



Supreme Court
New South Wales

Case Name: Worth v International Insurance Company of Hannover SE

Medium Neutral Citation: [2020] NSWSC 249

Hearing Date(s): 2, 3, 4, 5, 6, 9, 10, 11, 12, 13 December 2019; further written submissions ending 20 December 2019

Date of Orders: 19 March 2020

Decision Date: 19 March 2020

Jurisdiction: Equity

Before: Parker J

Decision: See [331]

Catchwords: INSURANCE – house fire – claim for indemnity – whether insured responsible for fire – circumstantial case – good faith in taking of defence alleging lack of reasonable dispatch in rectifying property

Legislation Cited: Evidence Act 1995 (NSW), ss 63, 69, 146
Insurance Contracts Act 1984 (Cth), s 13

Cases Cited: Briginshaw v Briginshaw (1938) 60 CLR 336; [1938] HCA 34
Rolleston v Insurance Australia Ltd [2016] NSWSC 1561
Sharma v Insurance Australia Ltd trading as NRMA Insurance [2017] NSWCA 307

Category: Principal judgment

Parties: Kim Worth (Plaintiff/Cross-Defendant)
International Insurance Company of Hannover SE (Defendant/Cross-Claimant)

Representation: Counsel:
TD Castle/P Mann (Plaintiff/Cross-Defendant)
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Solicitors:
LMI Legal (Plaintiff/Cross-Defendant)
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File Number(s): 2016/326625

Publication Restriction: Nil

JUDGMENT

- 1 The plaintiff, Kim Michelle Worth, is the owner of a two-storey house in Tweed Heads on the Far North Coast of New South Wales. On the morning of 1 September 2015, the house was severely damaged by fire. Since then it has been uninhabited, and the fire damage has not been repaired.
- 2 Ms Worth used the house as a home for herself and her son Joshua. She also operated a childcare business from the ground floor.
- 3 At the time of the fire, the house was insured with the defendant, International Insurance Company of Hannover SE (“IIC”), under a policy styled “Home Based Business Property Insurance Policy”. The Policy was effected on 20 August 2015, and the period of insurance was one year. As its name suggested, the Policy covered: (1) the building; (2) contents; (3) business interruption; and (4) additional items, including temporary accommodation, removal of debris and landscaping.
- 4 Following the fire, Ms Worth made a claim under the Policy. At that time the cause of the fire was still being investigated by the NSW Police Force and Fire & Rescue NSW (“FRNSW”). In December 2015, IIC and Ms Worth entered into a deed, styled “Deed of Settlement”. The Deed provided for IIC to grant “conditional indemnity” whilst investigations concerning the cause of the fire were brought to completion. IIC agreed to pay Ms Worth in accordance with the Policy unless it was established that Ms Worth was responsible for the fire. In that event, Ms Worth would repay any amounts paid by IIC under the Policy, together with interest at court rates.

5 IIC made some preliminary payments to Ms Worth, totalling approximately \$98,000. But in about June 2016 IIC learned that the Police had concluded that the fire had been deliberately lit. Thereafter IIC made no further payments to Ms Worth. In September 2016, IIC formally informed Ms Worth of its decision to decline indemnity under the Policy.

Issues for determination

6 Ms Worth commenced these proceedings against IIC in November 2016. The proceedings were commenced in this Division because Ms Worth's claim was propounded as one for specific performance of IIC's obligation to indemnify her under the Deed. But, as can be seen, all Ms Worth is really seeking is entry of judgment for amounts claimed under the Deed, or alternatively the Policy, and interest. There is no need for relief in the nature of specific performance. The case was presented before me as a contractual claim.

7 It appears to be agreed between the parties that Ms Worth's entitlement to recover for business interruption was confined, under the Policy, to the one year period of insurance (that is, until 20 August 2016). So too was Ms Worth's entitlement to the temporary accommodation benefit provided under the Policy.

8 But the case presented on Ms Worth's behalf sought to avoid this limitation. Ms Worth's primary contention is that she is entitled to payment under the Deed. The consequence is said to be that she is entitled to recover for business interruption, and to obtain the temporary accommodation benefit, up until the house has actually been reinstated (which is agreed, for the purpose of the argument, to be nine months after the Court delivers judgment in these proceedings). In a similar way, Ms Worth claims that the cost of reinstatement of the house is to be calculated at current, rather than 2016, rates. Ms Worth also claims general damages for inconvenience caused to her by the alleged breach of contract on the part of IIC.

9 IIC's first answer to Ms Worth's claim is to assert that she herself was responsible for the fire. Ms Worth accepts that if this was so, she has no claim either under the Deed or under the Policy. It is common ground that IIC bears the onus on this issue.

- 10 If IIC fails to establish that the fire was lit by Ms Worth, further issues will need to be determined. IIC does not accept that the Deed gives Ms Worth an ongoing entitlement to recover payment for her losses independently of limitations in the Policy. According to IIC, even after the parties entered into the Deed, the Policy remained the source of any entitlements Ms Worth had.
- 11 So far as quantum is concerned, IIC disputes the amount claimed by Ms Worth for interruption of her childcare business. The parties agree that the onus lies on Ms Worth to establish the amount of her loss under this head.
- 12 The final area of dispute on Ms Worth's claim is the basis on which her entitlement to payment for damage to the house under the Policy (if established) is to be calculated. Ms Worth claims payment on a reinstatement basis (the cost of rebuilding). It is agreed that reinstatement of the house would now cost \$524,000 (or would have cost \$495,000 in 2016, if that is the relevant date). But IIC contends that under the terms of the Policy Ms Worth was only entitled to payment on an "indemnity" basis (the value of the building destroyed) because she failed to undertake rebuilding with "reasonable dispatch". It is agreed for the purpose of this argument that Ms Worth's entitlement to payment on an indemnity basis would be \$400,000.
- 13 Ms Worth disputes that her entitlement to payment for the building is limited to payment on an indemnity basis. But, her contentions go further. Counsel for Ms Worth argued that it was a breach of IIC's duty of good faith (*Insurance Contracts Act 1984* (Cth), s 13) even to take the point.
- 14 In Ms Worth's Statement of Claim and in counsel's opening submission a wider allegation of lack of good faith was made. IIC's whole handling of the claim was attacked on the basis that all IIC was trying to do was to come up with a justification for failing to pay it. But it was not clear what practical significance this allegation had. Counsel for IIC accepted that if IIC was liable under the terms of the Policy (or the Deed), it would be obliged to pay the claim. As I understood counsel for Ms Worth, they accepted that the allegation of lack of good faith did not take her case any further. There is thus no live issue in the proceedings about good faith, apart from the raising of the "reasonable dispatch" point.

- 15 IIC has cross-claimed against Ms Worth on the basis that she was responsible for the fire. Under the Deed, IIC claims repayment of the preliminary payments it made to Ms Worth before March 2016. IIC also claims damages for breach of Ms Worth's general law and statutory obligations as insured. The damages claim covers not only the preliminary payments, but also claims handling expenses (including legal costs) incurred by IIC in response to the claim before the proceedings were brought.
- 16 Ms Worth does not dispute that if she was responsible for the fire, then the cross-claim will succeed. The only other issue on the cross-claim is a minor question about the quantum of the legal costs claimed by IIC.

Summary and analysis of evidence

Tweed Heads property

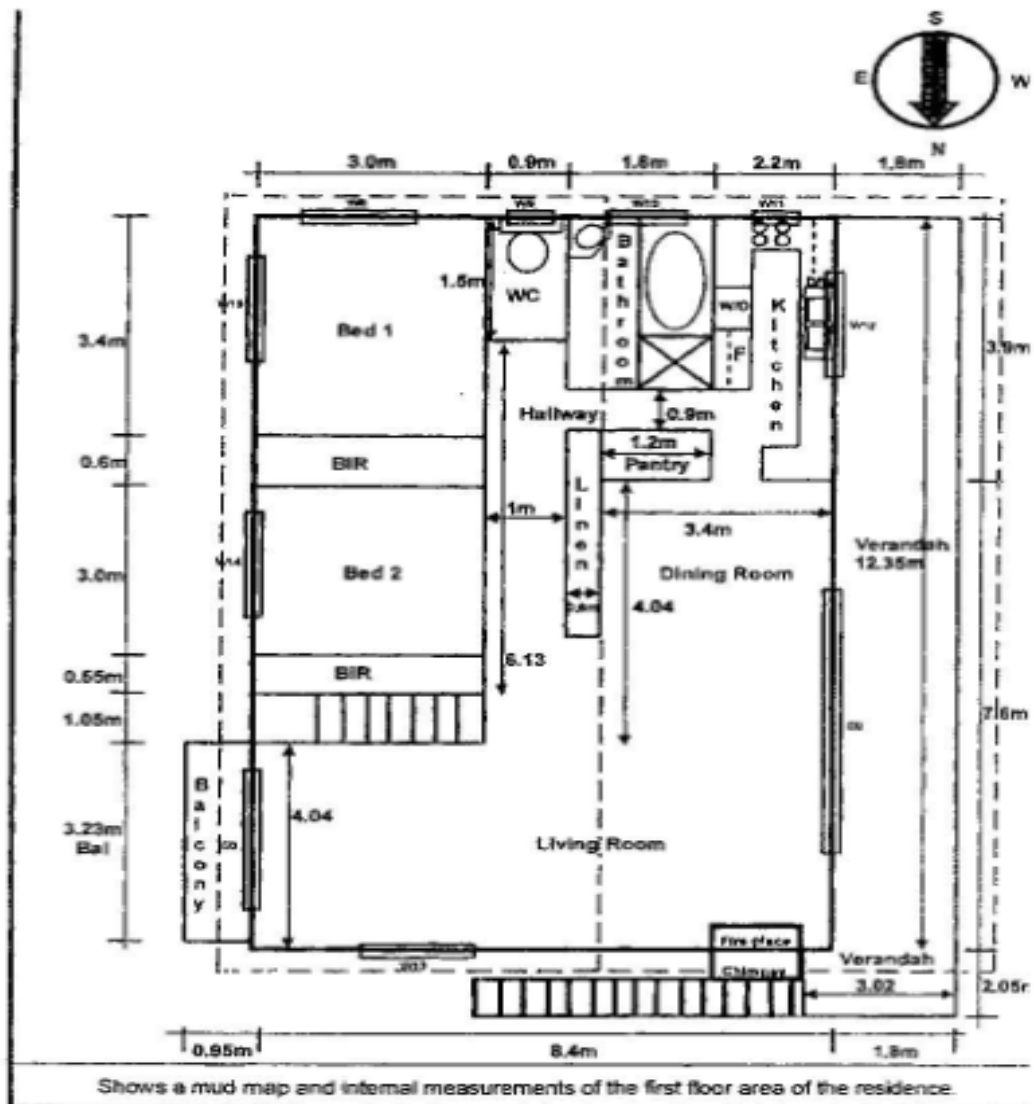
- 17 The house the subject of these proceedings, is located on the corner of two suburban streets in Tweed Heads, known as Champagne Drive (which runs north-south, and is also referred to in the evidence as Hillcrest Road) and Seaview Street (which runs east-west). A photograph of the house from Champagne Drive in 2010 is reproduced below:



- 18 The photograph shows the main entrance to the house, on its eastern side. The corner with Seaview Street, to the north, is beyond the right edge of the photograph. Apart from some minor alterations to the front façade and patio,

the appearance of the house was unchanged at the time of the fire in September 2015.

- 19 Although, as the photograph shows, the entrance to the house was on Champagne Drive, its postal address of the property was on Seaview Street. In the balance of this judgment I will refer to the property on which the house stands as the “Seaview Street property”.
- 20 The house was apparently built in the mid-1970s. It was first acquired by Ms Worth and her then husband, Paul Worth, in 2001. Initially the Worths bought the house as an investment and rented it out. After their divorce in 2007, Ms Worth received the house as part of her share under the property settlement. Ms Worth and her son Joshua moved into the house and thereafter used it as their primary residence. The kitchen, the main living room and their bedrooms were on the first floor. The ground floor was largely given over to Ms Worth’s childcare business (including the garage, which had been converted into a large play room for that purpose).
- 21 The fire originated on, and mainly affected, the first floor of the house. A plan of the first floor is reproduced below:



22 The left-hand side of the plan shows the eastern side of the house, which is visible in the photograph. The north-eastern living room balcony, with the sliding door open, and windows to the two bedrooms (covered by shutters) can be seen in the photograph; the western verandah, with its doors opening into the dining and living space, and the western window into the kitchen, are on the opposite side. The stairs shown on the south-eastern side of the living room led down to an entrance area on the ground floor.

The fire

23 Ms Worth and Joshua did not spend the night of 31 August/1 September at the house. Instead they stayed with Ms Worth's parents, who lived nearby. Ms Worth's parents had just returned from an ocean cruise and were unwell; Ms

Worth's father's condition gave cause for concern and he was taken to hospital by ambulance on the morning of 1 September.

- 24 At this point, Ms Worth paid a brief visit to the house. She then drove to Tweed Heads Hospital, where she assumed her father had been taken, to see him.
- 25 A neighbour, Mr Criss Ng Yip, who knew Ms Worth well, saw her arrive at the house in her car. In a statement he made the next day he estimated the time she arrived as about 9:00. Mr Yip did not see Ms Worth leave, and the evidence does not fix the time she left with absolute precision, but Ms Worth was recorded by CCTV footage as arriving at Tweed Heads Hospital at 9:36.
- 26 The fire was noticed by Ms Dale Ann Leo, a passenger in a car being driven by her husband, at about 9:35. The car was driving from north to south towards the intersection of Seaview Street and Champagne Drive. Ms Leo first saw smoke coming from the house before the car crossed the intersection. She later stated that the smoke was coming from where the roof met the gutter slightly to the north (left in the photograph) of the first floor living room balcony door.
- 27 Ms Leo's husband drove on, crossing the intersection, and stopped. Ms Leo saw flames coming from the first floor. In her statement she said that they were coming out of the top of the balcony door. Ms Leo's husband drove on for a few metres and then stopped again. Ms Leo called 000. The call was made at 9:36.
- 28 At about the same time, the fire was noticed by Mr Yip. He called 000. His call was made at 9:38.
- 29 The Tweed Heads Fire Station was notified of the fire at 9:38. The Station Officer in charge was Officer Christopher Perrin. He and three other officers immediately set off in a fire engine.
- 30 Meanwhile, Mr Yip was trying to contact Ms Worth. He rang her mobile phone number (which he knew) at 9:41, but there was no answer. He also tried to call her parents, whose number he looked up in the phone book, without success.
- 31 Ms Worth was unable to find her father at Tweed Heads Hospital. She telephoned her mother and learned that he had been taken to John Flynn Hospital nearby. She drove to John Flynn Hospital where she arrived at about

- 9:50. Her father was in intensive care and she went in to see him (but not before sending a text at 10:02). According to Ms Worth, she was not allowed to use her phone in the intensive care ward and she turned it off or put it on silent.
- 32 Officer Perrin went to the front door on the ground floor of the eastern side of the property. He forced the door (which was locked) and briefly ventured inside to check that there was no-one in the house.
- 33 When the fire officers arrived, smoke and flames were billowing from the roof and windows near the north eastern balcony. Within a few minutes the ceiling in the living area was sagging, indicating an imminent collapse. Three metre high flames were visible in the living and dining area, and the fire was also affecting the kitchen area. Officer Perrin requested a further fire team which was dispatched at 9:49.
- 34 At some point after the fire had been controlled, but not extinguished, Officer Perrin went back into the house, climbing the stairs to the first floor to inspect the scene. The fire officers put out spot fires, doused hot spots, and opened the windows and shutters. According to Officer Perrin, the fire was effectively extinguished at 10:55.
- 35 Officer Perrin undertook a further inspection after the fire was extinguished but he was unable to determine the fire's cause. He video-called Station Officer Michael Forbes of the FRNSW Fire Investigation & Research Unit in Sydney. It was agreed that Officer Forbes would come up to Tweed Heads to inspect the scene on the following day. FRNSW records show that the fire officers left the scene at various times after 11:00, and the response was completed at 11:51. According to Officer Perrin, he left the scene at 11:15.

