FEDERAL COURT OF AUSTRALIA

Tregidga v Pasma Holdings Pty Limited [2021] FCA 721

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| File number: | NSD 1803 of 2017 |
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| Judgment of: | **REEVES J** |
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| Date of judgment: | 28 June 2021 |
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| Catchwords: | **ADMIRALTY** – where applicants made claim for damages against maritime electrical contractor arising from fire on board vessel – whether there was a breach of contract or breach of statutory guarantee or negligence with regard to the fire – whether respondent was liable for damage caused to vessel – whether applicants were owners of the vessel at the time of fire – whether applicants were parties to contracts relating to the electrical works conducted on the vessel – whether applicants were “consumers” for the purposes of s 60 of the *Australian Consumer Law* (Schedule 2 to the *Competition and Consumer Act 2010* (Cth) (the ACL) – whether the applicants were entitled to pursue a claim against the respondents under s 60 of the ACL without being parties to the contract – whether duty of care in tort was owed to the applicants by the respondent – whether scope of the duty of care owed by the respondent extended to taking steps to prevent fire – whether scope of duty of care affected by terms of contracts – whether there was a breach of duty of care – determination of causation – application dismissed  |
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| Legislation: | *Australian Consumer Law* (Schedule 2 to the *Competition and Consumer Act 2010* (Cth))*Civil Liability Act 2002* (NSW)*Civil Liability Act 2003* (Qld)*Shipping Registration Act 1981* (Cth)*Trade Practices Act 1974* (Cth) |
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| Cases cited: | *Air Tahiti Nui Pty Ltd v McKenzie* (2009) 77 NSWLR 299; [2009] NSWCA 429*Alameddine v Glenworth Valley Horse Riding Pty Ltd* (2015) 324 ALR 355; [2015] NSWCA 219*BH Australia Constructions Pty Ltd v Kapeller* (2019) 100 NSWLR 367; [2019] NSWSC 108*Bradshaw v McEwans Pty Ltd* (1951) 217 ALR 1*Council of the Shire of Sutherland v Heyman* (1985) 157 CLR 424*Council of the Shire of Wyong v Shirt* (1980) 146 CLR 40*Tomko v Palasty* [2007] NSWCA 258*Graham Barclay Oysters Pty Limited v Ryan* (2002) 211 CLR 540; [2002] HCA 54*Kuhl v Zurich Financial Services Australia Ltd* (2011) 243 CLR 361; [2011] HCA 11*Lederberger v Mediterranean Olives Financial Pty Ltd* (2012) 38 VR 509; [2012] VSCA 262*Lets Go Adventures Pty Ltd v Barrett* [2017] NSWCA 243*Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705; [2001] NSWCA 305*Perre v Apand Pty Ltd* (1999) 198 CLR 180; [1999] HCA 36*Roads and Traffic Authority of New South Wales v Dederer* (2007) 234 CLR 330; [2007] HCA 42*Schellenberg v Tunnel Holdings Pty Limited* (2000) 200 CLR 121; [2000] HCA 18*Sullivan v Moody* (2001) 207 CLR 562; [2001] HCA 59*Valve Corporation v Australian Competition and Consumer Commission* (2017) 258 FCR 190; [2017] FCAFC 224*Voli v Inglewood Shire Council* (1963) 110 CLR 74*Wilson v Darling Island Stevedoring and Lighterage Company Limited* (1956) 95 CLR 43*Woods v Multi-Support Holdings Pty Limited* (2002) 208 CLR 460; [2002] HCA 9 |
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| Division: | General Division |
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| Registry: | New South Wales |
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| National Practice Area: | Admiralty and Maritime |
|  |  |
| Number of paragraphs: | 223 |
|  |  |
| Date of hearing: | 27-29 July 2020 and 9, 10, 11 and 13 November 2020  |
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| Counsel for the Applicants: | Mr G Nell SC and Mr N Derrington |
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| Solicitor for the Applicants: | HWL Ebsworth |
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| Counsel for the Respondent: | Mr D Savage QC and Ms D Whitehouse |
|  |  |
| Solicitor for the Respondent: | Turks Legal |

ORDERS

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|  | NSD 1803 of 2017 |
|   |
| BETWEEN: | ROSS GILL TREGIDGAFirst ApplicantCATHERINE MARY JENKINSSecond Applicant |
| AND: | PASMA HOLDINGS PTY LIMITED ACN 093 774 559 TRADING AS PASMA ELECTRICALRespondent |

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| order made by: | REEVES J |
| DATE OF ORDER: | 28 June 2021  |

THE COURT ORDERS THAT:

1. The applicants’ originating application filed on 11 October 2017 is dismissed.

2. The applicants pay the respondent’s costs of the proceeding to be taxed failing agreement.

3. If any party wishes to seek a different order as to costs, then order 2 is vacated and the following orders will apply.

4. By close of business on 5 July 2021, that party is to prepare and submit to my chambers a set of submissions, limited to four pages, and any supporting affidavit material.

5. By close of business on 12 July 2021, the opposing party is to prepare and submit to my chambers a set of submissions in response, limited to four pages, and any supporting affidavit material.

6. The costs of the proceeding will then be determined on the papers.

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

REASONS FOR JUDGMENT

REEVES J:

# INTRODUCTION

1 On the evening of 8 June 2016, the sailing motor yacht *Miss Angel* sustained extensive damage from a fire which started in her engine room. At that time, *Miss Angel* was slipped at the premises of BSE Cairns Slipways Pty Ltd (BSE) in Cairns, North Queensland. During the day of the fire, Mr Benjamin Tilton, an electrician employed by Pasma Holdings Pty Limited, the respondent, was undertaking work on *Miss Angel*’s electrical system.

2 In this proceeding, Mr Ross Tregidga and Ms Catharine Jenkins have claimed damages against Pasma alleging that the fire was caused by its breach of contract or its breach of a statutory guarantee and/or the negligence of Mr Tilton for which it is vicariously liable.

3 On 14 June 2019, the issue of liability in this proceeding was ordered to be dealt with first as a separate question. For the reasons that follow, I do not consider Mr Tregidga and Ms Jenkins have established, on the balance of probabilities, that Pasma is liable for the damage caused by the fire on board the *Miss Angel*. That is to say, I do not consider they have established that Mr Tilton’s negligence caused that fire. Their originating application must therefore be dismissed.

# FACTUAL BACKGROUND

4 In the second half of 2015, Mr Tregidga and Ms Jenkins decided to establish a business sailing tourists from Cairns to the Great Barrier Reef. To that end, on 30 September 2015, they registered a company called Allure Cruises Pty Limited , of which they were the sole directors and shareholders. At the same time, the Trekins Family Trust was settled, of which they were the principal beneficiaries, and they caused Allure to be appointed as the trustee of that Trust with the intention that their tourism business would be operated by the Trust through Allure as its trustee.

5 In October 2015, Mr Tregidga travelled to Turkey to find a suitable vessel which could be brought into commercial survey in Australia. He eventually located, and decided to purchase, the *Miss Angel*. She had been built in Bodrum, Turkey in 2004 and was of traditional Turkish design. Consequently, Mr Tregidga was aware that she would require extensive works to bring her up to the requisite Australian commercial survey standard.

6 With that matter in mind, during October 2015, Mr Tregidga and Ms Jenkins met in Cairns with Mr Russ Larkin and Mr Steven Larkin of Russ Larkin & Associates Pty Ltd. Steven Larkin is an Australian Maritime Safety Authority (AMSA) certified surveyor. He advised them on the works required to bring *Miss Angel* to the requisite standard mentioned above. Among other things, he advised that they would need to engage an AMSA certified electrical surveyor to attend to the upgrade to its electrical system. Steven Larkin told them he could not provide that certification himself because he was not AMSA certified for electrical surveys and he was not a licensed electrician.

7 On 23 October 2015, Allure entered into an agreement to purchase the *Miss Angel*. Mr Tregidga and Ms Jenkins loaned the monies to Allure necessary to complete that purchase. Those monies were transferred to Turkey in stages and the sale was eventually completed on 3 December 2015 when a bill of sale was executed transferring the *Miss Angel* to Allure. At about the same time, the vessel was insured with Pantaenius, a company specialising in maritime insurance.

8 Having completed the purchase, Mr Tregidga’s plan was for *Miss Angel* to set sail for Australia before Christmas 2015. However, he encountered two difficulties. The first was that, under Turkish law, the *Miss Angel* could not be removed from Turkey while it was owned by a foreign company unless Mr Tregidga produced certain documentation, which he was not able to do before the planned departure date. The second was that *Miss Angel* could not be imported into Australia as a commercial vessel unless she met the requisite AMSA survey standard and that could not be achieved without the extensive works mentioned above first being undertaken.

9 To comply with the former requirement, on 21 December 2015, Mr Tregidga and Ms Jenkins caused Allure to execute a bill of sale to transfer the *Miss Angel* to them individually. As a consequence, the loan they had made to Allure to purchase the vessel was subsequently forgiven. As to the latter, following advice from an AMSA official that the *Miss Angel* could enter Australia as a recreational vessel, Mr Tregidga decided to register her in that category. Furthermore, to achieve that registration in sufficient time to allow *Miss Angel* to set sail from Turkey before Christmas 2015, he flew from Bodrum to the Turkish capital, Ankara, on 23 December 2015 and attended the Australian Embassy in that city where he obtained the necessary registration certificate for the vessel.

10 The *Miss Angel* departed Turkey to sail to Australia on 24 December 2015. A Turkish captain sailed the vessel from Turkey to the Maldives and, at the Maldives, he was replaced by Ms Anita Rak, who sailed the vessel for the remainder of its journey to Australia.

11 During February 2016, while the *Miss Angel* was in transit to Australia, Mr Tregidga and Ms Jenkins met in Cairns with Mr Brian Keller of BSE to discuss the nature of the works that would need to be undertaken on the vessel and the timeframe required for those works. Mr Keller advised them that BSE could undertake the works on *Miss Angel*’s hull and propeller shaft, but he recommended other specialised contractors for other aspects of the works, including Pasma to undertake the electrical works.

12 The *Miss Angel* arrived at Cairns on about 26 April 2016. After clearing customs, she was initially berthed at the Cairns Jetty. On or about 28 April 2016, Mr Tregidga met with Mr Keller and entered into a written agreement with BSE in the form of a “SLIPWAY/REPAIR BOOKING FORM” pursuant to which BSE was to undertake the works discussed during their February meeting above. On or about 3 May 2016, the vessel was moved to the BSE Shipyard, slipped and placed on a hard stand there. In that process, she was connected to 240 volt AC shore power by an employee of BSE.

13 In late May and early June 2016, there was a series of conversations which variously involved Ms Rak, Mr Tregidga, Mr Pasma and Mr Tilton concerning certain repairs to *Miss Angel*’s electrical system and the upgrade works necessary for her to attain commercial survey standard in Australia. At the conclusion of one of those discussions on or about 2 or 3 June 2016, Mr Tregidga entered into an oral agreement with Pasma to undertake the upgrade works mentioned above. Mr Tilton began to undertake those works on or about 2 or 3 June 2016 and continued on 7 and 8 June.

14 On the day of the fire, several people were present on the *Miss Angel* for various periods of time. First, Mr Tregidga attended the vessel between approximately 7.30 and 9.30 in the morning and between approximately 2.30 and 3.00 in the afternoon. Secondly, Ms Jenkins arrived at the vessel at approximately 10.00 or 11.00 in the morning and she left with Mr Tregidga at about 3.00 in the afternoon. Thirdly, during the day, a number of subcontractors were working on the hull of the vessel stripping and sanding it. Fourthly, Ms Rak, the captain, was on the vessel for most of the day. Finally, Mr Tilton was working on the vessel’s battery banks in the vessel’s engine room throughout the day. Ms Rak and he left the vessel together at about 4.15 pm.

15 At about 11.15 that night, Mr Keller contacted Mr Tregidga and advised him that smoke had been seen coming from the *Miss Angel* and she appeared to be on fire. Mr Tregidga attended the BSE shipyard immediately and observed firefighters attempting to control the fire. The fire lasted for about three to four hours before it was brought under control. As already mentioned, the *Miss Angel* suffered extensive damage as a result.

16 Five days after the fire, Mr Tregidga received a tax invoice dated 13 June 2016 from Pasma and addressed to Allure. It was in the sum of $4,122.38 and related to the works carried out on the *Miss Angel* to 8 June 2016. Ms Jenkins paid that invoice from her personal bank account on 26 June 2016.

# THE ISSUES

17 Prior to closing submissions, counsel for the parties agreed that the following seven issues fell to be determined:

1. The ownership of the vessel – who was the owner of the *Miss Angel* at the time of the contract with Pasma and at the time of the fire?

2. The contracting parties – with whom did Pasma contract when it was engaged to undertake the work on the vessel?

3. The Australian Consumer Law issues:

(a) Are Mr Tregidga and Ms Jenkins “consumers” for the purposes of s 60 of the *Australian Consumer Law* (Schedule 2 to the *Competition and Consumer Act 2010* (Cth)) (the ACL)? and

(b) If so, are they entitled to pursue a claim against Pasma for breach of guarantee under s 60 of the ACL even if they are not a party to the contract with Pasma (see issue 2 above)?

4. The negligence issues:

(a) To whom is any duty of care in tort owed by Pasma? (This is linked to Issue 1)

(b) What is the scope of the duty of care owed by Pasma:

(i) in tort?

(ii) in contract?

(iii) pursuant to s 60 of the ACL?

(c) in particular, to what extent (if any) is the scope of Pasma’s duty of care in tort, contract or pursuant to the guarantee in s 60 of the ACL determined or affected by:

 (i) the terms of the contract by which Pasma was engaged to work on the Vessel?

 (ii) the terms of the contract between Allure and BSE?

(d) was there a breach of the duty of care by Mr Tilton/Pasma?

(e) was there a breach of that duty of care on the grounds of *res ipsa loquitor*?

5. The causation issues:

(a) what was the cause of the fire ?

(b) was it caused by Pasma’s alleged

(i) breach of its duty of care? and/or

(ii) breach of contract? and/or

(iii) breach of the s 60 ACL guarantee?

6. The proportionate liability issues:

(a) were any of the following concurrent wrongdoers?

(i) BSE;

(ii) the Master, Ms Rak;

(iii) Allure;

(iv) Mr Tregidga;

(v) Mr Steven Larkin;

(b) if so, should any liability of Pasma to Mr Tregidga and Ms Jenkins be reduced by the proportionate liability of any of the foregoing? and

(c) if so, by what amount (or amounts)?

7. The contributory negligence issues:

(a) is Mr Tregidga liable for contributory negligence?

(b) if so, should any liability of Pasma to Mr Tregidga and Ms Jenkins be reduced by Mr Tregidga’s contributory negligence? and if so, by what amount?

These issues will be dealt with in turn below. However, as will emerge later, it will not be necessary to deal with Issues 6 and 7.

# 1. THE OWNERSHIP ISSUE

## The issue as pleaded

18 In their Further Amended Statement of Claim (FASC) (at [4A]), Mr Tregidga and Ms Jenkins alleged that, as at 8 June 2016, they were the owners of the *Miss Angel*. In the corresponding paragraph of its defence, Pasma denied that allegation and claimed that instead Allure was the owner.

## The evidence

19 This issue essentially revolves around an email that Mr Tregidga sent to Pantaenius on 23 December 2015, shortly before the *Miss Angel* set sail for Australia, informing it of the change in ownership of the vessel and the circumstances in which that had occurred. That email relevantly stated:

Urgent

Please note that we have had to make the purchase of Miss Angel under our names due to requirements of Turkish authorities, as follows:

*…*

We have bought this for our company, Allure Cruises Pty Ltd. Miss Angel will revert to the Company ownership once we return to Australia. Cathy and I are the only Directors of Allure Cruises.

Will the current cover still suffice or will you need to reissue in our individual names? If so, can you please action urgently this morning and email to us as we are departing Turkey tomorrow and will not be contactable until after Boxing Day.

…

20 Pasma also relied upon a number of “contemporaneous documents”, including the agreement mentioned earlier that Allure entered into with BSE on 28 April 2016 to undertake works on the vessel and the invoice also mentioned earlier that Pasma submitted to Allure for the works it carried out on the vessel up to the time of the fire.

21 For their part, Mr Tregidga and Ms Jenkins relied, among other things, on the accounting records in evidence which recorded that their loan to Allure of the funds necessary to purchase *Miss Angel* had been forgiven.

## The contentions

22 Pasma contended that Mr Tregidga’s email evidenced a transfer by Allure “to it[s] directors on the basis of a promise to retransfer”. Further, it contended that the “contemporaneous documents” referred to above showed that all the dealings with the vessel after she arrived in Australia were conducted by Allure and it should therefore be inferred that the ownership of the vessel had been transferred from Mr Tregidga and Ms Jenkins to Allure prior to the fire. As well, in oral submissions, Pasma contended that the alleged promise arose in part from the serious context in which it was provided, namely by an insured to an insurer about the ownership of insured property. It also contended that this promise resulted in the grant to Allure of an equitable interest in the *Miss Angel*.

23 In their oral and written submissions, Mr Tregidga and Ms Jenkins contended that the indication that Mr Tregidga gave to Pantaenius in his email of 23 December 2015 was not a contractually enforceable promise, nor a declaration of trust, but rather was a statement of future intentions with respect to the ownership of the *Miss Angel* which, by the time of the fire, had not come to fruition. Further, they pointed to the evidence that the *Miss Angel* remained at all times registered and insured in their names and that the loan they had made to Allure to purchase the vessel had been forgiven. As well, they contended that there was no evidence of any bill of sale or other document evidencing the transfer of the *Miss Angel* from them to Allure. As to Allure’s dealings with the *Miss Angel* after she arrived in Australia, they contended they were all consistent with the original intention that Allure should operate the tourism business as trustee of the Trust and were not indicative of any transfer of the vessel from them to Allure. Finally, even if Allure were the equitable owner of the vessel, they contended that they still retained the legal ownership and, as such, were still owed a duty of care such that they were entitled to sue in tort for any damage caused to it by another person’s negligent conduct.

## Consideration and disposition

24 For the following reasons, I consider Pasma’s contentions with respect to this issue must be rejected. First, neither its context, nor its contents, permits Mr Tregidga’s email to Pantaenius of 23 December 2015 to be construed as a promise by him and Ms Jenkins to transfer ownership of the *Miss Angel* to Allure. Instead, that communication was, as Mr Tregidga and Ms Jenkins correctly contended, a statement of their future intentions concerning the ownership of the *Miss Angel* which was neither contractually binding on them, nor constituted a declaration of trust.

25 Secondly, there is simply no evidence which would support an inference being drawn that this statement of future intentions was acted on prior to the fire. No bill of sale or similar document that would ordinarily evidence the transfer of the ownership of a vessel such as the *Miss Angel* has been produced (see ss 36 and 37 of the *Shipping Registration Act 1981* (Cth)). To the contrary, the *Miss Angel* remained registered and insured in the names of Mr Tregidga and Ms Jenkins and the loan Mr Tregidga and Ms Jenkins made to Allure to purchase the vessel was forgiven.

26 Finally, and relatedly, Allure’s dealings with the *Miss Angel* after it arrived in Australia do not provide that evidence. All those dealings were consistent with the original intention that Allure, as trustee of the Trust, should operate the tourism business. They say nothing about the ownership of the *Miss Angel*. For these reasons, the answer to the question posed in Issue 1 above is that Mr Tregidga and Ms Jenkins remained the legal and equitable owners of the *Miss Angel* as at the time of the contract with Pasma and at the time of the fire.

# 2. THE CONTRACTING PARTIES ISSUE

## The issue as pleaded

27 In their FASC, Mr Tregidga and Ms Jenkins alleged (at [9]) that they entered into the agreement with Pasma in the following circumstances:

On or before 3 June 2016, [Mr Tregidga] met in person with Mr Henk Pasma and Mr Benjamin Tilton of [Pasma] and entered into an oral contract for [Pasma] to examine, repair and refit the Vessel’s electrical systems to ensure that they complied with AS/NZS 3000 and NSCV.

28 In the corresponding paragraph of its defence, Pasma did not admit this allegation and instead pleaded that Allure entered into the agreement with it on or before 25 May 2016 in the following circumstances:

…

that, on or before 25 May 2016, [Mr Tregidga], acting on behalf of Allure, met in person with Mr Henk Pasma and entered into an oral contract between Allure and [Pasma] for [Pasma] to bring the Vessel’s electrical system up to standard to obtain certification required under the *Marine Safety (Domestic Commercial Vessel) National Law Act 2012* (Cth) for the Vessel to operate in Queensland and certification in accordance with AS 3000 and NSCV.

29 Fortunately, in oral submissions, the following aspects of these two sets of allegations were accepted as common ground. First, that the agreement was oral. Secondly, that it was entered into by Mr Pasma on behalf of Pasma. Thirdly, that it was entered into in a conversation between Mr Pasma and Mr Tregidga. Fourthly, that its purpose was to ensure that the vessel complied with Australian Standard/New Zealand Standard (AS/NZS) 3000 and the National Standard for Commercial Vessels (NSCV), which set the relevant commercial survey standards. This issue is therefore confined to the question whether, when he had his conversation with Mr Pasma and entered into the agreement, Mr Tregidga did so on behalf of himself and Ms Jenkins, or on behalf of Allure.

## The evidence

30 In his first outline of evidence, Mr Tregidga described the events leading up to and including the entry into the oral agreement with Pasma in the following terms:

49. I cannot recall the exact date but sometime before electrical works commenced, I met with Henk Pasma and Ben Tilton of Pasma Electrical.

50. About 7 or 10 days before the fire, Henk and Ben were at BSE for an unrelated matter and Brian, Commercial Manager at BSE, took the opportunity to bring them to the Vessel.

51. I explained to Henk and Ben that we needed the Vessel to be brought to survey, specifically ‘Class 1 D Certification’. Henk advised *“don’t worry about it, we have undertaken the same work on many other boats, including up in Asia ”* or words to that effect.

52. Henk and Ben represented to me that they knew what was required to bring the Vessel to survey so I instructed them to *“get on with the work”* or words to that effect. I had no knowledge of what was required so was led by Pasma Electrical and trusted their expertise.

53. Neither Henk nor Ben quoted me for the work to be performed and I did not enter a signed contract. Henk and Ben did advise me that they estimated at least three weeks worth of work which included a complete rewiring of the vessel. I trusted them to do what was necessary.

54. In terms of the billing address for works, I do not recall instructing Pasma to invoice Allure Cruises. It is possible that BSE provided Pasma with this instruction.

55. A copy of the electrical drawings (wiring plans) was provided to Ben …

56. I did not see Henk after that and I believe that all works were performed by Ben. I saw him on board the Vessel.

57. I recall catching up with Ben about one week into the job and asking how long it was likely to take. Ben advised me it would take another 2 or 3 weeks due to the amount of work, particularly the rewiring, which was time consuming. I offered to hire a tradesman to assist him with the pulling of wires but Ben replied *“no, it’s okay, I’ve got it under control”* or words to that effect.

58. Aside from that, I had no other communications with Ben. He did not report to me. I had no other communication with Henk, Ben or anyone from Pasma Electrical either.

(Italics in original)

31 In his second outline of evidence, Mr Tregidga returned to the same issue and added the following:

22. When engaging [Pasma] to complete electrical works on the Vessel, I did so in my personal capacity on behalf of the Partnership.

23. The Pasma’s engagement was completely oral and I did not sign any written agreement with them. During my conversations with Henk Pasma and my provision of oral instructions, I do not recall ever advising the Henk that I was contracting with Pasma on behalf of Allure Cruises. As far as I was concerned, the Pasma were dealing with me directly and was fully aware that Cathy and I were the owners of the Vessel.

24. On 13 June 2016 (i.e. five days after the fire), the Pasma issued an invoice for the electrical work performed pre-fire in the sum of $4,122.38 and addressed it to *“Allure Cruises”*. I do not know why the invoice was addressed to Allure Cruises save that the business address of Allure Cruises was a sensible place to send the invoice knowing that it would reach me.

25. I, on behalf of the Partnership, paid Pasma’s invoice soon after it was issued without hesitation.

(Errors and italics in original)

32 Mr Tregidga’s oral evidence on this aspect was to similar effect.

33 Ms Rak was not called to give evidence at the trial.

34 In his first outline of evidence, Mr Pasma described the events leading up to and including the entry into the oral agreement relating to the works to be undertaken on the *Miss Angel* in the following terms:

8. I was approached first approached by Brian [Keller] of BSE Cairns Slipways Pty Ltd (**BSE**) to determine whether we had availability to undertake electrical works on MV Miss Angel (the **Vessel**).

9. I received a telephone call from [Ms Rak] who I understood to be the captain of the Vessel to discuss undertaking works on the Vessel.

10. At the time of entering into initial discussions with [Ms Rak] to undertake works on the Vessel, I understood that the Vessel was slipped at the BSE Slipway located at 61-79 Cook Street, Portsmith in the State of Queensland (the **BSE Slipway**) and that BSE Cairns Slipways Pty Ltd (**BSE**) was undertaking works on the Vessel.

11. I was advised by Ross Tregida [sic Tregidga] to issue invoices for works undertaken by Pasma on the Vessel in the name of Allure Cruises Pty Ltd (**Allure Cruises**).

12. It was my understanding that the owners of the Vessel, who are the Applicants to these proceedings, required a Class 10 Electrical Certification as the owners of the Vessel intended to use the Vessel for commercial purposes.

13. During the works I [redacted] had little contact with [Mr Tregidga and Ms Jenkins] and relied on direction from the Captain, [Ms Rak]. I did not meet [Mr Tregidga and Ms Jenkins] in person until sometime after the project had commenced.

14. On or around 26 May 2016, I along with Benjamin Naho Tilton, met with the Captain of the Vessel [Ms Rak] at the BSE Slipway for the purpose of undertaking a visual inspection of the Vessel.

15. I undertook the visual inspection in the company of the Vessel’s Captain, Mr Tilton and one of my other apprentices, during which I noted and we discussed the various works that would be required on the Vessel. In addition, I took photographs of the Vessel …

…

24. On 13 June 2016 I caused an invoice to be issued to Allure Cruises (Invoice 711455) work undertaken on the vessel up to and inclusive of 8 June 2016 …

(Emphasis and errors in original)

35 In his second outline of evidence, Mr Pasma repeated much of this evidence, but he provided approximate dates when some of the events referred to occurred as follows:

4. In relation to work to be performed on the Vessel, I was first approached on or around 9 May 2016 by Brian Keller of BSE regarding whether Pasma had availability to give a quote to do electrical works to bring the Vessel into compliance. At that point in time Brian did not mention any specifics of the state of the Vessel.

5. Within a week from Brian calling me, Aneta Rak, The Vessel’s captain, called me by telephone to request I attend the Vessel to provide a certificate of compliance …

6. Within a week of speaking to the Vessel’s captain, on or about 25 May 2016, I attended the BSE shipyard where the Vessel was already slipped and on the hardstand and I entered the Vessel via the gangway where I was met by the Vessel’s captain. Ms Rak then gave me her business card …

7. When I arrived at the Vessel I entered by the gangway and observed that the Vessel was connected to shore power. Ms Rak told me that she was living on board. I observed that she had what appeared to be an office with a laptop set up in the lounge area and that the lights were on in all areas of the Vessel that I inspected.

8. On 26 May 2016, Ms Rak, Mr. Tilton and I met at the BSE Slipway to undertake a further visual inspection of the vessel.

9. At the inspection, Ms Rak told me of the feature lights she wanted to be installed on the mast of the Vessel. Ms Rak discussed with me aesthetic improvements only, such as the installation of “mood lighting”. I observed:

(a) That there were no identifiable issues which caused me to believe the electrical system posed a risk of injury to someone onboard the vessel;

(b) The current wiring was not compliant with Australia Standards, as the vessel was built overseas;

(c) There was no proper fire cladding in the engine room. I raised this specific issue with Ms Rak and said words to the effect that the fire cladding issue needed to be rectified and advice on what additions and changes would be required before we could undertake the electrical work in the engine room in particular, the accommodation, wheelhouse and galley areas. Structural changes would most likely be required in those areas of the Vessel.

…

11. On or about 2 June I gave a budget estimate of $30K with weekly updates and costings to Ross Tregidga, at a meeting with him on board the vessel. He advised me to issue invoices for works undertaken by Pasma to Allure Cruises Pty Ltd.

12. On or about 3 June, Ms Rak also advised me to issue invoices for works undertaken by Pasma to Allure Cruises Pty Ltd. Invoices of work were then addressed as required by those persons.

(Errors in original)

36 However, Mr Pasma clarified who it was he made the agreement with and changed when it was made at the conclusion of his oral evidence, as the following passages from the transcript demonstrate:

In this proceeding, the pleadings refer to you having – or your company having entered into an oral agreement to perform this work. And I just want to ask you about – firstly, if you go to your first outline, which is at page 77 of the court book. And you will see - - -?---Yes.

- - - from paragraphs 8 through to 22 you describe the dealings you had with, firstly, Mr Keller from BSE and then Ms Rak?---Yes.

In your second outline, you deal with the same issue from paragraph 7 through to –might be six. Five or six through to about 10. I’m telling you that to ask you this question: who did you make this oral agreement with?---With regards to the work on the vessel?

Yes?---Ms Rak.

And in those paragraphs, particularly in the paragraphs of your second statement, you seem to recount, I think, two or three meetings with Ms Rak?---Yes.

So in paragraph 6 you refer to one on 25 May. In paragraph 8 you refer to a meeting on 26 May, and you refer in paragraph 11 to giving a budget estimate to Mr Tregidga on 2 June?---I believe so, yes.

So when did you make this oral agreement?---When I was talking with Mr – Mr Tregidga at the time. He wanted some sort of indication on the possible costing.

… he wanted to know an approximate costing of … what I thought would be the extent of the works, from my experience.

So when did you make the oral agreement? You said you made it with Ms Rak. When did you make it?---It was with Ross Tregidga. Ms Rak asked me if I could have a think about a cost estimate, and it’s with Ross that I discussed that cost estimate.

So does that mean you made the oral agreement with Mr Tregidga?---That’s correct.

So the only reference – only mention of him is in - - -?---Sir, Ms Rak - - -

I’m sorry?---Sir, Ms Rak was available there as well.

So that must be – if you’re looking at your second outline that’s in paragraph 11?---Right.

You say:

*On or about 2 June I gave an estimate –*

etcetera?---Hang on. What page is that?

Page 83?---Yes. That’s correct.

So does that - - -?---Paragraph 11. Paragraph 11, is that what you’re referring to?

Yes. I’m asking you whether that’s the time when you made the oral agreement?---That’s correct, with Mr Tregidga.

On 2 June?---Yes.

Or about that time?---About – about that time.

(Italics in original)

37 Mr Tilton’s outlines of evidence did not include any information relevant to this issue.

38 Finally, there are two exhibits, the contents of which have a bearing on this issue. They are, first, the contract Mr Tregidga entered into in the name of Allure with BSE on 28 April 2016. As already mentioned, that contract took the form of a “SLIPWAY/REPAIR BOOKING FORM” (the Slipway Contract). Excluding the “STANDARD TERMS AND CONDITIONS OF SLIPPING AND/OR REPAIR” (the Slipway Contract Terms) that were attached to it, that form was as follows:



39 Secondly, there is the tax invoice dated 13 June 2016 already mentioned above that Pasma submitted to Allure for its work on the vessel. That invoice was in the following form:



40 At the conclusion of his oral evidence, after Mr Pasma clarified and changed the position with respect to the oral agreement he made on or before 3 June 2016 (see at [36] above), he gave the following evidence about the “PE Standard Terms and Conditions” referred to in this invoice:

And one further area. When Mr Savage was taking you to various documents, he took you to the document at 1149 of the court book. That’s your standard terms and conditions?---That’s our standard terms and conditions. Yes.

