FEDERAL COURT OF AUSTRALIA

LCA Marrickville Pty Limited v Swiss Re International SE [2022] FCAFC 17

Appeal from:	*Swiss Re International Se v LCA Marrickville Pty Limited (Second COVID-19 insurance test cases)* [2021] FCA 1206
File numbers:	NSD 1076 of 2021 NSD 1079 of 2021 NSD 1080 of 2021 NSD 1081 of 2021 NSD 1082 of 2021
Judgment of:	**MOSHINSKY, DERRINGTON AND COLVIN JJ**
Date of judgment:	21 February 2022
Catchwords:	**INSURANCE** – construction of policies – principles of construction – requirement to read policy "as a whole" – requirement to read policy provisions in context – giving effect to specific or important clauses which might otherwise be rendered redundant by a broad reading of other clauses – whether incongruence or incoherence as opposed to mere overlap **INSURANCE** – construction of policies – principles of construction – requirement to read policy from the position of an objective third party taking into account the circumstances of the contracting parties – whether different to the position of the reasonable policyholder **INSURANCE** – business interruption insurance – COVID-19 – cause of loss – causes of loss from government imposed restrictions – whether restrictions imposed as a result of risk of disease, outbreak or threat of disease from overseas **INSURANCE** – business interruption insurance – COVID-19 – hybrid clauses – composite insured perils with consecutive sequential elements – causal nexus between elements – proximate cause not necessarily required – ordinary construction of connecting words **INSURANCE** – business interruption insurance – COVID-19 – test cases – concurrent causes of loss – application of the "underlying fortuity principle" – whether general effects of COVID-19 arose from the same

underlying fortuity as insured perils – whether concurrent cause of loss a matter which the parties would naturally expect to occur concurrently with the insured peril

INSURANCE – business interruption insurance – scope of indemnity – "trends clauses" – whether insured required to bring into account amounts received from third parties – government assistance payments provided without reference to loss incurred

INSURANCE – business interruption insurance – hybrid clauses – authority acting in response to outbreak of disease – insured obliged to establish authority acted in response to outbreak but not the actual outbreak

INSURANCE – business interruption insurance – construction of particular insuring clauses – disease clause – hybrid clause – prevention of access clause

INSURANCE – interest on claims – s 57 of the *Insurance Contracts Act 1984* (Cth) – from when is it unreasonable for insurer to withhold payment of an amount – significance as to bona fide dispute as to reasonableness – whether present appeals are exceptional cases permitting insurers to withhold payment without obligation to pay interest

CONTRACTS – construction – the *contra proferentem* rule – rule of last resort – application of rule to policies of insurance – application of *ejusdem generis* and *nocitur a sociis* rule

CONTRACTS – meaning of words – "outbreak" – "occurrence" – "conflagration" – "catastrophe" – "premises" – "closure" – "evacuation" – "hindrance" – "physical damage"

STATUTORY INTERPRETATION – s 61A *Property Law Act 1958* (Vic) – application to Acts of the Commonwealth – whether *Biosecurity Act 2015* (Cth) a re-enactment with modifications of *Quarantine Act 1908* (Cth) – s 61A applies to Victorian Acts only – *Biosecurity Act 2015* (Cth) not a re-enactment with modifications of *Quarantine Act 1908* (Cth)

STATUTORY INTERPRETATION – s 57 of the *Insurance Contracts Act 1984* (Cth) – when unreasonable for insurer to withhold payment of the amount – significance as to bona fide dispute as to reasonableness

Legislation:	*Biosecurity Act 2015* (Cth), ss 2, 3, 42, 44, 45, 46, 51, 52, 477 *Coronavirus Economic Response Package (Payments and Benefits) Act 2020* (Cth) *Coronavirus Economic Response Package Omnibus (Measures No 2) Act 2020* (Cth) *Corporations Act 2001* (Cth) *Insurance Contracts Act 1984* (Cth), ss 13, 14, 37, 54, 57 *National Health Security Act 2007* (Cth) *Quarantine Act 1908* (Cth), ss 2, 4, 18 *Trade Marks Act 1955* (Cth) *Trade Marks Act 1995* (Cth) *Acts Interpretation Act 1890* (Vic), ss 3, 4, 5, 6, 22, 27 *Acts Interpretation Act 1915* (Vic), s 6 *Acts Interpretation Act 1928* (Vic), s 6 *Acts Interpretation Act 1958* (Vic), s 7 *Interpretation Act 1987* (NSW), ss 5, 12 *Interpretation of Legislation Act 1984* (Vic), ss 38, 16, 17 *Interpretation of Legislation (Amendment) Act 1993* (Vic) *Property Law Act 1958* (Vic), ss 4, 61A *Public Health Act 2010* (NSW), s 7 *Public Health Act 2005* (Qld), ss 68, 70, 362B *Public Health and Wellbeing Act 2008* (Vic), s 200
Cases cited:	*Adelaide (SA) Pools & Spa Manufacturing and Installation Pty Ltd v Westcourt General Insurance Brokers Pty Ltd (No 2)* [2021] SASC 123 *Arbory Group Ltd v West Craven Insurance Services (A Firm)* [2007] Lloyd's Rep IR 491 *Australian Broadcasting Commission v Australasian Performing Rights Association Ltd* (1973) 129 CLR 99 *Australian Pipe & Tube Pty Ltd v QBE Insurance (Australia) Ltd (No 2)* [2018] FCA 1450 *Arnold v Britton* [2015] AC 1619 *Australian Casualty Co Ltd v Federico* (1986) 160 CLR 513 *Axa Reinsurance (UK) plc v Field* [1996] 1 WLR 1026 *Bankstown Football Club Ltd v CIC Insurance Ltd* (unreported, Sup Ct, NSW, 17 December 1993) *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 *Beaufort Developments (NI) Ltd v Gilbert-Ash NI Ltd* [1999] 1 AC 266 *BMW Australia Ltd v Brewster* (2019) 269 CLR 574

Board of Trade v Hain Steamship Co Ltd [1929] AC 534

Byrnes v Kendall (2011) 243 CLR 253

Cat Media Pty Ltd v Allianz Australia Insurance Ltd (2006) 14 ANZ Ins Cas 61-700

CE Heath Underwriting & Insurance (Aust) Pty Ltd v Edwards Dunlop & Co Ltd (1993) 176 CLR 535

CGU Insurance Ltd v Porthouse (2008) 235 CLR 103

Chapmans Ltd v Australian Stock Exchange Ltd (1996) 67 FCR 402

Cherry v Steele-Park (2017) 96 NSWLR 548

Chief Commissioner of State Revenue v Tasty Chicks Pty Ltd (2012) 87 ATR 880

CIC Insurance Ltd v Bankstown Football Club Ltd (1997) 187 CLR 384

CIC Insurance Ltd v Bankstown Football Club Ltd (1995) 8 ANZ Ins Cas 61-232

Commonwealth v Aurora Energy Pty Ltd (2006) 235 ALR 644

Cornish v Accident Insurance Co Ltd (1889) 23 QBD 453

Dalby v Bio-Refinery Ltd v Allianz Australia Insurance Ltd [2019] FCAFC 85

Day v Adam; Ex parte Day [1989] 2 Qd R 9

Deputy Commissioner of Taxation v Clark (2003) 57 NSWLR 113

Director-General of Social Services v Hales (1983) 47 ALR 281

DRJ v Commissioner of Victims Rights (No 2) (2020) 103 NSWLR 692

Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd (2017) 261 CLR 544

Elders Ltd v Swinbank (2000) 96 FCR 303

Electricity Generation Corporation v Woodside Energy Ltd (2014) 251 CLR 640

F & D Normoyle Pty Ltd v Transfield Pty Ltd (2005) 63 NSWLR 502

Fenton v Thorley & Co Ltd [1903] AC 443

Financial Conduct Authority v Arch Insurance (UK) Ltd [2020] EWHC 2448

Financial Conduct Authority v Arch Insurance (UK) Ltd [2021] AC 649

Fitness First Australia Pty Ltd v Fenshaw Pty Ltd (2016) 92 NSWLR 128

Fitzgerald v CBL Insurance Ltd [2014] VSC 493

Fitzgerald v CBL Insurance Ltd (No 2) [2015] VSC 176

Fox v Percy (2003) 214 CLR 118

Globe Church Incorporated v Allianz Australia Insurance Ltd (2019) 99 NSWLR 470

Greencapital Aust Pty Ltd v Pasminco Cockle Creek Smelter Pty Ltd [2019] NSWCA 53

Halford v Price (1960) 105 CLR 23

Hams v CGU Insurance Ltd (2002) 12 ANZ Ins Cas 61-542

HDI Global Speciality SE v Wonkana No 3 Pty Ltd (2020) 104 NSWLR 634

HIH Casualty & General Insurance v Insurance Australia Ltd (No 2) (2006) 14 ANZ Ins Cas 61-685

Hill v Villawood Sheet Metal Pty Ltd [1970] 2 NSWR 434

Horsell International Pty Ltd v Divetwo Pty Ltd [2013] NSWCA 368

HP Mercantile Pty Ltd v Hartnett [2016] NSWCA 342

Hu v Kim [2019] NSWSC 448

Hume Steel Ltd v Attorney-General (Vic) (1927) 39 CLR 455

Hyper Trust Ltd t/as The Leopardstown Inn v FBD Insurance plc [2021] IEHC 78

Hyper Trust Ltd t/as The Leopardstown Inn & Ors v FBD Insurance plc (No 2) [2021] IEHC 279

Insurance Australia Ltd v HIH Casualty & General Insurance Ltd (in liq) (2007) 18 VR 528

Insurance Commission of Western Australia v Container Handles Pty Ltd (2003) 218 CLR 89

Jan de Nul (UK) Ltd v Axa Royale Belge SA [2002] 1 Lloyd's Rep 583

JJ Lloyd Instruments Ltd v Northern Star Insurance Co Ltd (The 'Miss Jay Jay') [1987] 1 Lloyd's Rep 32

Johnson v American Home Assurance Co (1998) 192 CLR 266

Karlsson v Griffith University (2020) 103 NSWLR 131

Kernaghan v Corrections Corp of Australia Staff Superannuation Pty Ltd (No 3) [2007] FCA 2018

Kuru v State of New South Wales (2008) 236 CLR 1

Lange v Queensland Building Services Authority [2012] 2 Qd R 457

Lasermax Engineering Pty Ltd v QBE Insurance (Aust) Ltd (2005) 13 ANZ Ins Cas 61-643

Legal & General Insurance Australia Ltd v Eather (1986) 6 NSWLR 390

Lend Lease Real Estate Investments Ltd v GPT RE Ltd [2006] NSWCA 207

Leyland Shipping Co Ltd v Norwich Union Fire Insurance Society Ltd [1918] AC 350

Liberty Mutual Insurance Co Australia Branch v Icon Co (NSW) Pty Ltd (2021) 154 ACSR 126

Losinjska Plovidba v Transco Overseas Ltd (The "Orjula") [1995] 2 Lloyds Rep 395

Mainteck Services Pty Ltd v Stein Heurtey SA (2014) 89 NSWLR 633

McAuliffe v Secretary, Department of Social Security (1991) 23 ALD 284

McCann v Switzerland Insurance Australia Ltd (2000) 203 CLR 579

McCarthy v St Paul International Insurance Co Ltd (2007) 157 FCR 402

McConnell Dowell Middle East LLC v Royal & Sun Alliance Insurance Plc (No 2) [2009] VSC 49

McIntosh v Federal Commissioner of Taxation (1979) 25 ALR 557

Mobis Parts Australia Pty Ltd v XL Insurance Company SE (2018) 363 ALR 730

Mutual Community General Insurance Pty Ltd v Khatchmanian (2013) 17 ANZ Ins Cas 61-974

Midland Mainline Ltd v Eagle Star Insurance Co Ltd [2004] 2 Lloyd's Rep 604

Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd (2015) 256 CLR 104

North v Marina [2003] NSWSC 64

O'Neill v FSS Trustee Corp [2015] NSWSC 1248

Orient-Express Hotels Ltd v Assicurazioni Generali SA [2010] Lloyd's Rep IR 531

Park v Murray Irrigation Ltd [2018] NSWCA 166

Preston v AIA Australia Ltd [2013] NSWSC 282

Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355

R v Khazaal (2012) 246 CLR 601

R&B Directional Drilling Pty Ltd (in liq) v CGU Insurance Ltd (No 2) (2019) 369 ALR 137

Ranicar v Frigmobile Pty Ltd [1983] Tas R 113

Ransley v Chubb Insurance Company of Australia Ltd [2015] NSWSC 1350

Reseck v Federal Commissioner of Taxation (1975) 133 CLR 45

Re Sigma Finance Corp [2009] UKSC 2

Sayseng v Kellogg Superannuation Pty Ltd (2007) 213 FLR

	174 *Secretary, Department of Family and Community Services v Hayward (a pseudonym)* (2018) 98 NSWLR 599 *Sheehan v Lloyds Names Munich Re Syndicate Ltd* [2017] FCA 1340 *Siemens Ltd v Schenker International (Aust) Pty Ltd* (2004) 216 CLR 418 *Stag Line Ltd v Foscolo, Mango & Co Ltd* [1932] AC 328 *Star Entertainment Group Limited v Chubb Insurance Australia Ltd* [2021] FCA 907 *Star Entertainment Group Ltd v Chubb Insurance Australia Ltd* [2022] FCAFC 16 *Teele v Federal Commissioner of Taxation* (1940) 63 CLR 201 *Telstra Corp Ltd v Australasian Performing Right Association Ltd* (1997) 191 CLR 140 *The Trust Company (Nominees) Ltd v Banksia Securities Ltd (recs and mgrs apptd) (in liq)* [2016] VSCA 324 *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 *Triffitt v Australiansuper Pty Ltd* (2007) 214 FLR 407 *VL Credits Pty Ltd v Switzerland General Insurance Co Ltd (No 2)* [1991] 2 VR 311 *Walker v FAI Insurance Ltd* (1991) 6 ANZ Ins Cas 61-081 *Warren v Coombes* (1979) 142 CLR 531 *Wayne Tank and Pump Co Ltd v Employers' Liability Assurance Corp Ltd* [1974] QB 57 *Western Australian Bank v Royal Insurance Co* (1908) 5 CLR 533 *Wilkie v Gordian Runoff Ltd* (2005) 221 CLR 522 *Wood v Capita Insurance Services Ltd* [2017] AC 1173 *Woolworths Ltd v Lister* [2004] NSWCA 292 *Worth v HDI Global Specialty SE* (2021) 393 ALR 93 *XL Insurance Co SE v BNY Trust Company of Australia Ltd* (2019) 20 ANZ Ins Cas 62-211 *Yanner v Eaton* (1999) 201 CLR 351 *Zhang v ROC Services (NSW) Pty Ltd* (2016) 93 NSWLR 561
Division:	General Division
Registry:	New South Wales
National Practice Area:	Commercial and Corporations

Sub-area:	Commercial Contracts, Banking, Finance and Insurance
Number of paragraphs:	812
Date of hearing:	8, 9, 10, 11 and 12 November 2021
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ORDERS

NSD 1079 of 2021

BETWEEN:	**LCA MARRICKVILLE PTY LIMITED (ACN 601 220 080)** Appellant
AND:	**SWISS RE INTERNATIONAL SE** Respondent
AND BETWEEN:	**SWISS RE INTERNATIONAL SE** Cross-Appellant
AND:	**LCA MARRICKVILLE PTY LIMITED (ACN 601 220 080)** Cross-Respondent
ORDER MADE BY:	**MOSHINSKY, DERRINGTON AND COLVIN JJ**
DATE OF ORDER:	**21 FEBRUARY 2022**

THE COURT ORDERS THAT:

1. The Appeal be allowed in part.

2. The Cross-Appeal be allowed in part.

3. The primary judge's answers to the questions posed be amended as follows:

1. Disease Clause (9.1.2.1) (page 31):

On the proper construction of the Disease Clause:

(a) Did the "Authority Response-LCA Marrickville" cause "closure … of the whole or part of the Situation"?

Answer: in respect of the order of 26 March 2020, yes. In respect of the orders of 1 and 13 June 2020, no.

(b) Was there a closure or evacuation of the whole or part of the Situation?

See 1(a) above.

In assessing:

(i) "closure", must there be physical prevention of access to the Situation (or part of it), or is it sufficient there was a restriction of LCA Marrickville's use of the Situation (or part of it) for its Business and if so, what restriction?

(ii) "evacuation", must there be a physical removal of persons from the Situation (or part of it), or is it sufficient if there was a restriction of LCA Marrickville's use of the Situation (or part of it) for its Business

and if so, what restriction?

As to (i), there must be physical prevention of access to the Situation (or part of it) to those who would otherwise be able to obtain access (for example, members of the public).

As to (ii), this does not arise, but the answer would be yes.

(c) Was there an "outbreak" of COVID-19 at the Situation?

This cannot be answered on the evidence.

(i) Does a single person infected with COVID-19 entering the Situation constitute an "outbreak"?

~~*Not necessarily. If the person is able to communicate COVID-19 to other people and is within the community (in the sense of not being in a controlled environment such as quarantine, isolation or a hospital) then, given the nature of COVID-19 and the associated probability of transmission including to persons unknown, a single person infected with COVID-19 entering the Situation who is in a non-controlled setting would constitute an "outbreak" of COVID-19.*~~

Unnecessary to answer.

(ii) With what degree of prevalence do instances of COVID-19 have to occur at the Situation (or elsewhere) in order to constitute an "outbreak" at the Situation?

See (c)(i) above.

(iii) Does the outbreak have to occur at the Situation or can it occur:

A. at the Situation and elsewhere and, if so, where?

B. elsewhere but not at the Situation and, if so, where?

This does not arise. The requirement of cl 9.1.2.1 is an order of a competent public authority as a result of an outbreak of a notifiable human infectious or contagious disease at the Situation (or within the 5 kilometre radius under cl 9.1.2.4) or any discovery of an organism likely to result in the occurrence of a notifiable human infectious or contagious disease at the Situation (or within the 5 kilometre radius under cl 9.1.2.4). This depends not on objective facts but on the cause of the making of the order. The required cause must be an outbreak of a notifiable human infectious or contagious disease at the Situation (or within the 5 kilometre radius under cl 9.1.2.4) or any discovery of an organism likely to result in the occurrence of a notifiable human infectious or contagious disease at the Situation (or within the 5 kilometre radius under cl 9.1.2.4).

If yes to (c), was the "Authority Response-LCA Marrickville" "a result of" that "outbreak"?

No.

(e) Was there a "discovery of [SARS-CoV-2] likely to result in the occurrence of [COVID-19] … at the Situation"?

On the current evidence, no. However, this does not arise for the reasons set out at 1B above.

(i) Does SARS-CoV-2 have to be discovered at the Situation or is it

sufficient if it is discovered elsewhere and, if so, where?

No. If SARS-CoV-2 is discovered elsewhere but is likely to result in the occurrence of a notifiable human infectious or contagious disease at the Situation or within the 5 kilometre radius that requirement of cl 9.1.2.1/9.1.2.4 will be satisfied. To satisfy the requirement of likelihood, however, evidence of a person with COVID-19 who is capable of communicating the disease to another person within the radius will be required. However, this does not arise for the reasons set out at B above.

(ii) Does SARS-CoV-2 have to be likely to result in the occurrence of COVID-19 at the Situation or is it sufficient if it is likely to result in the occurrence of COVID-19 elsewhere and, if so, where?

SARS-CoV-2 must be likely to result in the occurrence of a notifiable human infectious or contagious disease at the Situation or within the 5 kilometre radius.

(f) Was the "Authority Response-LCA Marrickville" "a result of" a "discovery of [SARS-CoV-2] likely to result in the occurrence of [COVID-19] … at the Situation"?

No.

(g) What if any "interruption" or "interference" occurred "in consequence of" any "closure … by order of a competent public authority"?

None.

(h) What is required for there to be an "occurrence" of COVID-19?

A single case of COVID-19 is an occurrence of COVID-19.

2. Biosecurity Act exclusion (clause 9.1.2.1) (page 31)

(a) Is COVID-19 a disease "declared to be a listed human disease pursuant to subsection 42(1) of the Biosecurity Act 2015", in circumstances where it was determined to be a "listed human disease" after the Policy inception date and during the Policy Period?

Yes.

(b) If yes to (a), does section 54 of the *Insurance Contracts Act 1984* (Cth) (ICA) have the effect that the insurer cannot refuse to pay LCA Marrickville's claim by reason only of the determination and can only reduce its liability to the extent that its interests were prejudiced as a result of the determination?

No.