Fire damage

- 36 The fire damage centred on the living room at the northern end of the first floor. Reproduced below is a photograph of the living room, looking north-east, taken some years before the fire.



- 37 The photograph shows a television on an entertainment unit against the northern wall. Facing the television was a lounge clad in cane or wicker. The lounge was roughly in the shape of an “L” with one seating area running north-south and another running east-west. At the western end was a backless cushioned area.
- 38 Behind the back of the east-west part of the lounge, on the northern side of the stairwell, was a wooden balustrade, which can be seen on the photograph. There was also a wooden balustrade which ran down the southern side of the staircase next to the wall; only the top-most post is visible in the photograph.
- 39 A diagram showing the furniture in the living and dining areas as it was before the fire is reproduced below:

was controlled by a switch near the top of the stairs. There was no evidence before me to identify the particular product or exactly how it worked.

43 The fire resulted in extensive damage to the living and dining area, as well as the ceiling and roofing. There was widespread charring to the ceiling joists and rafters in the centre of the roof and towards the eastern side, causing the roof to sag toward the northern end, threatening collapse. The external door frame of the balcony on the north-eastern corner of the house was almost entirely melted.

44 A picture of the living room and dining room area after the fire is reproduced below:



45 The photograph shows that the north-south part of the lounge was completely consumed by fire. Of the east-west part, only some of the timber frame at the base survived. At the western end of the lounge the damaged table and remains of the magazine basket can be seen. To the north-east, the furniture unit and the speakers were completely destroyed.

46 Behind the lounge, the balustrade on the northern side of the staircase was completely consumed, apart from the north-western post (heavily charred but

still standing, in the centre of the photograph) and the charred stumps of a few other posts. The descending balustrade on the other side of the stairs was charred on the northern side but its structure was intact. Above, the Tahiti picture and much of the fibreboard wall cladding behind is missing.

- 47 The photograph also shows the damage to the ceiling and the way in which fragments of burned joists had fallen down into the living area. By contrast, as the photograph shows, the damage to the furniture and to the ceiling joists in the dining area was less.
- 48 The kitchen, in the south-western corner of the first floor of the house, was also less severely affected than the living room. Intense heat had caused the melting of plastic fittings and parts of the appliances, and the breakage of the glass in the kitchen window. The surfaces were heavily covered with soot. But the ceilings and the rafters seemed to have been left intact by the fire (although the ceilings themselves were partially brought down by the fire-fighting).
- 49 Built into the bench below the southern window in the kitchen was an electric cooktop. The surface of the cooktop was glass, with heated elements underneath. Following the fire, the left-most element was found in the "on" position. On or to the side of that element were found the charred remains of a book. Reproduced below is a photograph of the cooktop and the window sill behind it.



- 50 In this photograph the charred remains of the book can just be made out on the left-hand side. Reproduced below is close-up photograph which shows the cooktop after it had been partially cleaned.



- 51 On the right of the photograph the left-most power knob can be seen in the maximum “on” position; to the right are the remains of the book (this had been moved as part of the cleaning and it may not represent the precise place where the book was originally found).
- 52 The charred book found on or near the cooktop was later identified as a game guide for playing a computer game called Lego Marvel Super Heroes which belonged to Ms Worth’s son Joshua. Further new copies of the game guide were later purchased by the police and one is in evidence. It contained descriptions of the characters and scenarios encountered in the game. It is a large format paperback consisting of almost five hundred pages printed in colour.
- 53 The charred copy of the game guide found on or near the cooktop was face up and the first one hundred pages were missing. Underneath, the burn pattern on the back was roughly semi-circular and matched the outline of the left-most cooktop element.

Investigations by FRNSW and NSW Police

- 54 The fire was reported to the Police soon after the first 000 call. The report came by way of radio call to Detective Senior Constables Scott Matthew Wilcox and Duncan King who were in a patrol car. They arrived at about 10:00 and spoke to Officer Perrin. By this time the fire had been controlled, but there was still smoke coming off it and the roof was in danger of collapse.
- 55 After Detective Wilcox arrived he was approached by Ms Worth’s neighbour Mr Yip who introduced himself and explained that he knew Ms Worth’s mobile phone number. Mr Yip continued to call Ms Worth. According to Detective Wilcox, he also tried to call her. The calls were not answered.
- 56 Eventually at 10:47 Ms Worth called Mr Yip back. One of the police officers, either Detective Wilcox or Detective King, was put on to speak to Ms Worth. At the time she was still at the John Flynn Hospital. Detective Wilcox drove to the Hospital to speak to her but by the time he arrived she had left, leaving a message that she would meet him at the fire scene. They did eventually meet up there later on. Ms Worth agreed to be interviewed the following morning.

- 57 Detectives Wilcox and King wanted to declare the property a crime scene so that they could control access to it, and for this purpose they needed Ms Worth to sign a consent form. The form is in evidence and bears the time 1:10.
- 58 Ms Kelly Rampling, a crime scene officer in the Crime Scene Services Branch of the NSW Police Forensic Services Group, based at Lismore, was tasked with undertaking the forensic work on the fire. She arrived at the Seaview Street property at about 12:30. She took photographs of the scene, mostly outside, and suspended work at about 3:30. A police guard was placed on the property overnight.
- 59 On the following morning, at about 7:30, Ms Rampling returned to the scene accompanied by another NSW Police forensic officer. They took further photographs, and also samples to be tested for accelerants. Also present that morning were Officer Forbes (to conduct his investigation), Officer Perrin, and Detectives Wilcox and King.
- 60 The state of the cooktop was quickly identified as potentially suspicious (in fact it had been noticed by Officer Perrin the previous day) and was discussed between Officer Forbes and the Detectives. The Detectives left the scene after a few hours to interview Ms Worth (as arranged the previous day). After the interview, they returned to the scene. It was decided to remove the cooktop from the scene for further tests. Later that afternoon, Officer Forbes returned to Sydney.
- 61 Officer Forbes issued his report on 17 September. In his report he concluded that the fire had been deliberately lit. Detective Wilcox received the report the following day. The police investigation continued, and neither the report nor its findings were disclosed to Ms Worth or IIC.
- 62 In October it was decided to carry out further tests on the cooktop with the copies of the game guide which by that stage had been obtained by the police. The cooktop was taken to Sydney for this purpose. The tests were carried out on 28 October at the FRNSW training centre at Londonderry in Western Sydney. Officer Forbes was present, as was another NSW Police forensic officer.

- 63 The cooktop was connected to electricity and various tests were undertaken, with a game guide being placed in different positions on the hotplate for different periods of time. In some of these the game guide ignited and flame was visible but in others the game guide only smouldered. The testing was recorded on video disc.
- 64 These tests confirmed, or at least did not alter, Officer Forbes' view that the fire had been deliberately lit. The police investigation into the fire remained current, although there is no evidence before the Court of any significant further investigation work being done over the following six months or so.

Dealings between Ms Worth and IIC

- 65 Ms Worth's insurance Policy had been effected through Family Day Care Australia ("FDCA"), a business group of which Ms Worth was a member. FDCA placed the cover through Epsilon Insurance as IIC's agent. The fire was notified by FDCA to Epsilon, following instructions from Ms Worth, on the afternoon of 2 September.
- 66 The claim was managed on IIC's behalf by an independent claims management firm, Proclaim Management Solutions ("Proclaim"). Ms Courtney Bretherton was the employee of Proclaim who handled the claim. Ms Ann Malcolm, of the firm Cunningham Lindsey, was appointed as the loss adjustor. Mr Gary Nash, a scientific consultant specialising in fires, was appointed to provide forensic services.
- 67 On 4 September, three days after the fire, Ms Malcolm and Mr Nash visited the fire scene. There they briefly met Ms Worth. Mr Nash took some photographs and some samples for analysis. But Mr Nash and Ms Malcolm formed the view that the building was unsafe because of the potential for roof collapse. At Ms Malcolm's instigation, temporary fencing and signage were set up and a building company, Command Building Services ("Command"), was retained to carry out emergency works to make the building safe.
- 68 Mr Nash completed his report to Cunningham Lindsey on 10 September. He concluded that the fire had originated in the eastern section of the living room, "including the stairwell", and there was no evidence to indicate that the fire had been deliberately set. Like the police, he found no trace of accelerants. He

stated that an electrical malfunction associated with the sound system or the Tahiti picture was a possible accidental cause of ignition. He indicated that a more detailed investigation could be undertaken once the roof had been made safe but this would not be done unless further instructions were obtained.

- 69 On 15 September, Ms Malcolm submitted Cunningham Lindsey's report (incorporating Mr Nash's conclusions) to Ms Bretherton at Proclaim. In particular, Ms Malcolm noted that there was no apparent evidence of fraud. Ms Malcom also noted that there was a police investigation under way, but reported that the police "were not forthcoming" with information about the investigation. Until the police investigations were completed Ms Malcolm formally reserved any comment on policy indemnity.
- 70 At some point, Command removed the section of the roof which was in danger of collapse. The evidence does not reveal exactly when this work was done. In her report to Proclaim, Ms Campbell sought approval to pay an invoice from Command, but the invoice was not in evidence and it is not clear whether the roof had been removed at that point.
- 71 According to Ms Worth, she was told by Ms Campbell that she was not allowed into the house because of its dangerous state. At some point asbestos-based building materials on the site were identified as another potential danger. Ms Worth said she did not actually go into the house until 18 September, when she was briefly allowed to venture in with a builder from Command. She retrieved, or the builder retrieved for her, some jewellery boxes. Ms Worth said that the house was not secure and she noticed that some of her modelling pictures, her computer and other items were not there. Ms Worth said that when she looked in the jewellery boxes her diamond engagement ring, which she usually did not wear and kept in one of the boxes, was missing.
- 72 On the next day, 19 September, Ms Worth lodged a police incident report or reports about the property she said was missing from the house, but the actual report is not in evidence. Ms Campbell's report of 15 September recorded that Ms Worth was to provide a list of contents for her claim, but again there is no such list in evidence.

- 73 On 22 September, Proclaim retained an insurance investigator, Mr Bob King, to assist with the claim. Mr King's task was to investigate the factual elements of the claim, as distinct from the forensic issues which were the subject of Mr Nash's retainer. Over the next few weeks Mr King interviewed Ms Worth and carried out some further investigations about her childcare business and her background.
- 74 Meanwhile, on 28 September, an insurance broker acting for Ms Worth, Mr Ryan Sandilands, wrote to Ms Bretherton at Proclaim advising that he had been retained to act for her in pursuing the claim. Mr Sandilands stated that Ms Worth had no access to her home which had also been her primary source of income. He alleged that IIC was in breach of its obligations under cl 7.7 of the Insurance Code of Practice. That clause applied when the insured demonstrated to the insurer that he or she was in "urgent financial need". It required the insurer to fast-track the assessment of the claim and to make an advance payment to assist in alleviating the insured's immediate hardship.
- 75 On 16 October, Mr King submitted his report to Ms Bretherton. He recounted the results of the investigation he had undertaken into Ms Worth's background and business. In his conclusions, Mr King stated that it was apparent from conferring with Detective Wilcox that the police had some concerns about the fire and was treating Ms Worth as a person of interest. On the other hand, Mr King referred to Mr Nash's conclusion that no evidence had been detected that the fire had been deliberately set and that an electrical malfunction was a possible cause. Mr King expressed the view that on the information provided by Ms Worth she had been in a stable and financially sound position at the time of the fire and emphasised on what he saw as a lack of motive for Ms Worth to set fire to her own house.
- 76 Ms Bretherton passed Mr King's report to IIC with a recommendation that indemnity be granted. But IIC was not satisfied. On 22 October, Mr Kosta Biris, who had immediate responsibility for the claim at IIC, emailed Ms Bretherton. Mr Biris thought there were a number of discrepancies, or potential discrepancies, which had not been properly investigated by Mr King and expressed dissatisfaction with Mr King's performance. He said:

The police are treating the fire as suspicious, the insured is a person of interest who was interrogated for four hours, we appoint the PI to alleviate our concerns and yet we find doing most of the forensic/analysis ourselves.

- 77 Ms Bretherton forwarded Mr Biris' comments to Mr King for response, but it appears that IIC had lost confidence in Mr King and he was taken off the case. Instead, another private investigator, Mr Dale Coleman, was appointed.
- 78 At about the same time, the insurers retained a solicitor, Ms Keely Graham, then with the firm Lee & Lyons. She apparently shared Mr Biris' concerns about Mr King's investigation.
- 79 Meanwhile, Ms Worth had retained Mr Kelvin Connelly, of the law firm Stacks, to act for her in connection with the claim. On 17 November, Mr Connelly wrote to Ms Graham repeating the earlier complaint that the insurer was not complying with the Code of Practice.
- 80 On 25 November, Ms Worth was interviewed by Ms Graham. Mr Biris and Mr Coleman also participated. Ms Worth was accompanied by two lawyers from Stacks. It emerged from the interview that although Mr King had earlier interviewed Ms Worth at length, he had not recorded the interview.
- 81 On 9 December, Ms Graham wrote to Mr Connelly about the claim. She noted:
- The exact cause of the Fire and the Loss has yet to be determined, and investigations, including those being conducted by authorities, are continuing. Further, as you are aware, [IIC] has received conflicting statements/evidence throughout its investigation of this matter.
- 82 Ms Graham's letter went on to say that in light of the financial difficulty being experienced by Ms Worth, IIC was prepared to grant conditional indemnity, and she enclosed a draft of the Deed of Settlement, inviting Mr Connelly to suggest amendments. The Deed was signed by Ms Worth on 16 December; it is not clear on the evidence whether any changes were requested, or made.
- 83 At some point not identified in the evidence, IIC paid Ms Worth \$10,000 for four months' business interruption and made payments totalling \$3,750 for four months' alternative accommodation. In January 2016 Cunningham Lindsey increased its assessment of the business interruption loss and IIC paid a further sum of approximately \$51,000 so as to cover that loss for six months (that is, until the end of February).

