years  
8       and it just has not been formally introduced as a  
9       particular. But the evidence in the case against the  
10      second defendant is that at the time when it carried out  
11      the, I'll call it plaster works but it's insulation alleged  
12      as well, the down lights had not been disconnected and it  
13      did not ascertain, more relevantly, did not ascertain  
14      whether the power supply to the down lights had been  
15      disconnected. That's a fundamental plasterer related  
16      obligation to which a number of expert witnesses, and I  
17      won't perhaps take Your Honour to them at this point, do  
18      refer to and it's something that is a factor in the  
19      culpability of the second defendant and the submissions  
20      that - we don't understand how the second defendant could  
21      be taken by surprise because the question of whether or not  
22      it ought to have ascertained if the power supply to the  
23      down lights had been disconnected has been a fundamental  
24      part of the case. It just hasn't worked it's way into the  
25      particulars.

26   HIS HONOUR: On that Mr Muller would say, well look, they've  
27       settled against a number of parties who have involvement  
28       with the electrical works and now to suggest that some  
29       obligation to those parties with involvement in electrical  
30       works extends to his client is to have another bite at the  
31       cherry against his client on that point.

1 MR SIMPSON: Your Honour, the response to that, with respect, is  
2 that the second plaintiff still has in its armoury under  
3 part 4AA - perhaps not under the ACL but under part 4AA -  
4 the comparative liability available to transfer or shed on  
5 to the builder and/or the electrician the consequence of  
6 the plasterer not ascertaining whether the power to the  
7 down lights had been disconnected. So we don't understand  
8 how there can be a fundamental prejudice or disadvantage to  
9 the second defendant when it retains its culpability  
10 allegations against D1 and D3 for the purposes of  
11 apportionable and concurrent wrongdoing liability.

12 HIS HONOUR: But in a situation where they've settled and let  
13 those parties go, all that can really happen now is that in  
14 the proceedings against your client they can be held to  
15 account for a greater amount than they might have been if  
16 this allegation is successful, which would have affected  
17 the way that they had settled with those other parties,  
18 wouldn't it?

19 MR SIMPSON: No, with respect, Your Honour, because the way the  
20 second defendant takes the benefit of the increased  
21 culpability of the other parties is in a corresponding  
22 reduction in its liabilities. So for instance if - - -

23 HIS HONOUR: No, but if I found that they were, let's just put  
24 it broadly, more liable because of this allegation - - -

25 MR SIMPSON: Yes.

26 HIS HONOUR: - - - and this allegation had not formed part of  
27 the pleadings at the time when they settled with the other  
28 defendants, then they couldn't shed that liability.

29 MR SIMPSON: Well, Your Honour, they could only take the benefit  
30 of trying to shed that liability by way of the fifth if it  
31 wasn't a Part 4AA matter, they could for instance have

1 filed notice of contribution and then what Your Honour is  
2 saying would be, with respect, absolutely correct, that by  
3 settling the claims for contribution by the second  
4 defendant against D1 and D3 on the terms that were done,  
5 which was dismissal, no order as to costs, there's been  
6 some prejudice by the subsequent allegation, but as Your  
7 Honour might be aware, under Part 4AA it's not permissible  
8 to file contribution notices because the liability is one  
9 of comparative or proportionable liability. So the second  
10 defendant takes the benefit of being able to maintain its  
11 allegations against D1 and D3 to the full extent that the  
12 evidence and arguments allow, and hence why a second  
13 defendant in the context of this case is not overly  
14 troubled by the release of the - or by the dismissal by the  
15 plaintiff of D1 and 3 because it doesn't affect its ability  
16 to reduce its own comparative liability. As distinct, Your  
17 Honour, from the fourth defendant, the MFB, where its  
18 dismissal and removal as a party from the proceeding now  
19 precludes the second defendant from seeking to reduce its  
20 comparative liability referable to the MFB because they are  
21 no longer a party, and that's a decision that the second  
22 defendant took.

23 HIS HONOUR: Didn't they take that, and this is moving broader  
24 than this point, they took that on the basis of the way  
25 that the claim had been put and Mr Muller would say, look,  
26 it was a very significant point whether or not the  
27 plaintiff turned the lights on because that had downstream  
28 effects on the liability of the MFB. Because if she is  
29 said not to have turned the lights on, then the MFB's  
30 attended, not properly checked the insulation for a  
31 smouldering fire, and it potentially increases their

1 liability. But given the way the plaintiff put the case,  
2 that she had turned the lights on, then the second  
3 defendant had a particular risk profile, in Mr Muller's  
4 words, against the MFB leading them to make the decision  
5 they made in respect to settlement with them. Now that  
6 can't be gone back on, can it?

7 MR SIMPSON: It can't be gone back on but we make the  
8 submission, Your Honour, that the causative substance or  
9 effect of that decision of releasing the MFB from the  
10 proceedings doesn't derogate from the second defendant's  
11 comparative defence that the MFB did nothing wrong, but the  
12 plasterer did, and whoever turned on the lights did  
13 something wrong. But the plaintiff using the down lights  
14 in the way alleged in paragraph 6, the plaintiff used the  
15 down lights on the evening of 30 April 2014, in my  
16 submission doesn't exculpate or inculcate the MFB at all.  
17 It's a factual background that's inaccurately pleaded,  
18 recognising that the plaintiff's case is that the down  
19 lights were on, but it's just she didn't turn them on. And  
20 if that admission is permitted to be withdrawn, then the  
21 second defendant has the opportunity, through  
22 cross-examination and other evidence, to show that that's  
23 wrong.

24 HIS HONOUR: But how does it cure the prejudice that the second  
25 defendant faced or the second defendant has now incurred,  
26 which is that it's entered settlement negotiations, at  
27 mediation or wherever, and has come to settlement with  
28 other parties, particularly the MFB? That factual matter  
29 must have very significant impacts on the second  
30 defendant's risk assessment at the time when it went into  
31 those negotiations.

1 MR SIMPSON: Well, Your Honour, again the regime, as Your Honour  
2 is aware, the apportionality regime targets individual  
3 defendants referable to their comparative liability for the  
4 conduct alleged and disqualifies those defendants from  
5 seeking contribution against each other. So there is  
6 really no - the settlement with the first and third  
7 defendants is, if I may say, it's a procedural settlement  
8 devoid of substantive consequence because the second  
9 defendant retains within its armoury or arsenal the ability  
10 to inculcate and continue to inculcate the first defendant  
11 for its conduct, but more relevantly in this instance the  
12 third defendant for his conduct or its conduct and together  
13 or additionally, Your Honour, the plaintiff for her  
14 conduct. We make the submission there has been nothing  
15 relevantly lost by the second defendant in so-called  
16 settling with the first and third defendants.

17 Could I make this further submission? The settlement  
18 is perhaps a misnomer because it's almost by force of law  
19 impossible for a comparative liability Part 4AA defendant  
20 to settle with another. It's a misnomer because you can't  
21 - you do not have a right of contribution, that's in  
22 s.24A(i) I think it is, you don't have a right of  
23 contribution as a co-defendant, because that's not how  
24 comparative liability works, comparative liability is  
25 several, and if you don't have a right of contribution  
26 against a co-defendant under Part 4AA, the concept of  
27 settling with such a defendant loses the usual force of  
28 what it would be if it was a 23B *Wrongs Act* type position  
29 or some other thing. It might be different if there was a  
30 contractual indemnity scenario, which there isn't here.

31 So the second defendant, in my submission, has lost

1 absolutely nothing in the way in which it settled with D1  
2 and D3 because it can amend its pleading and its defence to  
3 increase the factual basis now upon which it might seek to  
4 assert comparative liability of D1 or D3, which of course  
5 detracts from its potential comparative liability.

6 We don't understand how the formal settlements - the  
7 settlements the subject of discussion are effectively  
8 between the plaintiff and the first and third defendant.  
9 That's the operative settlement to which the second  
10 defendant doesn't have any practical privity because  
11 legislatively the second defendant's captured by the  
12 apportionable concurrent wrongdoer provisions.

13 HIS HONOUR: Doesn't it lead to this position though, that the  
14 plaintiff settles with some defendants on one factual basis  
15 and receives value in the course of those settlements, I  
16 assume, whether you call it \$1 or \$100.

17 MR SIMPSON: Yes.

18 HIS HONOUR: Then if the plaintiff changes the basis on which it  
19 makes its claim and goes after another defendant, being the  
20 second defendant here, and seeks value against them on a  
21 different factual basis. Now that to me, that  
22 inconsistency to me seems to be an unfair way to deal with  
23 one case involving multiple defendants, all which should be  
24 dealt with at one time. That's the basic position, isn't  
25 it?

26 MR SIMPSON: I accept that, Your Honour, it is the basic  
27 position. Then I really maintain that the substance of the  
28 rule would place paragraph 6 in the way that my short  
29 outline of submission, typographical errors included,  
30 identifies, is that such a paragraph could hardly be or  
31 seriously be relied upon as creating real prejudice to a



1 party who's admitting that paragraph because it's a short  
2 sentence which doesn't say very much, and I appreciate  
3 Mr Muller has chronologically sequenced it between the  
4 first fire and the second fire and that might suggest that  
5 the temporal aspect of paragraph 6 is after 7.40 pm, but  
6 which down lights - and there'll be evidence about the down  
7 light system in the house and there's multiple down lights  
8 which are not affected by this, or at least not the subject  
9 of causation of the fire but they're still in a defective  
10 position, but there are multiple down lights in various  
11 areas of the house which is part of the evidence.

12 Those are the submissions on that, if the court  
13 pleases. Your Honour, there is a point in paragraph 4, and  
14 Mr Muller may not have had an opportunity to address this,  
15 but it's a short point in the sense that - we submit that  
16 the second defendant was taken to admit it, the present sum  
17 of the contents at 47,998 by force of not having served a  
18 notice of dispute within the 7 days, the truncated 7 days,  
19 if I can call it that, by which Judge Carmody ordered on 22  
20 May - they were a day late - and paragraph 11.7 of the  
21 plaintiff's notice to admit at court book 78 sets out a  
22 fact of 47,998. So that's a basal starting point. The  
23 increase in the contents' value by a further 20,000 was  
24 sought as a matter of justice and fairness to the  
25 plaintiff. If the court pleases.

26 HIS HONOUR: Mr Simpson, tell me, if I decline your application,  
27 what will that mean for the case?

28 MR SIMPSON: Well, if Your Honour declines the application and  
29 the admission stands it means that the plaintiff will be  
30 taken to have used the down light - - -

31 HIS HONOUR: Just stepping away from this, but more broadly. If

1 I do not grant you leave to amend your statement of claim  
2 at all, let's say, what does that mean for the case?

3 MR SIMPSON: We would be seeking to proceed bereft of the  
4 amendments, Your Honour.

5 HIS HONOUR: All right, thank you. Mr Muller, any reply from  
6 you?

7 MR MULLER: Just three short points. It was said that the  
8 submission that I made in respect of the paragraph was  
9 misconceived because it was somehow said that it wasn't a  
10 withdrawal of the paragraph, but as I read the proposed  
11 further amended statement of claim paragraph 6 is deleted  
12 and not replaced with anything, and that's the basis upon  
13 which the submission is put, my submission is put.

14 The second is that there was a further amended  
15 statement of claim that the plaintiff filed on 2 May 2019  
16 that was signed by counsel other than Mr Simpson.

17 In respect of the third, the very last point that  
18 Mr Simpson just made about the admission, my instructor  
19 says that the notice of dispute was filed within time, but  
20 in any event even, if an earlier and smaller amount had  
21 been admitted that can't possibly be then taken to be that  
22 a larger unspecified amount is also admitted.

