IN THE HIGH COURT OF AUSTRALIA No S110/2010 & S219 of 2010
SYDNEY OFFICE OF THE REGISTRY
ON APPEAL FROM THE NEW SOUTH WALES COURT OF APPEAL

BETWEEN

WESTPORT INSURANCE CORPORATION (ABN 48 072 715 738)
First Appellant

ASSETINSURE PTY LIMITED (ABN 65 066 463 803)
Second Appellant

MUNICH REINSURANCE COMPANY OF AUSTRALASIA LIMITED (ABN 51 004 804 013)
Third Appellant

XL RE LIMITED (ABN 54 094 352 048)
Fourth Appellant

SCOR SWITZERLAND LTD (ABN 92 098 315 176)
Fifth Appellant

GORDIAN RUNOFF LIMITED (ABN 11 052 179 647)
Respondent

RESPONDENT'S SUBMISSIONS

PART I: CERTIFICATION

1. These submissions are in a form suitable for publication on the internet.

PART II: CONCISE STATEMENT OF ISSUES

2. In addition to the issues identified by the appellants/applicants ("**Reinsurers**"), the following issues arise.

3. Should the existing grant of special leave be revoked in circumstances where Reinsurers no longer contend that *Oil Basins v BHP Billiton*[1] should be preferred to the decision of the court below, contrary to the basis on which special leave was granted?

4. Anterior to the issues specified in Reinsurers' submissions [3-4], should there be any further grant of special leave in relation to those two issues?

5. Consequent upon the issues specified in Reinsurers' submissions [3], how can this Court grant any of the orders sought in circumstances where the court below has held there is no grant of section 38 leave, and there is no appeal to this Court from that decision?

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[1] (2007) 18 VR 346.

6. None of the issues specified in Reinsurers' submissions [5-14] arise unless special leave is granted beyond that already granted.

PART III: SECTION 78B OF THE JUDICARY ACT 1903

7. Consideration has been given to the question whether notice pursuant to section 78B of the *Judiciary Act 1903* should be given with the conclusion that it is not necessary.

PART IV: CONTESTED MATERIAL FACTS

8. The respondent ("**Gordian**") accepts Reinsurers' statement of facts with the following comments.

9. First, the treaties covered all policies written by Gordian and classified by it as D&O insurance[2].

10. Secondly, in addition to the findings of the arbitrators referred to at [21] of Reinsurers' submissions, there was the finding that the reason why the reinsurance contracts did not cover D&O policies which did not require that claims be made and notified within 3 years was that such D&O policies were excluded or because the D&O policies which were covered by the reinsurance contracts were limited[3].

11. The characterisation of the finding of the primary judge at [23] of Reinsurers' submissions is not correct. The primary judge held that the application of section 18B turned on a distinction in insurance contracts between "exclusions" and "limitations", on the one hand, and "scope of cover" on the other[4]. The reinsurance argument put in this Court about the terms of treaties that identify which underlying policies are covered[5] was not put to the primary judge (nor to the arbitrators or the court below).

PART V: APPLICABLE STATUTES AND REGULATIONS

12. Gordian agrees with paragraphs [93-95] of Reinsurers submissions but adds that the repeal of the NSW *Commercial Arbitration Act 1984* is the first step in the implementation of an agreement by all State Attorney's General to modernise this uniform legislate regime[6]. The other States are still to repeal and replace their respective statutes.

PART VI: STATEMENT OF ARGUMENT

Special leave should be revoked

13. This case is no longer a suitable vehicle for the Court to consider any conflict between *Oil Basins* and the court below. Gordian contends that the court below was correct to hold that *Oil Basis* was plainly wrong, and there is no contradictor[7]. Further, in the

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[2] AB 4/1943 (Court of Appeal judgment [62(a)] (the wording of the new 10xs10 treaty was as expiring [63])).
[3] AB 1/17 (Award [90]).
[4] Eg, AB 4/1711 (judgment [78]) and AB4/1716 (judgment [92]).
[5] Eg, Reinsurers' submissions [26].
[6] AB 5/2067.40 (second reading speech of NSW Attorney General, 12 May 2010).
[7] Reinsurers' submissions at [78]; contrast Reinsurers' special leave submissions at [29] AB 5/2039 and [2010] HCATrans 233 p.8; their argument in the court below recorded at [195] and [199] (AB 4/1983-5).

absence of any appeal from the court below's refusal of section 38 leave, it is not possible for any of the orders sought by Reinsurers to be granted.

Reasons adequate in any event

14. If special leave is not revoked, then the appeal should be dismissed because either (1) the reasons are adequate or (2) if not, nothing flows.

15. The arbitrators' obligation to give reasons in this case arose from section 29(1)(c) of the *Commercial Arbitration Act 1984*. Section 29(1)(c) required "a statement of the reasons for making the award". The section 29(1)(c) duty is, ultimately, a question of construction.

16. When considering the extent of a duty to give reasons, primary regard is to be had to the function to be served by the giving of those reasons[8]. The function of reasons under s.29(1)(c) is to enable the parties to assess their limited rights of appeal under section 38.

17. The adequacy of the arbitrators' reasons in this case might be tested by asking whether, if more reasons had been given, Reinsurers' rights of appeal would have been affected. The answer to that question is "no".

18. The relevant question under section 18B(1) of the *Insurance Act 1902* was whether, in all the circumstances, it was not reasonable for the Reinsurers to be bound to indemnify Gordian. The court below correctly characterised this as an evaluative question of fact[9]. An appeal might lie from the arbitrators' decision if there was no evidence to support their conclusion, but that it not alleged (nor could it be)[10]. Otherwise, no appeal lies from this decision, even if an appeal court considers it illogical, perverse or completely unreasonable[11] (which it is not: Reinsurers were willing (and in the treaties agreed) to provide automatic cover for all D&O policies which covered claims up to three years, no matter who the original insured was).

19. Reinsurers' attempt to transform the issue of reasonableness into a question of statutory construction by reference to the subject, scope and objects of the statute is unconvincing and should be rejected. The words are: "in all the circumstances it is not reasonable".

20. In their reasons, the arbitrators identified the correct question and stated their conclusion[12]. The adequacy of the reasoning for reaching that conclusion has to be considered in the light of the way the arbitration was conducted and, in particular, the submissions made to the arbitrators. These matters are known to the parties. The arbitrators' reasons are not impenetrable if read in the light of these matters.

