New South Wales

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Decision Date:	23 June 2026
Before:	Leeming JA at [1] Ball JA at [2] Free JA at [96]
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[Note: The Uniform Civil Procedure Rules 2005 provide (Rule 36.11) that unless the Court otherwise orders, a judgment or order is taken to be entered when it is recorded in the Court's computerised court record system. Setting aside and variation of judgments or orders is dealt with by Rules 36.15, 36.16, 36.17 and 36.18. Parties should in particular note the time limit of fourteen days in Rule 36.16.]

HEADNOTE

[This headnote is not to be read as part of the judgment]

Simon Bibby was injured on 5 April 2018 in the course of his employment with Tyre and Auto Pty Ltd trading as Kmart Tyre & Auto Services (**KTAS**) when he was manually moving a wheeled waste oil container up a concrete ramp between the lower and upper levels of a service station complex in St Ives, NSW (**the Premises**). KTAS occupied a mechanic's workshop and work bays on the lower and upper levels of the Premises under a sub-licence from Eureka Operations Pty Ltd trading as Coles Express (**Eureka**), which operated a petrol

station and shop from the Premises under a licence from Viva Energy Australia Pty Ltd (**Viva**).

The system of moving waste oil containers up the ramp was adopted by KTAS because the drivers of waste oil trucks were refusing to drive down the ramp due to concerns about its load-bearing capacity. From January 2018 Viva was on notice of these concerns and was taking steps to investigate and repair the ramp. After Mr Bibby's injury, KTAS sought, and was given, Viva's approval to install a system to allow waste oil to be pumped from the lower level of the workshop. Viva also paid for the works.

Mr Bibby commenced proceedings against Eureka and Viva in the District Court of New South Wales in relation to the incident. The primary judge found that Viva was 90% liable for Mr Bibby's injuries, Eureka had no liability, and the notional liability of KTAS (which had not been joined to the proceedings) was 10%. Viva appealed to this Court.

The Court (Ball JA, Leeming and Free JJA agreeing) **held, allowing the appeal:**

(1) A landlord owes an entrant onto and a tenant of leased premises a duty to take reasonable care to avoid a foreseeable risk of injury to the person in question. The nature and extent of the duty of care, and what constitutes a breach of it, will depend on the circumstances of the case and is now governed by s 5B of the *Civil Liability Act 2002* (NSW). The circumstances to be considered may include the purposes for which the premises are let, the terms of the lease, and the obligations the parties are allocated under the lease: at [60]-[61], [63].

> *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313; [1997] HCA 39; *Jones v Bartlett* (2000) 205 CLR 166; [2000] HCA 56; *Aldred v Stelcad Pty Ltd* [2015] NSWCA 201, considered.

(2) Viva was contractually obliged to undertake structural repairs to the Premises. The scope of its duty in negligence extended to undertaking repairs to the ramp. To discharge that duty, it was necessary to engage an engineer to inspect the ramp, to devise a method of repair, and to engage contractors to undertake the work. Viva's duty could not have extended beyond a duty to repair the ramp within a reasonable time (taking account of the seriousness of the problem): at [77].

(3) The evidence did not justify a conclusion that Viva delayed unreasonably in repairing the ramp. It first became aware that there may be a problem with the ramp on 22 January 2018. It arranged for an engineer to inspect the ramp, which occurred on 13 February 2018. The engineer provided his report on 19 February 2018. The report

contemplated that the work would proceed in two stages, the first of which involved temporary propping, which would permit vehicles of up to three tonnes to use the ramp, and the second of which involved repairs to return the ramp to its design capacity of six tonnes. To complete the second stage, it was necessary to engage a structural remedial works engineer to prepare a set of specifications, obtain quotes for that work and engage a contractor to undertake that work. It was unrealistic to suppose that that work could have been completed before Mr Bibby was injured; and Mr Bibby led no evidence to suggest otherwise: at [78].

(4) There was no evidence before the primary judge from which it could be concluded that if the ramp had been repaired before Mr Bibby's injury, his injury would have been avoided. If the temporary support for the ramp proposed by the engineer had been installed before Mr Bibby's accident, the heaviest vehicles that could use the ramp safely were those not exceeding three tonnes. Even if the ramp had been repaired before Mr Bibby's accident, the heaviest vehicles that could use it safely were those not exceeding six tonnes. There was no evidence before the primary judge that the waste oil trucks that were used to collect the waste oil weighed less than six tonnes let alone less than three. What evidence there was suggested otherwise. Consequently, on the evidence, it could not be said that the failure to repair the ramp or to install temporary supports before Mr Bibby's accident caused that accident: at [79].

(5) The unsafe system of work was introduced by KTAS because waste oil truck drivers refused to use the ramp, not because of a breach of duty by Viva. Contrary to the basis on which the primary judge proceeded, there was no real connection between the defects in the ramp, let alone Viva's breach of duty, and Mr Bibby's injury: at [83].

(6) The evidence did not establish that the only solution to the problem of disposing of waste oil on the lower level was the one that was eventually adopted, which involved a minor structural modification of the Premises. Even if it was, there was no basis for concluding that the obligation was on Viva to come up with or to implement the solution. KTAS had a right to make structural alterations with consent, which was not to be delayed or withheld unreasonably. It was not required to obtain consent where the alteration was reasonably necessary to comply with its obligations under the terms of the Site Licence which were incorporated into the Sub-Licence. It was for KTAS to implement a safe system of work for its employees given the inherent restrictions imposed by the Premises: at [86]-[87].

(7) To the extent that Mr Bibby sought to argue that Viva was required, as an aspect of its duty of care, to approve the implementation of the new system of disposing of oil, there was no evidence of Viva being asked to provide such approval prior to Mr Bibby's accident. No causally significant breach could be established, even if there was otherwise a sound basis for the contention that approving the implementation of such a system was an aspect of Viva's duty of care: at [88].

JUDGMENT

1 **LEEMING JA:** I agree with Ball JA.

2 **BALL JA:** By a notice of appeal filed on 11 December 2025, Viva Energy Australia Pty Ltd (***Viva***) appeals against orders made in the District Court of NSW by Gibson DCJ on 24 September 2025 and 20 October 2025. By those orders, the primary judge (1) gave judgment for the first respondent, Mr Simon Bibby, against Viva in relation to Mr Bibby's claim in negligence for damages for personal injury for an amount the calculation of which was to be agreed between the parties consistently with her Honour's reasons for judgment; (2) gave judgment for the second respondent, Eureka Operations Pty Ltd trading as Coles Express (***Eureka***), in relation to Mr Bibby's claim against it; and (3) ordered that Viva (not Mr Bibby) pay Eureka's costs of the proceedings "on the ordinary basis until 24 November 2021 and thereafter on the indemnity basis": see *Bibby v Viva Energy Australia Pty Ltd* [2025] NSWDC 377 (***Principal Judgment*** or ***PJ***); *Bibby v Viva Energy Australia Pty Ltd (No 2)* [2025] NSWDC 407 (***Costs Judgment*** or ***CJ***).

