[2007] WASCA 34

JURISDICTION	**:**	SUPREME COURT OF WESTERN AUSTRALIA
TITLE OF COURT	**:**	THE COURT OF APPEAL (WA)
CITATION	**:**	MAMMOTH INVESTMENTS PTY LTD -v- GIO GENERAL LTD [2007] WASCA 34
CORAM	**:**	MARTIN CJ PULLIN JA BUSS JA
HEARD	**:**	12 SEPTEMBER 2006
DELIVERED	**:**	15 FEBRUARY 2007
FILE NO/S	**:**	CACV 67 of 2005
BETWEEN	**:**	MAMMOTH INVESTMENTS PTY LTD (ACN 008 735 797) Appellant AND GIO GENERAL LTD (ACN 002 861 583) Respondent

ON APPEAL FROM:

For File No	**:**	CACV 67 of 2005
Jurisdiction	**:**	DISTRICT COURT OF WESTERN AUSTRALIA
Coram	**:**	CRISFORD DCJ
Citation	**:**	GIO GENERAL INSURANCE LTD -v- MAMMOTH INVESTMENTS PTY LTD [2005] WADC 91
File No	**:**	CIV 2061 of 2002

Catchwords:

Workers' compensation - Amounts claimed as premium of worker's compensation insurance written by the respondent - Where erroneous industry code figure used to calculate premium when renewing policy of insurance for a further one year period - Allegation of common mistake - Basic requirements of pleadings - Turns on its own facts

Legislation:

Employers Indemnity Policies (Premium Rates) Act 1990 (WA)
Rules of the Supreme Court 1971 (WA), O 20 r 8
Supreme Court Act 1935 (WA), s 32

Result:

Appeal dismissed

Category: B

Representation:

Counsel:

Appellant	:	Ms C H Thompson
Respondent	:	Mr R E Birmingham QC and Mr T J Kavenagh

Solicitors:

Appellant	:	Dawson Davies
Respondent	:	Corser & Corser

Case(s) referred to in judgment(s):

Abalos v Australian Postal Commission (1990) 171 CLR 167
Bruce v Odhams Press Ltd (1936) 1 KB 697
Devries v Australian National Railways Commission (1993) 177 CLR 472
East-West Airlines (Operations) Ltd v Commonwealth (1983) 57 ALJR 783
Fox v Percy (2003) 214 CLR 118
O'Brien v Komesaroff (1982) 150 CLR 310
Water Board v Moustakas (1988) 180 CLR 491

1 **MARTIN CJ**: This appeal is brought from a decision of a Judge of the District Court in which she upheld a claim by GIO General Ltd ("GIO") against Mammoth Investments Pty Ltd ("Mammoth") in respect of amounts claimed by GIO as premium due under two policies of worker's compensation insurance written by GIO in favour of Mammoth for the years 20 July 2000 to 20 July 2001 and 20 July 2001 to 20 July 2002 respectively.

2 The circumstances in which GIO's claim arose (as found by the trial Judge) can be briefly set out. On 17 July 2000, by a letter from Mr Jim Guilfoile of Denboer & Associates ("Denboer"), insurance brokers, GIO were invited to submit terms for the provision of worker's compensation cover to Mammoth. GIO were advised in the letter that of an amount of $240,000 paid in wages (inferentially annual):

> "[A]pproximately 55% of the overall wages involve sheep farming, and the remaining wages are involved in road works, including gravel stockpiling as a subcontractor for Main Roads WA."

3 Mr Guilfoile was not called to give evidence, although Mr Ellison, who had been the accountant for the Caratti Group of Companies, of which Mammoth has been a member since June 1988, did give evidence to the effect that the original wages figure of $240,000 was provided by him to Denboer. There was no clear evidence as to the source of the description of the activities carried out by Mammoth contained in Mr Guilfoile's letter.

4 Under the *Employers Indemnity Policies (Premium Rates) Act 1990* (WA), the premium rates applicable to worker's compensation and employer's liability policies are set by the Premium Rates Committee ("the Committee") annually by reference to a table classifying the industries in which the relevant employer participates.