23 HIS HONOUR: Sorry, just explain that to me again.

24 MR MULLER: What appears to have been said in the notice to  
25 admit - not what appears, I take that back. What the  
26 plaintiff put in the notice to admit dated 22 May addressed  
27 to the second defendant, asks the second defendant to admit  
28 that the plaintiff and her insurers had been put to expense  
29 in connection with the fire repair works as follows, and  
30 then it sets out a number of repairs. And then in  
31 paragraph 11.7 of that notice - I should say, Your Honour,

1           that that notice commences at p.75 of the court book.

2   HIS HONOUR:   Yes, thank you.   We'll just get that up.

3   MR MULLER:   Then scrolling down to p.77 is where the request is  
4           made to admit the facts set out in that paragraph, and  
5           relevantly on the next page, which is 11.7, with reference  
6           to paragraphs 1.4 and 1.5, damage to contents of the sum of  
7           \$47,998, and that is the amount that is claimed in the  
8           second further amended statement of claim.

9           In the second defendant's notice of dispute, which is  
10          at p.85, that is disputed by the second defendant.

11          Paragraph 1, the second defendant disputes all the facts in  
12          paragraphs 1 and 3 to 12, so that includes paragraph 11.7.

13   HIS HONOUR:   Yes.   And what's the date of that?

14   MR MULLER:   The date of this is 2 June 2020, which - I'm just  
15          having my instructor pull up the orders that His Honour  
16          Judge Carmody made.   Order 14 of those - paragraph 14 of  
17          those orders does provide a truncation of the time for the  
18          filing of notices of dispute to 7 days, which would make  
19          that due on 29 May 2020, and it was in fact served two  
20          business days later than that on 2 June from what I can  
21          tell from the documents.   It may be that technically on the  
22          orders made that it's taken to be an admission.   In my  
23          submission if that's - the first submission I made is  
24          that's an oversight by the second defendant's lawyers and  
25          the position is made clear and is made clear shortly after  
26          the date for that to have been done.

27          But the second point that I wanted to make was even  
28          if it's accepted that the second defendant had admitted the  
29          sum of \$47,000 as being the appropriate sum for damages, it  
30          doesn't follow that then if the plaintiff seeks to enlarge  
31          that amount by another \$20,000 that the admission then

1 flows with that inflation. That was the point that I was  
2 making on that, Your Honour.

3 HIS HONOUR: Yes, thank you. What I propose to do is the  
4 following: I will take until 12 o'clock and at that time I  
5 will provide you with a ruling as to the application for  
6 the plaintiff to file and serve the proposed third further  
7 amended statement of claim. I'll provide very short oral  
8 reasons for that. Once I've done that we'll plot a course  
9 for the trial.

10 MR SIMPSON: As the court pleases.

11 MR MULLER: Yes, Your Honour.

12 HIS HONOUR: I'll have my associates place you all into the  
13 waiting room at the moment. You're free obviously to leave  
14 your chairs and use facilities but I would ask you to be  
15 back in front of your chairs, in front of your screens  
16 promptly at 12 when my associates will admit you to the  
17 main hearing room.

18 MR SIMPSON: If the court pleases.

19 HIS HONOUR: Thank you.

20 (Short adjournment.)

21 (RULING FOLLOWS)

1 (Following ruling.)

2 HIS HONOUR: Having made that ruling what I propose is to  
3 reserve your costs, Mr Muller, over the last day at least  
4 and hear all costs matters at the end. Is that a suitable  
5 course to you both?

6 MR MULLER: Yes, Your Honour.

7 MR SIMPSON: Yes, Your Honour.

8 HIS HONOUR: Thank you. I should say, I note that this matter  
9 did start yesterday. It's still obviously going today in  
10 dealing with that issue, so I might, out of an abundance of  
11 caution, simply reserve your costs, Mr Muller, for  
12 yesterday and today and we'll just see where we end up  
13 today.

14 With that out of the way where are we up to,  
15 Mr Simpson?

16 MR SIMPSON: Your Honour, we're up to the plaintiff wishing to  
17 proceed by way of a proposed opening address and perhaps  
18 before that occurs there's some preliminary points that  
19 Your Honour may be able to rule on and then the plaintiff  
20 to give an opening address, which may take about 40 minutes  
21 or so, and subject to Your Honour's leave, if Mr Muller  
22 wants to give a short reply opening, and then we would  
23 propose to adjourn to allow - for evidence to commence from  
24 Mr El Oster on Tuesday morning, subject to further  
25 direction by Your Honour.

26 Could I indicate, Your Honour, there are seven  
27 witnesses for the plaintiff and there are five witnesses  
28 for the second defendant, and so that makes 12 witnesses.  
29 I wouldn't think - - -

30 HIS HONOUR: Just on that, your client, Ms Marzouk, there's no  
31 witness statement from her; is she included in your seven

1 witnesses?

2 MR SIMPSON: She is and I've indicated to my learned friend that  
3 we will provide an outline by close of business today.

4 HIS HONOUR: Right. When will she come along and give evidence?

5 MR SIMPSON: On the Tuesday - well, she's available on the  
6 Tuesday.

7 HIS HONOUR: All right. Let me just see with Mr Muller.

8 Mr Muller, my usual practice is immediately after the  
9 plaintiff's counsel's opened the case I would like an  
10 opening from you as well. It need not be long, it can be  
11 ten minutes, but I really want to know what the central  
12 issues in dispute are from the second defendant's position.  
13 Otherwise, what do you say about the course proposed by  
14 Mr Simpson?

15 MR MULLER: I'm prepared to give that short opening after the  
16 plaintiff has opened her case. On my count there are  
17 actually eight witnesses for the plaintiff, which means  
18 there are I think 13 witnesses all up. I would like to see  
19 Ms Marzouk's statements before cross-examination commences.

20 HIS HONOUR: Can I just indicate to the parties that what I  
21 propose to do with evidence-in-chief is simply have the  
22 witness adopt the statement and then be cross-examined on  
23 it. Obviously I'll give slightly greater leeway when  
24 re-examination comes around, but I don't require you to  
25 call the witness and then go through the witness statement  
26 line-by-line with them.

27 MR SIMPSON: Your Honour, may I be heard on that?

28 HIS HONOUR: Yes certainly.

29 MR SIMPSON: Your Honour, I fully appreciate what has just  
30 fallen from Your Honour but, with respect, in order to do  
31 justice to the plaintiff's case I'm going to need to have

1 to put to Mr El Oster, among others, for instance, the  
2 photographs and, for instance, what's put against him by  
3 Mr Wood and Mr Mothersole in detail to satisfy puttage and  
4 I would ask the court then for some leniency to be able to  
5 do that because the witness statements haven't been  
6 prepared as statements of exclusive and wholly encompassing  
7 all of the evidence. It's the substance of the evidence  
8 and distinct from in the Supreme Court commercial list  
9 where what occurs is what Your Honour just indicated, the  
10 statements are prepared with some more detail, if I may  
11 say. So unless - and there's a fair bit of updating of the  
12 witnesses' material, because of the flurry of activity that  
13 has gone on in the last three days. For instance, the  
14 experts, just jumping, just changing to the experts, I'd be  
15 seeking leave from Your Honour, I would seek leave from  
16 Your Honour to be able to send the expert witnesses for the  
17 plaintiff the statements of Mr O'Toole, Mr Wood,  
18 Mr Mothersole so they can understand what's being said in  
19 relation to those matters and in this case it's rather,  
20 whether it's unusual or not, most of the MFB witnesses  
21 themselves are experts and, of course, there's no order 44  
22 report from those individuals, perhaps understandably, but  
23 nevertheless they are experts in their own right. So  
24 there's that leeway that's sought to accommodate that  
25 circumstance. Some judges might ask for a lay expert, as  
26 it were, to actually provide details of their credentials  
27 and expertise in the way of an order 44 statement, but I'm  
28 not pressing for that. But clearly these gentlemen from  
29 the Melbourne Fire Brigade are highly experienced in what  
30 they know and do but they're saying things outside the  
31 parameters of the order 44 confine. So I would be seeking

1 leeway to develop such evidence as Your Honour considers  
2 appropriate outside of the written word of what's been  
3 filed. If the court pleases.

4 HIS HONOUR: Thank you. If you were wanting to go down that  
5 course, and I can understand why you're suggesting you've  
6 got some puttage for each of these witnesses, it might well  
7 be that prior to that person being called and before they  
8 come into the hearing you identify for me which matters you  
9 wish to go to outside of the witness statement.

10 MR SIMPSON: Yes.

11 HIS HONOUR: That way Mr Muller has a very clear idea of what's  
12 going to be covered and is able to then prepare for that  
13 and I'll understand what you're going to go to.

14 Mr Muller, does anything Mr Simpson said take you by  
15 surprise?

16 MR MULLER: It doesn't take me by surprise because we've had a  
17 conversation about it, so I thank Mr Simpson for that. My  
18 submission though is that the most effective way and  
19 efficient way to conduct the trial is in the way Your  
20 Honour proposed, which is that the witness statements stand  
21 as the evidence of the witness in chief. The puttage  
22 aspect, in my submission my learned friend has the wrong  
23 way around. It is my obligation to put contrary facts to  
24 his witnesses and that is what, of course, I would do,  
25 subject to witnesses perhaps having already seen  
26 statements. But - no, I take that back. It is my  
27 obligation to put those matters to his witnesses and vice  
28 versa. Then that enlivens the right of re-examination on  
29 those points. In my submission that's the most efficient  
30 way to deal with it.

31 Secondly, I have no issue with the MFB's witness



1 statements being provided to his experts, but again in my  
2 submission it should be done on the basis that I will be  
3 cross-examining and putting to those experts various  
4 matters, and then of course Mr Simpson would have the right  
5 of re-examination on those. In my submission to do  
6 otherwise is going to extend the length of the trial  
7 considerably and adding to that the difficulty that  
8 conducting a trial electronically presents. It slows  
9 everything down. That it will mean that the conduct of the  
10 proceeding is not just and efficient having regard to the  
11 sum that's in dispute.

12 HIS HONOUR: Yes, thank you. Mr Simpson, I've heard what  
13 Mr Muller says and what he says about puttage is right,  
14 isn't it? I can understand why you might update a  
15 particular witness, but once their statement's gone in it's  
16 for him to then take issue with certain points if he  
17 wishes.

18 MR SIMPSON: That's so, but if, for instance, Mr El Oster is  
19 unable to explain to Your Honour what down lights he's  
20 talking about and what the photos show to him in  
21 evidence-in-chief, it makes it perhaps unfair that  
22 Mr Muller is then cross-examining on material that's not  
23 there in chief and in this case, Your Honour, there's a  
24 necessity to understand the photos and for a witness to  
25 explain to the court what he or she understands from the  
26 photos. It's actually critical, and in my opening I'll be  
27 taking Your Honour to limited photos to show how it is that  
28 they become significant. Because the placement of down  
29 lights that have been within the water damage repairs or  
30 not is a critical matter and the placement of other down  
31 lights is a critical matter. Whilst the witness statements

1 have done as best as they can to deal with these issues,  
2 there are unavoidable gaps that the witness needs to, in my  
3 submission, complete before the court.

4 HIS HONOUR: Well, I must admit that I'm with Mr Muller on this.

5 I think what we'll do is we'll identify the witness  
6 statement, we'll put it in, cross-examination will then  
7 occur and, as I said, I might give you a little bit more  
8 leeway in re-examination.