- 84 Meanwhile, a builder's quotation had been obtained for the cost of repairing the house. But Ms Worth was concerned about whether this would be satisfactory. Command's removal of part of the roof had left the house exposed to the elements and it had been badly affected by damp and mould. Ms Worth was contending that the house needed to be completely demolished and rebuilt.
- 85 In about March, Ms Worth retained LMI Group, a specialist claims handling firm, to represent her in pursuing the claim. By now Ms Worth was seeking a cash settlement covering contents, reinstatement of the premises and the remaining business interruption and alternative accommodation payments (this was on the assumption, apparently common to both parties, that the Policy only covered such payments for the one year policy period). In response, payments under the Policy ceased while negotiations took place to determine a payout figure. Cunningham Lindsey put a figure forward in April and in May LMI Group responded with a request of an increased offer.
- 86 It appears that by the end of May IIC was prepared to pay out the claim, provided that the police investigation had not revealed anything untoward. On 1 June Ms Graham instructed Mr Coleman to contact Detective Wilcox to ask about the progress of the investigation. Detective Wilcox responded that the police considered, based on the forensic examinations carried out, that the fire had been deliberately lit. He added that the investigation was still current, but that he expected to complete his enquiries in the near future.
- 87 On 23 June, Ms Graham wrote to LMI Group stating that IIC had learned that the police were now treating the fire as "suspicious and not an accident", and their investigation was still continuing. Ms Graham said that in the circumstances IIC was "not in a position" to make a cash settlement under the Policy. It appears that by now trespassers had started visiting the house and vandalising it.
- 88 Ms Worth was not prepared to tolerate the continued delay and initiated a complaint to the Financial Ombudsman Service ("FOS"). This resulted in a letter from Ms Graham to Ms Worth on 20 July. The letter set out a summary of evidence which, according to the letter, suggested that the fire had been deliberately lit by Ms Worth. Ms Graham offered Ms Worth a choice of having

IIC make a formal policy response at that point or waiting until the end of the police investigation.

- 89 At around the same time as she received this letter, Ms Worth retained her current solicitors, LMI Legal. On 23 September Ms Graham formally wrote to LMI Legal denying indemnity. The FOS proceedings seem to have fallen away. As already stated, Ms Worth commenced these proceedings in November.
- 90 Meanwhile, on 4 August Detectives Wilcox and King interviewed Ms Worth for a second time. The interview took place under caution at the Tweed Heads Police Station and Ms Worth was accompanied by two solicitors from LMI Legal.
- 91 Following this interview, Officer Perrin's police statement was completed on 12 August. Some further statements were completed in 2017. The evidence does not contain any further information about the police investigation. It appears to be still current, but on hold, pending the results of this litigation.

Factual issues

- 92 The fire was detected only shortly after Ms Worth left the house on the morning of 1 September 2015. When the fire officers arrived, they had to force open the door, which was locked. There was no suggestion that the fire could realistically have been lit by a third party intruder. The only practical possibilities are that the fire was lit by Ms Worth before she left, or that it broke out spontaneously.
- 93 IIC's case that the fire was lit by Ms Worth was a circumstantial one. The case relied on three main objective features of the incident. These were:
- (1) the period of time which elapsed between when Ms Worth left the house and the fire was detected, which, on IIC's case, was only a few minutes;
 - (2) the charred game guide on the cooktop in the kitchen, which, IIC contended, must have been the result of an attempt by Ms Worth to start a fire;
 - (3) the fire originated in the living room, which, IIC contended, showed that Ms Worth had started another fire on or near the lounge, presumably because the cooktop fire had proved insufficient for her purposes.

- 94 The second and third of these contentions were vigorously contested by counsel for Ms Worth. There was also some debate about precisely how short the period was between Ms Worth leaving the house and the detection of the fire.
- 95 IIC also relied on two further circumstances going to Ms Worth's state of mind at the time of the fire. The first was Ms Worth's financial position in the period leading up to the fire. Counsel for IIC submitted that it was very unfavourable, and suggested that this gave her a motive for setting a fire. The second circumstance was Ms Worth's actions after the fire was noticed by neighbours and reported to the police. Counsel for IIC contended that Ms Worth deliberately ignored the messages she received on her mobile phone about the fire having broken out, and delayed visiting the site of the fire to discuss it with the police. The suggestion was that Ms Worth did not respond to the messages because she knew about the fire and she put off her meeting with the police in order to get her story straight and, perhaps, to dispose of contents of the house which she had removed before the fire.
- 96 Counsel for Ms Worth disputed this interpretation of the evidence. Counsel also contended that the surrounding circumstances, far from indicating that Ms Worth had deliberately lit the fire, were quite inconsistent with any prior planning on her behalf.
- 97 Initially, in opening, counsel for IIC suggested that the circumstances in which the insurance with IIC was effected, coming as it did only a few weeks before the fire broke out, was itself suspicious. But this contention was not pursued in final submissions: apparently it was accepted on behalf of IIC that Ms Worth's decision to take out insurance which covered business interruption losses was the result of a requirement, or at least a suggestion, from the external financier with whom she had refinanced her house. Accordingly it is not necessary to go into the evidence on this point.
- 98 One of the questions raised by the debate about Ms Worth's financial position in the period leading up to the fire was the amount of money she was making from her childcare business. This factual question was independently relevant

to the quantum issue raised by IIC in answer to Ms Worth's claim for payment for business losses under the policy. I also deal with this issue in detail below.

Course of the trial, and witness evidence

99 Recognising that IIC bore the onus of proving that the fire was deliberately lit by Ms Worth, IIC's case was presented first. Evidence in the form of statement or affidavit was given by:

(a) Ms Leo;

(b) Mr Yip;

(c) Officer Perrin and Mr Mark Donovan, another FRNSW officer who attended the fire; and

(d) Detective Wilcox.

100 Counsel for Ms Worth had wished to cross-examine Detective Wilcox but shortly before he was due to give evidence he was taken to hospital in a serious condition, and he was not available to give oral evidence at the trial. His affidavit was admitted on this basis (*Evidence Act 1995 (NSW)*, s 63). None of the other witnesses were required for cross-examination, and their evidence (to the extent admitted) was not contested.

101 Evidence was also called in IIC's case from Ms Rampling about the steps she took as part of her investigation of the site, and her opinion as to the point of origin of the lounge room fire. She had not complied with the formal requirements for the giving of expert evidence but no point was taken about this.

102 Officer Forbes gave evidence of the investigations which he carried out. Pursuant to a ruling by the Chief Judge in the course of managing the proceedings, Officer Forbes' report on the cause of the fire from September 2015 was received, and he gave evidence of an expert nature on this issue.

103 IIC also called expert evidence as to the cause of the fire from Mr Nash. Several reports from him, prepared for the purposes of these proceedings, were prepared in accordance with the requirements of the Rules and ultimately tendered. His report to IIC from September 2015 was also tendered. That

report did not contain the undertaking to comply with the expert witness code of conduct required by the Rules, but no point was taken about this.

- 104 On Ms Worth's behalf, Mr John Gardner was retained to provide expert scientific evidence. Mr Gardner is an electrical engineer with particular experience in investigating electrical fires. He prepared a report in August 2018 expressing his views as to the cause of the fire and responding to Mr Nash's and Officer Forbes' opinions.
- 105 Pursuant to the case management directions made for the proceedings, before the trial there was a conclave between Mr Nash and Mr Gardner and they prepared a joint report on areas of agreement and disagreement between them following that conclave. Mr Nash and Mr Gardner gave their evidence at trial concurrently. This took place before IIC's case was closed. Officer Forbes, although an expert witness, did not participate in the conclave process or the concurrent expert hearing. He was called and cross-examined in the conventional way at an earlier stage.
- 106 Once IIC's case was closed, Ms Worth gave evidence. She was cross-examined at length and her credit was challenged. I deal with the question of her credibility in more detail below. No other lay witnesses were called as part of Ms Worth's case.
- 107 A forensic accountant, Mr Revell Weightman, was also retained on behalf of Ms Worth. Mr Weightman is described in his reports as the "Head of LMI Forensics" at LMI Group, but no point was taken about his independence. IIC retained its own forensic accountant, Mr Chris Ehlers. Mr Weightman and Mr Ehlers also prepared a joint report following a conclave and gave evidence concurrently. This took place after Ms Worth gave evidence.

Fire origins

- 108 Both Officer Forbes and Mr Nash were of the opinion that there had been two separate and independent seats of fire, one involving the game guide on the cooktop and one which began in the living area and spread into the roof space. In their view the fire in the living area had been the main one, responsible for the heat and smoke damage throughout the first floor (including the kitchen).

The damage to the game guide had been caused by ignition from the cooktop element, although this had actually caused little or no further damage.

- 109 Mr Gardner, on the other hand, in his report prepared in August 2018, expressed the view that the fire had arisen in the roof space, probably as a result of an electrical fault in the light circuit wiring. In his view, the damage in the living room and the kitchen was the result of fire spreading downwards from the roof space.
- 110 Mr Gardner's view changed significantly as a result of the conclave with Mr Nash. In their joint report Mr Nash and Mr Gardner agreed that the fire did not originate in the roof space; that the main fire had originated in the living room and spread from there; and that there had been a separately ignited fire on the cooktop. The area of debate between the experts concerned the precise mechanism by which each of the fires had been ignited.

Cause of living room fire

- 111 There was evidence before me from a reference book (supplemented by evidence from Officer Forbes) on the course usually followed by a fire in a room or other enclosed space. Once the fire has taken hold, the hot air it produces rises to ceiling level. If the ceiling and walls prevent or restrict the dispersion of this hot air, a layer of it builds up, increasing in temperature and radiating heat downwards. Eventually the hot air layer reaches such a temperature that everything in the space which is capable of burning will spontaneously ignite. This stage of the fire development is known as "flashover".
- 112 Officer Forbes explained that following flashover a fibreboard ceiling such as that in the house can collapse. The fibreboard is coated in paper which will burn, and in addition the heat causes chemical changes in the fibreboard which cause it to lose its structural strength.
- 113 Officer Forbes was of the view that the fire had originated in the living room with the ceiling intact; following flashover the ceiling would have collapsed and the fire then spread into the roof. Mr Nash adopted a similar view.

- 114 This view became common ground when Mr Gardner abandoned his theory that the fire had commenced in the roof due to an electrical fault there. One of the propositions upon which Mr Nash and Mr Gardner agreed in the joint report was that the main fire originated in the living area, initially developing *below an intact ceiling* before spreading into the roof space.
- 115 Ms Rampling reported that on the eastern side of the living room there was an area of the floor where the fire had burned down into the floor boards, heavily charring them. She referred to this as the maximum depth of the fire.
- 116 Reproduced below is a photograph of the eastern part of the living room after debris had been cleared to expose the floor.



104

- 117 The photograph shows the remains of the timber frame of the east-west part of the lounge. Ms Rampling identified the area of fire damage to the floor as centring on the area in front of what remained of the lounge; the damage extended out to the point marked “C” in the photograph to the north and to “D” towards the east. This area covered, but was more extensive than, the north-south part of the lounge which was completely destroyed in the fire.

- 118 Both Ms Rampling and Officer Forbes placed the point of origin of the fire as having been at or near the north-south part of the lounge. This was for two reasons. First, the level of damage to the floor boards was greatest in that area, suggesting that was where the fire had burned for the longest time. Second, this was consistent with the pattern of damage to the lounge itself; the table to the west of the lounge; and the entertainment unit on the northern wall. Officer Forbes specifically noted that, although the furniture unit and its surrounding speakers were destroyed in the fire, there was no fire damage to the floor in that area. He concluded that the speakers had not been the source of the fire.
- 119 The significance of placing the point of origin of the fire to the north of what was left of the lounge was that there was no apparent electrical source for the fire in this area. The hypothesis was that if the fire originated in that area it must have been the result of deliberate human intervention to light it. Officer Forbes did not rule out the use of an accelerant; he said that the reason why none was detected might simply be that it had been consumed in the fire. Alternatively, a fire could have been lit by using paper or some other fuel, or possibly by direct application of flame to the lounge.
- 120 Mr Nash was not prepared to go as far as this. In his main report, prepared in August 2016 with the benefit of Officer Forbes' report from the previous year, Mr Nash stated that in his opinion the fire damage in the living room was too severe to allow a reliable conclusion to be reached that the area of greatest floor damage was the area in which the fire had originated. Mr Nash said that the fuel load provided by the lounge and the ventilation provided by the internal stairs would have had a significant effect on the amount of damage sustained after flashover. Thus, the localised area of greatest damage on the floor did not necessarily represent the area of fire origin. In Mr Nash's opinion, the area of origin could be reliably determined as having been generally within the eastern section of the lounge room, including the area of fire damage identified by Ms Rampling and Officer Forbes, but being several square metres larger.
- 121 In his report of August 2018, Mr Gardner had, as already noted, concluded that the origin of the fire was in the roof. He also agreed with Mr Nash that the area

of greatest damage did not necessarily represent the point at which the fire had originated, pointing out that a fuel load in the area of the lounge (such as a full laundry basket) could have been ignited by falling rafters.

- 122 Counsel for Ms Worth challenged both Ms Rampling and Officer Forbes on their identification of the area to the north of what was left of the lounge as the point of origin of the fire. Ms Rampling agreed that there was no absolute rule that the fire must have originated in the area of greatest damage. She also accepted that in theory a fire could have been ignited in the roof, with burning rafters falling through into the living room and then igniting the lounge and causing the damage to the floor underneath, but she did not accept that this had happened in the present case.
- 123 Ms Rampling had not been aware, at the time she did her investigation, of the Tahiti picture on the wall above the staircase. Counsel for Ms Worth put to her that the source of the fire in the living room might have been an electrical fire in the picture. Ms Rampling did not agree. She said that if that had been the case she would have expected more damage in the area where the picture had been mounted.
- 124 Counsel for Ms Worth also asked Ms Rampling about the damage to the stairwell and the balustrades. As already noted, the northern balustrade behind the sofa was much more severely damaged than the descending balustrade on the southern side of the stairs. Ms Rampling, however, considered that the most likely explanation for this was the fire spreading from the lounge in a southwards direction.
- 125 Ms Rampling accepted that the damage to the descending balustrade on the southern side of the stairs extended some distance below the first floor level. She accepted that the burnt area of the floor in the living room was therefore not the lowest level of damage in an absolute sense. But she did not accept that this meant that the fire must have originated in the stairwell. Overall the damage there was much less than in the living room; the damage to the stairwell treads in particular, was minimal.
- 126 Counsel for Ms Worth also put to Officer Forbes in cross-examination the theory that the fire had originated with an electrical fault in the Tahiti picture.