3 The parties apparently reached agreement on the quantum of damages payable by Viva in accordance with her Honour's reasons for judgment. However, that agreement was not recorded in an order of the Court. Nonetheless, Viva challenges two aspects of the conclusions reached by the primary judge on the question of damages.

4 First, there is no dispute that Mr Bibby was injured on 5 April 2018 in the course of his employment with Tyre and Auto Pty Ltd, which traded under the name Kmart Tyre & Auto Services (***KTAS***) and which appears to be a related company of Kmart Australia Ltd (***Kmart***), when he was manually moving a wheeled waste oil container up a concrete ramp between the lower and upper levels of a service station complex in St Ives, NSW (***the Premises***). KTAS occupied a mechanic's workshop and work bays on the lower and upper levels of the Premises under a sub-licence from Eureka, which operated a petrol station and shop from the Premises under a licence from Viva. The primary judge found that Viva was 90% liable for Mr Bibby's injuries, Eureka had no liability, and the notional liability of KTAS (which had not been joined to the

proceedings) was 10%. Accordingly, applying s 151Z(2) of the *Workers Compensation Act 1987* (NSW), the primary judge concluded that the amount of damages otherwise payable by Viva should be reduced by 10%. On appeal, Viva challenges that conclusion. It contends that if (contrary to its primary contention) it was liable to Mr Bibby, that liability should be reduced to no more than 25% of Mr Bibby's loss taking account of KTAS's responsibility for that loss.

5 Second, the damages claimed by Mr Bibby included an amount of $25,000 payable in accordance with the principle stated by the High Court in *Fox v Wood* (1981) 148 CLR 438; [1981] HCA 41 (***Fox v Wood***) (that a tortfeasor is liable to compensate an injured worker for tax paid or payable on workers compensation payments received by the worker). The primary judge stated at PJ[158] that "I should award the full sum claimed for past economic loss claimed in the schedule of damages" (which included the $25,000). Viva maintains, however, that Mr Bibby's counsel conceded during closing submissions that the correct amount was $18,350, although that amount was not reflected in the short minutes of order apparently agreed by the parties. It claims that the error should be corrected on appeal (again assuming it fails on its primary contention that it is not liable at all).

Background

Contractual arrangements

6 Viva licensed the Premises to Eureka under a Site Licence dated 27 November 2003 (***the Site Licence***). Although from August 2016 Viva leased the premises from another entity, under the provisions of that lease it stood in the position of the landlord (see PJ[3]), taking the lease subject to the rights of Eureka under the terms of the Site Licence and, with one irrelevant exception, assuming the rights, powers and obligations of the landlord.

7 Clause 3.4 of the Site Licence states:

> **Compliance with laws**
>
> (a) [Eureka] must at its expense observe and comply with all laws (including Environmental Laws, and laws that relate to occupational health and safety and workers' compensation insurance) that affect or relate to [Eureka's] use or occupation of the Licensed Area, or [Eureka's] use of the Fuel Equipment (***[Eureka] relevant laws***) other than any [Eureka] relevant law that [Viva] is

required to observe or comply with under this Agreement or any other Project Agreement, but otherwise regardless of whether the [Eureka] relevant laws require observance or compliance by any one or more of any party or any other person.

(b) [Viva] must at its expense observe and comply with all laws (including Environmental Laws, and laws that relate to occupational health and safety and workers' compensation insurance) that affect or relate to the performance of its obligations under this Agreement ([***Viva***] ***relevant laws***) other than any [Viva] relevant law that [Eureka], [Coles Supermarkets Australia] or [Coles Myer Finance Ltd] is required to observe or comply with under this Agreement or any other Project Agreement, but otherwise regardless of whether [Viva] relevant laws require observance or compliance by any one or more of any party or any other person.

8 Clauses 3.11 and 3.12 relevantly state:

3.11 Alterations, additions and works

(a) Without limitation to Clause 3.9, except as reasonably necessary for [Eureka] to exercise its rights and perform its obligations under any Project Agreement, including this Agreement, [Eureka] must not in relation to Sites owned by [Viva]:

(i) materially alter, remove or add to any fixed structure located on or within the Licensed Area;

(ii) erect any fixed structure of a material nature on or within the Licensed Area; or

(iii) conduct any works of a material or structural nature of any kind (including building works) on or within the Licensed Area (other than non-structural works),

without [Viva's] prior written consent which will not unreasonably be withheld or delayed (except to the extent that the alteration, removal or addition is to be made, the structure is to be erected, or the works are to be conducted only within the interior of the Shop, in which case [Viva's] consent is not required).

(b) [Eureka] must not in relation to Sites that are leased:

(i) alter, remove or add to any fixed structure located on or within the Licensed Area;

(ii) erect any fixed structure on or within the Licensed Area; or

(iii) conduct any works of any kind (including building works) on or within the Licensed Area (other than non-structural works),

without the prior written consent of the lessor under and in accordance with the Head Lease, if required under the Head Lease. [Viva] must (at [Eureka's] expense) use its reasonable endeavours to obtain the consent from the lessor under and in accordance with the Head Lease. If consent of the lessor under the Head Lease is not required, the provisions of Clause 3.11(a) will apply and not this Clause 3.11(b).

> (c) [Eureka] must ensure that any such alteration, removal or addition is made, structure is erected, or works are conducted, in a proper and workmanlike manner in accordance with the Site Procedures Manual, any applicable building regulations, Planning Approval and the lawful requirements of any Governmental Agency.
>
> **3.12 [Eureka] to notify material adverse effect**
>
> [Eureka] must promptly notify [Viva] if in [Eureka's] reasonable opinion the conduct of any part of the Business at the Licensed Area is reasonably likely to have a material adverse effect on the Fuel Equipment and that is or is reasonably likely to become a health, safety, security or environmental issue.

9 The Premises in this case were leased. However, it was not suggested that the head lease imposed any obligations on Viva to obtain the consent of the head lessor to carry out any of the activities referred to in cl 3.11(b)(i)-(iii). Accordingly, cl 3.11(a) applies. That requires Eureka to obtain Viva's consent relevantly to "erect any fixed structure of a material nature on or within the Licensed Area" and to "conduct any works of a material or structural nature" except where that work is "reasonably necessary for [Eureka] to … perform its obligations under … this Agreement". Consequently, Eureka is not required to obtain Viva's consent to carry out structural work that is necessary to comply relevantly with laws that relate to occupational health and safety. In any event, Viva is not entitled unreasonably to withhold or delay its consent to any structural work proposed to be carried out by Eureka.

10 Under cl 5.1(a) of the Site Licence, Eureka is obliged to keep the "Licensed Area" (defined by reference to a map that is said to be but which is not attached to the Site Licence) "clean and tidy and maintained and in good repair and condition" but excepting relevantly "repair and maintenance that are the obligation of [Viva] under this Agreement" and "fair wear and tear".