9 MR SIMPSON: Yes, Your Honour. I hear what Your Honour says.

10 In that event my re-examination is going to seek to go to  
11 areas that Mr Muller may not have cross-examined on.

12 HIS HONOUR: Well then I think you're simply going to have to  
13 deal with that.

14 MR SIMPSON: Yes.

15 HIS HONOUR: Because the witness statements should have covered  
16 the central issues in the case.

17 MR SIMPSON: Yes, indeed. Thank you, Your Honour.

18 HIS HONOUR: That's why we'll proceed - what I intend to happen  
19 now, Mr Simpson, is for you to open. At the end of that  
20 opening, which might be around 1 o'clock, we'll have lunch,  
21 assuming that you have finished. Mr Muller, I'll then have  
22 you briefly open to me and then at that point we'll  
23 adjourn, primarily because I think it's very important that  
24 the statement of Ms Marzouk be provided as quickly as  
25 possible.

26 MR SIMPSON: Yes, Your Honour.

27 HIS HONOUR: Then we'll commence on Tuesday with your witnesses,  
28 Mr Simpson. Hopefully we'll have a full slate and we'll  
29 just keep on going and we'll see how things eventuate.

30 Can I just indicate at the moment, you raised some  
31 questions about admissibility of expert material. Do I

1           need to deal with that now or are we better placed to do  
2           that after the opening?

3   MR SIMPSON: I would suggest we're better placed to do it after  
4           the opening, but there will be serial issues concerning the  
5           admissibility of particular aspects of each expert witness,  
6           which is a separate and distinct issue from Mr Conroy's  
7           expert report which involves a particular conflict  
8           question. Mr Conroy's report stands in a distinct separate  
9           category to what would otherwise be the ordinary objections  
10          - objections ordinarily taken.

11   HIS HONOUR: Let's have the opening. I'll see what the issues  
12          are from the second defendant's point and then we might  
13          just adjourn and deal with expert evidence and  
14          admissibility later on, perhaps on Tuesday. Mr Simpson.

15   MR SIMPSON: Yes. If the court pleases. Your Honour, may way  
16          of opening for the plaintiff this is a claim for damages  
17          arising out of fire damage to residential premises situated  
18          at 7 Golf Links Drive, Mill Park in the State of Victoria.  
19          There is an extensive amount of material filed with the  
20          court and the court has given directions which detail the  
21          background and I just want to take Your Honour to two  
22          statements at the moment. There's a joint statement of  
23          agreed and assumed facts which Your Honour will see at  
24          court book 296 to 306, and by reference to that joint  
25          statement of agreed and assumed facts it's been signed by  
26          the respective instructing solicitors for the plaintiff and  
27          second defendant dated 3 June. It speaks for itself so I  
28          won't take Your Honour through every paragraph, but I want  
29          to just summarise it by saying that the three fires the  
30          subject of issue occurred between 7.40 pm on 30 April 2014  
31          and 11 am on 1 May 2014. It's not contested that the fires

1 occurred within the roof cavity of the premises and so  
2 there's a first fire at around 7.40 pm on 30 April, a small  
3 smouldering fire. There is a main fire that occurred  
4 around 4.38 am on 1 May the following day, and then there  
5 is a third fire that was discovered around 11 am on 1 May  
6 in the course of investigating the main fire. At each of  
7 the three fires the Melbourne Fire Brigade were in  
8 attendance, in an emergency capacity at least in relation  
9 to the first and second, but they were on site by the time  
10 of the third fire.

11 Prior to the fires, the history of the property  
12 relevantly is that it's a three bedroom dwelling occupied  
13 by the plaintiff, Carol Marzouk, and her young daughter.  
14 Her former husband, Mr Youssef Abs El Oster no longer  
15 presides at the premises, had not presided at the premises  
16 since about 2011 but was a very frequent visitor at the  
17 premises by reason of his younger daughter and his interest  
18 in her welfare and, indeed, the welfare of the family for  
19 which he was no longer formally residing, but nevertheless,  
20 Your Honour, maintaining a very keen interest in the  
21 day-to-day activities of the family via the daughter.

22 So, Your Honour, the relevant history preceding the  
23 fires is significant and it's what the case is in part  
24 going to turn upon. By that I mean that some time before  
25 9 February 2014 there was water damage to the premises, and  
26 this is covered in the statement of agreed and assumed  
27 facts, and the water damage came from the air-conditioner  
28 on the western side of the roof of the premises and it  
29 leaked water into the living room ceiling.

30 Can I take Your Honour, please, to the sketch map  
31 which is a pivotal document in the case. If I could take

1 Your Honour to 242 of the court book.

2 HIS HONOUR: Mr Simpson, just while we're interrupted here, your  
3 witness I think we can let go for today.

4 MR SIMPSON: Thank you. Yes, please. So if the court pleases.

5 Does Your Honour's associate deal with that?

6 HIS HONOUR: Yes, so if you (indistinct words).

7 MR SIMPSON: Yes, thank you, Your Honour.

8 HIS HONOUR: The other thing that she can do is if you want it  
9 can be annotated. So if you want you can mark it or she  
10 can mark it with a particular X or a highlight.

11 MR SIMPSON: Thank you, Your Honour. I'm not sure I have the  
12 dexterity to mark it myself, Your Honour, but I appreciate  
13 that.

14 In the joint statement, the sketch plan that I've  
15 taken Your Honour to at 242 is at a number of places in the  
16 court book and it's in fact at 305 in the joint - it's at  
17 annexure A at 305 in the joint statement. But the point of  
18 taking Your Honour to the sketch plan at this stage is to  
19 identify that this was a sketch plan prepared by Damien  
20 O'Toole, the MFB fire officer and investigator, and this  
21 sketch plan discloses the three bedroom house in a  
22 configuration that is by and large an accurate lay-out, and  
23 there are some things that are not accurate which are  
24 probably not material, but importantly, Your Honour, if I  
25 can just clarify, it has a northwest orientation so the  
26 front door adjacent to bedroom 1, the master, is facing  
27 north and correspondingly Your Honour can see the east and  
28 west orientation and the south.

29 The way I want to work from this sketch for the  
30 opening, if Your Honour pleases, is to go to the southeast  
31 corner of the - thank you Ms Associate or whoever it doing

1       that - to the southeast corner and to identify that the  
2       area marked 'dining' is commonly referred to as the living  
3       room, but that's the subject of considerable scrutiny in  
4       this case. So it's what occurred, when it occurred and how  
5       it occurred to the ceiling of that living room in the  
6       southeast quadrant of the dwelling.

7               There are two red dots, as Your Honour can see. The  
8       first fire occurring around 7.40 pm on 30 April is the dot  
9       closest to bedroom 3, and so that could be marked, if the  
10      marking is appropriate, as first fire. There's actually a  
11      wall.

12   HIS HONOUR: We'll just put the number 1 there.

13   MR SIMPSON: Thank you. There's actually a wall that covers the  
14      bedroom door, so there's a small entrance way. The bedroom  
15      door is not exposed to the living room and hence there's a  
16      wall there but that's not critical. The second dot to the  
17      far southeast is the second fire, the ignition point of the  
18      second fire in our case, occurring about 4.38 am on 1 May.

19               So the leaking air-conditioner is on the roof that  
20      led to the water damage to the ceiling of the living room,  
21      and may I please have the dining room marked as 'living  
22      room', or 'L room', whatever's convenient. Thank you very  
23      much. And that's, of course, because as Your Honour can  
24      see north of the living room is a formal dining room  
25      adjacent to the kitchen.

26               Going back to the air-conditioner, Your Honour, the  
27      air-conditioner is located on the western roof. If I could  
28      ask for a marking - so that's on the far left of the  
29      diagram round about above the laundry, the laundry on the  
30      sketch map. It's on the western border - yes, thank you.  
31      It's effectively - the air-conditioner is installed on the

1 roof approximately above the laundry on that western side.  
2 If one went in a few millimetres - yes, thank you - that's  
3 the air-conditioner.

4 HIS HONOUR: Yes, we'll just mark that 'AC'.

5 MR SIMPSON: Thank you. As a result of the water damage which  
6 occurred some time before 9 February 2014, and I'm able to  
7 say that because if I take Your Honour to court book 434 -  
8 perhaps, yes, thank you. If I take Your Honour to 434.  
9 Your Honour will see there's an email from the first  
10 defendant's Mr Richard Bronstring, who's going to give  
11 evidence, to Cunningham Lindsay, who - Peter Fox is a loss  
12 assessor, saying, 'Hi Peter. Thanks for meeting me today.  
13 Please see email thread. I'll send other related emails  
14 following this. Also see attached photos showing down  
15 lights to lounge room'. If we could then please go to 437  
16 and 438-9.

17 HIS HONOUR: 437?

18 MR SIMPSON: Yes, thank you, 437. Those are the down lights in  
19 situ within the, within the what's called loose fill  
20 insulation in the ceiling cavity above the - of the roof  
21 above the living room. Your Honour, 439 is a helpful photo  
22 to indicate the extent of how the loose fill insulation has  
23 decomposed, as it were, and that is the top of the down  
24 light, or a down light with the wiring, and at 440, if the  
25 court pleases, 440, Your Honour will see what's called the  
26 loose fill insulation. There may be other sorts of  
27 insulation that have decomposed, as it were, and it's  
28 exposed when that down light has been pulled down from the  
29 water damaged plaster.

30 If I could then go back to the sketch plan at 242  
31 with the annotations adopted, if I may.

1 HIS HONOUR: They seem to have disappeared. I'm sure  
2 they'll - - -

3 MR SIMPSON: Anyway. Thank you, Your Honour. The area of water  
4 damage to the ceiling is in the location of in and around  
5 the word marked on that map 'dining', which we substitute  
6 for living room, but it's an area that is in that zone.  
7 That led to - the fact of the water damage led to an  
8 inspection report at court book 420, if the court pleases,  
9 and an inspection report at 420 by JKG Building.  
10 Mr Rudinella will give evidence in relation to this matter,  
11 but that indicates that there was an inspection report  
12 regarding a damage assessment on 3 March 2014. It's  
13 probably almost not quite a month after the occurrence of  
14 the water damage.

15 HIS HONOUR: What am I looking at 422, is that the living room,  
16 is it?

17 MR SIMPSON: Correct. This is not a very helpful photo because  
18 of the light considerations but at 422 Your Honour is  
19 looking at the living room and Your Honour's looking at it  
20 from a perspective of, looking at it the north facing  
21 south, so it's a north/south orientation photo and Your  
22 Honour is looking at a - what the photo shows is, if you  
23 like, a dress beam, so it's a shiny dress beam, and then it  
24 shows waterproofing called makeshift works, and they're the  
25 makeshift works that JKG Building performed and the better  
26 photo to take Your Honour to is really on 424. 424 - I'm  
27 not sure whether Your Honour can enlarge that, or the court  
28 can enlarge that, but 424 is a pivotal photo in this case  
29 because it demonstrates the completion of the water repair,  
30 I call it make safe works, and it indicates and evidences  
31 the area of the affected plaster damage that's the subject



1 of plastering by the second defendant in repair works, but  
2 importantly, Your Honour, it indicates there are two down  
3 rights to the forefront of the photo and there are two down  
4 lights in obscured view on the other side of that timber  
5 batten, on the south side of the timber batten, so on the  
6 south side of the timber batten there are two down lights  
7 as well, so there are at least four down lights - there are  
8 four down lights viewable in that photo. We believe, and  
9 we think there are reasonable grounds to believe, that  
10 there are a further two down lights within the plastic  
11 sheeting that have either been pushed up or the wiring's  
12 there or the - we don't know whether the down light's  
13 there. We don't know what is behind that sheeting, Your  
14 Honour, but it's the plaintiff's case that there is wiring  
15 behind the sheeting and/or down lights behind the sheeting  
16 that somehow became embedded above the black plastic  
17 sheeting and so if that's correct, if there were two or  
18 three down lights there, it's a busy ceiling of down  
19 lights, there's at least four in view - there are four in  
20 view and there's a further two or three not in view. So  
21 that makes for six down lights at least.