(c) {Swiss Re version; LCA Marrickville does not agree}: If yes to (b), was LCA Marrickville's loss caused or contributed to by the determination?

This does not arise.

(d) {LCA Marrickville version; Swiss Re does not agree}: If yes to (b), could the determination reasonably be regarded as being capable of causing or contributing to LCA Marrickville's loss?

This does not arise.

(e) If yes to (c) and/or (d), to what extent is Swiss Re entitled to refuse to pay the claim?

This does not arise.

(f) If yes to (b) but no to (c) and/or (d), what prejudice, if any, to Swiss Re resulted from the determination and to what extent (if any) should Swiss Re's liability in respect of the claim be reduced?

This does not arise.

(g) If the Biosecurity Act exclusion does apply to exclude LCA Marrickville's loss from cover under the Disease Clause and the Expansion Clause, can such loss be considered for cover under the Catastrophe Clause and/or the Prevention of Access Clause?

No.

3. Expansion Clause (9.1.2.4) (page 31):

On the proper construction of the Expansion Clause:

(a) Issues 1(a), (b), (g), (h) and (i) and 2, above also arise in the context of the Expansion Clause.

The same answers apply as set out above expanded to the 5 kilometre radius.

(b) Was there an "outbreak" of COVID-19 within a five kilometre radius of the Situation?

This cannot be answered on the evidence.

In particular:

(i) Does a person infected with COVID-19 entering, or residing in, the area within five kilometres of the Situation constitute an "outbreak"?

~~*Not necessarily. If the person is able to communicate COVID-19 to other people and is within the community (in the sense of not being in a controlled environment such as quarantine, isolation or a hospital) then, given the nature of COVID-19 and the associated probability of transmission including to persons unknown, a single person infected with COVID-19 entering the Situation who is in a non-controlled setting would constitute an "outbreak" of COVID-19.*~~

Unnecessary to answer.

(ii) With what degree of prevalence do instances of COVID-19 have to occur within five kilometres of the Situation (or elsewhere), or what other characteristics must such instances have, in order to constitute an "outbreak" within a five kilometre radius of the Situation?

See (b)(i) above.

(iii) Does the outbreak have to occur within a five kilometre radius of the Situation only or can the outbreak occur outside a five kilometre radius of the Situation as well and, if so, where?

This does not arise. The requirement of cl 9.1.2.1 is an order of a competent public authority as a result of an outbreak of a notifiable human infectious or contagious disease at the Situation (or within the 5 kilometre radius under cl 9.1.2.4) or any discovery of an organism likely to result in the occurrence of a notifiable human infectious or contagious disease at the Situation (or within the 5 kilometre radius under cl 9.1.2.4). This depends not on objective facts but on the cause of the making of the

order. The required cause must be an outbreak of a notifiable human infectious or contagious disease at the Situation (or within the 5 kilometre radius under cl 9.1.2.4) or any discovery of an organism likely to result in the occurrence of a notifiable human infectious or contagious disease at the Situation (or within the 5 kilometre radius under cl 9.1.2.4).

(c) Was the "Authority Response-LCA Marrickville" "a result of" an outbreak of COVID-19 within a five kilometre radius of the Situation?

No.

In particular, must the relevant order be made in direct response to the specific outbreak within a five kilometre radius of the Situation or is it sufficient if the relevant order is made in response to, or to prevent, the spread of COVID-19 more broadly (e.g. on a regional, state or nationwide scale)?

This depends on the terms of the order.

(d) Was there a "discovery of [SARS-CoV-2] likely to result in the occurrence of [COVID-19]" within a five kilometre radius of the Situation?

On the current evidence, no. However, this does not arise for the reasons set out at 1B above.

(i) Does SARS-CoV-2 have to be discovered within a five kilometre radius of the Situation or is it sufficient if it is discovered elsewhere and, if so, where?

No. If SARS-CoV-2 is discovered elsewhere but is likely to result in the occurrence of a notifiable human infectious or contagious disease at the Situation or within the 5 kilometre radius that requirement of cl 9.1.2.1/9.1.2.4 will be satisfied. To satisfy the requirement of likelihood, however, evidence of a person with COVID-19 who is capable of communicating the disease to another person within the radius will be required. However, this does not arise for the reasons set out at 1B above.

(ii) Does SARS-CoV-2 have to be likely to result in the occurrence of COVID-19 within a five kilometre radius of the Situation, or is it sufficient if it is likely to result in the occurrence of COVID-19 elsewhere and, if so, where?

SARS-CoV-2 must be likely to result in the occurrence of a notifiable human infectious or contagious disease at the Situation or within the 5 kilometre radius.

(e) Was the "Authority Response-LCA Marrickville" "a result of" a "discovery of [SARS-CoV-2] likely to result in the occurrence of [COVID-19]" within a five kilometre radius of the Situation?

No.

4. Catastrophe Clause (9.1.2.5) (page 31):

On the proper construction of the Catastrophe Clause:

(a) {Swiss Re version; LCA Marrickville does not agree}: Was the outbreak of COVID-19 a "conflagration or other catastrophe"?

No.

(b) {LCA Marrickville version; Swiss Re does not agree}: Was COVID-19 and its impact a "conflagration or other catastrophe"?

No.

(c) When did any such "conflagration or other catastrophe" commence and end?

~~*If COVID-19 is a catastrophe within cl 9.1.2.5 it commenced in NSW no later than 20 March 2020.*~~

Unnecessary to answer.

(d) Was the "Authority Response-LCA Marrickville" an "action of a civil authority" implemented "for the purpose of retarding" the "conflagration or other catastrophe"?

No.

(e) What "interruption" or "interference" occurred "in consequence of" any "action of a civil authority"?

None within the meaning of cl 9.1.2.5.

5. Prevention of Access Clause (9.1.2.6) (page 31):

On the proper construction of the Prevention of Access Clause:

(a) Was there a "risk to life … within five kilometres of [the] Situation"?

This does not arise. The requirement is action of a lawful authority attempting to avoid or diminish a risk to life within 5 kilometres of the Situation. There is no requirement to prove as an objective fact a risk to life within 5 kilometres of the Situation.

(i) Does the "risk to life" have to exist within five kilometres of the Situation only or can the "risk to life" exist in areas further [than] five kilometres from the Situation as well and, if so, where?

See (a) above.

(ii) Must the relevant order be made in direct response to the specific "risk to life" within five kilometres of the Situation, or is it sufficient if the relevant order is made as part of an attempt to "avoid or diminish risk to life" of a broader scope (e.g. on a regional, state or nationwide scale)?

There is no requirement in this regard other than action of a lawful authority attempting to avoid or diminish a risk to life within 5 kilometres of the Situation. It does not matter is the authority is also attempting to avoid or diminish a risk to life outside 5 kilometres of the Situation.

(b) Was the "Authority Response-LCA Marrickville" taken in an attempt to avoid or diminish the identified "risk to life"?

No, because cl 9.1.2.6 does not apply to actions of an authority relating to a disease. If this is wrong, yes.

(c) Was access to or use of the Situation prevented or hindered?

Yes. The 26 March 2020 order prevented access to and prevented the use of the Situation. The 1 and 13 June 2020 orders potentially hindered use of the Situation.

In particular, must the use of or access to the Situation for any purpose be prevented or hindered or is it sufficient for use of or access to the Situation for the purposes of

LCA Marrickville's Business, to be prevented or hindered?

It is sufficient if use of or access to the Situation for the purposes of LCA Marrickville's Business, is prevented or hindered.

(d) What, if any, "interruption or interference" occurred "in consequence of" any "action of any lawful authority"?

None because cl 9.1.2.6 does not apply to an authority's action in response to a disease.

(e) {LCA Marrickville presses for the underlined words in this paragraph} To what extent would LCA Marrickville's access to or use of the Situation have been prevented or hindered, regardless of the lawful authority's action, and to what extent (if any) does this affect indemnity?

This does not arise.

6. Clause 9.1.2 (page 31):

On the proper construction of clause 9.1.2:

(a) Is Swiss Re's obligation to indemnify an "Insured" in respect of loss resulting from the interruption of or interference with the "Business" in consequence of closure or evacuation of the whole or part of the "Situation" by order of a competent public authority as a result of:

(i) an outbreak of a notifiable human infectious or contagious disease; or

(ii) any discovery of an organism likely to result in the occurrence of a notifiable human infectious or contagious disease,

confined to the terms of the Disease Clause and the Expansion Clause (as it applies to the circumstances of the Disease Clause)?

Clauses 9.1.2.5 and 9.1.2.6 do not apply to actions of an authority in response to a disease.

7. Causation, Adjustment and Basis of Settlement

If clause 9.1.2 of the Policy responds, on the proper construction of the adjustment clause (being the clause in the last sub-paragraph of Clause 8 on p. 29 of the Policy):

(a) Was there any interruption of or interference with LCA [Marrickville]'s Business in consequence of the relevant insured perils in the Disease Clause, the Expansion Clause, the Catastrophe Clause or the Prevention of Access Clause?

While the question does not arise I note that, if I am wrong about the proper construction of any of the insuring clauses, it should follow that there was interruption of or interference with LCA Marrickville's Business in consequence of the relevant insured perils in the applicable clause. The fact that LCA Marrickville may also have suffered loss generally from the existence and risk of COVID-19 in NSW would not mean that the action of the authority would not also be a proximate cause of LCA Marrickville's on the facts.

(b) What adjustment of the Rate of Gross Profit, Standard Turnover, Standard Gross Revenue, Standard Gross Rental and Rate of Payroll is necessary to provide for the "trend" of the Business, "variations" affecting the Business and/or "other circumstances" affecting the Business.

While the question does not arise I note that, if I am wrong about the proper construction of any of the insuring clauses, the adjustments clause does not require any adjustment to be made for the existence and risk of COVID-19 in NSW as it is an essential cause of the Damage.

(c) How, if at all, does adjustment take into account the effect that COVID-19 had on the Business (other than the effect of the "Authority Response–LCA Marrickville").

While the question does not arise I note that, if I am wrong about the proper construction of any of the insuring clauses, the adjustments clause does not require any adjustment to be made for the existence and risk of COVID-19 in NSW as it is an essential cause of the Damage.

(d) To what extent should account be made for grants, subsidies, abatements or other benefits received by LCA Marrickville when assessing its entitlement to be indemnified for its loss (if any) including but not limited to JobKeeper, other payments made to it by a Commonwealth or State Government and rental relief or rebates?

~~*While the question does not arise I note that, if I am wrong about the proper construction of any of the insuring clauses, LCA Marrickville, either under the general law or cl 10.1.3 would have to account for payments received under the JobKeeper scheme, by way of rental relief, and franchisor relief. It would not have to account for the act of grace payments received from the NSW Government.*~~

Unnecessary to answer

If clause 9.1.2 of the Policy responds, on the proper construction of the Basis of Settlement clause (clause 10):

(e) What is the date of the 'Damage'?

While the question does not arise I note that, if I am wrong about the proper construction of any of the insuring clauses, the date of the Damage would be the date of the first action by an authority satisfying an insuring clause, which would be 26 March 2020.

(f) {LCA Marrickville does not agree that issue (f) should be included in this test case because the factual premise for this issue will be the subject of a separate loss assessment process} To the extent interruption of, or interference with, LCA Marrickville's business was caused by different matters comprising the "Authority Response-LCA Marrickville", to what extent is the resulting loss (if any) to be aggregated for the purposes of applying a limit, deductible and any other conditions of cover?

Insufficient submissions were made to enable this issue to be answered.

8. Interest

(a) Is interest payable by Swiss Re pursuant to section 57 of the ICA?

No.

(b) If yes to paragraph (a), from what date is any such interest payable?

~~*This does not arise. If it did arise, interest would be payable from the date of final determination of this proceeding is Swiss Re is liable to pay under the policy.*~~

Unnecessary to answer.

4. Otherwise the Appeal and the Cross-Appeal be dismissed.

5. No order as to costs.

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

ORDERS

NSD 1080 of 2021

BETWEEN:	**MERIDIAN TRAVEL (VIC) PTY LTD (ACN 111 480 883)** Appellant
AND:	**INSURANCE AUSTRALIA LIMITED (ACN 000 016 722)** Respondent
AND BETWEEN:	**INSURANCE AUSTRALIA LIMITED (ACN 000 016 722)** Cross-Appellant
AND:	**MERIDIAN TRAVEL (VIC) PTY LTD (ACN 111 480 883)** Cross-Respondent
ORDER MADE BY:	**MOSHINSKY, DERRINGTON AND COLVIN JJ**
DATE OF ORDER:	**21 FEBRUARY 2022**

THE COURT ORDERS THAT:

1. The Appeal be allowed in part.

2. The Cross-Appeal be allowed in part.

3. The primary judge's answers to the questions posed by the parties be amended as follows:

9. Disease extension (policy schedule, paragraph (c) of the "Murder, Suicide or Disease" clause (page 5)):

(a) Did an occurrence of an outbreak of COVID-19 occur within a 20 kilometre radius of the Situation? If so, when?

Yes. The outbreak occurred by no later than 30 March 2020. Further evidence may prove that the outbreak occurred earlier, by 1 March 2020.

10. Evacuation and Closure extension (policy schedule, paragraph (d)(1) of the "Murder, Suicide or Disease" clause (page 5)):

(a) Was Meridian's Business closed or evacuated by order of a government, public or statutory authority by reason of the "Authority Response-Meridian"?

No

(b) If yes to (a), were those orders consequent upon the discovery of an organism likely to result in a human infectious or contagious disease at the Situation?

~~*This does not arise but, if it did, the answer would be no.*~~

Unnecessary to answer.

(c) {CGU disputes the inclusion of issues (c)-(f)} Did the discovery have to occur at the Situation or could it have occurred elsewhere and, if so, where?

~~*Clause 8(d)(1) requires only that the order be consequent on discovery of an organism (anywhere) likely to result in a human infectious or contagious disease at the Situation.*~~

Unnecessary to answer.

(d) If the outbreak or discovery had to occur at the Situation, did it so occur at the Situation?

~~*There is no requirement that the outbreak occur at the Situation - see cl 8(c). There is no requirement that the organism be discovered at the Situation - see cl 8(d)(1). It is agreed that there was no outbreak of COVID-19 or discovery of the SARS-CoV-2 organism at the Situation.*~~

Unnecessary to answer.

(e) What is required for there to be an "occurrence" of an outbreak [of] COVID-19?

~~*The "occurrence" of an outbreak of COVID-19 means any event of that kind. An "outbreak" of COVID-19 is the occurrence of a single case of COVID-19 while a person is in the community (that is, not in a controlled environment such as quarantine, isolation or a hospital) and who is capable of communicating COVID-19 to another person.*~~

Unnecessary to answer.

(f) What is required for there to be the "discovery" of SARS-CoV-2?

A "discovery" means finding or ascertaining the existence of SARS-CoV-2. It can be inferred that SARS-CoV-2 has been "discovered" at a location if a person with SARS-CoV-2 is found or ascertained to have been at that location during an infectious period.

11. Causation, adjustments and loss (page 21):

If it is found that the Disease extension and/or the Evacuation and Closure extension responds to Meridian's claim:

(a) Was there any interruption of or interference with Meridian's Business which was a direct result of the relevant insured perils?

There is no evidence as yet from which I would infer that the insured perils were a proximate cause of any interruption of or interference with Meridian's business.

(b) If yes to (a), what losses claimed by Meridian resulted from that interruption of or interference with its Business?

This question cannot be answered on the current evidence.

(c) {CGU disputes the inclusion of this issue (c)} Is the term "Adjustment" in the Business Interruption section of the policy applicable to the calculation of Meridian's claim, having regard to the definitions used in the "Settlement of Claims" clause in the Business Interruption section of the policy.

No.

(d) {CGU version; Meridian does not agree}: Should any adjustment be made to Meridian's business interruption loss by reference to uninsured events relating to the COVID-19 pandemic?

Adjustments should not be made to Meridian's business interruption loss by reference to uninsured events caused by the same underlying fortuity as the insured peril. The fortuity underlying the insured peril is not "COVID-19 generally" but the presence and risk of COVID-19 in Victoria". Adjustments should otherwise be made to Meridian's loss.

(e) {Meridian version; CGU does not agree}: Should any adjustment be made to Meridian's business interruption loss by reference to events (other than the insured perils) relating to the COVID-19 pandemic?

Adjustments should not be made to Meridian's business interruption loss by reference to uninsured events caused by the same underlying fortuity as the insured peril. The fortuity underlying the insured peril is not "COVID-19 generally" but the presence and risk of COVID-19 in Victoria". Adjustments should otherwise be made to Meridian's loss.

(f) What loss is payable in accordance with the terms of the policy?

This question cannot be answered on the current evidence.

(i) Are JobKeeper or other government subsidies to be taken into account in the assessment of any loss and, if so, in what way?

~~*JobKeeper - yes.*~~

JobKeeper - no.

Federal COVID-19 Consumer Travel Support Program - no.

Victorian Government Support Fund - no.

~~*Meridian would have to account for the full amounts paid to it under these schemes as operating to reduce its loss.*~~

(ii) Should rental abatements be taken into account in assessing recoverable loss?

Yes.

(iii) On what dates did the indemnity period/s start and end?

The indemnity period starts on the occurrence of the Damage (which must mean the insured peril) and ends when the results of Meridian's business cease to be affected as a consequence of the damage, such period not exceeding 12 months.

(iv) Further quantum issues may be raised when Meridian provides the information that has been requested by CGU.

Noted.

(g) {Meridian disputes the inclusion of subparagraph (f), as those issues should not be included in this test case in circumstances where CGU has denied indemnity and because the factual premise for these issues will be the subject of a separate loss assessment process} Has Meridian:

(i) provided sufficient information for CGU to determine any amount

payable under the policy; and/or

Not to my knowledge.

(ii) failed to respond to reasonable requests for information from CGU?

Not to my knowledge.

(h) If it is found that the policy responds and CGU is liable to pay an amount to Meridian, from what date is interest under section 57 of the ICA payable?

The issue whether Meridian can establish that the insured peril in 8(c) was a proximate cause of any of its loss remains unanswerable on the current state of the evidence. On the current state of the evidence, Meridian has not proved that to be the case. As a result, s 57 has not yet been engaged. If Meridian is entitled to cover, further evidence and submissions would be required in relation to interest.

4. Otherwise the Appeal and the Cross-Appeal be dismissed.

5. No order as to costs.

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

ORDERS

NSD 1081 of 2021

BETWEEN:	**THE TAPHOUSE TOWNSVILLE PTY LTD (ACN 603 252 482)** Appellant
AND:	**INSURANCE AUSTRALIA LIMITED (ACN 000 016 722)** Respondent

ORDER MADE BY: **MOSHINSKY, DERRINGTON AND COLVIN JJ**

DATE OF ORDER: **21 FEBRUARY 2022**

THE COURT ORDERS THAT:

1. The Appeal be allowed in part.

2. The primary judge's answers to the questions posed be amended as follows:

12. Disease clause (clause 8, page 23):

(a) Was all or part of Taphouse's premises closed or evacuated by any legal authority by reason of the "Authority Response-Taphouse"?

No.

(b) If yes to (a), was that closure or evacuation as a result of the outbreak of COVID-19 occurring within a 20 kilometre radius of Taphouse's premises?

No.

13. Prevention of access (POA) clause (clause 7, page 23):

(a) Does the POA clause apply to an outbreak of COVID-19 in light of the separate disease clause?

No.

(b) If yes to (a), did the "Authority Response-Taphouse" involve any legal authority preventing or restricting access to Taphouse's premises or ordering the evacuation of the public?

This does not arise. If it did, then yes, except for the 29 March 2020 order.

(c) If yes to (a) and (b), were those orders as a result of damage to, or the threat of damage to, property or persons within a 50 kilometre radius of Taphouse's premises?

This does not arise.

(d) {CGU disputes the inclusion of this paragraph} Alternatively to (c), how are the words "as a result of … damage to or threat of damage to … persons" to be construed? In particular:

(i) Does the "threat of damage" have to exist within 50 kilometres of the premises only or [can] it exist in areas further than 50 kilometres from the premises as well and, if so, where?

~~*The threat of damage within the 50 kilometre radius must be a proximate cause of the action of the authority. It may be such a cause if the authority considers the threat exists anywhere provided it also considers it exists within the 50 kilometre radius.*~~

The threat of damage within the 50 kilometre radius does not need to be a proximate cause of the action of the authority. It only needs to be more than a remote cause. If the authority considers the threat exists in all parts of the State and the prevention or restriction of access is caused by that threat, the clause will respond because the threat within the 50 kilometre radius is "a cause".