21. Section 18B(1) required the arbitrators to consider "all the circumstances", but that did not mandate an enquiry at large. It was incumbent upon Reinsurers to identify any circumstance they relied upon for their contention that it was not reasonable. Before the arbitrators, Reinsurers invoked the proviso to section 18B(1) and bore the onus of

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[8] *Soulemezis v Dudely (Holdings) Pty Ltd* (1987) 10 NSWLR 247 at 280G (McHugh JA).
[9] AB 4/1982 (Court of Appeal judgment [188]).
[10] AB 4/1982 (Court of Appeal judgment [189]).
[11] *Clark v Flanagan* (1934) 52 CLR 416 at 427-428 (Dixon J); *Roncevich v Repatriation Commission* (2005) 222 CLR 115 at 136-137 [66-68] (Kirby J); *Warley Pty Ltd v Adco Constructions Pty Ltd* (1988) 8 BCL 300 at 310-311 (McHugh JA); *R v District Court of the Metropolitan District Holden at Sydney; Ex parte White* (1966) 116 CLR 644 at 654 (Menzies J).
[12] AB 1/16 (Award [88]).

persuasion. They positively pleaded that it was not reasonable in all the circumstances[13] and made submissions to that effect[14]. Reinsurers only relied upon one circumstance, namely the fact that, if Gordian was bound to submit the FAI policy for special acceptance, Reinsurers would have declined it. Reinsurers gave a number of reasons why they would have declined it, but all the reasons came back to the same point of reasonableness, namely that special acceptance would have been declined.

22. As the court below noted[15], the arbitrators' reasons reveal a comprehensive appreciation of the underlying factual material, including Reinsurers' hypothetical willingness to grant special acceptance. This particular factual matter was first considered by the arbitrators in the context of rejecting Gordian's alternative argument under section 18 of the *Insurance Act 1902* (which refers to an absence of prejudice to the insurer). In the context of dealing with the section 18 argument, the arbitrators' considered the hypothetical special acceptance[16]. They referred to the evidence on this issue and implicitly found in favour of Reinsurers[17]. The arbitrators thereafter considered the proviso to section 18B on the factual basis contended for by Reinsurers.

23. The fact that the arbitrators expressly considered hypothetical special acceptance in the context of section 18, not section 18B, does not undermine their reasoning on section 18B. The arbitrators' reasons, in this regard, reflects the structure of Reinsurers' written submissions. In their written submissions, Reinsurers addressed hypothetical special acceptance under the heading for section 18. When turning to reasonableness under section 18B, Reinsurers merely cross referred back to their earlier submissions[18]. Following as it does paras [84] and [85], para [88] of the arbitrators' reasons mirrors the brevity of para [15] in section M of Reinsurers' written submissions.

24. Having adopted Reinsurers' factual position on hypothetical special acceptance, the only step which remained was for the arbitrators to reach a conclusion about whether that circumstance (the only one relied upon by Reinsurers) made it unreasonable for Reinsurers to be bound to indemnify Gordian. This was a process of evaluation. The arbitrators were not compelled to conclude unreasonableness. The arbitrators' contrary conclusion was open to them.

25. Understood in the light of Reinsurers' submissions, the arbitrators' reasons are adequate. They satisfy the standard correctly adopted by the court below[19].

26. Even if the arbitrators' reasons do not satisfy s.29(1)(c), nothing flows. Leave to appeal for this specific question has never been granted under s.38(4)(b). Although a grant of leave was sought from the primary judge for this question, his grant of leave was limited to other questions[20]. In the court below, Reinsurers failed on their notice of contention by which they sought to revisit the width of the primary judge's grant of s.38 leave[21]. The application for special leave from this part of the court below's decision (Grounds

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[13] AB 1/85 (Amended Rejoinder [2(d)]).
[14] AB 1/359-363 (Section J of Reinsurers' submission to the arbitrators dated 20 July 2008).
[15] AB 4/1983-1984 (Court of Appeal judgment [196-197]).
[16] AB 1/15 (Award [84]).
[17] AB 1/15-16 (Award [85]).
[18] AB 4/327.27 (Section M, para [15] of Reinsurers' submission to the arbitrators dated 20 July 2008).
[19] AB 4/1991 (Court of Appeal judgment [215]).
[20] AB 4/1721 (Einstein J [106]); AB 4/1954 (Court of Appeal [97]).
[21] AB 4/1933 (Court of Appeal [17(c)]) and AB 4/1982-1983 ([190-194]).

2&3 in the Amended Application for Special Leave[22]) was dismissed on 3 September 2010[23].

27. In any event, this specific question is not suitable for a grant of section 38 leave. As a free standing question of law, no section 38 leave may be obtained for inadequate reasons for an evaluative conclusion, from which there would be no appeal anyway. The essential requirement of section 38(5)(a) is lacking and the court in its residual discretion[24] would not grant section 38 leave where a remitter would have no utility.

28. Absent a grant of section 38 leave, the court has no jurisdiction to set aside or remit the award[25]. The relief now sought under section 38(3) is not available. Neither does section 42 apply, which requires misconduct on the part of the arbitrators which has never been alleged (even in a technical sense).

29. As remitter is futile, and given the policy objectives of arbitration as an alternative means of dispute resolution featuring speed and finality, the appeal should be dismissed.

Further grant of special leave for Grounds 5 (section 18B) & 6 (causation)

30. Special leave should be refused for Ground 5 because it has no utility. The court below held that Reinsurers were not entitled to a grant of section 38 leave for this issue[26] and the application for special leave to appeal from that decision has been dismissed[27]. Reinsurers' submissions at [55-60] are beyond the grant of special leave, either extant or reserved, and are not responded to. Even if Ground 5 is upheld, the outcome below remains unchanged.

31. Further, Reinsurers' arguments, as articulated in this Court, are now cast in terms of reinsurance treaties[28]. These arguments were not advanced below. Without the views of the court below, and because of the exclusion of reinsurance from section 18B since 2009[29], these further grounds are inapposite for a grant of special leave. The ongoing relevance of section 18B to reinsurance is asserted but not proved.

32. Special leave should similarly be refused for Ground 6. It seeks to raise an issue of the construction of section 38(5)(b)(i), which has now been repealed in NSW as the forerunner to the modernisation of the uniform national scheme.

33. Further, the purpose of section 38 was to minimise judicial supervision and review of arbitrations, and enhance the finality of awards[30]. This purpose is underpinned by public policy objectives. A grant of special leave to review the arbitrators' decision on either Ground is inappropriate.

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[22] AB 5/2021-2022.
[23] AB 5/2244 (Order 4).
[24] *Promenade Investments Pty Ltd v New South Wales* (1991) 26 NSWLR 203 at 225-226 (Sheller JA, with whom Mahoney and Meagher JJA agreed).
[25] Section 38(1).
[26] AB 4/1978 (Court of Appeal [178]).
[27] AB 5/2244 (Order 4 dismissing ground 2 at AB 5/2021-2022).
[28] Reinsurers' submissions [3], [26], [27], [42-46], [50-51], [73], [61(2)] and [63].
[29] *Insurance Regulation 2009*
[30] *Promenade Investments Pty Ltd v State of New South Wales* (1991) 26 NSWLR 184 at 187-189 (Rogers CJ Comm D); *Promenade Investments Pty Ltd v State of New South Wales* at 221 and 226 (Sheller JA, with whom Mahoney & Meagher JJA agreed); *Natoli v Walker* (1994) 217 ALR 201 at 202 (Kirby P).