So when you made this agreement on 2 June, were those terms and conditions discussed in any way?---They were not discussed, no. They were implied.

And, in particular, was there – if you look at page 1151, was there any discussion about who was responsible for the – I’m looking at clause 5.6. Who would be responsible for the safety and security of the vessel?--- ....

Was there any discussion about who would be responsible for the safety and security of the vessel?---There was no discussion, no.

Thank you?---The owner of the vessel is always responsible.

Well - - -?---In particular the captain.

41 Mr Tregidga and Ms Jenkins’ counsel then asked Mr Pasma some further questions concerning both matters as follows:

And when you had the conversation with Mr Tregidga, you had already been engaged to perform work on the vessel and were performing that work. That was the situation, wasn’t it?---That’s correct.

And the conversation with Mr Tregidga was in relation to the likely cost of that work and a request that you provide – I think you said a budget estimate, or – yes, a budget estimate is what you said in paragraph 11. That’s correct, isn’t it?---That’s correct.

And it was - the budget estimate that was being provided by you to Mr Tregidga was an estimate in relation to the work that was being performed under the engagement that you had concluded with Ms Rak, prior to 2 June. That’s the position, wasn’t it, Mr Pasma?---I believe so.

And when you spoke with Ms Rak on 26 May, or indeed at any time, I take it that you didn’t speak with her about the standard terms and conditions that his Honour has just taken you to, at page 1149 and following, at tab 52. That’s correct?---That’s correct.

And at no time did you provide those standard terms and conditions to Ms Rak, even before 8 June. That’s the position, is it not?---That’s correct. She was aware of our website, because she had visited us prior – after having had discussions with Mr Keller.

She was aware that you had a website, is that what your evidence was?---Yes.

But you don’t know to what extent that she had accessed, or had in fact accessed that website. That’s correct, is it not?---That’s correct.

And even if she had accessed that website after she had spoken with Mr Keller, and prior to speaking to you, at no point in time did you provide her with a copy of those terms and conditions, or refer them to her. That’s correct?---That’s correct.

And at no time did you provide a copy of those terms and conditions to Mr Tregidga, either before 2 June – is that correct?---That’s correct.

Or on 2 June, is that so?---That’s correct.

Or even after 2 June, before 8 June, is that correct?---That’s correct.

And indeed, would it be correct to say that at no time have you, or to your knowledge, your company, provided either Ms Rak or Mr Tregidga with a copy of those standard terms and conditions?---That’s right.

42 Finally, in her outline of evidence, Ms Jenkins said that, at the request of her husband, she paid Pasma’s invoice from her personal bank account on 26 June 2016.

## The contentions

43 In their written submissions, Mr Tregidga and Ms Jenkins contended that this question had to be determined by reference to who it was that the parties objectively intended to enter into the agreement. On that footing, they contended that, objectively assessed, they individually made the agreement with Pasma. In support of this contention, they pointed to the facts that they were the owners of the *Miss Angel* and that Ms Jenkins had paid Pasma’s invoice for the works from her personal bank account. With respect to Mr Pasma’s evidence that Mr Tregidga told him to issue the invoice to Allure, they contended that: that evidence was self-serving; that since, on Mr Pasma’s evidence, Mr Tregidga gave him the instruction concerned on or about 2 June 2016, that evidence conflicted with its pleaded case that the agreement was concluded on or before 25 May 2016 (see at [28] above); that, in circumstances where there was no evidence that Mr Pasma was aware of the existence of Allure, it was not possible to conclude that the objectively assessed contracting party was anyone other than the person to whom Mr Pasma was speaking, namely Mr Tregidga; and Mr Tregidga’s conduct in issuing that instruction must be assessed by reference to his evidence more broadly, which showed that he was a lay person who did not appreciate the legal significance of his request.

44 As already noted, Pasma contended that the agreement was made between it and Allure and it was made on the terms as to the work to be done and the price to be paid as reflected in the invoice it rendered to Allure on 13 June 2016. In support of this contention, it pointed to several other aspects of the factual background to the formation of the agreement, including: Mr Pasma’s evidence at [4]-[7] of his second outline of evidence concerning his dealings with Ms Rak (see at [35] above); the Slipway Contract that Allure had entered into one month earlier with BSE according to which Pasma was an approved contractor, pursuant to which Mr Tilton had attended a BSE induction and under which Allure had paid a contractor’s fee to BSE. It also pointed to Mr Tregidga’s evidence at [51]-[53] of his first outline of evidence (see at [30] above) and his oral evidence that he made the agreement with Mr Pasma on or before 2 June 2016.

## Consideration and disposition

45 It is convenient to begin by noting two matters of principle that emerged as common ground in closing submissions. First, the identification of the parties to a contract requires an objective assessment of all the relevant surrounding circumstances. That principle was expressed by Allsop P and Handley AJA (Hodgson JA agreeing) in *Air Tahiti Nui Pty Ltd v McKenzie* (2009) 77 NSWLR 299; [2009] NSWCA 429 at [28]:

The identity of the contracting party is to be determined looking at the matter objectively, examining and construing any relevant documents in the factual matrix in which they were created and ascertaining between whom the parties objectively intended to contract.

46 To similar effect, in *Lederberger v Mediterranean Olives Financial Pty Ltd* (2012) 38 VR 509; [2012] VSCA 262 (*Lederberger*) at [19], the Victorian Court of Appeal (Nettle, Redlich JJA and Beach AJA) observed:

Identification of the parties to a contract must be in accordance with the objective theory of contract. That is the intention that a reasonable person, with the knowledge of the words and actions of the parties communicated to each other, and the knowledge that the parties had of the surrounding circumstances, would conclude that the parties had. The process of construction requires consideration of not only the text of the documents, but also the surrounding circumstances known to the parties and the purpose and object of the transaction. This, in turn, presupposes knowledge of the genesis of the transaction, the background, and the context in which the parties are operating.

(Footnotes omitted)

47 Secondly, at least in respect of a contract that is not wholly in writing (cf *BH Australia Constructions Pty Ltd v Kapeller* (2019) 100 NSWLR 367; [2019] NSWSC 1086 per Leeming JA), there is intermediate Court of Appeal authority that, in making the abovementioned objective assessment, regard may be had to post-contractual conduct (see *Tomko v Palasty* [2007] NSWCA 258 at [67]-[68] per Einstein J (Mason P agreeing) and *Lederberger* at [31]).

48 Turning then to the evidence, I consider the resolution of this issue rests with the contemporaneous documents to which Pasma has referred. Conversely, while I accept that Mr Tregidga and Mr Pasma were doing their best to give their honest recollections of the relevant events in May/June 2016, given that those events occurred about four and a half years before the trial of this matter, I do not consider those recollections are reliable. In particular, when the broader factual background to the dealings with *Miss Angel* in that period and the pertinent contemporaneous documents mentioned above are viewed objectively, I consider it becomes relatively clear that the contracting parties to the agreement were Allure and Pasma.

49 First, as the principles outlined above show, Mr Tregidga’s subjective perception (at [31(22)]-[31(23)] above) as to who the contracting party was is irrelevant. Secondly, I consider there is strength in Pasma’s contention that almost all the dealings with the *Miss Angel* after she arrived in Australia were conducted by Allure. Indeed, in cross-examination, Mr Tregidga was not able to point to, or produce, any invoices or similar documents that were not issued to Allure in this period. That pattern is, of course, consistent with Mr Tregidga and Ms Jenkins’ original intention already remarked on above that Allure should conduct the tourism business as trustee for the Trekins Family Trust.

50 Thirdly, I consider it is significant that, in his outlines of evidence, Mr Tregidga did not deny Mr Pasma’s claims above (at [34(11)] and [35(11)]) that Mr Tregidga had instructed him to issue the invoices to Allure. Instead, Mr Tregidga said that he did not recall advising Mr Pasma to do that (see [30(54)] and [31(23)]). This is to be compared with his similar evidence about the circumstances in which the first contemporaneous document of significance to this issue came into existence. That document is the Slipway Contract (at [38] above). In cross-examination, Mr Tregidga gave the following evidence about the circumstances in which that agreement was made:

And the person – this is a pro forma document from BSE, is it not?---I imagine it is, yes.

And the – this is the document that they gave to you for your consideration and signature?---Yes.

And the customer’s name is Allure Cruises Proprietary Limited?---Yes.

And you told them that. You told them that the customer’s name was Allure Cruises Proprietary Limited?---Sorry, I imagine we – as I said yesterday, there was times when it was referred to as Allure Cruises - - -

You just tell me the answer to my question, please. The question was: you told them that the customer name was Allure Cruises Proprietary Limited with that ACN number?---To be honest, I think they had actually prepared this before I came in and put it as Allure Cruises. And I accepted it as the time because as I said yesterday, we were working with the two areas.

And - - -?---To repeat, I believe this was a prepared document which they tabled for me which I then accepted and signed.

Yes. But you didn’t just accept it and signed, did you? Because you wrote on it in your hand. Because the handwriting on the document is yours, isn’t it?---That’s right. The ACN – I added the ACN to it.

That’s right?---Yes.

You wrote “ACN 608” so as to identify the company?---Yes.

And you wrote “71/1 Marlin Parade, Cairns” because that’s where you were residing at the time?---That’s right.

And more importantly, that’s the registered address of Allure Cruises Propriety Limited, isn’t it?---I can’t recall. It may well be, it may also be the registered address of the trustee, as well, of Trekins Trust.

51 I do not accept Mr Tregidga’s claim in these passages that BSE was the source of the information in that document concerning Allure. To the contrary, given the detailed nature of that information, I consider it was most likely to have originated from him. Accordingly, I think it is most likely that Mr Tregidga instructed BSE that Allure was to be the counterparty in that agreement. This is important because it demonstrates that Mr Tregidga’s recollection is unreliable with respect to the contracting party for an agreement that was entered into at about the same time and which involved the same general subject matter, namely the upgrading works to the *Miss Angel* necessary to achieve commercial survey standard.

52 Fourthly, there is the second contemporaneous document: the invoice that Pasma rendered to Allure on 13 June 2016 (see at [39] above). While that invoice does not contain the details of Allure mentioned above, it is addressed to that company at its business address. Given that Pasma’s first dealings with Mr Tregidga and Ms Jenkins were in May 2016 and that the business and commercial arrangements in relation to the use of Allure were matters at that time known to Mr Tregidga and Ms Jenkins, it is likely, in my view, that that information was provided to Pasma by one or both of them. On the other hand, I consider it is unlikely to have been provided by BSE, as Mr Tregidga faintly claimed in his evidence. Accordingly, I consider Mr Pasma’s evidence that Mr Tregidga instructed him to send the invoice to Allure is more likely to be accurate. Finally, I infer from Ms Rak’s absence as a witness that her evidence would not have assisted Mr Tregidga and Ms Jenkins on this issue (see discussion at [148] below).

53 For these reasons, on an objective assessment of all the relevant surrounding circumstances, I conclude that Allure Cruises Pty Ltd was the contracting party with Pasma. It follows that the answer to the question posed in Issue 2 above is: Allure Cruises Pty Ltd.

# 3. THE AUSTRALIAN CONSUMER LAW ISSUES

## The issue as pleaded

54 Even if they were not the contracting party in the agreement with Pasma, Mr Tregidga and Ms Jenkins claimed in the alternative that, as “consumers”, they were entitled to rely on the guarantee prescribed by s 60 of the ACL. They pleaded this issue at [12] and [28] of the FASC in the following terms:

12. Further and in the alternative, [Pasma] guaranteed that the Electrical Services would be rendered with due care and skill in accordance with sections 3 and 60 of the Australian Consumer Law.

…

28. As a result of the aforementioned breaches of the Contract, the guarantee pleaded in paragraph 12 above, and [Pasma’s] duty of care, [Mr Tregidga and Ms Jenkins] have suffered the following loss and damage totalling $1.1 million.

55 In its defence, Pasma did not admit the allegations in [12] of the FASC above and denied that Mr Tregidga and Ms Jenkins were entitled to the relief claimed in [28].

## The relevant statutory provisions

56 Section 60 of the ACL provides:

If a person supplies, in trade or commerce, services to a consumer, there is a guarantee that the services will be rendered with due care and skill.

57 The right to pursue damages for a breach of the guarantee provided by s 60 is contained in s 267(4) of the ACL as follows:

The consumer may, by action against the supplier, recover damages for any loss or damage suffered by the consumer because of the failure to comply with the guarantee if it was reasonably foreseeable that the consumer would suffer such loss or damage as a result of such a failure.

58 The expression “consumer”, which is one of the qualifying criteria in s 60 above, is relevantly defined in s 3 of the ACL in the following terms:

**3 Meaning of *consumer***

…

*Acquiring services as a consumer*

(3) A person is taken to have acquired particular services as a ***consumer*** if, and only if:

(a) the amount paid or payable for the services, as worked out under subsections (4) to (9), did not exceed:

(i) $40,000; or

(ii) if a greater amount is prescribed for the purposes of subsection (1)(a)—that greater amount; or

(b) the services were of a kind ordinarily acquired for personal, domestic or household use or consumption.

…

*Presumption that persons are consumers*

(10) If it is alleged in any proceeding under this Schedule, or in any other proceeding in respect of a matter arising under this Schedule, that a person was a consumer in relation to particular goods or services, it is presumed, unless the contrary is established, that the person was a consumer in relation to those goods or services.

59 The expression “acquire”, which is pivotal to the above definition, is relevantly defined in s 2 of the ACL in the following terms:

**2 Definitions**

…

***acquire*** includes:

…

(b) in relation to services—accept.

## The contentions

60 Mr Tregidga and Ms Jenkins contended that there was no issue that Pasma provided the electrical services and that those services were supplied in trade or commerce. I interpose to note that, since Pasma did not contest these two contentions, I will assume they are not in issue. As well, Mr Tregidga and Ms Jenkins contended that they were “consumers” for the purposes of s 60 of the ACL and they were entitled to claim damages under the guarantee in s 60 even if they were not a party to the agreement with Pasma. As to the former issue, they contended that their pleading of this issue, as set out above, activated the presumption in s 3(10) of the ACL such that Pasma bore the onus to establish that they were not consumers. In any event, they contended they fell within the definition of the expression “consumer” in s 3(3)(a)(i) of the ACL because the amount they actually paid Pasma for the services was $4,122.38, as evidenced by its invoice rendered on 13 June 2016. Further, they contended that the statutory guarantee in s 60 differs markedly from the equivalent provisions in the *Trade Practices Act 1974* (Cth) in that it may exist independently of any contractual relationship. Accordingly, since, as owners of the *Miss Angel*, they obtained the benefit of the works Pasma undertook on the vessel, they contended they were entitled to rely upon the guarantee provided by that provision, relying on the judgment of Campbell AJA in *Alameddine v Glenworth Valley Horse Riding Pty Ltd* (2015) 324 ALR 355; [2015] NSWCA 219 (*Alameddine*) at [77].

61 There was a number of reasons, so Pasma contended, why s 60 of the ACL did not avail Mr Tregidga and Ms Jenkins. First, it contended they were not parties to the agreement with it and s 60 of the ACL did not apply to third parties. In this respect, it contended that the judgment of Campbell AJA in *Alameddine* was obiter and should not be followed. Further, it contended that Mr Tregidga and Ms Jenkins could not rely on the presumption in s 3(10) of the ACL because they had not pleaded, with sufficient clarity, the “services” that were allegedly not rendered with due care and skill. In this respect, it claimed they were in no different a position to that of the plaintiff in *Lets Go Adventures Pty Ltd v Barrett* [2017] NSWCA 243 (*Lets Go Adventures*) at [4] per Basten and Gleeson JJA. In oral submissions, Pasma’s counsel clarified that he was not contending that Mr Tregidga and Ms Jenkins had not properly pleaded that they were “consumers”.

## Consideration and disposition

62 For the following reasons, I reject Pasma’s main contentions on this issue and generally accept those of Mr Tregidga and Ms Jenkins. First, as the Full Court explained in *Valve Corporation v Australian Competition and Consumer Commission* (2017) 258 FCR 190; [2017] FCAFC 224 at [106]:

It is apparent on the face of Div 1 of Pt 3-2 [of the ACL] that it adopts the mechanism of providing that certain consumer guarantees apply to certain transactions, in contrast to the mechanism (adopted by the predecessor provisions) of implying terms into a contract. The consumer guarantee provisions are therefore capable of application whether or not there is a contract …

See also at [111].

It is to be noted that Division 1 of Part 3-2 of the ACL includes s 60. It follows that the fact Mr Tregidga and Ms Jenkins were not parties to the agreement with Pasma is not determinative of their claim under s 60.

63 Secondly, Pasma’s related contention that s 60 does not apply to third parties is inconsistent with the reasoning of Campbell AJA in *Alameddine*. That judgment was primarily concerned with the construction of ss 5M, 5L and 5N of the *Civil Liability Act 2002* (NSW). Macfarlan JA wrote the primary judgment and Simpson JA and Campbell AJA agreed. In that sense, Pasma is therefore correct in its contention that the observations of Campbell AJA at [75]-[77] are obiter. Indeed, so much is clear from his Honour’s qualifying comments at [75]. Nonetheless, I consider his Honour’s reasoning at [76]-[77] as follows is, with respect, compelling and I propose to apply it in this matter:

[76] The case was argued, both at first instance and on appeal, on the basis that the services relating to the quad biking activity that the respondents supplied to the appellant were supplied pursuant to a contract that had been entered on behalf of the appellant either by her mother (if the relevant contract arose from the telephone conversation) or by her sister (if the contract arose from the application form). The reasons of Macfarlan JA proceed in accordance with the basis upon which the case was argued.

[77] Often, a parent or sibling will not have authority to act as the agent for a child in entering a contract that binds the child. Indeed, there are many occasions when services are supplied to a consumer under a contract to which that consumer is not a party, that is a third party beneficiary contract. In particular, it commonly happens that a person enters a contract for services to be supplied in trade or commerce to a friend or member of the family of the contracting party, and that the person to whom the services are provided is a “consumer” within the meaning of s 3 of the Australian Consumer Law. As well, services can sometimes be supplied to a consumer in trade or commerce when they are not supplied pursuant to any contract at all –– for example, if a service provider gives a free trial of the services. Even in those circumstances, a “guarantee” can arise under s 60 or s 61 of the Australian Consumer Law. If such “guarantee” arises, then, subject to some limitations, s 267 of the Australian Consumer Law can entitle the consumer to take action if the guarantee is not complied with. That shows that the “guarantee” is not a contractual obligation, but rather a statutorily imposed obligation, concerning which s 267 provides a statutory remedy. Section 5N of the Civil Liberty Act and the provisions of the Australian Consumer Law that relate to the effect of contractual limitations on liability may well not operate in the same way when services are provided to a consumer pursuant to a contract to which that consumer is a party as they operate when services are provided to a consumer pursuant to a third party beneficiary contract.

64 In this matter, as owners of the *Miss Angel*, Mr Tregidga and Ms Jenkins were the beneficiaries of the works that Pasma carried out on that vessel under its agreement with Allure. As such, they were “consumers” of those services as defined in s 3 of the ACL and were therefore entitled to claim damages under s 267(4) of the ACL for any failure by Pasma to supply those services in accordance with the guarantee in s 60 of the ACL. This conclusion is reinforced, in my view, by the inclusive definition of the expression “acquire” in s 2 of the ACL and the breadth of the ordinary meaning of the word “accept” used in that definition.

65 Thirdly, I do not accept the third of Pasma’s contentions above that Mr Tregidga and Ms Jenkins have not pleaded the services concerned with sufficient clarity. Those services are defined in the FASC in the following terms:

9. On or before 3 June 2016, [Mr Tregidga] met in person with Mr Henk Pasma and Mr Benjamin Tilton of [Pasma] and entered into an oral contract for [Pasma] to examine, repair and refit the Vessel’s electrical systems to ensure that they complied with AS/NZS 3000 and NSCV.

10. The contractual scope of work included:

a. Inspection and survey of the existing electrical systems to identify defects;

b. Repair of all defects identified;

c. Electrical repairs, inspection and service.

d. Lighting, Power, Battery Systems, bilge alarm system, Switchboards

e. Survey compliance modifications and systems upgrades.

f. Ensuring that the Vessel’s electrical systems complied with AS300 [sic AS3000] and NSCV.

(**Electrical Services**).

(Emphasis in original)

The “Electrical Services” so defined are then identified as the services to which the guarantee in s 60 applied (at [12] of the FASC) (see at [54] above). Hence the services to which the s 60 guarantee applied are clearly pleaded.

66 This contention also requires consideration of the decision of the New South Wales Court of Appeal in *Lets Go Adventures* at [4] upon which Pasma placed particular reliance. As in *Alameddine*, the observations in that paragraph are additional to the agreement of Basten and Gleeson JJA with the reasons and orders of Adamson JA (see at [1]). Those observations are therefore obiter. More importantly, when the comments in [4] are read in the context of the comments at [3]-[6], it becomes apparent that their Honours’ criticism of the “failure to identify the services with precision” relates, in particular, to the claim made in that matter under s 61 of the ACL that the services concerned were not fit for a particular purpose. It is therefore not difficult to see why the subject services needed to be pleaded with precision in that instance. However, I do not consider the same necessity applies to the more general claim under the guarantee in s 60. Pasma’s attempt to rely upon the comments in [4] of *Lets Go Adventures* is therefore misconceived.

67 Finally, and for completeness, because the amount that was actually paid for the works Pasma carried out on the *Miss Angel* was $4,122.38, as evidenced by Pasma’s invoice dated 13 June 2016 (see at [39] above), Mr Tregidga and Ms Jenkins fall squarely within the terms of s 3(a)(i) of the definition of “consumer” above (at [58]). In any event, since there is no challenge to the sufficiency of their pleading on this aspect of this issue, Pasma bore the onus to establish otherwise and it has not adduced any evidence directed to discharging that onus.

68 For these reasons, I consider the answers to the questions posed by Issue 3 above (at [17]) are:

(a) Yes; and

(b) Yes.

# 4. THE SCOPE OF DUTY ISSUES

## Issue 4(a) – To whom was any duty of care in tort owed

69 As can be seen above (at [17]), this issue involves a number of sub-issues. Many of them have been affected by the conclusions reached on Issues 1 to 3 above. First, because of the conclusion reached with respect to Issue 1 above, that Mr Tregidga and Ms Jenkins were the owners of the *Miss Angel* at the time of the fire, the answer to the question posed by Issue 4(a) above (and [23] of the FASC) is: Mr Tregidga and Ms Jenkins.

## Issue 4(b)(ii) – What is the scope of Pasma’s duty of care in contract?

70 Secondly, because of the conclusion reached with respect to Issue 2 above, that Allure was the party that contracted with Pasma, there was no contract between Pasma and Mr Tregidga and Ms Jenkins. Accordingly, the question posed by Issue 4(b)(ii) is, for present purposes, rendered redundant.

## Issue 4(c)(i) – Is the scope of Pasma’s duty of care determined or affected by its contract with Allure?

71 The conclusion reached with respect to Issue 2 above also has an effect on the questions posed in Issue 4(c). That is so, with respect to Pasma’s agreement with Allure (Issue 4(c)(i)) because, while the terms of that agreement are binding as between Allure and Pasma, nothing has been advanced to show that they would bind third parties such as Mr Tregidga and Ms Jenkins. In any event, even if they were binding, there is no evidence that the terms and conditions upon which Pasma seeks to rely with respect to that issue, namely the “PE Standard Terms and Conditions” referred to in Pasma’s invoice dated 13 June 2016(see at [39] above), were ever incorporated as terms of that agreement. They were not mentioned in the discussion between Mr Tregidga and Mr Pasma when that oral agreement was made, they were not provided to Mr Tregidga, or Ms Rak, at any relevant time and nor were they, by some other means, incorporated as terms of it (see the questioning on this matter at [40]-[41] above).

72 This conclusion means that those terms neither determined the duty of care between Pasma and Mr Tregidga and Ms Jenkins, nor directly affected it. However, it is worth adding that the latter may have been a consideration if those terms were incorporated into that agreement because, as Windeyer J remarked in *Voli v Inglewood Shire Council* (1963) 110 CLR 74 at 85 with respect to the liability of an architect for injuries caused to third parties on the collapse of a building, while those terms could not operate:

… to discharge the architect from a duty of care to persons who are strangers to those contracts … Nevertheless his contract with the building owner is not an irrelevant circumstance. It determines what was the task upon which he entered. If, for example, it was to design a stage to bear only some specified weight, he would not be liable for the consequences of someone thereafter negligently permitting a greater weight to be put upon it.

## Issue 4(c)(ii) – Is the scope of Pasma’s duty of care determined or affected by Allure’s contract with BSE?

73 Similar considerations are determinative of the question posed in Issue 4(c)(ii) (and at [19(b)(iv)] of Pasma’s defence). On that issue, Pasma contended that “its liability was excluded” because it was an approved subcontractor under the Slipway Contract between Allure and BSE (see at [38] above). The particular parts of that contract that it sought to rely upon were cll 9 and 14 of the attached Slipway Contract Terms as follows:

**9, BSE’S LIABILITY**

Subject to clause 8:-

BSE is not liable to the Client for any loss or damage (including consequential loss) to the Works or the Vessel while in the care or control of BSE or for the death or personal injury howsoever arising which is suffered or incurred by the Client arising out of:-

Any act or omission (whether negligent or otherwise) by BSE while undertaking the Works; or

Any breach of any contractual or other obligation imposed on BSE in respect of the works undertaken by BSE.

Any implied conditions, warranties and liabilities including liability for consequential loss and/or loss arising from negligence are hereby excluded.

If the Client is a “consumer” as defined under the Trade Practices Act 1974 (and/or any equivalent State legislation) (“the Act”) then:-

The Client’s rights under that Act are not excluded, restricted or modified; and

BSE’s liability for Work is limited to any of the following as determined by BSE:-

The replacement of the Works or the supply of equivalent Works and/or the repair of the Works; or

The payment of the cost of replacing the Works or acquiring equivalent Works or the payment of the cost of having the Works repaired; or

The supply of the services again; or

The payment of the cost of having the services supplied again.

Where components not manufactured by BSE are supplied, BSE:-

Will assign to the Client its rights under the warranty (if any) applicable to such components; and

Shall not be liable for any loss or damage arising from any deficiency or defect in such components except to the extent that the warranties were honoured by the original manufacturer.

…

**14, SUBCONTRACTING**

The Client acknowledges that BSE enters into this Agreement on its own behalf and on behalf of its servants, agents and subcontractors and warrants that no claim or allegation shall be made against any servant, agent or subcontractor of BSE which imposes or attempts to impose upon any of them any liability whatsoever in connection with the works whether or not arising out of negligence or a wilful act or omission on the part of any of them and if any such claim or allegation should nevertheless be made indemnifies BSE against the consequences thereof.

The Client shall save harmless and keep BSE indemnified against all claims or demands whatsoever by whomsoever made in excess of the liability of BSE under these conditions as to any loss, damage or injury howsoever caused whether or not by the negligence or wilful act or omission of BSE his servants, agents or subcontractors. Any sub-contractors must be approved by BSE, prior to entry to the site. A site access fee will apply to all approved contractors to cover induction and liability unless otherwise agreed to in writing by BSE.

(Emphasis in original)

74 Clause 8 of the Slipway Contract Terms, which is referred to at the beginning of cl 9, contains a series of warranties by BSE’s client or customer which are not presently relevant. Clause 1 of the Slipway Contract Terms below contains definitions of the expressions “BSE”, “Customer” and “Works” which appear throughout the two clauses above:

**1, DEFINITIONS**

In these terms and conditions the following words and phrases mean:-

“**BSE**” means BSE Cairns Slipways Pty Ltd and includes any employee of BSE or any subcontractor employed directly or indirectly by BSE.

…

“**Customer**” means and includes any entity whatsoever requesting the works to be carried out for the Customer by BSE and includes any employee, representative, or subcontractor representing the customer.

…

“**Works**” or “Work” means the Anticipated Extent of Work attached plus any agreed variations plus any Work Request List for works to be carried out by BSE including any goods or things associated with it.

While the expression “the Client” is not defined in cl 1, or elsewhere, in the present context it can only be taken to refer to Allure, which is described on the first page of the Slipway Contract as the “Customer” (see at [38] above).

75 It is therefore apparent that cl 9 above excludes BSE’s liability to its client or customer, in this instance, Allure. In this respect, it is important to emphasise that the expression “BSE” is defined in cl 1 to mean and include “or any subcontractor employed directly or indirectly by BSE”. Further, cl 14 above contains a warranty and indemnity by Allure as the client or customer of BSE that “no claim or allegation” will be made against, amongst others, any “subcontractor” of BSE. It follows that to gain the benefit of the exclusions of liability in either of these clauses of the Slipway Contract Terms, Pasma would need to bring itself within the expression “subcontractor” of BSE as that expression is used in both clauses. However, that construction is not open because, as discussed earlier, Pasma contracted directly with Allure on or about 2 or 3 June 2016, approximately five weeks after this Slipway Contract was entered into between BSE and Allure. Hence, from that point on, it became a “subcontractor representing the Customer”, namely Allure, within the terms of the definition of the expression “Customer” in cl 1 above.

76 This conclusion is reinforced by the fact that the expression “Works” appearing in both the clauses above is defined in cl 1 of the Slipway Contract Terms to mean the “works to be carried out by BSE”. That expression could not therefore be construed to refer to the works carried out by Pasma for Allure. It follows that neither of these clauses applies to protect Pasma from liability for claims made by Mr Tregidga and Ms Jenkins. Put differently, as a non-party to Allure’s contract with BSE, Pasma cannot rely upon it to relieve it of the consequences of tortuous acts committed against third parties such as Mr Tregidga and Ms Jenkins (see *Wilson v Darling Island Stevedoring and Lighterage Company Limited* (1956) 95 CLR 43 at 67 per Fullagar J.

77 Accordingly, subject to the qualification below, the answers to the two questions posed by Issue 4(c) are:

(i) the terms of the contract between Pasma and Allure do not determine or affect the scope of Pasma’s duty of care to Mr Tregidga and Ms Jenkins;

(ii) the terms of the contact between Allure and BSE do not determine or affect the scope of Pasma’s duty of care to Mr Tregidga and Ms Jenkins.

78 The qualification mentioned above relates to the second aspect of these two questions: whether the scope of Pasma’s duty of care in tort was affected by the terms of either of those contracts. The reasons set out above explain why those terms neither determined, nor directly affected, that duty. However, in the circumstances of this matter, it should be noted that those terms may have some bearing on the question whether Pasma owed Mr Tregidga and Ms Jenkins a duty to take action to protect *Miss Angel* from injury or harm. That is so because, as will emerge later in these reasons, that question is partly determined by reference to the “salient features” of the relationship between Pasma and Mr Tregidga and Ms Jenkins and those terms may bear on those circumstances.