(ii) Must the relevant order be made in direct response to the specific "threat of damage" within 50 kilometres of the Situation, or is it sufficient if the relevant order is made as a result of "threat of damage" both within the radius and of a broader scope (e.g. on a regional, state or nationwide scale)?

See (i) above.

14. Causation, adjustments and loss (page 19)

If it is found that the Disease clause and/or the POA clause responds to Taphouse's claim:

(a) Does the interruption of or interference with Taphouse's business have to be "a direct result" of or "result from" or be "caused by", the relevant insured perils, and if not, what is the relevant test?

The insured peril has to be a proximate cause of the interruption of or interference with Taphouse's business.

(b) Was there any interruption of or interference with Taphouse's business which satisfies the test of causation identified in the answer to (a)?

No. If, however, I am wrong about the application of cll 7 and 8 then Taphouse has proved some loss (reduced turnover evidence) which should be inferred to be result of the relevant proximate cause.

(c) If yes to (b), what losses claimed by Taphouse resulted from that interruption or interference of Taphouse's business?

~~*This cannot be answered on the evidence but the loss would exclude savings from the JobKeeper payments, the Commonwealth Cash Flow Boost and rental waivers or abatement from Taphouse's landlord, but not the Queensland Government's COVID-19 Grant.*~~

Unnecessary to answer.

(d) {CGU disputes the inclusion of this issue (d)} Is the term "Adjustment" in the Business Interruption section of the policy applicable to the calculation of Meridian's [sic, Taphouse's] claim, having regard to the definitions used in the "Settlement of Claims" clause in the Business Interruption section of the policy.

No, but the loss must be in consequence of the damage.

(e) {CGU version; Taphouse does not agree}: Should any adjustment be made to Meridian's [sic, Taphouse's] business interruption loss by reference to uninsured events relating to the COVID-19 pandemic?

Not if the uninsured events are a result of the same underlying cause as the insured peril, in this case being the presence and risk of COVID-19 in Queensland.

(f) {Taphouse version; CGU does not agree}: Should any adjustment be made to Meridian's [sic, Taphouse's] business interruption loss by reference to events (other than the insured perils) relating to the COVID-19 pandemic?

See (e) above.

(g) What loss is payable in accordance with the terms of the policy?

See (c) above.

(i) Are JobKeeper or other government subsidies to be taken into account in the assessment of any loss and, if so, in what way?

See (c) above.

(ii) Should rental abatements be taken into account in assessing recoverable loss?

Yes

(iii) On what dates did the indemnity period/s start and end?

The indemnity period started on the date Taphouse suffered loss from the insured peril and ended 12 months later provided that Taphouse's business continued to be affected as a consequence of the insured peril.

(iv) Further quantum issues may be raised when Taphouse provides the information that has been requested by CGU.

Noted.

(h) {Taphouse does not agree that this issue be included in this test case in circumstances where CGU has denied indemnity and because the factual premise for these issues will be the subject of a separate loss assessment process} Has Taphouse:

(i) provided sufficient information for CGU to determine any amount payable under the policy; and / or

(ii) failed to respond to reasonable requests for information from CGU?

These questions cannot be answered.

(i) If it is found that the policy responds and CGU is liable to pay an amount to Taphouse, from what date is interest under section 57 of the ICA payable?

~~*This does not arise, but it would not be unreasonable for Insurance Australia to withhold payment unless and until it is finally determined to be liable to make payment in this proceeding.*~~

Unnecessary to answer.

3. Otherwise the Appeal be dismissed.

4. No order as to costs.

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

ORDERS

NSD 1082 of 2021

BETWEEN:	**MARKET FOODS PTY LIMITED (ABN 48 604 308 581)** Appellant
AND:	**CHUBB INSURANCE AUSTRALIA LIMITED (ABN 23 001 642 020)** Respondent

ORDER MADE BY:	**MOSHINSKY, DERRINGTON AND COLVIN JJ**
DATE OF ORDER:	**21 FEBRUARY 2022**

THE COURT ORDERS THAT:

1. The appeal is dismissed.

2. There is no order as to costs.

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

ORDERS

NSD 1076 of 2021

BETWEEN:	**DAVID COYNE (IN HIS CAPACITY AS LIQUIDATOR OF EDUCATIONAL WORLD TRAVEL PTY LTD (ACN 006 888 179) (IN LIQUIDATION))** First Appellant
	EDUCATIONAL WORLD TRAVEL PTY LTD (ACN 006 888 179) (IN LIQUIDATION) Second Appellant
AND:	**QBE INSURANCE (AUSTRALIA) LIMITED (ACN 003 191 035)** Respondent
AND BETWEEN:	**QBE INSURANCE (AUSTRALIA) LIMITED (ACN 003 191 035)** Cross-Appellant
AND:	**DAVID COYNE (IN HIS CAPACITY AS LIQUIDATOR OF EDUCATIONAL WORLD TRAVEL PTY LTD (ACN 006 888 179) (IN LIQUIDATION))** First Cross-Respondent
	EDUCATIONAL WORLD TRAVEL PTY LTD (ACN 006 888 179) (IN LIQUIDATION) Second Cross-Respondent
ORDER MADE BY:	**MOSHINSKY, DERRINGTON AND COLVIN JJ**
DATE OF ORDER:	**21 FEBRUARY 2022**

THE COURT ORDERS THAT:

1. The appeal be allowed in part.

2. The cross-appeal be dismissed.

3. The primary judge's answers to the questions posed by the parties be amended as follows:

Property Law Act

1. Does section 61A of the *Property Law Act 1958* (Vic) apply to the policy, such that the reference to the repealed *Quarantine Act 1908* (Cth) is to be construed as a reference to the *Biosecurity Act 2015* (Cth), and such that a disease determined to be a "listed human disease" under the *Biosecurity Act 2015* (Cth) falls within the scope of

the exclusion from cover for business interruption?

No.

Prevention of access (POA) extension (page 12)

2. Was there "closure or evacuation of all or part of the [insured's] premises" within the meaning of the policy?

No.

3. If the answer to 2 is 'yes', was it due to any one or more of the directions as set out in Annexures A and B of the Statement of Agreed Facts?

No.

4. If the answer to 3 is 'yes', was it an order by a competent government, public or statutory authority as a result of a human infectious or contagious disease?

This does not arise, but if it did arise all of the actions on which EWT relied were orders of a competent government, public or statutory authority as a result of a human infectious or contagious disease.

5. If the answer to 3 and 4 is yes, did the "closure or evacuation of all or part of the premises":

(a) prevent or hinder the use of the insured's building or access thereto; or

No.

(b) "result in" a cessation or diminution of trade "due to" the temporary falling away of potential customers?

No.

6. Was there "interruption or interference with" the insured's business within the meaning of the policy?

No.

7. If the answer to 6 is yes, was the interruption or interference "in consequence of" closure or evacuation of all or part of the premises within the meaning of the policy?

No.

Loss

8. Whether, having regard to the answers to issues 1 – 7 above, the Policy responds to EWT's claim for indemnity.

No.

Concurrent Causes

9. If the answer to issue 8 is "yes", whether:

(a) the appropriate counter-factual for the purposes of the "Standard Income" definition in the Policy may take into account the presence and effect of COVID-19 as relevant circumstances, so that any payment to be made reflects the results that but for the insured events,

would have been obtained during the relevant period (less any expenses saved as a result of the loss or damage); or

This does not arise.

(b) to the extent EWT suffered loss that was caused concurrently by events or circumstances referable to the outbreak of COVID-19 other than as a consequence of the matters set out in 2 to 7 above, the Prevention of Access Extension in the Policy covers EWT for the loss resulting from any such concurrent causes of that loss.

This does not arise.

Interest

10. Is interest under section 57 of the Insurance Contracts Act payable? If so from what date is interest payable?

~~*This does not arise, but it would not be unreasonable for QBE to withhold payment unless and until it is finally determined to be liable to make payment in this proceeding.*~~

Unnecessary to answer.

4. The appeal otherwise be dismissed.

5. There be no order as to costs.

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

REASONS FOR JUDGMENT

MOSHINSKY J:

Introduction

1 I have had the considerable benefit of reading in draft the reasons for judgment of Derrington and Colvin JJ (the **joint judgment**). I agree with their Honours' reasons and with the orders they propose. I wish to set out, briefly, why I have reached the same conclusions as their Honours on certain key issues in each appeal (including, where applicable, the cross-appeal). The following reasons are by way of addition, and are not intended to qualify my agreement with the reasons in the joint judgment. For the purposes of these reasons, I gratefully adopt their Honours' outline, for each appeal, of the relevant facts, the policy wording, the decision of the primary judge, and the issues to be determined. I also adopt the abbreviations used in the joint judgment.

General issues

2 The principles of construction applicable to commercial documents, such as the insurance policies in issue in these appeals, are well-established, and are outlined in *Star Entertainment Group Ltd v Chubb Insurance Australia Ltd* [2022] FCAFC 16 at [8]-[14]. That appeal was heard at the same time as the present appeals, and the reasons for judgment of the Full Court in that matter have been handed down on the same day as the reasons for judgment in the present appeals. As is well-established, the task of contractual construction is to be approached objectively, in the sense that the meaning of the words used is to be ascertained by reference to what a reasonable person would have understood the language of the contract to convey; this normally requires consideration not only of the text, but also of the surrounding circumstances known to the parties, and the purpose and object of the transaction: *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 at [40] per Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ. See also: *McCann v Switzerland Insurance Australia Ltd* (2000) 203 CLR 579 at [22] per Gleeson CJ; *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640 at [35] per French CJ, Hayne, Crennan and Kiefel JJ; *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104 at [46], [47], [51] per French CJ, Nettle and Gordon JJ, at [109] per Kiefel and Keane JJ; *Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd* (2017) 261 CLR 544 at [16]-[17] per Kiefel, Bell and Gordon JJ. When undertaking this task, "preference is given to a construction supplying a congruent operation

to the various components of the whole": *Wilkie v Gordian Runoff Ltd* (2005) 221 CLR 522 at [16] per Gleeson CJ, McHugh, Gummow and Kirby JJ.

3 In the judgment of the primary judge at [53], her Honour noted that the parties relied on those parts of the reasoning in *Financial Conduct Authority v Arch Insurance (UK) Ltd* [2021] AC 649 (*FCA v Arch*) that suited their purposes. The same can be said of the parties' submissions on appeal. Insofar as the judgments of the Supreme Court of the United Kingdom deal with *causation*, their Lordships' reasoning was helpfully summarised by the primary judge at [53]-[83] of her Honour's reasons. I do not consider it necessary for the purposes of deciding any issue in the present appeals to consider the correctness or otherwise of their Lordships' reasoning in relation to causation. It is important to note that the underlying factual circumstances in the United Kingdom at the relevant times for the purposes of *FCA v Arch* were very different from those in Australia at the relevant times for the purposes of these appeals (namely, during 2020 and 2021). As the primary judge noted at [56], an important part of the context of the decision in *FCA v Arch* was that the outbreak of COVID-19 in the United Kingdom was "so widespread". In comparison, it could not be said that the occurrence of COVID-19 cases in Australia at the relevant times was widespread: PJ [66].

LCAM appeal

4 The relevant policy wording is set out in the joint judgment. While it is necessary to have regard to all of these provisions, and the policy document as a whole, it is convenient to set out the key relevant terms, which are as follows. Section 2 of the policy dealt with interruption insurance. Within that section, cl 9 provided in part:

> **9. Extent of Cover**
>
> 9.1 The **Insurer** will indemnify the **Insured** in accordance with the provisions of Clause 10 (Basis of Settlement) against loss resulting from the interruption of or interference with the **Business**, provided the interruption or interference:
>
> 9.1.1 is caused by **Damage** occurring during the **Period of Insurance** to: …
>
> 9.1.1.1 any building or any other property or any part thereof used by the **Insured** at the **Situation** for the purposes of the **Business**;
>
> …
>
> 9.1.2 is in consequence of:
>
> 9.1.2.1 closure or evacuation of the whole or part of the **Situation** by order of a competent public authority as a result of an outbreak of a notifiable human infectious or contagious disease or bacterial infection or any discovery of an organism likely to result in the occurrence of a notifiable human infectious or

> contagious disease or consequent upon vermin or pests or defects in the drains and/or sanitary arrangements at the **Situation** but specifically excluding losses arising from or in connection with highly Pathogenic Avian Influenza in Humans or any disease(s) declared to be a listed human disease pursuant to subsection 42(1) of the Biosecurity Act 2015;
>
> …
>
> 9.1.2.3 injury, illness or disease arising from or likely to arise from or traceable to foreign or injurious matter in food or drink provided from or on the **Situation**;
>
> 9.1.2.4 any of the circumstances set out in Sub-Clauses 9.1.2.1 to 9.1.2.3 (inclusive) occurring within a 5 kilometer radius of the **Situation**;
>
> 9.1.2.5 the action of a civil authority during a conflagration or other catastrophe for the purpose of retarding same;
>
> 9.1.2.6 the action of any lawful authority attempting to avoid or diminish risk to life or **Damage** to property within 5 kilometres of such **Situation** which prevents or hinders the use of or access to the **Situation** whether any property of the **Insured** shall be the subject of **Damage** or not,
>
> occurring during the **Period of Insurance**. Such events shall be deemed to be loss caused by **Damage** covered by Section 2 of this **Policy**. Furthermore Clauses 12 and 13 shall not apply to the cover provided by this Clause 9.1.2.
>
> (Original emphasis).

5 The primary judge held that the exclusion in the latter part of cl 9.1.2.1 applied in the present case (as COVID-19 had been listed as a human disease pursuant to s 42(1) of the *Biosecurity Act 2015* (Cth)) and that, accordingly, cl 9.1.2.1 (as expanded by cl 9.1.2.4) did not apply in this case: PJ [215], [233], [327]. There is no appeal from that conclusion.

6 The key determinative issue in the appeal is whether the primary judge was correct to conclude that, as a matter of construction, cll 9.1.2.5 and 9.1.2.6 did not apply in the present case. The primary judge's construction was essentially based on construing these clauses in the context of the policy as a whole. That context included the whole of cl 9.1.2. The primary judge considered that cll 9.1.2.1 and 9.1.2.4 exclusively provided for loss as a result of an outbreak of a notifiable human infectious or contagious disease or bacterial infection or any discovery of an organism likely to result in the occurrence of a notifiable human infectious or contagious disease, where cl 9.1.2.3 was not applicable: PJ [241]-[252]. Accordingly, insofar as loss was consequent on the action of an authority resulting from disease, cll 9.1.2.5 and 9.1.2.6 were incapable of being engaged: PJ [253]. The primary judge also held that, in any event, cl 9.1.2.5

had nothing to do with diseases. This was because, read in context, the word "catastrophe" here referred to something like a conflagration, which is a physical event requiring physical action to be retarded; in that respect, a pandemic is not like a conflagration: PJ [332]-[336]. For these additional reasons, the primary judge held that cl 9.1.2.5 did not apply: PJ [337].

7 In my view, the primary judge's construction of these clauses is the correct construction, for the reasons given by her Honour. Among other things, as the primary judge reasoned at [244], "construing cll 9.1.2.5 and 9.1.2.6 as applying to diseases generally would expunge the careful distinction drawn by cl 9.1.2.1 between notifiable diseases and listed human diseases. That distinction would be meaningless. So too would the requirement for an order of an authority resulting from a notifiable disease. The inconsistency between the provisions would be profound." As her Honour said, the result would not be a reasonable and commercial operation of this part of the policy: PJ [244]. Further, the presence of the *Biosecurity Act* exclusion in cl 9.1.2.1 indicates that cll 9.1.2.5 and 9.1.2.6 were not intended by the parties to apply to diseases, as does the sub-limit on liability for diseases (as the primary judge reasoned at [247]).

8 For these reasons, reading cll 9.1.2.5 and/or 9.1.2.6 as applicable to loss as a result of an outbreak of a notifiable human infectious or contagious disease or bacterial infection or any discovery of an organism likely to result in the occurrence of a notifiable human infectious or contagious disease, where cl 9.1.2.3 was not applicable, would result in incoherence and incongruity in the terms of the policy. The primary judge's construction, with which I respectfully agree, places emphasis on the text of the policy and reading cll 9.1.2.5 and 9.1.2.6 in the context of the policy as a whole. That approach is consistent with, and supported by, the principles of construction referred to above.

9 It follows that LCAM was not entitled to indemnity under the policy in respect of its claims, and the primary judge was correct to so hold: PJ [419]. This is determinative of the substance of the appeal.

Meridian appeal

10 The relevant policy wording is set out in the joint judgment. Again, while it is necessary to have regard to all of these provisions, and the policy document as a whole, it is nevertheless convenient for present purposes to set out the key relevant terms. Section 2 of the policy dealt with business interruption. This included a section headed "Additional benefits". As amended by the Schedule to the policy, this provided in part:

Additional benefits

This section is extended to include the following additional benefits. …

For additional benefits 1 to 9 inclusive We will pay You (depending on the part of this section which is applicable to You) for: …

e) 'Item 9 Gross revenue',

resulting from interruption of or interference with Your Business as a result of Damage occurring during the Period of Insurance to, or as a direct result of:

…

8. Murder, Suicide or Disease

The occurrence of any of the circumstances set out in this Additional Benefit shall be deemed to be Damage to Property used by You in the Situation.

…

(c) The outbreak of a human infectious or contagious disease occurring within a 20 kilometre radius of the Situation.

(d) Closure or evacuation of Your Business by order of a government, public or statutory authority consequent upon:

(1) the discovery of an organism likely to result in a human infectious or contagious disease at the Situation; or …

Cover under Additional Benefits 8(c) and 8(d)(1) does not apply in respect of Highly Pathogenic Avian Influenza in Humans or any other diseases declared to be quarantinable diseases under the Quarantine Act 1908 and subsequent amendments.

As noted in the joint judgment, there is some inconsistency in the numbering in the policy. It will be convenient to refer to the above clause as "cl 8".

11 As will be noted, the exclusion at the end of cl 8 referred to the *Quarantine Act 1908* (Cth). However, before the policy commenced, the *Quarantine Act* had been repealed and the *Biosecurity Act*, which covers some of the same subject matter as the *Quarantine Act*, had been enacted. Prima facie, on the basis of the decision of the NSW Court of Appeal in *HDI Global Speciality SE v Wonkana No 3 Pty Ltd* (2020) 104 NSWLR 634 (*Wonkana*), this meant that the exclusion did not operate. However, in circumstances where Meridian was based in Victoria, the insurer in this matter sought to rely on s 61A of the *Property Law Act 1958* (Vic) (set out in the joint judgment) in the following way. The insurer argued that the policy of insurance was governed by the law of Victoria and that s 61A operated such that the reference in the exclusion to "quarantinable diseases under the Quarantine Act 1908 and subsequent amendments" was to be construed as a reference to "listed human diseases under the *Biosecurity Act*". The primary judge rejected the insurer's contention that s 61A operated in

that way. For the reasons set out in the joint judgment, the primary judge was correct to so hold. It follows that the exclusion at the end of cl 8 did not operate. It can therefore be put to one side.

Clause 8(c)

12 Before the primary judge, the insurer accepted that there was an outbreak of COVID-19 within 20 kilometres of Meridian's premises (which were in Heidelberg, Victoria) by no later than 30 March 2020: PJ [449]. The primary judge stated that, based on the evidence, she was unable to find that there was an outbreak (in the sense discussed earlier in her reasons) of COVID-19 within 20 kilometres of Meridian's premises before 30 March 2020: PJ [450]-[451]. The primary judge also stated that she would not infer that the outbreak ceased by February 2021, as the insurer proposed: PJ [452]. For these reasons, the primary judge held that cl 8(c) applied on the facts of the case from 30 March 2020 to at least the beginning of February 2021: PJ [453]. Apart from a challenge by the insurer to the primary judge's construction of the word "outbreak", there is no challenge to these conclusions of the primary judge. For the reasons given in the joint judgment, the primary judge's construction of "outbreak" was correct.

13 A key issue in this appeal is whether the primary judge's treatment of causation and adjustments in relation to cl 8(c) was correct. The primary judge dealt with this issue at [479]-[497]. The primary judge held that, on the current state of the evidence, she was unable to infer that the outbreak of a human infectious or contagious disease occurring within a 20 kilometre radius of the Situation was a proximate cause or any other kind of cause of Meridian's loss: PJ [481]; see also [496]-[497]. The primary judge stated that, given the lack of focus on this issue in the hearing, she would be prepared to hear the parties further about it if appropriate: PJ [481]. Her Honour discussed a number of issues that arose. One of the issues that concerned her Honour (see [485]) was: assuming Meridian can prove that the insured peril in cl 8(c) was a proximate cause of some loss, could it be said, consistently with the logic and reasoning about causation and trends in *FCA v Arch*, that various actions of the Commonwealth Government (in particular, the Overseas Travel Ban and the ban on cruise ships) were caused by the same underlying fortuity as the insured peril? Her Honour held that the underlying fortuity in the case of the Commonwealth action was not the same as the underlying fortuity of the presence of COVID-19 in the State and the associated risk of spread of COVID-19 throughout the State (including the area within the radius or at the insured Situation): PJ [488].