Ground 5 – section 18B – if further special leave is granted

34. At all stages below, Reinsurers' contention that section18B did not apply was based on a perceived distinction in insurance contracts between "exclusions" and "limitations", on the one hand, and "scope of cover" on the other. This was the only relevant question of law from which Reinsurers made an application for section 38 leave to appeal[31]. The court below was right to reject this argument. Reinsurers now abandon it[32].

35. Reinsurers now put a different argument which does not apply to insurance generally, or even to reinsurance generally. It only applies to treaty reinsurance: section 18B does not apply to "the terms of reinsurance treaties that identify which underlying insurance contracts are covered by the terms of the reinsurance treaties"[33]. To make good this argument, Reinsurers call in aid concepts of "loss" under reinsurance[34], a distinction between treaty and other reinsurance[35] and a contention that section 18B was intended as "consumer" legislation which was not concerned with reinsurance[36].

36. It being common ground before the arbitrators that the reinsurance contracts in this case were subject to section 18B[37], the provision had to be applied in accordance with its terms.

37. The reinsurance contracts, although treaties, were themselves contracts of reinsurance[38]. Under those contracts, Reinsurers agreed to indemnify Gordian in respect of losses under business written by Gordian and classified by it as Directors and Officers Liability Insurance[39]. For any business so classified, Gordian was prima facie entitled to indemnity.

38. The arbitrators undertook the task of construing the parties' agreement. They found:

(a) the cover did not include subsequently issued D&O policies which did not require claims to be made and notified within three years from inception[40]; and

(b) the reason why such policies were not covered was because they were "excluded" or because the reinsurance treaties were "limited"[41].

39. By the provisions of the reinsurance contracts, as construed by the arbitrators, the circumstances in which Reinsurers were bound to indemnify Gordian were defined so as to exclude or limit liability where a D&O policy not only covered claims which were made within three years, but also claims made after three years[42]. In these circumstances, section 18B was engaged.

40. Nothing in the background material warrants the operation of the statute being cut back as Reinsurers contend. The objective of section 18B is to remedy the perceived commercial mischief where insurers are able to avoid liability on claims otherwise

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[31] AB 1/30 (Commercial List Statement [8(c)]).
[32] Reinsurers' submission [52].
[33] Reinsurers' submissions [26]. See also [27], [42-46], [50] and [61(2)].
[34] Reinsurers' submissions [50].
[35] Reinsurers' submissions [43-45].
[36] Reinsurers' submissions [27] and [33].
[37] AB 4/1996 (Court of Appeal judgment [234]).
[38] *Tariff Reinsurance Ltd v Commissioner of Taxes (Victoria)* (1938) 59 CLR 194 at 215 (Dixon J).
[39] AB 4/1943 (Court of Appeal judgment [62(a)] (the wording of the new 10xs10 treaty was as expiring [63])).
[40] AB 1/17-18 (Award [90-92]).
[41] *Id.*
[42] AB 4/1981 (Court of Appeal judgment [184]).

based on exclusions or terms operative upon, or triggered by, events that had no relationship to the cause of the event giving rise to the loss and claim in question[43]. The LRC Report makes clear that the amendments to the *Insurance Act 1902* were not intended to be limited to some notion of "consumer" contracts[44]. The NSWLRC rejected a submission from the Insurance Council of Australia that the amendments should be limited to "domestic" insurance, and instead recommended that they apply to all insurance, including insurance taken out by a large public company which employs insurance specialists on its staff[45].

41. As remedial legislation, the language of section 18B is to be construed so as to give the most complete remedy which is consistent with the actual language employed and to which its words are fairly open[46]. The words are fairly open to the construction adopted by the court below.

Ground 6 – "causation" – if further special leave is granted

42. The court below found that determination of the "causation" question will not add to the certainty of commercial law[47]. The application for special leave to appeal from that finding has been dismissed[48]. Therefore, the only question of utility in Ground 6 is whether the error found by the court below was an error of law within section 38(5)(b)(i).

43. Section 38(5)(b)(i) does not apply because (1) it was not an error of law and (2) it was not manifest on the face of the award. The issue is not one of causation but rather one of identifying the "circumstance" by which cover was excluded or limited under the reinsurance contracts. The arbitrators' specifically found that the "circumstance" was the fact that the FAI Policy not only covered claims which were made within three years, but also claims made after three years[49]. The court below was correct to characterise this as a question of fact[50]. Section 18B uses words according to their common understanding, so there is no error of law unless Reinsurers can show that it was not reasonably open to the arbitrators to conclude that the facts as found by them fall within the words of the statute[51]. They do not.

44. It is not enough for Reinsurers to contend that the alleged error was a mixed question of fact and law. Section 38(2) is limited to "questions of law". This is to be construed having regard to the statute's purpose of restricting judicial intervention in arbitrations. The subject matter of the appeal must be limited to a question of law, and to that

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[43] AB 4/1972 (Court of Appeal judgment [149]).
[44] Eg, LRC Report [7.16].
[45] LRC Report [7.30 – 7.31].
[46] *Khoury v Government Insurance Office (NSW)* (1984) 165 CLR 622 at 638 and 640.
[47] AB 4/1981 (Court of Appeal [185]).
[48] AB 5/2244 (Order 4 dismissing ground 2 at AB 5/2021-2022). Reinsurers' submissions at [73] are beyond the grant of special leave, either extant or reserved, and are not responded to.
[49] AB 1/17-18 (Award [92]).
[50] AB 4/1980 (Court of Appeal judgment [182]).
[51] *Vetter v Lake Macquarie City Council* (2001) 202 CLR 439 at 450-451 [25-26] (Gleeson CJ, Gummow & Callinan JJ) and at 477-378 [108] (Hayne J); *Hope v Bathurst City Council* (1980) 144 CLR 1 at 7.

alone[52]. The identification of the applicable "circumstance" is the kind of issue arbitrators should decide, not courts.

45. In any event, the alleged error does not rise to the level of manifest. The history of adjudication in this case demonstrates that the alleged error is not capable of rapid recognition after swift and easy persuasion, and without lengthy exploration and reconsideration[53]. It is not obvious with little or no doubt[54]. If the primary judge had correctly applied the two-stage process and refused section 38 leave before hearing full argument on the issue, the ultimate merits of the arbitrators' reasoning would never have required the court's adjudication.

PART VII: RESPONDENT'S NOTICE OF CONTENTION

Contention 1 – manifest error on the face of the award and strong evidence[55]

46. This issue does not arise unless there is a further grant of special leave for Ground 5 (section 18B) or Ground 6 ("causation") of the Application for Special Leave. A further grant of special leave for Ground 2 (strong evidence and certainty of commercial law)[56] would also be required.

47. The court below held (correctly) that there was no manifest error of law on the face of the award for both the section 18B question[57] and the "causation" question[58].

48. To demonstrate error for these two questions, Reinsurers relied upon no evidence other than the award and reasons included in it[59]. The court below considered that the alternative in section 38(5)(b)(ii) might nonetheless apply, so long as the criteria in that section were met[60]. In so doing, the court below erred. As a matter of construction of section 38(5)(b), where recourse is had to nothing but the award and the reasons included in it, the error of law must be manifest on the face of the award before leave may be granted.