Counsel put two hypotheses. One was that the picture produced flames that went up into the ceiling and thus led to the fire in the roof cavity. The other was that the picture caught fire and this somehow “transmitted burning material into the living room”.

- 127 Officer Forbes rejected counsel’s theory in dogmatic fashion. He bluntly stated that what counsel put to him did not happen. He said that there was plasterboard still on the wall in the area and a fire in the monitor would have produced much more damage than was visible. When counsel suggested that the picture might have produced “hot burning pieces of plastic” which somehow spread into the living room, he responded that burning plastic from an electrical device would melt and drip. If that occurred, it would have fallen straight down into the stairwell and the fire would have been at the base of the stairs.
- 128 The possibility of an electrical fire in the living room was taken up with Mr Nash and Mr Gardner in their concurrent evidence. Mr Gardner said that, contrary to Officer Forbes’ suggestion, fires had been known to break out in electrical speakers. In his view, ignition of the fire as a result of an electrical fault in the sound system remained a possibility.
- 129 Mr Gardner also picked up the idea that the fire could have started in the Tahiti picture. He said that if an electrical fault caused a fire in the picture unit and the plastic case burned it would not take long for the unit to fall off the wall onto the staircase below. His hypothesis, however, was that in the meantime “burning plastic embers” could have been generated which “floated into” the living room, setting it alight.
- 130 Mr Nash’s view was that the living room fire had been deliberately lit. But he based this view on his conclusion that the kitchen fire had been deliberately lit, and the unlikelihood in that circumstance of a fire spontaneously breaking out in the living room at the same time. For the purposes of his evidence on this point he was invited to put aside the fire in the kitchen and consider the living room fire on its own.
- 131 Ignoring the fire in the kitchen, Mr Nash was of the view that an electrical fault in the Tahiti picture could possibly have been the source of the lounge room fire. He suggested that the lack of evidence of fire on the wall could be

explained by thermal degradation during flashover. Mr Nash, however, said nothing about floating embers. His hypothesis appeared to be that the fire spread from the picture unit after it had fallen off the wall.

132 I must say I found this somewhat implausible. For it to happen, the picture unit would have had to fall from its position on the southern side of the stairwell but somehow come to rest against the northern side, and do so in such a position that flames from the fallen unit (which Mr Nash accepted would have needed to be at least a metre high) could somehow have ignited the lounge. It seemed to me that a picture unit falling from that height would have fallen down the stairs rather than staying where it fell; and even if it somehow did come to rest on the staircase it would have come to rest on the southern rather than the northern side of the stairwell.

133 When I put these doubts to Mr Nash it emerged that he may have had a different idea of what the picture unit actually was. He apparently was working on the assumption that it could be largely made of paper with a timber frame, and when counsel for IIC put the description of the picture unit to him, he said that it did not match the description with which he had been provided. Ultimately, he emphasised that he was not saying that his hypothesis represented an opinion of what was likely to have happened. All he was saying was that he could not eliminate it as a possibility.

134 In final submissions, counsel for Ms Worth invited me to conclude that the fire in the living room could possibly have been started by an electrical fault in the Tahiti picture, or in the sound system, with the fire then spreading to the lounge and elsewhere in the living room. So far as the Tahiti picture was concerned, counsel put forward two hypotheses. One was Mr Gardner's hypothesis that "embers" emitted from the screen somehow found their way across the air space above the stairwell and fell on the lounge, causing it to burn. The other was Mr Nash's hypothesis was that the fire spread to the lounge after the picture unit fell onto the stairs.

135 Both of the theories depend on the fire somehow moving or being transmitted several metres from its source to the lounge. Mr Gardner's hypothesis required that the picture unit emitted "embers" which were sufficiently large and

contained sufficient thermal energy to ignite the lounge, and that it emitted those “embers” with sufficient force for them to cross the stairwell and reach the lounge. Mr Nash’s hypothesis required the picture unit to have come to rest on the northern side of the stairs close enough to the top that flames emitted from the unit could reach the lounge and ignite it.

- 136 Whether the picture unit would have fallen down the stairs, or would have somehow stayed where it fell, depends upon the application of scientific laws. The same is true of whether embers of sufficient size could have reached the lounge from the picture unit when it was on the wall. But the laws are those of the science of mechanics. In simple applications they are sufficiently well known to be matters of general knowledge. So far as I can see they are not a matter of fire expertise, and neither Mr Nash nor Mr Gardner identified any specific area of study or experience in support of their hypotheses.
- 137 Mr Gardner said nothing at all about how large the “embers” would have had to be or the force with which they would have had to be emitted from the picture unit. The analogy used by counsel for Ms Worth in submissions, of spot fires developing ahead of a bush fire front, seems to me to have nothing to do with the circumstances of this case. It was notable that Mr Nash did not offer any support to the “ember” hypothesis. Nor, for his part, did Mr Gardner support Mr Nash’s “fallen unit” hypothesis.
- 138 In these circumstances, I find the blunt response from Officer Forbes to the Tahiti picture theory compelling. I think the theory depends upon “possibilities” which are so remote and apparently improbable as to be fanciful.
- 139 I am, however, left with Mr Nash’s opinion that it was not possible to be sure that the fire originated where the damage to the floorboards was greatest. Although Officer Forbes was sufficiently sure, Mr Nash’s opinion was not challenged and there is nothing in the evidence to shake it. It is simply a case of two well-qualified experts disagreeing about the degree of certainty with which a proposition can be expressed. The evidence for the fire having originated on or near the north-south part of the lounge is strong but at the same time I am not prepared to say that Mr Nash was wrong in his view.

140 As a result of Mr Gardner's evidence the possibility of an electrical fire in the speakers cannot be excluded, and this is within the somewhat larger area of origin of the fire identified by Mr Nash. There is no evidence which affirmatively suggests that there was any such electrical fire in the speakers; all that can be said is that, if attention is confined to the living room fire, it was possible.

Cause of cooktop fire

141 As already mentioned, the charred remains of the game guide which were found on the side of the cooktop were missing the first one hundred pages and the front cover. The back of the game guide had semi-circular burn marks which corresponded to the shape of the cooktop, but the book itself was found resting partially on and partially off the left hand side of the cooktop so that the back was not actually on the element.

142 The tests which were done at Londonderry in October 2015 were directed towards understanding how this could have happened. One hypothesis was that the game guide had been left open with the first one hundred pages draped over the top of the cooktop; the thought was that those pages could have been ignited and wholly consumed, and the roughly semi-circular burn mark could have been created by fire spreading from the front pages to the bottom of the back of the game guide.

143 But the test results did not support this hypothesis. Opening the game guide with the first one hundred pages over the cooktop did not result in the complete destruction of the first hundred pages or the semi-circular burn mark on the back. The only way in which that burn mark could be achieved was by placing the back of the game guide directly on the element.

144 As a result, both Officer Forbes and Mr Nash concluded that the first hundred pages had been torn off the game guide; the rest of the book had been placed on the cooktop on the element; and it had later been moved off to one side. This obviously could only have been the result of human intervention.

145 As already mentioned, in his main report, Mr Gardner expressed the view that the damage in the kitchen had happened as a result of the fire moving downwards from the ceiling space. But he also advanced a theory to explain the charred copy of the game guide found on the edge of the cooktop,

assuming that the element had accidentally been left on. He drew attention to a pile of magazines on a box which had stood near the cooktop and said that the game guide (which he described as a “magazine”) had probably slid down onto the cooktop “when other magazines were dislodged from” the box.

146 Again, Mr Gardner modified his views as a result of the conclave with Mr Nash. The joint report recorded the experts’ agreement that:

(1) the fire at the cooktop was a result of the energised cooktop element burning the underside of the game guide that was on the cooktop;

(2) the game guide could not have come from the pile of magazines in the kitchen because of the distance involved;

(3) there was no direct physical evidence remaining to identify the most likely reason why the magazine ended up on the cooktop element.

147 The conclave took place, and the expert report was prepared, in early October 2019, about two months before the trial was due to begin. Then, on 13 November, about three weeks before the trial was due to begin, Mr Gardner was asked by Ms Worth’s instructing solicitors to prepare a further report. The instructions picked up the conclusion on the joint report about there being no *direct* physical evidence remaining to identify the *most likely* reason why the game guide ended up on the cooktop element (emphasis in original instructions) and asked Mr Gardner to identify any possible explanations, assuming that it was not deliberately placed there and the cooktop element was on at the time the fire started. Mr Gardner completed his report two weeks later, in the week before the trial.

148 No provision had been made in the timetable for any such supplementary report. But the solicitors for IIC were able to obtain reports in response from Officer Forbes and Mr Nash, and there was no objection to the issues raised by the report being dealt with in Officer Forbes’ cross-examination and in the concurrent evidence of Mr Nash and Mr Gardner.

149 In his supplementary report, Mr Gardner advanced two theories. One was that the game guide had been on the floor and had been picked up and tossed by

Ms Worth onto the bench area, coming to rest on the cooktop. But Ms Worth gave no evidence in support of this theory and it was not seriously pursued.

- 150 Mr Gardner's other theory centred on the window area behind the cooktop, which can be seen in the photograph reproduced at [49] above. The photograph shows the remains of a blind originally suspended from a roller above the window. In the course of the fire the blind had fallen. This would have been a result of the fittings holding it in place having melted or ignited due to the heat in the kitchen. Mr Gardner's hypothesis was that the game guide had been left propped up on the windowsill and when the blind fell, it knocked the game guide down so that it came to rest on the cooktop.
- 151 In their responses to Mr Gardner's supplementary report, both Officer Forbes and Mr Nash rejected this theory. In the concurrent hearing, three major objections to it emerged.
- 152 The first difficulty with the theory is that it did not directly explain what had happened to the first one hundred pages of the game guide, nor why the guide was found with a burn mark matching the element but not on top of the element. Mr Gardner's response appeared to be that the guide must have fallen down in an open position, with the back of the guide where it was found on the side of the cooktop and with the front one hundred pages in contact with the element.
- 153 Mr Gardner's theory, like the Tahiti picture theory, seemed to me to depend on matters of mechanics rather than fire expertise. I must say I have some difficulty with seeing how a paperback book, having fallen on to the cooktop, would be left open in the way Mr Gardner's hypothesis required. In any event, as already noted, the results of the Londonderry tests appeared inconsistent with an "open book" hypothesis.
- 154 Mr Gardner made the obvious point that the test conditions were not the same as those in the kitchen, being conducted outside. But Officer Forbes and Mr Nash did not think that this would have made any great difference. In the end, I did not think that Mr Gardner had explained (at least in a way that I found remotely plausible) how the semicircular burn mark which matched the hotplate could have been created under his scenario.

155 The second difficulty with Mr Gardner's theory focussed on the idea that the game guide had been propped up on the window sill, from where it had been knocked onto the cooktop by the falling blind. Mr Nash pointed out that the glass of the window was set back some distance behind the blind. It followed that if the game guide had been leaning on the glass, the blind would have fallen down a line between it and the cooktop. It was hard to see how this could have propelled the guide onto the cooktop as Mr Gardner's hypothesis required.

156 When this was put to Mr Gardner, he said:

Well, I, I can agree that it's probably not quite as likely that the curtain rod, the blind rod would have knocked it off the window ledge, given its size and its, its weight.

157 A third difficulty with Mr Gardner's theory which was put forward at the concurrent hearing derived from the fact that the kitchen photographs showed an area of the bench under the game guide which had no soot or debris on it. It appeared that the game guide had protected the bench from the hot air and smoke in the kitchen, which had elsewhere left the kitchen surfaces covered in soot.

158 The significance of this was that the bench would not have been protected as it was if the guide had only come to rest on the cooktop after the fall of the blind, when the heat and smoke from the living room fire had already invaded the kitchen. Indeed, the existence of the protection mark appeared to support Officer Forbes' and Mr Nash's theory that the guide had been burned on the cooktop, and then moved, before the fire in the living room got underway.

159 Mr Gardner's only answer to this was to suggest that the apparent protection pattern had actually been caused by the cleaning work done on the cooktop after the fire (which can be seen in the photograph at [50] above). While I suppose this was physically possible, it seemed an extraordinary coincidence that a part of the bench matching where the game guide happened to be, but only that area, would have been cleaned.

160 One other feature of the Londonderry tests should be mentioned. The tests where a game guide was placed directly on the element produced a pattern of damage similar to, but not quite as extensive as, that on the game guide

recovered from the fire scene. In those tests, a game guide was left on the element for thirty minutes or more.

- 161 On the day of the fire, the cooktop element would have been on until the power was switched off by Officer Perrin at some point after he arrived at 9:46. It would then have taken some time to cool down. Even so, if the game guide had only fallen onto the cooktop after the heat and smoke from the living room had caused the blind in the kitchen to fall, it would have been on the cooktop for only about 15 minutes at most, not the 30 minutes or more suggested by the Londonderry tests.
- 162 On the other hand, if, as Officer Forbes and Mr Nash hypothesised, Ms Worth attempted to burn the game guide on the element and then moved it to the side of the cooktop before starting the living room fire and leaving the house, the Londonderry tests suggested she must have started trying to burn the guide at 9:00 or thereabouts. This seems quite a long time in the circumstances.
- 163 In the end I do not think it is possible to reach a definite conclusion as to how long the book was in contact with the cooktop element. But it is not necessary to do so. To the extent that there is any difficulty in reconciling the Londonderry test times with the rival theories in this case, the difficulty applies to both theories. In the end the debate is a neutral factor.
- 164 In my view, the other problems with Mr Gardner's theory are such that for practical purposes it can be discounted. I think the scientific evidence indicates very strongly that the burning of the game guide was the result of human intervention. There is no other realistic explanation for how the guide came to be in contact with the cooktop element. Whether the guide was then moved off the element before the fire in the living room is perhaps less clear but I do not think that is an essential point.

Timing of Ms Worth's departure from the house

- 165 As already mentioned, the fire was first noticed by Ms Leo shortly before she made her 000 call at 9:36, and CCTV footage recorded Ms Worth's arrival at Tweed Heads Hospital also at 9:36.