14 In my view, proceeding on the basis that the principles relating to "underlying fortuity" were correctly stated by the UK Supreme Court in *FCA v Arch* (which principles were not challenged by Meridian), the primary judge's conclusion on this issue was correct, for the reasons her Honour gave at [485]-[490]. As the primary judge stated at [487], the Commonwealth actions focused not on the presence of COVID-19 in the State and the associated risk of the spread of COVID-19 throughout the State (including the area within the radius or at the insured Situation); they were focused on the presence of COVID-19 overseas and the risk that an overseas traveller coming to Australia may bring COVID-19 into any part of Australia. The underlying fortuities involved different subject-matter (as the primary judge said at [488]).

Clause 8(d)(1)

15 The primary judge held that cl 8(d)(1) did not apply in the circumstances of this case. Although there is no appeal by Meridian in relation to this conclusion, I note the following matters for completeness. The primary judge held that the Overseas Travel Ban did not close any part of Meridian's travel business: PJ [463]. The primary judge stated that the fact that international bookings had comprised approximately 90% of Meridian's revenue and the Overseas Travel Ban had the effect of curtailing or destroying Meridian's business did not mean that the business, or part of it, was closed *by an order* as required by cl 8(d)(1): PJ [463]; see also [464]-[465]. Similarly, the primary judge held, the relevant lockdown directions did not close the whole or part of Meridian's business: PJ [466]-[467]. The primary judge also held that the causal element of cl 8(d)(1) ("consequent upon") was not present: PJ [469]-[477]. Accordingly, the primary judge held that cl 8(d)(1) was not satisfied: PJ [478]. As noted above, Meridian does not challenge this conclusion.

Taphouse appeal

16 The relevant policy wording is set out in the joint judgment. As noted for the other appeals, while it is necessary to have regard to all of these provisions, and the policy document as a whole, it is nevertheless convenient for present purposes to set out the key relevant terms. Section 2 of the policy dealt with business interruption. This included a part dealing with extensions of cover. That part included:

> **Extensions of cover**
>
> This section is extended to include the following additional benefits. …
>
> *We* will pay *you* (depending on the part of this section which is applicable to *you*) for:
>
> a) item 1 Gross profit, …

resulting from *interruption* of or interference with your business as a result of insured damage occurring during the *period of insurance* to, or as a direct result of:

…

7. Prevention of access by public authority

We will pay for loss that results from an *interruption* of *your business* that is caused by any legal authority preventing or restricting access to *your premises* or ordering the evacuation of the public as a result of *damage* to or threat of *damage* to property or persons within a 50-kilometre radius of *your premises*.

8. Murder, suicide & infectious disease

We will pay for loss that results from an *interruption* of *your business* that is caused by:

a) any legal authority closing or evacuating all or part of the *premises* as a result of:

i. the outbreak of an infectious or contagious human disease occurring within a 20-kilometre radius of *your* premises, however, there is no cover for highly pathogenic Avian Influenza or any disease declared to be a quarantinable disease under the *Quarantine Act 1908* (as amended) irrespective of whether discovered at the location of *your premises*, or out-breaking elsewhere

…

Clause 7

17 A key issue in this appeal is whether the primary judge was correct to hold that cl 7 did not apply to diseases, which, instead, were regulated exclusively by cl 8: PJ [561]. The primary judge's view was based on construing cl 7 in the context of the policy as a whole, including, in particular cl 8. Her Honour considered that the operation of the policy would otherwise involve "profound incongruence and incoherence". Her Honour inferred that the parties could not have intended that cl 7 would apply to an authority preventing or restricting access to the premises under cl 7 where the threat of damage to persons was from a disease. This was because, if that were so, the various conditions or requirements within cl 7 would be circumvented or would not apply: PJ [561].

18 In my view, the primary judge's construction of these clauses is the correct construction, for the reasons given by her Honour at [561]-[564]. In particular, if cl 7 were construed as applying to an authority preventing or restricting access to the premises where the threat of damage to persons is from a disease: (a) the requirement in cl 8 for an authority to close or evacuate the premises "as a result of" the outbreak of the disease would be circumvented; (b) the 20 kilometre radius in cl 8 would be circumvented and the 50 kilometre radius in cl 7 would apply; (c) the limitation in cl 8 to infectious or contagious human diseases would not apply;

and (d) the exclusion of highly pathogenic Avian Influenza in cl 8 would not apply. In light of these matters, construing cl 7 as applying to an authority preventing or restricting access to the premises where the threat of damage to persons is from a disease would result in profound incoherence or incongruence, as the primary judge concluded. It follows that the primary judge was correct to conclude that Taphouse was not entitled to indemnity under cl 7.

Clause 8

19 Another key issue in this appeal is whether the primary judge was correct to hold that the causal requirement in cl 8 was not satisfied. The primary judge found that the relevant State directions were made as a result of the threat or risk of harm to human health across the whole of Queensland by reason of COVID-19, but that it could not be inferred that the directions were a result of an outbreak of an infectious or contagious human disease occurring within a 20 kilometre radius of the premises: PJ [588]. The primary judge noted, at [589], the distinction between, on the one hand, an authority preventing or restricting access to the premises as a result of a *threat or risk* of harm to each and every person in the State (which was relevant to one of the alternative issues that her Honour had considered in relation to cl 7), and, on the other hand, an authority closing or evacuating the premises as a result of *an outbreak of an infectious or contagious human disease occurring within a 20 kilometre radius of the premises*. Her Honour found that the relevant State directions "had nothing to do with a perceived outbreak of COVID-19 within a 20 kilometre radius of [Taphouse's] premises": PJ [590]; see also [591]. Further, the primary judge found, the relevant directions were not made because of an outbreak of COVID-19 across the whole of Queensland (including within the 20 kilometre radius of the premises): PJ [591]. Accordingly, the primary judge held, the causal requirement of the clause was not satisfied.

20 Before directly addressing this issue, I note that, for the reasons given in the joint judgment, ground 2(a) of Taphouse's notice of appeal is made out. This concerns a factual statement made by her Honour at [601] that there was no evidence that there was a single case of a person within the 20 kilometre radius who was in the community with COVID-19 at a time when the person was capable of communicating the disease to others. For the reasons given in the joint judgment, that statement was in error – the evidence from the forms submitted to NOCS was sufficient to justify the conclusion that, prior to 23 March 2020 (the date of the relevant direction), there *were* persons infected with COVID-19 within the community within an area of 20 kilometres of Taphouse's premises and capable of communicating it to others. In other

words, contrary to the primary judge's statement, there *was* an "outbreak" or "outbreaks" of COVID-19 in the 20 kilometre radius of Taphouse's premises prior to 23 March 2020.

21 In my view, notwithstanding the above point, the primary judge was correct to conclude that the causal requirement of cl 8 was not satisfied. The text of cl 8 requires that the authority close or evacuate all or part of the premises "as a result of" the outbreak of an infectious or contagious human disease occurring within a 20 kilometre radius of the premises. There is no indication here that the directions were made as a result of the outbreak or outbreaks of COVID-19 within the 20 kilometre radius of Taphouse's premises (even if the Chief Health Officer was aware of that outbreak or those outbreaks). Nor were the directions made as a result of an outbreak or outbreaks of COVID-19 in each and every part of Queensland, such that it could be said (by analogy with the situation in the United Kingdom considered in *FCA v Arch*) that the directions were a result of the outbreak or outbreaks within the radius of 20 kilometres of Taphouse's premises.

22 It follows that the primary judge was correct to conclude that Taphouse was not entitled to indemnity under cl 8.

Market Foods appeal

23 The relevant policy wording is set out in the joint judgment. Again, while it is necessary to have regard to all of these provisions, and the policy document as a whole, it is again convenient to set out the key relevant terms. Section 2 of the policy dealt with business interruption. Within that section, Extensions B and C provided in part:

> **Extensions B: Following damage at locations not occupied by you**
>
> Cover under Section 2 is extended to include loss resulting from Business Interruption to property: (a) of a type insured by this Policy; and (b) at the locations described in points 1. to 8. directly below;
>
> …
>
> **4. Public Authority**
>
> any legal authority preventing or restricting access to an Insured Location or ordering the evacuation of the public due to damage or a threat of damage to property or persons within 50 kilometres of any Insured Location.
>
> …
>
> **Extension C: non damage**
>
> **1. Infectious Disease, Murder and Closure Extension**
>
> Cover is extended for loss resulting from interruption of or interference with the

> Insured Location in direct consequence of the intervention of a public body authorised to restrict or deny access to the Insured Location directly arising from an occurrence or outbreak at the premises of any of the following:
>
> a) Notifiable Disease, or
>
> b) the discovery of an organism likely to cause Notifiable Disease;
>
> …
>
> leading to restriction or denial of the use of the Insured Location on the order or advice of the local health authority or other competent authority.
>
> Cover under this Extension does not include the costs incurred in cleaning, repair, replacement, and recall or checking of property.

24 The preamble to Extension B used the expression "Business Interruption", which was defined as:

> **Business Interruption**
>
> means the interruption of or interference with Your Business in consequence of Insured Damage that occurs during the Policy Period.

25 That definition used the expression "Insured Damage", which was defined as follows:

> **Insured Damage**
>
> means physical loss, destruction or damage occurring during the Policy Period caused by an event insured under the Property Damage, Theft, Money, Glass or General Property Sections.

26 Extension C used the expression "Notifiable Disease", which was defined as:

> **Notifiable Disease**
>
> means illness sustained by any person resulting from food or drink poisoning or any human infectious or human contagious disease, an outbreak of which the competent local authority has stipulated must be notified to them. Notifiable Disease does not include any occurrence of any prescribed infectious or contagious diseases to which the Quarantine Act 1908 as amended applies.

27 As indicated in the Schedule to the policy, the cover under the policy was for Property Damage, Business Interruption, Theft, Money, Glass, and Public and Products Liability. In respect of Property Damage, there was cover for contents, stock, glass and money, but not for buildings. There were three Insured Locations specified in the Schedule.

Extension B, Item 4

28 A key issue in this appeal is whether the primary judge was correct to hold that, as a matter of construction, Item 4 of Extension B did not provide cover for the effects of a disease: PJ [875], [901]. The primary judge reasoned that, whatever its infelicities, the better view was that

Extension B was concerned with "Business Interruption", as defined, to property other than that owned by the insured: PJ [874]. Her Honour noted that Business Interruption required Insured Damage, which involved physical loss, destruction or damage to property: PJ [874]. The primary judge considered that, even if Item 4 was read as extending that concept to include the threat of physical loss, destruction or damage to property and the threat of physical loss, destruction or damage to persons (whether caused by the threat of physical loss, destruction or damage to property or not), the central concept remained that Extension B was concerned with physical loss, destruction or damage to property other than that owned by the insured: PJ [874]. Implicit in this reasoning was that each Item of Extension B was to be read *together with* the preamble to Extension B. This was later made explicit in her Honour's reasons, in the context of Item 4 of Extension B, at [897]-[898]. Her Honour also expressed the view that it would be profoundly inconsistent and incongruous with the *context* of Extension B to understand it as applying to potential damage to property from a disease or potential harm to persons from a disease: PJ [875]; see also [876]-[883]. The primary judge relied, in particular, on the wording of the preamble to Extension B (at [878]) and reading Extension B in the context of Extension C (at [879]-[880]).

29 In my view, the primary judge's construction of Item 4 of Extension B, as not providing cover for the effects of a disease, was correct. First, the language used by the parties in the preamble to Extension B strongly points to the Extension relating to physical loss, destruction or damage. The preamble refers to "Business Interruption", which in turn refers to "Insured Damage". The latter expression is defined in terms that refer to physical loss, destruction or damage. Insofar as Market Foods suggests that the scope of cover is identified in Item 4 alone (that is, without the preamble), I do not accept that submission. While there may be some grammatical awkwardness in reading the preamble together with Item 4, I do not consider this to provide a sufficient basis to disregard, or read out, the preamble. I consider the better view to be that the preamble and Item 4 are to be read together; each has some work to do in defining the scope of the extended cover. Indeed, the preamble expressly refers to "points 1. to 8. directly below", providing an express textual link between the preamble and the Items that follow (referred to as "points" in the policy).

30 Secondly, and in any event, Item 4 of Extension B needs to be read in the context of the policy as a whole including, in particular, Extension C. If Item 4 of Extension B were construed as applying to diseases: (a) Extension B would apply to any disease and not only a Notifiable Disease; and (b) the requirement in Extension C that there be an outbreak or occurrence of a

Notifiable Disease, or an occurrence of the discovery of an organism likely to cause Notifiable Disease, would not apply. In the context of Extension C, it would be productive of incoherence and incongruity if Extension B provided cover for the effects of a disease.

31 Insofar as Market Foods relies on the *contra proferentem* rule, I do not consider it necessary to have resort to this rule to resolve the constructional issue.

32 It follows that the primary judge was correct to conclude that Market Foods was not entitled to indemnity under Item 4 of Extension B.

Extension C

33 Another key issue in this appeal is whether the primary judge was correct to conclude that the causal requirement in Extension C was not satisfied. There was no issue that COVID-19 was a Notifiable Disease: PJ [938]. Further, there was no issue that the Queensland Government directions led to restriction or denial of the use of the Insured Locations as required: PJ [940]. As the primary judge stated at [942], the issue was whether the Queensland Government directions directly arose from an occurrence or outbreak at the premises of a Notifiable Disease or the discovery of an organism at the premises likely to cause Notifiable Disease. The primary judge concluded that there was no evidence suggesting that the Queensland Government directions were made because of an occurrence or outbreak of COVID-19 or the discovery of the SARS-CoV-2 virus at these premises: PJ [945]. The primary judge did not accept Market Foods' contention that the word "premises" extended to land or area in the vicinity of the Insured Locations: PJ [946]. Rather, the relevant premises were the buildings (including curtilages: see PJ [946]) in which the Insured Locations were located, as identified by her Honour at [944], namely:

(a) in the case of the Herston Insured Location, the Herston building;

(b) in the case of the William Street Insured Location, the William Street building; and

(c) in the case of the UQ Insured Location, building 63.

34 In the case of the UQ Insured Location, the primary judge did not accept that the relevant premises was the whole of the UQ campus: PJ [947]. Accordingly, the primary judge held that Extension C was not satisfied: PJ [950].

35 In my view, the primary judge was correct to conclude that the causal requirement in Extension C was not satisfied. As the primary judge stated, there was no evidence suggesting

that the Queensland Government directions were made because of an occurrence or outbreak of COVID-19 or the discovery of the SARS-CoV-2 virus at the relevant premises. The insured therefore failed to satisfy the causal requirement ("directly arising") in Extension C. Further, the primary judge was correct to reject the contention that the word "premises", as used in Extension C, extended to land or area in the vicinity of the Insured Locations. As used in this context, the word "premises" referred to the buildings (including curtilages) in which the Insured Locations were located, as identified by the primary judge. This reflects the ordinary meaning of the word "premises" (as to which, see PJ [947]). There is no good reason to depart from the ordinary meaning.

36 It follows that the primary judge was correct to conclude that Market Foods was not entitled to indemnity under Extension C.

EWT appeal

37 The relevant policy wording is set out in the joint judgment. Again, while it is necessary to have regard to all of these provisions, and the policy document as a whole, it is nevertheless convenient for present purposes to set out the key relevant terms. The relevant section of the policy was headed "Business interruption section". Within this, there was a part headed "Additional benefits", which included:

> **Additional benefits**
>
> …
>
> **If you have chosen to insure gross income or weekly income under this section, we will also pay the following, provided the sum insured for that cover is not exhausted:**
>
> …
>
> 3. Prevention of access
>
> The indemnity under this section is extended to include interruption or interference with your business in consequence of:
>
> …
>
> c. closure or evacuation of all or part of the premises by order of a competent government, public or statutory authority as a result of a human infectious or contagious diseases [sic]. However there is no cover for highly pathogenic Avian Influenza or any disease declared to be a quarantinable disease under the *Quarantine Act 1908* (as amended) irrespective of whether discovered at the location of your premises, or out-breaking elsewhere,
>
> …
>
> which shall prevent or hinder the use of your building or access thereto, or results in a

cessation or diminution of trade due to temporary falling away of potential customers.

(Original emphasis.)

38 As in the Meridian appeal, an issue arises regarding s 61A of the *Property Law Act 1958* (Vic). The exclusion at the end of cl 3(c) referred to the *Quarantine Act 1908* (Cth). However, before the policy commenced, the *Quarantine Act* had been repealed and the *Biosecurity Act* had been enacted. Prima facie, on the basis of the decision of the NSW Court of Appeal in *Wonkana*, this meant that the exclusion did not operate. However, in circumstances where EWT was based in Victoria, the insurer in this matter sought to rely on s 61A of the *Property Law Act 1958* (Vic) in the same way as the insurer in the Meridian matter. In summary, the insurer argued that the policy of insurance was governed by the law of Victoria and that s 61A operated, such that the reference in the exclusion to "quarantinable disease under the *Quarantine Act 1908* (as amended)" was to be construed as a reference to "listed human diseases under the *Biosecurity Act*". The primary judge rejected the insurer's contention that s 61A operated. For the reasons set out in the joint judgment, the primary judge was correct to so hold. It follows that the exclusion at the end of cl 3(c) did not operate. It can therefore be put to one side.

39 A key issue in this appeal was whether the primary judge was correct to conclude that the words "by order" in cl 3(c) meant "required by" the order as distinct from "caused by" the order: PJ [1101]-[1102]. Before the primary judge, EWT contended that the words "by order" should be construed as "caused by" the order. The primary judge rejected this, having regard to the context in which the word "by" was used, including other parts of cl 3: PJ [1102].

40 In my view, the primary judge was correct to so hold. Read in the context of cl 3 as a whole, the words "by order" in cl 3(c) mean required by the order, in the sense that the order itself must require the closure or evacuation of all or part of the premises; thus, for example, if the insured makes a voluntary decision to close the premises in response to an order, but the order does not itself require the premises to be closed, this would not be sufficient.

41 It follows that, in my opinion, the primary judge was correct to hold that, insofar as EWT relied on the Overseas Travel Ban, EWT did not satisfy the requirements of cl 3(c). As the primary judge held, the Overseas Travel Ban did not require the closure of the premises: PJ [1108], [1115], [1123]. Mr Camfield, the sole director of EWT, decided to close the premises because of the deleterious effect of the Overseas Travel Ban on the business: PJ [1108]. However, for

the reasons given above, this is not sufficient to satisfy cl 3(c). Insofar as EWT challenges this part of her Honour's reasons, I can discern no error in her Honour's approach.

42 It follows that the primary judge was correct to hold that cl 3(c) did not provide cover in respect of the Overseas Travel Ban.

43 Another key issue in this appeal is whether the primary judge was correct to conclude that, insofar as EWT relied on the Victorian Workplace Closure directions (which came into force on 6 August 2020), EWT did not satisfy the requirements of cl 3(c). The primary judge accepted that the Victorian Workplace Closure directions required the premises to be closed from 6 August to 9 November 2020: PJ [1109]. However, by the time these directions came into force, Mr Camfield had already closed the premises. That occurred in March 2020 as a result, primarily, of the Overseas Travel Ban: PJ [1109]. The Overseas Travel Ban remained in force when the Victorian Workplace Closure directions came into force: PJ [1116]. In these circumstances, the primary judge concluded that if (as contended by EWT) the words "by order" meant "caused by", the Victorian Workplace Closure directions did not cause the closure of the premises: PJ [1116]-[1120]. The primary judge also concluded that if (as her Honour considered to be the case) the words "by order" meant "required by", the premises were not closed by the Victorian Workplace Closure directions: PJ [1121]. In her Honour's view, the requirement attached to circumstances where premises would otherwise, excluding the order, not be closed; that was not the present case: PJ [1121], [1124]. The primary judge also concluded that EWT's claim failed to satisfy the tailpiece of cl 3: PJ [1125]-[1126].