5 Upon receipt of the letter from Mr Guilfoile, Mr Vidler, an underwriter at GIO, assessed that the applicable industry under the classification table set by the Committee was the Australian and New Zealand Standard Industrial Classification ("ANZSIC") Code 01220 (grain-sheep and grain-beef cattle farming). For the year 2000/2001, the Committee had set a rate of 6.38 per cent in respect of that industry. Mr Vidler decided to add a loading of 39.5 per cent to that rate, producing an overall premium rate of 8.9 per cent.

6 Two of GIO's Worker's Compensation Insurance Proposal forms, both dated 25 July 2000 and signed by Mr Ellison, were produced in evidence. The "Business details" section of each proposal included the following:

> "Please provide a full description of your business including, as applicable, your industry, the services you provide, the products or goods you produce or handle, the activities you undertake, the processes you use, the materials, tools of trade or equipment you use, and specific trade licences required to carry out your work, product brochures, etc."

7 In response, Mr Ellison wrote:

> "FARMING OPERATIONS, ADMINISTRATION/ WORKSHOP FUNCTIONS, PROPERTY DEVELOPMENT & SUBDIVISIONAL WORKS, SUBCONTRACTING WORKS."

8 The form provided an opportunity for the proposer to insert the relevant ANZSIC Code. That opportunity was not taken by Mr Ellison on either of the forms he completed.

9 The third pages of the two forms completed by Mr Ellison differ. On one form and under the heading "Expected Wages of All Workers", he indicated that there were 12 permanent workers having estimated gross total wages of $300,000. Further down the same page, under the heading "Contractors", Mr Ellison entered in the box marked "Description of work expected to be performed by contractors", the phrase "PROPERTY SUBDIVISIONAL WORKS" and indicated that there would be ten estimated workers with an estimated total value of contracts in an amount of $200,000.

10 The evidence, as accepted by the trial Judge, did not establish that the form completed in this manner went any further than from Mr Ellison to Denboer.

11 The trial Judge accepted the evidence that the other form had been provided by Denboer to GIO. This form only had one entry on its third page, indicating that there were 15 permanent workers with an estimated gross total wages of $350,000. There was no entry made under the heading "Contractors".

12 Based on the estimated annual wages of $350,000, Mammoth's proposal to GIO was accepted and a policy issued for which a premium of $35,978.25 was charged. However, cl 15 - cl 17 of the policy provided:

> "15. You must give us a complete account of all the wages you paid, how many workers you had and the value of all your contracts and subcontracts, during the period of insurance.
>
> 16. You have 1 month after this policy ends to do this.
>
> 17. We will then adjust the premium payable if this policy ended before the end of the period of insurance, or if this information is different to the information we used to work out the premium when this policy started. We will tell you what the adjusted premium is, and refund you any excess premium you paid. However, if the adjusted premium is more than you actually paid, you must pay us the difference, and you have 1 month to do this …"

13 Clause 19 of the policy provided:

> "19. You must give us written notice as soon as practicable after you become aware that there has been a material change in any of the information you gave us in the proposal for this policy."

14 On 25 June 2001, GIO wrote to Denboer offering to renew the policy of insurance for a further period of one year. The offer was based upon the same ANZSIC Code applying and on the basis of the previous year's estimate of wages in the amount of $350,000.

15 In respect of the insurance year 2001/2002, the gazetted premium rate for the relevant industry code had changed to 6.04 per cent. However, due to an apparent error on an internal GIO document in which the rate was stipulated at 6.34 per cent, the premium calculated by GIO for the second year was based on that erroneous figure, to which a loading of 75 per cent was added by reason of four claims having been made during the initial year of cover. The premium rate quoted was therefore 11.095 per cent.

16 A form entitled "Workers' Compensation Renewal Application" was completed by Mammoth during July 2001. On that form, a Mr Allen Caratti, a director of Mammoth, completed a portion of the form taking

the form of a statutory declaration, witnessed by Mr Ellison, in which Mr Caratti asserted that the total sum of wages, salaries and other earnings including overtime paid to Mammoth's employees during the period now expired was as set out elsewhere on the form, and further declared that the nature of the business of Mammoth as originally stated had not changed.