11 Under cl 5.3(a) of the Site Licence Viva is required to carry out structural repairs of the Premises. That clause provides:

> **5.3 Structural repair and maintenance**
>
> (a) Subject to [Eureka's] obligations set out in Clause 5.1, [Viva] will perform, or procure the performance, of:
>
> (i) structural repairs and maintenance;
>
> (ii) capital repairs and maintenance; and
>
> (iii) replacement of major component parts for the Licensed Area (including the Licensed Area Building),

> including keeping the structure of the Building wind and water proof and in good repair and condition, using reasonable endeavours to minimise any interference with [Eureka's] use or occupation of the Licensed Area and/or the Fuel Equipment and the conduct of the Business.

12 Clause 7.1 of the Site Licence relevantly provides:

> **No warranty as to use**
>
> Without limitation to anything in the Alliance Agreement, [Eureka] acknowledges that:
>
> (a) …
>
> (b) [Eureka] has made its own appraisal of and satisfied itself about,
>
> each of the following matters:
>
> (i) how the Licensed Area may be used;
>
> (ii) the suitability or fitness, including the structural suitability or fitness, of the Licensed Area for the conduct of the Business or any other purpose;
>
> (iii) …
>
> (iv) the condition of the Licensed Area;
>
> (v) …
>
> (vi) …

13 Eureka sub-licensed part of the Premises to KTAS under a Sub-Licence Agreement dated 20 February 2006 (***the Sub-Licence***), which was novated from Kmart to KTAS by a deed of novation between Eureka, Kmart and KTAS dated 21 January 2015. Under the terms of the Sub-Licence Eureka agreed to sublicense to KTAS "part of the sites listed in Schedule 1 … being the areas cross-hatched on the plans annexed in Schedule 2". Again, no schedules are attached to the Sub-Licence, but it is common ground that the area that was sub-licensed was the area described above, which includes the concrete ramp that was being used by Mr Bibby when he was injured.

14 Clause 3 of the Sub-Licence relevantly requires KTAS to "comply with all directions or instructions given by [Eureka] which arises from [Eureka's] obligations under the [Site Licence]".

15 In relation to the carrying out of structural works, cl 9 provides:

> [KTAS] is only obliged to carry out structural works, at its cost, if the works are required as a result of the act, neglect or omission of [KTAS], its employees, contractors, agents, customers, visitors and invitees. [KTAS] must obtain [Eureka's] written consent prior to undertaking any structural works.

16 Clause 10 provides:

> [Eureka] agrees to observe and perform all covenants and conditions which it is required to observe and perform under its licence arrangement with [Viva] for each Alliance Site, but with such modifications as may be necessary to make them applicable to this Sub-Licence Agreement or as modified by the provisions of this Sub-Licence Agreement.

17 Clause 13 relevantly provides that KTAS must obtain Eureka's written consent before it "alters, install[s] any equipment or [carries] out any other works in the Licensed Area".

18 Clause 16 provides:

> [KTAS] must undertake its business in compliance with all laws and regulations.

19 Clause 19 requires KTAS to notify Eureka promptly of any "defect in or lack of repair of any services to or in the Licensed Areas of which [KTAS] is aware … which is likely to cause danger … to any person".

The system of work

20 Mr Bibby started working at the Premises on 1 October 2017: PJ[13]. His evidence was that he had been employed by KTAS since 2012 and worked at several facilities before being transferred to the Premises, where he worked as store manager.

21 Before March 2017, waste oil from vehicles being serviced at the Premises by employees of KTAS was drained into a wheeled container known as an "oil boy". The oil was then pumped from the container into one of two waste oil tanks, one of which was in the upstairs workshop and the other of which was on the lower level. The oil in the tanks would then be siphoned off into waste oil trucks that attended the Premises. The trucks drove down the ramp, which was supported by piers, to collect the waste oil from the lower level, although as will become apparent some of the correspondence mistakenly suggests that the trucks entered the Premises at the lower level and drove up the ramp to collect the waste oil from the upper level. The weight of the waste oil trucks is unclear.

22 There was a question at trial about when the practice of trucks driving down the ramp to collect the oil ceased. Mr Bibby's evidence was that in about March 2017, oil truck drivers began refusing to use the ramp due to concerns about its

load-bearing capacity. There was no documentary evidence that supported the evidence given by Mr Bibby, and the basis of Mr Bibby's knowledge or belief is not revealed by the evidence, although, as will become apparent, Mr Bibby did suggest in an email he sent Eureka on 16 January 2018 that the issue "has been ongoing and getting nowhere since around march 2017". In any event, Ms Morgan SC, who appeared for Mr Bibby before this Court, properly conceded that the evidence demonstrated that Viva did not become aware of any issue with the ramp until 22 January 2018 in the circumstances described below.

23 As a result of the reluctance of truck drivers to use the ramp, at some time well before January 2018, KTAS staff adopted the practice of physically pushing the "oil boys" up the ramp to the upper level: PJ[13]. According to Mr Bibby's evidence, these containers weighed approximately 35 kg when empty and up to 120 kg when full: PJ[13].

Correspondence with Eureka and Viva

24 The available documentary evidence suggests that the issue with the ramp was first raised with Eureka on 30 August 2017. On that date, Mr Mike Phasavath, KTAS's facilities co-ordinator, sent Ms Wynn Yap and Ms Belinda Be, two employees of Eureka, an email which said:

> Requesting a load rating on the ramp at the St Ives CE premises.
>
> One of our service providers (waste oil) requesting a load rating on the ramp to ensure vehicles used are not exceeding weight limit.
>
> Can you please assist or advise who may have this information.

25 Little seems to have happened then until January 2018. On 10 January 2018, Mr Phasavath sent a further email to Ms Yap and Mr Andrew Curry, who was also employed by Eureka, which was copied to Mr Bibby, following up the ramp load rating and noting that contractors had been refusing "to go up the ramp due to vehicle weight and size". The email went on to say:

> Store staff have been rolling down waste oil drainers down the ramp to the trucks which is a safety concern with potential spillage and trip hazard.

26 On 16 January 2018, Mr Bibby sent Mr Phasavath, Ms Yap and Mr Curry a more strongly worded email in which he said:

> Hey guys is there any news on this problem at all yet, its [sic] starting to become more than frustrating!
>
> This is a complete health hazard at the moment so someone needs to pull there [sic] finger out of somewhere and sort it out URGENTLY!!!
>
> WE ARE HAVING TO DRAG HEAVY OIL DRAINERS UP A SLOPED RAMP DAILY TO EMPTY. The staff are complaining it is a complete health and safety issue which it is, due to the gradient of the ramp, the weight of the oil drainers and the fact that when it rains the ramp becomes slippy.
>
> It is currently tue jan 16th 2018, this issue has been ongoing and getting nowhere since around march 2017 …

27 The issue was brought to Viva's attention by an email dated 22 January 2018 which Mr Curry sent to Ms Be, who was by that time Viva's maintenance manager. By that email, Mr Curry forwarded the emails dated 10 and 16 January 2018 that had been sent to him. Mr Curry said in his covering email that he suspected the issue was "structural" and that it would be for Viva to action.

28 On the same day, Ms Be sent an email to Mr Roshan Krupakaran, Viva's Building Maintenance Manager, and Ms Amy Shearer, who was at the time Viva's NSW and ACT property manager, asking whether the recipients had any documentation to confirm the load-bearing capacity of the ramp or whether an engineer should be retained: PJ[52].