44 In my view, the primary judge was correct to conclude that, insofar as EWT relied on the Victorian Workplace Closure directions, EWT did not satisfy the requirements of cl 3(c). In circumstances where EWT's premises were already closed at the time when the Victorian Workplace Closure directions came into force, and the Overseas Travel Ban remained in force, it cannot be said that the closure of the premises was "by order", the relevant order being the Victorian Workplace Closure directions. In my view, not only must the order require the closure or evacuation of all or part of the premises, the requirement attaches to circumstances where premises would otherwise, excluding the order, not be closed or evacuated. This is, in my opinion, a commercially sensible construction of the provision, having regard to its text, subject-matter and purpose. Further and in any event, insofar as EWT relies on the Victorian Workplace Closure directions, it fails to satisfy the tailpiece of cl 3, for the reasons given by the primary judge at [1125]-[1126].

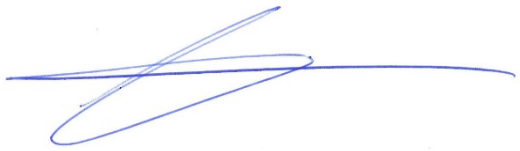
45 It follows that the primary judge was correct to hold that cl 3(c) did not provide cover in respect of the Victorian Workplace Closure directions.

Conclusion

46 For these additional reasons, I agree with the orders proposed by Derrington and Colvin JJ.

I certify that the preceding forty-six (46) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Moshinsky.

Associate:



Dated: 21 February 2022

REASONS FOR JUDGMENT

DERRINGTON AND COLVIN JJ:

INTRODUCTION [47]

The potentially advisory nature of the certain issues raised in the appeals [52]

Nomenclature used in these reasons [53]

GENERAL ISSUES [55]

Principles of construction [55]

Context and reading a contract as a whole [56]

The Policyholders specified in Schedule 1 to the Arbitration Agreement v China Taiping Insurance (UK) Co Ltd [65]

The meaning of "context" [70]

The perspective of the objective reader of the policy [71]

The* contra proferentem *rule [83]

The reasons below [85]

Issue on appeal [87]

The established scope of the rule [89]

Principles of causation and proximate cause [104]

The requirement of "proximate cause" [109]

Limits on the application of proximate cause [112]

***The decision in* FCA v Arch** [113]

No direct submissions as to the correctness of FCA v Arch [113]

The unique circumstances in FCA v Arch [116]

The nature of the test cases before the Supreme Court [118]

The impact of competing causes of loss [119]

The operation of the trends clauses [130]

The causation issues in* FCA v Arch *adopted by the primary judge [131]

The approach of the primary judge [132]

Other regularly arising matters [140]

Occurrence/outbreak and risk/threat [140]

"Occurrence" and "outbreak" [141]

The insurers' submissions [145]

Discussion [149]

The primary judge's conclusion as to the meaning of "outbreak" should be adopted [154]

Role of an authority in relation to hybrid clauses [156]

The insurers' submissions to the contrary [160]

The primary judge's interpretation should be adopted [161]

Section 61A of the *Property Law Act 1958* (Vic) [174]

The relevant facts [189]

Does the reference to "Act" in s 61A includes an Act of the Commonwealth Parliament? [196]

***Was the* Biosecurity Act *a re-enactment with modification of the* Quarantine Act?** [212]

Section 57 of the *Insurance Contracts Act 1984* (Cth) [228]

The reasons below [231]

Submissions [233]

Consideration [235]

The ALRC Report [237]

The significance of a bona fide *dispute as to liability* [242]

Are the circumstances of the present appeals exceptional? [251]

Conclusion in relation to section 57 [256]

LCA MARRICKVILLE PTY LIMITED V SWISS RE INTERNATIONAL SE – NSD 1079 OF 2021 [259]

The relevant facts [260]

Policy wording [269]

The decision at first instance [282]

The operation of cll 9.1.2.1 and 9.1.2.4 – the hybrid clause [284]

***Section 54 of the* Insurance Contracts Act** [286]

The effect of exclusion in cl 9.1.2.1 on cll 9.1.2.5 and 9.1.2.6 [287]

The operation of cll 9.1.2.1 and 9.1.2.4 [294]

Closure or evacuation by order [299]

Conclusions as to cl 9.1.2.1 [302]

Clause 9.1.2.5 – the catastrophe clause [304]

Clause 9.1.2.6 – the prevention of access clause [306]

Causation and adjustment [311]

Basis of settlement – amounts saved [313]

***Interest pursuant to s 57 of the* Insurance Contracts Act** [314]

Answers to questions and relief [315]

The appeals [316]

LCAM's appeal [320]

The scope of cll 9.1.2.5 and 9.1.2.6 – Appeal, Ground 1 [320]

Clauses 9.1.2.5 and 9.1.2.6 are not concerned with disease [335]

Conclusion on the impact of cll 9.1.2.1, 9.1.2.3 and 9.1.2.4 on cll 9.1.2.5 and 9.1.2.6 [337]

Clause 9.1.2.5 – the catastrophe clause – Appeal, Ground 2 [339]

The meaning of "catastrophe" [344]

The meaning of the expression "or other catastrophe" [348]

The meaning of "catastrophe" in the context of the policy [353]

The construction of cl 9.1.2.5 in the context of the policy [357]

Conclusion as to cl 9.1.2.5 [358]

Whether account needs to be taken of third party payments – Appeal, Ground 4; Cross-Appeal, Ground 6 [359]

Whether interest is payable under s 57 of the Insurance Contracts Act – Appeal, Ground 5 [360]

Swiss Re's cross-appeal [361]

The meaning of "outbreak" – Cross-Appeal, Ground 1 [361]

Did a catastrophe occur in Australia and when? – Cross-Appeal, Ground 2 [362]

Did cl 9.1.2.6 (the prevention of access clause) respond? – Cross-Appeal, Ground 3 [364]

Swiss Re's main submission [365]

The correct operation of cl 9.1.2.6 [369]

Was there a hindrance on the use of the situation – Cross-Appeal, Grounds 1 and 4 [376]

The operation of the trends clause – Cross-Appeal, Ground 5 [381]

The primary judge's determination as to the operation of the trends clause [384]

The issue as developed on appeal [391]

Conclusion [400]

PROPOSED ORDERS ON THE APPEAL [402]

MERIDIAN TRAVEL (VIC) PTY LTD V INSURANCE AUSTRALIA LIMITED – NSD 1080 OF 2021 [403]

The relevant facts [404]

Policy wording [412]

The decision at first instance [420]

Meridian's appeal [425]

Whether the Overseas Travel Ban and the Cruise Ship Ban were caused by the same underlying fortuity as the insured peril – appeal, Ground 1 [425]

The reasons at first instance in more detail [427]

Meridian's submissions as the underlying fortuity [432]

Insurance Australia's submissions [435]

Conclusion as to the fortuity underlying the Commonwealth Government actions [436]

Whether third party payments had to be taken into account – appeal, Ground 2; Cross-appeal, Ground 4 [442]

The relevant policy terms [445]

JobKeeper payments [451]

Federal COVID-19 Consumer Travel Support Program payments [464]

Victorian Government's Support Fund [467]

Whether interest is payable under s 57 of the* Insurance Contracts Act *– appeal, Ground 3 [470]

Insurance Australia's cross-appeal [472]

The application of s 61A of the* Property Law Act (Vic) *– cross-appeal, Ground 1 [472]

The construction of the word "outbreak" in the disease clause – cross-appeal, Ground 2 [473]

The construction of the phrase "at the Situation" in the hybrid clause – cross-appeal, Ground 3 [474]

The construction of the phrase "closure or evacuation of Your Business" in the hybrid clause – Insurance Australia's notice of contention, Ground 3 [484]

Conclusion [485]

PROPOSED ORDERS ON THE APPEAL [487]

THE TAPHOUSE TOWNSVILLE PTY LTD V INSURANCE AUSTRALIA LIMITED – NSD 1081 OF 2021 [488]

The relevant facts [489]

Policy wording [494]

The decision at first instance [502]

Is cl 7 (the prevention of access clause) capable of applying to interruptions from diseases – Appeal, Ground 1 [509]

Damage, being "accidental physical damage, destruction or loss" to persons [514]

The incongruence and incoherence of Taphouse's proposed construction [519]

Was any threat of damage to persons within a 50 kilometre radius a sufficient cause of the relevant directions – notice of contention, Ground 1 [525]

Insurance Australia's submissions [529]

Conclusion as to Ground 1 of the notice of contention [553]

The meaning of "outbreak" in cl 8 – notice of contention, Ground 2(a) [554]

Were the relevant directions made "as a result" of a relevant outbreak – Appeal, Ground 2; notice of contention, Ground 2(b) [560]

Is it necessary to demonstrate, as a fact, that there was an "outbreak" within the specified radius – notice of contention, Ground 2(b) [561]

Were the restrictions made "as a result" of an "outbreak" within 20 kilometres of the premises – Appeal, Ground 2 [564]

Was there an "outbreak" prior to 23 March 2020 – Appeal, Ground 2(a) [565]

Did the outbreaks result in the making of the directions – Appeal, Ground 2(b) [573]

Did the direction of 23 March 2020 close or evacuate all or part of the premises – notice of contention, Ground 2(c) [583]

Conclusion as to Ground 2(c) of the notice of contention [595]

No obligation to indemnify – Appeal, Ground 3 [595]

Payments received by Taphouse under the JobKeeper scheme – Appeal, Ground 4; notice of contention, Ground 3 [595]

Interest under s 57 of the *Insurance Contracts Act* – Appeal, Ground 5 [596]

Conclusion [597]

PROPOSED ORDERS ON THE APPEAL [599]

MARKET FOODS V CHUBB – NSD 1082 OF 2021 [600]

The relevant facts [601]

Policy wording [611]

The decision at first instance [616]

The general scope of Item 4 of Extension B [631]

The issues on appeal [639]

Item 4 of Extension B and the *contra proferentem* rule – Appeal, Grounds 1 and 4 [641]

Did Extension B apply to disease? [645]

No error was demonstrated in the primary judge's reasons as to the meaning of "damage" [646]

Chubb's response [651]

The effect of Extension C [654]

No ambiguity [655]

The alternative construction is not workable [656]

No room for the operation of the contra proferentem *rule* [657]

Sections 13 and 14 of the Insurance Contracts Act [658]

Conclusion on the main issue [659]

Was damage sustained by reason of the existence of SARS CoV-2 on the property? [661]

Market Foods' submissions [668]

***The obligations of good faith ss 13 and 14 of the* Insurance Contracts Act** [678]

Extension C – Appeal, Grounds 5 – 7 [685]

The primary judge's reasons as to Extension C [688]

Was there an "occurrence" or "outbreak" of COVID-19 "at the premises"? [693]

The meaning of "occurrence" or "outbreak" [694]

Whether it was sufficient that the premises were in the area of an outbreak or occurrence [695]

The meaning of "premises" [702]

Conclusion as to the meaning of "at the premises" [708]

Did the Queensland Government directions "directly arise" from the occurrence or outbreak of COVD-19 on the UQ campus? [711]

The issues raised on appeal from the above conclusions [716]

JobKeeper and other benefits received – Appeal, Grounds 8 – 10 [727]

Conclusion [729]

PROPOSED ORDERS ON THE APPEAL [730]

COYNE V QBE INSURANCE (AUSTRALIA) - NSD 1076 OF 2021 [731]

The relevant facts [732]

Policy wording [743]

The decision at first instance [745]

Closure of premises "by order" – Appeal, Ground 1 [748]

Does "by order" mean "required by"? [751]

Conclusion as to the construction of cl 3(c) [759]

Was the closure "by" the Overseas Travel Ban? – Appeal, Ground 2 [760]

Was the closure from 6 August 2020 "by order" of the Victorian Workplace Closure directions? – Appeal, Ground 3 [763]

Did the Victorian Workplace Closure directions prevent or hinder the use of the premises? – Appeal, Ground 4 [772]

Causation of loss under cl 3 – Appeal, Ground 5 [778]

Can the business interruption be "in consequence of" any one or more of the elements of the insured peril? – Appeal, Ground 7 [785]

Did the Overseas Travel Ban cause an interruption or interference with EWT's business? – Appeal, Ground 6 [808]

Interest under s 57 of the *Insurance Contracts Act* – Appeal, Ground 8 [809]

Answers to the questions posed – Appeal, Ground 9 [810]

QBE's cross-appeal and notice of contention; EWT's notice of contention [811]

PROPOSED ORDERS ON THE APPEAL [812]

INTRODUCTION

47 Whilst the worldwide COVID-19 pandemic brought death to millions across the globe and inflicted illness to varying degrees on hundreds of millions more, the actions of the Commonwealth and State governments in Australia in 2020 and 2021 spared the country a significant number of deaths during that period. Nevertheless, the mitigation of the risks associated with COVID-19 through the imposition of restrictions and other public health

measures had adverse financial consequences for businesses across the country. Many such businesses held insurance in the form of Industrial Special Risk combined policies and the like which provided cover for different kinds of loss, including business interruption loss sustained in specifically defined circumstances. The matters before this Court concern whether the events which occasioned loss to several policy holders arising from the presence or threat of COVID-19 in Australia were events in respect of which those policies, as properly construed, provide cover.

48 Ten test cases, each seeking an authoritative construction of a particular policy, were commenced in this Court in February and April of 2021. They were case managed by the Chief Justice and a trial of all matters occurred before Jagot J between 6 and 15 September 2021. Her Honour delivered her reasons in the matter, being some 373 pages and 1,152 paragraphs in length, on 8 October 2021: *Swiss Re International Se v LCA Marrickville Pty Ltd (Second COVID-19 insurance test cases)* [2021] FCA 1206 (PJ). In large part, the careful and thoughtful explication of numerous difficult issues in that judgment has rendered the preparation of the present reasons much less onerous than it might otherwise have been. Indeed, her Honour's astute analysis and precise resolution of the numerous questions in issue had the consequence that appeals were lodged in only five of the test cases. Those appeals were brought on for an expedited hearing and were heard together with an appeal from the decision of Allsop CJ in *Star Entertainment Group Limited v Chubb Insurance Australia Ltd* [2021] FCA 907 (*Star first instance*). The reasons in that additional appeal have been delivered separately on the same day as these reasons. These reasons deal only with the test cases on appeal from Jagot J, being:

(a) *David Coyne (in his capacity as liquidator of Educational World Travel Pty Ltd) & Anor v QBE Insurance (Australia) Limited* (NSD1076/2021);

(b) *LCA Marrickville Pty Limited v Swiss Re International SE* (NSD1079/2021);

(c) *Meridian Travel (Vic) Pty Ltd v Insurance Australia Limited* (NSD1080/2021);

(d) *The Taphouse Townsville Pty Ltd v Insurance Australia Limited* (NSD1081/2021); and

(e) *Market Foods Pty Limited v Chubb Insurance Australia Limited* (NSD1082/2021).

49 The structure of these reasons generally follows that adopted by the learned primary judge. Initially, there is some discussion of issues which arose across all or most of the test cases. As a result of the crystallisation of the matters actually in dispute, there has been greater scope for

the resolution of these broader issues which reduces the need for their specific treatment in the subsequent discussion of the individual appeals.

50 The primary judge answered a series of questions posed by the parties and incorporated them by reference into the orders made in relation to each matter. Accordingly, to the extent that the answers are challenged in the appeals, and it is determined that the answer should be changed, such changes are reflected in the Court's orders.

51 The background circumstances of the COVID-19 pandemic were concisely stated in the reasons of the primary judge (PJ [9] – [20]). They were not controversial and it is not necessary to repeat them here. The relevant circumstances of the individual appellant insureds are otherwise identified in the discussion of the issues in their respective appeals.

The potentially advisory nature of the certain issues raised in the appeals

52 In each of the five appeals, there existed an appeal and a cross-appeal and/or a notice of contention, the result of which was that a multitude of issues were raised for consideration by the Full Court. Early in the hearing, the Court raised with the parties whether it was important to resolve them all, in particular, because it would not be strictly necessary to respond to many unless the party advancing them had succeeded on a number of anterior issues. It was only if there was such success that an answer by this Court could have any substantive effect on the parties' rights. Moreover, although these matters have been advanced as test cases for the purposes of exemplifying certain issues which may arise between many insureds and insurers, real caution must be exercised to avoid the giving of an advisory opinion or answering a question that is hypothetical: *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 (*Bass*) at 357 [49]. In this case, where the issues arose from "a concrete and established or agreed situation": *Bass* at 355 [45]; it was appropriate for the learned primary judge to answer all of the questions raised for determination, even where this necessitated assuming that her reasoning in relation to one or more logically anterior issues was incorrect. The same applies on appeal. As the High Court has emphasised, even if an intermediate appellate court has disposed of a decisive ground of appeal, consideration should still be given to addressing any further grounds: *Kuru v State of New South Wales* (2008) 236 CLR 1 at 6 [12] and the cases there cited. In the context of these matters having been advanced as test cases, it was generally appropriate that this Court address the issues raised by the grounds of appeal even where they proceeded on a basis which had already been determined to be incorrect. However, there were some grounds by which an insurer challenged the primary judge's answer to a separate question

or even mere *obiter dicta* comments in relation to an issue, where logically anterior issues had been resolved in the insurer's favour and were not the subject of an appeal by the insured. For example, one insurer cross-appealed in relation to the construction given to the word "outbreak" in a hybrid clause, even though the insured had not appealed from the conclusion that the clause did not respond to its claim. The appropriateness of considering that issue did not have to be determined because the same issue legitimately arose in other appeals and it was appropriate to resolve it in them. In some other instances, where an issue only arises on the assumption that an answer to an anterior issue was incorrect, it has been considered unnecessary and inappropriate to address it. In such cases, the primary judge's answer to the question in issue has been amended to, "Unnecessary to answer".

Nomenclature used in these reasons

53 In these reasons, each appeal is referred to by an abbreviation of the name of the insured: EWT, LCAM, Meridian, Taphouse, and Market Foods. The same abbreviation is used to refer to the particular policy held by each insured – for example, the "Meridian policy". Likewise, each insurer is referred to by a convenient abbreviation: QBE, Swiss Re, Insurance Australia, and Chubb.

54 These reasons also adopt much of the nomenclature used by the primary judge. In particular, the following terminologies and definitions adopted by her Honour (PJ [99]) as to the types of clauses which arose for consideration:

> (1) **infectious disease clauses** [or **disease clauses**]: these provide cover for loss that arises from either infectious disease or the outbreak of an infectious disease at the insured premises or within a specified radius of the insured premises;
>
> (2) **prevention of access clauses**: these provide cover for loss from orders/actions of a competent authority preventing or restricting access to insured premises because of damage or a threat of damage to property or persons (often within a specified radius of the insured premises); and
>
> (3) **hybrid clauses**: these provide cover for loss from orders/actions of a competent authority in closing or restricting access to premises, but only where those orders/actions are made or taken as a result of infectious disease or the outbreak of infectious disease within a specified radius of the insured premises;
>
> (4) **a catastrophe clause**: this provides cover for loss resulting from the action of a civil authority during a catastrophe for the purpose of retarding the catastrophe.

GENERAL ISSUES

Principles of construction

55 In general, there were limited real differences in the parties' express submissions as to the general principles applicable to the construction of policies of insurance and there is no need to further traverse that well-trodden ground. They have, in any event, been restated in the reasons for decision in *Star Entertainment Group Limited v Chubb Insurance Australia Ltd* [2022] FCAFC 16. However, the parties did diverge on three particular matters, though their differences may have related to the application of principles rather than their content. Those matters concern the obligation of courts to read contracts "as a whole", the objective person from whose perspective a document ought to be interpreted, and, in the *Market Foods* appeal, the application of the *contra proferentem* rule. Each of those issues is addressed, seriatim, below.

Context and reading a contract as a whole

56 The issue as to the application of the principle that documents ought to be read in their context and "as a whole" arose in relation to several appeals as a consequence of a number of the policies containing several extensions of business interruption cover. In particular, they contained clauses specifically directed to interruption losses consequent upon the outbreak or occurrence of an infectious disease, as well as more general clauses providing cover in relation to the consequences of governmental authorities responding to major calamities or preventing or restricting access to an insured's premises. Where that was so, the obligation to read the policy as a whole is relevant to ascertaining the respective clauses' scope of cover. Disease or hybrid clauses often contain inherent limitations as to the types of disease or circumstances to which they respond, as well as exclusions in relation to specific diseases or specific types of disease. In such scenarios, an insured, whose claim for indemnity for loss following a disease is prevented by the limited scope of cover or such exclusions, may seek indemnity under a more broadly expressed prevention of access clause. This was a common feature in the current appeals and raised the question of whether the existence of a clause specifically dealing with cover in relation to the effects of disease reduces the scope of more broadly expressed clauses.