## Issue 4(b)(iii) – What is the scope of Pasma’s duty of care pursuant to s 60 of the ACL?

79 Before turning to address the question posed by Issue 4(b)(i), it is convenient to deal with the other remaining question posed in Issue 4(b), namely the scope of Pasma’s duty of care pursuant to s 60 of the ACL (Issue 4(b)(iii)). For present purposes, that duty is concurrent and co-extensive with Pasma’s duty of care in tort (see the definition of “duty” in Sch 2 to the *Civil Liability Act 2003* (Qld). That means that the answer to the question posed by Issue 4(b)(i) will apply equally to the question posed by this issue.

## Issue 4(b)(i) – The scope of Pasma’s duty of care in tort – some relevant principles

80 Before considering the pleadings and evidence related to this issue, it is convenient to essay some of the relevant principles. A fitting starting point is the following observations of Mason J in the *Council of the Shire of Wyong v Shirt* (1980) 146 CLR 40 at 47 where his Honour expressed the obligation of a person to respond to a risk of injury to another in the following terms:

In deciding whether there has been a breach of the duty of care the tribunal of fact must first ask itself whether a reasonable man in the defendant’s position would have foreseen that his conduct involved a risk of injury to the plaintiff or to a class of persons including the plaintiff. If the answer be in the affirmative, it is then for the tribunal of fact to determine what a reasonable man would do by way of response to the risk. **The perception of the reasonable man’s response calls for a consideration of the magnitude of the risk and the degree of the probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have.** It is only when these matters are balanced out that the tribunal of fact can confidently assert what is the standard of response to be ascribed to the reasonable man placed in the defendant’s position.

(Emphasis added)

81 However, in the *Council of the Shire of Sutherland v Heyman* (1985) 157 CLR 424 (*Heyman*), Brennan J underscored the insufficiency of foreseeability of injury by itself to found a duty of care in tort in the following terms (at 477-479):

… The test of foreseeability of injury never has been applied as an exhaustive test for determining whether there is a prima facie duty to act to prevent injury caused by the acts of another or by circumstances for which the alleged wrongdoer is not responsible. Lord Diplock reminds us in *Dorset Yacht*:

“The branch of English law which deals with civil wrongs abounds with instances of acts and, more particularly, of omissions which give rise to no legal liability in the doer or omitter for loss or damage sustained by others as a consequence of the act or omission, however reasonably or probably that loss or damage might have been anticipated.”

A man on the beach is not legally bound to plunge into the sea when he can foresee that a swimmer might drown. In *Jaensch v. Coffey* Deane J. observed that “the common law has neither recognised fault in the conduct of the feasting Dives nor embraced the embarrassing moral perception that he who has failed to feed the man dying from hunger has truly killed him”.

If foreseeability of injury were the exhaustive criterion of a duty to act to prevent the occurrence of that injury, legal duty would be coterminous with moral obligation … The judgment of Lord Esher M.R. in *Le Lievre v. Gould* which Lord Atkin cites makes it clear that the general principle expresses a duty to take reasonable care to avoid doing what might cause injury to another, not a duty to act to prevent injury being done to another by that other, by a third person, or by circumstances for which nobody is responsible.

I can be liable only for an injury that I cause to my neighbour. If I do nothing to cause it, I am not liable for the injury he suffers except in those cases where I am under a duty to act to prevent the injury occurring. **Indeed, he is not in law my neighbour unless he is foreseeably “affected” by my conduct. But he can be said to be “affected” by my omission to act to prevent injury being done to him only if I am bound to act and do not do so**. He cannot be said to be affected by my omission to act if I am not under a duty to him to act. Lord Atkin’s “neighbour” test involves us in hopeless circularity if my duty depends on foreseeability of injury being caused to my neighbour by my omission and a person becomes my neighbour only if I am under a duty to act to prevent that injury to him. **Foreseeability of an injury that another is likely to suffer is insufficient to place me under a duty to him to act to prevent that injury. Some broader foundation than mere foreseeability must appear before a common law duty to act arises.** There must also be either the undertaking of some task which leads another to rely on its being performed, or the ownership, occupation or use of land or chattels to found the duty: cf Windeyer J. in *Hargrave v. Goldman*.

(Emphasis added; citations omitted)

82 Pertinent to this matter, his Honour then proceeded (at 479) to identify the circumstances in which a person may be required to act to prevent injury occurring to another as follows:

Thus a duty to act to prevent foreseeable injury to another may arise when a transaction – which may be no more than a single act – has been undertaken by the alleged wrongdoer and that transaction – or act – has created or increased the risk of that injury occurring. Such a case falls literally within Lord Atkin’s principle in *Donoghue v. Stevenson*. **Where a person, whether a public authority or not, and whether acting in exercise of a statutory power or not, does something which creates or increases the risk of injury to another, he brings himself into such a relationship with the other that he is bound to do what is reasonable to prevent the occurrence of that injury unless statute excludes the duty**. An omission to do what is reasonable in such a case is negligent whether or not the person who makes the omission is liable for any damage caused by the antecedent act which created or increased the risk of injury …

(Emphasis added; citation omitted)

See also *Roads and Traffic Authority of New South Wales v Dederer* (2007) 234 CLR 330; [2007] HCA 42 (*Dederer*) at [51] per Gummow J.

83 In this respect, it is also worth noting the judgment of Gleeson CJ in *Woods v Multi-Support Holdings Pty Limited* (2002) 208 CLR 460; [2002] HCA 9 at [41] where his Honour pointed to the relationship between the parties as a factor in determining whether a person may be obligated to provide protection or warning to another:

**Where it is claimed that reasonableness requires one person to provide protection, or warning, to another, the relationship between the parties, and the context in which they entered into that relationship, may be significant.** The relationship of control that exists between an employer and an employee, or of wardship that exists between a school authority and a pupil, may have practical consequences, as to what it is reasonable to expect by way of protection or warning, different from those which flow from the relationship between the proprietor of a sporting facility and an adult who voluntarily uses the facility for recreational purposes. I say “may”, because it is ultimately a question of factual judgment, to be made in the light of all the circumstances of a particular case.

(Emphasis added)

84 Gummow J made a similar point in *Dederer* in the context of a broader examination of the relevant principles, including the observations of Brennan J in *Heyman* set out above, and said (at [43]):

First, duties of care are not owed in the abstract. Rather, they are obligations of a particular scope, and that scope may be more or less expansive depending on the relationship in question. Secondly, whatever their scope, all duties of care are to be discharged by the exercise of reasonable care. They do not impose a more stringent or onerous burden.

As to the former, his Honour then went on to observe (at [44]):

Regarding the first point, **a duty of care involves a particular and defined legal obligation arising out of a relationship between an ascertained defendant (or class of defendants) and an ascertained plaintiff (or class of plaintiffs)**.

(Emphasis added)

85 Gummow J then quoted the following observations of the Court (Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ) in *Sullivan v Moody* (2001) 207 CLR 562; [2001] HCA 59 at [50]:

**Different classes of case give rise to different problems in determining the existence and nature or scope, of a duty of care**. Sometimes the problems may be bound up with the harm suffered by the plaintiff, as, for example, where its direct cause is the criminal conduct of some third party. Sometimes they may arise because the defendant is the repository of a statutory power or discretion. Sometimes they may reflect the difficulty of confining the class of persons to whom a duty may be owed within reasonable limits. Sometimes they may concern the need to preserve the coherence of other legal principles, or of a statutory scheme which governs certain conduct or relationships. The relevant problem will then become the focus of attention in a judicial evaluation of the factors which tend for or against a conclusion, to be arrived at as a matter of principle.

(Emphasis added)

86 In *Kuhl v Zurich Financial Services Australia Ltd* (2011) 243 CLR 361; [2011] HCA 11, French CJ and Gummow J made the same point where they said of the approach adopted by the trial judge in that matter (at [20]) that:

Such an approach runs the risk of predetermining the outcome before considering the first important step; whether WOMA owed Mr Kuhl a duty of care to begin with and, if so, what was the scope and content of that duty. Those questions are determined by considering reasonable foreseeability and the “salient features” of the relationship between the plaintiff and defendant. **Even if it can be said that there was some reasonable course of conduct the defendant could have engaged in that would have avoided the injury suffered by the plaintiff, the defendant will not be liable unless there can first be established the existence of a duty of care with the relevant scope and content**.

(Emphasis added; footnote omitted)

87 The expression “salient features” was used by Gummow J in two earlier judgments that are worth noting. First, in *Perre v Apand Pty Ltd* (1999) 198 CLR 180; [1999] HCA 36 (*Perre*) at [198], where his Honour said:

The question in the present case is whether the salient features of the matter gave rise to a duty of care owed by Apand. **In determining whether the relationship is so close that the duty of care arises, attention is to be paid to the particular connections between the parties**. Hence what McHugh J has called the “inherent indeterminacy” of the law of negligence in relation to the recovery of damages for purely economic loss. **There is no simple formula which can mask the necessity for examination of the particular facts.** That this is so is not a problem to be solved; rather, as Priestley JA put it in *Avenhouse v Hornsby Shire Council*, “it is a situation to be recognised”.

(Citations omitted)

88 Next, in *Graham Barclay Oysters Pty Limited v Ryan* (2002) 211 CLR 540; [2002] HCA 54 (*Graham Barclay*), in a joint judgment with Hayne J, albeit in the context of the liability of a statutory authority, their Honours said (at [149]):

An evaluation of whether a relationship between a statutory authority and a class of persons imports a common law duty of care is necessarily a multi-faceted inquiry. Each of the salient features of the relationship must be considered. The focus of analysis is the relevant legislation and the positions occupied by the parties on the facts as found at trial. It ordinarily will be necessary to consider the degree and nature of control exercised by the authority over the risk of harm that eventuated; the degree of vulnerability of those who depend on the proper exercise by the authority of its powers; and the consistency or otherwise of the asserted duty of care with the terms, scope and purpose of the relevant statute.

(Footnotes omitted)

## Issue 4(b)(i) – The scope of Pasma’s duty of care in tort – the required inquiries

89 To sum up on these principles as they apply to the scope of Pasma’s duty of care in tort, Pasma owed such a duty to Mr Tregidga and Ms Jenkins, as owners of the *Miss Angel*, to exercise reasonable care and skill in carrying out the works on the vessel to avoid causing injury or harm to the vessel, the risk of which was reasonably foreseeable. However, the foreseeability of that risk of injury or harm is not a sufficient justification, by itself, to extend the scope of that duty of care so as to require Pasma to take action to prevent injury or harm being caused to the vessel. Whether there was such an extended scope to its duty of care requires a multi-faceted inquiry into all of the relevant surrounding circumstances, or “salient features”, of the relationship between Pasma and Mr Tregidga and Ms Jenkins. It is therefore necessary to turn next to those two inquiries: was there a reasonably foreseeable risk of the *Miss Angel* sustaining injury or harm while Pasma was carrying out the works on the vessel and, were the salient features of the relationship between Pasma and Mr Tregidga and Ms Jenkins such that the scope of Pasma’s duty of care in tort extended to require it to take action to prevent the *Miss Angel* from sustaining injury or harm?

90 Those two inquiries will therefore be conducted in the following sections of these reasons. With respect to the former, it will be necessary, among other things, to review the critical elements of the reasonably foreseeable risk of injury or harm to the *Miss Angel*. That is to say, its existence, its magnitude, its probability of occurrence and the expense, difficulty and inconvenience of taking alleviating action. If that inquiry leads to an affirmative answer to the first question posed above then, at least with respect to, what I will refer to as, Pasma’s “standard” duty of care in tort, it will then be necessary to turn to the interrelated questions of breach and causation posed by Issues 4(d) and 4(e) and by Issues 5(a) and 5(b), respectively. Those issues will be considered in the next section of these reasons (Section 5). However, in the meantime, with respect to, what I will refer to as, Pasma’s “extended” duty of care in tort, it will be necessary to conduct the second inquiry above to determine whether the relationship between Pasma and Mr Tregidga and Ms Jenkins required it to take action to prevent the *Miss Angel* sustaining injury or harm. If that inquiry returns an affirmative answer to the second question posed above, it will also be necessary to turn to the issue of breach and causation with respect to that answer in the next section of these reasons.

## Issue 4(b)(i) – The scope of Pasma’s duty of care in tort – the issues as pleaded

91 To set the framework for those inquiries, it is convenient next to describe how those issues were elaborated in the pleadings. In Mr Tregidga and Ms Jenkins’ FASC, the issues concerning the scope of Pasma’s duty of care, the reasonable foreseeability of risk of injury or harm to the *Miss Angel*, the breach of Pasma’s duty of care and the cause of the fire on the *Miss Angel* were pleaded in a series of interconnected paragraphs. Since those issues all fall to be considered in this and the succeeding sections of these reasons, it is convenient to set out all those paragraphs of the FASC and Pasma’s responses to them at this point. It should, however, be noted that some of these pleadings either proceed on assumptions that, because of the conclusions reached earlier in these reasons, are no longer valid, or raise facts and matters that are relevant to other issues, in particular Issue 6 concerning proportionate liability.

92 First, the broad factual circumstances surrounding the fire were pleaded at [13]-[15] and [17] of the FASC as follows:

13. [Pasma] commenced the Electrical Services on or about 3 June 2016.

14. Between 3 and 8 June 2016 [Pasma’s] employee and licenced electrician Mr Ben Tilton (**Mr Tilton**) undertook the various electrical work on the Vessel including comprehensive survey and testing.

15. At approximately 1615 hours on 8 June 2016 Mr Tilton left the Vessel.

…

17. On the evening of 8 June 2016 a fire caused extensive damage to the Vessel.

(Emphasis in original)

93 Secondly, the condition of the *Miss Angel*’s electrical system and the factual background thereto, including the scope of the work to be performed under the agreement between Pasma and Allure, were pleaded at [4]-[10] of the FASC. Noting that [9] is already set out at [27] above and [10] is already set out at [65] above, [4]-[8] are as follows:

4. In December 2015, [Mr Tregidga and Ms Jenkins] jointly purchased from Allure Cruises Pty Ltd a Turkish-built sailing motor yacht “Miss Angel” constructed primarily of timber and measuring approximately 23 meters in length (**Vessel**).

4A. At all material times thereafter, including up to and as at 8 June 2016, [Mr Tregidga and Ms Jenkins] remained the owners of the Vessel.

5. The Vessel was purchased in Turkey for commercial tourism purposes around the Queensland coast.

6. The Vessel was motored from Turkey to Australia.

7. The Vessel arrived from Turkey at the BSE Cairns Slipway on or about 26 April 2016 and was slipped on or about 5 May 2016.

8. The Vessel was to undergo repair and survey by various contractors for the purpose of compliance with National Standard for Commercial Vessels (NSCV) to allow it to be operated as a commercial vessel in Queensland.

(Emphasis and errors in original)

94 Thirdly, Mr Tilton’s state of knowledge with respect to the condition of the vessel’s electrical system was pleaded at [16] of the FASC as follows:

At the time of leaving the Vessel on 8 June 2016:

a. Mr Tilton had spent a total of 28 hours surveying and working on the Vessel’s electrical systems.

**Particulars**

Respondent Tax Invoice No. 711455 dated 13 June 2016.

b. the Vessel did not comply with relevant Australian commercial survey standards, which include in relation to electricity the AS/NZS3000:2007 [AS3000] and the National Standard for Commercial Vessels (NSCV), and required substantial works before it would do so.

c. Mr Tilton left the Vessel connected to 240 volt shore power;

d. Mr Tilton did not isolate the 240 volt electrical system onboard the Vessel;

e. Mr Tilton did not isolate the 240 volt switchboard onboard the Vessel;

f. Mr Tilton did not close and seal the fire proof 240V switchboard housing;

g. Mr Tilton had, that afternoon fitted and connected up at least two batteries to the extra low voltage system (**the Engine Batteries**);

h. Mr Tilton had not finished his work on the engine room battery systems of which the Engine Batteries formed part;

i. Mr Tilton had not tested the electrical systems to which the Engine Batteries were connected;

j. The Engine Batteries were situated directly below the extra low voltage and low voltage switchboards

k. Mr Tilton knew that:

i. Shore power was being supplied to the Vessel;

ii. the condition of the electrical system on the Vessel was in his opinion poor and ranked as one of the worse he had worked on;

iii. Wiring did not follow acceptable colour coding;

iv. Cables were not terminated at junction boxes as they should have been;

v. The engine room lighting was not earthed correctly;

vi. The main earthing cable was inadequate by reason of it being too small;

vii. The main switchboard was not earthed by at least 6mm cable;

viii. The GPO circuits did not have any mechanical protection or adequate insulation;

ix. the electrical system on the Vessel did not comply with AS3000;

x. the electrical system on the Vessel did not comply with NSCV;

xi. the Electrical Services remained incomplete and there was a large amount of work to do;

xii. The Vessel did not have a functioning emergency fire system;

xiii. battery power was being supplied to the Vessel:

xiv. he had dropped one of the Engine Batteries earlier in the day;

xv. he had fitted and connected the Engine Batteries earlier in the day;

xvi. he had not finished his work on the engine room batteries;

xvii. he had not tested the Engine Batteries and the systems to which they were connected to ensure that they were electrically safe.

**Particulars**

Transcript of Conversation between Mr Greg Kelly and Mr Benjamin Tilton conducted at the Cairns Slipway on Thursday 16 June 2016.

(Emphasis in original)

95 Fourthly, Pasma’s alleged breach of its duty of care is pleaded at [19], [20] and [24] as follows:

19. When supplying the Electrical Services Mr Tilton did not exercise reasonable skill, care and diligence or due care and skill in the following respects:

a. failed to take reasonable steps to isolate shore power supplied to the Vessel;

b. failed to disconnect the shore power prior to leaving the Vessel; and/or

c. failed to ensure that the all faults that he had identified in the Vessel’s electrical system were remedied before leaving the Vessel connected to shore power; and/or

d. failed to ensure that the Vessel’s electrical system complied with AS3000 and NSCV before leaving the Vessel connected to shore power; and/or

e. failed to ensure that the fire proof 240V switchboard housing was closed and sealed before leaving the Vessel connected to shore power; and/or

f. failed to take reasonable steps to isolate battery power supplied to the Vessel; and/or

g. failed to disconnect battery power supplied to the Vessel; and/or

h. failed to ensure that all the faults that he had identified in the Vessel's electrical system were remedied before leaving the Vessel connected to battery power; and/or

i. connected and left the Engine Batteries connected to the electrical system without:

i. first completing and testing the works on the engine room battery banks and systems;

ii. first testing the Engine Batteries and the systems to which they were connected to ensure that they were electrically safe

j. *Res Ipsa Loquitor*.

**Particulars**

Johns Marine Surveying Expert Witness Report dated 10 November 2016

20. [Pasma] is vicariously liable for the actions of its employee Mr Tilton.

…

24. On 8 June 2016, [Pasma] breached that duty of care when through its employee Mr Benjamin Tilton it failed to exercise reasonable skill, care and diligence in its conduct of the Electrical Services in the circumstances outlined in paragraphs 13 to 21 above.

(Errors, emphasis and italics in original)

96 Fifthly, the issue of causation is pleaded at [18], [22] and [25] of the FASC as follows:

18. The fire started in the electrical system in the switchboard area of the engine room.

**Particulars**

Forensic Examination Origin and Cause Report of GKA Investigations Group dated 16 August 2016

…

22. The fire would not have started if, prior to leaving the Vessel, Mr Tilton had:

a. not left the Vessel connected to 240 volt shore power;

b. disconnected the 240 volt shore power;

c. isolated the 240 volt electrical system onboard the Vessel;

d. isolated the 240 volt switchboard onboard the Vessel;

e. closed and sealed the fire proof switchboard housing;

f. not left the Vessel connected to battery power;

g. disconnected battery power;

h. isolated each of the batteries.

…

25. But for [Pasma’s] breach of its duty of care the fire would not have started for the reasons set out at paragraph 22.

97 Noting that there is a degree of overlapping between them, the corresponding parts of Pasma’s defence containing its response on these various matters or issues are as follows. First, with respect to the broad factual circumstances surrounding the fire (at [92] above):

(a) apart from admitting that it “commenced work on or about 3 June 2016 such work being amongst other work being conducted in the said workplaces at or about the same time”, it did not admit [13];

(b) with respect to [14], it pleaded that it:

(a) admits that Mr Tilton undertook various electrical work on the Vessel between 3 and 8 June 2016, but otherwise does not admit paragraph 14;

(b) says further that Mr Tilton undertook electrical work on the Vessel between 27 May 2016 and 2 June 2016 (inclusive), including visual and operational tests of general purpose outlets (**GPOs**), engine room lighting, the bilge system, aft lighting, power circuits;

(c) says further that the only work undertaken by Mr Tilton utilising the 240 volt shore power system was visual checks of the electrical systems and functional tests of the engine room lighting and GPOs on the Vessel;

(d) says further that all other work carried out by Mr Tilton on the Vessel was limited to the extra low voltage direct current system and batteries; and

(e) says further that at all times when Mr Tilton was undertaking work on the Vessel, there were other persons on board, including one or both of [Mr Tregidga and Ms Jenkins].

(Emphasis in original)

(c) it admitted [15] and added: “that when Mr Tilton left the Vessel for the day, the captain was still on board the Vessel”; and

(d) it admitted [17] and added “that there was a fire aboard the Vessel from an unknown cause”.

98 Secondly, with respect to the condition of the vessel’s electrical system and the factual background thereto, including the scope of the work to be performed under the agreement between Pasma and Allure (at [94]):

(a) it did not admit [5], but it admitted [7];

(b) with respect to [4], it pleaded that it:

(a) admits paragraph 4 of the Amended Statement of Claim;.

(b) says the Vessel (as defined) had been in apparent proper operation for a period of at least 12 years including a lengthy open sea voyage from Turkey to Australia.

(c) with respect to [6], it pleaded that it:

(a) admits paragraph 6 of the Amended Statement of Claim; and

(b) says “BSE” as referred to there is a reference to a company offering “dry docking” facilities in Cairns Queensland;

(c) says the “dry docking” facility was a workplace for the purposes of the Workplace Health & Safety Act (Q) 2011 (“the **Act**”);

(d) says the Vessel itself was a workplace for the purposes of the Act;

(e) says at all material times each of the workplaces was under the control and authority of “BSE” and Ross Gill Tregidga as Project Manager and the master of the Vessel and the employees or subordinates and not [Pasma].

(Emphasis in original)

(d) with respect to [8], it pleaded that it:

(a) Says that the Vessel arrived in Australia with significant electrical faults;

(b) Says that the repair work that [Pasma] was engaged to undertake included repair of those faults in order to ensure compliance with, *inter alia*, the NSCV in particular the condition of the Vessel as the Allure maintained it was as follows:

*“No CE certification, CE certification indicates conformity with health, safety, and environmental protection standards for products sold within the European Economic Area (EEA). The* ***CE marking*** *is also found on products sold outside the EEA that are manufactured in, or designed to be sold in, the EEA.*

*Not built to any recognised standard*

*That no RCD protection devices were observed on the vessel. An* ***RCD****, or residual current device, is a life-saving device which is designed to prevent a fatal electric shock. It also provides protection against electrical fires.*

*The general condition of wiring on the Vessel was is serviceable but not to the standard of a yacht with CE certification.*

(c) Otherwise admits the allegations in paragraph 8.

(Italics, emphasis and errors in original)

(e) its response to [9] is already set out at [28] above; and

(f) in response to [10], it pleaded that it:

(a) does not admit paragraph 10;

(b) says that no specific scope of works was given by [Mr Tregidga and Ms Jenkins] to [Pasma] and work was to be conducted on an *ad hoc* week-by-week basis;

(c) says that the general scope of works included electrical repairs, inspection and service of the Vessel’s lighting, power, battery systems, bilge alarm system and switchboard; and

(d) says that the work to be completed by [Pasma] did not include connecting the Vessel to shore power or managing or inspecting the Vessel’s connection to shore power.

(Italics in original)

99 Thirdly, with respect to Mr Tilton’s state of knowledge with respect to the condition of the vessel’s electrical system (at [94]):

(a) it admitted [16(a)] and added:

(ii) … that as at 8 June 2016, the work undertaken on the Vessel by Mr Tilton was not complete; and

(iii) … further that a proportion of the 28 hours spent included work carried out whilst off the Vessel;

(b) it admitted [16(b)] and added that it:

(ii) says further that the matters pleaded in sub-paragraph (b) was the state of the Vessel when it arrived in Australia; and

(iii) in the premises pleaded in sub-paragraph (ii) above, that Australian commercial survey standards in relation to electricity did not apply to the Vessel as it was not in Australian class or flag at all times prior to 8 June 2016.

(iv) notwithstanding the foregoing neither BSE, the plaintiffs, Allure or any employee or subordinate tested the electrical systems on board the vessel to determine the safety of the electrical system.

(c) its response to [16(c)] was that it:

(i) admits that the Vessel was connected to 240 volt shore power;

(ii) says further [Pasma] and/or Mr Tilton did not connect and/or energise the Vessel to 240 volt shore power and were not responsible for that connection;

(iii) says further the 240 volt shore power was on and connected to the Vessel prior to [Pasma] [sic Mr Tilton] commencing work on the Vessel and remained on after he left the vessel;

(iv) says further that on or about 5 May 2016, BSE Cairns Slipway Pty Ltd ACN 153 468 627 (BSE) caused the Vessel to be connected to 240 volt shore power;

(v) says further that the connection and disconnection of the 240 volt shore power was within the scope of works being conducted by BSE or actions including the master of the Vessel;

(vi) Says further [Mr Tregidga and Ms Jenkins] had engaged and paid BSE for the service of connecting and disconnecting the 240 volt shore power for the period of 28 April 2016 to 8 June 2016;

**Particulars**

 (B) BSE Slipway/Repair Booking Form dated 28 April 2016;

(C) BSE Scope for Work and Quotation;

(D) BSE Tax Invoices to Allure Cruises Pty Ltd covering the period of 28 April 2016 to 8 June 2016.

(vii) says further in undertaking the electrical installation and/or electrical work pleaded in sub-paragraph (iv) above, BSE was required to ensure that the connection was electrically safe and complied with the requirements of the wiring rules and any other standard applicable and tested and examined the 240 volt shore power connection to ensure it was electrically safe;

**Particulars**

(A) *Electrical Safety Act 2002* (Qld) ss 10, 15, 30, 36.

(B) *Electrical Safety Regulations 2013* (Qld) regs 218, 222.

(viii) says further in connecting the Vessel equipped with 220 volt power to 240 volt shore power, BSE caused the plug on the shore power lead to be changed from a European plug to an Australian plug;

**Particulars**

(A) Forensic Examination Origin and Cause Report of GKA Investigations Group dated 16 August 2016, [5.8].

(ix) says further in undertaking the electrical work pleaded in sub-paragraph (vi) above, BSE was required to ensure that electrical work was electrically safe;

**Particulars**

(A) *Electrical Safety Act 2002* (Qld) ss 10, 15, 18, 30, 36, 37.

(B) *Electrical Safety Regulations 2013* (Qld) divs 1, 3, 4, pt 3.

(C) *Electrical Safety Code of Practice*.

(x) says further the ongoing use of and connection to 240 volt shore power was the responsibility of, and managed by, BSE and/or [Mr Tregidga and Ms Jenkins] and/or the Master of the Vessel [Ms Rak];

**Particulars**

(A) *Electrical Safety Act 2002* (Qld) ss 10, 30, 36, 38.

(B) *Electrical Safety Regulations 2013* (Qld) divs 1, 3, 4, pt 3.

(C) BSE invoices to Allure Cruises Pty Limited dated 12 May 2016, 19 May 2016, 2 June 2016.

(xi) says further BSE and/or [Mr Tregidga and Ms Jenkins]gave no advice to Mr Tilton of any procedure for the 240 volt shore power connection when leaving the Vessel each day, and in particular, that no instruction or advice regarding the 240 volt shore power connection was given at the BSE induction on 27 May 2016;

(xii) says further the 240 volt shore power was used on the Vessel to power the lighting, refrigerator and freezers on the Vessel and to have dismantled it without authority would have been itself unsafe and reasonably foreseeable as causative of loss;

(xiii) says further that the work carried out by Mr Tilton on 8 June 2016 did not involve the 240 volt shore power; and

(d) it admitted [16(e)], [16(f)], [16(h)] and [16(j)], but it did not admit [16(d)];

(e) it admitted [16(g)] in the following terms:

(i) [it] admits that Mr Tilton fitted and connected the engine batteries to the extra low voltage system not the 240 volt system connected to show [sic shore] power;

(ii) says further that the Vessel did not require the use of the engine in the time during which it was slipped as the Vessel was connected to shore power; and

(iii) in the circumstances pleaded above, Mr Tilton considered the connection of the engine batteries to be “safe” and same were “safe” that is it was not reasonably foreseeable that the connection would result in damage to the Vessel by fire by reason of that – if that is what is alleged (which is denied);

(Errors in original)

(f) it admitted [16(i)] in the following terms:

(i) [it] admits that Mr Tilton had not tested the electrical systems to which the engine batteries were connected as:

(A) there was no change to either the batteries or the electrical system at that stage;

(B) the work being undertaken required Mr Tilton to disconnect and reconnecting the same batteries to the same electrical system;

(C) the batteries were required to be re-housed only at that stage as they were sitting on a small wooden shelf which could not contain the fluid in the event of a leak;

(D) At the time of the work being undertaken by Mr Tilton, a person engaged by BSE was on-board and utilising the battery charger, which was isolated, for the purpose of charging batteries on board the Vessel;

(ii) says further that in circumstances where the Vessel was slipped and did not require the use of the engine, there was no need to test the electrical systems at that point in time …

(g) In response to [16(k)], it admitted 11 of the 17 items listed therein (i, ii, v, vii, viii, ix, x, xiv, xv, xvi and xvii), it did not admit five of those items (iii, vi, xi, xii and xiii), and it denied one. The item that it denied was iv: “Cables were not terminated at junction boxes as they should have been”. It also added the following two statements at the conclusion of [16(k)] of its defence:

(l) says further that none of the matters pleaded in sub-paragraph (k) above were known or ought reasonably to have been known by Mr Tilton to pose an electrical risk; and

(m) says further that Mr Tilton was not aware of and had not observed any faults with the Vessel’s electrical system that were in need of emergency, time sensitive or critical repairs.

100 Fourthly, with respect to the allegations that it breached its duty of care (at [95] above):

(a) it denied [19] and added that it:

…

(d) says further, with specific regard to paragraphs f. to i.:

(i) Mr Tilton was using the extra low voltage system on the date of the fire; and

(ii) The particulars relied on by [Mr Tregidga and Ms Jenkins] conclude that the fire likely started as a result of an electrical fault in the low voltage electrical system, not the extra low voltage system;

(e) says further and in the alternative by reason of the matters pleaded in paragraphs 15 and 16(c) above, [Pasma] and Mr Tilton were entitled to assume that the shore power connection was electrically safe and did not pose an electrical risk and that BSE and/or [Mr Tregidga and Ms Jenkins] and/or Allure or the employees or subordinates had complied with their statutory and other duties.

(b) it did not admit [20];

(c) it denied the allegations in [24].

101 Fifthly, with respect to the issue of causation (at [96] above):

(a) it responded to [18] in the following terms:

(a) [it] admits the fire started in the switchboard area of the engine room;

(b) otherwise denies paragraph 18; and

(c) says further it is not possible to determine the exact location or source of the fire.

**Particulars**

(i) Forensic Examination Origin and Cause Report of GKA Investigations Group dated 16 August 2016, [9.1].