22 May the court please go to 425. 425, the first photo  
23 is an example of what appears to an unaffected in situ down  
24 light, but it's the second photo on that page. Again, now  
25 that's what one would call an east/west orientation photo.  
26 It's taken from the west - sorry, I withdraw that. That is  
27 a north/south orientation photo, so the living room door  
28 faces south. The cameraman is to the north of that and  
29 that's the polished beam and there are another two down  
30 lights on the, what I'll call the northern side of that  
31 beam. So again the whole area is quite a - the living

1 area, so to speak, is a busy down light construction of  
2 installations because there are the four down lights that I  
3 took Your Honour to in the previous photo, there are these  
4 two separate down lights on the other side of the beam, or  
5 the closer side of the beam, and then there's whatever's  
6 lying within the plastic makeshift works.

7 So that's to give an idea. Mr El Oster will give  
8 evidence, to the extent that he's able to, about the down  
9 lights and their use. But that is the critical area of  
10 examination. There are multiple photos in different  
11 contexts of that ceiling area. But that's where the origin  
12 of the water damage arises. I'll come to the dimensions of  
13 the damage and move on to some very important documents,  
14 I'll just call them key documents in the case, and  
15 appreciating, the court book, Your Honour, just to clarify,  
16 the court book is now pp.1 to 702 with the recent additions  
17 this morning and so I'm not going to take Your Honour to  
18 other than an absolute minimum of what might be regarded as  
19 trade documents in the case, and there's only about eight  
20 or so mercifully.

21 Can I then turn to the question of what then followed  
22 from the makeshift works of about 3 March 2014 following  
23 the water damage of about 9 February 2014.

24 So what followed is that at court book 430, Your  
25 Honour, there is a tax invoice at 430 from JKG, the if you  
26 like, the make safe contractor. It's actually more than a  
27 make safe contractor, it's a building contractor, but to  
28 the insurer at risk for the homeowner and it verifies that,  
29 or at least contains a description of comments, Your  
30 Honour, under item 1D, and this the instructions from, it  
31 actually came from the loss assessor, Cunningham Lindsey,

1 'Please attend and make safe the ceiling so more cause more  
2 damage' - that would be so no more cause of damage -  
3 'please take photos and upload to console. Please submit  
4 docket once this has happened', and there's the tax invoice  
5 for \$385.

6 But what importantly follows is at 431, if the court  
7 pleases. This is another key document because this is the  
8 first written record, Your Honour, of the scope of works  
9 the subject of rectification required consequent upon the  
10 water damage. It's the first initiating document. It was  
11 never acted upon, I might say. So it's a quotation by the  
12 makeshift repairer to - it's marked to the client, and  
13 that's important because Carol Marzouk in this case, she is  
14 the client in the sense of she's the consumer acquiring, in  
15 this relevant sense, the plaster services and insulation  
16 work from the second defendant. So there is a consumer  
17 acquiring services in the form of, in our submission,  
18 repair and replacement works provided by a supplier, the  
19 second defendant, of trade or commerce. The second  
20 defendant is admitted to be acting in trade or commerce or  
21 conducting business in trade or commerce.

22 Your Honour, the scope of works is insightful  
23 because, and it's dated 17 March, and JKG are quoting for  
24 the repair works. They don't get it - I'm sorry, the works  
25 are not awarded to JKG but the quote description is  
26 instructive because if the court pleases there are seven  
27 items in the scope of works, and it's a fairly basic  
28 description, but it's a telling description because it  
29 identifies each and every one of the proposed seven items  
30 of works to be performed to repair and rectify the water  
31 damage to the living room ceiling, and you can see the

1 first heading 'family room 16 square metres'. That's  
2 clearly not (indistinct) because that's the approximate  
3 dimensions of the room. It's 3 metres wide, Your Honour, I  
4 should have mentioned that perhaps on the map, the family  
5 room is 3 metres wide and the relevant - I'll come back to  
6 that, but that's the width of the family room it would  
7 appear.

8 So the plastering task is described as 'remove and  
9 replace plaster ceiling, including cornices, 2.4 metres',  
10 we take that, 'by 3 metres'. Your Honour, that's a total  
11 of 7.2 square metres, and plaster wall 1.2 by 3, that's  
12 about a little over 5 square metres, so that's existing or  
13 quoted too.

14 Then the next item which appears second line is  
15 'disconnect and reconnect two existing down lights'. It  
16 doesn't say where they are, but that's the subject there.  
17 'Replace one light fitting as per existing and replace  
18 three down lights as per existing. Check all electrical  
19 and make sure all is okay'. We read that, Your Honour, to  
20 suggest that the repair works are referable to five down  
21 lights, two of which are existing and have to be  
22 disconnected and reconnected, and another three that have  
23 to be replaced. Now this is speculation on the plaintiff's  
24 part and the plaintiff's advisors' part, but it may well be  
25 that the two existing down lights are the ones that appear  
26 - and this is the plaintiff's case at least, and we can't  
27 be fixed and firm about this, Your Honour, but it's our  
28 case that the two existing down lights are in the agreed  
29 statement at annexure B. The court book reference is 306.  
30 I'm not sure I took Your Honour to 306. But at 306 they  
31 are the - we suspect and infer and it's our case that those

1 two existing down lights are those down lights at 306 in  
2 photo B. So this is an important photograph, Your Honour,  
3 and it's pivotal to, with respect, understanding the  
4 plaintiff's case and it's because it's that area, between  
5 the southern wall and the, if I can call it the cut face of  
6 the plaster which is running, as Your Honour can see, in a  
7 north southerly direction - and I'm incorrect, I want to  
8 correct myself on that and make it clear that the black  
9 plaster appears to be 3 metres long in an east/west  
10 direction and appears to be 2.4 metres wide. I'm sorry,  
11 I'm getting my configuration - I'll just restate it again.  
12 The black plastic that Your Honour is looking at appears to  
13 be 3 metres long running in a north southerly direction  
14 from the back door towards the front of the living room.  
15 So that's a 3 metre length. Thank you. The width of the  
16 black plastic appears to be about 2.4 metres.

17 This is critical, Your Honour, because it's that area  
18 that the plasterers were assigned to fix and the fixing of  
19 that area, as Your Honour can see, part of that area has an  
20 existing roof, a ceiling I'm sorry, a ceiling, with the two  
21 down lights, but it is part of the water damaged affected  
22 area and Your Honour can see a batten to the left of the  
23 two down lights, and that's that timber batten running  
24 again in a more southerly direction and we infer that what  
25 the plasterer did was it replaced the entire area between  
26 the timber batten that I've just indicated and the western  
27 wall of the living room. Whether that width - whether that  
28 amounts to a width of 2.4 metres or something less, and I  
29 did say before, Your Honour, that the black plastic  
30 sheeting was 2.4 metres wide, I might be wrong about that.  
31 It may be less than 2.4 metres because the 2.4 metres runs

1 from the western wall in that picture to the batten and  
2 that's because a plasterer would not seek to butt new  
3 plaster with existing plaster that's potentially water  
4 damaged or affected, would not seek to butt new plaster  
5 with existing plaster, but would replace the entire  
6 required plaster area from the wall, that's to say the  
7 western wall, to that timber batten. If that's true, Your  
8 Honour, and if the evidence establishes or makes it more  
9 probable than not, with respect, that the plasterer had  
10 replaced a plaster area of 3 metres by 2.4 metres, and it  
11 was from that western wall to that timber batten, then they  
12 had to remove or deal with or interfere with the down  
13 lights. That's a critical part of the case.

14 Those are the two existing down lights that JKG  
15 identify in their scope of works. They've assessed it and  
16 they're saying those two lights have to be replaced, and  
17 additionally on that point they're saying - and replace  
18 three down lights as per existing and we can't see the  
19 three down lights. Your Honour, I'll pass over the  
20 painting because that's not the point, the sanding's not to  
21 point, the furniture's not to the point, but what is to the  
22 point is the next item which is - it's not numbered but  
23 it's the fifth item, insulation. All it says, Your Honour,  
24 'Remove and replace 5 square metres damaged insulation to  
25 ceiling. \$400'. This contractor has assessed a need to  
26 remove and replace 5 square metres of damaged insulation to  
27 the ceiling which, of course, arithmetically is a smaller  
28 area than what the plaster under which the insulation is to  
29 be held, because Your Honour will recall that the plaster  
30 ceiling to be replaced is 2.4 by 3 metres, which is 7.2  
31 square metres, and yet the replacement of the insulation is

1           5 square metres. There's an issue there, Your Honour.

2           Five square metres does not cover 7.2 square metres. It  
3           just doesn't work. But that's an oddity or an irregularity  
4           or an inexplicable item.

5           One would think that if you were replacing the  
6           ceilings, the submission, Your Honour, opening submission,  
7           one would think that if a plaster was replacing a ceiling  
8           of 7.2 square metres there would be a need to replace 7.2  
9           square metres of insulation, not 5 square metres. So  
10          something's a little bit astray there and it may or may not  
11          be explained in the evidence.

12          Your Honour, the rest of the items are not really to  
13          the point, they are consequential water damaged items. So  
14          really that invoice becomes absolutely critical at item 1,  
15          being plastering, and item 2 disconnect, and at item 5.

16          If I can then move, Your Honour, to court book 441  
17          and 441 is relevantly an email from Mr Richard Bronstring  
18          of 10 April 2014 to the second defendants, Mr Serge  
19          Anakeev. 'Hi Serge, hope you're doing well, mate. Just  
20          seeing if you're interested in doing attached job. If so,  
21          can you let me know and contact insured Carol and book it  
22          in'. Again, this is important, Your Honour, because this  
23          is indicating that the second defendant has had direct  
24          contact with the plaintiff insured, Carol, and that is a  
25          consumer acquiring services from the second defendant  
26          through Mr Serge Anakeev within the meaning of the  
27          Australian consumer law, within the meaning of - the  
28          definition of consumer under s.3, within the meaning of  
29          acquired under s.2, and the services are also within the  
30          meaning of those provisions. And all of that attracts and  
31          brings in, in our submission, the services guaranteed

1 provisions under s.60 and 61 of the Australian consumer  
2 law, required by force of Victorian legislation within this  
3 jurisdiction, as Your Honour will be aware.

4 But what the critical document follows is at 447.  
5 I'm not sure why it shouldn't be the next page of the court  
6 book but it doesn't matter. This is now the scope of  
7 works, this is now the trade scope of works, Your Honour.  
8 This is the trade scope of works issued by the first  
9 defendant builder, Gippsland Building Services Pty Ltd,  
10 it's dated 9 April, the day before that email, and lo and  
11 behold, Your Honour, we don't mean to be facetious, but lo  
12 and behold, Your Honour, the scope of works happens to be  
13 drawn word for word in accordance with JKG's document at  
14 431. When I say word for word I better be careful because  
15 Mr Muller may say that's just not right. But what has  
16 happened is it appears quite evident that Mr Richard  
17 Bronstring has adopted the quotation, the formulation of  
18 JKG, put it into a scope of works, used the same  
19 terminology, and the relevant terminology is in bullet  
20 point 1, 2 and 3. That terminology is exactly the same.

21 So what GBS are asking the plasterer to quote on  
22 relevantly in his trade domain is, and I won't repeat this,  
23 but referable to the family room, 16 square metres, which  
24 is what JKG had identified, 'Remove and replace plaster  
25 ceiling, including cornices, 2.4 by 3m'. I want to just  
26 make it clear that in the JKG report they put it the other  
27 way round. No, no, I wish to withdraw that. It's exactly  
28 the same, '2.4 by 3 metre and plaster wall 1.2 by 3,  
29 approx. to match existing or close to'.