49. Section 38(5)(b), which was amended in 1990, reflects the guidelines for granting leave articulated by Lord Diplock in *The Nema*[61].

50. Section 38(5)(b)(i) applies where the error of law is manifest on the face of the award. Although s.38(5)(b)(i) does not refer to evidence, it is implicit that an application for

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[52] AB 5/2008 (Court of Appeal judgment [279]). And see *TNT Skypak International (Aust) Pty Ltd v Federal Commission of Taxation* (1988) 82 ALR 175 at 178 (Gummow J); *B&L Linings Pty Ltd v Chief Commissioner of State Revenue* (2008) 74 NSWLR 481 at 495-496 [47-48] (Allsop P).

[53] *Natoli v Walker* at 215 (Kirby P); Court of Appeal judgment [116] (AB 4/1961).

[54] *Natoli v Walker* at 223 (Mahoney JA).

[55] AB 5/2254.

[56] AB 5/2021-2022.

[57] AB 4/1961 (at [116] - this was also conceded by Reinsurers).

[58] AB 4/1981 (at [183]).

[59] For the section 18B question, reference was made to the materials extrinsic to the enactment of section 18B of the *Insurance Act 1902*, but there was no evidence about the conduct of the arbitration.

[60] For the section 18B question, see AB 4/1975-1978 (at [161-172]). For the causation question, see AB 4/1981 (at [183]). In both cases, the court below held that the criteria in section 38(5)(b)(ii) were not satisfied in this case.

[61] *Pioneer Shipping Ltd v BTP Tioxide Ltd* [1982] AC 724 at 742-743.

leave under that provision will include evidence of the award (and the reasons included in it[62]).

51. Section 38(5)(b)(ii) contemplates that the error of law will be demonstrated by "evidence". When contrasted with the reference in s.38(5)(b)(i) to "the face of the award", and in any event, this means evidence of something other than the award itself (including reasons). The express provision for adducing evidence with which to demonstrate error of law responds to the uncertainty in 1990 about the circumstances in which this was permitted[63].

52. Having regard to the influence of *The Nema* guidelines, the specification of "strong evidence" is readily equated with a requirement that the evidence establishes a strong prima facie case before leave is granted under section 38(5)(b)(ii). Such a construction is apposite to a preliminary application for leave to appeal. The applicant must demonstrate that there is evidence (to the requisite standard: "strong") which, at a subsequent hearing of the appeal, may establish an error of law (or may not when the full evidence is considered).

53. If recourse is to be had to nothing but the award (including reasons), then the evidence is already complete at the time of the hearing of the application for leave. In those circumstances, section 38(5)(b) requires the court to decide whether the alleged error of law is already manifest. If not, there is no utility in further argument at the appeal. To nonetheless grant leave in such circumstances would be inimical to the finality of arbitration, which is the overriding policy objective of the statute.

54. The construction of section 38(5)(b) outlined above gives effect to the meaning of the words chosen by Parliament, is harmonious with the legislative history and serves the policy objective of the statute. Section 38 leave should have been declined for Grounds 5 and 6 for these additional reasons.

Contention 2 – section 18B argument will not add to the certainty of commercial law[64]

55. This issue does not arise unless there is a further grant of special leave for Ground 5 of the Application for Special Leave (section 18B). A further grant of special leave for Ground 2 would also be required.

56. The question as to the arbitrators' construction of section 18B may not be considered by a court unless there is a grant of leave. Reinsurers have conceded that only section 38(5)(b)(ii) is potentially applicable[65]. That section requires that determination of the question may add, or may be likely to add, substantially to the certainty of commercial law. The court below held that this criterion was satisfied for the section 18B question because of its effect on the operation of insurance markets in Australia: at [173][66].

57. Before the court below, the argument advanced by Reinsurers (and to which the court referred in [173]) applied to insurance generally. It was based on a distinction between "scope of cover" and "exclusion" or "limitation"[67]. The argument Reinsurers seek to advance in this Court is different. It is limited to reinsurance treaties. The

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[62] Section 29(1)(c) of the *Commercial Arbitration Act 1984*.
[63] AB 4/1962-1964 (Court of Appeal judgment [120-123]).
[64] AB 5/2254.
[65] AB 4/1961 (Court of Appeal judgment [116]).
[66] AB 4/1978.
[67] AB 4/1975 (Court of Appeal's summary of the argument at [160]).

determination of this reinsurance question will not add substantially to the certainty of commercial law. Reinsurance has been removed from the operation of section 18B[68]. The court below recognised this, and would have decided this issue against Reinsurers had the same argument been advanced to it[69].

Contentions 3 & 4 – what was the circumstance limiting or excluding cover? [70]

58. This issue does not arise unless there is a further grant of special leave for Ground 6 ("causation").

59. The question about what caused the loss in respect of which Gordian sought to be indemnified turns on the identification of the "circumstance" by which cover was excluded or limited under the reinsurance contracts. Section 18B will apply unless that circumstance caused the loss.

60. The arbitrators addressed this question with precision. They found that the circumstance was not that the FAI policy was issued but that the terms of the FAI policy not only covered claims which were made within 3 years, but also claims made after 3 years[71]. From that conclusion, a non-causation finding correctly and necessarily follows.

61. The court below preferred the contention of Reinsurers, namely that the relevant circumstance was the fact that FAI policy was issued at all[72]. The court below's view on this issue was evidently equivocal[73].

62. The arbitrators' analysis was correct. Nothing warranted the court below interfering with the arbitrators' conclusion on what was essentially a factual matter[74]. The arbitrators' conclusion is more in tune with commonsense and the operation of section 18B. Gordian was entitled under the reinsurance contracts to indemnity for all policies written by it and classified by it as D&O (such as the FAI policy), but cover was excluded or limited if the terms of the policy covered claims made more than 3 years after inception. Reinsurers seek to take advantage of this exclusion or limitation, even though the claim was made within 3 years. It is not attended by the vice sought to be avoided by the exclusion or limit.

Contentions 5 & 6 – section 38 leave not required to raise purely defensive points of law[75]

63. The court below held that Gordian required section 38 leave for each point of contention it sought to raise before the primary judge[76]. The points of contention (listed in the judgment below at [80][77]) were generally questions anterior to the application of section 18B. They went to the existence and extent of the 3 year limit in the reinsurance contracts. They were points of law by which Gordian sought to sustain the Award.

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[68] Clause 4(b) of the *Insurance Regulations 2009*.
[69] AB 5/2003 (Court of Appeal judgment [264]).
[70] AB 5/2254.
[71] AB 1/17-57ff (Award [92]).
[72] AB 5/2002 (at [257-258]).
[73] AB 4/1980 (Court of Appeal judgment at [180] & [182]).
[74] AB 4/1980 (Court of Appeal judgment at [182]).
[75] AB 5/2255.
[76] AB 5/2009-2010 (Court of Appeal judgment [280-283]).
[77] AB 4/1949-1950.

64. The question of leave to raise such points of contention is ultimately a question of construction of section 38, read as a whole.