(ii) Queensland Fire and Emergency Services Fire Investigation Report dated 10 February 2017, p. 6.

(b) it responded to [22] in the following terms:

(a) [it] denies the conclusion pleaded here and refers to and repeats paragraphs 16, 18 and 19 above; and

(b) says further that on the day of the fire Mr Tilton left the BSA [sic BSE] Slipway with the Captain of the Vessel who had waited for Mr Tilton to finish work on the Vessel before she then locked the Vessel, with her having to return as resident on the Vessel;

(c) otherwise denies paragraph 22;

(c) it denied the allegation in [25].

102 Some of Pasma’s responses above were, in turn, responded to in Mr Tregidga and Ms Jenkins’ reply. For present purposes, the following paragraphs of that document are pertinent. First, with respect to the broad factual circumstances surrounding the fire (at [92] and [97] above):

(a) with respect to [15(b)], they pleaded (at [8]) that they:

(a) deny that the Captain remained on board the Vessel when Mr Tilton left for the day; and

(b) say that the Captain and Mr Tilton left the Vessel at the same time.

(b) With respect to [17], they pleaded (at [14A]):

In reply to the allegations in paragraph 17, [Mr Tregidga and Ms Jenkins] say that the fire aboard the vessel was an electrical fire and deny that the cause is “unknown”.

103 Secondly, with respect to the condition of the *Miss Angel*’s electrical system and the factual background thereto, including the scope of the works performed under the agreement between Pasma and Allure (at [93] and [98] above):

(a) they admitted [6(b)], [6(c)] and [6(d)] and [10(b)] and [10(c)], they did not admit [4(b)] and they denied [6(e)];

(b) with respect to [8(b)], they pleaded (at [2A]) that they:

(a) admit that [Pasma] was engaged to repair significant electrical faults on the Vessel and ensure compliance with inter alia the NSCV;

(b) admit that the Vessel was not built in Turkey to any CE certification standard or Class Rules;

(c) admit that Mr Joe Rowles recorded in his report of 27 October 2015 that “*The general condition of the wiring, its routing, terminals and chafe protection from where observed is serviceable but not to the standard of a yacht with CE certification*.”; and

(d) otherwise denies the paragraph.

(Italics in original)

(c) with respect to [9(b)], they pleaded (at [3]) that they:

(a) admit that an oral contract was entered into with Henk Pasma of [Pasma];

(b) say that the oral contract was entered into by Ross Tregidga … on behalf of himself and [Ms Jenkins] in their personal capacities and not by [Mr Tregidga] on behalf of Allure; and

(c) say that the oral contract was for [Pasma] to examine, repair and refit the Vessel’s electrical systems to ensure that they complied with AS/NZS 3000 and NSCV.

(d) and finally, with respect to [10(d)], they pleaded (at [5]) that they:

(a) say that in conducting the agreed works [Pasma] was to have regard to the supply of power to the Vessel and its various electrical systems and parts including whether or not the Vessel should remain connected to shore power; and

(b) otherwise do not admit the allegations.

104 Thirdly, with respect to the Mr Tilton’s state of knowledge with respect to the condition of the vessel’s electrical system (at [94] and [99]):

(a) they admitted [16(k)(iii)(B)] (at [13(a)] and [16(k)(iv)(B)] (at [14]) and did not admit [16(i)(ii)] (at [12B]) and [16(k)(iii)(C)] at [13(b)];

(b) with respect to [16(b)(iii)], they pleaded (at [9]):

(a) that, as [Pasma] has admitted at paragraphs 9(b) of the Defence, it was a term of the contract that [Pasma] was to bring the Vessel’s electrical systems up to Australian domestic commercial survey standards; and

(b) such standards applied to the Vessel prior to 8 June 2016.

(c) with respect to [16(b)(iv)], they pleaded (at [9A]) that they:

(a) admit that [Mr Tregidga and Ms Jenkins] and Allure did not test the electrical systems on board the Vessel to determine safety of the electrical system;

(b) say that [Mr Tregidga and Ms Jenkins] contracted with [Pasma] to undertake all electrical work on the Vessel; and

(c) otherwise does not admit the paragraph.

(d) with respect to [16(c)(v)] and [16(c)(vi)], they pleaded (at [10]) that they:

(a) deny that any regular or routine connection and disconnection of shore power was within the scope of works requested of or being conducted by BSE or the Master of the Vessel [Ms Rak]; and

(b) admit that BSE was required to supply shore power which included the initial connection of shore power to the Vessel when she arrived at her berth on 26 April 2016, the disconnection and reconnection of shore power on or about 6 May 2016 when the Vessel was slipped and the disconnection and reconnection of shore power when the shore power was tripped as noted by Mr Tilton during the period that [Pasma] was working on the Vessel.

(e) with respect to [16(c)(vii)], they pleaded (at [10A]):

[Mr Tregidga and Ms Jenkins] deny the allegations … and say that BSE were not required to ensure that the Vessel was electrically safe in circumstances were [sic where]:

(a) BSE had not contracted to perform any electrical work on the Vessel;

(b) BSE had not performed any electrical work on the Vessel;

(c) BSE is not a licenced electrical contractor;

(c) [sic (d)] BSE was aware that:

(i) [Pasma] was a licenced electrical contractor;

(ii) [Pasma] had been contracted by [Mr Tregidga and Ms Jenkins] to perform all electrical work on the Vessel; and

(iii) [Pasma’s] employee had been on the Vessel undertaking electrical work for at least five days.

(f) with respect to [16(c)(x)], they pleaded (at [10B]):

… [Mr Tregidga and Ms Jenkins] deny that the ongoing use of and connection to 240 volt shore power was the responsibility of BSE and/or [Mr Tregidga and Ms Jenkins] and/or the Master of the vessel [Ms Rak].

(g) With respect to [16(c)(xi)], they pleaded at [11] that they:

(a) admit that [Mr Tregidga and Ms Jenkins] gave no advice to Mr Tilton of any procedure for the 240 volt shore power connection when leaving the Vessel each day; and

(b) otherwise do not admit the allegations.

(h) With respect to [16(c)(xii)], they pleaded (at 12]) that they:

(a) admit that the 240 volt shore power was used to power the lighting, refrigerator and freezers on the vessel;

(aa) deny that isolating or dismantling power to the lighting, refrigerator and freezers on the Vessel would have been unsafe and potentially causative of loss; and

(b) say that if, as a result of the state of the electrical system on which [Pasma] was working, or as a result of the work which [Pasma] was undertaking or had yet to complete, it was unsafe for the shore power to remain on, [Pasma] had a duty to advise that it should be turned off, isolated or disconnected and ensure that it was turned off, isolated or disconnected.

(i) and finally, with respect to [16(g)(iii)], they pleaded (at [12A]) that they:

(a) do not admit Mr Tilton’s alleged state of mind; and

(b) say that [Pasma] could not have assessed the engine batteries to be “*safe*” without performing a test of connections and the Vessel’s electrical system to which the batteries were connected.

(Italics in original)

105 Fourthly, with respect to Pasma’s alleged breach of its duty of care (at [95] and [100] above):

(a) with respect to [19(b)], they pleaded (at [14AA]) that they:

(a) deny sub-paragraph (i) for the reasons pleaded in paragraph 3 above and paragraph 9 of the [FASC];

(b) deny sub-paragraph (ii), because [Pasma] did not owe a duty of care to Allure Cruises Pty Ltd as it was neither the party that contracted with [Pasma] nor the owner of the Vessel;

(c) deny sub-paragraph (iii), because:

(i) [Pasma] did not owe a duty of care to Allure Cruises Pty Ltd, as it was neither the party that contracted with [Pasma] nor the owner of the Vessel; and

(ii) in the alternative to (i) above, if Allure Cruises Pty Ltd was the party who entered into the contract with [Pasma] as pleaded in paragraph 9 of the Fourth Further Amended Defence, [Pasma]had a duty of care to [Mr Tregidga and Ms Jenkins], as the owners of the Vessel, to exercise reasonable skill, care and diligence in its conduct of the Electrical Services and care for the Vessel, so as not to cause reasonably foreseeable property damage to the Vessel, and such duty was not limited by its contract with Allure Cruises Pty Ltd;

(d) deny sub-paragraph (iv), because:

(i) [Pasma] was not a sub-contractor within the meaning of the terms and conditions pleaded therein; and

(ii) [Pasma’s] negligence, pleaded in paragraph 19 of the [FASC] did not involve any act or omission by it while undertaking the Work, as defined in the terms and conditions pleaded by [Pasma]; and

(iii) [Mr Tregidga and Ms Jenkins] are not “the Client” within the meaning of the terms of the conditions as pleaded therein and the terms and conditions only purport to exclude liability for any loss or damage to the Client; and

says further that the facts pleaded are not capable of excluding [Pasma’s] liability in contract or tort to [Mr Tregidga and Ms Jenkins] because:

(iv) [Mr Tregidga and Ms Jenkins] are not bound by the terms of a contract entered into between Allure Cruises Pty Ltd and BSE; and

(v) [Pasma] is not entitled to enforce the terms and conditions in a contract made between Allure Cruises Pty Ltd and BSE as against [Mr Tregidga and Ms Jenkins] or at all; and

(e) otherwise deny sub-paragraph (b) for the reasons pleaded in sub-paragraphs (a) to (d) above and paragraphs 11, 12, and 23 of the [FASC].

(b) with respect to [19(d)(i)] and [19(d)(ii)], they pleaded (at [15]) that they:

(a) say that the fire was an electrical fire started in the engine room at the location where [Pasma] was carrying out electrical repair works on the day of the fire; and

(b) otherwise do not admit the allegations.

(c) with respect to [19(e)], they pleaded (at [15A]) that:

(a) [Pasma] had been contracted by [Mr Tregidga and Ms Jenkins] to carry out all electrical works on the Vessel;

(b) [Pasma] knew that the Vessel was not electrically safe:

(Errors in original)

106 Fifthly, with respect to the issue of causation (at [96] and [101] above), with respect to [22(b)], they pleaded (at [16]) that they:

(a) admit Mr Tilton and [Ms Rak] left the Vessel at the same time on the day of the fire;

(b) deny that [Ms Rak] Captain returned to the Vessel as a resident on the day of the fire; and

(c) deny that [Ms Rak] was a resident aboard the Vessel during the period of the repair works.

## Issue 4(b)(i) – The scope of Pasma’s duty in tort – the witnesses

### Lay evidence

107 Next, before setting out the evidence relevant to the two inquiries mentioned above, it is convenient to briefly describe the witnesses who gave that evidence at the trial. Unsurprisingly, the main lay witness on this issue was Mr Tilton himself. He made two outlines of evidence. In the first outline, he described, among other things, the circumstances in which he became involved in the works on the *Miss Angel*; his observations about the electrical system on the vessel; and the works he undertook prior to and on the day of the fire. In his second outline, Mr Tilton repeated some of the evidence covered by his first outline and added some additional information. He was also cross-examined at length by Mr Tregidga and Ms Jenkins’ counsel. In particular, he was questioned about his inspection of the *Miss Angel* before he commenced working on her, the “non-conformances” that existed in her electrical system and his knowledge of the risks associated therewith. In addition, shortly after the fire, Mr Greg Kelly, one of the expert witnesses engaged on behalf of Mr Tregidga and Ms Jenkins, conducted a recorded interview with Mr Tilton. Mr Kelly arranged for a transcript to be prepared of that interview and that transcript was tendered in evidence. As well, Mr Tilton provided Mr Kelly with a series of photographs that he had taken in the engine room of the *Miss Angel* prior to the fire. Those photographs were also tendered in evidence.

108 In addition to Mr Tilton, the other main lay witnesses were Mr Pasma and Mr Tregidga and, to a lesser extent, Mr Steven Larkin. They variously provided evidence about the circumstances of Pasma’s engagement to carry out the works on *Miss Angel*’s electrical system and the condition of that system. Mr Pasma also gave some evidence about the risk of fire posed by the defective condition of *Miss Angel*’s electrical system. In this respect, Mr Pasma’s qualifications and experience should be noted. He said in his first outline of evidence that he commenced operation of Pasma in or around 1977 providing electrical services “in the heavy industrial, mining, construction and commercial industry on projects such as water and sewerage plants, power stations, solar panels, mining infrastructure, public infrastructure and major shopping centres”. Since 1996, he said Pasma has primarily provided electrical services for maritime vessels. As already noted, Ms Rak did not give evidence at the trial.

### Expert evidence

109 In addition to these lay witnesses, each party adduced evidence from two expert witnesses. On behalf of Mr Tregidga and Ms Jenkins, Mr Kelly and Mr Ian Ritchie each produced two reports which were tendered in evidence and, on behalf of Pasma, Dr Peter Hart and Mr Jason Locke each produced a report which was also tendered in evidence. The matters upon which these experts variously expressed opinions included: the condition of the vessel’s electrical system; the nature of the fire; the location of the point of origin of the fire; and the possible causes of the fire. Their evidence will be reviewed in more detail later in these reasons in connection with the interrelated issues of breach and causation mentioned above (see below at [169] et seq).

## Issue 4(b)(i) – The scope of Pasma’s duty in tort – the reasonably foreseeable risk inquiry

### The issue as pleaded

110 Turning then to the first inquiry: the reasonably foreseeable risk of injury or harm to the *Miss Angel*, it is convenient to begin by briefly identifying the main parts of the pleadings above that particularly concern this inquiry. Mr Tilton’s knowledge of the defects in the electrical system in the *Miss Angel* and the associated risks was pleaded at [16] of the FASC and, in particular at [16(k)] (see at [94] above). Pasma’s response to those allegations is also set out above (at [99]). Finally, Mr Tregidga and Ms Jenkins’ reply to Pasma’s response is set out at [104] above.

### The evidence

111 The evidence pertinent to this inquiry came from three witnesses: Mr Pasma, Mr Tilton and Mr Ritchie. The evidence in Mr Pasma’s two outlines of evidence is already set out above (see [34] and [35]). As well, Mr Pasma expressed the following views about the risk of fire associated with the defects present in the *Miss Angel*’s electrical system in his cross-examination and re-examination:

[**Cross-examination**]

And some of the defects and deficiencies that you observed were of a nature that they presented an electrical hazard, or the possibility of an electrical hazard to the vessel, or users of the vessel. Do you agree with that?---No, I don’t.

Or to the extent that – well, if you had observed, for instance, wiring that didn’t terminate in a junction box – and I think you said that you didn’t observe any on your inspection – would you agree with me that that condition is one which would present an electrical hazard, in particular in the form of a risk of injury or electrocution, and also the possibility of fire?---Well, it would depend on whether it was a 240 volts, or extra low voltage.

And if it was 240 volts and it was on a live circuit, or a live wire, then you would agree that it would present such an electrical hazard, I take it?---That’s correct.

And if that had been – if the wiring not terminating in the junction box was readily able to be seen visually, then that would, in those circumstances, have been an obvious hazard. Do you agree with that?---That’s correct. Yes.

And had you seen such an obvious hazard, that would have been a matter that would have required, on your part as a person who saw it, some investigation, in relation to that condition and the hazard. Is that correct?---That’s right.

And if that wasn’t remedied, that deficiency wasn’t to be remedied immediately, but was to continue for some period of time, then that hazard is one that would need to be addressed if people were to be onboard the vessel, or work onboard the vessel. That’s correct, isn’t it?---That’s correct.

And indeed, not only would it need to be addressed, but the appropriate course would be to eliminate that hazard if possible. That’s correct, isn’t it?---That’s correct.

And one way of eliminating that hazard would be to de-energise that particular wire, or circuit. Do you agree with that?---Yes. That’s correct.

And if there were numerous instances of those on different circuits, a way of dealing with all of that would have been to de-energise the vessel completely. Do you agree with that?---That’s correct, or at least fix it temporarily.

Yes, but if it wasn’t fixed temporarily, if the decision to carry out repairs was deferred, then some other measure would need to be taken, such as the measure I’ve just suggested, namely, de-energising the vessel. Correct?---That’s correct.

And do I take it that your conclusion that there were no obvious electrical hazards was because you, on this occasion, didn’t see any instances such as exposed wiring, or wiring that didn’t terminate in junction boxes, of the type that I’ve just described. Is that correct?---That’s correct.

But had you seen such things, then you would have come to a different conclusion to that expressed in paragraph 16G of your outline, is that so?---That’s correct.

And having come to that different conclusion, you would have expected – I withdraw that. Having come to that conclusion, you would have taken some action to address, or deal with, that hazard. Correct?---That’s correct.

And if there were numerous instances of that onboard the vessel, then that would provide an even stronger reason to take such measures. Do you agree with that?---Yes.

 [**Re-examination**]

What hazards are – what fire hazards arise from the use of electricity in a vessel such as the Miss Angel as it stood on the hardstand connected to shore power?---I believe fire hazards are an extremely small likelihood.

Thank you?---Electrocution has a higher likelihood. Fire on a vessel normally is caused by smouldering, which is – usually happens over time, moisture-related in particular.

So you were asked about a series of things which were said to be hazards, including exposed wiring and the like, or wiring that – let me deal with one, which wasn’t – wiring which wasn’t double insulated. Do you recall that?---Yes, I do.

And that was – and I think you accepted that it was an electrical hazard?---But not necessarily a fire hazard.

No. But what sort of electrical hazard is a failure to double insulate?---Insulation breakdown.

Sorry. I withdraw that. What are the possible consequences of having wiring that’s not double insulated, but only single insulated?---No hazard at all.

Well, then why is a double – a failure to double hazard – double insulate a breach of the Standard?---Double insulator cable must be – any exposed low voltage cabling must be double insulated.

Well, why?---For electrocution hazards.

Well, is one – is a double insulated rather than a single insulated cable any more hazardous from a fire perspective?---No, it’s not.

What about the hazard you identified of wires not terminating in a junction box? What’s the hazard, the electrical hazard, that arises where a wire is not terminated in a junction box?---Sorry. Can you repeat that question?

Yes. You were asked about an electrical hazard described as a wire not terminating in a junction box. Do you recall that?---Yes. Yes, I do.

And that was described as an electrical hazard. What type of electrical hazard is that?---If it was low voltage, it would be electrocution hazard.

And what sort of hazard is it if one has the risk of fire in mind rather than the risk of electrocution?---None. None.

112 Next, in Mr Tilton’s first outline of evidence, he said, relevant to this inquiry:

10. I was advised by Henk Pasma on or around 26 May 2016 that [Pasma] was engaged to undertake works on MV Miss Angel (the **Vessel**). Mr Pasma advised me that the Vessel required electrical works so that a Certificate of Compliance could be issued.

11. I understood that my works on the Vessel would be undertaken on a day-by-day basis dependant on the outcome of my initial inspection of the Vessel and would be conducted in consultation with Mr Pasma and the Vessel’s Captain.

12. Upon attending the Vessel I noted that the Vessel was a wooden motor sailing schooner of approximately 23 meters.

13. On 27 May 2016 I attended BSE Maritime Solutions at 61-79 Cook Street, Cairns (**BSE**) to begin work on the Vessel. Upon my arrival I conducted an initial inspection of the Vessel and noted:

(a) the Vessel’s electrical system was poor in quality when compared to other examples of vessel electrical systems I have observed in my time at Pasma;

(b) there were no emergency, time sensitive or critical repairs required to the Vessel’s electrical system;

(c) the Vessel did not substantially or otherwise comply with the relevant Australian standards; and

(d) signs denoting the electrical system on the Vessel were in Turkish.

14. In my opinion and in my experience this initially appeared to be a larger than usual compliance job. None of issues initially identified appeared to require immediate attention, noting that the Vessel had just successfully been sailed to Cairns from Turkey.

15. When I arrived to undertake the works:

(a) The Vessel was already energised with shore power. This is not unusual as in my experience the slipway provides the connection to the shore power and charges the vessel’s owner accordingly.

(b) There were no electrical drawings or technical drawings of the Vessel available to me or on board the Vessel.

(c) The various signs and labels were in Turkish and I was required to translate the Turkish into English using an online translation application.

…

38. Throughout my works on 8 June 2016 I do not recall undertaking any different works than I normally would or noticing anything which would lead me to suspect the Vessel was unsafe when I exited the Vessel at the end of the day. If I had thought the Vessel was unsafe, I would have notified [Ms Rak].

(Emphasis in original)

113 Then, in his second outline of evidence, Mr Tilton said:

4. On or about 26 May 2016, Mr Pasma, Aneta Rak and myself met at the BSE Slipway to undertake a visual inspection of the vessel.

5. On that occasion we met Ms Rak on board the Vessel which was connected to shore power. The lights were on on board the Vessel. The shore power was connected to the AC system at this time. I had been made aware from speaking with Mr Pasma that Ms Rak was the Vessel’s captain and that I was going to be doing some work on the Vessel. Ms Rak introduced herself to me and then Mr Pasma and I proceeded to do an initial visual inspection and familiarization of the vessel.

6. I observed that there was an emergency radio battery on the bridge deck in front of the helm …

7. Also during that inspection I observed that the engine room had a large opening in the forward and aft bulkheads, a hole in the upper deck to the helm which cables ran. The engine room was therefore not sealed for fire or flooding at the time of this inspection. I also observed that there was no proper cable support structure and the electrical cables were being supported by a plastic ducting frame and cable ties, both on the general wiring of the AC and DC electrical system. Mr Pasma and I both decided that we needed to inform the surveyor that the engine room was not properly sealed for fire and flooding. Both Mr Pasma and I were of the view at this inspection that before any major work in the electrical system in the engine room were to commence, a solution for the sealing of the engine room would first have to be conceived. There was no point in conducting works in the engine room in terms of the general wiring on the AC or DC system because in doing so may require double handling and double charging of work if major mechanical alterations were required to seal the engine room. From discussions of repairs I had with Ms Rak, I felt that Ms Rak or the owners were being limited in their monetary expenditure for repairs or alterations that may be required.

…

18. When I undertook the inspection of the Vessel on 26 May 2016, I observed that the vessel had a DC (Direct Current) electrical system on board. The Vessel’s DC system operated on 24 Volts from energy stored in the Vessel’s house batteries, which could be replenished by the Vessel's charging system.

…

22. As soon as I became aware that Steve Larkin was the surveyor for the Vessel when he was on board the Vessel I asked him to provide me with any electrical or technical drawings. He subsequently provided me with two pages of drawings on 7 June 2016 …

…

26. The “AC system” powers the “battery charger”. When working on the “AC system”, the number one risk is shock. The battery charger was isolated when I disconnected the batteries.

27. Upon commencing work on the Vessel, I conducted a risk assessment to:

a) Identify any hazards that may be associated with the task I may be performing.

b) Assess and control any risks.

28. I performed a risk assessment for the tasks that I completed on the vessel. Of the tasks that I completed I did not identify a fire hazard.

29. From my visual inspection, I noticed, along with the matters outlines at paragraph 20 of my First Outline of Lay Evidence, the following:

(a) There were improper cable supports. That being, brackets and trays used to support the cabling of the vessel were present, but insufficient to meet the standards of AS3000;

(b) Some of The wiring colours were incorrect. Whilst the colour of a wire being red or blue does not itself present a safety risk, Standards in Australia require a certain colouring scheme to be compliant with AS3000, and some of the Vessel’s colouring scheme was not compliant with those standards;

(c) Single insulated cabling was present, which itself is not a hazard but was not compliant;

(d) The Vessel’s electrical system had circuit protection;

(e) The main earthing cable did not comply with AS3000. I observed that the size required by Australian Standards is 2mm bigger than the one fitted to the Vessel. I did not consider this to be a risk as there was an RCD device fitted to the electrical switchboard;

(f) There was inadequate mechanical protection to the wiring supplying particular outlets but I did not consider that to represent a hazard;

(g) The Vessel’s batteries were not housed in accordance with the NSCV. I considered that the batteries needed to be disconnected, fitted into a battery box, and reconnected. Whilst I did not consider this to represent any risk, it was required in order to bring the Vessel into survey;

(h) I was concerned that the engine room was non-compliant with maritime standards for fire safety and flooding because there were holes and gaps between the engine room, the galley, accommodation areas as well as up to the wheel house;

(i) The condition of the electrical systems on the vessel was poor but serviceable considering it was never previously in survey. Notwithstanding this, I did not observe anything that made me consider the vessel unsafe to the point where I would have to shut down the entire vessels electrical system and tag out shore power to the vessel. The compliance issues did not present as any indication of a risk of the electrical system failing or causing a fire.

30. Following my initial inspection of the Vessel I determined that there were no electrical faults or hazards that I could identify that would cause me to consider the vessel unsafe to commence work. If I had identified any electrical fault or hazard that led me to believe the vessel was unsafe to work in for myself or others I would have taken steps to make it safe.

…

37. On the date of the fire I was aware that:

a) Shore power was being supplied to the vessel and I was not aware of any electrical faults or hazards that presented any risk that caused me to consider the vessel unsafe.

b) The wiring of the vessel did not follow the colour coding set out in the Australian Standards. However, the colour of the wiring does not affect the operation of the vessel’s electrical system. It was my intention to rectify the colour issue but those repairs were not time sensitive.

c) Single insulated cabling was observed. However, I did not consider this to be a electrical hazard but it would have been addressed as part of the overall works to bring it into survey;

d) The main earthing cable did not comply with AS3000 by reason of it being too small. Whilst I did not consider this to be a risk, it was required to be changed in order to comply with AS3000.

e) The GPO circuits did not have compliant mechanical protection and had some single insulated sections However, despite my view that the mechanical protection to the wiring non-compliant I did not consider it to be a risk of damage or a hazard.

f) The electrical systems on the vessel did not comply with AS3000. However, at no time prior to the fire did the vessel’s electrical systems ever comply with AS3000. This is only a compliance issue and not a risk of a fire or any indication of the electrical system presenting a hazard.

g) The electrical system on the vessel did not comply with the National Standard for Commercial Vessels in Australia (NSCV). However, at no time prior to the fire did the vessel’s electrical systems ever comply with NSCV or any known standard. This is only a compliance issue and not a risk of a fire or any indication of the electrical system presenting a hazard.

h) The electrical work being undertaken on the Vessel remained incomplete as at the date of the fire and there was a considerable amount of work left to do in order to bring the Vessel into survey. However, I did not consider that any of the issues described above either individually or collectively presented a risk of a fire or any indication of the electrical system presenting a hazard.

i) From my observation the Vessel’s engine room was not sealed to prevent the spread of fire. However, the vessel’s compliance with the Australian Standards in relation to the fire system was outside of my expertise and scope of works. I had raised these issues with Ms Rak who I understood to be in charge of the Vessel as well as the Surveyor, Steven Larkin, who I understood to be responsible for certifying compliance with all survey requirements.

…

38. The vessel was still at the date of the fire in significant non-compliance in accordance with the AS3000 and the NSCV Standards, primarily because of the method of its construction as the vessel was not constructed to any known standards.

(Errors in original)

114 Finally, in the transcript of his interview with Mr Kelly, Mr Tilton gave the following answers relevant to this inquiry:

|  |  |  |
| --- | --- | --- |
| **Q** | **46** | **So what was your general opinion of the electrical system on the vessel when you had a look at it?** |
| A |  | Ah, it was poor. |
|  |  |  |
| **Q** | **47** | **Okay and what makes you form that opinion that’s obviously you’ve been a sparkie for a while now so what was it you looked at you thought that’s not good?** |
| A |  | Okay well the cable, the cable supports is not really the, the proper type cable support for, for that, that ah purpose. Ahem, wiring needs to follow a certain colour code right, so like the earth wire in particular needs to be green and yellow, neutral wire black and they didn't, that colour coding on the cables was not of that type, ahem you, so you couldn’t identify earth wires, ahem, you know double insulated cables have to you know could be run through cable trays but then have to terminate into some kind of junction box and there was lots, lots of areas where that was not the case. Ahem, when you’re running 240 volt right everything needs to be earthed right, so the engine room lighting didn’t have earthing, you know, even if it was above earth the engine room, ah the system was an above earth system, still everything needs to be earthed and tied to the earth plate. The earth plate I thought the main cable, the main earthing cable was inadequate it’s too small. |
|  |  |  |
| … |  |  |
|  |  |  |
| **Q** | **183** | **So […indecipherable….] you’ve told me that the electrical system was poor, ahem there was power coming on, just shore power and ….** |
| A |  | No that’s just my opinion |
|  |  |  |
| **Q** | **184** | **Yes.** |
| A |  | You know if somebody else come on board and maybe looked at it, but I mean I’ve been on a lot of vessels and this would rank up there as one of you know one of the worst ones that I have to work on, like I’ve seen another vessel prior to that they wanted to do the same thing and they had a lot of problems also…. |

(Emphasis in original)

115 Mr Tilton was cross-examined at length about, among other things, his inspection of the vessel, the defects or “non-conformances” he observed on it, the associated risk of fire and the need to remove that risk. Before setting out the more salient extracts from that cross-examination, it is convenient, first, to explain the origins of the expression “non-conformances”. That expression comes from section 6 of Mr Ritchie’s first report as follows:

**6 Identified non-conformances**

Mr Tilton identified various non-conformances with the LV and ELV systems which in my opinion presented electrical risk, were not electrically safe and were serious defects.

I address each one in turn.