57 It is often identified as "trite law" that the duty of a court when construing a document is to discover its meaning by considering it "as a whole": *Australian Broadcasting Commission v Australasian Performing Rights Association Ltd* (1973) 129 CLR 99 at 109 per Gibbs J. The rationale is, as Gibbs J observed, that "the meaning of any one part of it may be revealed by

other parts" and, as a corollary, "the words of every clause must if possible be construed so as to render them all harmonious one with another". In *Wilkie v Gordian Runoff Ltd* (2005) 221 CLR 522 (*Wilkie v Gordian Runoff*), a majority of the High Court observed that in construing a policy of insurance, as with other instruments, "preference is given to a construction supplying a congruent operation to the various components of the whole": at 529 [16] citing *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 – 382 [69] – [71]. Necessarily, the identification of that construction can only be achieved by ascertaining how a contract or policy might operate as affected by each of the competing interpretations. This "iterative process", involving "checking each of the rival meanings against the other provisions of the document and investigating its commercial consequences", "enables a court to assess whether either party's preferred legal meaning gives rise to a result that is more or less internally consistent and avoids commercial absurdity": *HP Mercantile Pty Ltd v Hartnett* [2016] NSWCA 342 [134] quoting *Re Sigma Finance Corp* [2009] UKSC 2 [12].

58 In the interpretive process, the concept of reading a document as a whole involves more than merely acquiring an awareness of the surrounding and related provisions. It requires a substantive intellectual process of evaluating the degree of operative coherence and consistency between a proffered construction and the instrument's other terms. Depending upon the terms of the particular policy it may be that, if giving a broadly worded clause its fullest scope would negate the operative efficacy of a specific clause directed to the issue at the centre of a claim for indemnity, some alternative and narrower meaning may have to be given to the broadly worded one. Whether this involves the application of the maxims *generalia specialibus non derogant*, *generalibus specialia derogant*, or the principle that the context requires one clause to be qualified by another does not matter. It is merely part of construing one clause of a document by reference to the others and, as was said by Higgins J in *Hume Steel Ltd v Attorney-General (Vic)* (1927) 39 CLR 455 at 466, it is a process which is "based on sound common sense and appeals to everyone, layman and lawyer": cf *BMW Australia Ltd v Brewster* (2019) 269 CLR 574 at 651 – 652 [206].

59 A preparedness to read a more specific clause as reducing the scope of a more general one may be more acute where the former contains detailed and specific provisions dealing with a particular subject matter. The existence of such a clause tends to indicate to the objective reader that the parties had turned their mind to the precise topic and intended to specifically record their respective rights and obligations in relation to it. This is especially applicable to the

construction of clauses in a policy of insurance which provide different types of cover. Where cover is provided in respect of a particular subject matter and the insuring clause stipulates the circumstances in which the cover is or is not available, barring a clear intention to the contrary, it might reasonably be thought that the clause articulated the extent of the insurer's indemnity in relation to that subject matter. Whether that is so is, of course, a matter for the particular policy and no general rule can apply in all cases. Nevertheless, if a more broadly worded clause is construed as providing cover in circumstances where the claim would otherwise be excluded by a clause dealing with the claim's specific subject matter, the issue of incoherence or incongruence in the policy's operation is likely to arise.

60 The importance of reading an agreement as a whole and its provisions in context was recognised by the learned primary judge in this matter who referred to the observations of Lockhart and Hill JJ in *Chapmans Ltd v Australian Stock Exchange Ltd* (1996) 67 FCR 402, 411 (*Chapmans v Australian Stock Exchange*) to the effect that:

> It is an elementary proposition that a contract will be read as a whole giving weight to all clauses of it, where possible, in an endeavour to give effect to the intention of the parties as reflected in the language which they have used. A court will strain against interpreting a contract so that a particular clause in it is nugatory or ineffective, particularly if a meaning can be given to it consonant with other provisions in a contract. Likewise where there are general provisions in a contract and specific provisions, both will be given effect, the specific provisions being applicable to the circumstances which fall within them.

61 Her Honour also adopted the reasoning of Leeming JA in *Greencapital Aust Pty Ltd v Pasminco Cockle Creek Smelter Pty Ltd* [2019] NSWCA 53 [52] where reliance was placed upon the statement of Sackville AJA in *Park v Murray Irrigation Ltd* [2018] NSWCA 166 [79] that "a conflict between apparently inconsistent provisions is to be resolved on the basis that one provision qualifies the other and, hence, both have meaning and effect". She also had regard to similar observations of the Victorian Court of Appeal in *The Trust Company (Nominees) Ltd v Banksia Securities Ltd (recs and mgrs apptd) (in liq)* [2016] VSCA 324 (*Banksia Securities*) where the Court held (at [46]):

> The principle traditionally called *generalibus specialia derogant*, or its obverse *generalia specialibus non derogant*, by either of which specific provisions will be given effect in preference to general provisions, or specific provisions are given greater weight than general provisions applying to the same subject matter, has been described as reflecting 'sound common sense'. On the other hand, when it is open to debate which provision is the more general and which the more specific, the utility of the principle is correspondingly limited. Hoffman LJ made the converse point in *William Sindall plc v Cambridgeshire County Council*, that the 'rule is particularly apposite if the effect of general words would otherwise be to nullify what the parties appear to

have contemplated as an important element in the transaction'.

(Footnotes omitted).

62 In none of the appeals to this Court is there room to debate which of the policies' provisions are more general and which are more specific. As appears later in the discussion of the specific matters, the difference is clearly discernible.

63 As her Honour also noted, the Court of Appeal in *Banksia Securities* identified (at [53]), an alternative approach when dealing with a contract containing both a general and specific provision which have overlapping operation. It was to determine whether either of the competing provisions, taken alone, gives effect to an object important to the transaction which the agreement embodies. In none of the appeals was it submitted on behalf of an insured that this principle was not applicable.

64 As more fully expressed in these reasons when considering the specific contentions, in each appeal the primary judge's approach to the construction of the polices in the several appeals, by reading them as a whole and thereby according their several insuring clauses a coherent and congruent operation, was entirely correct and in accordance with both principle and established authority. Her Honour was right to reject the insureds' submissions that it was permissible to construe a clause providing cover divorced from the operative effect of other insuring clauses even where such a construction rendered the operation of one or some of those other clauses either wholly or partially ineffective. That approach does not accord with the principles referred to and, in particular, it fails to accord prominence to provisions which are expressed in terms that are evidently intended to regulate the rights of the parties in respect of the particular circumstances.

The Policyholders specified in Schedule 1 to the Arbitration Agreement v China Taiping Insurance (UK) Co Ltd

65 An illustration of the application of the above principles appears in the observations of Lord Mance in his arbitral award in the matter of *The Policyholders specified in Schedule 1 to the Arbitration Agreement v China Taiping Insurance (UK) Co Ltd* (*China Taiping Insurance*). That matter concerned, *inter alia*, claims on policies of insurance featuring identical policy wording for business interruption losses consequent upon interference with the insureds' businesses arising from restrictions imposed by the UK Government at various times in 2020 in response to the COVID-19 pandemic. The insureds had made claims under a prevention of access clause which did not specifically relate to the occurrence of a disease. The policies

included a hybrid clause which covered losses from interruption or interference as a consequence of restrictions on the use of premises by an order of a competent local authority as a result of the occurrence at the insured premises of one of the notifiable human infectious or contagious diseases listed in the policy. As at the time of the occasioning of loss, COVID-19 was not included in that list. The policyholders nevertheless claimed indemnity under the broader prevention of access clause and the insurer declined cover on the basis that the existence and terms of the hybrid clause necessarily narrowed the scope and operation of the former such that it did not respond to the claim.

66 In his award, Lord Mance referred to several of the observations of Lord Hodge JSC in *Wood v Capita Insurance Services Ltd* [2017] AC 1173, including (at 1179 [11]) that in "striking a balance between the indications given by the language and the implications of the competing constructions the court must consider the quality of drafting of the clause", and that the poorer the quality of the drafting the greater latitude a court had to depart from the natural meaning of the words used. His Lordship also referred to the following observations of Lord Neuberger in *Arnold v Britton* [2015] AC 1619 at 1628 – 1629 [20]:

> Fourthly, while commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight.

67 The insurer had submitted that the hybrid clause specifically addressed the occurrence of the listed notifiable diseases and, in the light of its careful wording, the parties could not have intended that the insured obtained different and potentially wider cover in respect of them under another extension. It further relied on the fact that the hybrid clause covered only notifiable diseases occurring "at" the premises and, then, only those which appeared on a closed list of notifiable diseases which did not include COVID-19. So the submission went, it would considerably widen the scope of cover if the policyholder was entitled to rely on the prevention of access clause to obtain indemnity for loss following the occurrence of diseases not covered by the hybrid clause.

68 Importantly for the purposes of the present discussion, Lord Mance found (at [24]) that the clauses in the policy wording before him could not be differentiated on the basis that one was clearly more specifically worded than the other. Certainly, that is a point of differentiation from the clauses in any of the matters in this appeal. His Lordship went on to conclude that the potential for overlap did not have the consequence that any particular provision in an

extension must apply to the exclusion of the other. Both must be allowed to operate according to their respective terms. On this basis, losses arising from the consequences of disease, which would not otherwise be covered due to the inherent limitations in the hybrid clause, might fall to be indemnified under the prevention of access clause.

69 It should be kept steadily in mind that his Lordship's award does not constitute an "authority", albeit that is how it was occasionally described during the hearing. Nevertheless, as it contains the observations of an eminent jurist on a topic related to the issues before the Court, it is necessarily of persuasive value. However, the policies in that arbitration were quite unlike any which are the subject of the present appeals. There, the prevention of access clause (referred to as a "Denial of Access" clause in the policy) and the hybrid clause were structured and carefully drafted, and each contained their own expressly articulated limitations. In the matters before this Court, no policy had any similar structure. The award of Lord Mance, whilst of assistance, can be confined to the particular circumstances of the policy wording under consideration and the, perhaps, unusual aspect of the two clauses addressing specific but overlapping matters. Neither it nor its contents detracts from the general principles referred to above and, indeed, it would be most surprising were it to have purported to do so.

The meaning of "context"

70 In the course of the appeal, a number of submissions were made to the effect that "context" would rarely displace the ordinary meaning of the words of a contract. In particular, the written submissions of LCAM referenced the decision of Leeming JA in *Cherry v Steele-Park* (2017) 96 NSWLR 548 at 565 [72], where his Honour made an observation to that effect, relying upon his reasons in the earlier decision of *Mainteck Services Pty Ltd v Stein Heurtey SA* (2014) 89 NSWLR 633 at 654 [74]. However, in those cases, his Honour was referring to the surrounding circumstances in which an agreement was entered into as the "context", rather than the internal context of the terms of the agreement. Here, the circumstances surrounding the entry into the policies of insurance were not identified in detail and, apart from the policies including business interruption cover and that some were brokered, that context generally provides little assistance.

The perspective of the objective reader of the policy

71 The dispute in relation to the objective reader concerned the identity or characteristics of the notional person from whose perspective a policy of insurance is to be construed. For a number of the insureds it was submitted that it ought to be "a reasonable person in the position of the

prospective insured" or a "reasonable policyholder". For the several insurers, it was submitted that the policies ought to be interpreted objectively by ascertaining what a reasonable person, with all of the knowledge which was known or, perhaps, was available to the parties: *Byrnes v Kendall* (2011) 243 CLR 253 at 283 [94]; when they entered the contract would have understood the terms of the contract to mean.

72 In support of the proposition that the Court should interpret a policy of insurance by reference to the understanding of the personified "reasonable insured" or a "reasonable policyholder", Mr Finch SC, who appeared for a number of the insureds, relied upon the High Court's decision in *Australian Casualty Co Ltd v Federico* (1986) 160 CLR 513 (*Federico*). That case concerned the interpretation of a policy of personal accident insurance, the question being whether the insured had suffered total disability as a result of "bodily injury … caused by an accident". The majority observed of the policy (at 525) that it was a standard document used by the insurer in the course of its insurance business and was offered in different States across the Commonwealth to ordinary working people such as Mr Federico, who were unlikely to have the advantage of the advice of a commercial lawyer when they purchase insurance against the contingency of sustaining a disabling injury or illness. Moreover, it contained nothing which suggested that its terms were to be construed in any special technical sense, or conveyed anything other than that which they convey as a matter of ordinary language. Thus, their Honours observed (at 525):

> That being so, the starting point of a consideration of whether Mr. Federico's central disc prolapse and its consequences were an "injury" for the purposes of the policy must be a consideration of what the words of the policy convey, as a matter of contemporary language read in the context of the whole policy, to a reasonable non-expert in this country. If that meaning is plain, it can be of but limited significance if, at other times and in other places, other courts, however eminent, have held that similar words in other policies were to be construed as having had some different meaning.

73 In the course of his submissions in the LCAM appeal, Mr Finch SC provided an example of the approach which his postulated reasonable insured would adopt in construing a policy of insurance. It was to the effect that the insured would, on suffering loss and damage, consider the policy and, on identifying a generally worded clause, satisfy themselves that their circumstances fell within it. Then, on reading another clause which dealt with the specific circumstances in which loss was covered and identifying that an exclusion prevented any claim under it, the insured would not read that clause or any limitation in it as applying to the more generally worded clause which, on its face, responds to the claim. In effect, the alleged reasonable insured would construe each term of the policy unaffected by others around it.

74 Similar submissions were made on behalf of other insureds. They were necessitated by the existence in most policies of specific provisions dealing with interruption to the insured's business activities consequent upon the outbreak or occurrence of disease, but the insured's claim either being excluded or not otherwise falling within the indemnity. So the submissions went, the fact that a policy contained a specific provision dealing with the subject-matter of the claim but excluded it was irrelevant to the reasonable policyholder whose concern was with a more general provision which apparently responded to their claim.

75 After referring to the above passages from *Federico*, Mr Finch SC submitted that it founded a "key" or "central" part of the way in which the policies should be construed. He said:

> And we would extend the same reasoning to not only looking at what judges in other courts may have said about other policies in other places, but also to not reading the policy through the eyes of an expert commercial lawyer. That is, you would not, having read if something is plain in clause A, go through the policy to see if clauses B, C, D or E are in any way different to, inconsistent with or overlapped with the clause that catchments [sic: catches] your eye as applicable. So that the glasses that your Honours wear as expert lawyers are not the glasses that you wear when you read this policy from the point of view of the Taphouse [which was the insured].

76 This suggests an approach which attributes to the notional third party considering the terms of the policy a disinclination to accept that incongruence or incoherence flows from a construction which has the consequence of rendering redundant a clause providing specific cover in relation to an insured's claim. Rather, the third party postulated by Mr Finch SC construes the terms of the policy as operating independently of each other or, at least, regards a construction that renders a more specific provision ineffective to be an instance of mere overlap. That does not accord with the obligation to read the contract "as a whole" and, particularly to engage in an iterative assessment of a proposed construction by reference to its impact on the operation of other provisions.

77 None of this is to suggest that the position of the parties is irrelevant. On the contrary, an objective construction requires that account be taken of the surrounding context which includes the essential characteristics and nature of the parties. The policies in issue in these proceedings were between insurers and business operators and ought to be construed from the point of view of a reasonable businessperson appreciating that and the purpose and object of the agreements.

78 It is also to be kept in mind that policies of insurance for business interruption are commercial documents and, in this case, were either Industrial Special Risk policies or composite policies especially tailored to businesses, all with business interruption extensions. Such policies are

commonly acquired by the operators of small to medium businesses for the purposes of their business activities and, as such, should be given an appropriate business interpretation: *Electricity Generation Corp v Woodside Energy Ltd* (2014) 251 CLR 640 (*Electricity Generation*) at 656 – 657 [35]. In *Wilkie v Gordian Runoff*, the majority of the High Court said as to the correct approach to policies of insurance (at 528 – 529 [15]):

> In *McCann v Switzerland Insurance Australia Ltd* [(2000) 203 CLR 579 at 589 [22]; cf at 600-601 [74]], after observing that, as a commercial contract, a policy of insurance should be given a businesslike interpretation, Gleeson CJ added:
>
> > "Interpreting a commercial document requires attention to the language used by the parties, the commercial circumstances which the document addresses, and the objects which it is intended to secure."

See also *CGU Insurance Ltd v Porthouse* (2008) 235 CLR 103 at 116 [43].

79 It must be accepted that some support for the approach urged by Mr Finch SC and others on behalf of the insureds might be derived from *HDI Global Speciality SE v Wonkana No 3 Pty Ltd* (2020) 104 NSWLR 634 (*Wonkana*), where Meagher JA and Ball J stated (at 639 [21]):

> Where the written contract evidences the terms on which a financial product or service is offered for acquisition, the meaning of its language is to be construed from the perspective of a reasonable person in the position of the offeree, in this case the prospective insured. This analysis was adopted in *Australian Casualty Co Ltd v Federico* (1986) 160 CLR 513; [1986] HCA 32. The plurality (Wilson, Deane and Dawson JJ) observed at 525 in relation to a sickness and accident policy that it was "a standard document used by Australian Casualty in the course of its insurance business. It is apparently offered in different States of the Commonwealth to ordinary working people … who are unlikely to have the advantage of the advice of a commercial lawyer when they purchase [it]". Their Honours described the starting point for the exercise of construction as being (at 525):
>
> > "what the words of the policy convey, as a matter of contemporary language read in the context of the whole policy, to a reasonable non-expert in this country."

80 However, with respect to their Honours, the passage in *Federico* says nothing in support of the proposition that a policy is to be interpreted from the perspective of a reasonable policyholder. Rather, their Honours in the High Court merely rejected the reverse proposition that the reasonable person from whose perspective the policy is to be interpreted is to be imbued with the characteristics of a legal expert. This in turn led their Honours to reject the insurer's argument that Mr Federico's central disc prolapse and its sequelae were not an "injury" for the purposes of the policy because it was not "caused by an accident". This argument, it was noted, "involved reliance upon what was described as 'the fundamental distinction drawn by the law

between cause and effect'": at 529. This issue was ultimately answered (at 531) with the following comments of Lord Robertson in *Fenton v Thorley & Co Ltd* [1903] AC 443 at 452:

> Much poring over the word "accident" by learned counsel has evolved some subtle reasoning about these sections. I confess that the arguments seem to me to be entirely over the heads of Parliament, of employers, and of workmen. No one out of a Law Court would ever hesitate to say that this man met with an accident, and, when all is said, I think this use of the word is perfectly right. The word "accident" is not made inappropriate by the fact that the man hurt himself. … Yet the argument … is … that there is nothing accidental in the matter, as the man did what he intended to do. The fallacy of the argument lies in leaving out of account the miscalculation of forces, or inadvertence to them, which is the element of mischance, mishap, or misadventure.

81 There was nothing in the above approach which diverges from the orthodox approach of interpreting the policy from the perspective of a reasonable person in the position of the parties. It merely supports the uncontroversial proposition that those parties are not to be attributed with the special knowledge of a legal expert which is unknown or unavailable to both parties.

82 To the foregoing it can be added that even if a policy's interpretation is to be approached from the perspective of the reasonable insured, it cannot be assumed that they would do so in a manner inconsistent with the requirement to construe the policy "as a whole". Indeed, Meagher JA and Ball J in *Wonkana* confirm that the reasonable insured would not do so: at 642 [33].

The contra proferentem *rule*

83 A further recurring issue in the several appeals concerned the application of the *contra proferentem* rule insofar as it applied to the construction of insurance policies. That well known rule derives from the maxim, *verba chartarum fortius accipiuntur contra proferentem*, translated as "the words of the deed should be construed strongly against the grantor": *Insurance Commission of Western Australia v Container Handles Pty Ltd* (2003) 218 CLR 89 (*Container Handles*) at 122 [97]. Although not reflected in that translation, where the rule applies, a relevant ambiguity in a contract is resolved by construing the relevant words against the interests of the *proferens* and adopting the construction which favours the other party.

84 Unlike many other interpretive maxims, the rule cannot be said to be an extension or application of the uncontroversial principle that documents should be construed as a whole: cf. Herzfeld P and Prince T, *Interpretation* (2nd ed, Thomson Reuters, 2020) (*Interpretation*) [24.10]. Rather, in the insurance context, it has been observed that it applies in recognition of certain characteristics of insurance contracts, including the use of standard form documentation over which insurers generally have control: *Johnson v American Home Assurance Co* (1998) 192

CLR 266 at 274 – 275 [19] per Kirby J (in dissent). The view has emerged that, as the insurer is in a position to clarify the scope of the promise it offered, it ought to bear the consequences of failing to do so: *McCann v Switzerland Insurance Australia Limited* (2000) 203 CLR 579 (*McCann*) at 602 [74], 604 – 605 [78] per Kirby J. See also *Halford v Price* (1960) 105 CLR 23 at 30 per Dixon CJ; *Container Handles* at 122 [97]. In a different context, Kirby J identified a similar rationale for the application of the rule in relation to contractual exclusions of liability: *Siemens Ltd v Schenker International (Aust) Pty Ltd* (2004) 216 CLR 418 at 471 [167].