17 On another portion of the form, it was stated that the total wages paid for the period 21 July 2000 to the period 20 July 2001 inclusive was the amount of $895,195, which had been paid in respect of 26 employees. At the same part of the form, an estimate of wages to be paid for the period 20 July 2001 to 20 July 2002 was made, in an amount of $800,000.

18 Notwithstanding these estimates, by this time, a statement of premium had already issued based upon the previous estimate of annual wages of $350,000. Under that statement, a premium of $45,959.55 was claimed and paid.

19 In November 2001, GIO issued an invoice for the adjusted premium for the cover provided over the period 20 July 2000 to 20 July 2001 by reason of the actual wages paid over that period (of $895,195) exceeding the estimate of $350,000. The amount claimed was $56,318.33.

20 It seems that no statement of actual wages paid by Mammoth for the second period of cover (ie, the period ending July 2002) was ever provided to GIO. Consequently, GIO based its claim for adjusted premium over that period upon the estimate of $800,000 to which I have referred. Using the erroneous premium rate, that gave rise to a further premium due of $61,044.46. However, as the trial Judge found, use of the correct rate of 6.04 per cent adjusted upwards by 75 per cent, produces a balance due of $55,935.25.

21 GIO commenced proceedings against Mammoth claiming the additional premiums due in respect of each of the two years for which cover had been provided. Mammoth defended those proceedings with an assertion that the premiums paid and claimed had been calculated on the basis of a common mistake by both GIO and Mammoth as to the applicable industry code. Although not clearly enunciated in the pleadings, in essence, the defence was based on the proposition that the applicable industry code for both years of cover was ANZSIC Code 77120 "Commercial Property Operators and Developers" for which the relevant premium rate for the insurance year 2000/2001 was 1per cent and for the succeeding year, 1.51 per cent. Mammoth therefore asserted that, because of the common mistake as to the applicable industry code, it

had already paid more than the amounts of the premiums properly due, by reason of which GIO had been unjustly enriched. Mammoth, accordingly, brought a counterclaim against GIO for an amount of $40,992.98 which was alleged to be the total premium overpaid by reason of the alleged common mistake.

22 The trial Judge rejected Mammoth's assertion to the effect that a common mistake had occurred and found that the properly applicable industry code was that pertaining to the industry of sheep farming; namely, ANZSIC Code 01220. Accordingly, after slightly adjusting GIO's claim to correct the erroneous calculation of the premium due for the second year, the trial Judge allowed GIO's claim in the amount of $111,978.58, together with interest pursuant to s 32 of the *Supreme Court Act 1935* (WA). Mammoth's counterclaim was dismissed. The trial Judge further ordered that Mammoth pay GIO's costs of the action, including any reserved costs on an indemnity basis as and from 20 December 2004, being the date upon which GIO had made an offer to settle on terms more favourable to Mammoth and less favourable to GIO than the judgment it ultimately received.

The Grounds of Appeal

23 The first ground of appeal complains that:

> "The learned trial [J]udge erred in law in finding that the respondent (plaintiff) was entitled to rely on the terms of clause 19 of the contract."

24 Particulars of the ground are given in which it is clear that the fundamental complaint is to the effect that GIO had not made any reference to cl 19 in its statement of claim or reply.

25 In order to put this ground in context, it is necessary to refer briefly to the relevant portion of the decision of the trial Judge, which is in the following terms:

> "107. The renewal application form dated 26 July 2001 for the further term of insurance was signed by A B Caratti and witnessed by Ellison. It declares the nature of the business as originally stated had not changed. The schedule to the policy states the business to be farming. That renewal application form sets out the actual wages paid for the initial period. The number of employees was 26 and the wages were $895,195. There is no detail

provided by Mammoth as sought in the form for the class of employees, the class of work performed, contractors and subcontractors and working contractors.

108. On the face of it there were simply 26 workers within the meaning of the Act and these 26 workers were paid $895,195. On the basis of this information there was an adjustment to the premiums in accordance with cls 15, 16 and 17 of the contract contained within the policy document. The adjustment to the premium was in accordance with the information provided by Mammoth. The adjustment was confirmed by Mammoth on 23 November 2001.

109. The further term ended on 21 July 2002. There was never a like wages declaration made by Mammoth in respect of the further term.