29 Mr Krupakaran replied that he would make enquiries to determine if there was any documentation of that type available and, if no documentation was available, he would engage Viva's property maintenance contractor, Cushman & Wakefield, to seek advice from an engineer: PJ[53].

30 On the evening of 30 January 2018, Mr Bibby sent what the primary judge described as a "particularly strongly worded email regarding safety concerns about the ramp" to staff at KTAS and Eureka, in which he relevantly stated that contractors had been refusing to collect waste oil and as a result staff had been walking oil containers up and down the ramp, which was a safety hazard: PJ[54]. Mr Curry of Eureka responded on the same evening stating that "This requirement is structural & Viva will action accordingly via an Engineering visit & subsequent report". Mr Krupakaran also replied to the effect that an engineer was expected to attend the site over the coming days "to conduct an investigation into the structural integrity of the ramp".

31 On 31 January 2018, Modus Projects reported to Cushman & Wakefield by email to the effect that further investigations would be required to assess the load rating of the ramp. They suggested two options to assess the load rating of the ramp. The first involved locating the structural drawings for the ramp. The second was to engage a ground penetration radar company to scan the existing reinforcement. Mr Krupakaran was told of the two options on the same day.

32 On the following day, there was a series of emails between the parties about the issue. Mr Krupakaran asked Ms Shearer about the availability of structural drawings. Ms Shearer responded saying that it was "Unlikely we would hold these". Mr Krupakaran also received an email from Mr Phasavath which was also sent to others at KTAS, Eureka and Viva which relevantly stated:

> Understand you are organising an engineer/surveyor to investigate.
>
> I still have the issue regarding the below [referring to part of Mr Bibby's email of 30 January 2018].
>
> Require a solution before it becomes a major safety concern.

33 Mr Krupakaran replied saying that, due to the absence of documentation available about the ramp, Viva would engage an engineer to carry out testing, and that it may take "up to two weeks to arrange the necessary permits, book in the engineer to attend, perform testing of the ramp and provide a report back to attest to its structural integrity". His email concluded:

> I acknowledge that this has been on-going for some time now, but rest assured that all appropriate stakeholders have been briefed on the situation and are working to have all of your concerns addressed as a matter of urgency.

34 Mr Phasavath responded to that email saying that he understood testing may take some time but that he "need[ed] a solution/interim fix to empty the waste oil immediately". Mr Krupakaran responded that "As your lease is with Coles Express (and not Viva Energy), I'd recommend discussing the below with Wynn Yap". This email received a particularly trenchant response from Mr Bibby, set out by the primary judge at PJ[57], which Ms Yap forwarded to Ms Shearer of Viva stating:

> Can you please review below? Viva is currently reviewing the structural integrity of the ramp.

> This is a Pluto site and Viva receives full rental income from KTAS. Can your maintenance team propose an interim solution to assist pending on a permanent resolution in place?

35 Ms Shearer responded:

> Roshan [Krupakaran] is dealing with this as a matter of urgency, and is currently arranging for a suitable engineer to complete the necessary structural testing on the ramp to work out what fix needs to be undertaken.
>
> Note, that we fixed up the side rails last year (which needed repairing and reinforcing), but this is the first we have heard of any potential structural issues with the actual ramp itself.
>
> Will give you an update as soon as we have it.

36 On 2 February 2018, Ms Yap emailed Mr Phasavath and Mr Bibby stating that Viva was dealing with the issue "as a matter of urgency" and was arranging for an engineer to perform testing. The email concluded: "Please discuss interim solution with site team".

Investigations

37 Mr Gerardo Suarez, an engineer from Jones Nicholson Consulting Engineers, attended the site on 13 February 2018 and took concrete samples. According to an email sent by Mr Bibby to Viva on 13 February 2018, Mr Suarez had told KTAS staff "not [to] drive any vehicles of more than 2.5t down or up the ramp, until his final findings and calculations come in".

38 Mr Suarez's findings were recorded in a report dated 19 February 2018 addressed to Modus Projects, which was circulated to Viva on the same day. Mr Suarez recorded the presence of defects in the ramp in the form of cracking, misalignment and honeycombing, and made the following recommendations:

> R1) Temporary propping should be installed immediately as per the attached sketch SK3
>
> R2) Install a sign limiting the traffic on the ramp to 3 Tonnes
>
> R3) Engage a Structural Remedial Works engineer to prepare a set of specifications to correct the observed damage and defects of the ramp structure. Engineer to supervise and provide certification that the works have been completed to his/her satisfaction.
>
> R4) After the repairs mentioned in R3) above are completed and certified, install a sign limiting the traffic on the ramp to 6 Tonnes.

> R5) If a heavier vehicle load is required, engage a structural engineer to coordinate the required additional site investigation and to carry out the corresponding structural design.

Implicit in this report was that the design capacity of the ramp was six tonnes, which could be achieved if the repairs he refers to were carried out.

39 On 6 March 2018, Mr Phasavath and Mr Bibby both sent emails to Viva and Eureka seeking an update in relation to the outcome of the testing: PJ[63]-[64]. Mr Bibby's email relevantly stated:

> Looking forward to hearing the outcome for this asap, ie the ramp loading, and if that's not going to happen any time soon, i'm really looking forward to hearing what options to drain the oil tank downstairs your [sic] going to put in place with **immediate effect**. [Emphasis in original]

40 Mr Krupakaran corresponded with Cushman & Wakefield in relation to obtaining a quote to carry out the work recommended by Mr Suarez (PJ[65]), and provided an update to Mr Phasavath (not including Mr Bibby) stating:

> Currently awaiting quotes for rectification of the concrete ramp.
>
> Note that in its current condition, the engineer has recommended that vehicles of more than 3.0t GVM stay clear of the ramp altogether.
>
> I will advise as soon as a quote has been approved and date firmed for commencement of works.

41 Mr Bibby sent further emails on 7 and 13 March 2018 in which, among other things, he requested the installation of signage stating a maximum load limit of three tonnes for the ramp: PJ[66]-[67].

42 On 20 March 2018, Mr Steven Dodds, KTAS's national facilities manager, sent an email to Mr Krupakaran and other staff at Viva and Eureka stating:

> Could I please get an update on the ramp situation at St Ives. I now have team members pushing 60kgs oil containment units up the ramp to be emptied. As you would be well aware, this is a major safety hazard for both our team members and the environment if an accident were to occur.
>
> If the ramp can't be rectified within an acceptable time frame (I would suggest two weeks) then a solution needs to be found were [sic] the oil can be pumped up from down stairs.

43 On the same day, Ms Yap sent an email to Mr Krupakaran and Ms Shearer requesting an "update regarding the timeframe" and asking "Would you/engineer be able to suggest an interim solution to pump up the oil?". There was no response to this email.

The Modus Projects Quote

44 On the evening of 20 March 2018, Mr Allan Seage of Cushman & Wakefield sent Mr Krupakaran a quote from Modus Projects dated 9 March 2018 dealing with the installation of signage and temporary propping (described as Stage 1), and the engagement of a structural remedial works engineer to prepare specifications and certification of those remedial works once completed (described as Stage 2). Absent from the quote was any description or quotation of the remedial works to be performed once the specifications were prepared, and Mr Krupakaran replied to Mr Seage later that evening seeking clarification on that issue.