The reasons below

85 In the course of summarising the relevant principles of construction (PJ [21] – [40]), the learned primary judge quoted with approval from the following passages from the reasons of Meagher JA and Ball J in *Wonkana* (at 641 – 642 [30] – [31]):

> 30 There remains the contra proferentem rule which provides that any ambiguity in a policy of insurance should be resolved by adopting the construction favourable to the insured: *Halford v Price* (1960) 105 CLR 23 at 30; [1960] HCA 38; *Darlington Futures* at 510; *Johnson v American Home Assurance* (1998) 192 CLR 266 at 275 (Kirby J, dissenting); [1998] HCA 14; *McCann* at [74]. The justification for the rule is that the party drafting the words is in the best position to look after its own interests, and has had the opportunity to do so by clear words. It ought only be applied for the purpose of removing a doubt, and not for the purpose of creating a doubt, or magnifying an ambiguity: *Cornish v Accident Insurance Co Ltd* (1889) 23 QBD 453 at 456 (Lindley LJ).
>
> 31 With acceptance of the principle that ambiguity can be resolved by reference to the surrounding circumstances, the contra proferentem rule is now generally regarded as a doctrine of last resort. However, it continues to have a role to play in insurance and other standard form contracts. That is so for two reasons. First, by their nature, standard form contracts are not negotiated between the parties, and the surrounding circumstances relevant to the entry into one contract or another are less likely to shed much light on the meaning of the written words. Secondly, the contra proferentem rule complements the principle that standard form contracts should be interpreted from the point of view of the offeree. The offeror has the opportunity to, and should, make its intentions plain. The point was made by Dixon CJ (at 30) in *Halford v Price*, citing with approval the following statement in *Halsbury's Laws of England* (Butterworth & Co, 3rd ed, 1958) vol 22, p 214:
>
> > "The printed parts of a non-marine insurance policy, and usually the written parts also, are framed by the insurers, and it is their language which is going to become binding on both parties. It is therefore their business to see that precision and clarity is attained and, if they fail in this, any ambiguity is resolved by adopting the construction favourable to the assured …"

86 Her Honour subsequently concluded that the insurers were the *proferens* of the policies in question, being the promisors for the purposes of the relevant provisions (PJ [35] quoting

Commonwealth v Aurora Energy Pty Ltd (2006) 235 ALR 644 at 652 – 653 [41] per North and Emmett JJ. But see *North v Marina* [2003] NSWSC 64 [56] – [74]). Thus, *if the rule applied*, an ambiguity in a policy was to be resolved by adopting the construction which favoured the insured. It was irrelevant to the application of the rule that several of the insureds had been represented by brokers in the process of obtaining the insurance (see PJ [35] – [36], [204], [558], [877], [1078]).

Issue on appeal

87 The debate on appeal was directed to the circumstances in which the rule may apply and, in particular, the validity of the proposition stated in *Wonkana* at 641 [31] that "the contra proferentem rule is now generally regarded as a doctrine of last resort". The learned primary judge accepted that proposition and later concluded that the rule had no material role to play where the issues of construction could be resolved by the orthodox process of construction (PJ [36], [248], [881], [891], [892], [897(5)]). Nevertheless, her Honour accepted that the rule might apply in the event that aspects of her analysis were wrong (PJ [764(3)], [901(6)]).

88 It was also submitted by QBE that the operation of the rule was generally confined to exclusion clauses rather than provisions such as insuring clauses by which the *proferens* is conferring a benefit upon the insured. This was not developed at the hearing, but is readily answered by reference to the decision in *Darlington Futures*, where the High Court emphasised that the words of an exclusion clause are to be construed by reference to the same principles of construction as are applicable to other kinds of clauses. The justification for the rule ultimately rests on the *proferens* having control with respect to the policy's wording, rather than the particular kind of clause. Whilst the issue may arise more frequently in the context of exclusion or limitation clauses because of their fundamental inconsistency with the principal obligation or liability which they circumscribe, that is no basis for confining the rule's application to those kinds of clause. See also *Interpretation*, [25.110], [29.310].

The established scope of the rule

89 It is trite law that the *contra proferentem* rule may "only be applied for the purpose of removing a doubt, and not for the purpose of creating a doubt, or magnifying an ambiguity": *Wonkana* at 641 [30] citing *Cornish v Accident Insurance Co Ltd* (1889) 23 QBD 453 at 456. See also *CE Heath Underwriting & Insurance (Aust) Pty Ltd v Edwards Dunlop & Co Ltd* (1993) 176 CLR 535 at 548 per Dawson, Toohey and McHugh JJ. However, although there must be an

ambiguity in the words of a policy, that is not sufficient to warrant the application of the rule. As Kirby J observed in *McCann* (at 602 [74]):

> Courts now generally regard the *contra proferentem* rule (as it is called) as one of last resort because it is widely accepted that it is preferable that judges should struggle with the words actually used as applied to the unique circumstances of the case and reach their own conclusions by reference to the logic of the matter, rather than by using mechanical formulae.
>
> (Footnote omitted).

90 It has long been recognised that the rule has a limited, residual application. In *Western Australian Bank v Royal Insurance Co* (1908) 5 CLR 533, the High Court considered the construction of a contract of insurance which required the insured to give notice of damage to the insured property to its insurer within 15 days "at the latest", but provided that, in default thereof, no claim in respect of the damage could be payable "unless and until" such notice was given. In the circumstances, there was no possible construction of the condition which gave full effect to the words "at the latest" and "unless and until" with the result that the Court resolved the issue by applying the *contra proferentem* rule and concluded that the condition merely suspended the right of action until notice was given: at 554 – 555 per Griffith CJ; at 559 per Barton J; at 566 – 567 per O'Connor J; at 574 per Higgins J.

91 In applying the rule, each member of the Court explicitly recognised its limited application. In particular, Barton J observed (at 559):

> There is, no doubt, an ambiguity, and when we consider also the prior words "at the latest," I do not see how that ambiguity is solved by the application of the ordinary rules of construction. But if that point of intractability is reached we are entitled to apply the maxim *verba chartarum fortius accipiuntur contra proferentem*.
>
> (Citation omitted).

92 Higgins J doubted the validity of the maxim as a rule of construction, but nevertheless accepted that, if it was applicable "as the last resort in construction", it ought to be applied in that case to construe the condition against the interests of the insurer: at 574.

93 The rule was later referred to in *Halford v Price*, a case in which the appellant underwriters had sought to imply a restriction on the scope of an indemnity in a policy of insurance. In dismissing the appeal, Dixon CJ (with whom Menzies and Windeyer JJ agreed) resolved the issue in favour of the insureds by undertaking an orthodox process of construction. Although the Chief Justice did not find it necessary to rely upon the rule, he made the following observation (at 29 – 30):

> I do not think that the provision or the entire insurance documents contain any materials from which an implication may be made restraining the operation of the indemnity in the manner desired by the appellant underwriters. But were there any such materials I would regard it as contrary to principle to attempt to work out a restrictive implication unless the context and subject matter supplied convincing evidence of intention. "The printed parts of a non-marine insurance policy, and usually the written parts also, are framed by the insurers, and it is their language which is going to become binding on both parties. It is therefore their business to see that precision and clarity is attained and, if they fail in this, any ambiguity is resolved by adopting the construction favourable to the assured in accordance with the maxim *verba chartarum fortius accipiuntur contra proferentem*." 22 *Halsbury* 3rd ed. p. 214.

94 In a concurring judgment, Fullagar J resolved the ambiguity in favour of the insured by applying the rule: at 34.

95 In its appeal, Market Foods submitted that Dixon CJ's approval of the quoted passage, in particular the words "any ambiguity" showed that it was incorrect to consider the *contra proferentem* rule "as one of last resort". In response, Chubb submitted that approval was expressed in *obiter*. In any case, that passage must be considered in light of the earlier reasoning by which the relevant ambiguity was resolved without recourse to the rule. Thus, Dixon CJ's comments are, at best, an equivocal indication that the rule may be applied to resolve "any ambiguity" or where the words are "fairly susceptible" of more than one construction: at 34 per Fullagar J.

96 The contrary view, that the rule applies only where an ambiguity cannot be resolved by the orthodox process of construction, is well supported by the earlier decision in *Western Australian Bank v Royal Insurance Co*. It is also consistent with the later decision in *Darlington Futures* where the High Court unanimously rejected the argument that exclusion and limitation clauses are to be construed restrictively. That decision instead confirmed that the general approach to the interpretation of contracts is to be applied to those kinds of clause. The Court stated (at 510 – 511):

> **These decisions clearly establish that the interpretation of an exclusion clause is to be determined by construing the clause according to its natural and ordinary meaning, read in the light of the contract as a whole, thereby giving due weight to the context in which the clause appears including the nature and object of the contract, and, where appropriate, construing the clause *contra proferentem* in case of ambiguity**… And the principle, in the form in which we have expressed it, does no more than express the general approach to the interpretation of contracts and it is of sufficient generality to accommodate the different considerations that may arise in the interpretation of a wide variety of exclusion and limitation clauses in formal commercial contracts between business people where no question of the reasonableness or fairness of the clause arises.
>
> (Emphasis added).

See also *Wonkana* at 641 [29].

97 While the phrases, "where appropriate", and, "in case of ambiguity", in that passage may conceal more than they reveal, the passage as a whole confirms that the construction of a clause by the usual principles is to be attempted first and before recourse to the *contra proferentem* rule. It would be surprising to read the Court's decision as endorsing a more liberal approach to the application of the rule while, simultaneously, emphasising the universality and importance of the orthodox principles of construction. This is supported by its conclusions in relation to the proper construction of the relevant exclusion and limitation clauses, one favourably to each party, which were reached without any reliance on the rule. The Court's reasoning instead rested on the *proferens*' preferred construction of the exclusion clause being absurd or uncommercial and the limitation clause being unambiguous: at 511.

98 The conclusion that the *contra proferentem* rule applies only once the orthodox process of construction has failed to resolve an ambiguity is also sound as a matter of principle. Unlike other interpretive rules, it is not based upon logic or inference as to the objective intention of the contracting parties as are other principles of construction but, instead, applies as a matter of legal policy. This distinction lead Kirby J to observe in *McCann* that it is preferable that judges should reach their own conclusions as to the construction of words "by reference to the logic of the matter, rather than by using mechanical formulae": at 602 [74]. It is only when the process of construction based upon logic had failed to elucidate the parties' intention that his Honour considered the rule had a role to play. As his Honour continued:

> Nevertheless, dictionaries, facts and logic alone will sometimes not provide an answer to the contest before the court. In those cases: "it is not unreasonable for an insured to contend that, if the insurer proffers a document which is ambiguous, it and not the insured should bear the consequences of the ambiguity because the insurer is usually in the superior position to add a word or a clause clarifying the promise of insurance which it is offering."
>
> (Footnotes omitted).

99 Were it to be accepted that the rule is not one of last resort, there would be not insignificant difficulty in ascertaining its limits. In the course of the hearing, Mr Morris QC sought to avoid the characterisation of Market Foods' position as being that the rule applies as a "rule of first resort", and accepted, at least, that the context of the words used must first be considered before resorting to the applying the rule. This tended to undermine his submission that the rule applied to "any ambiguity". It also rendered it difficult to ascertain precisely when, in his submission, the rule was to be applied, except that it ought to be applied in this case. It might be asked

rhetorically, if the rule is not a rule of last resort, what principles of construction may be jettisoned in favour of its application? It is sufficient to state that question to recognise the error in the approach for which Market Foods contended.

100 In any case, the High Court's decisions considered above strongly support the application of the rule as one of last resort. There is also ample intermediate appellate authority to support that position: see e.g. *Wonkana* at 641 – 642 [31]; *Zhang v ROC Services (NSW) Pty Ltd* (2016) 93 NSWLR 561 (*Zhang v ROC Services*) at 591 [140] and the cases there cited; *Lange v Queensland Building Services Authority* [2012] 2 Qd R 457 at 466 [52].

101 In its written submissions, Market Foods also took issue with the learned primary judge's drawing a distinction between words which are "merely ambiguous", in that they can be construed without recourse to the *contra proferentem* rule, and those which are more egregiously ambiguous, such that recourse to the rule is necessary. The problem, so it was submitted, was that if the rule applies only if an ambiguity is intractable but does not apply where one possible construction gains ascendancy by "the narrowest of margins" following the orthodox process of construction, then it had no real scope of application.

102 With respect, that submission misstated the way in which the rule is actually applied and, in particular, when there will be "two genuinely available alternatives": *Dalby v Bio-Refinery Ltd v Allianz Australia Insurance Ltd* [2019] FCAFC 85 [32]. Having undertaken the orthodox process of construction, the court does not merely elect between whichever construction is favoured by "the narrowest of margins". Rather, the rule applies where, after ascertaining the literal or grammatical meanings and evaluating them against the text, context and purpose of the contract, there remains "real doubt" as to the correct construction: *Zhang v ROC Services* at 591 [140]. See also *XL Insurance Co SE v BNY Trust Company of Australia Ltd* (2019) 20 ANZ Ins Cas 62-211 (*XL Insurance v BNY Trust Company*) at 77,413 [107]. Thus, the description of the rule as a last resort is apt because it applies only where that process fails to resolve any ambiguity and there is insufficient basis for choosing between the then available constructions.

103 On the basis of the nature of the rule as identified, save in the most unlikely of the scenarios which are discussed in these reasons, there was no scope for the *contra proferentem* rule to alter the outcome of any disputed issue of construction which arose in any of the appeals.

Principles of causation and proximate cause

104 The appeals also raised issues as to the nature of causation in the law of insurance. Although the broad principles were accepted, there remained some differences as to their application and the correct use of the concept of "proximate cause". In general terms, the element of proximity relates to the degree of immediacy between the cause and the result, and not to its degree of force by comparison with another cause. That may be relevant to the issue as to whether a minimal factor which is contemporaneous is in fact causal of the result at all; but if it does cause the result, even minimally, it is an operative cause, but absent that, it cannot be said to have caused it.

105 In some cases under discussion, the issue is simply a question of causation of any degree. Causation may be an element of any provision, such as an insuring promise, an exclusion or a condition, and the degree of proximity required between the cause and the result in order to engage the provision may be express or implied. Further, the issue of causation is not necessarily limited to the cause of the insured loss. (For the convenience of brevity, this discussion will be limited to the element of causation referred to in an insuring promise.) The choice of degree of proximity required may extend from the immediate to one very remote provided that causation is somehow present.

106 In a discussion of causation in this context, it is necessary to distinguish its application from that in which causation issues determine the rights of parties in other situations. In the law of tort and in the criminal law it is concerned with the attribution of personal liability or culpability for a personal act. In both, the boundaries are set by public policy. In insurance, the principles of causation, or at least the concept of proximate cause, are concerned with whether an insurer is obliged to provide indemnity pursuant to the bargain between it and the insured. As was said by Lords Hamblen and Leggatt JJSC in *Financial Conduct Authority v Arch Insurance (UK) Ltd* [2021] AC 649 at 726 – 727 [192] (*FCA v Arch*), the issue of causation raises the question, "did the insured peril cause the business interruption losses sustained by the policyholder within the meaning of the causal requirements specified in the policy?" In that context it is apt to keep in mind that, it is by the policy's terms that the insurer stakes its money against an actuarially assessed risk that an insured peril will be the proximate cause of the insured's loss. This requires a different causal analysis from that applied in relation to the assessment of a person's culpability for an act: Davies M, "Proximate Cause in Insurance Law" (1996) 7 *Insurance Law Journal* 135 at 140. In particular, the causation inquiry is narrower and has the function of determining "whether the insurer must indemnify the insured

allowing for any agreed limits placed on the transfer of risk from the insured to the insurer": McDonald A, "Proximate cause in insurance law: Fire following earthquake" (1995) 25 *Victoria University of Wellington Law Review* 525 at 533.

107 Necessarily, the degree of causality required before an insurer incurs liability on its policy is, in the first instance, a matter of the interpretation of the policy and ascertaining for what loss has the insurer agreed to compensate the insured as a result of the occurrence of an insured peril. However, in the absence of any contrary intention, it is presumed that it is only those causes "proximate" to the loss in respect of which the insurer has agreed to indemnify, which will trigger that liability. In this way, proximate cause functions as a presumptive standard of causation for the purpose of determining when the insurer's liability arises. More generally, the development of a generally universal standard of causation based on the presumed mutual intention of the parties aids in maintaining the availability of insurance. In Clarke MA, Burling JM and Purves RL, *The Law of Insurance Contracts* (6th ed, Informa, 2009) (*The Law of Insurance Contracts*), the learned authors observe (at [25-2]):

> The characteristic emphasis on the contract of insurance and on party intention affects not only the selection of potential causes but also proximity, that is, the degree of connection required between cause and loss. Insurers wish to know as accurately as possible the extent of the real risk written. Too loose a connection between peril and recoverable loss, it is said, would make underwriting difficult, except on terms that would drive away business: insurers want to write risks that are actuarial rather than entrepreneurial. Consequently, the proximity required between cause and loss is close.
>
> (Footnotes omitted).

108 In the context of concurrent causes, the adoption of the requirement of proximate causation is further supported by the fact that insurers' liability to indemnify occurs without any apportionment for the degree to which the insured peril has caused the insured's loss: Derrington DK and Ashton RS, *The Law of Liability Insurance*, (3rd ed, LexisNexis Butterworths, 2013) at 1,246 [8-351].

The requirement of "proximate cause"

109 Nearly all of the parties accepted that the general principles of proximate cause, insofar as they apply in Australia, were correctly stated by McColl JA (with whom Ipp and Tobias JJA agreed) in *Lasermax Engineering Pty Ltd v QBE Insurance (Aust) Ltd* (2005) 13 ANZ Ins Cas 61-643 (*Lasermax*). The primary judge summarised those principles as follows (PJ [44]):

> (1) [i]n the law of insurance it early became, and has remained, the rule to look to the proximate and not the remote cause of loss or damage in order to determine the liability of underwriters (*causa proxima non remota spectatur*) [the

immediate cause, and not the remote cause, is to be considered]: [39];

(2) in this context, the words "proximate cause" and "direct cause" came to be used interchangeably: [41];

(3) as Gibbs CJ said in *Federico* at 521 "… the words 'caused by an accident' naturally refer to the proximate or direct cause of the injury, and not to a cause of the cause, or the mere occasion of the injury": [42];

(4) proximate in this context meant proximate in efficiency rather than in time: [44];

(5) the proximate cause rule was not divorced in the cases from the terms of the particular policy under consideration but was based upon the inferred common intention of the parties and would not apply if it would defeat the manifest intention of the parties: [45]; and

(6) it is consistent with this approach that the proximate cause rule is capable of applying even where the word "directly" expressly qualifies the word "cause" in a policy: [46].

110 Her Honour also referred to Allsop CJ's summary of the principles in *Sheehan v Lloyds Names Munich Re Syndicate Ltd* [2017] FCA 1340 (*Sheehan*), which was as follows (at [77]):

> The causal inquiry in insurance law is directed to the proximate cause of the relevant loss or damage. This means proximate in efficiency, not the last in time*: Leyland Shipping Co Ltd v Norwich Union Fire Insurance Society Ltd* [1918] AC 350 at 369 per Lord Shaw; *Global Process Systems Inc v Syarikat Takaful Malaysia Berhad (The "Cendor MOPU")* [2011] UKSC 5; 1 Lloyds Rep 560 at 564 [19] per Lord Saville and 568 [49] per Lord Mance. A proximate cause is determined based upon a judgment as to the "real", "effective", "dominant" or "most efficient" cause: see *Leyland Shipping* [1918] AC at 370 per Lord Shaw; *Wayne Tank and Pump Co Ltd v Employers Liability Assurance Corp Ltd* [1974] QB 57 at 66 per Lord Denning MR. What is the proximate cause is to be decided as a matter of judgment reached by applying the commonsense knowledge of a business person or seafarer: see *The "Cendor MOPU"* [2011] 1 Lloyds Rep at 564 [19] per Lord Saville and 568 [49] and 576 [79] per Lord Mance. There does not need to be a single dominant, proximate or effective cause of loss or damage: *McCarthy v St Paul International Insurance Co Ltd* [2007] FCAFC 28; 157 FCR 402 at 430 [90]. In *City Centre Cold Storage Pty Ltd v Preservatrice Skandia Insurance Ltd* (1985) 3 NSWLR 739 (referred to in *McCarthy* 157 FCR at 430 [90]), Clarke J at 745 approached the question as follows:
>
> > … to determine in the first instance whether there is one effective cause. But, recognising that in the present case there are a number of contributing causes, I do not propose straining to isolate one if it seems to me that two or more causes operated with approximately equal effect.