110. Despite apparent knowledge by Mammoth of a likely material change in the information upon which the policy was based as early as June 2002 and the preparation of schedules before the end of 2002 GIO was never alerted to this as required by cl 19 of the insurance contract.

111. Forms and schedules filled in by Ellison were incomplete or carelessly completed. There were simple mathematical errors in the schedules."

26 Those paragraphs are found in a portion of her Honour's judgment in which she reviews the evidence generally and expresses her views as to the credibility of the witnesses, in particular Mr Ellison and Mr John Caratti.

27 To me, this ground of appeal seems to fundamentally misconceive the basic requirements of a pleading. The basic requirement of a pleading is to set out the material facts upon which that party relies for their cause of action, or defence, as the case may be. There is no requirement to plead evidence, nor to identify processes of reasoning or argument that will be relied upon to sustain either the cause of action or defence.

28 It must be accepted that there has been a contemporary trend to expand pleadings beyond the basic requirement to plead and to plead only the material facts upon which the party relies. Narrative and argumentative forms of pleading are not uncommon, but this does not

mean that they are compulsory or that a party suffers any form of injustice if the other party restricts its pleading to the material facts upon which it relies for its cause of action or defence (see O 20 r 8 of the *Rules of the Supreme Court 1971* (WA) ; ***Bruce v Odhams Press Ltd*** (1936) 1 KB 697, 715; ***East-West Airlines (Operations) Ltd v Commonwealth*** (1983) 57 ALJR 783, 784 per Dawson J).

29 In the present case, GIO did not assert any claim for breach of cl 19 of the policies of insurance it had written. Its claim was based upon the underpayment of premium having regard to the actual wages paid over the periods of cover (or in the case of the second period of cover, the best estimate of those wages). The material facts necessary to sustain that claim; being essentially the issue of the policy, the terms of the policy relating to the calculation of initial premium by reference to estimated wages and adjusted premium by reference to actual wages paid, and the facts pertaining to the actual wages paid and estimated by Mammoth, were clearly and explicitly pleaded. There was no need for GIO to plead a reference to cl 19 of each policy in order to sustain its cause of action. As it did not claim damages for breach of that clause, it was irrelevant to GIO's pleaded case.

30 It is equally clear that the trial Judge did not refer to cl 19 for the purpose of a finding that a cause of action for breach of that clause had been made out. Plainly, her reference to the failure of Mammoth to comply with the obligations imposed by cl 19 was made in a context in which she was reviewing generally the steps taken by Mammoth and its officers in relation to the provision of information to GIO. This review was relevant to her ultimate findings as to credibility. The reference made by her Honour to that clause in that context was perfectly fair and legitimate, irrespective of whether or not the clause had been pleaded.

31 Her Honour's reference to Mammoth's failure to comply with the clause was also entirely justifiable. Notwithstanding the imposition of a continuing obligation to notify of any change of circumstances during the period of cover, Mammoth made no disclosure of the very substantial increase in actual wages paid during the first period of cover until that period had concluded. Nor did Mammoth make any disclosure of actual wages paid during the second period of cover, notwithstanding the fact that the premium charged at the inception of that cover had been based upon Mammoth's previous estimate of wages of $350,000. Mammoth knew that estimate was much less than those wages likely to be paid during the second period of cover. Nor did Mammoth ever disclose any change in the nature of the business it carried on during either period of

cover. In my view, it was quite appropriate for the trial Judge to refer to Mammoth's continuing obligation to disclose changed circumstances (being the obligation imposed by cl 19) when reviewing the steps taken by Mammoth in relation to the provision of information to GIO.

32 There is no substance in the first ground of appeal.

Ground 2

33 The second ground of appeal challenges the finding by the trial Judge that the correct industry code was ANZSIC 01220 (grain-sheep and grain-beef cattle farming) and alleges that she should have found that the correct industry code for the business carried on by Mammoth was 77120 (commercial property operators and developers). As developed in written and oral submissions, the ground had two distinct limbs; firstly, an argument based entirely upon the proper construction and effect of the documents provided to GIO; and secondly, an argument based upon the evidence given, essentially by Mr John Caratti, as to the actual business in which Mammoth was engaged over the relevant period.