***6.1*** Defect 1 - No LV terminal covers on air-conditioners

*Noted in the Tilton Interview Q73, 74, 75& 76 and Photo 2016-05-27 11:22;*

Expert Opinion – *The exposed live LV terminals at the air conditioners pose a significant risk of electric shock and/or fire.*

*The Wiring Rules (AS/NZS 3000:2007) refers to this as basic protection (protection against direct contact) and in clause 1.5.4.1 states “Protection shall be provided against the dangers that may arise from contact with parts of the electrical installation that are live in normal service”. The Wiring Rules continue in clause 1.5.4.2 to describe methods of basic protection as being one or a combination of:*

- *Insulation;*

- *Barriers or enclosures;*

- *Obstacles;*

- *Placing out of reach.*

*To alleviate the risk of electric shock or fire the exposed live terminals could be enclosed in an insulating terminal box.*

*That work itself poses the same significant risk of electric shock however the LV electrical energy could be disconnected to safely repair the air conditioner terminal covers to a safe and compliant condition.*

*If Mr Tilton did not intend to repair it, he needed to disconnect the supply source to make it electrically safe for himself and others on board.*

***6.2*** Defect 2 - Broken hinge on LV switchboard door exposing live terminals due to the lack of an escutcheon panel.

*Noted in photo 2016-05-27 14:45 and photo 2016-06-02 11:23*

Expert Opinion – *The exposed live LV terminals in the engine room LV switchboard pose a significant risk of electric shock and/or fire.*

*The Wiring Rules (AS/NZS 3000:2007) refers to this as basic protection (protection against direct contact) and in clause 1.5.4.1 states “Protection shall be provided against the dangers that may arise from contact with parts of the electrical installation that are live in normal service”. The Wiring Rules continue in clause 1.5.4.2 to describe methods of basic protection as being one or a combination of:*

- *Insulation;*

- *Barriers or enclosures;*

- *Obstacles;*

- *Placing out of reach.*

*To alleviate the risk of electric shock or fire the switchboard housing the exposed live terminals could be replaced or repaired with an escutcheon panel and correctly functioning door hinge.*

*That work itself poses the same significant risk of electric shock however the LV electrical energy could be disconnected to safely repair the engine room LV switchboard to a safe and compliant condition.*

*lf Mr Tilton did not intend to repair it, he needed to disconnect the supply source to make it electrically safe for himself and others on board.*

***6.3*** Defect 3 – Wiring not terminated in a Junction Box

*Noted in the Statement of Claim 16(g) (iv), the Defence 16g (iv), Tilton Notes “A/C”, Tilton interview Q47, Photo 2016-05-27 15:46;*

Expert Opinion – *Any exposed live LV terminals or single insulated wiring associated with terminations not enclosed in a junction box pose a significant risk of electric shock and/or fire.*

*The Wiring Rules (AS/NZS 3000:2007) refers to this as basic protection (protection against direct contact) and in clause 1.5.4.1 states “Protection shall be provided against the dangers that may arise from contact with parts of the electrical installation that are live in normal service”. The Wiring Rules continue in clause 1.5.4.2 to describe methods of basic protection as being one or a combination of:*

- *Insulation;*

- *Barriers or enclosures;*

- *Obstacles;*

- *Placing out of reach.*

*To alleviate the risk of electric shock or fire any terminations with exposed live terminals or single insulated wiring could be enclosed in an insulating junction box.*

*That work itself poses the same significant risk of electric shock however the LV electrical energy could be disconnected to safely repair any exposed live LV terminals or single insulated wiring to a safe and compliant condition.*

*If Mr Tilton did not intend to repair it, he needed to disconnect the supply source to make it electrically safe for himself and others on board.*

***6.4*** Defect 4 – Engine lights incorrectly earthed

*Noted in the Statement of Claim 16g (v), the Defence 16g (v), Tilton Notes “To Do List”, Tilton interview Q47, Photo 2016-05-27 14:22;*

Expert Opinion – *Earthing (or equipotential bonding on an electrically separated system) is a primary means of ensuring circuit protective devices provide automatic disconnection of supply in under 400mS in the event of a fault, providing protection to the installation from fire and some protection against inadvertent shock. The engine room lights were identified as being unearthed and many were damaged.*

*The Wiring Rules (AS/NZS 3000:2007) refers to this as fault protection (protection against indirect contact) and in clause 1.5.5.1 states “Protection shall be provided against the dangers that may arise from contact with exposed conductive parts that may become live under fault conditions”. The Wiring Rules continue in clause 1.5.5.2 to describe methods of fault protection as being one or a combination of:*

- *Automatic disconnection of supply;*

- *The use of class II equipment (double insulated equipment);*

- *Electrical separation;*

- *Limiting the fault current that can pass through a body to a value lower than the shock current.*

*To alleviate the risk of electric shock or fire posed by incorrectly earthed or bonded engine room light fittings, the correct earth or bonding conductor could be fitted to each light fitting and the damaged light fittings repaired or replaced.*

*That work itself poses the same significant risk of electric shock however the LV electrical energy could be disconnected to safely repair any damaged and/or incorrectly earthed or bonded engine room light fittings.*

*If Mr Tilton did not intend to repair it, he needed to disconnect the supply source to make it electrically safe for himself and others on board.*

***6.5*** Defect 5 – Switchboard unearthed

*Noted in the Statement of Claim 16g (vii) and the Defence 16g (vii);*

Expert Opinion – *Earthing (or equipotential bonding on an electrically separated system) is a primary means of ensuring circuit protective devices provide automatic disconnection of supply in under 400mS in the event of a fault, providing protection to the installation from fire and some protection against inadvertent shock. The LV switchboard was identified as being unearthed.*

*The Wiring Rules (AS/NZS 3000:2007) refers to this as fault protection (protection against indirect contact) and in clause 1.5.5.1 states “Protection shall be provided against the dangers that may arise from contact with exposed conductive parts that may become live under fault conditions”. The Wiring Rules continue in clause 1.5.5.2 to describe methods of fault protection as being one or a combination of:*

- *Automatic disconnection of supply;*

- *The use of class II equipment (double insulated equipment);*

- *Electrical separation;*

- *Limiting the fault current that can pass through a body to a value lower than the shock current.*

*To alleviate the risk of electric shock or fire posed by an incorrectly earthed or bonded LV switchboard, the correct earth or bonding conductor could be fitted to the LV switchboard.*

*That work itself poses the same significant risk of electric shock however the LV electrical energy could be disconnected to safely repair any necessary LV switchboard earth or bonding conductor.*

*If Mr Tilton did not intend to repair it, he needed to disconnect the supply source to make it electrically safe for himself and others on board.*

***6.6*** Defect 6 - Main earth too small

*Noted in the Statement of Claim 16g (vi) and Tilton interview Q47;*

Expert Opinion – *Earthing (or equipotential bonding on an electrically separated system) is a primary means of ensuring circuit protective devices provide automatic disconnection of supply in under 400mS in the event of a fault, providing protection to the installation from fire and some protection against inadvertent shock. The main earth was identified as being undersized.*

*The Wiring Rules (AS/NZS 3000:2007) refers to this as fault protection (protection against indirect contact) and in clause 1.5.5.1 states “Protection shall be provided against the dangers that may arise from contact with exposed conductive parts that may become live under fault conditions”. The Wiring Rules continue in clause 1.5.5.2 to describe methods of fault protection as being one or a combination of:*

- *Automatic disconnection of supply;*

- *The use of class II equipment (double insulated equipment);*

- *Electrical separation;*

- *Limiting the fault current that can pass through a body to a value lower than the shock current.*

*To alleviate the risk of electric shock or fire posed by an undersized main earth, the correct earth conductor could be fitted if it was required.*

*That work itself poses the same significant risk of electric shock however the LV electrical energy could be disconnected to safely repair the cable if necessary.*

*If Mr Tilton did not intend to repair it, he needed to disconnect the supply source to make it electrically safe for himself and others on board.*

***6.7*** Defect 7 - Exposed ELV live terminals

*Noted in the Photo 2016-05-27 15:56;*

Expert Opinion – *Exposed ELV terminals pose a risk of short circuit and fire due to potentially high current flow causing excessive heat dissipation.*

*The NSCV (National Standard for Commercial Vessels) C.5.5b clause 2.15.3 states “Cable connections and terminations shall be at fixed, enclosed terminals”.*

*To alleviate the risk of short circuit and fire posed by exposed ELV terminations, the exposed live terminals could be enclosed in an insulating terminal block or fuse box.*

*That work itself poses the same significant risk of fire however the ELV electrical energy could be disconnected to safely repair the exposed ELV terminals to a safe and compliant condition.*

*If Mr Tilton did not intend to repair it, he needed to disconnect the supply source to make it safe for himself and others on board.*

***6.8*** Defect 8 - GPO circuits not mechanically protected and insulation non-compliant

*Noted in the Statement of Claim 16g (viii), the Defence 16(g) (viii)and Tilton interview Q54;*

Expert Opinion – *Lack of double insulation and lack of mechanical protection poses a risk of previous or new damage allowing a leakage current to result in electric shock.*

*The Wiring Rules (AS/NZS 3000:2007) states in clause 3.10.1.1 “Insulated, unsheathed cables shall be enclosed in a wiring enclosure throughout their entire length”.*

*To alleviate the risk of electric shock posed by single insulated cables and lack of mechanical protection, the cabling could be enclosed in a conduit or duct or replaced with double insulated cable with added mechanical protection where required.*

*That work itself poses the same significant risk of electric shock however the LV electrical energy could be disconnected to safely repair any single insulated or mechanically unprotected circuit wiring.*

*lf Mr Tilton did not intend to repair it, he needed to disconnect the supply source to make it electrically safe for himself and others on board.*

***6.9*** Defect 9 - Non-compliance with AS/NZS 3000:2007

*Noted in the Statement of Claim 16g (ix), the Defence 16g (ix), Pasma Evidence 16(a), Tilton Evidence 13 (c) and Tilton interview Q77;*

Expert Opinion – *Lack of compliance with standards may harbour initially unknown hazards and risks.*

*Such non-compliances could be repaired to bring the vessel to a compliant state.*

*That work itself poses hazards and risks however the electrical energy from both LV and ELV sources could be disconnected to safely repair any identified non-compliance.*

*If Mr Tilton did not intend to repair it, he needed to disconnect the supply source to make it electrically safe for himself and others on board.*

***6.10*** Defect 10 - Non-compliant with NSCV

*Noted in the Statement of Claim 16(g) (x), the Defence 16(g) (x), Pasma Evidence 16(c), and Tilton interview Q91;*

Expert Opinion – *Lack of compliance with standards may harbour initially unknown hazards and risks.*

*Such non-compliances could be repaired to bring the vessel to a compliant state.*

*That work itself poses hazards and risks however the electrical energy from both LV and ELV sources could be disconnected to safely repair any identified non-compliance.*

*If Mr Tilton did not intend to repair it, he needed to disconnect the supply source to make it electrically safe for himself and others on board.*

***6.11*** Defect 11 - Significant faults

*Noted in the Defence 8a;*

Expert Opinion – *Significant faults may harbour initially unknown hazards and risks.*

*Such significant faults could be repaired to bring the vessel to a safe and compliant state.*

*That work itself poses hazards and risks however the electrical energy from both LV and ELV sources could be disconnected to safely repair any identified non-compliance.*

*If Mr Tilton did not intend to repair it, he needed to disconnect the supply source to make it electrically safe for himself and others on board.*

***6.12*** Defect 12 - Electrical systems were “poor” and/or needed “lots of work”

*Noted in the Statement of Claim 16g (ii), the Defence 16g (ii), Pasma Evidence 16(d),Tilton Evidence 13a and Tilton interview Q46;*

Expert Opinion – *Poor electrical systems in need of “lots of work” may harbour initially unknown hazards and risks.*

*Such poor electrical systems could be repaired to bring the vessel to a safe and compliant state.*

*That work itself poses hazards and risks however the electrical energy from both LV and ELV sources could be disconnected to safely repair any identified non-compliance.*

*If Mr Tilton did not intend to repair it, he needed to disconnect the supply source to make it electrically safe for himself and others on board.*

***6.13*** Defect 13 - Non-compliant colour code of wiring

*Noted in the Statement of Claim 16g (iii), the Defence 16g (iii) and in the Tilton interview Q47;*

Expert Opinion – *Nonstandard colour coding of wiring is a hazard that has the risk of inadvertent confusion.*

*Such non-compliant colour coding could he dealt with via clear notification and signage to remove confusion.*

*That work could be safely undertaken whilst the electrical energy from both LV and ELV sources were disconnected for other work being undertaken.*

***6.14*** Defect 14 - Nonfunctional or non-compliant fire system

*Noted in the Statement of Claim 16g (xi), Pasma Evidence 16(f) and Tilton Evidence 18;*

Expert Opinion – *A nonfunctional or non-compliant fire system is a hazard that has a risk of undetected/unextinguished fire causing damage.*

*The lack of a functional fire system could have been taken into account when carrying out a risk assessment.*

***6.15*** Defect 15 - No electrical drawings

*Noted in Pasma Evidence 17 and 18;*

Expert Opinion – *Lack of electrical drawings is a hazard that has the risk of inadvertent confusion.*

*Such confusion could lead to error; however, it could can be dealt with by drafting the schematic drawings to remove confusion.*

*The lack of electrical drawings should be taken into account when carrying out a risk assessment.*

***6.16*** Defect 16 - Unsuitable cable supports

*Noted in Tilton Evidence 20c, Tilton interview Q47 and photo 2016-05-27 14:39;*

Expert Opinion – *Unsuitable cable supports is a hazard due to ambient temperatures that needs to be considered in the scope of works.*

***6.17*** Defect 17 - Unprofessional workmanship evident

*Noted in Tilton Evidence 20(f);*

Expert Opinion – *Unprofessional workmanship may harbour initially unknown hazards and risks.*

…

When faced with the electrical risks and hazards set out above, in my opinion a reasonable electrician would have conducted a risk assessment and concluded the appropriate way to make the vessel electrically safe was to isolate power from the LV and the ELV sources of supply.

(Typography and errors in original)

116 Returning, then, to Mr Tilton’s cross-examination, the following are the salient extracts from it concerning his inspections of the electrical system on the vessel, the defects or “non-conformances” he observed and their associated risk of fire:

**[Inspection]**

Now, on 26 May, did you inspect the vessel in the company of Mr Pasma, or did you inspect it on your own?---I believe Mr Pasma was there with me.

And you wandered around the vessel together, is that how I take your evidence?---Yes. Yes.

On that occasion, it was an entirely visual inspection, is that correct?---Yes.

You didn’t perform any what might be described as invasive inspection? You didn’t remove any panels to look at wiring or anything like that, is that correct?---That’s correct.

You didn’t test any circuits at that time, is that correct?---Don’t think so.

Did you go into the engine room, do you recall?---I would have, yes.

But I take it that you didn’t test any of the appliances in the engine room, the electrical appliances, on that occasion, is that correct?---Don’t think so.

,..

On this inspection on 27 May, this was again a visual inspection, that’s so, isn’t it?---Yes.

Again, on this occasion, you didn’t undertake any invasive inspection, you didn’t remove panels to access wiring or anything like that, correct?---That’s correct.

You didn’t test any circuits or any of the appliances on this occasion, is that correct?---Excessive polarity on the GPOs in the forecabin area.

But for instance, you didn’t carry out any tests on this occasion on the AC switchboard in the vessel, that’s correct, isn’t it?---That’s correct.

Or any of the RCD devices that were in that switchboard, for example, correct?---Yes, I believe so.

And you also didn’t carry out any tests on the DC switchboard either on this occasion, I take it?---Yes, I believe so.

When you say you believe so, you agree that you didn’t carry out inspections, is that correct?---Yes, I would agree.

**[Non-compliances and associated risks – cables not terminating at junction boxes]**

Now, one of those non-compliances that you observed was that there were some cables that didn’t terminate at junction boxes as they should have; is that correct?---That’s correct.

And as a result those cables were exposed at the terminal connections; is that so?---Yes.

…

And what you observed was that there was no terminal cover for the AC power on that air conditioning unit, is that correct?---That’s correct.

…

And in its current state, if there was a risk that someone may be electrocuted if they touch that terminal cover, and it was live, that’s correct, isn’t it?---That’s correct.

And also, whilst it was in that condition, there was a risk of the potential of fire, in the event of a short circuit through that connection. That’s correct, isn’t it?---Possibly.

And they’re the risks that one was seeking to avoid by placing it in an insulating terminal box, in accordance with the usual practices as you’ve just suggested. That’s correct, isn’t it?---Yes.

And until that was done, that terminal cover in that condition posed a risk or electrical hazard. That’s correct, isn’t it?---Possibly.

Well, so long as – I withdraw that. At the time you inspected it, it posed – in its current condition, it posed a risk or hazard to somebody either working in that vicinity, or the possibility of fire that I’ve just put to you. That’s correct, isn’t it?---If it was on, yes. Maybe.

If the wire was energised, then there was that risk. That’s correct, isn’t it?---Possible, yes.

And that’s a hazard – electrical hazard – which you would seek to eliminate, consistent with good practice. That’s correct, isn’t it?---That’s correct.

And the way to do it in the long term is to use an insulating box, correct?---Correct.

…

And again, where wiring was not terminated in a junction box, such as depicted here, then that meant that there was an exposed live wire where the circuit was energised. That’s correct?---Yes.

And that posed the same, or similar risks to those that we’ve just been discussing in relation to the previous photo, namely, the possibility of electric shock or injury to a person, and the possibility of fire. That’s correct, isn’t it?---A fire can happen in any short circuit situation - - -

Yes?--- - - - regardless of whether it’s in a box or not.

But if it’s not in a box, and there is a fire and a short circuit, then it’s more likely to escape into other parts of the engine – other parts of the vessel. That’s correct, isn’t it?---Possible.

And one of the reasons you have an insulating junction box is to prevent a spark that may arise in a short circuit from escaping the circuit, beyond the circuit and into adjoining parts of the ship. That’s correct, isn’t it?---Well, it’s mainly to prevent somebody from touching it.

But it does both, does it not, Mr Tilton?---Yes, I suppose.

And again, until this wire was enclosed in an insulating junction box, it would continue to present the electrical hazard or risk that we’ve just discussed, whilst ever it was energised. That’s correct, isn’t it?---Yes.

And again, this isn’t a – I withdraw that. Prior to 8 June, you didn’t carry out any work on the vessel which involved identifying wires that were in this condition and then enclosing them in an insulating junction box; that’s correct, isn’t it?---That’s correct.

That’s something that you were planning to do later or that you had deferred until later; correct?---That’s correct.

 **[Non-compliances and associated risks – broken hinge on switchboard]**

Now, the – one of the things that you observed was that the hinge on the AC or the LV switchboard door was broken; that’s correct, isn’t it?---That’s correct.

And, as a result, the panel door – the external door wasn’t able to close securely; that’s correct, isn’t it?---Well, if three points is not secure enough, then yes.

Yes. Well, in that condition, it wouldn’t have satisfied the relevant applicable standard to which the vessel was aspiring; that’s so, isn’t it?---That’s correct.

And that was amongst the work that you would be carrying out onboard the vessel; namely, the repair of that door or that hinge; that’s correct, isn’t it?---That’s correct.

And when that was done, then it would be able to be secured and the door would then be – well, would then be certainly more – provide more sealing and be more fireproof than in its current condition as depicted in the photograph; that’s correct, isn’t it?---That’s correct.

…

While the switchboard door was in the condition that’s depicted in the photograph, there was – and didn’t provide full sealing and fireproofing, then there was an electrical hazard, or some risk, that’s correct, isn’t it?---For what kind of risk? Electrical shock?

Or electrical – or electrical – or a risk of – in the event of a short circuit in a fire, when the switchboard – it escaping the switchboard?---It’s possible, yes.

Well, that’s the reason why it should be sealed at all four points and surely, that’s correct, isn’t it?---Correct.

It’s to render it fireproof, or as fireproofed as one can, that’s correct, isn’t it?---Well, it needs to be closed, as well.

Yes?---It needs to be locked up so that – because it’s a switchboard.

Yes?---It has got power in it.

 **[Non-compliances and associated risks – engine room lighting]**

So the ER – the reference to ER lighting is to lighting in the engine room, is that correct?---That’s correct.

And the – and – and as you have just said, the lighting needed – needed to be replaced. Do you recall why it needed to be replaced?---They didn’t have any cover. They didn’t have any glass covers over them, the didn’t have lamps. One of them had a – the body was, you know, melted a little bit. They weren’t working.

And in all – in all of those – all of those conditions were, I take it, noncompliant with the standard AS/NZS 3000 that you were seeking to bring the vessel up to, correct?---Correct.

And all of that work needed to be done at some stage as part of the work that your company, Pasma Electrical, had been contracted to do, correct?---Yes.

…

Something else that you observed in relation to the engine room lights were that they didn’t have earthing. Do you recall that?---That’s correct.

And, in relation to that observation, that would include the light that you have just referred to there. Is that so?---It’s possible.

Well, is it some of the lights didn’t have earthing in the engine room, or all of the lights in the engine room didn’t have earthing? Do you recall?---I don’t remember.

But they should have had earthing. Is that so?---If it was AC-powered, yes. If it was DC-powered, not necessarily.

To the extent to which you observed that they didn’t have earthing, the reason you did so was because they required earthing and that would need to be corrected. That’s so, isn’t it?---Yes, I said they didn’t have any earthing. But if it – if it was DC, then I would – it doesn’t need any earthing.

…

Now, the requirement for the light to be earthed is because earthing is a means of ensuring that circuit protective devices on the circuit provide an automatic disconnection in the event of a fault or an imbalance. That’s correct, isn’t it?---That’s correct.

The light is earthed so that the circuit protection devices can operate, and in that way, either eliminate or minimise any injury that might be caused by the short circuit to somebody. That’s correct?---Yes, or – yes.

And also to protect against the short circuit producing a fire. That’s correct, isn’t it?---Correct.

So in the condition that you observed them on board the vessel on 27 May or thereafter, these AC engine room lights were in a condition that posed or presented an electrical hazard or a risk of the type that I have just asked you about. That’s correct, isn’t it?---If the lights were AC, yes.

 **[Removing hazard by de-energising the vessel]**

And one way of – now, the electricity going into that switchboard is the electricity that is coming from the shoreline into the vessel, at the rear of the vessel that you gave some evidence about earlier. That’s correct, isn’t it?---That’s correct.

So in order to – one way – I withdraw that. One way of addressing or eliminating that electrical hazard or risk that I have just referred to would be de-energising the vessel, that is so, isn’t it?---Yes, you can do that.

And if you did that, that would remove any risk associated with the condition of which that switchboard was in at the time it was taken – you took that photograph. That’s correct, isn’t it?---That’s correct.

And it – it wouldn’t be possible to address that condition by, for example, isolating any component, or isolating any circuitry, in the switchboard that was up on the helm. That’s so, isn’t it?---That’s correct.

The only way of really dealing with that, if the – until it’s repaired, is by addressing the source of electricity into the vessel, correct?---That’s correct.

…

What I’m suggesting to you is – do you agree that that was the appropriate course that you should have done?---No. At the time, I didn’t think it was necessary.

But what I’m suggesting to you is that now you agree that that’s what we should have done?---In hindsight, maybe.

(Headings added, errors in original).

117 Finally in respect of Mr Tilton’s evidence pertinent to this inquiry, it is necessary to mention the Daily Job/Service Cards (the Job Cards) that he prepared while he was working on the *Miss Angel* . They show that he either inspected or worked on the vessel on 27, 30 and 31 May 2016 and on 2, 3, 7 and 8 June 2016. They also show that, on 27 May 2016, he undertook an induction before inspecting the *Miss Angel* with an electrician referred to as “Lachlan” who noted the inspection as “assess requirements for survey”. On 30 and 31 May 2016, they show that he inspected the bilge system wiring on the vessel and carried out repairs on it, including obtaining new parts, installing them and testing the bilge system. Further, they show that he attended a “Production Meeting” and inspected the vessel’s battery charger and inverter on 3 June 2016. Finally, they show that he was working on the batteries in the engine room on the vessel on 7 and 8 June 2016.

118 Lastly with respect to this inquiry, it is necessary to mention the second part of the Joint Experts’ Report which was devoted to the question of eliminating the risk of fire on the *Miss Angel*. Before doing so, three things should be noted. First, some of this evidence appears to presume an affirmative answer to the next aspect of this inquiry, namely whether Mr Tilton had a duty to take action to prevent injury or harm being caused to the *Miss Angel*. Since that is essentially a legal issue to be determined by this Court, that evidence has to be treated accordingly. Secondly, some of this evidence is directed to the proportionate liability issues (Issue 6) and, in particular, to BSE’s role as a concurrent wrongdoer in, among other things, connecting the 240 volt AC shore power to the vessel. Thirdly, some parts of the Joint Experts’ Report have been excluded below because they are affected by the ruling made later in these reasons concerning the risk assessment issue (see at [203]). With those qualifications, the pertinent parts of the Joint Experts’ Report that relate to this inquiry were as follows:

|  |
| --- |
| **B(1) - Should a licenced electrician disconnect (or ensure that someone else****disconnects) the 240 volt shore power from the Vessel?** |
| **Areas of agreement:** Yes.The Experts noted that the action of disconnecting the shore power cable from the Vessel is not a regulated action and can be done by an unqualified person. |

…

|  |
| --- |
| **B(3) - Should a licenced electrician isolate the 240 switchboard on board the Vessel?** |
| **Areas of agreement:** Yes, all 240V switchboards should have been de-energized.“Electrical Isolation” is achieved by de-energising the switchboard. |

…

|  |
| --- |
| **B(4) - Should a licenced electrician repair, close and seal the fire proof switchboard housing?** |
| **Areas of agreement:** Yes, switchboards need to be made safe. |

…

|  |
| --- |
| **B(11) - Were the defects listed at paragraph 16k of the Further Amended Statement of Claim (if they existed), the cause of the fire on board the Vessel?** |
| **Areas of agreement:** The Experts agree that the shore power should have been disconnected and that batteries should have been disconnected.The Experts are not able to say how the fire started except to say that it probably had an electrical cause and the items in 16k cannot be excluded as the cause. |

|  |
| --- |
| **B(12) - If the defects listed at paragraph 16k of the Further Amended Statement of Claim existed and were known, would a licensed electrician consider the electrical equipment to pose a risk of loss or damage to the Vessel or injury to persons directly by electricity or originating from electricity in the LV and/or ULV system?** |
| **Areas of agreement:** Yes but we interpret ULV to mean ELV |

|  |
| --- |
| **B(13) - If the defects listed at paragraph 16k of the Further Amended Statement of Claim existed, should a licensed electrician have de-energised the LV and ULV system prior to leaving the vessel on 8 June 2016?** |
| **Areas of agreement:** Yes but we interpret ULV to mean ELV |

…

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| --- |
| **B(15) - Once shore power is connected to the Vessel, is it the responsibility of any licenced electrician working on board the vessel to re-test the connection to shore power prior to leaving the Vessel?** |
| **Areas of agreement:** A licenced electrician shall reverify (which includes a visual inspection and electrical testing) any work done before connecting to shore power.The Experts assess that the shore power should have been disconnected either entirely or at a circuit level of unsafe circuits. |

|  |
| --- |
| **B(16) - Assuming the Vessel was connected to shore power by a third party licenced electrician is it reasonable for a licenced electrician to assume that the shore power has been correctly connected?** |
| **Areas of agreement:** Yes, unless subsequent investigation proves safety concerns should trigger a reverification. |

|  |
| --- |
| **B(17) - Is it reasonable for a licenced electrician to assume that the LV and ULV****systems or either of them did not pose an electrical risk after the vessel had been****connected to shore power by a third party?** |
| **Areas of agreement:** No |

### The contentions

119 As appears from the summary of the pleadings relating to this inquiry above, the areas of dispute are limited. In their written submissions, Mr Tregidga and Ms Jenkins highlighted the admissions made in Pasma’s defence and contended that Mr Tilton must have known that the electrical system on the *Miss Angel* posed a risk of loss or damage to the vessel from “electricity originating from ongoing connection to the shore power of the low voltage system (the AC system) and the extra low voltage system (the DC system)”. They placed particular emphasis on the defect relating to wires which did not terminate at junction boxes. They contended that this was a risk that both Mr Pasma and Mr Tilton accepted gave rise to a hazard which needed to be addressed.

120 While Pasma accepted that the electrical system on the vessel was sub-standard and that, as a foreign vessel, she contained many non-conformances with Australian standards, its main point of contention on this issue was the distinction it claimed should be drawn between non-conformances and hazards and, in particular, those hazards that posed a risk of fire. In this respect, it contended that none of the 17 non-conformances referred to in Mr Ritchie’s report (see above at [115]) “occasioned an identifiable risk of fire as distinct from a risk of electrocution”. By way of example, it pointed to item 6.2 of that report: “Defect 2 – Broken hinge on the LV switchboard door”. With respect to this non-conformance, it claimed:

… Mr Tilton gave evidence it would be could be closed at 3 not 4 points – there was no evidence that the door was not closed at the time of the fire and there is no suggestion that a broken hinge on the switchboard door where the door is otherwise closed, presents to a reasonable electrician a risk of fire sufficient to warrant [Mr] Tilton, without the authority of the master or anyone else to turn off the power.

(Errors in original).

121 Pasma also emphasised Mr Pasma’s evidence that the risk of fire from the use of electricity in a vessel on a hard stand was “an extremely small likelihood”. Finally, it pointed to the evidence concerning the RCD device and contended that the tripping incident demonstrated that that device was “not only operating effectively but that the power would turn off in the event of an electrical fault”.

### Consideration and findings

122 At the outset, it is important to emphasise that the existence of a reasonably foreseeable risk of injury or harm to the *Miss Angel* has to be assessed prospectively, having regard to the circumstances prevailing immediately prior to the fire on the *Miss Angel*. It is not to be assessed retrospectively, with hindsight of that event and the significant damage it caused to the vessel. Adopting that approach, I consider the following aspects of the evidence set out above are germane to this inquiry. First, both Mr Pasma and Mr Tilton inspected the *Miss Angel* and its electrical system on at least two occasions prior to the commencement of the upgrade works on the vessel on or before 2 or 3 June 2016. Mr Pasma inspected it on or about 25 and 26 May 2016. According to the contemporaneous record contained in his Job Cards (see at [117] above), Mr Tilton inspected the vessel and her electrical system once on or about 27 May 2016. Following that inspection, his Job Cards show that he carried out repairs to the bilge pump on the vessel on or about 30 and 31 May 2016. Then they show that he conducted a second inspection of the vessel on or about 2 or 3 June 2016 before he started the upgrade works on the vessel’s extra-low voltage [ELV] system from on or about that date. None of these inspections was an invasive inspection, nor involved the testing of any appliances.

123 As a result of his inspections, while he observed that the electrical system on the vessel did not comply with the relevant Australian Standards, Mr Pasma did not identify any “issues which caused [him] to believe the electrical system posed a risk of injury to someone onboard the vessel”. He did, however, agree in cross-examination that, if the vessel was connected to 240 volt AC shore power, some aspects of her electrical system, such as wiring that did not terminate at a junction box, would present an obvious electrical hazard that required attention. He also agreed that de-energising that circuit, or the whole vessel, would eliminate that risk. In re-examination, however, he made a distinction between an electrical hazard, that is a risk of electric shock, and a fire hazard. He said that the risk of the latter on a vessel on a hard stand connected to AC shore power had an “extremely small likelihood”.

124 For his part, Mr Tilton concluded that the electrical system on the *Miss Angel* was “poor in quality”. Indeed, he told Mr Kelly in his interview with him shortly after the fire that it was “one of the worst” he had seen. From his inspections of that system, he identified numerous aspects that did not comply with the applicable Australian Standards. Nonetheless, he said that it was “serviceable considering it was never previously in survey … [and] … I did not observe anything that made me consider the vessel unsafe to the point where I would have to shut down the entire vessels electrical system and tag out shore power to the vessel. The compliance issues did not present as any indication of a risk of the electrical system failing or causing a fire” (error in original). In cross-examination concerning the hazards present in the system, Mr Tilton also drew the same distinction between electrical hazards and fire hazards as Mr Pasma, describing the latter as “possible”. However, he did acknowledge “a fire can happen in any short circuit situation”. As with Mr Pasma, he also accepted that that risk could be removed by de-energising the particular circuit concerned or the whole system.

125 Next, it is necessary to address Mr Ritchie’s expert evidence about the “non-conformances” in the *Miss Angel*’s electrical system and any associated fire hazard they posed. As the following analysis demonstrates, that evidence is largely consistent with Mr Tilton’s evidence that, while the *Miss Angel*’s electrical system did not comply with the applicable Australian Standards in numerous respects, the vast majority of the “non-conformances” did not involve a fire hazard, as distinct from an electrical hazard, or a risk of sustaining an electric shock.

126 First, in 13 of Mr Ritchie’s list of 17 non-conformances (see at [115] above), the risk was not described as a fire hazard, but rather as an electrical hazard, or as involving a defect in “protection to the installation from fire”, or in vague terms that did not discern an existing risk, as follows:

(a) items concerning a failure to provide protection from hazards: “protection to the installation from fire and some protection against inadvertent shock” (Items 6.4, 6.5 and 6.6)

(b) items which described the risk or hazard in vague or speculative terms. Specifically, that it “may harbour initially unknown hazards and risks” (Items 6.9, 6.10, 6.11, 6.12 and 6.17), or a “hazard that has the risk of inadvertent confusion” (Items 6.13 and 6.15), or a “hazard due to ambient temperatures that needs to be considered in the scope of works” (Item 6.16)

(c) an item describing a risk of electric shock as distinct from a fire hazard (Item 6.8)

(d) an item describing a nonfunctional or non-compliant fire system which was said to entail a risk of “undetected/unextinguished fire causing damage” (Item 6.14). Self-evidently, this item describes the detection or extinguishing of a fire rather than a fire hazard *per se*.