65. Section 38 is directed to the circumstances in which it is permissible for the court to set aside or remit an award. Sections 38(1) and 38(2) prescribe the court's jurisdiction for that purpose. Importantly, section 38 is expressed in terms of an "appeal". Conventionally understood, this means a challenge to the orders made, not the reasons given[78]. Consistent with this conventional meaning, the outcome of a section 38 appeal is an order made in relation to "the award": section 38(3). "The award" means the orders made by the arbitrators. Whilst an award may have included in it the reasons for making the award[79], the reasons do not constitute the award.

66. Section 38, in its terms, is directed only to a challenge to the orders made by the arbitrators: that is, "the award". Section 38 does not apply to an attempt to sustain the arbitrator's orders by raising other questions of law. The court below erred by construing section 38 otherwise. It erroneously equated an "appeal" (against orders) with a "complaint" (about questions of law)[80]. It also equated "the award" with the reasons for making the award[81]. The wording of section 38 does not warrant these terms being construed in this unconventional way.

67. Whilst it may be accepted that the policy behind section 38 is to restrict and limit appeals against awards, that policy is implemented by the requirement that there first be a grant of leave for an appeal. Once there is a grant of leave, it is incumbent upon the court to determine the appeal by making an order under section 38(3). As the court below recognised, points of contention may be relevant to the decision as to the section 38(3) remedy[82]. In those circumstances, permitting points of contention without a grant of leave is appropriate. Recourse to the court has still been regulated by the anterior grant of leave.

68. For the reason outlined by the House of Lords in *The Santa Clara*[83], section 38 ought not be construed as shutting out a respondent which seeks to sustain an existing award on alternative grounds not considered or upheld by the arbitrators at first instance. To do otherwise would undermine the finality of awards.

Contention 8 – construction of the reinsurance contracts: 3 year limit[84]

69. This issue does not arise unless the determination of the appeal gives rise to the possible result that Gordian is not entitled to indemnity because the reinsurance contracts contained the 3 year limit. Contention 8 addresses the anterior question of whether the reinsurance contracts contained the 3 year limit. The court below did not address this issue beyond saying that section 38 leave was required[85]. The primary judgment is

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[78] *Driclad Pty Ltd v Federal Commissioner of Taxation* (1968) 121 CLR 45 at 64 (Barwick CJ and Kitto J).
[79] Section 29(1)(c). The parties may agree otherwise, in which case there will be no reasons.
[80] AB 5/2007.38, AB 5/2009.10 and AB 5/2009.56.
[81] AB 5/2011.1.
[82] AB 2010.30 (Court of Appeal judgment [284]).
[83] *Vitol SA v Norelf Ltd* [1996] AC 800 at 813-814.
[84] AB 5/2255. Contention 7 is addressed below.
[85] AB 5/2012-13 (Court of Appeal judgment [293-300]).

silent on this issue. This is a question of law, as it concerns the proper construction of the reinsurance contracts[86].

70. The arbitrators construed the 10xs10 contract as containing an exclusion or limitation which was not set out in the slip by which the contract was formed. Their reasoning was as follows:

(a) both the expiring reinsurance contract and the 10xs10 slip for 1999 were silent on whether there was an exclusion or limit in the cover for underlying policies with extended periods or extended reporting periods[87];

(b) the expiring reinsurance contract nonetheless contained such a limit[88];

(c) the parties had the common understanding and intention that the expiring contract was so limited when the 10xs10 contract was arranged at the end of 1998[89]; and

(d) the Reinsurers agreed to extend the 10xs10 contract to have a 3 year limit[90].

Implied term in the expiring reinsurance contract: 12 months plus odd time

71. By finding that the expiring reinsurance contract contained an unwritten exclusion or limit, the arbitrators erred in law. To justify the finding, the arbitrators referred to one matter only, namely Reinsurers' submission that such a limit was in accordance with general industry practice[91].

72. As the asserter of an implied term based on custom and usage[92], Reinsurers bore the onus of proving the existence of the custom or usage. The burden of proving a sufficient custom is difficult to discharge[93], requiring proof to a high standard[94]. The arbitrators did not refer to these legal principles. The reasons actually stated by them may be understood as recording the steps that were in fact taken in arriving at their finding[95]. Thus, it may be concluded that the arbitrators did not take into account these legal principles.

73. Further, the arbitrators did not set out in the Award the findings of fact which were legally necessary to imply the alleged term. In particular[96]:

(a) they did not find that any relevant exclusion or limit was so notorious that everybody in the trade entered into contracts in 1998 with that usage as an implied term;

(b) they did not find that any relevant exclusion or limit was reasonable; and

(c) they did not find that any relevant exclusion or limit was as certain as the written contract itself.

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[86] *BTP Tioxide Ltd v Pioneer Shipping Ltd (The Nema)* [1982] AC 724 at 736; *Pilgrim Shipping Co Ltd v The State Trading Corporation of India Ltd* [1975] 1 LL Rep 356 at 361 (Roskill LJ) and 366 (Sir John Pennycuick).
[87] AB 1/5 (Award [20]) and AB 1/14 (Award [78]).
[88] AB 1/14 (Award [79]).
[89] AB 1/14 (Award [79]).
[90] AB 1/14 (Award [79]).
[91] AB 1/14 (Award [78]).
[92] AB 1/69 (Second Further Amended Defence [4]).
[93] *Majeau Carrying Co Pty Ltd v Coastal Rutile Ltd* (1973) 129 CLR 48 at 52 (Gibbs J).
[94] *Con-Stan Industries of Australia v Norwich Winterthur Insurance (Australia)* (1986) 160 CLR 226 at 241.
[95] *Waterways Authority v Fitzgibbon* (2005) 79 ALJR 1816 at 1835 [130] (Hayne J, with whom McHugh J at [26] and Gummow J at [28] agreed).
[96] *Con-Stan Industries of Australia v Norwich Winterthur Insurance (Australia)* at 236; *Black Sea & Baltic General Insurance Co Ltd v Equitas Reinsurance Ltd* [1998] 1 WLR 974 at 983 (HL).

74. By the arbitrators concluding that there was an implied term, without setting out in the Award the findings of fact which were legally necessary for the implication, there has been an error in law arising out of the Award[97].

75. None of the necessary findings were open to the arbitrators on the evidence. This is certainly so having regard to the high standard of proof required. The high water mark of Reinsurers' evidence about industry practice was Mr Hassos at [6][98] and [9][99]. This was no more than evidence of a practice which "usually" occurred. It was not evidence of a practice of sufficient notoriety to warrant the implication of an unwritten term binding on all participants in the industry in 1998. Mr Backe-Hansen's evidence at [20] did not take the case any further, being evidence of what was known "generally" to happen[100].

76. To make the necessary findings, the arbitrators would have had either to make findings for which there was no evidence or misdirect themselves as to the legal principles governing the standard of proof for implication of terms. Either way, there was an error of law[101].

"Common understanding and intention of the parties"

77. From the context, the arbitrators' reference[102] to the common understanding and intention of the parties appears to be a reference to their subjective intention, not understanding and intention objectively ascertained. The subjective intention of the parties is irrelevant[103]. The arbitrators misdirected themselves on the correct principles of contractual construction.