34 Dealing firstly with the argument based upon the proper construction and effect of the documents submitted to GIO, it should first be noted that counsel for Mammoth quite properly accepted that the insurance broker, Denboer, should be regarded as Mammoth's agent. It follows from that concession that the letter of 17 July 2000 from Denboer to GIO in which an offer of cover was solicited was written for, and on behalf of, Mammoth. That letter clearly and unequivocally asserted that the majority of the wages paid by Mammoth related to sheep farming. That representation was not substantially modified by the proposal form signed by Mr Ellison and later submitted, in which the first activities referred to in the description of the activities undertaken are:

"Farming operations, administration/workshop functions …"

35 In respect of the second year's cover, the application for renewal submitted by Mammoth contained a declaration to the effect that the nature of its business had not changed from that previously disclosed.

36 Given the clear and unequivocal representation to the effect that the majority of the wages paid by Mammoth were paid in respect of its sheep farming operations and the failure to resile in any way from that representation in any subsequent information provided to GIO, the trial Judge was plainly correct in holding that it was entirely appropriate for

GIO to apply the industry code applicable to sheep farming when calculating the premium in respect of each period of cover.

37 The second strand of argument relied upon in support of this ground essentially comes down to the proposition that the trial Judge should not have made the adverse finding which she made as to the credibility of Mr John Caratti and should have accepted his evidence instead. However, although it must be said that this aspect of the ground was not abandoned in argument before us, it must also be said that neither in written or oral submissions has any error in the process of reasoning enunciated by the trial Judge in relation to her findings as to credibility been identified.

38 In her reasons for decision, the trial Judge undertook a careful and thorough review of the evidence that had been adduced. She referred to the documents which had been provided to GIO for and on behalf of Mammoth; being that it was engaged predominantly in sheep farming and which significantly understated the wages paid, at least in respect of the first period. She carefully reviewed the evidence given by Mr Ellison and Mr John Caratti, who were the only witnesses called to give evidence as to the substantive activities undertaken by Mammoth. Her Honour referred to the evidence which each of them gave to the effect that the group had operated various farms, including those known as Yuna, Bella Guarda and Young River Station. She referred to claims which had been lodged during the period of cover, both of which related to injuries suffered by farming workers. She also referred to an affidavit sworn on 31 March 2003 in which Mr John Caratti deposed that:

> "… in relevant years the appellant employed persons at its farming operations at Esperance and Yuna. The farms had six employees and two administration staff. The farms produced grain, sheep and cattle."

39 As the trial Judge observed, that assertion was inconsistent with the evidence given at trial by Mr Caratti. He sought to explain that inconsistency by asserting that the affidavit was wrong. However, the trial Judge also referred to correspondence from Mr Caratti of 25 March 2003 five days before he swore the affidavit in which he again indicated that Mammoth was involved in wheat, sheep and cattle farming at both Esperance and Yuna.

40 The trial Judge also referred to the general inadequacy of the evidence given by each of Ellison and Caratti as to the work actually undertaken. That evidence largely took the form of schedules indicating

the breakdown of wages or various named employees. However, those schedules were, of course, secondary evidence of the fact, and primary evidence was not adduced. As the trial Judge remarked, no source documents such as wage records were ever produced to support the schedules provided; no group certificates were provided in respect of those who had been the subject of worker's compensation claims; the schedules produced were plainly inadequate, in that they omitted reference to the two workers in respect of whom claims were lodged; and the schedules had to be amended to include those two workers during the course of the hearing.

41 After reviewing this evidence, the trial Judge expressed her findings in the following terms:

> "114. I did not find Caratti to be a credible or a convincing witness, despite having a very ready and apparently simple explanation for the inconsistencies. I do not accept the schedules accurately reflect the situation at Mammoth. Documents prepared closer to or at the time the contracts were entered into suggest a different situation.
>
> 115. I do not accept on the evidence before me that at the time the insurance contract was entered into the predominant industry of Mammoth was property development or subdivision. There is nothing that persuades me the nature of its predominant industry was anything but farming."