- 166 In her interview with the police in August 2016, Ms Worth described the route she had taken from the house to Tweed Heads Hospital on the day of the fire. In one of his affidavits, made in November 2018, Detective Wilcox said that he was familiar with the route and had driven it many times. He said that it took between six and eight minutes. He also gave evidence that for test purposes he drove the route in February 2018 and timed it at “just under eight minutes”.
- 167 As already mentioned, Detective Wilcox could not be cross-examined on his evidence at trial. But Ms Graham gave evidence that she was with Detective Wilcox when he did the February 2018 test. Ms Graham said that it was actually she who did the timing. The test took place in the morning (after Ms Graham arrived by plane at 9:30). Detective Wilcox drove both ways. The drive from the hospital to the house took seven and a half minutes and the drive back took just over eight minutes. On each leg of the journey, they had to stop for a red light.
- 168 Counsel for Ms Worth objected to Detective Wilcox’s and Ms Graham’s evidence on this point, on the ground of relevance. Counsel submitted that the test drive in February 2018 was not a reliable guide to how long Ms Worth’s journey would have taken on 1 September 2015, given evidence from Ms Worth that in September 2015 there were road works being undertaken which would have lengthened the journey time (see [260] below). But in my view that submission went to weight not relevance. Ms Graham was not challenged in cross-examination on the accuracy of what she said.
- 169 Counsel for Ms Worth also sought to tender a display produced with the Google Maps application, showing the route from the Seaview Street property to the Tweed Heads Hospital. The display showed a distance (5.6 km) and a driving time for arrival at the Hospital at 9:35 am on 1 September 2015 (10 minutes). It was apparently generated by Ms Worth at the time she prepared her September 2018 affidavit.
- 170 There was no objection to the map or the distance shown on the display, but counsel for IIC did object to the driving time. Counsel for Ms Worth submitted that the display was admissible under the *Evidence Act 1995* (NSW), s 69.

That provision makes admissible a “previous representation” recorded in a “business record”.

171 In my view the display was not a business record in the relevant sense. It was not a record of what someone had observed. It was the output of a computer program, produced by applying an algorithm to data input into the program. If governed by any provision of the *Evidence Act*, such an output is governed by s 146, which requires, for the output to be admissible as evidence of what it purports to say, that it be “reasonably open to find” that the device or process, if properly used, ordinarily produces that output. Counsel for Ms Worth did not rely upon s 146, and there was no evidence before me as to how the Google Maps algorithm (and particularly its retrospective driving time calculation) worked. I therefore declined to receive into evidence the driving time shown in the display.

Conduct of Ms Worth after the outbreak of the fire

172 CCTV footage from the Tweed Heads Hospital from the morning of 1 September 2015 is in evidence. External footage shows Ms Worth arriving and parking her car. She arrived at 9:36.

173 Internal CCTV footage showed Ms Worth entering the reception area of the hospital at 9:39. She can be seen in the footage near the enquiries desk and making a call to her mother, during which she was told that her father was not at the Tweed Heads Hospital but was at the John Flynn Hospital instead. She left at 9:43.

174 External CCTV footage from the John Flynn Hospital is also in evidence. It records Ms Worth arriving at about 9:50 and parking her car at 9:53. She remained in the car for about two minutes before leaving it and walking to the Hospital.

175 In evidence is an activity report for Ms Worth’s mobile phone produced by her service provider, Optus. An Optus service officer also gave evidence at the hearing.

176 The report covers the day of the fire, 1 September 2015, and several days on either side. The report records calls made and received, and the length of time

the calls were connected. It does not record text or email messages. Where a call to Ms Worth's phone was not answered, the call was automatically forwarded to Optus' "call back" system. Forwarded calls are also shown on the report. Forwarded calls would generate a text message to the phone notifying the missed call.

- 177 The report does not record any calls to or from Ms Worth's phone between 9:00 and 9:30 when she was at the Seaview Street property. The first call thereafter was Mr Yip's call at 9:41:07. Ms Worth did not answer. The report shows Ms Worth next called her mother at 9:41:41. The call lasted for twenty seconds. While Ms Worth was on this call, Mr Yip called at 9:41:47 but again Ms Worth did not answer. All of these calls took place while Ms Worth can be seen in the reception area in the CCTV footage.
- 178 Mr Yip called again at 9:43:53, 9:47:51 and 9:54:11. The first of these calls was made as Ms Worth was leaving the Tweed Heads Hospital but it was not clear whether she had reached her car in the car park when the call came in. The second was made while she was driving to the John Flynn Hospital. The third was made while she was sitting in her car having parked there. None of these calls was answered.
- 179 It had previously been arranged that Joshua was to attend a birthday party on the afternoon of 1 September hosted by a friend of Ms Worth's, Donna Campbell, and Ms Worth was to help Ms Campbell with the preparation for the party. At 10:02 Ms Worth sent a text message to Ms Campbell saying that she and Joshua would be unable to attend because her father was in hospital. Ms Worth said that she received a call from Ms Campbell as she left her car having parked at the John Flynn Hospital but she missed the call, and she sent the text message rather than calling back. Cross-referencing to the Optus report suggests that this call was made at 9:57:30. The report records that there was a further unanswered call from the same number at 9:58:29.
- 180 At about the same time Ms Worth started receiving calls from another number. The source of these calls was not identified in the evidence, although it appeared to be accepted that the calls were made by a friend or neighbour of

Ms Worth's to tell her about the fire. Calls from this number were made at 9:57:59, 9:58:45 and 10:00:08. Ms Worth did not answer any of those calls.

- 181 After sending the text message to Ms Campbell at 10:02 Ms Worth continued to receive calls from Mr Yip, and from the other unidentified number to which I have referred. She also received some calls from other numbers which are not further referred to in evidence. Mr Yip called at 10:07, 10:10, 10:15, 10:22 and 10:41. None of these calls was answered. Ms Worth finally returned Mr Yip's calls and spoke to Detective Wilcox or Detective King at 10:47.
- 182 According to Detective Wilcox, in the course of that conversation he agreed to meet Ms Worth at the John Flynn Hospital. On his evidence, there was no reason for Ms Worth to leave the Hospital before he arrived as she did (see [56] above). He also said that she did not arrive at the fire scene until 1:00, shortly before the time recorded in the permission form she signed (see [57] above). The suggestion was that Ms Worth was avoiding the police, perhaps so as to dispose of valuables she had removed from the house before setting the fire.

Income from Ms Worth's childcare business prior to the fire

- 183 According to Ms Worth, she established her childcare business in 2007. The evidence before me included some financial records of the business from 2010/2011 up to the date of the fire. What follows is based on that evidence.
- 184 The business was conducted for tax purposes by Ms Worth as a sole trader. Ms Worth did her own bookkeeping. This involved recording income and expenses in a software package ("MYOB") on a computer which Ms Worth kept at the house. Following the end of the year, Ms Worth would submit these figures to an external accountant. Initially this was Mr Stuart Bulkeley, whose firm was called UAB Accountants and Business Advisers. Ms Worth dispensed with his services in June 2015 in circumstances to which I will refer in more detail below.
- 185 Ms Worth's tax returns for the financial years 2010-2011 through to 2014-2015 were in evidence. The business income declared, and business deductions claimed, by Ms Worth in those returns are set out in the following table:

	2010/ 2011	2011/ 2012	2012/ 2013	2013/ 2014	2014/ 2015
Gross incom e	82,17 5	81,73 3	69,56 2	92,94 6	131,3 61
Deduc tions	(65,49 5)	(62,65 1)	(50,78 3)	(78,81 0)	(109,7 87)
Net incom e	16,68 0	19,08 2	18,77 9	14,13 6	21,57 4

- 186 The returns for the 2010/2011 to 2013/2014 financial years were lodged by Mr Bulkeley on Ms Worth's behalf. The 2013/2014 assessment was issued in September 2014. The 2014/2015 return, although relating to the period prior to the fire, was not lodged until after it had happened. That return was lodged by another tax agent in January 2016.
- 187 MYOB profit and loss statements which supported the figures in the tax returns were in evidence for the 2010/2011 to 2013/2014 financial years, together with a detailed ledger printout for each year showing the account entries from which those statements were generated. The statements contained some non-cash items such as depreciation. It is not clear if those figures were calculated, and the entries done, by Ms Worth herself; the other possibility is that Ms Worth entered the receipts and payments and then provided the MYOB ledgers to Mr Bulkeley who completed the accounts by adding the non-cash items.
- 188 There was no MYOB statement, or set of ledger printouts, for the 2014/2015 financial year. It will be recalled that, according to Ms Worth, her computer disappeared after the fire. Nor were there any supporting invoices or receipts for expenditure in that year. The only evidence before the Court was the tax return itself.

189 Although for tax purposes the business was conducted by Ms Worth as a sole trader, she operated under the banner of a larger organisation which provided her with business and administrative support. Up until the end of the 2012/2013 financial year, this was an organisation known as “Newtrain”. At some point in 2013/2014, Newtrain’s operations were taken over by another organisation called “Multitask”.

190 An important part of the support provided by Newtrain/Multitask was that it collected and accounted to Ms Worth for the Federal Government childcare benefit payable on the childcare she provided. This is a benefit payable to parents who put their children in childcare, which is calculated by reference to the number of hours of childcare provided and the degree of benefit to which the parents are entitled.

191 The procedure was that parents would book their children in with Ms Worth, specifying the number of hours required. These were referred to as the “contract hours”. Ms Worth would report the details to Newtrain/Multitask. Newtrain/Multitask would then calculate the amount of childcare benefit to which the parents were entitled, claim it from the Government, and remit the proceeds to Ms Worth, after deducting administration fees and other charges. This was done on a fortnightly basis. The balance not covered by the childcare rebate was, at least in theory, owed by the parents to Ms Worth and had to be collected from them.

192 Newtrain/Multitask provided fortnightly statements to Ms Worth setting out her children’s contract hours, the government rebate collected, the administration charges, and the balance, to which I will refer as the “parents’ contribution”. The evidence before me includes annual statements for 2011/2012, 2012/2013 and 2014/2015, the figures for which are set out in the following table:

	2010/ 2011	2011/ 2012	2012/ 2013	2013/ 2014	2014/ 2015
Govt rebate		61,89 4	61,37 3		59,42 6

Admin fees		(5,860)	(5,372)		(6,687)
Net receipt from Multitask		56,034	56,001		52,739
Parents' contribution		25,699	13,561		78,487
Grand total		81,733	69,562		131,226

193 These figures show a large increase in 2014/2015 in total childcare fees. But the actual amount received from Multitask in 2014/2015 represented a slight decline from the previous year from which there are complete figures (2012/2103). All of the apparent increase in income was attributable to the parents' contribution. It represented about \$1,500 per week, compared with the net \$1,000 per week received from Multitask.

194 Figures for the period from 1 July 2015 up to the date of the fire are also in evidence. Set out in the table below are the figures for the four fortnights up to the fortnight ended 23 August, which was the last full fortnight for which Ms Worth's business operated.

	To 12/7	To 26/7	To 9/8	To 23/8	Total
Govt rebate	3,234	2,154	2,907	2,783	11,078

Admin fees	(972)	(595)	(803)	(772)	(3,142)
Net receipt from Multitask	2,261	1,559	2,104	2,101	8,026
Parents' contribution	4,337	3,445	4,577	4,403	16,762
Grand total	7,570	5,599	7,484	7,185	27,839

195 These figures represent a continuation of the change seen in the 2014/2015 year. The net receipt from Multitask was almost exactly the same as the \$1,000 per week in 2014/2015. But the apparent gross income was higher still, with a parents' contribution of \$2,100 per week.

196 It is apparent from comparing the income figures in the tax returns with the figures in the annual statements from Newtrain/Multitask that all of the contract hours' income reported to Newtrain/Multitask, including the parents' contribution, was declared as income in Ms Worth's tax returns. The 2014/2015 return shows a large increase in gross income over the previous years. But the return was lodged after the fire by a new tax agent and was accompanied by a large increase in the deductions claimed.

197 The list of expense items changed in 2014/2015 from that used in previous returns, so direct comparison is not possible. But the increase seems largely attributable to a figure of \$40,000 claimed in 2014/2015 for "materials and supplies", which was apparently largely made up of claimed purchases of children's toys. As I have noted, there are no supporting documents to support that expenditure.

198 Ordinarily one would assume that a taxpayer would not declare income in a tax return (and thus subject himself or herself to tax on it) unless he or she had

actually received that income. But counsel for IIC pointed to evidence which, in their submission, suggested that the parents' contribution was not actually collected by Ms Worth, or at least was not actually collected in the 2014/2015 financial year. The evidence fell into three categories.

- 199 First, IIC tendered evidence concerning the financial affairs of the parents of the children in Ms Worth's care at the time. This evidence largely consisted of bank statements and tax returns. But these records were not complete and therefore did not necessarily establish that the relevant parents' contributions could not have been paid. For this reason, the evidence is somewhat inconclusive and I do not propose to analyse it in any further detail.
- 200 Second, Ms Worth's bank statements contained some receipts which were, or might have been, referable to parents' contributions for the childcare business but they were only a fraction of the amount of the contributions supposedly owing. From 1 July 2015 to the date of the fire there was only one bank credit, for \$100, which was clearly referable to childcare. There was one other deposit for \$500, the source of which was not identified. Over the same period the total amount of parents' contributions supposedly due to Ms Worth was \$19,300. The same pattern is seen in the bank statements for the 2014/2015 year.
- 201 Third, daily attendance records were in evidence for the period from 1 July 2015 up to the date of the fire. They showed that the number of hours when the children who were recorded on Ms Worth's books were actually in her care were significantly less than the contracted hours. That is, had the parents' contribution been collected by Ms Worth, a large part of it would have represented payment for periods of care which were not in fact used.
- 202 Counsel for Ms Worth submitted that the parents were contractually obliged to pay Ms Worth for the contracted hours whether those hours were used or not. In evidence was a Multitask fee schedule signed by a parent of one of the children being looked after by Ms Worth in June 2015. But this only constituted an agreement to pay at specified rates. There was no documentary evidence before me recording an undertaking on the part of the parents to pay Ms Worth for specified contract hours, and I got the impression that there may not have been any such document. Instead, it seemed to me to be likely that the hourly

figures reported by Ms Worth to Multitask for contract hours were based on informal arrangements with the parents, which may have been subject to change from one fortnight to another.

Ms Worth's financial position prior to the fire

203 In addition to her net income from her childcare business, Ms Worth received some Centrelink benefits. Up until the 2012/2013 financial year she received a single parent benefit. From that year onwards she received a benefit known as Newstart (why she received this benefit when she was earning money from operating a business was not addressed in the evidence). The figures for income in Ms Worth's tax returns are set out in the table below.

	2010/ 2011	2011/ 2012	2012/ 2013	2013/ 2014	2014/ 2015
Net busin ess incom e	16,68 0	19,08 2	18,77 9	14,13 6	21,57 4
Centr elink	10,73 9	9,351	7,105	5,226	7,001
Total	27,41 9	28,43 3	25,88 4	19,36 2	28,57 5

204 Ms Worth's disposable income would not have been quite as low as these figures suggest. She was able to claim some of her household and travel expenses, and amounts for car running expenses, as deductions against her business income. She also received child support payments from her former husband, Paul Worth, for Joshua. In 2015 these were \$110 per week. In 2015 she was also receiving another Commonwealth benefit, payable to low income families, of \$106 per fortnight. But on any view the income available to meet other household expenses, and her financial commitments, was limited.