Letter dated 15 December 1998 and "agreement" to a 3 year limit

78. As for the objective intention of the parties, the only document referred to in the Award was the letter dated 15 December 1998[104]. The arbitrators have construed this document as constituting the parties' agreement that the 10xs10 contract would have an exclusion or limit for underlying policies with a period longer than 3 years.

79. Construction of the letter was a question of law. By construing the letter as they did, the arbitrators made an error of law. To the extent (if any) that the letter reveals contractual intention, it is in para 4.0 of the letter where it is specified that cover was to be equivalent to 1998 (or better)[105]. For the reasons set out above, there was no relevant exclusion or limit in the expiring reinsurance contract.

80. The part of the letter relied upon by Reinsurers was para 6.0, which they sought to elevate to contractual effect. Objectively viewed, any pre-contractual statements contained in that paragraph were not intended to be promissory[106]. They were not even representational. In its terms, para 6.0 was merely a statement of Mr Fletcher's

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[97] *Friend and Brooker Pty Ltd v Council of the Shire of Eurobodalla* [1993] NSWCA 103 (Clarke JA with whom Kirby P and Sheller JA agreed).
[98] AB 1/185.
[99] AB 1/186.
[100] AB 1/168. Ms Rathbone's evidence at [11] was to a similar effect: AB 1/154.
[101] *Warley Pty Ltd v Adco Constructions Pty Ltd* (1988) 8 BCL 300 at 311 (McHugh JA, Hope JA agreeing).
[102] AB 1/14 (Award [79]).
[103] *Pacific Carries Ltd v BNP Paribas* (2004) 218 CLR 451 at 461 [22] (HC).
[104] AB 1/5 (Award [22]) & AB 1/14 (Award [79]). Full text of the letter at AB 2/512-514.
[105] AB 1/5 (Award [22]).
[106] *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 61-62 (Gibbs CJ).

(erroneous) belief about the expiring cover, a statement about the basis for that belief, and a request for information.

81. In any event, para 6.0 was too vague to give rise to a binding contractual term. It is too vague to be viewed as an offer capable of acceptance. Para 6.0 does not reveal agreement by the parties on how the subject matter of the paragraph was to be addressed in contractual terms. The vagueness of para 6.0 is reflected in the way Reinsurers have variously approached their dispute with Gordian, at times contending for an exclusion, then a limitation and more recently scope of cover[107].

82. Further, the erroneous premise upon which para 6.0 was expressly based is important to its construction. The premise reveals what was objectively intended, namely that the cover provided by the expiring contract was to be *expanded* to include something not already covered. The arbitrators have instead held that para 6.0 had the opposite intention, namely an intention to *cut back* the expiring cover by the addition of a new exclusion or limitation. The letter dated 15 December 1998 did not reveal such an intention. This is apparent from para 4.0 (point 5). The arbitrators' error in this regard proceeds from their error about the implied limit in the expiring reinsurance contract.

83. Further, the construction of the letter found by the arbitrators makes it internally inconsistent: para 4.0 (point 5) versus para 6.0. Such a construction was to be eschewed. The meaning of para 6.0 is revealed by the terms of the letter read as a whole, including para 4.0. The two parts are to be construed in a way that renders them harmonious one with the other[108]. The arbitrators have failed to adhere to these principles of construction.

84. As a matter of construction, the letter dated 15 December 1998 does not establish agreement by the parties on a 3 year limit. The arbitrators erred in law by so construing it.

Contention 9 –construction of the 3 year limit to apply to run off cover[109]

85. This issue arises in the same circumstances as the previous issue, and not otherwise. It addresses another anterior question, namely whether the 3 year limit applied to run off cover, such as the FAI policy. Again, the court below did not address this issue beyond saying (erroneously) that section 38 leave was required[110]. The primary judge did not address this issue.

86. The substance of the issue is another question of construction. Even if the letter dated 15 December 1998 is construed as the parties' agreement that the 10xs10 contract have some exclusion or limit in the cover, the content and operation of that exclusion or limit was a matter for construction of the letter.

87. Relevantly, there are two types of D&O policies:

(a) policies for the directors of a company which will be in ongoing operation during the period of the policy – such policies typically cover claims made and notified

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[107] AB 1/17 (Award [90]).
[108] *Australian Broadcasting Commission v Australasian Performing Right Association* (1973) 129 CLR 99 at 109.
[109] AB 5/2255.
[110] AB 5/2012-13 (Court of Appeal judgment [293-300]).

during the period arising from wrongful acts, which wrongful acts may also occur during the period of the policy as the company is in ongoing operation; and

(b) run-off policies, where the company has ceased to trade (or has been taken over) – such policies cover claims made and notified during the period specified in the policy, but only where the claim arises from a wrongful act which occurred before the run-off policy commenced.

88. The two types of policy are distinct. Reinsurers' evidence before the arbitrators, which Gordian accepted, was that an agreement to reinsure operational policies is not the same as an agreement to reinsure run-off policies[111]. For North American claims, the standard exclusion clause addressed the two types of policies separately[112].

89. The arbitrators, however, did not draw any distinction between the two types of policies for the purposes of construing the 3 year limit. The arbitrators overlooked this central issue in the case, namely that the FAI policy was not an operational policy but a run-off policy[113]. The arbitrators did not consider whether the parties' agreement on a 3 year limit addressed run-off policies. The Award is silent on this construction issue.

90. It is apparent from the terms of the letter dated 15 December 1998 (ie, paragraph 6.0) that the parties did not address run-off policies. This is how a reasonable reader of the letter would have understood it, as illustrated by the understanding of the person who wrote it (Mr Fletcher[114]) and the reinsurance officer who read it (Ms Rathbone[115]). Both understood Gordian's enquiry about multi year policies to deal only with the operational period of policies.

91. As a matter of construction, any 3 year limit in the 15 December 1998 did not extend to cover run-off policies. The arbitrators erred in law by construing it otherwise.

Contention 10 – construction of the 5xs5 and 3xs2 contracts[116]

92. Gordian sued Reinsurers on three different contracts of reinsurance. In addition to the 10xs10 contract, Gordian sued on the 5xs5 and 3xs2 contracts which were formed by various reinsurers signing and stamping slips in 1999 and 2000 (see below).

93. Contention 10 arises in the same circumstances as Contentions 8 and 9 above, and not otherwise. It addresses another anterior question, namely whether the 3 year limit (however construed) was included in the 5xs5 and 3xs2 contracts, or just the 10xs10 contract. Again, the court below did not address this issue beyond saying (erroneously) that section 38 leave was required[117]. The primary judge did not address this issue.

94. The two construction issues addressed above relate to the 10xs10 contract. The parties to the 10xs10 contract were Gordian and Westport, Assetinsure, Munich Re and XL Re. It was entered into on 23 and 31 December 1998[118].