42 In reviewing the cross-examination of Mr Caratti and readily acknowledging the difficulties that arise from attempting to make any assessment of credibility based only on transcript, it is clear from the transcript that Mr Caratti contradicted his earlier sworn evidence and that the schedules he had prepared relating to the employees were at least erroneous in part. Accordingly, the transcript of Mr Caratti's evidence appears to provide ample justification for an adverse finding as to his credibility by the trial Judge who had the benefit of seeing him give his evidence (see in this regard: ***Jones v Hyde*** (1989) 63 ALJR 349; ***Abalos* v *Australian Postal Commission*** (1990) 171 CLR 167; ***Devries* v *Australian National Railways Commission*** (1993) 177 CLR 472 and ***Fox v Percy*** (2003) 214 CLR 118). Given that there appears to have been a quite adequate basis for an adverse finding as to credibility, and that the

trial Judge has carefully and clearly enunciated her reasons for that finding, there is no substance in this ground of appeal.

Ground 3

43 Ground 3 complains that the trial Judge erred by approaching the case on the basis that there was only one relevantly applicable industry code to be used for the purposes of calculating the applicable premium. It was argued that she should have looked separately at each individual location at which Mammoth carried on business and identified the premium rate relevantly applicable to the business carried on at that particular location.

44 This ground relies upon that part of the instrument published by the Committee relating to each of the two years in question in which it is stated that:

> "Only one rate will apply for each establishment. An establishment is defined as a unit covering all the operations of a company conducted at or from a single location. If an employer conducts more than one industry at the same single location, the classification of the employer's predominant industry (based on gross remuneration) shall apply."

45 It would therefore have been quite open to Mammoth to have conducted its defence and counterclaim on the basis that it operated a number of separate establishments at different locations and to have led evidence of the predominant industry (based on gross remuneration) at each such location.

46 However, Mammoth did not conduct its case on this basis. On the contrary, Mammoth conducted its case entirely on the basis that its activities and operations should be viewed as a single and indivisible operation, which should be characterised, for the purposes of industry classification, by reference to the predominant activity of property development. No attempt was made by Mammoth to lead evidence by reference to site specific locations or to identify the particular activities carried on at each particular site. Although schedules were provided in respect of individual employees, those schedules did not specify the location at which each identified employee provided services.

47 By reason of the nature of the evidence adduced by Mammoth at trial, counsel for the appellant quite properly conceded before us that if this ground succeeded, it would be necessary to direct a retrial at which

the evidence necessary to determine the relevant premium rate applicable to each site of operations would have to be led.

48 Therefore, in general terms, Mammoth now seeks to run its case on an entirely different basis; being a basis which would require an amendment to its pleadings and the leading of further evidence. This is because Mammoth did not plead the material facts pertaining to the activities carried on at each site of operation, nor lead any evidence as to the specific activities carried on at each site of operation, having conducted its case on the basis that the activities of Mammoth should be viewed and characterised collectively, rather than on a site specific basis and having put submissions before the trial Judge based on that basic assumption.

49 In support of the extraordinary proposition that Mammoth should be permitted to conduct its case in this way, reliance was placed upon a decision of the High Court in ***Water Board v Moustakas*** (1988) 180 CLR 491. However, in the joint judgment of Mason CJ, Wilson, Brennan and Dawson JJ, the Court held at 497:

> "More than once it has been held by this Court that a point cannot be raised for the first time upon appeal when it could possibly have been met by calling evidence below. Where all the facts have been established beyond controversy or where the point is one of construction or of law, then a court of appeal may find it expedient and in the interests of justice to entertain the point, but otherwise the rule is strictly applied."

50 Their Honours went on to observe that the question of whether a point was raised at trial will not necessarily be determined by the pleadings if, upon analysis of the conduct of the trial as a whole, it can be seen that a point was put in issue (see in this regard the observations of Mason J in ***O'Brien v Komesaroff*** (1982) 150 CLR 310 at 318 - 319.

51 However, if an issue has not been raised either on the pleadings or by conduct at trial, in general terms, the only circumstance in which that issue will be allowed to be ventilated on appeal is if it is constrained to an issue of law which can be resolved upon facts which are either admitted or which have been proved beyond controversy. It follows that the concession, properly made by counsel for the appellant, to the effect that the determination of this issue would require further evidence to be led, is fatal to the proposition that the appellant should be permitted to raise this

issue for the first time on appeal. This ground of appeal should not be countenanced.