45 After several follow-up emails, on 27 March 2018 Cushman & Wakefield confirmed that the Stage 2 prices did not "include the corrective actions (Labour and Materials) for the ramp repairs" and that Modus would arrange an "urgent budget estimate" for those costs.

46 On the same day, Mr Bibby sent a further email requesting an update (PJ[69]), which prompted Ms Yap to seek an update from Viva that evening.

47 On 5 April 2018, Ms Rebecca Garrett of Modus Projects emailed Mr Seage of Cushman & Wakefield confirming the Stage 2 pricing and stating that the pricing did not include remedial works, which could not be quoted until inspections had been first undertaken. Mr Seage forwarded this email to Mr Krupakaran some eight minutes later, who approved the quote later that morning.

Subsequent events

48 Works to install the temporary propping and signage commenced on 13 April 2018.

49 On 3 May 2018, Mr Bibby sent an email to Mr Dodds and other KTAS staff which relevantly stated:

> Are we getting plumbing installed to remove the waste oil from the downstairs tank?
>
> recently we ordered an oil collection 1 week prior to our tank requiring being emptied, that was 5/4/18, unfortunately the waste oil company we use are useless and they did not collect the oil for over 2 weeks. our tanks were both full (one ongoing and the second filled over the neck on 12/4/18), as were our

> oil boys and any other containers we had so we had to use the waste oil separator tank to put our waste oil into, im pretty certain that environmentally this was not the best solution, but due to the current ongoing situation being presented to us in the store with no solution seemingly in sight (or for that even being considered with the lack of answered phone calls and messages, and no calls back).
>
> simple question, Who is going to do What, and When?
>
> this has now been ongoing for well over 1 year, can someone please get something sorted?

50 It appears that Mr Bibby's injury was notified on 3 May 2018. Ms Amberley James, a staff member of KTAS, sent an email addressed to Mr Dodds and copied to other KTAS staff enclosing an "Incident Report Notification", which relevantly said:

> SM Simon Bibby reported that he woke up about a month ago with right sided inguinal (groin) pain. SM advised that this was on 06/04/2018.
>
> SM stated that on the afternoon of 05/04/2018 he was pushing/pulling the mobile oil drainer up the ramp (as the truck is too heavy to go down the ramp). SM advised that he thinks this has contributed to his injury but is unsure of the cause.

51 Ms James' email stated:

> Steve – can you please review possible options for the waste oil removal?

52 On 4 May 2018, Mr Dodds replied to Mr Bibby's email stating:

> I have spoken to James and he has assured me I will have the quotation for the works required over this weekend. I will get the quote signed off by Wednesday next week and in consultation with you plan to start the works required asap. I will be in touch with you over the next week.

53 The reference to "James" is a reference to Mr James Attard, a plumbing contractor used by KTAS, who on 7 May 2018 sent an email to Mr Dodds to which he attached a quote of $2,695.00 for plumbing works at the Premises and apologised for the delay. The following works were quoted:

> Install waste oil suction system from downstairs waste tank to upstairs location at workshop door to allow efficient waste oil removal from site.
>
> Including
>
> - Piping, fittings and fixings.
> - Core hole through floor.
> - Decant safe tray with camlock coupling.

54 Some four hours later, at 12:42pm, Mr Dodds sent an email to Ms Yap attaching the quote. The email said:

> We now have an injury due to the ramp not able to hold the weight of the oil truck and the time it has taken to rectify this situation. The team members are having to drag 60kg oil boys up the ramp so the waste oil can be collected. This practice is to stop now.
>
> We need to build new infrastructure to allow the oil truck to pump the waste oil from the down stairs workshop to the waste oil truck upstairs.
>
> I am now seeking permission to implement this infrastructure and for someone to pick up the cost.
>
> Please see quotation above.
>
> I am also seeking approval to drill a core hole from the top workshop to the bottom.
>
> Your urgent reply in this matter will be appreciated.

55 At 12:50pm Ms Yap forwarded the quote to Mr Krupakaran requesting that he “review the below and advise”.

56 At 1:02pm Mr Krupakaran sent an email to Ms Shearer, and others at Viva and Cushman & Wakefield, relevantly stating:

> Please see below e-mail from Wynn Yap regarding the concrete ramp at CEXP [Eureka] St Ives.
>
> In my opinion, given the dimensions and make-up of the ramp in question, it has never been capable of carrying a vehicle the weight of a waste oil truck (which, according to the store manager, can be up to 60 tonnes).
>
> As such, I believe that this needs to be discussed between Coles Express [Eureka] and their sub-tenant KTAS and not involve Viva Energy, and any costs associated with the installation of a pump system to transport waste oil from the downstairs workshop upstairs should be at CEXP [Eureka] cost.
>
> What are your thoughts?

57 Ms Shearer did not respond to that email until 14 May 2018, when she said:

> I would proceed with all necessary works. We have to ensure the premises is fit for purpose as the landlord.

58 Mr Krupakaran responded to Ms Yap on the same day confirming that the quote was approved.

Some relevant legal principles

59 Before addressing the reasoning of the primary judge, it is necessary to say something about the relevant legal principles.

60 A landlord owes an entrant onto and a tenant of leased premises a duty to take reasonable care to avoid a foreseeable risk of injury to the person in question: see *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313 (***Northern***

Sandblasting) at 343; [1997] HCA 39 (Dawson J, with whom Gummow J agreed); cited with approval in *Jones v Bartlett* (2000) 205 CLR 166; [2000] HCA 56 (***Jones***) at [56] (Gleeson CJ); [100] (McHugh J, dissenting in the result); [168] (Gummow and Hayne JJ).

61 The nature and extent of the duty of care, and what constitutes a breach of it, will depend on the circumstances of the case and is now governed by s 5B of the *Civil Liability Act 2002* (NSW) (***CLA***), which provides:

> **5B General principles**
>
> (1) A person is not negligent in failing to take precautions against a risk of harm unless—
>
> > (a) the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known), and
> >
> > (b) the risk was not insignificant, and
> >
> > (c) in the circumstances, a reasonable person in the person's position would have taken those precautions.
>
> (2) In determining whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following (amongst other relevant things)—
>
> > (a) the probability that the harm would occur if care were not taken,
> >
> > (b) the likely seriousness of the harm,
> >
> > (c) the burden of taking precautions to avoid the risk of harm,
> >
> > (d) the social utility of the activity that creates the risk of harm.

62 Section 5B requires identification of the relevant risk of harm and consideration of the question of what precautions a reasonable person in the position of the landlord would take against that risk of harm: *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* (2022) 273 CLR 454; [2022] HCA 11 at [106] (Gordon, Edelman & Gleeson JJ).