127 That left four items which were expressly stated to pose “a significant risk of electric shock and/or fire”. They are:

(a) Item 6.1 - “No LV terminal covers on air-conditioners”.

(b) Item 6.2 - “Broken hinge on LV switchboard door exposing live terminals due to the lack of an escutcheon panel”.

(c) Item 6.3 - “Wiring not terminated in a Junction Box”.

(d) Item 6.7 - “Exposed ELV live terminals” (rather than a “significant risk”, this was stated to pose a “risk of short circuit and fire”).

128 With respect to those four items, the following is to be noted. First, the description of the risk in Items 6.2 and 6.3: *“the dangers that may arise from contact with parts of the electrical installation that are live in normal service”* (italics in original) suggest that the risk concerned is one of electric shock rather than fire. Secondly, and additionally, with respect to Item 6.2, I agree with Pasma’s contention above that it is difficult to discern how a broken hinge on the LV switchboard could pose a risk of a fire *per se*. Thirdly, the mechanism or process by which each of those items could result in a fire was not satisfactorily explained in Mr Ritchie’s report. The closest he came to giving that explanation was in section 11, particularly [11.8] and [11.9], as follows:

**11 Electrical energy and fire**

**11.1** Fire requires three primary elements to ignite and sustain, those being heat oxygen and fuel. Once a fire has been ignited, the fuel releases energy in the form of heat;

**11.2** For a comparison, a single standard matchstick is roughly considered capable of releasing 1 BTU (British thermal unit) of heat and burns at about 600-800 degrees Celsius and a match is capable of starting a fire;

**11.3** Heat is a form of energy. 1 BTU is approximately equal to 1055 Joules (J);

**11.4** Electrical energy can start a fire by either creating an arc (which is an instant release of electrical energy, often associated with ionization of the gases in the air) or by a short circuit in which a large flow of current and the resistance of the material creating the short circuit, converts electrical energy to heat energy.

**11.5** A battery for example, may produce thousands of amps on a short circuit which can generate extremely large levels of energy, measured in many tens of thousands or even millions of Joules (KJ or MJ) in the form of heat, limited only by the internal and external impedances of the fault circuit and the capacity of the battery bank. This can easily produce one to two thousand BTU’s for every second the fault remains (or the battery capacity lasts) reaching temperatures greater than 700°C and capable of igniting and supporting the combustion of many common substances (wood, fabrics, vinyl, PVC insulation etc) found in general everyday use.

**11.6** In the event of any residual fumes (from cleaning solvents, petrol, gas etc) which are commonly found on vessels or used during vessel repairs and refits, an extremely small minimum ignition energy (MIE) level, as low as 800μJ (lμJ is 1 micro Joule = lx10-6 Joules = 1/1000000th of a Joule) can ignite, for example petrol vapour, almost instantly in an explosive combustion and release of intense heat

**11.7** For this vessel, I note that the seat of the fire has been suggested as being in or around the vicinity of the engine room switchboards, which consisted of a low voltage board, an extra-low voltage board and a battery bank.

**11.8** Fires in switchboards can start from loose terminals causing a resistive joint which heats up, from short circuits and from overloads.

**11.9** Fires from batteries can be caused by overcharging, loose terminals causing a resistive joint and damaged batteries which can cause internal short circuits and thermal runaway.

(Emphasis and typography in original)

129 Finally, I make the following three findings with respect to the surrounding circumstances that are pertinent to this inquiry. First, the *Miss Angel* had, between late December 2015 and late April 2016, engaged in a four month sea journey from Turkey to Australia without any issue being raised with respect to the safety of the vessel’s electrical system. Secondly, after the vessel was slipped in Cairns and connected to 240 volt AC shore power, Ms Rak was living on board and making extensive use of her electrical system, including lighting, fans and various domestic appliances. In this respect, I accept the evidence of Mr Pasma (see at [35(7)] above) and Mr Steven Larkin (see at [137] below) to this effect and infer from Ms Rak’s absence as a witness that her evidence on this matter would not have assisted Mr Tregidga and Ms Jenkins’ case (see the discussion at [148] below). Again there is no evidence of Ms Rak raising any issue with respect to the safety of the vessel’s electrical system. Thirdly and self-evidently, while the vessel was on the hard stand at the BSE Slipway, there was no necessity to operate her engine or that part of the electrical system associated with it. For the same reason, there was no risk of any loose items within that system, such as batteries, being moved about on the vessel as would otherwise occur by the motion of the waves if the vessel were at sea.

130 In conclusion on this inquiry, having regard to all of the evidence set out above and particularly the features of it which have been reviewed in the immediately preceding paragraphs, I have come to the following conclusions. First, there was a reasonably foreseeable risk that the poor condition of the electrical system on the *Miss Angel* could result in injury or harm being occasioned to the vessel itself or to people present on her. For present purposes, that risk involved two forms of hazard: a fire hazard and an electrical shock hazard. With respect to the former hazard, in all the circumstances outlined above, I do not consider the magnitude of that risk was significant and I consider the probability of its occurrence was small. Secondly, because this risk of injury or harm was pre-existing, that is it was not created by Pasma, it could only be required to take action in respect of it if it did something while undertaking the works on the vessel to increase the risk of that hazard occurring, or if the nature of its relationship with Mr Tregidga and Ms Jenkins was such that it was required to take action to prevent the risk of that hazard occurring. Whether the first occurred is a question that will be considered in the next section of these reasons (Section 5 – The breach and causation issues). Whether there were some features of the relationship between the parties that, in addition to the existence of this risk, obligated Pasma to take action to prevent the *Miss Angel* sustaining injury or harm associated with it occurring, is the question to which I will turn in the next inquiry.

## Issue 4(b)(i) – The scope of Pasma’s duty in tort – the salient features of the relationship

### The issue as pleaded

131 The pleading of this issue in Mr Tregidga and Ms Jenkins’ FASC and their contentions below proceeded on the footing that there was a contractual relationship between them and Pasma and therefore focused almost exclusively on the terms of that engagement. Since I have concluded that Allure was the contracting party with Pasma, that focus is no longer valid. Nonetheless, as has been observed earlier, the terms of that engagement may have an indirect bearing on the circumstances of the relationship mentioned above so it is appropriate to identify what the FASC said about those terms. That is contained at [9] and [10] of the FASC, which are already set out above (at [65]).

132 Pasma did not admit either of those sets of allegations in its defence and, in respect of [10], it added that it:

…

(b) says that no specific scope of works was given by [Mr Tregidga and Ms Jenkins] to [Pasma] and work was to be conducted on an *ad hoc* week-by-week basis;

(c) says that the general scope of works included electrical repairs, inspection and service of the Vessel’s lighting, power, battery systems, bilge alarm system and switchboard; and

(d) says that the work to be completed by [Pasma] did not include connecting the Vessel to shore power or managing or inspecting the Vessel’s connection to shore power.

133 Pertinent to this inquiry, it is also worth mentioning some other parts of Mr Tregidga and Ms Jenkins’ FASC and Pasma’s defence which canvassed the proposition that Mr Tilton should have acted to disconnect the *Miss Angel* from the 240 volt AC shore power in order to prevent injury or harm being caused to the vessel. That issue is pleaded at [16(c)]-[16(f)] and [19(a)]-[19(e)] of the FASC (see at [94]-[95] above) and the corresponding paragraphs of Pasma’s defence (see at [97]-[101] above).

### The evidence

134 It is convenient to begin with the evidence on Pasma’s terms of engagement. That evidence came from three witnesses: Mr Tregidga, Mr Pasma and Mr Tilton. Most of that evidence is already set out above: Mr Tregidga at [30(49)]-[30(58)] and Mr Pasma at [34(8)]-[34(13)] and [35(4)]-[35(12)]. Mr Tilton dealt with this aspect in his first outline of evidence at [10]-[11]. Those paragraphs are already set out at [112] above. He returned to the same subject matter in his second outline of evidence where he gave the following evidence:

8. It is usual practice that when I attend a vessel to do electrical work I report to either the vessel’s engineer, or if there is no engineer, the captain of the vessel or, if the captain is absent, the owner. It is not usual practice or my experience that an electrician is appointed the person in charge of a vessel security. I was not appointed the person in charge of the Vessel at any point in time. The Vessel did not have an engineer so I reported to Ms Rak who was the captain of the vessel. I was informed that she would be the one to report to for any repairs that were required due to the owner's lack of experience with vessel systems. Ms Rak would make the determination of whether or not a job would be required.

9. … I reported to Ms Rak that the engine room was not sealed for fire and flooding and that there was no point working on the AC or DC system until the surveyor had a solution for how the engine room was going to be sealed. For this reason electrical works on the ships general wiring was postponed.

10. It is not within the scope of my expertise to design or install the mechanical fire safety components of the Vessel. I was not aware who was responsible for this aspect of the repair work but I would expect the marine surveyor for the Vessel to coordinate this, either independently or at the direction of Ms Rak. When a Vessel is slipped to be brought into survey, a marine surveyor usually becomes involved to my knowledge at the very beginning before work commences.

12. Before starting work I spoke to Catherine Jenkins about the need to rehouse the batteries that provided electrical power to the Vessel when the Vessel was not connected to shore power I understood from speaking to Ms Jenkins that she was keen to keep costs low in respect of this and any other work.

…

**Scope of Works**

15. I did not receive a specific scope of works from Ms Rak, or any other person, regarding the electrical work or any work that was to be done on the Vessel. Instead, I understood that I was engaged to review and repair the electrical systems of the Vessel in an attempt to bring the Vessel into compliance with Australian Standards and NSCV Standards as they related to Commercial Vessels. I understood the vessel was not built to Australian Standards, given it was built overseas. I also understood the vessel was not to NSCV Standards or any known standard. No particular electrical faults or issues of concern were alerted to me when I attended the Vessel except for a light that was not working that Ms Rak said needed to be replaced. I was no concerned from my observations about my personal safety or the safety of the Vessel from my inspection and I understood the Vessel had just completed a length sea voyage and proved operational.

16. Based on my initial inspection of the vessel and my understanding that it was to be brought into survey pursuant to AS3000 and NSCV Standards, I generally understood that the Pasma was engaged to conduct work to satisfy the categories outlined in AS3000 contents extract and the NSCV Standards …

17. I never prepared nor was I asked for a schedule of when specific works would be undertaken and it was my understanding that work was to be done on an ad hoc weekly basis in consultation with Ms Rak and that the budget was limited.

…

**Assistance sought from the Surveyor**

36. On the first occasion I met the surveyor, Steven Larkin, I spoke to him about the amount of work the Vessel required.

(Emphasis and errors in original)

135 Next, it is convenient to turn to the evidence concerning the broader circumstances of the relationship between Pasma and Mr Tregidga and Ms Jenkins, including the control of the vessel and its electrical system. First, in his second outline of evidence, Mr Pasma said (at [7] – which is already set out at [35] above but bears repeating in this context):

When I arrived at the Vessel I entered by the gangway and observed that the Vessel was connected to shore power. Ms Rak told me that she was living on board. I observed that she had what appeared to be an office with a laptop set up in the lounge area and that the lights were on in all areas of the Vessel that I inspected.

136 As well, Mr Pasma gave the following answers when questioned about the terms and conditions that were referred to in his company’s invoice (see at [39] above) relating to the safety and security of a vessel as follows:

And, in particular, was there – if you look at page 1151, was there any discussion about who was responsible for the – I’m looking at clause 5.6. Who would be responsible for the safety and security of the vessel?--- ....

Was there any discussion about who would be responsible for the safety and security of the vessel?---There was no discussion, no.

Thank you?---The owner of the vessel is always responsible.

Well - - -?---In particular the captain.

137 Secondly, Mr Steven Larkin gave the following oral evidence about the people he observed to be present on the *Miss Angel* in the period prior to the fire:

And no one, such as Ms Rak, who had sailed the vessel at least part of the way from Turkey, suggested to you any other such thing, that there was any other safety or other problem?---That’s correct. In fact, Ms Rak was living on the vessel.

…

Well, there were all sorts of appliances and electrical apparatus on the vessel that were powered by whatever power supply was available, wasn’t there?---I would presume so.

Well, to be down in the vessel itself under the deck required lighting, didn’t it?

…Yes.

Ventilation; fans and the like?---Yes, that’s right.

And can you just – apart from the [Pasma] electrician, Mr Tilton, there were other contractors working on the vessel?---Yes.

In the week prior to the fire, there was something like eight different contractors working on the vessel, were there not?---I don’t know the actual number, but that doesn’t sound unreasonable.

138 Thirdly, on the same subject matter, Mr Tregidga gave the following oral evidence:

And you understood that BSE employed electricians?---No, I didn’t. I said before, I’m not sure what tradesmen they have. There were some trades they didn’t employ.

Well, anyway, whoever it was, was someone that was going to be chosen by BSE?---True.

Because it’s the BSE slipyard, isn’t it?---It is the BSE shipyard. Yes.

And when I say it’s a – a slipyard, it’s a business premises that’s entirely, at least from land, fenced off?---From land it is, yes. Otherwise not.

And people aren’t permitted just to come and go as they please without the permission of BSE?---They are not permitted to, but they can.

Right. And – and – so BSE maintain control of those people who come onto the premises to do work on the ships?---Yes, you would certainly hope that.

139 Fourthly, the salient parts of Mr Tilton’s extensive evidence on this subject matter are as follows. First, with respect to the period prior to the day of the fire, he said in his first outline of evidence:

16. While undertaking works on the Vessel I maintained Daily Job/Service Cards …

17. In addition to maintain Daily Job/Service Cards, I made handwritten notes relating to the Vessel’s circuitry and electrical compliance issues … These additional notes were taken as I was not provided with a copy of the electrical drawings for the Vessel.

18. On or shortly after 27 May 2016, I spoke to the surveyor, who would come and go throughout the time I worked on the Vessel, and I requested the Vessel’s electrical drawings, which were not on board. I also enquired as to what fire modification would be undertaken in the engine room as it was clear that the engine room would need fire cladding installed and was not compliant.

19. During the period from 27 May 2016 to 8 June 2016 I undertook works I deemed to be safe. Those works were undertaken on:

(a) the Extra Low Voltage (**ELV**) electrical systems of the Vessel;

(b) the bilge pump system; and

(c) the Vessel’s engine starting and house batteries.

20. While undertaking works on the Vessel from 27 May 2016 to 8 June 2016:

(a) I did not undertake works on the Vessel’s Low Voltage (**LV**) Alternating Current (**AC**), electrical systems other than to do my own drawings of these;

(b) I did not observe any interruptions to the Vessel’s power nor did I observe the Vessel’s power to trip;

(c) I observed that electrical cabling was installed on the ceiling of the engine room and was not suitably supported (i.e. there was no cable tray to support the cables);

(d) I heard a number of electrical appliances, including a fridge, operating on what I suspect was the Vessel’s AC or DC electrical systems;

(e) I observed that the Vessel’s lighting system was on and powered by the shore power.

(f) I observed that there were connections to small appliances such as fans and smoke detectors which, in my opinion, it did not appear as though they were connected by a professional electrician;

(g) I did not require and did not utilise any appliances connected to the Vessel;

(h) I observed that the engine room did not have proper cladding and fire protection which delayed me from undertaking works on the AC electrical system;

(i) I did not have any conversations with [Mr Tregidga and Ms Jenkins] regarding the status of the Vessels’ electrics or the work I was undertaking;

(j) Any directions that I did receive regarding the Vessel came from the Vessel’s Captain, [Ms Rak];

(k) I received no instructions from [Mr Tregidga and Ms Jenkins] or BSE as to the protocol to be followed if I were the last person on the Vessel at the end of the day;

(l) It was my responsibility to keep [Ms Rak] informed of the work that I was undertaking;

(m) There was always someone on the Vessel at the time I finished work every day;

(n) I do not recall working or being present on the Vessel alone.

21. I did not undertake work on the LV AC electrical systems as I was awaiting information from the surveyor regarding the noncompliant engine room. I was aware that the engine room was noncompliant with the relevant standards as, amongst other things:

(a) there was a large open cable penetration which lead from the engine room to the wheel house;

(b) the engine room lacked the requisite fire cladding; and

(c) the door to the engine room did not have a proper seal.

22. It was not within the scope of my job as an electrician to rectify the compliance issues outlined above.

23. I was not directed to, nor did I understand it to be my task, to energise or de-energise the Vessel at the beginning or conclusion of a working day.

24. It was my understanding that the shore power and the maintenance of the shore power was the responsibility of BSE, the Vessel’s Captain or [Mr Tregidga and Ms Jenkins].

25. As is my usual practice, I brought my own headlamp to work each day and did not specifically require the lighting on the Vessel in order to undertake my work each day.

26. It is not normal practice for an external electrician undertaking works on a Vessel to de-energise the Vessel or interfere with the shore power unless the electrician requires the shore power to be turned off for a period of time while undertaking works on the Vessel.

27. I do not remember requiring the shore power to be turned off for any period of time during the period I worked on the Vessel.

…

36. When I left the Vessel on 8 June 2016 I did not de-energise the Vessel and I did not witness [Ms Rak] de-energise the Vessel, consistent with my previous actions throughout the time I performed works on the Vessel, as the Vessel was connected to shore power.

37. I never witnessed [Mr Tregidga and Ms Jenkins] or [Ms Rak] or any other tradesperson de-energise the Vessel during the period I worked on it.

38. Throughout my works on 8 June 2016 I do not recall undertaking any different works than I normally would or noticing anything which would lead me to suspect the Vessel was unsafe when I exited the Vessel at the end of the day. If I had thought the Vessel was unsafe, I would have notified the Captain.

(Emphasis in original)

140 Then, with respect to the same period, he said in his second outline of evidence:

11. A large portion of the electrical equipment on board a vessel (including this Vessel) is contained within the engine room or on the bridge. I chose to start work on the bilge alarm system which is extra low voltage. I first installed a junction box to accommodate the bilge wiring. I chose to start with the bilge alarm system because it was a job I could start and finish easily without being held up by waiting for any drawing and/or further directions from the Captain or the marine surveyor.

…

13. Each time that I attended the Vessel Ms Rak was present.

…

18. When I undertook the inspection of the Vessel on 26 May 2016, I observed that the vessel had a DC (Direct Current) electrical system on board. The Vessel’s DC system operated on 24 Volts from energy stored in the Vessel’s house batteries, which could be replenished by the Vessel’s charging system.

19. I also observed that the vessel was connected to shore power when I first inspected the vessel.

20. To my knowledge, the shore power remained connected to the vessel at all times. However, as I was not responsible for connecting the vessel to shore power and the connection and disconnection of the vessel’s shore power did not affect the work that I was undertaking on board the vessel, I was not concerned with the connection.

21. When I commenced work on the vessel, I was not supplied with any electrical or technical drawings …

…

23. During my time on the vessel, I performed electrical works on:

a) The vessels house battery boxes.

b) The bilge system in the engine room. Which is a 24VDC system.

c) The Vessel’s engine starting battery boxes.

d) The vessels generator starting battery box and isolator. Which is a 12VDC system.

24. The “Bilge pumps system”, where I commenced work, is a water pump used to remove water from the bilge of the Vessel. This work did not represent any risk in an electrical sense to the Vessel or others on board because the bilge pump had circuit protection that I designed and installed and it did not have enough electrical power to represent an electrical safety risk.

25. The Vessel’s engine “starting batteries” power the “starter motor”. The “house batteries” power the Vessel’s “DC electrical system” when it is being used on the vessel. My experience is that there is very little risk associated with working on the Vessel's engine starting and house batteries when they are disconnected. The only risk when working with disconnected batteries is associated with either dropping a conductive object on the battery terminals or dropping the battery on your foot or if the battery is leaking acid, but leaking acid does not represent a fire risk.

…

31. I performed electrical works on the vessel between 27 May 2016 and 8 June 2016.

…

33. My risk assessment was a non-intrusive assessment of the vessel’s electrical systems, to ensure there was no risk of someone working on the Vessel being injured, and no risk of a fault that would cause significant damage. The assessment was visual.

34. The electrical work to the Vessel I conducted from 27 May 2016 to 8 June 2016 was as follows:

a) Initial inspection as described in paragraphs 18 to 21 (inclusive) herein;

b) Further significant inspections to the onboard electrical systems of the vessel;

c) visual and operational tests of the general purpose outlets;

d) redesign of the bilge system.

e) electrical repairs to the Bilge pump systems.

f) the isolation, disconnection and reconnection of the vessel's engine starting batteries and generator starting batteries;

g) the disconnection and isolation of the house batteries.

35. Whilst I did not rely on shore power when undertaking my work, it is normal practice for other trades to require power on board to allow them to conduct their works.

…

39. I left the Vessel on the day of the fire at approximately 4:15pm with Ms Rak . On most other occasions that I departed the Vessel Ms Rak or other staff and/or workers were still on board the Vessel. On one occasion when I was last to leave I was told only to close the door on exiting the Vessel.

(Errors in original)

141 He also provided some answers relating to that period in his interview with Mr Kelly as follows:

|  |  |  |
| --- | --- | --- |
| **Q** | **160** | **So the vessel is on shore power on the hard stand?** |
| A |  | Yeah so the charger is a 240 volt charger and it puts out output 24 volts and it was on but I don’t know whether it was working or not because there were you know the shipyard’s electrician was coming on and charging the batteries with external charger, a portable charger. |
|  |  |  |
| **Q** | **161** | **Yeah because I was going to ask you that because in one of the photographs […indecipherable….] yesterday, ah excuse me this morning, there’s big bull dog clips like battery clamps on one of the batteries….** |
| A |  | Yeah. |
|  |  |  |
| **Q** | **162** | **I was what’s that about, because they weren’t, I didn’t see them when I was there.** |
| A |  | Yeah that’s right they weren’t, they weren’t there at the time, like all that had been done, they individually charged you know like each day they, during the day they were just charging all the batteries up. |
|  |  |  |
| **Q** | **163** | **Do you know what, what was the purpose of that?** |
| A |  | They said that at one point in time like when I first arrived on the vessel probably the second day or something like that, they said that the shore power tripped out and overnight it drained all the batteries, which seemed odd to me because you know they’re a whole house battery, you’ve got how many are there, eight, you had three six nine ten, ah, three six seven eight, eight house batteries connected, so my initial, my initial thoughts about it was that there was something wrong with the system it wasn’t connected right or there was some problem with it but I hadn’t delved into that yet, that was going to be you know as I reconnect everything, the batteries once I put them in the container then that was going to be you know how I, I determined that whether or not everything was connected properly, working properly. |
|  |  |  |
| **Q** | **164** | **So is that BSC’s** [sic BSE’s] **electricians have been on board obviously someone from BSC** [sic BSE] **had been on board put the charger on?** |
| A |  | That’s correct. |
|  |  |  |
| **Q** | **165** | **And you just told me as you did yesterday that you were made aware that the power had tripped off, the shore power?** |
| A |  | Yes that’s right. |
|  |  |  |
| **Q** | **166** | **Was that connected to the bollard the free standing bollard or did it go all the way back to the switchboard, do you know?** |
| A |  | I don’t, I don’t know that. I don’t, I didn’t look into it because they just told me that, I didn’t, and I wasn’t actually involved in restarting or anything like that. |
|  |  |  |
| **Q** | **167** | **So it created, who else was working on the boat when you were there?** |
| A |  | During, during the charting period it was Simon from, from [BSE]…. |
|  |  |  |
| **Q** | **168** | **Yeah.** |
| A |  | He was doing battery charging but other than that I don’t think there was, oh there was a gentleman that was doing the electronics, he was putting in new electronic gear. |
|  |  |  |
| … |  |  |
|  |  |  |
| **Q** | **207** | **Was there anybody else doing work on the boat prior to the fire other than yourself? On that day?** |
| A |  | Ah, well I’m the only one in the, I was in the engine room only, I don’t, I know [Ms Jenkins] was there I saw her there in the morning, [Ms Rak] was there all day. |
|  |  |  |
| … |  |  |
|  |  |  |
| **Q** | **211** | **Each day when you left what was the situation with what was still energised on the vessel at the time. So was the shore power turned off or what happened?** |
| A |  | No. Well I don’t know like, I, I didn’t manage that bit, [Ms Rak] was there last so I don’t know how she managed the vessel before she left. |
|  |  |  |
| **Q** | **212** | **But each day, who turned the shore power on?** |
| A |  | I don’t know I was never there early enough to do that. I was never the first person there. Like generally I’ve only, I was the last person to leave there maybe twice and then I was told to just close the doors and that would be fine so I don’t know what actually you know how the procedure was you know prior to leaving or arriving. |

(Emphasis in original)

142 In his cross-examination Mr Tilton was asked about question and answer 162 above (at [141]) and, in particular, about the battery charger present in the engine room and he gave the following evidence:

…. There’s just one last question that I will ask you, Mr Tilton. You gave some evidence earlier today to a battery charger which was depicted in one of the photographs that I showed you; do you remember that?---Yes.

That was the battery charger on the cabinet which housed the house batteries and which had a red light that I pointed out to you; do you recall that?---That’s correct.

And that was a battery charger that was hardwired into the vessel’s electrical system; correct?---Correct.

And that charger was obviously for the purposes of charging batteries. Which – was that all of the batteries in the area that you were working on on 7 or 8 June?---Yes.

So that’s both the main engine batteries and the house batteries; is that so?---They can be linked together. Yes.

Now, there is – the shipyard electricians were also using a portable battery charger in the period that you were employed onboard the vessel or working onboard the vessel; is that correct?---Yes.

You observed them using that charger to charge certain batteries; is that so?---Yes.

What batteries were they charging with that?---It was the house batteries, I believe.

And the source of the power for that portable charger, do you recall what that was?---No, I don’t.

Do you recall whether that was also connected into the power box, the RCD box, the GPO box that you gave some evidence about earlier, and which your heat gun was connected to?---Yes, it could have been.

Your recollection is that the portable charger was not itself hardwired into the vessel’s electrical system. That’s correct, isn’t it?---Yes.

So to – and therefore, it wasn’t a charger that could be isolated at the switchboard, or in the engine room, or the switchboard on the helm. That’s correct, isn’t it?---That’s right.

It would be isolated by removing the extension cord from the bollard on the shore side. That’s correct, isn’t it?---Well, you can turn it off at the power box.

Or in the - - -?---The engine.

143 Further, in both his cross-examination and re-examination, Mr Tilton was asked about the RCD device on the vessel and its relevance to the tripping incident described in questions 163 to 166 above, and their respective answers (see at [141]). He gave the following evidence about that topic:

[**Cross-examination**]

And do you recall who it was who told you about that incident?---I don’t remember.

…

And do you recall when you were told?---No, I don’t.

Do you recall whether it was just after you first arrived at the vessel, probably the second day or something like that?---It’s possible.

And what is it that you recall you were told on that occasion?---I heard that’s an RCD trip.

…

… And can I ask you just to look at question 163. And then there’s an answer that – then it says:

*They said that at one point in time –*

this is a transcript of your answer to Mr Kelly’s question, which had to do with some bulldog clips and battery packs in the earlier question. But you say that the shore power tripped out and overnight, it drained all the batteries. Does that assist you in recalling that that’s what you were told about ..... ?---I believe so. Yes.

…

And you were told that – and that – you were informed that on either 27 or 28 May by someone who was – it appears was from BSE. Do you see that?---Yes.

And - - -?---I see BSE. I don’t remember who told me.

…

And when you were told this, your initial thought was that there must be something wrong with the system. Is that correct?---Yes.

And the system you were referring to was the electrical system I take it, correct?---Yes.

And the electrical system that interacted with the factories, is that the case?---Yes.

And you also thought that it – it may not have been correct – connected right, or that there was some problem with it?---Yes.

…

But did you investigate this incident at all after you had told about?---No.

…

An incident like that would be something of some concern to the electrician that was working on the vessel bringing it up to compliance standard, would you agree with me to that effect?---Maybe.

Well, you would want to know why it is that the vessel that you were working on had tripped and why the batteries had drained, that’s correct, isn’t it?---Possibly, I – at the time, it – it didn’t – wasn’t of anything – any concern at the time.

 [**Re-examination**]

Yes. Can you tell me what an RCD is, as it concerns this case?---So, a residual current device.

And what does it do, or not do?---It trips a breaker on an earth fault, or imbalance of active and neutral current.

And were there one or more of these devices on the boat, Miss Angel?---Yes, there was.

Where would one find those prior to the fire?---In the switchboard, AC switchboard, down in the engine room.

Why are they located there, and what is their function there?---They protect all the downline circuits from that.

Protect the circuits from what?---From any imbalance or earth – mainly earth leakage, what we consider earth leakage, earth faults.

That is faults that are found in the electrical system onboard the vessel?---That’s correct.

144 Finally, there are three exhibits which are pertinent to this inquiry. First, the Slipway Contract Terms and, in particular, the last sentence of cl 14 of it dealing with subcontractors (see at [74] above). Secondly, there is a bundle of accounts which Allure paid to BSE which include numerous items during the period leading up to the fire for power usage on the *Miss Angel* and at least 20 levies for subcontractor inductions. Thirdly, there are Mr Tilton’s Job Cards, which he refers to in his first outline of evidence above (see at [139(16)] and [139(17)]). The contents of those Cards have been summarised earlier in these reasons (see at [117] above).

### The contentions

145 It can be seen from the pleadings set out earlier that Mr Tregidga and Ms Jenkins raised several aspects of their relationship with Pasma. They included the scope of the works it was required to undertake under the agreement with Allure, its obligations in carrying out those works and the control it had over the vessel’s electrical system. In particular, in their written and oral submissions, they contended, among other things, that the scope of the works under the agreement between Pasma and Allure required it to bring the “whole of the vessel’s electrical system” up to the requisite standard. They contended that Pasma was therefore wholly responsible for doing whatever was necessary to repair, survey and bring the vessel to that standard. They also contended that the program of works was entirely within the discretion of Mr Tilton and/or Pasma and that the electrical system in the engine room on the vessel was therefore under the “exclusive management and control” of Mr Tilton.

146 Pasma’s contentions on this aspect were similarly extensive. Among other things, it contended that its retainer with Allure was to work on the vessel on an “*ad hoc* basis” at an hourly rate in order to procure a commercial survey certification for the vessel as directed by, among others, Mr Steven Larkin, the Marine Surveyor. It contended there was no lump sum fixed price for the works, nor any agreement for progress, or staged, payments. Accordingly, it contended that “at any stage either party could have resiled from further performance”. Further, it contended that its retainer was not “to separately address supposed defects requiring immediate attention or immediate precaution to be taken against known risks”. In addition, it contended that the agreement did not require it to maintain control over and supervise the electrical safety of the vessel.

147 Pasma also contended that it had no effective control over the vessel’s electrical system, nor the vessel itself. It contended that, instead, a BSE electrician controlled the connection and disconnection of shore power to the vessel and BSE itself controlled access to the vessel under the terms of its agreement with Allure. As well, it contended that, while Mr Tilton was performing works on the vessel, Ms Rak, the Master, lived on it and up to eight subcontractors were working on her, all of whom required a power supply to carry out their activities.