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[111] AB 1/189 (Hassos [25]).
[112] AB 1/389-390 (PINA exclusions (iii) and (v). The PINA clause was in the expiring reinsurance contract and a modified version was also in the 10xs10 contract).
[113] AB 1/13 (Award [73]).
[114] AB 1/128 (Fletcher [45]-[46]).
[115] AB 3/1290-1291 (Rathbone xxm at T138.37-139.7), AB 3/1297 (T145.39-42) and AB 3/1305 (T153.34-36).
[116] AB 5/2255.
[117] AB 5/2014 (Court of Appeal judgment [301-303]).
[118] AB 1/6 (Award [28]).

95. The parties to the 3xs2 and the 5xs5 contracts were different: Gordian and Westport, Assetinsure, Scor and Copenhagen Re. All the parties to the 3xs2 and 5xs5 contracts, except Copenhagen Re, entered into them in August 1999[119]. Copenhagen Re did not enter into the 3xs2 and 5xs5 contracts until March 2000[120]. The broker used for the 3xs2 and 5xs5 contracts was different to the broker for the 10xs10 contract[121].

96. Like the 10xs10 contract, the slips for the 3xs2 and 5xs5 contracts were silent on any exclusion or limitation that would affect the FAI policy. The letter dated 15 December 1998, which was central to the arbitrators' reasoning for the 10xs10 contract, was removed in time from formation of the 3xs2 and 5xs5 contracts. Further, the arbitrators gave special emphasis to the fact that the letter was initialled and stamped by each of the parties to the 10xs10 contract[122]. However, the letter was never seen by some of the parties to the 3xs2 and 5xs5 contracts (Copenhagen Re and Scor), much less initialled and stamped by them.

97. Nonetheless, the arbitrators stated that "although there are some differences between the reinsurance treaties and the reinsurers are not identical, there are no differences which are material to the primary question whether the FAI D&O run-off policy is covered by all or any of the reinsurance treaties. The question substantially involves the ambit of the [10xs10 contract]."[123]

98. The Award is thereafter silent on the 3xs2 and 5xs5 contracts. The arbitrators evidently took the approach that they would decide the claim with respect to the 10xs10 contract, and the result for the other contracts would automatically follow. This was an error of law. They failed to have regard to the case as pleaded They also failed to have regard to their own subsequent reasoning about the centrality of the letter dated 15 December 1998, and the absence of a material connection between that letter and the formation of the 3xs2 and 5xs5 contracts. In the result, they misconstrued the 3xs2 and 5xs5 contracts to include an exclusion or limit which was not in the written terms.

99. There has never been any suggestion that the parties to the 3xs2 and 5xs5 contracts agreed that there would be an exclusion or limit which applied to underlying policies with long periods, or run-off policies. On the pleadings, Reinsurers only put forward two defences to the claim under the 3xs2 and 5xs5 contracts:

(a) an express term that the class of business covered by the 3xs2 and 5xs5 contracts would be the same as for the 10xs10 contract[124]; and

(b) an implied term to the same effect[125].

100. The arbitrators made no finding that the 3xs2 or the 5xs5 contracts contained either the alleged express term or the alleged implied term. Nor did they make any findings of fact which were necessary to allow either of those terms to be found. Such findings would not have been open to the arbitrators having regard to the case put by Reinsurers.

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[119] AB 1/8 (Award [49]).
[120] AB 1/9 (Award [58]).
[121] AB 1/8 (Award [46]).
[122] AB 1/14 (Award [79]).
[123] AB 1/13 (Award [76]).
[124] AB 1/69 (Second Further Amended Defence [5]).
[125] *Ibid.* Rectification and estoppel claims were also pleaded, but were only faintly pressed before the arbitrators.

Alleged express term

101. The particulars given of the alleged express term were contained in paragraph 6 of the Second Further Amended Defence[126]. They were limited to:

(a) the letter dated 15 December 1998[127];
(b) a conversation on 29 June 1999 between Gordian's new broker (Benfield Greig) and one of the reinsurers, Westport[128]; and
(c) a letter dated 5 July 1999 from Westport to Benfield Greig[129].

102. All these matters are merely pre-contractual negotiations. It would have been impermissible[130] for the arbitrators to allow them to subtract from, add to, vary or contradict the terms of the parties' agreement as subsequently set out in the slip which was formally signed and stamped by the relevant Reinsurers.

103. In any event, the letter dated 15 December 1998 was 8 months old when the 3xs2 and 5xs5 contracts were formed with most of the Reinsurers (even older for Copenhagen Re). Objectively, the contents of that letter could not have been taken to have been the intention of the parties in August 1999 (or March 2000 in the case of Copenhagen Re), especially having regard to the changes in broker and personnel within Gordian in the meantime[131]. In any event, neither Copenhagen Re nor Scor ever saw the letter. They did not agree to it.

104. As for the conversation on 29 June 1999, the arbitrators' finding is expressed in terms of pre-contractual negotiations. It is not capable of establishing an agreement which would bind the parties after written documents were subsequently executed. In any event, there was no evidence that Assetinsure, Scor and Copenhagen Re were aware of the conversation. Further, the conversation occurred 7 weeks before the contracts were finally made. Objectively, the parties would not be taken still to have any intention revealed by the conversation other than what they reduced to writing at the time of contract.

105. As for Westport's letter dated 5 July 1999[132], the only words relied upon by the Reinsurers were "Exclusions: As per draft slip and the $10mio xs $10mio layer except ...". The arbitrators made no finding about the proper construction of these words. If the arbitrators construed them as relating to all exclusions and limitations in the contracts, they misconstrued the letter. Read in context, these words related only to the professions exclusion list, not exclusions generally. In any event, there was no evidence that Assetinsure, Scor and Copenhagen Re ever saw this letter or agreed to its terms. The only terms agreed by them were set out in the slips they formally stamped.

106. As the asserter of the alleged express term, Reinsurers bore the onus of proof. The evidence was incapable of establishing the alleged term. If the arbitrators found the express term as alleged, they erred in law.

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[126] AB 1/70.
[127] AB 1/8 (Award [46]).
[128] AB 1/8 (Award [47]).
[129] AB 1/8 (Award [48]).
[130] *Codelfa Constructions Pty Ltd v State Rail Authority of NSW* at 347 and 352 (Mason J); *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101 at 1120-1121 [41-42].
[131] AB 1/8 (Award [46]).
[132] AB 2/801 (letter).

Alleged implied term

107. The particulars given of the alleged implied term were also in paragraph 6 of the Second Further Amended Defence[133]. *First*, the implication was said to arise from the conversation on 29 June 1999. The arbitrators' finding as to that conversation[134] is not capable of sustaining the alleged implied term in the contract subsequently formed. This is especially so given the other reinsurers' ignorance of the conversation.