30 In other words, there's been a cut and paste of JKG's  
31 scope of work, or whether it's a cut and paste or whether



1       it's duplication of some kind, referable to the first  
2       bullet point, the second bullet point and, Your Honour,  
3       it's the fourth bullet point.

4             The oddity with the measurements transfers across  
5       from the JKG quote into the subject quote of the trade  
6       scope and somehow this plasterer's being told, 'I want you  
7       to quote on replacing and removing 5 square metres of  
8       damaged insulation to the ceiling that I want you to  
9       replace that's actually 7.2 metres in size'. Again, that  
10      may be explained. And we infer that the builder is not  
11      asking the plasterer to disconnect and reconnect two  
12      existing down lights, but there's some ambiguity about that  
13      because some plasterers, Your Honour, the evidence will  
14      come, some plasterers do have disconnect and connect  
15      licences and it's not an unreasonable thing for a builder  
16      to ask a plasterer to do that. But in this instance we  
17      understand the plasterer did not have a disconnect and  
18      reconnect licence so we don't know how the plasterer would  
19      treat that scope of work item vis-a-vis it's own trade  
20      dealings, but we'll find out no doubt in due course.

21            And so what then happens, Your Honour, is that those  
22      works are then the subject of an engagement, and we say an  
23      engagement for or to the benefit of the plaintiff, for or  
24      to the benefit of the plaintiff by which she acquires the  
25      services of the plasterer to perform the scope of work.  
26      Can I just finish off with the plasterer before lunch if  
27      that's convenient by taking Your Honour to 548. 548 is a  
28      tax invoice indicating it was paid on 2 June, but the  
29      date's inaccurate. We think the date is 28 May 2014, of  
30      course, it's not 13. So that's a tax invoice from the  
31      second defendant to the first defendant in respect of the

1 subject premises headed 'Work description. Plaster of  
2 living room' and then the work described, Your Honour, is  
3 as follows, 'Remove and replace plaster ceiling including  
4 cornice and wall', and that's what we infer is the plaster  
5 ceiling at 7.2 square metres, if indeed that is correct,  
6 the plasterer to replace 3 metres by 2.4. Then what's  
7 highlighted in yellow 'remove and replace 5 square metres  
8 of damaged insulation'. That is a highly contested issue  
9 as to whether that was in fact done, Your Honour, or  
10 whether in fact the plasterer used the existing insulation,  
11 meaning the loose fill or the batts that were in the  
12 ceiling, as the replacement insulation. I haven't actually  
13 explained, Your Honour, that there is an attic in the roof  
14 cavity of the premises and it's accessed via a ladder.

15 Perhaps could we go back to 242 quickly if I may, or  
16 briefly. At 242 I can indicate that there is a ladder  
17 approximately to the left of the formal dining room and up  
18 about three or four millimetres. Thank you. Around about  
19 that, that area, there is a hatch and that hatch has a drop  
20 down ladder and that drop down ladder enables access to the  
21 roof cavity or attic which is the subject of a storage area  
22 boarded up by chipboard, it's produced in the form of  
23 chipboard is attached to the joists, as they're known. But  
24 the whole area, the whole of the roof is not an attic with  
25 chipboard, but a very large part of it is and it contains  
26 storage items people keep in their attics, Christmas items  
27 and other sorts of storage, household storage things. But  
28 we don't understand, Your Honour, there's an attic over the  
29 living room ceiling, but I might be wrong about that, and  
30 we don't understand the attic goes all the way down south  
31 to the house.

1           In any event, I then want to come to the important  
2           part of the opening involving the first fire. Is that a  
3           convenient time, Your Honour, or would you like me to  
4           proceed?

5   HIS HONOUR: Well I'm keen to keep things ticking along but I'm  
6           also conscious that there are a number of other things that  
7           need to be done. One, the pleadings need to be properly  
8           amended to the correct form after my ruling, and also we  
9           need the statement from Ms Marzouk if she's going to be one  
10          of the first witnesses to come along. So I'm just  
11          wondering how we are placed for this afternoon.

12   MR SIMPSON: We would value the time this afternoon to attend to  
13          those things, as well as, Your Honour, I haven't absorbed  
14          the more recent amended witness statement of - I think it's  
15          Mr Damien O'Toole that came through. There's some - I  
16          gather there's some significant things in that. Would Your  
17          Honour permit me just to conclude, perhaps have another ten  
18          or 15 minutes to conclude that part of the process.

19   HIS HONOUR: How much longer do you think you've got in opening,  
20          Mr Simpson?

21   MR SIMPSON: I've got another 25 or 30 minutes, Your Honour.

22          It's a considerable - I'm just starting on the first fire.

23   HIS HONOUR: I'll give you another 25 minutes and we'll start at  
24          2 o'clock because I want to hear very briefly from  
25          Mr Muller, just so that he can identify for me the critical  
26          issues, because I think I understand some of the factual  
27          matters. I'm really interested in what are going to be the  
28          critical issues in dispute between the parties.

29   MR SIMPSON: Perhaps I can truncate it by this. The first  
30          critical issue from the plaintiff's perspective, and there  
31          is a statement of, a memorandum of issues in dispute. That

1 was sent to Your Honour's associate at 4.30 pm on 3 June.

2 Does Your Honour have access to that?

3 HIS HONOUR: Yes, I've read that.

4 MR SIMPSON: Thank you. So those issues are there. I won't  
5 repeat them. But in terms of the critical legal question  
6 and how the case is put, it's put this way, Your Honour,  
7 that the plasterer is the first in time to attend the  
8 building site or the dwelling to commence the repair work  
9 process. So it's the first trade in time to arrive there.  
10 It had the first opportunity in time to avert what  
11 subsequently occurred in the form of the ignition of loose  
12 fill insulation exposed to hot down lights. So it's a  
13 first in time service attendance.

14 Secondly, its departure from the standard of care  
15 that it owed as a plasterer at common law to the client  
16 that it's working for, the ultimately client, being the  
17 homeowner and plaintiff, it's standard of care is very  
18 significantly departed from and negligent in the way that  
19 the particulars as drawn in the second further amendment  
20 statement of claim allege and it failed miserably, Your  
21 Honour, to identify the risk that the ceiling it was  
22 dealing with was compromised by loose fill insulation  
23 exposed to hazardous down lights that weren't protected  
24 with barriers, and that it took no steps, no reasonable  
25 steps that a competent plasterer would do to realise that  
26 it was dealing with a hazardous ceiling, that if it wasn't  
27 properly secured it would cause substantial damage, and its  
28 departure from the duty of care of a competent plasterer  
29 and not to have become aware of that is highly significant.

30 The next thing that's highly significant by the  
31 plasterer, Your Honour, is the fact that as a matter of

1 causal potency, that's one of Justice Beach's favourite  
2 terms in Papadopoulos number 4, as a matter of causal  
3 potency - it's also what the High Court looked at in  
4 Podriversic - as a matter of causal potency of the conduct  
5 of a plasterer to the occurrence of the fires, that was  
6 very significant and that was greater than the builder or  
7 the electrician. And so that means, in our submission, the  
8 comparative culpability of the plasterer gets a, in our  
9 submission, rises to the point of 60 to 70 per cent  
10 culpability for having caused the fire damage. That's how  
11 we put the case against the plasterer, as a result of first  
12 time trade attender, departure from duty of care enormous,  
13 causal proximity highly, highly prevalent, and all of that  
14 adds up comparatively speaking to a 60, if not 70, per cent  
15 culpability to the plasterer for the purposes of part 4A.

16 But, Your Honour, I've put the second case first. I  
17 really want to put the first case now, which is put  
18 aside - - -

19 HIS HONOUR: I'll just stop you there, because that might be an  
20 appropriate time. I might save that for 2 o'clock and give  
21 you 25 minutes then to finish off.

22 MR SIMPSON: If Your Honour pleases.

23 HIS HONOUR: I must admit, Mr Simpson, I'm greatly assisted by  
24 the way that you've just gone through the case. I'm  
25 greatly assist by that because the facts I think I've got  
26 into my mind so some extent, but the way that you  
27 identified those issues there was much more beneficial for  
28 me.

29 MR SIMPSON: Good.

30 HIS HONOUR: What we'll do is we will recommence at 2. I'll  
31 give you 25 minutes, Mr Simpson. At the end of that,

1 Mr Muller, I'll give you ten to 15 minutes just to go  
2 through those critical issues for me and tell me what you  
3 say, and then what we'll do is we'll adjourn for the  
4 afternoon and in that time left for you I'd like to see the  
5 amended statement of claim, Ms Marzouk's statement so that  
6 that's all been provided by close of business today.

7 MR SIMPSON: If the court pleases.

8 HIS HONOUR: Thank you. We'll adjourn until 2 o'clock. You'll  
9 all be placed into the waiting room and I'll ask that you  
10 be back in front of your computer at 2 o'clock, please.

11 LUNCHEON ADJOURNMENT

UPON RESUMING AT 2.00 PM:

HIS HONOUR: Yes Mr Simpson.

MR SIMPSON: If the court pleases the matter is proceeding, Your Honour. Your Honour, prior to the luncheon adjournment I was about to continue with the opening statement in terms of what I put is the second but in fact it should be the first basis of legal liability which is pursuant to the Australian Consumer Law and I won't detail the whole statutory framework, but the proposition is simply this, Your Honour, that the plaintiff acquired services relating to the performance of the plaster works, so the insulation works, at the premises, her dwelling, in trade or commerce, from the second defendant, and those works give rise to services as a consumer and that there was a, consequently the terms governing the provision of consumer services as enacted by ss.60 and 61 govern that acquisition and the services weren't performed with due care or skill, they weren't reasonably fit for the particular purpose of achieving a safe repaired and installed roof or ceiling and nor did they achieve the result that the plaintiff desired to have achieved.

Your Honour, if that's correct that then gives rise to an entitlement under s.236 of the ACL for damages and the provision simply reads, 'If a person, the claimant suffered loss or damage because of the conduct of another person and the conduct contravened a provision of chapter 2', which in this case is governing, 'The claimant may recover the amount of the loss or damage by action against that other person or any other person involved in the contravention', so that is - and that is put then that

1 there is no apportionable comparative analysis for that  
2 right of action and it focuses therefore on the quality and  
3 nature of the services provided and whether or not they  
4 satisfy the statutory guarantees applicable thereto.

5 Could I just now mention, if the court pleases, that  
6 I omitted to say that it's the plaintiff's case that the  
7 plasterers got access into the roof because they asked for  
8 it and for whatever reason, it's a matter for their trade  
9 practice, they asked Mr El Oster where to get access to the  
10 roof and he showed them the access ladder and they went up  
11 into the roof and they did whatever works were performed up  
12 in the roof, in the cavity over the living room area.

13 That then leads me to go perhaps back into the  
14 comparative analysis part of the case to make submissions  
15 in relation to the electrician, Fast Electrical, through  
16 Mark Micallef is the proprietor of that business, we make  
17 the daring observation that there is a concerted effort by  
18 the second defendant to inculcate Mr Micallef in having  
19 caused or substantially contributed to the second fire and  
20 possibly the third fire, and we say this about that. We  
21 say, Your Honour, firstly as a matter of law that if a  
22 negligent plasterer performs works in such a way as to  
23 place a domestic dwelling at risk from fire by reason of  
24 loose insulation fill in close proximity to down lights, if  
25 that's an event that occurred at the hands of the  
26 plasterer, then the plasterer ought to be responsible for  
27 the foreseeable consequence of all subsequent conduct in  
28 relation to that scenario. It's a Kidman v Sefa type  
29 analogy, whereby an employer can't escape liability for the  
30 negligence, for instance, of a doctor in relation to a  
31 worker's injury. If a worker suffers a hand injury and a



1 doctor negligently undertakes surgery on the hand that  
2 worsens or exacerbates the injury, the employer can't say,  
3 'I'm not responsible for that worsened or exacerbated  
4 injury because it's seen as a foreseeable consequence'. So  
5 by analogy - - -

6 HIS HONOUR: Sorry, can I just understand that though, because  
7 Kidman v Sefa occurs in an accident compensation setting  
8 and the principal in Kidman v Sefa extends to the liability  
9 under the Act. Does it extend in a tortious sense where  
10 there's essentially a novus actus?