- 205 Ms Worth had, as already stated, acquired sole ownership of the Seaview Street property following her divorce from Mr Worth. That property was subject to a mortgage in favour of Ms Worth's bank, ANZ. The mortgage secured a home loan and an additional loan referred to as a "supplementary" loan. As at January 2015, the outstanding balance on the home loan was \$225,000 and on the supplementary loan \$47,000. The repayment on the home loan was \$689 per fortnight (\$17,900 per annum) and on the supplementary loan it was \$147 per fortnight (\$3,800 per annum).
- 206 In addition to her ANZ home loan and supplementary loan, Ms Worth had a loan from Esanda (an ANZ subsidiary) which she had used to finance the purchase of her car. She also had an ANZ credit card with a credit limit of \$10,000.
- 207 The statements for Ms Worth's ANZ credit card for 2015 are in evidence. They show that the card was "maxed out". Ms Worth was making the minimum monthly payment on the card, which was only a few hundred dollars. On occasion she paid a few hundred dollars more, but with interest and over-limit fees, together with occasional purchases, the credit balance continued to hover at or slightly above \$10,000 right up to the time of the fire. The interest rate Ms Worth was paying on the card balance was high, 19.7 per cent.
- 208 Ms Worth had credit cards, or personal loans, from various other providers as well. There seem to have been at least three such credit facilities on which Ms Worth was making regular payments in 2015.
- 209 Ms Worth operated two bank accounts, one in her own name, and one which was in the name of her son, Joshua, but for which she was the sole signatory. According to Ms Worth, the idea behind Joshua's account had been to provide something for him when he left school.
- 210 In 2015, Ms Worth's Multitask income, and her child support money from Mr Worth, was being paid into her ANZ account. The payments on her ANZ loans were debited directly to that account. Ms Worth also drew on it to pay for household expenses. Ms Worth's Centrelink and family benefit payments were paid into Joshua's account and that account seems to have been primarily used to make the payments on the Esanda car loan and Ms Worth's other

credit card or personal loan debt. Neither account had any significant credit balance for any length of time, and the ANZ account in fact was overdrawn on a few occasions.

- 211 Ms Worth did own a parcel of shares in Novogen Limited, a listed public company seeking to develop cancer therapies. She said that she had bought the shares for Joshua's benefit when he grew up. The evidence before me (in the form of Novogen's half yearly report to 31 December 2015) contained share prices from early March 2015 (18 cents); late June (24.5 cents); and mid-October (14 cents). On those figures, the value of the shareholding did not exceed \$3,000 at any point.
- 212 On 20 April 2015 Ms Worth exchanged contracts to buy two units in Ducat Street, Tweed Heads. The purchase price was \$595,000. The deposit was \$30,000, which was paid by her parents.
- 213 On 1 May Ms Worth obtained approval from a financier, RAMS, for a loan package to complete the purchase of the Ducat Street properties and refinance the ANZ home loan on the Seaview Street property. The package consisted of two loans totalling \$820,000; a loan of \$590,000 with a five year interest-only period and a loan of \$230,000 with a two year fixed-rate interest period.
- 214 The loan was drawn down on 1 June. The purchase of the Ducat Street properties was presumably settled on the same day. Both the ANZ loans (the home loan and the supplementary loan) were discharged. The total pay-out was just over \$270,000. This would have left \$550,000 to put towards the balance of the purchase price on the Ducat Street properties, which according to the contract would have been \$565,000. There is no evidence (from settlement sheets or otherwise) to account for how the balance of the purchase price (and the stamp duty on the purchase) was paid.
- 215 Within a few weeks of the RAMS refinance settling, Ms Worth was trying to borrow more money so as to fund renovation work on the Ducat Street properties. Ms Worth approached a number of lenders. One such lender was GE Money: an application by Ms Worth for a personal loan of \$42,000 from GE is in evidence.

- 216 On 19 June Ms Worth approached Mr Bulkeley to help with obtaining approval for the GE loan. She sent him some income and expenditure figures which she had prepared and asked him to put them “on his letterhead” for transmission to GE. She said that it was very urgent (19 June was a Friday, and Ms Worth said she needed to send something to GE on that day). Mr Bulkeley demurred. He pointed out that his firm could not make a representation to a third party based only on information which Ms Worth had provided.
- 217 On the following Monday, 22 June, Mr Bulkeley said that if he was to put figures on his letterhead he would need to do a full scale audit of the numbers, which his firm had not done. Ms Worth responded to him with two angry texts which ended by saying that she would not use his services again. On the very same day Ms Worth obtained a certificate as to her income (stating a net figure, less expenses, of \$73,000) on the letterhead of another accountant, Julie West. Her firm was called Cummings West.
- 218 Ms Worth’s regular monthly payments to RAMS were \$2,598.90, payable by direct debit from her ANZ account. The first was due on 1 July. As at 30 June Ms Worth had only \$9 in her account. On 1 July she received a deposit into that account of \$2,600, and this allowed the RAMS payment to clear. Documents produced on subpoena by Ms Worth’s parents showed that this deposit came from them as a loan.
- 219 The loan application to GE was unsuccessful. On 7 July Ms Worth emailed Ms West. Ms Worth wrote that she had no luck with previous financiers but had a broker who could help her if Ms West could write a letter certifying her income in accordance with an estimate which she provided. That estimate was \$226,000, which included \$150,000 from the childcare business. Ms Worth continued:

If you can do this for I [sic] would appreciate it as I have currently purchased two properties in Ducat Street as you know and have run out of money, we desperately need a loan of \$50,000 to complete renovations, we have workers that we need to pay and desperately need the extra money or we could lose everything!!

I know you don’t know me, but I am honest, Tracey Hamilton’s friend [Tracey Hamilton was one of the parents of the children looked after by Ms Worth]. Broker says it’s just an estimation you are not liable I am. I hope you can help

me, other tax is just about finished so I will make an appointment in a few weeks when completed, please charge me for all you've been doing for me.

- 220 In response, Ms West referred to a Multitask statement which Ms Worth had provided. Ms West said that it did not support an annual income of \$150,000, only \$119,000 (this, of course, assumed that the parents' contribution was collected in full, and ignored expenses other than Multitask's fees). Ms Worth replied that the \$150,000 was an estimate of which she considered to be reasonable due to the fact that she was currently working more hours and doing nights and weekends. Ms West ultimately issued a certificate dated 7 July which adopted Ms Worth's estimate (including \$150,000 income for the business) but expressly stated that the figures were based on information provided by Ms Worth.
- 221 The financier Ms Worth had in mind to lend her the further money was a lender called Resimac. Ms Worth's loan application to Resimac is in evidence. The application records that Ms Worth was interviewed by an authorised representative of Resimac on 7 July, the day of her emails to Ms West. Ms Worth's own signature as applicant was dated 14 July. Ms Worth sought a loan of \$919,000. For the purposes of the application she estimated her income as \$193,570. The application was supported by an accountant's certificate, apparently signed by Ms West, which stated that this amount represented Ms Worth's "declared net profit before tax".
- 222 It is clear that this figure was false. It took no account of Ms Worth's expenses in operating the childcare business. As can be seen from the table at [192] above it would have been a gross overstatement of her taxable income for the year even if she had collected all of the parents' contributions referred to in the Multitask statement.
- 223 In her application, Ms Worth also overstated the value of her assets. She valued the Ducat Street properties at \$700,000, as against their purchase price, less than two months before, of \$595,000. She also declared shares worth \$50,000 when, as we have seen, her shares in Novogen could not have exceeded \$3,000 in value.
- 224 The second RAMS payment fell due on 1 August. Ms Worth had insufficient funds in her bank account to meet it and the payment was dishonoured. But

she did eventually obtain the loan she sought from Resimac. The loan transaction settled on 18 August. The total amount advanced was the \$919,000 sought by Ms Worth. Repayments were \$4,664 per month (\$56,000 per annum).

225 The Resimac loan represented an increase of approximately \$100,000 above the amount Ms Worth had borrowed from RAMS. But out of this amount Ms Worth had to pay significant broker and lender fees (Ms Worth estimated \$20,000, but it may have been as much as \$30,000). What is clear is that Ms Worth was left with \$70,000 in her ANZ account on settlement. Within two days this had reduced to \$36,000. Most of the \$34,000 paid out seems to have gone to pay renovation costs for Ducat Street. Ms Worth accepted that at the time of the loan she was already indebted to tradesmen for work they had done.

226 Ms Worth did pay off her Esanda car loan in August. The amount of the payment is not revealed by the evidence. Her ANZ credit card remained maxed out, and her other credit cards (or personal loans) do not appear to have been paid off, or reduced, either.

227 By 31 August, the day before the fire, the balance in Ms Worth's ANZ account had dropped to \$32,000 (despite a Multitask payment being received in the meantime). By 9 September, the last date on the last ANZ statement in evidence, the balance had fallen to \$16,000.

228 Ms Worth sold the Ducat Street properties the following year. One of the units was sold for \$400,000 on 15 March and the other for \$500,000 on 22 April. This was while Ms Worth was negotiating with IIC about a lump sum payment (see [85] above). The result was a capital gain of \$305,000, without taking into account stamp duty, other acquisition costs and renovation costs.

Expert accounting evidence

229 Mr Weightman prepared a report expressing his opinion as to Ms Worth's business interruption loss for the Policy period and also the extended period of her claim (up to May 2018, which was when the report was prepared). Mr Ehlers followed with a report of his own about Ms Worth's financial position as at 1 September 2015. Mr Weightman then responded and Mr Ehlers replied.

- 230 Mr Ehlers' opinion was that Ms Worth was insolvent as at 1 September 2015. In his opinion she was unable from her own resources to meet her outgoings and in particular the repayments on the Resimac loan. Mr Weightman disagreed. The principal issue between the experts concerned the parents' contribution which was supposedly payable to Ms Worth. Mr Ehlers observed that virtually nothing was paid into Ms Worth's bank account. He assumed that the only income was the net benefit paid by Multitask. Mr Weightman, however, included the parents' contribution as income, based on an assumption he was asked to make for the purpose of preparing his report.
- 231 There was some other areas of dispute between the experts. But it was not suggested that if Mr Ehlers' assumption about there being no parents' contribution was correct, his conclusion of insolvency was incorrect. I resolve the issue about the parents' contributions below. In view of my conclusion, it is unnecessary to go into the other areas of dispute between the experts on this topic.
- 232 Mr Ehlers did not directly respond to Mr Weightman's calculations in his report of Ms Worth's loss of business income for the purpose of the Policy. But in the joint report the experts set out their rival calculations of this loss. The most important difference between them was whether the parents' contribution should be included, which I deal with below.

Ms Worth's evidence

- 233 Ms Worth was born Kim Michelle Hopkins in 1966; her parents are John and Sandra Hopkins. Ms Worth's brother, Stephen Hopkins, was born in 1965.
- 234 Ms Worth was brought up in Shellharbour, south of Wollongong. After leaving school she undertook a business course at TAFE for two years. She worked in jewellery retailing. It was at this time that she began her relationship with Paul Worth.
- 235 In 1988 Ms Hopkins (as Ms Worth then was) and Mr Worth moved to the Gold Coast in Queensland. She worked in jewellery retailing for the next ten years or so. They married in 1999.

236 In 1998 the Worths moved to Tweed Heads. This was as a result of Ms Worth's parents moving to the area. Together they managed a "relocatable homes village" called "The Palms". This consisted of space for 250 relocatable homes, four rental properties and four rental shops. Mr Worth was the grounds keeper and Ms Worth acted as the landlord, doing administration.

237 The Worths were also involved in property investment. As already noted, that was why they originally acquired the Seaview Street property. They also acquired another investment property in 2002.

238 Joshua was born in 2003. The Worths' marriage broke up in 2006. Ms Worth then undertook the necessary training, and obtained the necessary certificates, to set up her childcare business. That business began in July 2007.

239 **Interviews and affidavits:** In evidence are transcripts of three interviews with Ms Worth about the fire, namely:

- (1) with the police on 2 September 2015 (see [60] above);
- (2) with Ms Graham on behalf of IIC in November 2015 (see [80] above); and
- (3) with the police, for the second time, in August 2016 (see [90] above).

240 For the purpose of the proceedings, Ms Worth swore three affidavits. The first affidavit was sworn in May 2018. Consistently with Ms Worth's role as the plaintiff, and with the fact that the onus in proving that she started the fire lay in IIC, this affidavit was mainly concerned with supporting Ms Worth's insurance claim. Ms Worth's second affidavit was sworn in September 2018. That affidavit responded to IIC's allegation that the fire had been started by Ms Worth herself, dealing with the insurer's lay evidence which had, by then, been prepared and served. On 6 December 2019 (during the course of the trial) Ms Worth swore a third affidavit. This affidavit again canvassed IIC's allegation and restated Ms Worth's response to aspects of it in some detail.

241 **Credit generally:** As already noted, the evidence before me clearly establishes that Ms Worth overstated her income and the value of her assets in her loan application to Resimac. It is only fair to Ms Worth to say that subsequent events justified her perception that the Ducat Street units were a good investment which would be profitable, and her confidence in being able to

repay the Resimac loan. But the false statements that Ms Worth made to obtain the loan are still discreditable.

- 242 And Ms Worth did not just make false statements on these matters to Resimac. She also made false statements to the Court. When asked in cross-examination about the value of her shares in Novogen, Ms Worth insisted that they were worth \$50,000. She undertook to try to produce evidence to support this valuation, but no such evidence emerged. It was not until after Ms Worth had left the witness box that the Novogen report to which I have referred, which established that the shares were worth no more than \$3,000, was tendered. Ms Worth's initial evidence that the shares were worth \$50,000 was never explained.
- 243 Ms Worth also gave false evidence about the \$2,600 that Ms Worth received from her parents in order to meet the first payment due to RAMS. When first asked about this, Ms Worth suggested that it was money she herself had paid into the account, probably from the cash which she was supposedly holding from parents' contributions. When it was put to her later in cross-examination that the money had been provided by her mother she at first said that she did not recall. Even when shown the bank records produced by her parents recording the payment as a loan to her, she appeared unwilling to accept that this was what had happened. She also claimed that she did not remember defaulting on the second RAMS payment.
- 244 In general, I was not impressed by Ms Worth's performance in cross-examination. She frequently failed to answer questions directly, instead seeking to pre-empt further enquiry by offering some explanation of what she thought counsel might be driving at. She appeared to me to be more interested in putting her story to the Court than in assisting the Court with actual recollections of events.
- 245 For these reasons, I have treated Ms Worth's evidence overall with considerable reservation. As will be seen, I disbelieve her on critical aspects of her evidence.
- 246 **Movements at Seaview Street property before fire:** At her initial interview with the police on 2 September, Ms Worth said that she only visited the house

briefly in order to pick up a change of clothes for herself and Joshua, as they had not been at home the previous night. She said she was “up to 99” out of concern for her father’s welfare. Ms Worth said that she visited her bedroom and Joshua’s bedroom in turn, collecting fresh underwear and some other clothes and putting them in her bag, and noticed rubbish on the road which had been dropped by the garbage workers. She said she picked this up and put it in a garbage bag. She then went back inside, taking some of the mail with her, and went to the kitchen.