108. Reinsurers' *second* alleged basis was that the implied term was obvious, reasonable and equitable as well as necessary for the effective operation of a contract of its nature in the circumstances in which it was entered into. No such implication could occur unless the alleged implied term met all of the five conditions set out in *Codelfa Constructions Proprietary Ltd v State Rail Authority of NSW* [135]. The arbitrators made no findings of fact which would have been legally necessary to conclude that all five conditions had been fulfilled. Nor was it open to them to do so:

(a) no evidence was adduced to establish why different treaties with different terms would not have been reasonable, let alone equitable;

(b) no evidence was adduced to show necessity - the necessity of the alleged implied term was contradicted by the facts in this case itself, where the parties to the 3xs2 and 5xs5 contracts expressly agreed to professions exclusions different to those which had previously been agreed for the 10xs10 treaty[136];

(c) nor was there any evidence that the alleged implied term was so obvious that it went without saying; and

(d) the alleged implied term was inconsistent with the parties' express agreement in the 5xs5 and 3xs2 slips, namely that the wording was "to be agreed" - the parties contemplated further agreement which may or may not be consistent with the terms of the 10xs10 contract, to which there was different parties.

109. The *third* basis put forward for the implied term was customs, usages and professional practices in the market in 1998. Again, Reinsurers bore the onus of proof to a high standard. The arbitrators made no finding of the facts which were legally necessary for the implication of a term on this basis. There was no finding that there existed any relevant market practice, especially when regard is had to the circumstances of this particular case:

(a) 80% of the 3xs2 and 5xs5 treaties were placed 8 months after the 10xs10 treaty;

(b) 20% was placed 14 months after the 10xs10 treaty;

(c) in each case, by a different broker; and

(d) to different reinsurers.

110. Nor was there any finding that the alleged implied term was reasonable and was as certain as the written contract itself.

111. Absent these findings, it was not open to the arbitrators to find the implied term as alleged. If they nonetheless did so, they erred in law.

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[133] AB 1/70.
[134] AB 1/8 (Award [47]).
[135] (1982) 149 CLR 337 at 347 (Mason J).
[136] AB 1/8-9 (Award [47], [48] [54] & [55]).

Summary of construction of the 3xs2 and 5xs5 contracts

112. There was no basis for the conclusion set out in paragraph [76] of the Award that there was no material difference between the three contracts. By construing the 3xs2 and the 5xs5 contracts as containing an unwritten exclusion or limitation which affected the FAI policy, the arbitrators erred in law.

Contention 7 – Gordian's established acceptance and underwriting policy[137]

113. This issue does not arise unless the determination of the appeal results in further consideration of section 18B reasonableness and/or section 22 general justice and fairness (either by the Equity Division or the arbitrators).

114. Although not an issue in the arbitration, the question whether the FAI policy was within Gordian's established acceptance and underwriting policy is referred to in the Award[138]. The arbitrators said that they were not persuaded that the FAI policy was within Gordian's established acceptance and underwriting policy.

115. After what fell from the arbitrators, Reinsurers for the first time submitted to the primary judge that the FAI policy was not within Gordian's established acceptance and underwriting policy. They did so to support their arguments about section 18B reasonableness and section 22 general justice and fairness[139]. If such a finding was made by the arbitrators, it constituted an error of law. It was not open to them, having regard to the way the arbitration was conducted.

116. Arbitrators are only permitted to decide issues submitted to them by the parties because:

(a) arbitration is a consensual process; and

(b) procedural fairness requires that the parties be aware what issues are being decided.

117. In this case, the issues in the arbitration were defined by points of claims and points of defence. Originally, Reinsurers alleged that the FAI policy was not within Gordian's established underwriting policy, by reason of which Gordian was in breach of the 10xs10 contract of reinsurance[140]. This allegation was denied by Gordian[141]. Had it remained an issue, Reinsurers bore the onus of proof.

118. However, by amendment made on the eve of the hearing (10 July 2008), the allegation was abandoned by Reinsurers[142]. Thereafter, the arbitration was conducted on the basis that the FAI policy was within Gordian's established underwriting policy:

(a) no evidence was adduced by Reinsurers to prove that the FAI policy was not within Gordian's established underwriting policy;

(b) evidence from Gordian that the FAI policy was within its established underwriting policy[143] was not challenged – there was no cross examination on this issue;

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[137] AB 5/2255.
[138] AB 1/14 (Award [79]).
[139] AB 4/1598.02, 4/1598.40ff & 4/1600.30. They continue to do so in this Court: Reinsurers' submissions [21(e)].
[140] AB 1/94 (Amended Cross Claim dated 10 March 2008 [12]-[13]).
[141] AB 1/107 (Defence to Amended Cross Claim [1]).
[142] AB 1/102 (Further Amended Cross Claim dated 10 July 2008 [4-17]).
[143] AB 1/120-121 & 1/126 (Fletcher statement dated 3 June 2008 [6]-[10] & [34]).

(c) Reinsurers made no submission that the FAI policy was not within Gordian's established underwriting policy; and

(d) Gordian positively submitted that there was no allegation that the FAI policy was not within its established underwriting policy[144].

119. The issue having been withdrawn from the arena of controversy, Gordian conducted its case accordingly, including as to submissions made. Procedural fairness required that the arbitrators proceed on the basis that the FAI policy was within Gordian's established underwriting policy.

120. Further, the arbitrators made the following findings of fact:

(a) FAI Insurance Limited was a current D&O insured of Gordian when it requested Gordian to provide run-off cover[145]; and

(b) when requested to do so, Gordian's usual practice was to provide run-off cover to current D&O insureds provided the premium was appropriate to the risk[146].

121. These findings suggest an internal contradiction within the Award on this issue. Having regard to these findings, and absent any allegation, evidence or submission to the contrary, it was not open to the arbitrators to find that the FAI policy was not within Gordian's established underwriting policy. Had Reinsurers maintained such an allegation, there would have been no evidence upon which the arbitrators could have upheld it.

122. In these circumstances, the arbitrators' treatment of this issue was an error of law. The court below found there to be powerful considerations in support of the above contentions, but did not deal further with the issue because it had held that section 38 leave is required to raise a point of contention[147]. For the reasons outlined above, section 38 leave is not required. If the appeal to this Court is allowed, any remitter ought be on the basis that the FAI policy was within Gordian's established underwriting policy.

Contentions 11 & 12 – implications of the points of contention for the appeal[148]

123. If the Court upholds either Contention 8 or Contention 9, then Gordian is entitled to all the relief granted in the Award regardless of the determination of the issues raised on the appeal. In those circumstances, the appeal should be dismissed.

124. If the Court upholds Contention 10, then Gordian is entitled to the relief granted in paragraph 2 of the Award (which relates to the 5xs5 and 3xs2 contracts only) regardless of the determination of the issues raised on the appeal. In those circumstances, the appeal should be dismissed to the extent that it challenges that part of the Award.

125. If the Court upholds Contention 7, any remitter of the case ought be on the basis that the FAI policy was within Gordian's established underwriting policy.

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[144] AB 1/266 (Outline of Claimant's Submissions to the arbitrators dated 21 July 2008 [5(b)]).
[145] AB 1/3 (Award [2]).
[146] AB 1/3 (Award [5]).
[147] AB 5/2012 (Court of Appeal judgment [290-292]).
[148] AB 5/2255-2256.

Dated: **10 December 2010**

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