11 MR SIMPSON: We make the submission it does, it extends in a  
12 tortious and a common law sense, Your Honour, because what  
13 has occurred here is that the plasterer on our submission  
14 has placed the premises in a vulnerable position and at  
15 risk of significant fire related damage because of the  
16 loose insulation in proximity to the down lights and that  
17 therefore has given rise to what we submit is an emergency  
18 occurrence which actually manifested in the first fire.  
19 That naturally, and coincidentally I should say, resulted  
20 in Mr Micallef being there at the premises and able to  
21 attend to the first fire by sheer coincidence, Your Honour,  
22 because he was there - after a busy day's trade work  
23 Mr Micallef was at the premises to quote for GBS on the  
24 cost of the electrical work and it was per chance that at  
25 the time he was there the first fire was discovered.  
26 Mr Micallef, his position is he's not a good Samaritan  
27 because he actually ultimately got paid for his work so  
28 he's not a good Samaritan, but he is put in emergency  
29 circumstances as a tradesman having to deal in the dark, in  
30 smoke and other emergency circumstances with a predicament  
31 of which he knows nothing. The submission is it's entirely

1 foreseeable in that scenario that something may go astray  
2 in the course of corrective works by an electrician to  
3 actually fix up the negligent effect of what a plasterer  
4 has done and if for some reason, Your Honour, those  
5 corrective works by the electrician are not as astute or  
6 accurate or performed as well as they might be, that should  
7 be taken into account as a foreseeable consequence of the  
8 plasterer creating effectively an emergency situation. And  
9 indeed, Your Honour, there's no issue about life or limb in  
10 this case happily enough, but what the plasterer did in our  
11 submission was to create an emergency circumstance that  
12 puts a different colour and aspect on how one views an  
13 uninformed electrician who knows nothing about the property  
14 having to deal, as Mr Micallef did, on the spot. And maybe  
15 that happens - - -

16 HIS HONOUR: Mr Simpson, is it true that the electrician  
17 provided a certificate of electrical safety at the time  
18 when he departed?

19 MR SIMPSON: That's absolutely correct, Your Honour, and I was  
20 going to take Your Honour to that. It's at court book,  
21 that certificate is at court book 471 and what's important  
22 about the certificate that Your Honour has referred me to  
23 is Your Honour will see that the completion of work date is  
24 30 April and that's the date of, of course, the first fire,  
25 but it's not certified until after the first fire, and  
26 indeed it's not certified until some unspecified time on  
27 the following day, the 1st, and the importance of that or  
28 the relevance of that is, Your Honour, informed by pp.449  
29 and 448 of the court book which correlate to this. So at  
30 449 the electrician, Mr Micallef, Mark Micallef, is  
31 emailing Richard Bronstring at 11.10 pm on the night of the

1 first fire. So I infer that Mr Micallef has got back to  
2 his, wherever, his home, business premises and he's sent  
3 off an email at that time saying, 'Hi Richard, here is an  
4 invoice of today, if you pass it on to the insurance  
5 company, call tomorrow' exclamation mark, and there's  
6 something probably behind that exclamation mark because  
7 what appears is Mr Micallef has just spent some four and a  
8 half hours dealing with an emergency electrical situation  
9 at the plaintiff's premises for which he had no idea that  
10 he was in for and so the exclamation mark is no doubt  
11 something of a reference to that. But at 448, Your Honour,  
12 p.4 is Mr Micallef's invoice, incorrectly dated but we  
13 infer that it should be dated 30 April 14 because it's the  
14 very invoice that his email refers to and Your Honour can  
15 see the description of words, Mr Micallef is charging for  
16 labour, testing and investigating, fault finding and making  
17 insulation safe. I'm not sure if that's misspelling or  
18 not, insulation safe, four and a half hours, \$70 an hour  
19 and the cost of a fire extinguisher.

20 There is a tradesman called upon to act in an  
21 emergency circumstance and it's a little bit rich, with  
22 respect, the extent to which the MFB witnesses are now  
23 criticising and challenging the standing of the emergency  
24 work carried out when there's no indication prior to this  
25 recent development, certainly by the MFB in their  
26 investigations, Your Honour, following the second fire, the  
27 main fire, that the electrician was in any way implicated  
28 for not having done the right thing. But what I'm  
29 suggesting, Your Honour, is that on both heads of the  
30 claim, whether it's comparative liability or ACL based,  
31 there needs to be, the submission is there ought to be a

1 consideration of what are the foreseeable consequences of a  
2 tradesman who in effect triggers and establishes a latent  
3 and non-discoverable risk factor in the manner in which the  
4 tradesman carries out the works but then manifests in  
5 highly urgent emergent circumstances and how critical  
6 should a judge, with respect, or the law be of an  
7 electrician who in good faith spends four hours trying to  
8 work out what's going on, late at night, in smoke, partly  
9 in smoke, and in other necessitous circumstances, how  
10 should the standard or how should - not the duty, Your  
11 Honour, but how should the standard of care be levelled  
12 against such a person in those circumstances? Now, if it  
13 was a good Samaritan coming in, let's say he was a tradie  
14 electrician who lived next door and he came in as a good  
15 Samaritan and he did what he could do to try and isolate  
16 and stop any further fire, that would be not necessarily  
17 the subject of criticism at all. But the point about  
18 Mr Micallef, Your Honour, is he never ever performed any of  
19 the scope of works the subject of the trade scope from GBS  
20 because he never got a chance to. By the time he might  
21 have been ready to do his electrical works the house had  
22 relevantly burnt. He is in our submission to be  
23 characterised as a good Samaritan tradesman who is using  
24 his trade skills and energy and best endeavours to make  
25 good a situation in emergency circumstances that is  
26 otherwise perilous. And his duty, which we don't deny  
27 there's a duty, the discharge of that duty is a matter for  
28 Your Honour but it ought to be seen in that context is how  
29 we would submit it.

30 Your Honour, so the electrical certificate that Your  
31 Honour took me to a moment ago and I took the court to, it

1 does indeed certify by Mr Micallef, so he is well - thank  
2 you, Your Honour, at 471, the electrical certificate does  
3 indeed certify a testing, and this is a description of the  
4 work, 'Tested power and lighting circuit, identified faulty  
5 circuit causing smoke. Isolated the faulty circuit at mech  
6 switch', which we understand to be mechanical switch, 'Left  
7 the house in a safe condition after fireman'.

8 Mr Micallef has been roundly criticised, challenged  
9 and undermined in respect of that certification as being  
10 inaccurate, wrong, false or the like. There's another  
11 matter here, Your Honour, of fair justice, or I should say  
12 natural justice and due process of procedure, and that is  
13 Mr Micallef is not represented in this proceeding and yet  
14 his trade reputation and standing are being severely tested  
15 and it's a matter for the court and perhaps a matter for  
16 him, but he's in a de facto way being made to be put on  
17 trial, not as Fast Electrical but as Mark Micallef and he's  
18 being called upon implicitly, without any choice in the  
19 matter, to defend his trade reputation and standing by  
20 what's being said against him, and it's a difficult  
21 circumstance that these cases bring about because clearly  
22 Fast Electrical have no liability any further in the matter  
23 because that's been resolved by settlement, but Your Honour  
24 has the capacity, of course, with respect to make findings,  
25 and appropriate findings, against Mr Micallef that may  
26 effect his trade reputation and it's just a matter I raise  
27 by ancillary point.

28 Your Honour, at 478, just to conclude - at 478 GBS,  
29 the first defendant, raise an important tax invoice. It's  
30 16 May and I infer it's been raised before the plasterer's,  
31 second defendant's invoice, and item K136 in the

1 description, you'll see there's an item headed, you'll see  
2 in the column that's headed item 1D, that actually appears,  
3 item 1D actually appears on JKG's documentation, in  
4 particular it appeared on JKG's tax invoice as item 1D  
5 adjacent to the description, court book 430. Just staying  
6 with 478, for some reason we have item ID notated there to  
7 the left of description and Your Honour can see the  
8 important entry in, 'Plaster - ceiling, plaster works.  
9 Apply and fix plasterboard to underside of timber joists.  
10 Comments', this is at K136, 'Family room 16 square metres,  
11 plastering, remove and replace ceiling, including  
12 cornices'. It's the same text as the scope and the JKG  
13 quote and there's a charge of, I see there's a charge there  
14 for quantity next to that item 1, it says \$1,300 plus GST  
15 and making a total of \$1,430 which is not quite in  
16 accordance with the plasterer's invoice, which as Your  
17 Honour may recall is for \$1,200 plus GST, making \$1,320.  
18 So there's \$110 difference but that's perhaps neither here  
19 nor there. But what is significant is Your Honour will see  
20 from that invoice that there appears to be no charge for  
21 insulation. I'll just see if I'm clear about that, I might  
22 be wrong about that.

23 HIS HONOUR: I'll just remind you, Mr Simpson, that I'm going to  
24 give you to 2.25.

25 MR SIMPSON: Thank you, Your Honour. The case then on the Part  
26 4A involves comparative analysis of the three culpable  
27 parties in the sense of the builder, plasterer and  
28 electrician and our submission is the lion's share of  
29 liability under a Part 4AA analysis lies with the  
30 plasterer, thereafter the builder and thereafter the  
31 electrician and we don't necessarily contend what

1 proportion should be attributable as between the builder  
2 and the electrician, but we say the electrician has, if the  
3 electrician has a culpable part to play it's modest and the  
4 builder, in having set up the chain of works perhaps in the  
5 wrong order, there's culpability there but it's by no means  
6 to any extent of the plasterer, Your Honour.

7 And, Your Honour, it's not in dispute, and I remain  
8 to be corrected about this, it's not in dispute that the  
9 cause of the fire, as Mr Neil Barnes says at 318, is - and  
10 Your Honour looked at a passage just above that this  
11 morning, 'The fire damage above the centre of the family  
12 room ceiling shows that the probable cause of the fire was  
13 the ignition of a blow in type insulation in the area of  
14 the down light in this area. Once the insulation caught  
15 fire the fire had smouldered for some time before spreading  
16 and being noticed when a smoke alarm activated'. That's in  
17 reference to the first fire.

18 So, Your Honour, unless there's anything further,  
19 those are the submissions by way of opening for the  
20 plaintiff, if the court pleases.

21 HIS HONOUR: Yes, thank you. Mr Muller, I'll call on you. Just  
22 give me one moment. Yes, Mr Muller.

23 MR MULLER: Thank you, Your Honour. Your Honour's asked me to  
24 address you on the critical issues which arise in this case  
25 so I will at this point restrict it as best I can to that  
26 for the purposes of being brief.

27 The factual issues I understand Your Honour is well  
28 on top of, but the critical ones are, firstly, what state  
29 was the living room in by 23 or 25 April? And that is  
30 important because contrary to what my learned friend said  
31 in his opening, prior to the plasterer attending on 23 and

1 25 April, in fact two other parties had been in attendance,  
2 two other people, not parties to this proceeding, had been  
3 in attendance at the property and had undertaken some form  
4 of works or investigation, and they were JKG who was there  
5 on or before 3 March of 2014 and then Marshall Restorations  
6 who were there on or before 18 March 2014.

7 Marshall Restorations make the recommendation back to  
8 Crawfords who are managing the claim on behalf of the  
9 insurer, that an electrician attended to check and make  
10 safe electrical circuits because the plaintiff reports  
11 power has been shorting. As Your Honour knows, JKG  
12 attended and they performed some level of make safe of the  
13 damaged area of the property.