### Consideration and findings

148 In reviewing the salient features of the relationship that emerge from the evidence outlined above, it is appropriate to begin with the Master of the *Miss Angel*, Ms Rak. As has been mentioned a number of times, Ms Rak did not give evidence at the trial. That, despite the fact that, as Master of the vessel, she was clearly in the same camp as Mr Tregidga and Ms Jenkins (see *Claremont Petroleum NL v Cummings* (1992) 110 ALR 239 at 259 per Wilcox J and *Australian Securities and Investments Commission v Australian Lending Centre Pty Ltd (No 3)* (2012) 213 FCR 380; [2012] FCA 43 at [153] per Perram J). Moreover, she was so closely involved in many of the events leading up to the fire on the *Miss Angel* that her evidence concerning those events was likely to be both material and important. Her unexplained absence as a witness at the trial therefore permits an inference to be drawn that her evidence would not have assisted Mr Tregidga and Ms Jenkins’ case (see the discussion in *Ross, in the matter of Print Mail Logistics (International) Pty Ltd (in liq) v Elias* [2021] FCA 419 at [60]-[63]). Indeed, I have already drawn such an inference earlier in these reasons (see at [52] and [129] above).

149 Ms Rak’s absence also removes any impediment to my accepting the following parts of Mr Tilton’s evidence about the arrangements that applied while he was working on the *Miss Angel*:

(a) that he was required to report to Ms Rak in respect of any repairs that were required to the vessel’s electrical systems and she would make a determination as to whether or not that work was required;

(b) that he was required to keep Ms Rak informed of the work he was undertaking and to act on any directions she gave to him regarding that work;

(c) that Ms Rak impressed upon him that the budget for the works “was limited”;

(d) that, except for a light that was not working on the vessel which Ms Rak asked him to replace, she did not alert him to any “particular electrical faults or issues of concern” with respect to the electrical system on the vessel;

(e) that he reported to Ms Rak that “the engine room was not sealed for fire and flooding and that there was no point working on the AC or DC system until the surveyor had a solution for how the engine room was going to be sealed”; and finally

(f) that Ms Rak was in charge of the security of the vessel.

150 On the same footing, I also accept Mr Steven Larkin’s evidence that, in the period prior to the fire, neither Ms Rak nor anyone else suggested to him that there was any safety or other similar problem with the electrical system on the vessel.

151 I turn next to Mr Tregidga. For the purposes of this inquiry, I consider the following matters are significant. First, that, in the period leading up to the fire, he did not express any particular concerns to Mr Tilton, or to Mr Pasma, about the safety of the electrical system on the *Miss Angel*, nor seek any advice from them about that matter. Secondly, of the two contracts he entered into on behalf of Allure, with respect to the *Miss Angel*, he must have been aware that, apart from dealing with the upgrade works required to the vessel’s electrical system, the agreement with Pasma was silent as to the security of the vessel and as to the safety of her electrical system. Conversely, he must also have been aware that the other contract, namely the Slipway Contract, placed the security of, and access to, the vessel in the hands of BSE. Furthermore, under that contract, he must have been aware that BSE was responsible for connecting and supplying the 240 volt AC shore power to the vessel.

152 Next, I turn to the other co-owner of the *Miss Angel*, Ms Jenkins. Her only relevant involvement in the events leading up to the fire was to impress on Mr Tilton that he needed to control the costs of the works that he was carrying out on the vessel. Otherwise, as with her husband and Ms Rak, there is no evidence that, in the period leading up to the fire, she expressed any particular concerns about the safety of the electrical system on the *Miss Angel*, or sought any advice or assistance from Mr Tilton relating to that matter.

153 Turning then to Mr Pasma’s involvement in the events leading up to the fire. As has already been outlined above, his main involvement was to enter into the oral agreement under which his company, Pasma, undertook the works on the *Miss Angel*. While both Mr Pasma and Mr Tilton gave evidence about the terms under which Pasma was engaged to perform those works, I consider the most reliable and accurate evidence on that subject matter is the contemporaneous record comprising Mr Tilton’s Job Cards. Having regard to the history recorded in those Job Cards, I find that the dealings between the parties which led to those terms being established proceeded in two stages.

154 The first stage commenced on or about 27 May 2016, when Ms Rak met with Mr Pasma and Mr Tilton at the *Miss Angel* to discuss certain aspects of those works. Mr Pasma and Mr Tilton inspected the vessel on that occasion and Ms Rak then engaged Pasma to undertake repairs to a light somewhere on the vessel and to its bilge pump. According to those Job Cards, Mr Tilton undertook those repairs on 30 and 31 May 2016.

155 While the possibility of more extensive works on the *Miss Angel*’s electrical system was probably discussed in that first stage, I do not consider any agreement was made with respect to them at that time. Instead, that agreement was made in the second stage which began on or about 2 or 3 June 2016, when Mr Tregidga met with Mr Pasma to discuss the electrical works that would be required to bring the *Miss Angel* to the requisite Australian commercial survey standard. During that discussion, Mr Pasma told Mr Tregidga that Pasma was able to undertake those works and he estimated that they would take at least three weeks. At the conclusion of that discussion, Mr Tregidga entered into an oral agreement with Mr Pasma to perform those works.

156 The agreement was to achieve that purpose under the general direction of Mr Steven Larkin and Ms Rak. There was no quoted lump sum price and there was no fixed term for achieving completion. Instead, it was to be achieved as soon as reasonably possible at an hourly rate, but at a reasonable overall price. There was also no specified scope of works and no requirement to fix any particular defects or attend to any safety concerns present in the electrical system on the vessel. Hence, I consider Pasma’s description of the terms of its engagement in its contentions above (at [146]) is broadly accurate. On the other hand, I consider that Mr Tregidga and Ms Jenkins have, in their contentions above (at [145]), misstated the scope of those works. In particular, I do not consider the agreement extended to carrying out repairs on the vessel except to the extent that was incidental to the upgrade works. That is so because all the repairs requested by Ms Rak had already been undertaken in the first stage (see at [154]).

157 Before leaving Mr Pasma’s involvement, it is important to mention his inspections of the *Miss Angel*’s electrical system and what they revealed. On that subject, I accept his evidence that “there were no identifiable issues which caused me to believe the electrical system posed a risk of injury to someone onboard the vessel”. Furthermore, in all the circumstances, I do not consider Mr Pasma, or his company, was obligated under the scope of works of its agreement with Allure, or because of his status as a licensed electrician, to carry out a more intrusive or detailed inspection of the vessel’s electrical system for the purposes of either the repair works that were carried out in the first stage mentioned above or the upgrade works that were being carried out in the second stage.

158 Finally, it is necessary to review the involvement of Mr Tilton. Apart from Ms Rak, he was obviously the person most directly involved in the events leading up to the fire. The following features of his involvement are particularly pertinent to the present inquiry. First, as well as his discussion with Ms Rak about the bulkhead in the engine room of the *Miss Angel*, which has already been mentioned above (see at [149(e)]), he also had a discussion with Mr Steven Larkin about that matter. As a result of those discussions, in the period leading up to the fire, he was not working on the AC electrical system on the vessel because he was awaiting direction from Mr Steven Larkin on a solution which would avoid duplicating the work on the vessel’s wiring. Consequently, on the day of the fire, he was working on the vessel’s ELV system and, in particular, on the batteries in its engine room. Accordingly, while he clearly had direct control over his work on those batteries and the ELV system in the engine room, I do not consider that meant he had control over the entire electrical system in the engine room on the *Miss Angel*.

159 Secondly, I consider the same conclusion applies with even more force with respect to the entire electrical system on the vessel and the 240 volt AC shore power that was being supplied to it. In that respect, I accept Mr Tilton’s evidence that he was not responsible for the connection or maintenance of that power supply to the vessel and he did not use it when he was performing his work on the vessel and instead he had with him, and used, his “own headlamp”. I also accept his evidence that he did not, on any occasion, switch the 240 volt AC shore power supply on the vessel on or off and nor did he observe anyone else doing that. Further, I accept his evidence that he did not require that power to be turned off for the purposes of his work on the vessel.

160 Finally on this aspect, I accept Mr Tilton’s evidence that he did not observe any interruptions to the vessel’s 240 volt AC shore power and nor did he observe that power to trip. Most importantly, I accept his evidence that he was not consulted about, nor asked to assist with respect to, the tripping incident that occurred in the vessel’s electrical system in late May. Instead, a licensed electrician named “Simon”, who was employed or engaged by BSE, dealt with that incident. For these reasons, I reject Mr Tregidga and Ms Jenkins’ contentions above (at [145]) concerning the level of control Mr Tilton had over the electrical system on the *Miss Angel*.

161 Thirdly, pertinent to this inquiry, I also accept Mr Tilton’s evidence that he was not responsible for the design or installation of the mechanical fire safety components on the vessel; that he was not responsible for the security of the vessel; and that he was not provided with a set of keys for the vessel. Further in that respect, I also accept his evidence that he was never the first person on the vessel in the morning and that, on the one or two occasions when he was the last person present in the afternoon, he was instructed to “just close the doors and that would be fine”. Finally, I accept his evidence on two other aspects. First, that, while he was working on the vessel, the 240 volt AC shore power on the vessel was being used extensively by, among others, Ms Rak and numerous subcontractors, including for lighting, electrical appliances and ventilation. Secondly, I accept his evidence that, as a result of his inspections of the vessel’s electrical system, “there were no electrical faults or hazards that I could identify that would cause me to consider the vessel unsafe to commence work” and further that “[t]hroughout my works on 8 June 2016 I do not recall undertaking any different works than I normally would or noticing anything which would lead me to suspect the Vessel was unsafe when I exited the Vessel at the end of the day”. Furthermore, in all the circumstances, I do not consider Mr Tilton was required to carry out a more intrusive or detailed inspection of the vessel’s electrical system at either of the first or second stage of the works mentioned above.

## Issue 4(b)(i) – The scope of Pasma’s duty in tort – conclusion

162 Having regard to all of these matters, I do not consider there were any features of the relationship between Pasma, on the one hand, and Mr Tregidga and Ms Jenkins, on the other, that gave rise to an obligation on Pasma’s part to act to prevent the pre-existing fire hazard risk in the *Miss Angel*’s electrical system manifesting itself. That is so for all of the reasons outlined above, including that, in the period leading up to the fire, neither Mr Tregidga, nor Ms Jenkins, nor Ms Rak alerted Mr Pasma, or Mr Tilton, to, or sought advice from them with respect to, any particular defects in, or safety concerns about, the *Miss Angel*’s electrical system so as to place reliance on their skills as licensed electricians with respect thereto. Secondly, in the same period, there is nothing to indicate that, as the owners of the *Miss Angel*, Mr Tregidga and Ms Jenkins were in a position of vulnerability vis-à-vis Pasma that it, or Mr Tilton, or anyone at Pasma, should have acted in the manner described above. Thirdly, in their inspections of that system in the same period, they did not observe anything that caused them to believe that there were any defects in it that were likely to cause a fire. Fourthly, except to the extent it was incidental to the upgrade works on the vessel’s electrical system, Pasma was not required, under its agreement with Allure, to attend to any particular defects in, or safety concerns about, the electrical system on the *Miss Angel*. Fifthly, in the period leading up to the fire, Pasma did not have control over the 240 volt AC component of that electrical system, or its 240 volt power supply. Sixthly, and most importantly, in the same period, Mr Tilton did not use or work on that component of the system such that he could have done anything to alter the existing fire hazard risk that was present in that system. To the contrary, on the day of the fire, Mr Tilton’s work was confined to the separate ELV component of that system and the batteries in the engine room of the *Miss Angel*.

163 It follows that the answer to the question posed in Issue 4(b)(i) is that the scope of Pasma’s duty of care in tort did not extend to require it to take action to prevent the *Miss Angel* sustaining injury or harm from the manifestation of a fire hazard risk arising from a defect in her electrical system.

# 5. BREACH AND CAUSATION ISSUES

## Introduction

164 As already mentioned, Issues 4(d) and 4(e) and 5(a) and 5(b) are interrelated. They concern the questions of breach and causation. The former requires consideration of the works Mr Tilton performed on the *Miss Angel* to determine whether anything he did, or omitted to do, in performing those works constituted a breach of what has been referred to above as, the standard duty of care. The latter requires consideration of the expert evidence with respect to the point of origin of the fire and its causes to determine whether, if Mr Tilton committed a breach of his duty of care, that breach caused the fire on the *Miss Angel*.

## The issues as pleaded

165 The breach issue is pleaded at [19], [20] and [24] of the FASC (see at [95] above) and the causation issue is pleaded at [18], [22] and [25] of the FASC (see at [96] above). Pasma’s response to those allegations is contained in the corresponding paragraphs of its defence (see at [100]-[101] above). Finally, Mr Tregidga and Ms Jenkins’ reply to Pasma’s response is set out at [105]-[106] above.

## The evidence

166 The evidence on these two issues came from Mr Tilton and the expert witnesses. First, in his first and second outlines of evidence, Mr Tilton described the work he did on the *Miss Angel* in the period immediately prior to the fire and then on the day of the fire. He also dealt with that matter in his recorded interview with Mr Kelly. The various parts of that evidence relating to the period prior to the day of the fire are already set out at [139]-[141] above. His evidence with respect to the day of the fire was as follows:

**[Day of the fire – first outline of evidence]**

28. On 8 June 2016 I attended BSE to continue works on the Vessel. I estimate that I arrived at BSE at approximately 8.30am.

29. Upon my arrival, I noted that the following people were present on board the Vessel:

(a) … [Ms] Jenkins;

(b) the Vessel’s Captain [Ms Rak]; and

(c) another tradesperson installing a tracking system on the Vessel.

30. I am not specifically aware of the movements of those on board as I was below deck in the engine room.

31. On this day I undertook work on the Vessel’s batteries only. These batteries were located on a rack in the engine room.

32. During the day I disconnected the batteries, uninstalled them from the racking and placed them into boxes. Of the Vessel’s 8 batteries I estimate that I re-installed 4 batteries. I estimate that I would have needed another day to complete this part of the job.

33. I did not consider there to be any electrical safety risk in leaving the batteries unrestrained overnight as the Vessel was slipped and the batteries would be immobile.

34. I have had made available to me the Outline of Lay Evidence of [Ms] Jenkins and note the contents contained in paragraph 11 of the Outline. The cause of the sound, which Ms Jenkins and [Ms Rak] heard, was the sound of a plastic battery box breaking as I was attempting to put a battery inside. After breaking the box I subsequently left and returned to the Vessel with a new battery box. I then installed the battery in the battery box and I reconnected it to the Vessel’s engine starting system as it was prior to disconnecting the battery.

35. At approximately 4.15pm I finished works on the Vessel and left BSE. I left the Vessel with [Ms Rak] who on this occasion was waiting for me to finish work. She then locked the Vessel and we had a non-specific discussion as we left the BSE Slipway. I was not given keys to the Vessel at any time.

 **[Day of the fire – second outline of evidence]**

37. On the date of the fire I was aware that:

…

j) With regards to the batteries I was working on:

i. I isolated the house, engine starting and generator starting batteries prior to commencing work on the batteries and they remained isolated at the time of the fire;

ii. Once isolated, I disconnected the engine starting and generator starting batteries and fitted them into boxes and then reconnected those batteries;

iii. Battery power was not being supplied to the vessel, as I had disconnected all the house batteries;

iv. I was not finished my work on rehousing the house batteries which remained disconnected when I left the Vessel on 8 June 2016. However, the batteries were disconnected and I intended to recommence work on rehousing the house batteries the following day.

v. I had not tested the individual batteries voltage, however I did not consider it to be necessary because the batteries were disconnected, meaning there was no power from the batteries to the ships systems.

(Errors in original).

167 Next, the pertinent parts of Mr Tilton’s interview with Mr Kelly were as follows:

|  |  |  |
| --- | --- | --- |
| **Q** | **175** | **So you didn’t from, from that was it because that was all over the place as far as the wiring is that why you disconnected the batteries?** |
| A |  | No I disconnected the batteries because I was going to put them in a container. |
|  |  |  |
| **Q** | **176** | **Oh right okay.** |
| A |  | Like….. |
|  |  |  |
| **Q** | **177** | **What about the ones on the starboard side, they’re still disconnected?** |
| A |  | No the ones on the starboard side was the ones I disconnected which is the house batteries…. |
|  |  |  |
| **Q** | **178** | **Yes.** |
| A |  | The house bank and ah…. |
|  |  |  |
| … |  |  |
| **Q** | **208** | **What were you working on, prior to the fire? I know you weren’t there at the time of the fire, you’d gone?** |
| A |  | Okay so the fir, the first thing I did was, I did the, the battery cables for the emergency generator, I had to finish that, that off, then I did the, ahem, the main engine batteries I put them in a plastic container. Ah I did that job, then ahem, on the other side I pulled three of the batteries off and set them down on the deck so that I can you know fix the, the wood panelling of where it was, where the plastic containers were going to sit. Ahem, yeah and that was, that was it. |
|  |  |  |
| **Q** | **209** | **Okay. And what time did you leave, on the 8th, that’s in your statement is it in your report?** |
| A |  | Yeah, it was, ah what time did I leave…… |
|  |  |  |
| **Q** | **210** | **[...Indecipherable....] 16.15 about quarter past four?** |
| A |  | Yeah so I, I trying to get all that stuff back in was going to be a big thing so I was like no I’ll just call it a day it was already you know getting close to closing time anyway, nobody was there, the yard, everything was all nice and quiet, ahem ….. |
| … |  |  |
| **Q** | **241** | **Okay. Given your general observations and you were on board beforehand, do you now have in hindsight have any thoughts about what might have been involved, because you’ve got a lot of these….. I’ll start a different question. If you focus on what I just said but now a number of the DC circuits were isolated you had them disconnected off the batteries?** |
| A |  | Yeah so that was, that’s all of them basically. |
|  |  |  |
| **Q** | **242** | **So pretty much [...indecipherable....] AC running?** |
| A |  | That’s correct. |
|  |  |  |
| **Q** | **243** | **But we still had 240 volt supplying going to the charger?** |
| A |  | Ah, yes but that was isolated I had it isolated. |
|  |  |  |
| **Q** | **244** | **Had it isolated off the breaker…..** |
| A |  | I just turned it off at the main switchboard. |
|  |  |  |
| **Q** | **245** | **At the switchboard?** |
| A |  | Yes. |

(Emphasis in original)

168 The last piece of evidence with a bearing on this issue is the Police and Emergency Services report concerning the fire. It shows that the fire was first reported at about 11.20 pm on 8 June 2016.

169 The four expert witnesses who gave evidence are described earlier (see at [109]). The following is a summary of their evidence pertinent to these issues commencing in each case with a description of their qualifications and experience.

## Mr Kelly

170 Mr Kelly is a qualified electrician having completed his trade course in 1976. Among other tertiary qualifications, he holds an Advanced Diploma in Electrical Engineering which he obtained from TAFE New South Wales in 2009. Since 1983 he has been a forensic examiner. Until 1987, he was a member of the New South Wales Police Service where he served in the Scientific Investigations Section. Since 1997, he has been the principal in GKA Investigations Group where he has been involved as an expert in more than 3000 fire origin and cause examinations. Mr Kelly authored two reports both of which were tendered in evidence.

171 Soon after the fire in 2016, Mr Kelly visited Cairns to investigate the incident on behalf of Pantaenius, the insurer of the *Miss Angel*. He inspected the burnt out vessel and he met with Mr Tregidga and Ms Jenkins and Mr Steven Larkin. He also interviewed Mr Tilton and obtained from him several photographs that he had taken in the engine room of the *Miss Angel* while he working there prior to the fire. As already mentioned, he subsequently arranged to have a transcript of that interview prepared. His first report was prepared about two months after that trip. Most of it was devoted to the observations he made from his examination of the burnt out vessel. It also included numerous photographs that he took during that examination. In section 6 of that report, he described the observations he made of the engine area of the vessel. He concluded that section with the following observations about the likely point of origin of the fire:

6.7 **Having considered the three shelved system of angle iron that was constructed in the forward starboard area adjacent to Genset, I observed that the batteries in that area were less fire affected and all had been disconnected.** Numerous battery cables had lugs on them, which were not terminated on the batteries. Fire damage on that side of the vessel and around that forward section of the engine was less pronounced than on the portside.

…

6.8 Having identified the various burn patterns and noting the rupturing of the fuel tank which I considered in regard to providing extra fuel load on the portside, having considered that information in relation to the burn patterns **I formed the opinion that with the disconnection of the batteries on the starboard side where the battery isolation switch could still be observed**, that dominant fire damage through all of the physical indicators were indicative of the fire development from the forward portside of the engine. This area contained the electrical switchboards for both AC and DC circuits.

(Photographs omitted; emphasis added)

172 He reiterated these remarks in the concluding section of that report (section 9) as follows:

The significant fire effects to the electrical sub-circuits were limiting in the amount of information that could be provided by their examination. Fire damage to the electrical sub-circuit panel’s switchgear including circuit breakers and other apparatus did not give any particular evidence of any particular failure. **All that could be deduced from the examination was that the electrical switchboard area was the area where the prime area fire development had occurred**.

(Emphasis added)

173 Thereafter in that conclusion, he made a number of criticisms of Mr Tilton’s conduct and suggested that it “might be considered as a negligent act and I would refer you to your Legal Advisors in order to make further consideration of that fact” . This correlates with the heading to the report, which states in part that it is “forwarded for the consideration and advice of HWL Ebsworth Lawyers on behalf of Pantaenius Australia Pty Ltd in anticipation of future litigation” (emphasis omitted). These are the parts of this report to which reference is made below (see at [186]).

174 Mr Kelly’s second report was prepared in March 2018, soon after this proceeding began in October 2017. In it, he referred to his first report as his “initial report”. Most of his second report was devoted to answering three questions posed by his instructors as follows:

6(A) - “BASED ON YOUR OBSERVATIONS AND EXPERIENCE, AND ASIDE FROM THE FACT THAT THE FIRE STARTED IN THE “ELECTRICAL SWITCHBOARD AREA”, HOW CAN IT BE CONCLUDED THAT THE CAUSE OF THE FIRE WAS ELECTRICAL?”

6(B) - “BASED ON YOUR OBSERVATIONS AND EXPERIENCE, COULD THE FIRE HAVE BEEN IGNITED BY ANY OTHER SOURCE?”

6(C) - “PLEASE IDENTIFY ANY OTHER POSSIBLE CAUSES OF THE FIRE.”

(Typography/emphasis omitted)

 Sections 4 to 6 of that report contain Mr Kelly’s answer to question (A) and sections 7 and 8 to questions (B) and (C) respectively.

175 In answering question (A), Mr Kelly began by summarising the conclusion he had reached in his first report, as follows:

4.1 My initial report dated 16 August 2016 covers the examination process where I started the examination on the outside of the yacht recording the various aspects of the vessel along with burn patterns that were evident before entering upon it. The report then chronologically addresses the process involved in the examination, typically reflecting normal fire cause examination from the least areas of damage to the most area of damage. **My consideration of the various burn patterns, physical damage and circumstances led me to identify that the engine room was the most significantly affected of fire and therefore the ignition sources in that area needed to be considered. The engine room was therefore the Area of Origin**.

(Emphasis added)

176 In the balance of that section, he explained why he had come to that conclusion. He reiterated that view at 4.16 as follows:

Further enhancing and supporting that interpretation is the fact that the lower shelf on the shelving unit still contains batteries where the plastic body of the large blue coloured batteries can be observed in the lower shelf of the shelving unit. Therefore, the photograph is quite indicative, of the burns patterns which I considered, indicating the fire developed from left(port) to right (starboard) and from the top (deckhead) down. **A fire originating from the electrical switchboard area, is consistent with normal fire propagation and the burn patterns that I observed in these areas**.

(Errors in original; emphasis added)

177 He then added the following observations:

4.17 If the fire had developed from say the charging unit or the batteries located on the shelving unit to the right, then I would expect that the burn patterns from the deckhead down may be similar however there should be more burning to the shelving unit and to the bulkhead. The remains of the timber bulkhead behind the battery charger are still observed with the area around the stairs destroyed. This would suggest that fire development is more port to starboard rather than starboard to port. The burn pattern on the generator is similarly left to right or port to starboard rather than right(starboard) to left(port). The burn patterns in the shelving unit show the top battery casings on that shelf in front of the battery charger, to be destroyed leaving only the battery plates. The lower level batteries are still able to be observed with some minor effects of melting but still relatively intact.

4.18 The rollover effect of fire development, produces heat and fire spread from the deckhead down. This is consistent with the appearance of the batteries in the shelving unit. The position of the Genset in front (to the port) of the batteries on the lower shelf, has also provided some protection from them being melted. Had the fire developed nearer the yacht engine, those lower down batteries would have been more exposed and more damage might be expected.

178 In the next section (section 5), he began by postulating three possible causes of a fire event: “that a fire is deliberately lit, is of accidental causation, or the cause cannot be determined”. He then turned to consider each of those possibilities. In the process, at 5.3, he stated: “I have not been made aware of any information or suggestion of a deliberately lit fire”. At 5.6 and 5.7, he mentioned the Onan Genset generator and the batteries located in the engine room of the *Miss Angel* and made the following observations:

5.6 In conjunction with the information he provided, photograph 20 in my initial report on page 16 gives a general overview of the engine area and is appropriately captioned with coloured arrows indicating various aspects of the fire damage which I considered. If this photograph is considered the burn patterns to the Onan Genset can be compared with the previous information I provided in relation to photograph 16 where the oxidisation to the metal and burn patterns around the engine area of the Genset are more readily identified to the left with damage becoming less to the right. Of note is that various hoses and other combustible materials around the Genset engine are still visible and, although fire-affected, are not destroyed or reflecting significant fire development from that engine location. That photograph has been copied below for ease of reference.

5.7 The Onan generator set had its own battery supply located to the left. The batteries for the engine operation associated with the vessel, which was now positioned on the hard stand, were over in the shelving unit near the charger. I was informed that the vessel was fitted with a number of batteries. Some of these were used with the engine operation whilst others were stored or at times on charge. **I was informed that the charger was not in use and in fact the batteries had been disconnected**. We are therefore left in the position to contemplate what could have caused the fire.

(Emphasis added)

179 In the next section (section 6), in response to question (A), he again opined that the fire originated “from the switchboards” at 6.1 as follows:

In consideration for the aforementioned information is the fact that the physical damage was indicative of the fire developing from the forward end of the engine room, where an accumulation of copper conductors consistent with having originated from the switchboards that had been mounted on the bulkhead existed. This is to the left or port side of the Onan Genset. Those cables had all of the insulation destroyed, leaving only the bare copper remains.

180 At 6.7, he briefly mentioned the batteries on the vessel and said:

Amongst the debris at that location were a number of thick battery cables leading to terminations which had now been destroyed. Those cables were terminated in crimp lugs with several being bolted together as a connection. The remains of a bulkhead light were part of the debris in that localised area where the cables had changed colour as a result of heating and accumulated on the deck and as a pile behind the Onan Genset.

181 Finally, at 6.11 he confirmed his conclusion that the fire was consistent with an electrical failure which caused a fire in and around the switchboard area as follows:

Having considered the aforementioned indicators during my examination, it therefore became apparent that as there were no hot engine components in operation, there was no fuel in the tanks, nor any evidence of any explosion immediately preceding the fire. The localised nature of the fire damage although expanding through the vessel, was indicative of fire development without the significant involvement of ignitable liquids. Fire spread through the engine area from the forward end towards the rear. That reconstruction, was supported by the burn patterns including the damage to the structure and paintwork previously described. **Other observations in relation to the lack of fire damage to hoses and the damage directly around the engine is, in my view, consistent with an electrical failure on the vessel causing a fire in and around the switchboard area**.

(Emphasis added)

182 Mr Kelly’s answers to questions (B) and (C) were relatively brief, so it is convenient to set them out in full as follows:

7.1 For the reasons previously referred to in both my initial report and in this report, **I considered the potential sources of fire and formed the opinion that the probable cause was an electrical failure**. There were reports of the shore power circuit breaker tripping off. The vessel had travelled from overseas where it had previously operated. The vessel was not compliant with Australian marine or electrical standards. The electrical system was reported to be unsafe and was contracted to be rewired. The electrical supply was left connected, that then provided a potential electrical failure and ignition source as a result of it being unsafe.

7.2 My examination which included the circumstances, burn patterns, damage to the vessel structure and contents, **led me to determine the fire probably occurred in the engine area as a result of an electrical fault**.

7.3 From my examination and consideration of the known facts **I do not believe the fire has been ignited by any other source that is not electrical**.

…

8.1 I did not identify any other reasonable possible cause.

8.2 During the course of my examination and investigation, based on the available information and evidence, I eliminated:

a) A deliberate fire

b) An engine fire

c) Fire developing from anywhere else other than the engine area

(Emphasis added)

183 At this point, it is convenient to deal with the four grounds that Pasma advanced for contending that little, if any, weight should be given to the opinions contained in Mr Kelly’s two reports. They were:

Firstly, [Pasma does] not accept that Mr Kelly is an expert either in matters of opinion concerning fires on board marine vessels, or on the standard require of marine electricians engaged to bring vessels into commercial survey.

Secondly, Mr Kelly’s report in the manner set out in the detailed objections paragraph by paragraph, are such that the report is not an expert opinion in the terms requires by law, and in particular, the requirements of an expert report explained in Makita (Australia) Pty Ltd v Sprowles (2001) 52 NSWLR 705 at [85].

Thirdly, because Mr Kelly is an “insurance investigator” he was engaged by the insurer, Pantaenius, shortly after the fire occurred. His conduct prior to making the expert report was that of an investigator gathering evidence for the insurer who is conducting these proceedings. In the course of that, much evidence was gathered which is arguably privileged, which bears directly upon the issues in the proceedings, which is not disclosed in the proceedings, or referred to in any way by the expert. For example, the expert does not acknowledge in either report that witnesses have been interviewed, or given information, or the information has been accepted or rejected, matters of which are directly in issue in the present proceedings.

There is thus a conflict between Mr Kelly’s obligation to the insurer conducting the proceedings and the obligation to the Court, which would permit the court to enjoined Mr Kelly giving evidence, or simply reject the evidence, or reject it until proper disclosure of the extent of his investigations and what was achieve from these investigations (some of which has been requested and not provided).

Fourthly, insofar as an opinion is given about electrical matters, in terms of s 135 of the Evidence Act (Cth), the probative evidence of Mr Kelly about electrical matters, given the calling of Mr Ritchie, is substantially outweighed by the danger that the evidence may fall within the qualification of s 135(b) and s135(c), given the above, and also given Mr Kelly’s role in the expert conclave, both the exclusion of Mr Johns from that conclave, in favour of Mr Kelly, and the conduct of the conclave and Mr Kelly’s part in it.

(Errors in original)

184 With two exceptions, all of these grounds of objection are rejected. First, I am satisfied from the curriculum vitae set out in his reports, that Mr Kelly holds the necessary qualifications and experience as a forensic examiner dealing particularly with fires such that he has the requisite specialised knowledge to express the opinions he has about the fire in this matter. Subject to the observations below (at [186]), those opinions should therefore be given due weight. However, the first exception mentioned above affects a confined part of those opinions. It does not appear from Mr Kelly’s curriculum vitae that he has the requisite specialised knowledge with respect to the “standard [required] of marine electricians engaged to bring vessels into commercial survey”. While I have not been able to locate any such opinions in his reports, if there are any, I will give no weight to them.