247 According to Ms Worth, she usually had a boiled egg for breakfast each day. She said that as she had not yet eaten breakfast that day, she decided to boil herself an egg. She said she took the saucepan out of the cupboard, put water in it and turned on the cooktop and put the saucepan on it. But she said that she then changed her mind. She said she could recall pouring the water out of the saucepan, drying it and putting it away. She said she thought she had turned off the cooktop, but could not be sure that she had done so.

248 Ms Worth said she then left to drive to the hospital. Ms Worth said she had already locked up downstairs and went out through the glass doors on the western side of the building, descending the staircase shown in the plan reproduced at [21] above.

249 There was a radio on the western side of the living room which can be seen in the diagram at [39] above. Ms Worth said that when she arrived at the house on 1 September the radio was on, having been left on from the previous evening (she said she usually left it on when she was out so as to deter intruders). She left it on when she went out again.

250 Ms Worth gave a similar account when interviewed by Ms Graham for IIC in November that year. But there was a change to the sequence. Ms Worth said that she set about boiling water for an egg (and presumably changed her mind) before she heard the garbage truck and went outside to put out the garbage bins. She picked up the spilt garbage, took it back to the house and left. She did not go back inside.

251 In her second police interview in August 2016 Ms Worth was provided with a transcript of the first interview on 2 September and asked whether she wished

to change or supplement her account. She said she did not. There was no mention of the sequence of boiling the egg and bringing in the garbage recounted in her first interview being incorrect.

252 Ms Worth was then asked about the game guide found on the cooktop. She identified it as a “Lego book” which she said was usually kept downstairs with Lego building blocks that were kept there. When asked about whether it had been in the kitchen, she said that she did not think that Joshua would have left it there. When presented with Officer Forbes’ theory that the game guide had been deliberately set alight using the cooktop element, she confirmed that the guide belonged to Joshua and that he could have had it upstairs, but he definitely would not have put it on the cooktop. She said it could have been with other paperwork she kept in the kitchen but she did not see it there. She said that the revelation about the guide being on the kitchen cooktop “blows my mind because I know I went in there”.

253 In her affidavit of September 2018, Ms Worth again gave a detailed version of her movements at the house on the morning of 1 September. Her account was consistent with what she told the police on 2 September, except that she placed setting about boiling the water for an egg before picking up the garbage outside, rather than after (her account in the affidavit was thus consistent with what she told Ms Graham in November 2015).

254 In her final affidavit, in December 2019, Ms Worth again repeated that the picking up of the garbage came second and she did not go back into the house afterwards. She said that although she had told the police that she had put water into the saucepan she was now unsure. She also referred specifically to the Tahiti picture. She said that, like the radio, it had been left on overnight and she had not turned it off before leaving in the morning. This was the first occasion on which the picture had been mentioned in Ms Worth’s evidence.

255 In the affidavit Ms Worth also gave detailed description of the arrangements that the children under her care, and Joshua, had for helping themselves to food. In particular, she said that Joshua had free run of the kitchen. This evidence was clearly designed to link up with the submission put by counsel for Ms Worth at the trial that Joshua might have been cooking popcorn in the

microwave on the day before the fire with friends and this might explain the game guide in the kitchen.

256 Concerning the game guide itself, Ms Worth in her affidavit said that when interviewed by the police she had believed that it related to Lego building blocks, rather than a Lego figure computer game as it in fact did. She said it was for that reason she thought it had been kept downstairs. She now identified the guide as something which Joshua kept in his room (where he would play with the game) or in the furniture basket in the living room (see [40] above). But she said she did not recall seeing it in the kitchen.

257 Under cross-examination Ms Worth maintained the account in her affidavits. So far as the game guide was concerned, she acknowledged that it would have been in her field of view if it had been on or near the cooktop when she was putting the saucepan on to the cooktop in preparation for boiling an egg. Ms Worth offered no further explanation of how the guide came to be on the cooktop. She said more than once:

I don't know what happened in my house.

258 **Time to travel to Tweed Heads Hospital:** In her interview with the police on 2 September, Ms Worth said that she “imagined” that she left the Seaview Street property at “about 9:30”. In her interview with Ms Graham in November she said the travel time was “about ten minutes”. In the second police interview in August 2016 she said that the travelling time was “ten to fifteen minutes at most”.

259 Ms Worth did not deal with this subject in her affidavits. In cross-examination, it was put to her that it took her no longer than eight minutes to make the drive. She responded that the journey would have taken ten to fifteen minutes, especially as part of Seaview Street was “only just fixed” after the fire.

260 It is notable that over time Ms Worth's estimate of the driving time increased. In November 2015 it was “about ten minutes”. In August 2016 it was “ten to fifteen minutes at most”. In December 2019 it was “ten to fifteen minutes” because of the road works. But these road works were never described by Ms Worth nor did she explain why they would have increased the travelling time on 1

September 2015. Given my other concerns about Ms Worth's credibility, I think her evidence on this subject has little weight.

- 261 **Post-fire conduct:** Ms Worth emphasised that she was in intensive care with her father and she was not allowed to use her mobile phone in there. She said that it was only when she got out of intensive care that she realised calls were being made to her.
- 262 At the police interview on 2 September the Optus report was not available. But Ms Worth had her mobile phone and the Detectives asked her about the missed calls she received from Mr Yip at 9:43, 9:47 and 9:54. Ms Worth's explanation for not answering the calls was that she was either driving (she said her car did not have a phone speaker) or her phone was in her bag. In the second police interview, in August 2016, Ms Worth was asked about Mr Yip's call at 9:41:07. She acknowledged that the call had come in shortly before she called her mother at 9:41:41 but insisted that she did not see or hear any other calls at the time.
- 263 In her September 2018 affidavit Ms Worth referred to the 10:02 text to her friend, Ms Campbell, about the party, she said that she did not hear or read any calls or messages that morning.
- 264 In cross-examination, Ms Worth was pressed about the call from Mr Yip at 9:41:07. She was shown the footage taken inside the hospital at that time and acknowledged that the phone appeared to be in her hand, with her looking at it, at the time the call came in. She responded by saying that her son Joshua had dropped her phone earlier and as a result there was some sort of malfunction which resulted in the volume turning itself down. She insisted that she had not noticed the calls from Mr Yip or anyone else.
- 265 Ms Worth denied the suggestion in Detective Wilcox' evidence that she was avoiding the police after learning of the fire (see [182] above). She denied that she left the John Flynn Hospital after having agreed to meet Detective Wilcox there. She also said that she first arrived at the fire scene at about 12:00, not at 1:00 as Detective Wilcox suggested.

- 266 There is a clear conflict of evidence between Ms Worth and Detective Wilcox on this issue. Despite my lack of confidence in Ms Worth's credibility, I am not prepared to disbelieve her when Detective Wilcox was not available to be cross-examined on his version of events. In any event the issue does not seem to me to be of any great significance.
- 267 It is otherwise Ms Worth's failure to respond to the phone calls which were made to her after the fire. Ms Worth may well have turned off her phone when in intensive care but that cannot explain her failure to respond to calls made before she went in there, which cannot have happened until 10:02 (the time of her text to Ms Campbell) at the earliest. Before 10:02 there were five calls from Mr Yip and three calls from the other, unidentified, number.
- 268 Each of these calls would have generated a "missed call" message on Ms Worth's phone. The phone was actually in her hand when Mr Yip's first call came in at 9:41:07, and when his second call came in (during Ms Worth's call to her mother) at 9:41:47. On her own account Ms Worth must have looked at her phone before 10:02 to pick up the missed call from Ms Campbell. I think it is highly improbable that she could have been unaware of the other eight calls which were made to her over the period from 9:41 to 10:02.
- 269 Counsel for Ms Worth submitted that she would not have known what the calls from Mr Yip and the other caller were about and she might not have responded because she assumed they were unimportant. But although she flirted briefly with such an explanation in cross-examination, Ms Worth never embraced it. Her evidence was that she was unaware of the calls until after coming out of intensive care at some point after 10:30. I found Ms Worth's evidence unpersuasive and I disbelieve it.
- 270 **Profitability of childcare business before fire:** In her interview with the Detectives on 2 September 2015, Ms Worth explained to them how the arrangements for the collection of fees from Multitask and parents worked. She referred to the Federal Government rebate, which she equated to "Centrelink", and said:

... it just depends like everybody is on a different percentage rate [of rebate] so some people might have to pay me but then the gist, the majority of it will come from Family Day Care [Multitask], come from Centrelink. Some of them

mightn't get any subsidy at all then they have to pay me. The majority of my care [customers] they all have to pay me a teeny bit and they get most of it [rebated] so three weeks I then have to wait to get it back from Centrelink.

271 Later in the interview Ms Worth was asked how much she was making from the childcare business. She referred to the "profit and loss" as \$14,000 but noted that this was after she could "write a lot of things off" against her business income. She said, in what appears to have been a reference to her gross income, that she made "roughly a thousand dollars a week, sometimes more, sometimes less".

272 By the time of her November 2015 interview with Ms Graham, IIC had Ms Worth's ANZ account statements. One of the topics which Ms Graham explored was how Ms Worth was able to fund her loan repayments. Ms Worth was asked about parents depositing money into her bank account and said that there was some who paid by direct debit but "pretty much they pay me in cash". After a break in the interview the following exchange then occurred:

Ms Graham: So when the parents pay you cash, what did you do with it, because there's no cash, unless I'm reading it [the ANZ account statements] wrong, there's not really cash deposits in here.

Ms Worth: Then I'll do whatever I have to do with it, just pay bills, buy food, whatever I mean. If you would notice that on my payments that come through from Multitask, pretty much every single parent that comes to me has already got a rebate so pretty much every single child is one hundred per cent rebated that comes to me, so the bit that I get off them is only not very much.

273 The issue was not referred to in the second police interview or in Ms Worth's affidavit of September 2018 but she returned to it in her December 2019 affidavit. She said that she received the parents' contributions in cash which she kept in "various hiding places" including in a cupboard above the refrigerator in the kitchen. She said she believed that at the time of the fire she had several thousand dollars there. She said that she used the cash for living expenses, but also for renovations and for some expenditure on her business. She said that she issued receipts to the parents for their contributions which were kept in a receipt book in the house at the time of the fire.

274 In cross-examination, Ms Worth was asked why she kept cash in the house rather than using it, for instance, to minimise the 19.7 per cent interest she was paying on her ANZ credit card. Her response, as I understood it, was that

instead she saved the cash up to use for repairs to the Seaview Street property and the renovation of the Ducat Street properties.

275 In cross-examination Ms Worth was also asked about her visit to the house on 4 September. She conceded that she did not ask Ms Malcolm or anyone else to look for the cash which was supposedly in the kitchen (or her engagement ring supposedly in a jewellery box in her bedroom). When asked why not, she said it was because she thought “it had all been burnt”. When shown a photograph of the kitchen after the fire she said that she had not been allowed into the house and thought that “everything had been destroyed”.

276 Ms Worth’s bank statements are consistent with her statement to the police on 2 September 2015 that her customers (or at least most of them) only paid a “teeny bit” out of their own pockets. This is also what she told Ms Graham in November. And the figure of “roughly a thousand dollars a week” she gave the police on 2 September agrees almost perfectly with the net income from Multitask in 2014/2015 (see table at [192] above).

277 This is also consistent with common sense. It is difficult to imagine Ms Worth’s customers paying for care that they did not use, at least to a significant extent and over a long period of time. Even if they were required to pay for the full contract hours for one fortnight, they could be expected then to have cut back when booking their children in for subsequent fortnights.

278 The receipt books mentioned by Ms Worth are not in evidence. Counsel for Ms Worth submitted that they had probably been destroyed or lost as a consequence of the fire. On the face of it, that appears somewhat surprising. Presumably they were kept downstairs with the computer. Located there, they are not likely to have been affected by the fire. While the computer might have been stolen by intruders, there would seem to have been no reason to steal a receipt book.

279 Nor were any of the original receipts which Ms Worth said she gave to her customers in evidence. Indeed, there was no evidence at all from them to support Ms Worth’s claim that they were paying her significant amounts in cash.

- 280 In the end the Court has only Ms Worth's word that she collected parents' contributions in cash and kept the cash in her house (a claim first made in her December 2019 affidavit). I found Ms Worth's attempts to sustain this in cross-examination unconvincing. Her evidence is not consistent with what she originally told the police, or IIC. I disbelieve it.
- 281 Ms Worth's bank statements show that she received some small amounts by way of direct credit from customers. She may have collected some other small amounts in cash, although there is no independent evidence of that. But I am satisfied that she was not collecting thousands of dollars in cash per month at the time of the fire, as she claims.
- 282 **Financial position as at the date of the fire:** In the interview with Ms Graham, Ms Worth was asked about how she could meet the outgoings on the loan. She said that she had enough income to do so. In cross-examination, Ms Worth maintained that she was not short of money as at the time of the fire. She said she had the cash from the parents' contribution and could also borrow from her parents (or from her brother, an executive at Coca-Cola Amatil) if she required money. She rejected the suggestion that she was unable to meet her expenses. She acknowledged however that her business interruption cover was \$132,000 (\$11,000 per month) and she expected when she took out the Policy to be paid at this rate if she had to claim on it.
- 283 The objective evidence shows that Ms Worth had little or no financial leeway even before she bought the Ducat Street properties. Her desperate manoeuvrings to obtain further finance after she purchased the properties speak for themselves. Her own email to Ms West of 7 July stated that she was at risk of losing everything. Her ability to meet her loan repayments and other obligations can only have worsened with her increased liability to Resimac after mid-August.
- 284 I am not prepared to accept Ms Worth's evidence that her parents or her brother was prepared to lend money to her when I have so many doubts about her credibility and they have not given evidence.
- 285 Counsel for Ms Worth submitted that, even if the Court was not satisfied that Ms Worth was receiving substantial childcare income from the parents in cash,

her financial position was not so dire as IIC contended. Counsel submitted that the Resimac loan had solved any prior financial difficulties she might have had. Counsel pointed out that as at the date of the fire she had \$32,000 in her bank account; counsel submitted that this would have been sufficient to pay the outgoings on the Resimac loan for six months or so, allowing sufficient time to complete the renovation of the Ducat Street properties and sell them at a handsome profit (as in fact ensued).