63 As Gummow and Hayne JJ observed in *Jones*, a decision that predated the CLA, the circumstances to be considered "may differ between landlord and tenant and landlord and other persons", and while there is no necessary correlation between the respective duties, "the latter is likely to be less stringent than the former": at [169]. The circumstances may also include the purposes for which the premises are let, the terms of the lease, and the obligations the parties are allocated under the lease: *Jones* at [174]. These observations have been applied in the context of leases of commercial

premises: see *Aldred v Stelcad Pty Ltd* [2015] NSWCA 201 (***Aldred***) at [38]-[44] (Emmett JA, Macfarlan JA and Campbell AJA agreeing). They apply equally where the premises are the subject of a licence rather than a lease. In view of the diversity of situations in which commercial premises may be leased it is neither possible nor desirable to articulate any generalisations about such premises without considering the circumstances of the case: *Aldred* at [43]. Generally, however, it is the person in occupation, rather than the landlord, which owes the relevant duty. As Gummow and Hayne JJ explained in *Jones* at [195]:

> A tenant in occupation, rather than the landlord, has possession and control with power to invite or to exclude, to welcome in or to expel. Those asserting a duty often will be the guests or invitees of the tenant or persons present on the tenant's business or for their business with the tenant. It will be the tenant who is best placed to inform such persons of any dangers or defects, and the tenant who "is more directly in touch with emerging repair needs than a landlord who has surrendered possession". (Footnotes omitted)

64 Section 5D of the CLA relevantly provides:

> **5D General principles**
>
> (1) A determination that negligence caused particular harm comprises the following elements—
>
> > (a) that the negligence was a necessary condition of the occurrence of the harm (***factual causation***), and
> >
> > (b) that it is appropriate for the scope of the negligent person's liability to extend to the harm so caused (***scope of liability***).
>
> (2) …
>
> (3) …
>
> (4) For the purpose of determining the scope of liability, the court is to consider (amongst other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party.

65 As is apparent from the wording of s 5D, causation has two elements. One (factual causation) requires the application of the "but for" test. The other (scope of liability) raises a normative question. The application of the first involves a relatively straightforward question. The application of the second less so. It requires consideration of many common law principles concerning causation such as those relating to remoteness of damage: see *Wallace v Kam* (2013) 250 CLR 375; [2013] HCA 19 at [24]. Something more will be said about it later in this judgment.

The reasoning of the primary judge

66 It is not easy to follow the reasoning of the primary judge. Her Honour did not attempt to fit her analysis of Viva's liability into the requirements of ss 5B and 5D of the CLA, although she did set out the terms of s 5B at PJ[101] and refers to s 5D at PJ[105(3)] and evidently had in mind some of the requirements imposed by those sections in undertaking the analysis she did. In substance, her Honour's analysis appears to have the following steps:

(1) As the landlord, Viva owed a duty to occupiers of the Premises to take reasonable steps to remedy any defects in the Premises that rendered it unsafe;

(2) The defective ramp was a danger to occupiers of the Premises (and entrants on to it) and consequently Viva owed a duty "to immediately arrange for the ramp to be secured and supported such that vehicles weighing more than 3 tonne could traverse the ramp" and to take reasonable steps to address the danger in the meantime: PJ[113];

(3) Those steps involved arranging "an alternate access or interim solution"; communicating "realistic timeframes within which the ramp could be repaired and secured, so that alternative measures could be taken for the oil bins to be safely conveyed across the ramp": PJ[113] They also involved "[devising] an interim solution", which was said to be a reference to the particular given in para 10.6 of the amended statement of claim (set out below at [68]): PJ[114];

(4) Viva failed to take any of the steps referred to above or failed to do so within a timeframe consistent with its duty;

(5) Had Viva taken those steps, Mr Bibby would not have been injured;

(6) Viva is therefore liable for the loss arising from those injuries.

67 Adapting that analysis to the requirements of ss 5B and 5D of the CLA: the relevant risk of harm was that employees of KTAS might be injured while pushing oil boys up and down the ramp; that risk was foreseeable and not insignificant; a reasonable person in the position of Viva would have taken the precautions identified in (2) and (3) above against that risk; Viva, therefore, was negligent in failing to take those precautions; but for Viva's negligence, Mr Bibby would not have been injured; and it is appropriate for Viva's liability to extend to the loss arising from those injuries.

68 The precautions which the primary judge identified as being ones that Viva ought reasonably to have taken in response to the risk of harm she had

identified were a paraphrase of the particulars given in Mr Bibby's amended statement of claim. Those particulars, which were reproduced at PJ[41], were:

> 10. A reasonable person in the [sic] either or both defendants' position would have taken the following precautions against the risk of harm (**the precautions**):
>
> 10.1. immediately arranged for the ramp to be secured and supported such that vehicles weighing more than 3 tonne could traverse the ramp;
>
> 10.2. arranged and/or approved for an alternate means by which the employer's business premises could be accessed and the waste oil removed;
>
> 10.3. clearly communicated realistic timeframes within which the ramp could be repaired and secured to the plaintiff's employer so that alternative measures could be taken for the oil bins to be safely conveyed across the ramp;
>
> …
>
> 10.6. approved the implementation of an alternate solution where oil could be pumped up from the employer's business premises.

69 However, in dealing with the questions of breach and causation, the primary judge only dealt with what she regarded as a failure by Viva to take interim measures to repair the ramp within a reasonable period of time. In relation to breach, her Honour said:

> [108] [Viva's] submissions that it took what steps it did within a sufficient timeframe must similarly fail because of the concessions made by its witnesses. [Viva] claims not to have been aware of anything prior to 10 January 2018, and even then was not aware that the issue with the ramp was structural, and was therefore a matter for [Viva]. [Viva] submits that the steps it took on 1, 8, 13 and 19 February 2018 were carried out within a reasonable timeframe and that effectively works were carried out more or less within weeks of [Mr Bibby's] accident, which was reasonable given the need for a proper investigation by engineers, followed by report, followed by the retaining of appropriately qualified persons to carry out the work. While Mr Walsh [Counsel who appeared for Viva] put to me that this was a complex engineering issue, there is no evidence (lay or expert) to this effect and, as Mr Polin SC pointed out in his submissions, [Viva] "owns thousands of petrol stations" (Tcpt 416).
>
> [109] [Viva's] witnesses acknowledged that a quick repair job could have been done within days and for a very modest cost. The first plaintiff [scil, Viva] did take some steps, but these were too little and taken too late, and invariably only after the very angry emails [Mr Bibby] kept sending. There was delay at every step on the way. For example, although clearly aware that the work was urgent when Mr Seage was retained on 6 March 2018, [Viva's] employees failed to chase him up until 20 March 2018; on being contacted, he was able to ask the builder to quote for the work and send it that same day. This is just one of many delays upon the route towards a solution for what was clearly an urgent problem.

70 In relation to the question of causation, her Honour said this (at PJ[123]):

> … I am satisfied that if the [Viva] had given proper attention to the resolution of the serious and urgent complaints made by [KTAS], the supports which were able to be quickly put in place shortly after [Mr Bibby's] accident would have been able to be put in place well within time to prevent an accident of the kind that [Mr Bibby] suffered. This finding is amply supported by the concessions made by the first plaintiff's [scil, Viva's] witnesses, and in particular Mr Krupakaran, who agreed that the work in question could be carried out in a few days for a very modest sum.