185 The third ground raises the second exception mentioned above. This ground raises a query in respect of Mr Kelly’s independence as an expert witness. Before addressing the substance of this ground, it is pertinent to record that, in his first report in 2016, Mr Kelly included a statement that he had read and agreed to be bound by the Federal Court Expert Witness Practice Note CM 7. Then, in his second report in 2018, he made the same statement with respect to the current Practice Note dealing with expert evidence, GPN-EXPT. Both those Practice Notes are to substantially the same effect. Relevant to this ground, the latter Practice Note states:

The role of the expert witness is to provide relevant and impartial evidence in his or her area of expertise. An expert should never mislead the Court or become an advocate for the cause of the party that has retained the expert.

186 In my view, Mr Kelly’s first report offends the latter. That is so because, as already mentioned (see at [173] above), in its concluding paragraphs it contains observations about Mr Tilton’s conduct and recommendations about the future conduct of this litigation, which appear to have been adopted thereafter by Mr Tregidga and Ms Jenkins’ legal advisers. That is consistent with the circumstances in which it was prepared, as already outlined earlier. That being so, I do not consider I should attribute the same weight to the opinions expressed in that report that I would to an independent expert’s report of the kind contemplated by the Practice Notes mentioned above. While it is not in the same category, this conclusion must also have a consequential effect on the weight I give to the opinions expressed in Mr Kelly’s second report. However, as with the first exception above, given that the expert witnesses are unanimous on these breach and causation issues, it is difficult to see what practical difference this conclusion will make.

187 Finally, as to the other two grounds of objection, since both of Mr Kelly’s reports have already been admitted into evidence, it is difficult to see how the observations of Hayden JA in *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705; [2001] NSWCA 305 at [85], which primarily deal with questions of admissibility, not weight, are of any relevance. For the same reason, little purpose would be gained by considering “the detailed objections paragraph by paragraph” to which that ground also refers. As for the fourth ground of objection, there is no evidence before me as to what occurred during the experts’ conclave and, in the present circumstances, no purpose would be served by considering it, even if there were.

## Mr Ritchie

188 I turn next to Mr Ritchie’s evidence. He authored two reports that were tendered in evidence. He summarised his qualifications and experience at 1.1 of his first report in the following terms:

I have enjoyed 36 years in the electrical industry with 30 of those years predominently within the marine industry. 1 have worked “on the tools” as well in mangerial roles as an electrical contractor, government accredited electrical surveyor, electrical advisor to both the private sector as well as government departments and electrical trainer/teacher for both the private sector and government registered training organisations (RTO’s).

(Errors in original)

189 In his first report, Mr Ritchie was asked whether a licensed electrician in the position of Mr Tilton would have:

a. Not left the vessel connected to 240V shore power;

b. Disconnected the 240V shore power;

c. Isolated the 240V electrical system onboard the vessel;

d. Isolated the 240V switchboard onboard the vessel;

e. Closed and sealed the fire proof switchboard housing; and

f. Taken any other steps or done anything differently that would have prevented an electrical fire occurring on the night of 8 June 2016.

190 Apart from the introductory chapters, Mr Ritchie’s first report was structured as follows:

Chapter 3 – Training and expected knowledge of a reasonable licensed electrician;

Chapter 4 – Risk assessment process;

Chapter 5 – Definition of terms used in the categorisation of hazards;

Chapter 6 – Identified non-conformances;

Chapter 7 – Sample risk assessment;

Chapter 8 – Pasma’s reliance on BSE Cairns actions;

Chapter 9 – Work on the low voltage (LV) system by Mr Tilton;

Chapter 10 – Work on the extra-low voltage (ELV) system by Mr Tilton;

Chapter 11 – Electrical energy and fire; and

Chapter 12 – Answers to questions

It should be noted that Sections 4 and 7, together with Appendix F, of this report are affected by the ruling referred to below (see at [203]). Further, Section 6, dealing with non-conformances, has already been set out and analysed above (see at [115] and [125] *et seq*).

191 The other pertinent parts of his report, for present purposes, are Sections 9, 10 and 11. Section 11 is already set out above (at [128]). Sections 9 and 10 are as follows:

**9 Work on the low voltage (LV) system by Mr Tilton**

I will now address the specific work done by Mr Tilton on the LV system.

From the documentation presented to me, Mr. Tilton predominantly confined his LV work to visual inspections *(Tilton interview Q47, Q70 and Tilton timesheets 27/5/16)*, tracing of wires *(Tilton interview Q89)*, functional testing *(Tilton interview Q70)* and fault finding the battery charger *(Tilton timesheets 5/6/16 and Tilton daily notes 27/5/16)*.

In doing so, Mr Tilton accessed live switchboards *(Tilton interview Q89)*, used a multimeter *(Tilton interview Q70)* and in my opinion, performed electrical work *(see C5.4 (b) of this report)*.

The Code of Practice, *managing electrical risks in the workplace*, advises that de-energised testing methods should be used before energised testing methods *(C7.5)* and further states *(C8)* that electrical work on any installation, equipment, machinery, plant or appliance may pose a risk of direct or indirect contact with nearby exposed energised electrical parts (eg installing or testing circuits on a switchboard adjacent to exposed live electrical parts) and that in some circumstances the risks associated with undertaking electrical work near exposed live parts can be equivalent to those associated with live electrical work.

The code offers further instruction when working near energised electrical parts *(C8.2)* that a worker must work through the hierarchy of controls to choose the control that most effectively eliminates or minimises the risk of working near energised electrical parts, so far as is reasonably practicable.

Mr Tilton stated he did not observe any interruptions to the vessels power *(Tilton evidence C20 (b))* and nor did he remember requiring the shore power to be turned off *(Tilton evidence C27)*.

Expert Opinion – *Mr Tilton stated that he knew this project was going to be larger than usual (Tilton evidence C14 and Tilton interview Q185) and that the electrical installation was in poor condition (Tilton evidence C13 (a)).*

*Despite the electrical worker training by way of the licence pathways, the requirements of the Acts and Regulations and the guidance of the Code of Practice, Mr Tilton claims (Tilton interview Q220 & Q226) that he didn’t really consider that the shore power left on may have been his responsibility.*

*In my opinion, a reasonable licensed electrician would have de-energised the shore power on this vessel, as being the most effective control measure to deal with the variety of non-conformances (refer to Chapter 6 of this report) as well as the need to work near energised electrical parts whilst fault finding and tracing of circuits within the live switchboard.*

**10 Work on the extra-low voltage (ELV) system by Mr Tilton**

I will now address the specific work done by Mr Tilton on the ELV system.

From the documentation presented to me, Mr Tilton had commenced work on the ELV installation and at the time of the fire, that work was incomplete. The work he had undertaken was assessing, repairing and modifying the bilge pumps and alarms *(Tilton interview Q105 and Tilton timesheets 30/5/16 and 31/5/16)*, battery work including disconnection, battery box installation, generator battery isolator installation *(Tilton interview Q20, Q84 & Q86)*, disconnection of inverter and solar supplies *(Tilton interview Q157 & Q208)* and reinstallation and connection of the engine and generator batteries *(Tilton photos 2016-06-08 09:24, Tilton photos 2016-06-08 15:02 and Tilton photos 201-06-08 15:05)*. The starboard house batteries were not finished and left incomplete at the end of the day on 8/6/16 *(Tilton photos 2016-06-08 16:01 (both) and Tilton interview Q210)*.

Mr Tilton noted that the two battery banks, being the completed and energised engine battery bank and the incomplete house load battery bank, could be linked from the bridge *(Tilton interview Q182)* and one of his sketches shows that linkage as being by an automatic device called a voltage sensing relay (VS relay or VSR) *(Tilton Evidence Sketch 2)*.

From the photo time stamps, Mr Tilton connected the engine batteries at approximately 3:00pm *(Tilton photo 2016-06-08 15:02)* before strapping the boxes shut at about 3:05 pm *(Tilton photo 2016-06-08 15.05)* and then turning his attention to the house batteries, which he worked on up until he departed the vessel at approximately 4.15pm *(Tilton evidence C35)*. Mr Tilton described what he did that day as disconnecting the batteries, uninstalled them from the racking, and placed them into boxes. He estimated that of the 8 batteries, he reinstalled 4 and that he would need approximately another day to complete the installation *(Tilton evidence C32)*.

Expert Opinion – *A reasonable licensed electrician will ensure an installation is safe to restore energy, following remedial work. In this instance, it appears that electrical energy was partially restored to the subject works whilst parts of the work were left incomplete. In my opinion, this is poor practice.*

*More so, Mr Tilton was aware of a possible problem with the original ELV installation. He was aware the vessel tripped the shore power and that a large load on the ELV system was draining the batteries or perhaps, the batteries themselves may have been faulty (Tilton interview Q 163) and this had led Mr Tilton to initially think that there was “something wrong” or “wasn't connected right” or had “some problem with it”, but he had not yet delved into finding the fault as he intended to do that once he had reconnected everything. I have not seen any statement to suggest that testing and fault finding of the ELV system occurred at all, despite Mr Tilton re-energising part of the ELV installation.*

*In my opinion, there are several variables which may have contributed to this fire event, including:*

*- A short circuit from the inadvertent or automatic paralleling of the energised and complete battery bank and the de-energised incomplete works;*

*- A faulty battery charger,·*

*- A faulty battery,·*

*- A fault in another part of the ELV system; or*

*- A wiring error in the rework of the batteries.*

(Typography in original)

192 It is not necessary to review Mr Ritchie’s second or supplementary report because it is either directed to the risk assessment issue, which is affected by the ruling below (see at [203]), or to other matters that are not relevant for present purposes.

## Dr Hart

193 Dr Peter Hart authored one report which was tendered in evidence. From his curriculum vitae attached as Appendix 2 to that report, it appears that he holds a Doctorate in Electrical Engineering. Since 1997, he has been the principal of Hartwood Consulting Pty Ltd, a firm of mechanical, electric and forensic engineering consultants. He has been involved in approximately 2,500 investigations and reports since 1995 and he has given evidence as an expert in, among other courts, the Victorian Supreme Court, the Victorian County Court, the New South Wales District Court and the Federal Court. His report is structured as follows:

**1 SUMMARY**

**2 INTRODUCTION**

**3 REVIEW OF REPORTS**

3.1 Statement of Claim

3.2 Inspection by Mr Joe Rowles

3.3 Incident Report by Ben Tilton

3.4 Interview with Mr Ben Tilton

3.5 Incident Report by Mr Ben Tilton

3.6 Expert Report by Mr Greg Kelly

**4 DISCUSSION**

**5 RESPONSES**

194 In his report, Dr Hart expressed his views on the point of origin and cause of the fire by reference to Mr Kelly’s investigation as follows:

Mr Kelly investigated the fire and opined that the fire indicators were indicative of fire initiation in the forward portside region of the engine room. There were two electrical switchboards in this location. One controlled aspects of the 240V Alternating Current (AC) power system and one controlled aspects of the Direct Current (24V) power system. There were also 24V system batteries in the general vicinity. Mr Kelly did not identify a particular component or cable where he thought that the fire had started. In particular, he did not identify ‘tell-tale’ copper melt globules that are usually seen after short-circuit occurs on a DC battery power system. Whilst the point-of-origin was not determined, an electrical fault was indicated because of the electrical installations in the vicinity and because no other type of cause was identified. **I concur that the fire probably had an electrical cause**.

…

The original [sic origin] of the fire was probably an electrical fault. The point of origin was not identified. No alternative source of energy that could have caused a fire was identified. This assumes that the fire was not deliberately set.

It cannot now be determined whether the fire started in the AC system or the remaining DC system. **At the time of the fire the house batteries were not on the vessel. The controls batteries and the engine start batteries were on the vessel and they were live**.

The shore power connection was via a three-phase cable that was plugged into the vessel’s power receptacle. It is possible that a single-phase electrical power lead had been run onto the vessel.

It is likely that the three-phase cable or the receptacle had been modified to facilitate the connection of power to the vessel’s incoming power receptacle. This level of electrical work should have been done by a qualified person.

The original shore power connection could have been done by Simon, the electrician who worked for BSE slipyard. Simon had been working in the vessel on some days just before the fire occurred.

(Emphasis added)

## Mr Locke

195 Mr Jason Locke authored two reports, one of which was tendered in evidence. Mr Locke has 31 years’ experience in the marine sector and has worked across the mining and heavy industry sectors in both trade, engineering and management roles. In that report, he listed his qualifications as follows:

a) Trade Qualified - Electrical Fitter Mechanic

b) University Certificate – Associate Degree Electrical and Electronic Engineering

c) Licenced Electrical Contractor

d) AMSA Accredited Marine Surveyor (Electrical)

e) NZ Accredited Marine Surveyor (Electrical)

f) Member of the Australian Institute of Marine Surveyors

196 The main section of his report is section 3, headed “Observations”. That section is subdivided into several sub-sections, which contain comments on the involvement of various persons including:

(a) Mr Joe Rowles, the marine surveyor who inspected the *Miss Angel* prior to purchase

(b) Mr Steven Larkin

(c) Simon, a BSE licenced electrician

(d) Mr Benjamin Tilton.

It should be noted that various sections of this report (for example, 3.6.1) deal with the risk assessment issue which is affected by the ruling below (see at [203]).

197 Mr Locke expressed the following opinion which may be considered to be of some relevance to these two issues:

|  |  |
| --- | --- |
| 3.6.5.1.1 | It is my opinion that there is a very high probability that a possible fire risk may not present itself prior to the subject fire. |
|  |  |
| 3.6.5.1.2 | In the case of Mr Tilton and Mr Pasma they took extensive pictures of the installation for future reference. As I looked through the pictures I cannot identify any particular sign or indicator that would have led me to believe there was an imminent or possible fire risk. |
|  |  |
| 3.6.5.1.3 | It is my opinion that, given the tasks undertaken by Mr Tilton and Mr Pasma, that they were not undertaking works that would enable them to identify any fire risk in or around the MSB. |

## The Joint Experts’ Report

198 Finally, the four expert witnesses conferred and produced the Joint Experts’ Report which has already been mentioned. That report is divided into two parts: Part A – Fire experts; and Part B – Experts in the conduct of a licensed electrician operating in the State of Queensland. It should be noted that various parts of this report are also affected by the risk assessment ruling referred to below (see at [203]). They include, but are not limited to, Parts B(5), B(6), B(8) and B(14).

199 With one exception, the opinions expressed in the Joint Experts’ Report are unanimous. First, it was agreed in Part A(1) without dissent that “[t]he fire probably started in the engine room”. The explanation provided for this view was as follows:

The fire damage in the engine room is biased to the port (left) side to the engine room. The fire damage in the engine room is also biased to the left of the ‘Onan’ generator and forward of the ‘Onan’ generator.

200 Fire damage bias is usually, but not always, a reliable indicator of the point of origin because fire damage tends to increase with the duration of a fire. The point-of-origin has the longest fire duration and therefore tends to have the greatest fire damage. Therefore, the point-of-origin was probably in the engine room to the port (left) side in the vicinity of the ‘Onan’ generator. Secondly, the possible causes of the fire were addressed in Part A(2) in the following terms:

The electrical items that are in the region of greatest fire damage, and which could be the point of origin, are:

* The LV switchboard that is in the engine room; which was located on the port (left) inboard side of the forward engine room bulkhead.
* The ELV (DC) battery switchboard that is in the engine room; which was located on the port (left) outboard side of the forward engine room bulkhead.
* A start battery (ELV) for the Onan generator and associated wiring.
* Start batteries (2 x 12V ELV) for the main engine and associated wiring.
* An additional battery (ELV), the use of which was undetermined.
* Wiring that is connected to either switchboard; and any of the batteries.

The Experts considered whether the fire could have started because a heat gun was left on by Mr Tilton when he finished work before the fire; however, consider this very unlikely.

The Experts excluded fire causation at the power board that was sitting on top of the main engine and the power cord that supplied that power board.

201 Thirdly, the exception mentioned above concerns Part B(10), which poses the question “Was the electrical work undertaken on board the Vessel by Mr Tilton the cause of the fire?” The areas of agreement and disagreement in respect of that question are as follows:

|  |
| --- |
| **Areas of agreement:** The probable cause of the fire on the boat was an electrical fault. Due to the level of damage and the pre-existing faults reported on the Vessel, the experts cannot say that this fault was the result of physical work done by Mr Tilton. |
| **Areas of disagreement**: It was debated whether to interpret “electrical work” as including carrying out a valid risk assessment. |

The reasons for disagreement of each of the expert witnesses were then set out. However, the risk assessment ruling below (at [203]) affects these reasons. The remaining parts of the report which are not affected by that ruling are already set out at [118] above.

202 Finally on these issues, it should be noted that the Police and Emergency Services report on the fire excluded suspicious activity as a cause of the fire. Specifically, it recorded that: “CIB officer Bronwyn MANSFIELD has then contacted SOC via the police radio and advised that CIB believe the fire is non suspicious possibly caused by an electrical fault”.

203 Having reviewed the expert evidence, it is convenient next to deal briefly with the evidentiary matter already alluded to numerous times above which affects much of this evidence. It initially arose during Mr Tilton’s cross-examination when he was asked whether he had performed, or should have performed, a risk assessment of the *Miss Angel*’s electrical system. Pasma’s counsel objected to that line of questioning on the ground that that issue had not been pleaded in Mr Tregidga and Ms Jenkins’ FASC. I upheld that objection when their counsel could not point to any part of the FASC where that issue had been expressly raised and they did not seek to apply to amend the FASC to address that state of affairs. When the time came for the tender of the reports of the expert witnesses mentioned above, Pasma’s counsel raised the same objection to the parts of those reports that were directed to the same issue. I received those reports on the footing that I would determine that objection in these reasons. Nothing was advanced in closing submissions to show why the same reasoning and ruling should not be applied to those reports. Accordingly, I will not have regard to any expert evidence directed to that issue. It should, however, be noted that this is a different issue to that concerning the knowledge that Mr Tilton had gained of the defects, or “non-conformances”, that existed in the *Miss Angel*’s electrical system as a result of the inspections he had performed. That knowledge is pleaded in [16(k)] of the FASC, which has been set out (see at [94]) and addressed (see at [110]) earlier in these reasons. This ruling affects several parts of the expert’s reports, including the following:

(a) Mr Ritchie’s first report: Section 4 Risk assessment process; Section 7 Sample risk assessment; Appendix F – Sample risk assessment;

(b) Mr Locke’s report where it responds to those parts of Mr Ritchie’s reports which addressed this issue, including those identified above;

(c) Mr Ritchie’s second report where it responds to those parts of Mr Locke’s report mentioned above, including Section 2.4; and

(d) various Parts of the Joint Experts’ Report including sections B(5), B(6), B(8) and B(14).

## The contentions

204 The case that Mr Tregidga and Ms Jenkins put on these breach and causation issues may be summarised as follows: that it should be inferred from the following set of circumstances that Mr Tilton’s negligence on the day of the fire was its most likely cause:

 the fire was by nature an electrical fire;

 the seat of the fire was in the *Miss Angel*’s engine room;

 the fire started:

a. in the low voltage switchboard in the engine room connected to the shore power; or

b. in the extra-low voltage battery switchboard, or in any of the engine starting or generator starting batteries connected to that switchboard; or

c. in any of the associated wiring.

 Mr Tilton had been working on some of the batteries in the engine room on the day of the fire and had left them connected to the vessel’s main electrical system;

 those batteries were capable of resulting in short circuits and thermal runaways which could have caused the fire;

 given his knowledge of the unsafe condition of the vessel’s electrical system, Mr Tilton should not have left those batteries connected;

 if they had been disconnected, they would not have been able to cause the fire;

 it should therefore be inferred that Mr Tilton’s negligence caused the fire;

205 For its part, Pasma responded that:

 the experts all agreed in their Joint Expert’s Report that “nothing [Mr] Tilton did occasioned the fire”;

 on the day of the fire, Mr Tilton had disconnected the batteries he was working on before he left the vessel so one could not infer that those batteries had anything to do with the fire; and

 Mr Tregidga and Ms Jenkins’ expert, Mr Ritchie, did not identify the mechanism by which any of the 17 “non-conformances” he identified in the electrical system of the *Miss Angel* “occasioned individually or cumulatively the fire or was even the main source of the fire”.

## Some relevant principles

206 To succeed on these issues, Mr Tregidga and Ms Jenkins bear the onus of establishing, on the balance of probabilities, that Mr Tilton’s negligence caused the fire. More specifically, since there is no direct proof as to what caused the fire, they accept that they need to rely upon inference. In particular, that “the circumstances appearing in the evidence give rise to a reasonable and definite inference” that Mr Tilton’s negligence was the cause. They also accept that those circumstances “must do more than give rise to conflicting inferences of equal degrees of probability so that the choice between them is a mere matter of conjecture” (*Bradshaw v McEwans Pty Ltd* (1951) 217 ALR 1 at 5 per Dixon CJ and Williams, Webb, Fullagar and Kitto JJ).

207 Mr Tregidga and Ms Jenkins have also relied on the principle of *res ipsa loquitor* to prove their case. In *Schellenberg v Tunnel Holdings Pty Limited* (2000) 200 CLR 121; [2000] HCA 18 (*Schellenberg*), Gleeson CJ and McHugh J traced the history of that principle (at [20]-[24]) and concluded with the following statement as to what it entails (at [25]):

*Piening v Wanless* and *Anchor Products Ltd v Hedges* as well as other cases in this Court make it clear that a plaintiff may rely on res ipsa loquitur even though he or she has also pleaded particular acts or omissions of negligence on the part of the defendant provided that the tribunal of fact concludes that: (1) there is an “absence of explanation” of the occurrence that caused the injury; (2) the occurrence was of such a kind that it does not ordinarily occur without negligence; and (3) the instrument or agency that caused the injury was under the control of the defendant.

(Footnotes omitted)

In this matter, proposition (1) above is common ground, but (2) and (3) are very much in issue.

## Consideration and disposition

208 It is convenient to begin with the following findings with respect to these issues. First, on the day of the fire, Mr Tilton was working on the *Miss Angel*’s ELV system in the engine room of the vessel. As already mentioned earlier in these reasons, neither on that day, nor on any previous day, had he worked on the 240 volt AC system. That was so because he was awaiting instructions from Mr Steven Larkin with respect to the sealing of the engine room before doing any work on the wiring there to avoid duplication of that wiring work.

209 Secondly, during the day of the fire, Mr Tilton worked on two sets of batteries in the engine room of the *Miss Angel*: the engine batteries and the house batteries. On the morning of the fire, after he commenced work, he completed his work installing the engine batteries in plastic boxes. In that process, he dropped and broke one of the plastic battery boxes while he was attempting to put a battery inside it and he had to replace that battery box. There is no evidence that he damaged any of the batteries in that incident (see Mr Tilton’s evidence at [166(34)] above). On this aspect, I interpose to note that Mr Tilton was not asked about this distinction in cross-examination. On the afternoon of the fire, after completing his work on the engine batteries, he began to work on the house batteries. Before doing so, he reconnected the engine batteries. However, that did not result in those batteries being connected to the 240 volt AC shore power. That is so because, as Mr Tilton said in his second outline of evidence (see at [166(37)(j)(i)] and [166(37)(j)(ii)] above) and as he told Mr Kelly in his interview with him (see at question and answer 243 to 245 at [167] above), he switched it off at the ELV DC switchboard to which they were connected thereby isolating it from that power source. He then began work on the house batteries. He had not completed that work by the end of the working day and he left those batteries disconnected.

210 Thirdly, based on the expert evidence, the probable cause of the fire was an electrical fault and the probable point of origin was the switchboards’ area of the engine room towards the port side of the vessel. The house batteries on the starboard side of the vessel that Mr Tilton was working on at the end of his day’s work on the day of the fire did not sustain significant damage in the fire suggesting that they were not at, or close to, the fire’s point of origin. On the other hand, the engine batteries on the port side of the vessel that Mr Tilton was working on earlier that day sustained significant damage suggesting that they could have been at, or close to, the point of origin of the fire.

211 Having regard to these findings, to succeed on the breach issue, Mr Tregidga and Ms Jenkins need to establish, on the balance of probabilities, that something Mr Tilton did, or omitted to do, in carrying out his work on the two sets of batteries in the engine room as described above increased the risk of injury or harm to the vessel such that he should have disconnected both sets of batteries from the 240 volt AC shore power supply before he ceased work. On this aspect, it is worth interposing to make the point that the alternative course of turning off that power supply has been rejected as a consequence of the conclusions reached in the preceding section of these reasons (see at [162] above). Further, to succeed on the causation issue, Mr Tregidga and Ms Jenkins need to establish that a “reasonable and definite inference” is open that an electrical fault in one of those batteries was the cause of the fire. For the reasons that follow, I consider that Mr Tregidga and Ms Jenkins have failed on both these issues.

212 First, there is a dearth of evidence that anything Mr Tilton did, or omitted to do, in his work on the two sets of batteries on the day of the fire resulted in any increase in the risk of fire on the *Miss Angel*. At paragraph 11.9 of his report (see at [128] above), Mr Ritchie identified the following three processes by which, he opined, those batteries could be the cause of a fire:

 overcharging;

 loose terminals; and

 damaged batteries.

213 Addressing these three processes in turn, first, there is no evidence that either set of batteries was overcharged. Secondly, there is also no evidence that the terminals on the two sets of batteries were loose. That is particularly so with respect to the engine batteries because Mr Tilton’s evidence was that he installed those batteries in plastic boxes on the morning and early afternoon of the fire. Finally, as to the question of damage, I have already made a finding that there is no evidence that Mr Tilton damaged any of the batteries, including in the incident where he dropped and damaged one of the plastic battery boxes on the morning of the fire (see at [209] above).

214 Secondly, and in the alternative, even if there were evidence that Mr Tilton did something to those batteries on the day of the fire which increased the risk of that fire occurring, the findings above show that neither set of batteries was connected to the 240 volt AC power source at the time of the fire. That is to say, Mr Tilton left the house batteries disconnected entirely. And, while he connected the engine batteries to the ELV DC switchboard, that switchboard was isolated from the 240 volt AC power supply. It follows that, albeit unwittingly, Mr Tilton either left disconnected or connected, but left isolated, both sets of batteries from that power supply before he left the vessel on the day of the fire.

215 Thirdly, and also in the alternative, even if that were not so and even if there were some evidence that Mr Tilton did, or omitted to do, something in his work on those batteries on the day of the fire that increased the risk of that fire occurring, the reasonable and definite inference that an electrical fault in one of those batteries was the cause of the fire is not open. That is so because, based on the evidence of the expert witnesses, there were six possible sources of an electrical fire in the vicinity of the switchboards in the *Miss Angel*’s engine room at about the time of the fire, as follows:

* The LV switchboard that is in the engine room; which was located on the port (left) inboard side of the forward engine room bulkhead.
* The ELV (DC) battery switchboard that is in the engine room; which was located on the port (left) outboard side of the forward engine room bulkhead.
* A start battery (ELV) for the Onan generator and associated wiring.
* Start batteries (2 x 12V ELV) for the main engine and associated wiring.
* An additional battery (ELV), the use of which was undetermined.
* Wiring that is connected to either switchboard; and any of the batteries.

216 First, it will be noted that, apart from the engine batteries, there are two other sets of batteries mentioned in this list: a start battery for the Onan generator and an additional battery. The location and minimal damage sustained by the house batteries, as mentioned earlier, is likely to explain why they have not been included in this list. In addition, there are two switchboards mentioned: the LV switchboard and the ELV (DC) battery switchboard. The three processes by which the three sets of batteries mentioned in these six sources could have been the cause of a fire are already set out above (see at [212]). The corresponding processes by which the two switchboards mentioned in the six sources could have been the cause of a fire are identified at paragraph 11.8 of Mr Ritchie’s report (see at [128] above), as follows:

 loose terminals;

 short circuits; and

 overloads.

217 It follows that, quite apart from the engine batteries, there were four other possible sources (two different sets of batteries and two switchboards) and several processes by which each could have been the source of the fire on the *Miss Angel*. Conversely, there is no basis upon which a reasonable and definite inference can be drawn that an electrical fault in one of the sets of batteries on which Mr Tilton was working was the cause of the fire. All of which is likely to explain why none of the expert witnesses was able to support such an inference being drawn.

## Conclusion

218 For these reasons, Mr Tregidga and Ms Jenkins have failed to establish, on the balance of probabilities, that Mr Tilton breached his duty of care when carrying out his works on the *Miss Angel* on 8 June 2016 or, assuming to the contrary that he was negligent, they have failed to establish that there is a reasonable and definite inference that his negligence caused the fire on that vessel. These conclusions apply equally to the claim that Mr Tilton breached the guarantee of due care and skill in carrying out those works required by s 60 of the ACL.

219 Finally, Mr Tregidga and Ms Jenkins’ case on these issues cannot be rehabilitated by resort to the *res ipsa loquitor* principle. First, with respect to the second proposition in *Schellenberg* (see at [207] above), the range of possible sources of the fire arising from electrical faults outlined above demonstrates that this occurrence could well have occurred without negligence. Secondly, with respect to the second proposition, for the reasons given earlier relating to the scope of Pasma’s duty of care, the instrument or agency that caused the injury or harm, namely the 240 volt AC shore power being supplied to the *Miss Angel*, was not under the control of Pasma.

220 It follows that the answers to the questions posed in Issues 4(d) and (d) and Issues 5(a) and (b) (see at [17] above) are:

(a) Issue 4(d) – No

(b) Issue 4(e) – No

(c) Issue 5(a) – The cause of the fire is unknown

(d) Issue 5(b) – An answer is not called for.

# OVERALL CONCLUSION

221 To sum up, for the reasons set out above, I have concluded that:

(a) Mr Tregidga and Ms Jenkins were the legal and equitable owners of the *Miss Angel* as at the time of the contract/agreement with Pasma and as at the time of the fire on 8 June 2016 (see at [26] above);

(b) Allure Cruises Pty Ltd was the contracting party with Pasma (see at [53] above);

(c) Mr Tregidga and Ms Jenkins are “consumers” for the purposes of the ACL and as such are entitled to seek damages under s 267(4) of the ACL for any proven breach of the statutory guarantee in s 60 of the ACL (see at [68] and [79] above);

(d) as owners of the *Miss Angel*, Mr Tregidga and Ms Jenkins are entitled to seek damages in tort for any proven breach of the duty of care owed to them by Pasma (see at [69] above);

(e) Pasma is unable to rely upon the terms and conditions referred to in its invoice rendered on 13 June 2016 or the terms of the Slipway Contract between Allure and BSE to avoid any liability that may arise under (c) or (d) above (see at [77] above);

(f) in the circumstances, Pasma was not under a duty to take action to prevent injury or harm being occasioned to the *Miss Angel* arising from defects in the vessel’s electrical system while it was carrying out the works on that system (see at [163] above); and

(g) Mr Tregidga and Ms Jenkins have not established, on the balance of probabilities, that Mr Tilton’s negligence, or breach of the guarantee under s 60 of the ACL, was the cause of the fire on the *Miss Angel* (see at [218] above).

222 These conclusions make it unnecessary to consider Issues 6 and 7.

223 It follows that the originating application filed by Mr Tregidga and Ms Jenkins on 11 October 2017 must be dismissed. I will hear from the parties on the question of costs.

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| I certify that the preceding two hundred and twenty-three (223) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Reeves. |

Associate:

Dated: 28 June 2021