286 The first difficulty with this submission is that by 9 September the \$32,000 in Ms Worth's bank account had halved to \$16,000. More importantly, this was not the way Ms Worth put her case in her evidence. She did not say that she made some sort of assessment that the remainder of the Resimac money, together with her receipts from Multitask and her other income, would be enough to tide her through. Indeed she suggested that at the time of the fire she was contemplating holding one of the Ducat Street properties and renting it out.

287 In the end Ms Worth's case on this point rested on her claim that she was collecting extensive childcare contributions from parents in cash. Having disbelieved her on that, I also disbelieve her evidence that she was in a financially sound position at the time of the fire. I am satisfied that in fact she was not.

Conclusions on factual issues

288 I return to the circumstances identified in support of IIC's case, and in particular the objective circumstances of the fire.

289 The first of those circumstances was the period of time which elapsed between Ms Worth leaving the Seaview Street property and the detection of the fire at 9:35. I have explained why I think Ms Worth's evidence on this question had little weight. I think the best evidence remains that it would have taken about eight minutes for Ms Worth to drive from the Seaview Street property to the Tweed Heads Hospital.

290 This would place Ms Worth's departure at about 9:28. This was only seven minutes before smoke and flames were seen at the house by Ms Leo. Even if Ms Worth is correct in saying that she brought the spilt garbage in before

leaving, or the drive to the hospital took a bit longer than eight minutes, or both, there was still only a very short period of time for the fire to break out spontaneously after she left.

291 The second circumstance was the location of the fire outbreak in the living room. For reasons I have given, the evidence favours the view that the fire broke out in the area of the north-south part of the sofa where there was no electrical source.

292 Of itself this suggests that the fire was deliberately lit. But then there is the additional circumstance agreed by all the experts, that there were two independent sources of fire. Officer Forbes and Mr Nash both heavily emphasised this point. In their view, it was too much of a coincidence to suppose that two fires could break out independently at the same time. In my view this is not really a matter of expertise; it is rather a matter of common sense reasoning. But in any event I agree with it.

293 And this is not all. As explained, the scientific evidence shows that there is no credible explanation for the kitchen fire apart from human intervention.

294 On Ms Worth's own account, she was in the kitchen on the morning of the fire at the cooktop and she turned it on. It is impossible to see how the game guide could innocently have ended up on the cooktop element.

295 It is not necessary to go into whether Joshua was cooking popcorn in the microwave on the afternoon before the fire or not. It is theoretically possible that he could have taken the game guide into the kitchen (although the reason for doing so is hard to see). But no one said that he actually did.

296 This is not a case of an explanation being offered, however, difficult it may be to believe. Ms Worth simply said that she did not know how the game guide came to be on the cooktop with the element turned on. The result is that the compelling scientific evidence of human intervention is unanswered.

297 IIC has proved that Ms Worth had a substantial motive for committing insurance fraud. She thought that a successful claim would result in her being paid \$132,000. In fact she received \$61,000 which may well have assisted her in completing the Ducat Street renovations. The evidence establishes that her

financial position at the time of the fire was dire. She needed to complete the Ducat Street renovation quickly.

298 I have already explained why I disbelieve Ms Worth about the phone calls that were made to her between 9:41 and 10:02 in which she did not answer. Why she did not does not emerge clearly from the evidence and counsel for IIC did not advance any theory about it. But I think that the important point is that, having failed to answer the calls, Ms Worth tried to deny that she had done so and relied on explanations which were shown to be false or inapplicable. Clearly, Ms Worth thought her own actions must have appeared suspicious and in that way the false stories suggest a consciousness of guilt.

299 Counsel for Ms Worth contended that IIC's arson allegation did not make psychological sense. Counsel made three points.

300 Firstly, counsel referred to the unlikelihood that anyone would wish to burn his or her own home. Counsel also referred to the resulting loss of Ms Worth's diamond ring and other items of sentimental value from the house.

301 Secondly, counsel pointed out that there was no evidence of Ms Worth having engaged in any preparation or planning for the fire. Counsel asked whether it was really likely that a person in Ms Worth's position would, on the spur of the moment, decide to burn her house down, especially when she would have been preoccupied with her father's illness. Counsel emphasised that the opportunity Ms Worth had, with an empty house on the morning of 1 September, was not something that she would have foreseen or planned for.

302 Thirdly, counsel suggested that if Ms Worth had really intended to burn her own house then attempting to use the cooktop to set fire to the game guide was an extraordinarily ineffective way of going about it. On the scientific evidence, the game guide did little more than smoulder, and it seems likely that if this had been the only source of fire the loss would not have occurred. Counsel put to Officer Forbes in cross-examination that using the game guide, which was thick and slow-burning, was not a very good way to start a fire and Officer Forbes agreed.

- 303 The difficulty with counsel's first point is that it rests exclusively on Ms Worth's own account of events. There is no independent evidence that the diamond ring and the other items of sentimental value later claimed to be missing were in the house at the time of the fire. Ms Worth had ample opportunity to remove them. In fact I found Ms Worth's attempts to explain why she did not try to get the ring on 4 September, if, as she claimed, she thought it was still in the house, very unconvincing. In my view, this point tends to support IIC's case rather than detract from it.
- 304 It is true that there is no evidence of pre-planning on Ms Worth's part. The fact that Ms Worth, her son Joshua, their cat, and the children Ms Worth had arranged to look after were all out of the house is readily explained by Ms Worth's parents' condition and especially the hospitalisation of her father. Ms Worth could not have foreseen these events and it was not suggested to Ms Worth in cross-examination that the steps that she took to cancel the attendance of children at the house on 1 September were the result of pre-planning.
- 305 But IIC's onus was to prove that Ms Worth had lit the fire herself, not to go on and prove all of the details of her plan, if she had one. For this reason, I refused an application by counsel for Ms Worth in the course of the trial to require IIC to particularise its case as to when Ms Worth allegedly decided to burn down the house. The idea might have occurred to Ms Worth beforehand and she might have acted when the opportunity presented itself. She might have acted entirely spontaneously on the day. But IIC had no obligation to present some sort of analysis of Ms Worth's mental processes leading up to the fire. If established, planning would have been relevant; but its absence did not necessarily exculpate Ms Worth.
- 306 It is clear in hindsight, and particularly having regard to the tests later undertaken at Londonderry, that the game guide was not a good choice for trying to ignite a fire. But it was not clear that this would necessarily have been apparent to Ms Worth. And the failure of the game guide to burn would help to explain a separate fire in the living room, as IIC's case assumed.

- 307 It is perhaps more difficult to understand the apparent movement of the game guide from the element to the side of the cooktop. But that is not something which has to be explained. The important point is that human agency was involved.
- 308 I also think there is a broader answer to counsel's submissions. They all involve the assumption that Ms Worth would have acted in a sensible or rational way. That is a relevant circumstantial factor but its weight is not always very great. Many, if not most, frauds which are uncovered look stupid in retrospect.
- 309 In the present case there is powerful objective evidence that the fire was deliberately lit. There is also strong evidence of motive. In such circumstances arguments based on suppositions about Ms Worth's individual psychology can have little weight.
- 310 Counsel for Ms Worth submitted that any reservations I might have about Ms Worth's credit (which, for reasons I have given, I emphatically do have) do not themselves establish IIC's case. Counsel relied for this proposition on the decision of McDougall J in *Rolleston v Insurance Australia Ltd* [2016] NSWSC 1561.
- 311 I accept this proposition. I do not think that *Rolleston* is actually a case of the proposition being applied, but the proposition itself is supported by what Meagher JA, speaking for the Court of Appeal said in *Sharma v Insurance Australia Ltd trading as NRMA Insurance* [2017] NSWCA 307 at [41].
- 312 But there is much more to IIC's case here than just disbelieving Ms Worth. There is circumstantial evidence which points towards the conclusion that Ms Worth set the fire. In that context Ms Worth's failure to offer a credible explanation of the circumstances leaves the Court to draw the obvious conclusion.
- 313 I bear in mind the need for proper proof given the seriousness of IIC's allegation (*Briginshaw v Briginshaw* (1938) 60 CLR 336; [1938] HCA 34). Nevertheless, taking all the circumstances together, I am satisfied that Ms Worth was responsible for the fire.

Claim by Ms Worth

- 314 On my findings, Ms Worth's claim under the Policy fails. But in case the matter should go further, I will make some further comments on the factual aspects of her claim.
- 315 Even if I were not persuaded affirmatively that Ms Worth was responsible for the fire, the onus would still lie on Ms Worth to prove her business interruption loss.
- 316 It will be recalled that Ms Worth's accounting expert, Mr Weightman, assumed for the purpose of calculating the loss that Ms Worth collected all of the contracted hours income reported to Multitask, including the parents' contribution. For reasons I have already given, I am not satisfied that this was so.
- 317 Counsel for Ms Worth urged that, should I find myself in this position, I should nevertheless make some sort of fall-back assessment of Ms Worth's business interruption loss. This is unsatisfactory because Ms Worth's expert did not undertake such an alternative assessment, nor was I provided with any specific submissions on how it should be undertaken and what the result should be.
- 318 The Multitask statements show that at the time of the fire Ms Worth was receiving, on average, \$1,000 a week in payments from Multitask. That much is reliably established. Some, relatively small, supplementary payments from parents appear in Ms Worth's bank account and this could be used as a basis for extrapolation after 1 September 2015.
- 319 But the expenses are more difficult. I regard the deductions claimed in the 2014/2015 tax return as suspect. Figures from earlier years, which are at least supported by MYOB figures and were compiled before the fire, would seem to be a more reliable basis for extrapolation. But there was disagreement between Mr Weightman and Mr Ehlers about how Ms Worth's business expenses (once established) translated into reductions in her business interruption entitlement under the wording of the Policy. In particular, the accountants disagreed on how living expenses which were claimed as deductions for tax purposes (such as the car deduction), but probably would have been incurred even if Ms Worth had not been conducting the business,

should be treated. Given the lack of submissions on this question from counsel for Ms Worth, I do not propose to try to unravel it further in this judgment.

- 320 I should say something about good faith. Counsel for Ms Worth referred in some detail to the internal correspondence between IIC and those who were handling the claim on its behalf. Counsel submitted that this showed that IIC was, throughout the process, casting around for ways to avoid paying the claim. Although counsel had acknowledged at the outset of the trial that no general claim of breach of IIC's obligation of good faith was being pursued (see [14] above), I understood the submission to be that IIC's earlier conduct supported the conclusion that, in relying on the "reasonable dispatch" defence, IIC was not acting in good faith.
- 321 It should be remembered that Ms Worth's good faith contention, if accepted, would shut IIC out from running a "reasonable dispatch" defence even if that defence is a valid one in law. In my view, that would only be justified if IIC were guilty of lack of good faith which was specific to the raising of the defence. Some sort of generalised wish to avoid paying the claim could not be enough.
- 322 The "reasonable dispatch" defence, if upheld, can operate harshly. Counsel for IIC acknowledged this. But that cannot, of itself, mean that taking the defence involves a lack of good faith. It is just a case of IIC invoking a legal right which it has in any case where the defence applies, or arguably applies.
- 323 In the present case the "reasonable dispatch" point was not even taken until IIC filed its defence, which was after it had denied the claim and Ms Worth had commenced proceedings. There is nothing in the evidence to suggest that in taking the point IIC did anything more than pursue a defence which it genuinely believed was open to it.
- 324 Even if I had taken a different view of what is required to establish a lack of good faith, I do not think that the evidence sustains the submission that there was even a "generalised" lack of good faith on IIC's part. It is true that IIC's initial suspicions seem to have been triggered by questions about the number of children Ms Worth had in her care, and that this did not feature in the trial. But as seen, by November 2015 IIC also had doubts about whether Ms Worth was actually earning sufficient income to meet her loan commitments. The

interview in November 2015 may well have left IIC with further doubts about her credibility.

325 The fact is that IIC was aware at all times of the police investigation into the fire, and that that investigation was continuing. IIC did not conduct its own investigations to satisfy itself that the claim should be denied. Instead IIC relied on the outcome of the police investigation. But in my opinion there was nothing unreasonable about this. IIC had no obligation to pay out on the claim before the investigation was completed. Once IIC became aware that the police thought the fire had been deliberately lit, that provided a legitimate basis for it to refuse the claim, whatever the ultimate outcome of the proceedings. There was no lack of good faith on IIC's part.

326 The remaining issues between the parties concern construction of the Deed and the Policy (see [10] and [12] above). As these are questions of law which do not, on my findings, arise, I see no point in addressing them in this judgment.

IIC's cross-claim

327 On my findings, IIC is entitled under the Deed to repayment of the amounts paid out of the claim (\$98,120.17) plus interest. IIC is also entitled to damages against Ms Worth for additional amounts expended on handling and investigating the claim prior to the commencement of Ms Worth's proceedings.

328 Invoices in support of the damages claim were in evidence before the Court. They totalled \$96,388 (exclusive of GST) and were made up of fees charged by Cunningham Lindsay; various investigators, including Mr Nash and Mr Coleman; and Ms Graham's firm (initially Lee & Lyons, and later McInnes Wilson). Counsel for Ms Worth did not dispute that these amounts were recoverable. Counsel did, however, take a point about the legal fees. Counsel suggested that the amount due should be determined by assessment. Presumably this was to avoid excessive charges.

329 It can happen that legal fees form part of a damages claim and in such cases reasonableness may be in issue. One way of dealing with that is to apply for any assessment of damages, or account, to take place after the determination of liability by the Court. The later assessment or account may be undertaken by

the Court at a separate hearing, or by a referee. Where the damages include or consist of legal fees, it will often be appropriate to appoint as referee a person experienced in costs assessment.

330 But no such application was made in this case. That means that when the proceedings were fixed for trial they were fixed on all issues including quantum. Ms Graham gave evidence, and could have been cross-examined on the reasonableness of any questionable item in her bills. In these circumstances it would be wrong to permit Ms Worth to defer a debate about quantum of legal fees to a subsequent hearing. There having been no challenge as to quantum at this hearing, I uphold the damages claim in full.

Conclusions and orders

331 I have concluded that:

(1) Ms Worth was responsible for lighting the fire. Her claim under the Deed (or the Policy) fails.

(2) IIC's cross-claim under the Deed for repayment of monies paid out on Ms Worth's claim, and interest, succeeds. So too does IIC's cross-claim for damages for other expenses incurred as a consequence of the claim.

332 As a result, there should be judgment in favour of IIC on Ms Worth's claim against it. IIC is entitled to judgment in its favour on the cross-claim for both repayment under the Deed and damages. The interest down to judgment will need to be calculated. I will direct IIC to bring in short minutes of order to deal with this, and the costs of the proceedings.

333 The orders of the Court are:

1. Judgment for the defendant on the plaintiff's claim against it.
2. Direct that the defendant/cross-claimant bring in short minutes of order to give effect to my judgment on the cross-claim, and to provide for the costs of the proceedings.

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