71 As I have said, in quantifying Viva's liability, the primary judge apportioned 10% of the responsibility for Mr Bibby's injury to KTAS. Her Honour gave the following explanation at PJ[133]:

> The contemporaneous correspondence set out above amply demonstrates that [KTAS] was aware of the difficulties and dangers and took every reasonable step in terms of writing to both defendants requiring them to take the necessary steps in accordance with their contractual obligations. [KTAS] was not entitled to carry out repairs, let alone structural repairs of the kind necessary. It was not up to [KTAS] to put forward methods of disposing of the waste oil. It did in fact devise the solution ultimately arrived at, but this was always the responsibility of the [Viva] because of the contractual terms between the parties.

72 Her Honour did not think that Eureka bore any responsibility for Mr Bibby's injuries. That was because "there was no causative link between any oversight or failure to act by [Eureka] in terms of liability for [Mr Bibby's] accident": PJ[143].

The grounds of appeal

73 The notice of appeal identifies 16 grounds of appeal. Grounds 1 to 8 concern the primary judge's conclusions in relation to the existence and scope of the duty of care said to be owed by Viva, as well as her Honour's conclusions in relation to causation. Grounds 1 to 3 challenge the primary judge's conclusion that Viva owed Mr Bibby a duty "to immediately arrange for the ramp to be secured and supported such that vehicles weighing more than 3 tonne could traverse the ramp" and her conclusion at PJ[123] that if the ramp had been repaired the accident could have been avoided. Ground 4 challenges the primary judge's conclusion that Viva owed a duty to arrange and/or approve an alternative means by which the Premises could be accessed and waste oil removed. Ground 5 and 6 challenge the primary judge's conclusion that Viva owed a duty to communicate clearly realistic timeframes within which the ramp could be repaired. Grounds 7 and 8 challenge the primary judge's conclusion

that Viva owed a duty to devise an alternative system of disposing of the waste oil.

74 Grounds 9 to 11 challenge particular factual findings made by the primary judge. Grounds 9 and 10 are concerned with the primary judge's findings concerning when Viva first became aware of a problem with the ramp. In light of the concession made by Ms Morgan, nothing more needs to be said about those grounds. Ground 11 challenges the primary judge's finding at PJ[72] that Mr Krupakaran did not at any stage advise KTAS that it was the one that should look for an interim solution. To the extent that it is relevant, the primary judge's finding is inconsistent with the email Mr Krupakaran sent to Mr Phasavath on 1 February 2018 in which he said "As your lease is with Coles Express (and not Viva Energy), I'd recommend discussing the below with Wynn Yap". The "below" was the email in which Mr Phasavath said he needed "a solution/interim fix to empty the waste oil immediately". The primary judge's finding is also inconsistent with Ms Yap's email sent on 2 February to Mr Bibby, Mr Krupakaran and Mr Phasavath in which she said "Please discuss this issue [that is "a solution/interim fix] with the site team". Again, nothing further needs to be said about this ground, other than it should be upheld.

75 Grounds 12 to 14 challenge the primary judge's conclusions in relation to KTAS's responsibility for Mr Bibby's loss. Ground 15 challenges the award of $25,000 in respect of *Fox v Wood* damages. Ground 16 challenges the primary judge's conclusion that Viva should pay Eureka's costs. That challenge is made even if Viva fails on its other grounds of appeal. Although Eureka has not filed a cross-appeal, it submitted in writing and orally that if the Court sets aside the costs order in its favour against Viva, then the same costs order should be made against Mr Bibby.

Grounds 1 to 8

76 It is convenient to take grounds 1 to 8 together.

77 Contrary to the conclusion of the primary judge, it cannot be the case that Viva owed a duty to repair the ramp "immediately". Viva had an obligation under the lease to undertake structural repairs to the Premises. Consequently, the scope of its duty in negligence extended to undertaking repairs to the ramp. Viva does

not contend otherwise. Plainly, as happened, in order to discharge that duty it was necessary to engage an engineer to inspect the ramp and to devise a method of repair. It was also necessary to engage contractors to undertake the work. Consequently, Viva's duty could not have extended beyond a duty to repair the ramp within a reasonable time (taking account of the seriousness of the problem).

78 The evidence does not justify a conclusion that Viva delayed unreasonably in repairing the ramp. Viva first became aware that there may be a problem with the ramp on 22 January 2018. Mr Bibby was injured on 5 April 2018. Viva arranged for an engineer to inspect the ramp on 12 February 2018 (the engineer postponed the inspection to 13 February 2018). It was not put to any of Viva's witnesses that they delayed unreasonably in appointing an engineer; and a period of approximately three weeks, particularly at the end of the holiday period, does not seem unreasonable. The engineer provided his report on 19 February 2018. It is plain from that report that it was contemplated that the work would proceed in two stages, the first of which involved temporary propping, which would permit vehicles of up to three tonnes to use the ramp, and the second of which involved repairs to return the ramp to its design capacity of six tonnes. In order to complete the second stage, it was necessary to engage a structural remedial works engineer to prepare a set of specifications, obtain quotes for that work and engage a contractor to undertake that work. It was unrealistic to suppose that that work could have been completed before Mr Bibby was injured; and Mr Bibby led no evidence to suggest otherwise.

79 Moreover, there was no evidence before the primary judge from which it could be concluded that if the ramp had been repaired before Mr Bibby's injury, his injury would have been avoided. Viva's duty was to repair the ramp. It was not to construct a ramp that could accommodate trucks whatever their weight. No such obligation was placed on Viva by the Site Licence. By that agreement, Eureka acknowledged (in cl 7.1) that it had satisfied itself about how the Premises could be used and their suitability for the conduct of "the Business" (a term which is not defined but which must mean the business actually carried on at the Premises). KTAS gave a corresponding acknowledgment in the Sub-

Licence. If the temporary support for the ramp proposed by the engineer had been installed before Mr Bibby's accident, the heaviest vehicles that could use the ramp safely were those not exceeding three tonnes. Even if the ramp had been repaired before Mr Bibby's accident, the heaviest vehicles that could use it safely were those not exceeding six tonnes. There was no evidence before the primary judge that the waste oil trucks that were used to collect the waste oil weighed less than six tonnes let alone less than three. What evidence there was suggested otherwise. Consequently, on the evidence, it could not be said that the failure to repair the ramp or to install temporary supports before Mr Bibby's accident caused that accident.

80 In his submissions on appeal, Mr Bibby does not seriously suggest otherwise. Rather, he sought to defend the primary judge's conclusion that Viva owed a duty clearly to communicate realistic timeframes within which the ramp could be repaired and to devise an alternative system of disposing of the waste oil. Mr Bibby submitted that if realistic timeframes had been communicated to KTAS, KTAS would have come up with a solution for disposing of the waste oil sooner than it did. But principally what is said is that, knowing that the Premises were not safe for the purposes for which they were let, Viva owed a duty "to work out an interim solution [and] to discuss that with KTAS and Eureka and work out a way to make sure the premises for which [it is] responsible [were] safe". At the time, Viva accepted that that was the case, since it ultimately agreed to bear the costs of installing the pumping system that was installed. If it had complied with its duty within a reasonable timeframe, Mr Bibby would not have been injured.