14 HIS HONOUR: Mr Muller, can I just have you give me the court  
15 book reference for Marshall Restorations communication with  
16 Crawfords?

17 MR MULLER: Indeed, Your Honour.

18 MR SIMPSON: 432, Your Honour.

19 MR MULLER: Thank you. And that statement is also in the joint  
20 statement of facts at 298 of the court book.

21 HIS HONOUR: Yes.

22 MR MULLER: And the reference to the make safe works that were  
23 done by JKG, which include - so they are found at, I think  
24 it is at - they're picked up in the agreed statement of  
25 facts at 298.

26 HIS HONOUR: Thank you.

27 MR MULLER: I might take Your Honour to that just for a moment.

28 So paragraph 17, that refers to the photograph which I'll  
29 take you to in a moment, Your Honour, but what is an agreed  
30 fact between the parties is that that photograph which was  
31 taken by JKG at some point on or before 3 March shows



1 plastic sheeting, two halogen down lights remaining, and a  
2 dangling wire from the plastic sheet with tape and/or  
3 plastic fitted to the end, and it says "limited clarity".

4 Then if you could go down to p.306, the top  
5 photograph is the annexure B that is referred to in the  
6 agreed statement of facts and it is difficult to see, but  
7 what the parties agree is that to the right - if Your  
8 Honour sees the down light in the foreground.

9 HIS HONOUR: Yes.

10 MR MULLER: And then it appears to the right of that down light  
11 in the black plastic there is a knotted wire that sits just  
12 by the beam in that area. Come back a little bit to the  
13 left. There. So what that shows is that JKG did some form  
14 of make safe in the electrical work as well.

15 So that leads to the critical fact that I was  
16 referring to, which is what was the true state of that  
17 damaged area, had someone already done some electrical  
18 work? Was that area, did it have live wires in it? Did it  
19 have halogen globes still in it? That is a factual issue  
20 that will have to be decided.

21 What the second defendant says is that there weren't  
22 any live wires in that area because - and if there had been  
23 he would have stopped work because he is not prepared to  
24 electrocute himself.

25 The second significant factual issue is: was the  
26 second or the main fire caused by the first fire, or did it  
27 separately commence? And that's important because what the  
28 MFB say is that the second fire, the centre of the second  
29 fire, which they say they deduced by looking at where the  
30 most damage has occurred, is in an area that is not in the  
31 area in which the second defendant performed any works.

1 HIS HONOUR: Sorry, just go back and talk to me about those  
2 three fires. So did the first fire and the second fire  
3 occur in the same geographical area of the roof?  
4 MR MULLER: No.  
5 HIS HONOUR: Did the third fire occur where either the first or  
6 the second fire occurred?  
7 MR MULLER: No.  
8 HIS HONOUR: So three separate locations in the roof?  
9 MR MULLER: Yes. If Your Honour goes to p.305 which is the  
10 sketch. The first, for present purposes the first fire  
11 occurred somewhere down in that kitchen and dining room  
12 area, what's referred to as the living room.  
13 HIS HONOUR: Yes, that's the red dot.  
14 MR MULLER: The MFB say that the second fire occurred to the  
15 north of that. Somewhere up in that - - -  
16 HIS HONOUR: So somewhere in the hallway or in the kitchen?  
17 MR MULLER: Yes, or perhaps in the dining room.  
18 HIS HONOUR: In the dining room.  
19 MR MULLER: The third fire - sorry, Your Honour.  
20 HIS HONOUR: No, Mr Simpson when he had described it to me had  
21 said the first fire had occurred just outside bedroom 3.  
22 That's the first fire there, my associate's got her pen on  
23 that. Then the second fire occurs in the living room area  
24 where she is going to indicate now, that's fire 2, and you  
25 say - that's what Mr Simpson had said. So do you dispute  
26 that?  
27 MR MULLER: What I rely on is what Mr O'Toole says at 655.  
28 HIS HONOUR: Right.  
29 MR MULLER: I think what I've done, Your Honour, is I've said  
30 north where I should have said west. Mr O'Toole clarifies  
31 this. In paragraph 6 of his statement the evidence he'll

1 give is that he drew the two dots on the diagram and the  
2 first dot, which is what Your Honour was just pointing to,  
3 closest to the doorway of bedroom 3.

4 HIS HONOUR: Yes.

5 MR MULLER: Is where the first fire occurred according to the  
6 owner. Now, Mr O'Toole can't say anything more than that  
7 because what he says elsewhere is that he was there much  
8 later and there was no evidence, because the owner took out  
9 the smoldering insulation into a bucket into the backyard.  
10 He then says the second dot is where a second down light  
11 was situated in the ceiling and where he considers the  
12 second fire started, and he says consistent with this was  
13 the existence of electrical cable running along and there  
14 was a halogen light attached to the end of the cable, both  
15 of which were fire affected. So Your Honour was right in  
16 the two dots in terms of where the first and the second  
17 fire are likely to have happened, although it's still a  
18 matter of evidence about where the first fire in fact  
19 occurred.

20 HIS HONOUR: And then the third fire?

21 MR MULLER: The third fire - - -

22 HIS HONOUR: If we can just go back to the diagram, please.  
23 What page is that, Mr Muller?

24 MR MULLER: 305.

25 HIS HONOUR: So where is the third fire?

26 MR MULLER: I'm just checking that. The first fire was I think  
27 up in either bedroom 1 or bedroom 2 - the third fire, yes.

28 HIS HONOUR: The third fire, right.

29 MR MULLER: Either in bedroom 1 or bedroom 2.

30 HIS HONOUR: I see.

31 MR MULLER: I can't quite find the reference for that at the

1 moment I'm sorry, Your Honour.

2 HIS HONOUR: No, just so I have a broad understanding, yes.

3 MR MULLER: The critical fact is if the second fire started  
4 independently of the first fire, that is it wasn't a  
5 continuation of the first fire, and it happened in an area  
6 that the plasterer didn't do any work in, then the second  
7 defendant's submission is of course that nothing that he  
8 did was causative of the second fire and the second fire is  
9 the fire that causes the damage. The first fire happens  
10 but there's no consequence from it, unless it was a  
11 continuation into the second fire.

12 HIS HONOUR: So your client says that it didn't work in the area  
13 where the second fire occurred?

14 MR MULLER: Yes. Well, he doesn't give that evidence himself  
15 because all he can say is the work that he did and then he  
16 hasn't been back to the property since 25 April. So he had  
17 left the property before, five days before the fire  
18 happened.

19 HIS HONOUR: Yes.

20 MR MULLER: All he can say is, 'This is the area that I did the  
21 work in' and he says, his evidence is that he did not go up  
22 into the roof. His evidence is that he did not throw any  
23 insulation around.

24 HIS HONOUR: Does he say that he removed any insulation from the  
25 roof?

26 MR MULLER: Yes. What he says on that point is that when the  
27 water damaged plaster was taken, when he took that down,  
28 the loose insulation that was there fell down with the  
29 plaster. It was all to some extent sodden and it all came  
30 down together. So he says that that fell down and was  
31 removed by him. He says he didn't throw any of - - -

1 HIS HONOUR: He didn't go into the roof?

2 MR MULLER: He says he didn't go into the roof at all and it  
3 wasn't necessary to go into the roof because what he says  
4 is that, or the effect of what he says is the loose  
5 insulation fell down with the plaster sheeting.

6 HIS HONOUR: Yes.

7 MR MULLER: He then put the new insulation up between the  
8 ceiling joists and then screwed the plaster into the  
9 ceiling joists which has the effect of holding insulation  
10 in place. So it was all done from underneath and not done  
11 from up in the ceiling.

12 HIS HONOUR: When he replaced the insulation, did he replace it  
13 with insulation in the form of bats or did he replace it  
14 with loose insulation?

15 MR MULLER: Insulation in the form of bats. He says that he  
16 attended the property on 23 April to measure, because he  
17 doesn't keep plasterboard and insulation, he doesn't store  
18 it so he buys it for each job. He then went and purchased  
19 the required amount of insulation and plaster and then came  
20 back on the 25th to install it. I think that it's no  
21 longer possible to buy that sort of loose insulation, but  
22 in any event he says that he put bats up.

23 Can I just pause there because one of the things that  
24 my learned friend said in his opening is that the plaintiff  
25 used loose fill or pre-existing insulation and what -  
26 sorry, not the plaintiff, the plasterer, used loose fill or  
27 pre-existing insulation. That's not pleaded so to the  
28 extent that the plaintiff wants to expand the case through  
29 his opening that's resisted. It's not ever been suggested  
30 that the plasterer used loose fill insulation, or indeed  
31 that he used pre-existing insulation. And the plasterer's

1 evidence on that is completely to the contrary in any  
2 event.

3 The third critical fact is: did Officer Wood from  
4 the MFB tell El Oster that he wanted the power off and the  
5 lights were unsafe? Officer Wood gives evidence that he  
6 said that to El Oster in no uncertain terms and that's at  
7 p.651 of the court book, it's in Officer Wood's statement.  
8 At paragraph 12 he says, 'I went back down to speak with  
9 the man in the suit whose name I learned was Joe', that's  
10 El Oster, 'And who I thought at the time was the owner of  
11 the property. I said to him that I wanted the power off  
12 and that if he turned the lights back on the insulation  
13 could burn and the house could catch fire again. I told  
14 him I did not want anyone staying in the house overnight'.  
15 Then he says in paragraph 13 that he turned to the man who  
16 he understood was the electrician and said that he wanted  
17 the power isolated overnight and he says he doesn't  
18 remember what was said in response except it was very  
19 little.

20 In Mr O'Toole's supplementary statement, which is  
21 found at p.696, and this turns to the next critical fact,  
22 is he says that, on p.697, sorry, at the very bottom of  
23 696, he says he's not an electrician but based on his  
24 experience he believes that the 8 amp fuse would have  
25 operated the lights in the house, including the halogen  
26 down lights. The 20 amp fuse would have operated household  
27 appliances and the 16 amp circuit breakers would have  
28 operated the power points. That's important evidence and  
29 it comes from his notes in which he makes a record in his  
30 contemporaneous notes of observing the fuse box and seeing  
31 those, and he notes the fuses and the circuit breakers and

1       then he says, 'I do not consider that a lock dog or dog  
2       lock can be applied to a fuse'. And to disable the lights  
3       the fuse needed to be pulled out and that when he inspected  
4       the switchboard neither of those two fuses were in fact  
5       pulled out. And he says if they had been he would have  
6       made a note of it.

7               That is evidence that contradicts the very recent  
8       evidence given by the electrician that he disabled the  
9       lamps and applied this device called a lock dog to the  
10      circuit breaker, and a lock dog is essentially a mechanism  
11      for padlocking a circuit breaker into an off position. And  
12      again that is a critical fact that's in dispute because if  
13      the electrician in fact did not properly make safe the  
14      lighting circuits, and with the admitted fact that the  
15      plaintiff used the lights on the evening of 30 April, then  
16      again even if there is some form of negligence established  
17      against the second defendant, the plasterer, it is  
18      completely broken in the causation sense by the intervening  
19      event of the electrician wholly failing to do what he ought  
20      to have done and in fact what he said he did.

21   HIS HONOUR: Can I just ask, is it accepted that when Mr Wood  
22       from the fire brigade talked to the electrician, is it  
23       accepted that by Mr Wood saying words to the effect, 'I  
24       want the circuits off' that meant a reasonable electrician  
25       would take that to mean using lock dogs on the circuit  
26       breaker?

27   MR MULLER: It's not put that high, no. What O'Toole says is  
28       it's not possible to put a lock dog on a fuse.