Ground 4

52 This ground relates only to the order for indemnity for costs made by the trial Judge. No complaint is made as to the fact of that order or as to the time from which it operates, but only as to its terms. In particular, the complaint is that the order should have been constrained by an express limitation to the effect that the costs should not be recoverable if they were of an unreasonable amount or were unreasonably incurred.

53 These are, of course, the usual restrictions put upon an order for indemnity costs. Counsel for GIO accepted that the order made by the trial Judge should be construed as containing the usual restrictions, imposed in those terms. GIO will be bound by that concession in any process relating to the taxation of those costs and there is, therefore, no need for us to amend the order made by the trial Judge.

54 For these various reasons, in my opinion, this appeal must be dismissed.

55 **PULLIN JA**: I agree with the Chief Justice that the appeal should be dismissed. The facts are set out in the Chief Justice's reasons.

Ground 1

56 The ground alleges that the trial Judge erred in finding that the respondent was "entitled to rely" on the terms of cl 19 of the contract. The appellant's written submissions contend that the trial Judge relied on the clause in order to "deprive the [appellant] of the relief it sought in its counterclaim". The appellant submits that this emerges in [110] of the reasons for decision, which is set out in the Chief Justice's reasons.

57 In my opinion, the allegation and submissions must be rejected.

58 Paragraph [110] appeared in the context of reasoning which lead eventually to a conclusion by the trial Judge that Mr Caratti was not a credible or believable witness. Counsel for the appellant submitted that the appellant did not know what material change was being adverted to by the trial Judge. There was debate during the hearing of the appeal about whether it was a reference to the change in the amount of wages during the year, but that is unlikely because it is questionable whether a change in the amount of wages would amount to a breach of cl 19. This is because the policy contemplates an estimate of the wages at the beginning

of the year and then an adjustment to the premium at the end of the year by reference to the aggregate amount of actual wages. The appellant submitted that the trial Judge's reference to a material change may have been a reference to the alleged change from farming to land development.

59 I agree with the appellant that it is unclear what material change the trial Judge was referring to in [110]. However, what is clear to me is that this reference to cl 19 was incidental, and counsel for the appellant agreed (t/s 34) that the reference to cl 19 was not the basis for the trial Judge's decision. There was adequate evidence to support her Honour's decision to reject the appellant's evidence that the predominant industry was not farming. Mr Caratti claimed, for example, that Mammoth farmed only at one farm, but then in cross-examination, evidence was produced that there were claims in relation to other farms. This showed the unreliability of his schedule which he had prepared as a summary of information he claimed to have drawn from primary sources which were not produced. In my opinion, the weight of the evidence warranted her Honour deciding that she would not accept Mr Caratti's evidence about the predominant industry and that instead she would prefer the contemporaneous documents.

60 Ground 1 should be dismissed.

Ground 2

61 The appellant submits that, based on the primary documents, the finding should have been that the predominant industry was not farming. In my opinion the documents do not support that submission. The most important document was the letter from Denboer which stated that farming was 55 per cent of the activities. The trial Judge was justified in concluding that the predominant industry for the purpose of the insurance was farming.

62 Ground 2 also invites the Court to conclude that Caratti's evidence should have been accepted. In my opinion, it has not been established that the trial Judge erred in concluding that Mr Caratti's evidence should not be believed, for the reasons I have already given.

63 Ground 2 should be dismissed.

Ground 3

64 The appellant submits that the appellant's business was conducted not at a single location attracting one industry code, but at several locations, each attracting its own calculation.

65 This was not an issue which was pleaded. It was not raised as an issue in the proceedings. There was a reference to locations at which Mammoth farmed, but only for the purpose of dealing with the issue about what the predominant industry was. Counsel conceded that the matter could not be dealt with on the facts as found and that further evidence would have to be led. As a result, this ground must fail, on the basis that it is an attempt to raise an issue which would require further evidence before it could be dealt with.

66 Ground 3 should be dismissed.

Ground 4

67 For the reasons given by the Chief Justice, this ground falls away.

68 The appeal should be dismissed.

69 **BUSS JA**: I agree with the Chief Justice.