81 Leaving aside the fact that this analysis is something of a reconstruction of the primary judge's reasoning, it cannot be accepted. The analysis elides the danger posed by the ramp and the danger posed by the system of work adopted by KTAS for disposing of the waste oil. Viva unquestionably owed a duty to users of the ramp in relation to the first danger, which required it to repair the ramp and to warn against its use by vehicles that exceeded a safe weight. It is less clear why it had a duty to employees of KTAS in relation to the second danger. One reason implicitly advanced by Mr Bibby, and that appears to have been accepted by the primary judge, is that the failure to repair the

ramp required KTAS to adopt the unsafe system of work, which in turn caused Mr Bibby's accident. Another reason explicitly advanced by Mr Bibby on appeal is that the Premises were licensed to KTAS to carry out an automotive repair business. In order to carry on that business, it was essential that waste oil be disposed of. Consequently, Viva owed a duty to make the Premises safe by providing a safe system for the disposal of waste oil, particularly since the necessary modifications to the Premises involved structural changes which could only occur with its consent. Had it complied with that duty, Mr Bibby would not have been injured. As a result, Viva was liable for those injuries.

82 Neither of those reasons can be accepted. As to the first, it is not correct to say that the failure to repair the ramp within a reasonable period caused KTAS to adopt the unsafe system of disposing of the waste oil. It was not suggested that Viva owed a duty to repair the ramp before it became aware of the fact that the ramp needed repair. Viva was not in possession of the Premises and could only have known about the ramp if it had been told about it by KTAS, or more likely, Eureka. A landlord does not generally have a duty to institute a system of regular inspection for defects during the currency of the tenancy: *Jones* at [183]. In the present case, the combined effect of cl 10 of the Sub-Licence and cl 5.6(a) of the Site Licence is that KTAS was obliged to notify Eureka of "any material structural defect" in the Premises and Eureka was obliged to pass that notification on to Viva. Despite those obligations, Viva was not notified of the defect until January 2018. However, the evidence is that the unsafe system of work was introduced well before then. It was introduced because waste oil truck drivers refused to use the ramp, not because of a breach of duty by Viva.

83 Moreover, for the reasons already stated, there was no reason to think that the drivers would resume using the ramp once it was repaired, since there was nothing in the evidence to suggest that the waste oil trucks would not exceed the load bearing capacity of the ramp, even after it had been repaired. Consequently, there was a need to find an alternative method of disposing of the waste oil irrespective of any defect in the ramp. Contrary to the basis on which the primary judge proceeded, there was no real connection between the defects in the ramp, let alone Viva's breach of duty, and Mr Bibby's injury. The most that could be said is that the defects in the ramp prompted the drivers of

the waste oil trucks to adopt a position that they ought to have adopted in any event, which in turn prompted KTAS to adopt an unsafe method of disposing of the waste oil.

84 Even if it could be said that but for Viva's breach of duty (assuming that there was one), KTAS would not have continued to adopt an unsafe system for disposing of the waste oil, that would raise the question whether the requirements of s 5D(1)(b) of the CLA had been satisfied in circumstances where the system of work performed by KTAS's employees was determined by KTAS, not Viva. However, that issue was not raised by Viva and, in the light of what has been said, nothing further needs to be said about it.

85 As to the second argument advanced by Mr Bibby, there are several difficulties with it. First, as has already been explained, the combined effect of cl 7.1 of the Site Licence and cl 10 of the Sub-Licence was that KTAS acknowledged that it had made its own appraisal of and satisfied itself about how the Premises may be used and their "suitability or fitness, including the structural suitability or fitness, of the [Premises] for the conduct of the Business or any other purpose". If the Premises were unsuited to the purposes for which KTAS proposed to use them because at the time they were licensed to KTAS there was no practical way of transporting the waste oil from the lower level, that was not a defect in the Premises for which Viva was responsible.

86 Second, the evidence does not establish that the only solution to the problem of disposing of waste oil on the lower level was the one that was eventually adopted, which involved a minor structural modification of the Premises. The likelihood is that there were various ways in which the waste oil on the lower level could be moved to the upper level, which would involve various levels of inconvenience and cost. It was a matter for KTAS to choose the method that suited it best subject to its obligations to provide a safe system of work for its employees.

87 Third, and connected to the second point, even if the only practical method of disposing of the waste oil was the one that was ultimately adopted, it is unclear why Viva had a duty either to come up with or to implement that solution. It is true that that method of disposing of the waste oil involved a minor structural

alteration to the Premises because it involved the installation of piping between the two levels. However, KTAS had a right to make structural alterations with consent, which was not to be delayed or withheld unreasonably. It was not required to obtain consent where the alteration was reasonably necessary to comply with its obligations under the terms of the Site Licence which were incorporated into the Sub-Licence. There is no basis in those circumstances for concluding that the obligation was on Viva to come up with or to implement the solution. It was for KTAS to implement a safe system of work for its employees given the inherent restrictions imposed by the Premises. The fact that Viva ultimately agreed to pay the costs of implementing the solution that was adopted does not alter the position.

88 To the extent that Mr Bibby sought to argue that Viva was required, as an aspect of its duty of care, to approve the implementation of the new system of disposing of oil, there was no evidence of Viva being asked to provide such approval prior to Mr Bibby's accident. It follows that no causally significant breach could be established, even if there was otherwise a sound basis for the contention that approving the implementation of such a system was an aspect of Viva's duty of care.

89 These conclusions also dispose of the contention that Viva breached its duty by failing to communicate realistic timeframes for repairing the ramp. Any such failure was causally irrelevant to Mr Bibby's injury.

90 For those reasons, Mr Bibby's claim against Viva must fail.

Grounds 12 to 15

91 In view of the conclusions in relation to grounds 1 to 8, it is unnecessary to consider grounds 12 to 15.

Ground 16

92 Ground 16 concerns costs.

93 It was common ground that if Viva succeeded in relation to grounds 1 to 8, then it must also succeed in relation to ground 16. Mr Bibby did not advance any reason why, in those circumstances, the same costs order in Eureka's favour that had been made against Viva should not be made against him. That follows

from the fact that Eureka was successful in resisting Mr Bibby's claim against it.

94 Eureka does not seek any orders in relation to its costs of the appeal.

Orders

95 The orders I, therefore, propose are:

(1) Appeal allowed;

(2) Set aside orders (1) and (4) of the court below made on 24 September 2025 and orders (1) and (2) of the court below made on 20 October 2025 and in their place order:

(a) Judgment for the first defendant against the plaintiff;

(b) The plaintiff pay the first defendant's costs on the ordinary basis;

(c) The plaintiff pay the second defendant's costs on the ordinary basis until 24 November 2021 and thereafter on the indemnity basis;

(3) The first respondent pay the appellant's costs of the appeal.

96 **FREE JA:** I agree with Ball JA.

****