29   HIS HONOUR: No.

30   MR MULLER: And the 8 amp fuse is the lighting circuit. He says  
31       in his experience that's what it will be. And so what

1 needed to happen was that fuse needed to be removed  
2 otherwise it was possible for the plaintiff to turn the  
3 lights back on.

4 HIS HONOUR: It is accepted a reasonable electrician, having  
5 heard what Wood says to him or her, would have taken the  
6 step to pull out the 8 amp fuse?

7 MR MULLER: Indeed, and particularly a reasonable electrician  
8 imbibed with the knowledge that there had already been a  
9 fire caused by the halogen light, he had been up in the  
10 roof space where he had observed the loose fill insulation  
11 and the lack of safety guards, and then the warning from  
12 the MFB, that knowledge, the knowledge of those facts, in  
13 my submission would put a reasonable electrician in the  
14 position of not just isolating the mechanical switch, the  
15 switch on the wall to turn off the down lighting in the  
16 area where the first fire occurred, but to if not isolate  
17 the whole of the house until further investigation could be  
18 done, at the very least the whole of the lighting system.

19 Bronstring on that point says he had a conversation  
20 with the electrician that evening, on 30 April, and he said  
21 he told the electrician to take the circuit breaker, as he  
22 calls it, for the lights out of the circuit board so the  
23 down lights could not be turned on. That's at p.701 in  
24 Bronstring's statement.

25 Those, Your Honour, are the critical facts that are  
26 in issue. What they lead to from the second plaintiff's  
27 position in terms of the legal issues is the existence of a  
28 duty of care by the plasterer is admitted. The legal issue  
29 that remains is what is the standard of care required in  
30 the situation?

31 HIS HONOUR: Yes.



1 MR MULLER: Then if the standard was breached, then was the  
2 causal connection between any breach of the standard and  
3 the damage broken by subsequent events? And they could be  
4 in whole or in part.

5 Then there is the further apportionment question  
6 under this part of the claim which is: are or is GBS, the  
7 Gippsland Building Services, the former first defendant and  
8 the electrician, are they concurrent wrongdoers and what  
9 level of apportionment should be allocated?

10 In terms of the Australian Consumer Law claim, the  
11 critical issues, the legal issues that come out of that are  
12 broadly: who did the plasterer provide the services to?  
13 Or to whom did the plasterer provide the services? And  
14 were those services reasonably fit for the purpose? That  
15 gives rise to the scope of what the services were and the  
16 second defendant will submit that the scope of the services  
17 provided was limited to the plastering work and the  
18 insulation work that was performed by the plasterer and  
19 that that work was in fact fit for the purpose. The  
20 insulation was installed, the plaster was installed. It  
21 was for someone else to provide electrical services and so  
22 by necessity having regard to the wording of the Act, the  
23 services are restricted to those and the plasterer is not  
24 responsible or does not give a guarantee in respect of  
25 electrical services and that's consistent with him being  
26 prohibited from providing electrical services under the  
27 Electrical Safety Act of 1998.

28 That, Your Honour, is a truncated opening on behalf  
29 of the second defendant.

30 HIS HONOUR: Yes. Mr Muller, I'll certainly let you open in  
31 full once your case commences. I just wanted to go back

1 and ask you a few questions, particularly about the Wrongs  
2 Act component of the claim. So starting there, if breach  
3 is found - well let me go back a step. What do you say are  
4 the independent acts which break the chain of causation?

5 You say one, it's the acts of the electrician on your case?

6 MR MULLER: There's two components, there's the acts of the  
7 electrician and the acts of the plaintiff.

8 HIS HONOUR: Yes, thank you. And then in relation to  
9 apportionment, do you venture any figures as Mr Simpson has  
10 as to apportionment between GBS and Fast Electrical?

11 MR MULLER: I don't at this point. I can put this though,  
12 assuming that the three parties were found to be concurrent  
13 wrongdoers, that is the builder, the plasterer and the  
14 electrician, then having regard to the responsibility that  
15 the plasterer had and the distance that the plasterer was  
16 from the damage occurring, the temporal distance, and that  
17 it being the builder's responsibility to properly sequence  
18 the jobs, and it being either the builder or the  
19 electrician's responsibility - I put it this way, it was  
20 the electrician's responsibility to make sure that when the  
21 electrical lights were being fitted they were fitted  
22 properly and safely. And it was the builder's  
23 responsibility to make sure that that happened, in the same  
24 way it's ultimately the builder's responsibility to make  
25 sure that the plastering works were done properly. The  
26 builder didn't get the opportunity to do that because the  
27 fire intervened, so what I do submit in that context is  
28 that the plasterer's apportionment is very low and in the  
29 realm of 5 or 10 per cent at most.

30 HIS HONOUR: Turning to your ACL claim, if the court was to find  
31 that there had been a breach of the guarantees under the

1 ACL, does that mean that your client goes in for the full  
2 amount?

3 MR MULLER: Yes, it does.

4 HIS HONOUR: Do you say that services were acquired by the  
5 plaintiff from your client?

6 MR MULLER: No.

7 HIS HONOUR: Do you say that there were any services acquired by  
8 the plaintiff from your client?

9 MR MULLER: Can I just go back a step. I think - there are two  
10 parts to the ACL claim and what I just answered you on was  
11 the second part, the s.61 claim.

12 HIS HONOUR: Yes.

13 MR MULLER: There's a s.60 claim which is a guarantee as to due  
14 care and skill. That is apportionable in my submission, it  
15 being cause of action that deals with failure to take  
16 reasonable care. My instructor pointed that out and I'm  
17 grateful to him for doing that.

18 HIS HONOUR: So a s.60 claim essentially is reflective of the  
19 Wrongs Act concurrent provisions?

20 MR MULLER: Yes.

21 HIS HONOUR: All right.

22 MR MULLER: And I accept that the s.61 claim is - - -

23 HIS HONOUR: The s.61 claim is not apportionable, yes. Just  
24 going back to the terminology employed in the ACL, you say  
25 that the plaintiff acquired no services from your client at  
26 all?

27 MR MULLER: Yes, because the services that my client provided  
28 were provided to the builder.

29 HIS HONOUR: Thank you. And you would say that - you tell me,  
30 if I was to find that the services that - just to use that  
31 term broadly for a moment, the services that you provided

1 as a plasterer were not up to the relevant standard under  
2 the Wrongs Act, does that necessarily mean that I make, I  
3 transpose that finding to the ACL claim?

4 MR MULLER: Not directly, no. So the questions that arise from  
5 the Act are, firstly, the question of were the services  
6 supplied to the consumer or someone else, but then the next  
7 step is the court has to be satisfied that the consumer  
8 expressly or by implication made known to the supplier any  
9 particular purpose for which the services are being  
10 acquired by the consumer. So that means the court then has  
11 to ask, well, there's no evidence it was expressly made,  
12 and it's not a situation where the consumer said, 'I need  
13 to buy a motor vehicle that can tow a horse float so I need  
14 the proper towing capacity', so there's no express  
15 statement of a particular purpose. So it has to be by  
16 implication, the particular purpose for which the services  
17 are being acquired by the consumer. And then the question  
18 is were those services and any product resulting from those  
19 services reasonably fit for that purpose? And in my  
20 submission that purpose, being the consumer's particular  
21 purpose, could be different to what Your Honour finds under  
22 the Wrongs Act or the negligence claim.

23 HIS HONOUR: Thank you. All right. Thank you for that.

24 MR MULLER: May it please the court.

25 HIS HONOUR: As foreshadowed I propose now to adjourn until  
26 Tuesday morning at 10.30. I don't propose to make any  
27 orders about the provision of further documents such as the  
28 admitted statement of claim, Mr Simpson, or the provision  
29 of Ms Marzouk's statement, but I would hope that that's  
30 done by 5 pm today.

31 MR SIMPSON: Yes, Your Honour. We're working towards that.

1 Your Honour, can I just raise one matter if I may?

2 HIS HONOUR: Yes.

3 MR SIMPSON: The reliance placed on the supplementary witness  
4 statement of Damien O'Toole in the opening, that statement  
5 has only been delivered this morning. We wish, and I think  
6 I raised this this morning, we wish to provide one or other  
7 of the plaintiff's experts, not Mr Conroy but one or other  
8 of Mr Marcos or Mr Barnes with copies of the statements  
9 from the MFB, the three witnesses. And I take it, Your  
10 Honour, there's no difficulty in that happening with  
11 respect?

12 HIS HONOUR: No. I mean I'll ask Mr Muller about it but my  
13 usual course would be if the expert is going to be  
14 cross-examined on a particular document, a particular piece  
15 of evidence, then I don't mind them having it in advance  
16 because it just increases the time they've got to consider  
17 it and how it might effect their opinion. I don't want  
18 them to be surprised by anything and hold things up while  
19 they consider it. You know, if it was film, for example,  
20 in a personal injury case that might be a different story,  
21 but in this setting I don't really see a problem.

22 Mr Muller?

23 MR MULLER: Not at all, Your Honour.

24 HIS HONOUR: All right. Mr Simpson, they are Mr Muller's  
25 experts, is that correct?

26 MR SIMPSON: There's another problem, they're lay witnesses that  
27 are highly credentialed with knowledge but it's come late  
28 in the day, but other things have happened late in the day  
29 as well, we at least know about it now so we'll deal with  
30 it in the time we have.

31 HIS HONOUR: Yes, then I have no problems with you forwarding

1 other witness statements or evidence to those people prior  
2 to them coming to give evidence.

3 MR SIMPSON: If the court pleases.

4 HIS HONOUR: Thank you. Though I would say that that material  
5 that you provide, it should be made clear to your friend  
6 what material has gone to these people.

7 MR SIMPSON: Indeed, we'll do that, Your Honour, thank you.

8 HIS HONOUR: Is there anything else we need to - Mr Muller?

9 MR MULLER: Your Honour, just a very minor procedural thing. My  
10 instructor hadn't filed the defence to the second further  
11 amended statement of claim - sorry, filed the defence as  
12 ordered yesterday which removed the fourth defendant. That  
13 defence has now been overtaken by the filing of the third  
14 further statement of claim, so if I could have leave to  
15 file a defence that is precisely the same as the one that  
16 would have been filed yesterday, except that it will  
17 reference the updated statement of claim.

18 HIS HONOUR: Yes, I'll give you until ten o'clock on Tuesday  
19 morning for that.

20 MR MULLER: Thank you, Your Honour.

21 MR SIMPSON: And, Your Honour, the plaintiff will then proceed  
22 on Tuesday morning with either of Mr El Oster or the  
23 plaintiff herself, so we'll work out which is to go first.  
24 Thereafter, Your Honour, Mark Micallef, Jonathan  
25 Girdinella, Neil Barnes, Paul Marcos, Sean Conroy, subject  
26 to a ruling if required, and Andrew Thompson and those are  
27 the eight witnesses that Mr Muller corrected me on as not  
28 being seven but eight.

29 HIS HONOUR: All right. So for Tuesday who do you think we'll  
30 get through?

31 MR SIMPSON: I would think we will only get through El Oster and

1 Marzouk. I'll try and have Micallef on standby, Your  
2 Honour. But yes. I'll endeavour to have - not endeavour,  
3 I'll request that Mr Micallef be on standby on a half hour  
4 notice.  
5 HIS HONOUR: Yes.  
6 MR SIMPSON: So that he can give evidence if time permits, Your  
7 Honour.  
8 HIS HONOUR: All right. We'll leave it at that and Tuesday  
9 morning, 10.30 I am.  
10 COUNSEL: If the court pleases.  
11 HIS HONOUR: Thank you parties, my associate will now terminate  
12 the link.  
13 ADJOURNED UNTIL TUESDAY 9 JUNE 2020