111 It is well established that there may be more than one proximate cause of loss: *Midland Mainline Ltd v Eagle Star Insurance Co Ltd* [2004] 2 Lloyd's Rep 604 at 606 [8]; *McCarthy v St Paul International Insurance Co Ltd* (2007) 157 FCR 402 (*McCarthy*) at 429 – 431 [88] – [91]. In the latter decision, Allsop J (as the Chief Justice then was) observed (at 430 – 431 [91]) that in the application of policies of insurance the first step was to ascertain whether only one cause can be said to be the proximate or efficient cause of the loss. If there is more than

one, the policy must be applied to those circumstances. Absent any provision in the policy to the contrary, if there are two concurrent causes, one being covered by the policy and the other not, the insured may recover. However, different considerations will apply if there is one cause falling within the policy and the other cause is the subject of an exclusion. If the two causes are concurrent and interdependent, in that neither cause would have caused the loss but for the other, the exclusion clause will prevail: *Wayne Tank and Pump Co Ltd v Employers' Liability Assurance Corp Ltd* [1974] QB 57. Where the two concurrent proximate causes, one within the policy and the other the subject of an exclusion, are independent, it is "always essential to pay close attention to the terms of any policy and the commercial context in which it was made, for it is out of these matters that the answer to the application of the policy to the facts will be revealed": *McCarthy* at 434 [104]. If the policy's construction leads to the conclusion that the parties intended that no cover is provided for any loss caused by a particular cause and the loss was so caused, the policy cannot respond. However, if the parties' intention was that the policy would not respond if only the excluded clause was the sole cause of the loss, the existence of that concurrent excluded cause is irrelevant: at 438 [114].

Limits on the application of proximate cause

112 Many of the policies before the Court in these appeals provide cover for business interruption loss consequent upon the occurrence of an insured peril of a complex nature. In particular, the insured peril in the hybrid clauses is the occurrence of a series of causally-related, sequential events. Often they are (a) the occurrence of a disease causing (b) the actions of a relevant government authority causing (c) the closing or restricting of access to business premises. Since the causal nexus between (a) and (b) and between (b) and (c) are expressed in varying terms, it is necessary in each case to identify the precise nature of the cause referred to, the precise result to which it is to be associated, the degree of causal relationship that is necessary, all according to the language used for the particular provision, and whether that is present in the circumstance of the claim. Although proximate cause was not expressly raised by the parties as being relevant to the causal nexus between elements of a composite insured peril, it was advanced implicitly by a number of insurers who submitted that it was appropriate to construe those causal links by reference to it. There is, however, no self-evident justification for a default application of the principle in these circumstances where the rationales for it do not exist. The insurers' submission, if accepted, would significantly limit the policy's coverage without offering any textual reason for doing so.

The decision in FCA v Arch

No direct submissions as to the correctness of FCA v Arch

113 Most, if not all, parties in the appeal referred to the decision of the Supreme Court of the United Kingdom in *FCA v Arch*. It was the most frequently cited authority in the written submissions. However, as her Honour recognised below, the parties referred to those parts of the judgment which suited their purposes. Where an aspect of it posed an impediment to their argument, their Lordships' reasoning was distinguished on the basis of the substantial differences in the underlying factual foundations of that case and those of the test cases. No party before either her Honour or this Court sought to critically analyse the decision or suggested any error in the majority's reasoning or conclusions. In those circumstances, it is not necessary to reach any view as to its correctness.

114 For present purposes it is appropriate to acknowledge the existence of two features of the decision. First, that the Supreme Court adopted a particular view as to the circumstances in which a single case of an infectious disease (which qualified as an insured peril) could be said to be a proximate cause of loss under a business interruption policy despite it being neither a sufficient nor necessary cause of that loss. That issue does not arise in the present appeals and there is no need to address it.

115 The second feature was the articulation of the "underlying fortuity principle". Again, no party in the present appeals contested the appropriateness of their Lordships' formulation and application of that principle. Rather, the disputes concerned whether it applied in the particular case or in relation to particular circumstances. *Prima facie*, in those particular circumstances, an insured would face difficulty in demonstrating that any outbreak of COVID-19 in a defined area was a cause, let alone a proximate cause, of the imposition of any relevant restrictions.

The unique circumstances in FCA v Arch

116 Not only were the relevant circumstances underpinning the issues in *FCA v Arch* substantially different from those which occurred in Australia, they were rather unique in themselves concerning as they did the occurrence of a disease of pandemic proportions. COVID-19 is highly infectious even prior to the onset of symptoms or in asymptomatic infectious persons, with the consequence that it is able to spread faster and more widely than other Notifiable Diseases which might trigger disease, prevention of access or hybrid clauses. Moreover, it had, in fact, spread throughout the whole of the United Kingdom and had infected a significant proportion of its population prior to the government taking the measures which affected

businesses there. It followed that, as at the time of the implementation of those measures, many businesses were concurrently affected by a downturn in trade caused by the presence of the disease generally. Further, cases of infected persons existed, for all practical purposes, across the country such that the government's measures were both in response to that situation and were national in their operation.

117 Those circumstances posed critical difficulties for businesses which were insured under the policy wordings which were the subject of consideration by the Supreme Court. In general terms, the insured peril in the disease clauses was the occurrence or outbreak of a disease within an identified geographical area around an insured's premises, usually defined by a radius of some specified length. In other clauses, the insured peril was in the nature of interference in the use of the insured's premises due to actions by a public authority caused by the outbreak of disease, also within a specified radial area of the premises. However, unlike one or more localised outbreaks which might announce the appearance of many Notifiable Diseases, the rapid spread of COVID-19 in the United Kingdom prior to the imposition of government measures meant that it was impossible to identify that any particular outbreak or outbreaks caused the government's response. Indeed, it was accepted by the Supreme Court that the measures in question would have been imposed regardless of whether there were any cases of the disease in the areas demarcated by the policies: *FCA v Arch* at 722 [179]: raising the issue of whether the insured peril could be a proximate cause of the claimed loss.

The nature of the test cases before the Supreme Court

118 The Supreme Court's decision was the culmination of a number of test cases brought against eight insurers by the Financial Conduct Authority, representing the interests of business interruption policyholders. In each action, declarations were sought as to the operation of certain insuring clauses and "basis of settlement" clauses consequent upon the effects of the COVID-19 pandemic and the restrictions imposed in the United Kingdom in response to it. The clauses in question were disease, hybrid, prevention of access and trends clauses. Central to the operation of each type of clause was the identification of the cause of the business interruption losses in respect of which indemnity was sought. As mentioned, the circumstances of the COVID-19 pandemic in the United Kingdom were such that the government measures would have been imposed whether or not there were cases of the disease within the specified radial areas around insured premises and, conversely, would have been imposed in that area by reason of the cases in the defined areas alone: at 727 [195]. See also PJ [61]. This gave rise

to substantial disputation before the Court as to whether the insured perils were a cause or a proximate cause of the claimed losses. That issue was resolved in favour of the policyholders through a construction of the policies which treated each case of COVID-19 as a proximate cause of government restrictions with the consequence that the policies responded to the claims and losses were recoverable even though the losses would have occurred in any event. As mentioned, this issue does not arise on the present appeals.

The impact of competing causes of loss

119 The Supreme Court also considered (at 733ff [217]ff) the manner in which the composite insured peril found in the hybrid clauses (COVID-19 causing the government measures causing restrictions on use of premises) might be a cause of loss where the disease and its sequelae had otherwise caused substantial damage to the insured's business. In the operation of hybrid clauses, the occurrence of the disease is merely the first element of a sequential and composite insured peril which, as a potential cause of insured loss, is substantially more specific than the disease itself. Hence, the question became one of identifying the efficiency of that insured peril in causing the business interruption losses in circumstances where the pandemic had otherwise detrimentally impacted the insured's business.

120 The insurers' submissions (identified at 734ff [221]ff) were that in such circumstances it could not be said that "but for" the restrictions caused by the government measures, the business interruption losses would not have occurred. In relation to the question of whether the composite insured peril had caused relevant loss, they submitted that the relevant counterfactual was one which hypothesised the identical situation as the existing circumstances, save that the insured was relieved from the restrictions imposed on the use of their premises. So the submission went (at 734 [219]), were it otherwise, an insured would recover all losses resulting from the effects of the disease, even though the insured peril is the closure of the premises and the insured loss is only that consequent upon that closure. However, their Lordships observed (at 736 [227]) that the necessary effect of this approach would be to reduce the scope of actual cover resulting from the insured event to a narrow and fanciful risk.

121 Their Lordships, Hamblen and Leggatt JJSC (with whom Lord Reed PSC agreed), identified that these difficulties arose only because the insurers posed the wrong counterfactual question, being, "what would the financial position of the business have been but for the occurrence of the insured peril?" It was said (at 736 [228]) that the effect of applying such a test was to limit

the indemnity to business interruption which was caused solely and exclusively by the insured peril and had no other proximate cause. With respect, it might be thought that the first necessary question is whether the insured peril was an efficient cause of the loss which, at a minimum, is to be analysed by ascertaining whether, "but for" the occurrence of the peril, the loss would have occurred. If the insured peril was not an effective cause the inquiry need go no further. If it is, the inquiry can proceed to consider the relevance of any uninsured concurrent causes. If such causes exist and are not excluded, the policy usually responds. Indeed, so much was recognised by their Lordships: at 737 [229] – [230].

122 Nevertheless, the critical development of their Lordships was the adoption of a causal analysis in respect of the effect of an insured peril which limited the impact of other competing causes. They reasoned (at 738 [237]) that when the elements of a composite insured peril occur, they originate from the same cause – in this case, the COVID-19 pandemic – and it is entirely predictable that, even if those elements had not combined to cause indemnifiable loss, they would individually have had a similar detrimental impact on the business. It would be wrong, so they held, to treat those other detrimental effects as diminishing cover under the policy because, although they are not themselves covered, they are matters arising from the same "underlying fortuity" which the parties would naturally have expected to occur concurrently with the insured peril. In that sense, they were not a separate and distinct risk. It was said (at 739 [239]):

> We … consider the underlying explanation to be that, where insurance is restricted to particular consequences of an adverse event … the parties do not generally intend other consequences of that event, which are inherently likely to arise, to restrict the scope of the indemnity.

123 Their Lordships later added caveats to that general principle to the effect that (a) it does not apply where the policy excludes loss from the other consequences of the insured event, and (b) that the principle is dependent upon findings of concurrent causation involving causes of approximately equal efficiency: at 740 [244].

124 Their Lordships then applied the "underlying fortuity" principle in answer to the insurers' submission that the insured peril in the hybrid clause was not a proximate cause of the insured loss due to the independent effects of COVID-19. However, there appears to be difficulty in ascertaining how it can be said that the principle is applicable at that stage of the causal analysis only if there exists a finding of a cause, concurrent to the insured peril, of approximate equal efficiency. Prior to any conclusion that an insured peril is a proximate cause of loss, its putative

causative effect may be denied due to the impact of the non-insured perils having overwhelming effect. Therefore, in the alternative, it may be that the "underlying fortuity" principle is only productive of recovery under the policy if, after applying it to strip out from the required counterfactual analysis the other competing causes, the insured peril is sufficiently elevated to the status of being a proximate cause of loss.

125 It is important to recognise that the practical consequences of the approach to causation described above are possibly concordant with the expectations of the parties to a policy of insurance of the type in question. In general terms, it can be accepted that the insurer who provides cover for business interruption loss following the restrictions on access to premises by authorities due to an infectious disease, intends that the insured's indemnified losses are not to be negated or reduced by the necessary sequelae of the essential elements of the insured peril. Neither would that be an insured's intention or expectation. However, the difficult question is, which concurrent causes might be ignored in undertaking the task of determining whether the insured peril has a sufficient causal connection to loss and, if so, to what extent. The greater the number of such causes which must be "stripped out" of the counterfactual in order to ascertain the causal contribution of the insured peril, the further one is from ascertaining whether the insured peril is, in the correct sense, a proximate cause of the loss.

126 A difficulty which arose in applying the underlying fortuity principle in the circumstances of the present appeals was that the parties' submissions were advanced in very broad terms, merely framing the question as, whether a cause of loss did or did not derive from the same underlying fortuity. However, the principle is more refined than those submissions would suggest. It does not apply in relation to *any* cause of loss which has some connection to an element of an insured peril or, indeed, its underlying cause. It cannot be said that, where there has been an occurrence of an insured peril which includes as an element an outbreak of COVID-19, the insured is entitled to recover all losses which can somehow be traced to the underlying outbreak of the disease. Were it otherwise, any clause which included the outbreak of a disease would effectively be converted into a form of "pandemic cover". What is required is some discrimen between the several causes of loss which have their origin in the underlying fortuity from which the insured peril sprung. This had been addressed at first instance in *FCA v Arch* and answered in terms of whether the concurrent causes of loss were "inextricably linked" to the elements of a composite peril. In the Supreme Court, their Lordships rejected that approach but accepted the need for some limitation on the concurrent causes which might be ignored in the process of ascertaining whether an insured peril was causative of an insured's

loss. Their resolution of this issue is probably best seen in the following passage of the reasons of Lords Hamblen and Leggatt JJSC (at 738 [237]):

> The other sense in which the elements of the insured peril are inextricably connected is that those elements and their effects on the policyholder's business all arise from the same original cause—in this case the Covid-19 pandemic. It is inherent in a situation where the elements of the peril insured under the public authority clause occur in the required combination to cause business interruption that there has been an occurrence of a notifiable disease which has led to the imposition of restrictions by a public authority. It is entirely predictable and to be expected that, even if they had not led to the closure of the insured premises, those elements of the insured peril would have had other potentially adverse effects on the turnover of the business. We have already expressed our view that it would undermine the commercial purpose of the cover to treat such potential effects as diminishing the scope of the indemnity. **The underlying reason, as it seems to us, is that, although not themselves covered by the insurance, such effects are matters arising from the same original fortuity which the parties to the insurance would naturally expect to occur concurrently with the insured peril.** They are not in that sense a separate and distinct risk.
>
> (Emphasis added).

127 It would appear that the necessary refinement of the underlying fortuity principle exists in their Lordships' observations that the matters which are to be disregarded or "stripped out" are those "which the parties … would naturally expect to occur concurrently with the insured peril." Whilst it may be that the relevant underlying fortuity is the global COVID-19 pandemic, the consequences or effects of that which the parties might expect to occur with the insured peril may be somewhat narrow in scope. One might take the example of a hybrid clause where the insured peril was the closure of premises by order of an authority as a result of the outbreak of an infectious disease within five kilometres of those premises. In any consideration of whether the insured peril was a proximate cause of the insured's loss, no account would be taken of the effect of concomitant "stay-at-home" orders requiring residents not to leave their premises other than for specific reasons. It can be expected that, if in response to an outbreak an order is made requiring businesses to cease operations, other orders or directions would be made limiting the movement of people within the same area. Similarly, no account would be taken of the reduced patronage which would necessarily occur as a result of persons avoiding interactions with others in an area where an outbreak occurred. On the other hand, if the business was dependent on trade from international tourism, bans on persons entering the country which cause loss would not be excluded because such bans cannot be reasonably expected to occur concurrently with an outbreak of a disease near the insured's premises.

128 A similar approach can be seen in the Supreme Court's treatment of the example of a travel agency which lost most of its business due to travel restrictions imposed as a result of the

pandemic: at 740 [244]. Their Lordships held that, although customer access to its premises might have become impossible, as the sole proximate cause of the loss of the walk in customers was the travel restrictions and not the inability of customers to enter the agency, the loss would not be covered. It is apparent from their Lordships' reasons that they did not regard overseas travel restrictions as a matter which the parties would naturally expect to occur concurrently with the imposition of lockdown orders. Indeed, it may even be that the twin causes of loss did not arise from the same underlying fortuity in that the lockdown orders were the result of the localised outbreak of a disease and international travel bans were concerned with wider issues.

129 Despite the apparent expansive effect of the underlying fortuity principle, all it does is to remove from the hypothetical counterfactual certain competing causes of loss which would otherwise diminish the causative impact of the insured peril. It does not expand the scope of loss which might flow from the occurrence of the insured peril in the sense that it is only the loss which, after making the relevant adjustments, was proximately caused by the insured peril which might be recovered. Reference can be made to the travel agency example referred to above. Even if the underlying fortuity of COVID-19 in the local area or more generally is removed from the counterfactual, it was the overseas travel ban which has caused the loss and not the restriction on access to the premises which is the essential part of the insured peril.

The operation of the trends clauses

130 Finally, in relation to this issue of causation, the Supreme Court turned its attention to the operation of the trends clauses which required adjustments to the amount recoverable under the policies so as to put the insureds in the position they would have been "but for" the occurrence of the insured peril: at 741ff [251]ff. The insurers advanced submissions similar to those made in relation to causation generally; namely that only the closure of the premises consequent upon government order should be "stripped out" of the counterfactual, leaving the insured in a position where the general effects of COVID-19 would have diminished its business in any event. Their Lordships (at 243 [260] – [262]) applied an approach consistent with that described above to this issue and held (at 749 [287]) that trends clauses should be construed so that an adjustment is made only to reflect circumstances which are unconnected with the insured peril and not those which are inextricably linked with it in the sense they derive from the same underlying fortuity.

The causation issues in* FCA v Arch *adopted by the primary judge

131 The geographic and demographic circumstances in the United Kingdom are vastly different to those in Australia. The geography and population density in the United Kingdom is such that the radial areas described in several of the policies (such as a radius of 25 miles around an insured premise) covered a significant portion of the country and its population. This impacted heavily upon the question of causation in *FCA v Arch* because, so their Lordships held, it must have been understood by the parties to any policy that the government would have acted identically in any assumed counterfactual scenario: that is, the restrictions would have been imposed even if there was no case of COVID-19 in the relevant radial area and all cases were outside of it. Further, the occurrence and spread of COVID-19 in the United Kingdom differed from the position in Australia in 2020 and 2021 by orders of magnitude. As was recognised by Lords Hamblen and Leggatt JJSC, by the time of the imposition of government restrictions in the United Kingdom, the virus had spread throughout the whole country and had infected a significant portion of the population. As a consequence, the governmental measures put in place there were necessarily taken by the UK Government for the whole of the United Kingdom, the whole of England or, in other instances, by each nation State (England, Wales, Scotland and Northern Ireland) for the entirety of their respective countries. The actions were at a national level in response to a widespread national issue.

The approach of the primary judge

132 The primary judge (PJ [61]) identified the above geographic and demographic issues as being critical to understanding the reasoning in *FCA v Arch* in relation to causation. In particular, it was almost impossible to avoid the conclusion that there existed two sufficient concurrent causes of the government action which resulted in the business interruption losses; being the cases within the radial area of the insured premises and those outside of it. On that basis, her Honour accepted that it was rational to infer that the cases of COVID-19, both inside and outside the relevant areas, were concurrent causes of the relevant restrictions and lockdowns which interfered with the insureds' businesses. This had the consequence that the "but for" test was inapplicable as a minimum requirement for determining the cause of government action.

133 Her Honour distinguished the circumstances of the policies in question in the matters before her from those considered in *FCA v Arch* and, in particular, identified that the former were made in the Australian Constitutional context where the Commonwealth and State

governments had different spheres of power and operation (PJ [62]). In the case of the outbreak of COVID-19, the Commonwealth Government was empowered to impose bans restricting international travel and preventing people from entering or leaving Australia, whereas the States were empowered to require businesses to cease operating, require premises to close, or regulate the number of persons a business might allow on its premises (PJ [63]).

134 Additionally, the geographic and demographic differences were substantial (PJ [64]). Australia is a large continent with a sparse population such that an area within a 25 or 50 kilometres radius around a business premises may or may not encompass a densely populated area. Her Honour observed (PJ [65]) that the extent of the presence of COVID-19 in Australia in 2020 and 2021 could be contrasted with the widespread outbreak which occurred in the United Kingdom. The parties had agreed upon the numbers of persons who contracted the disease in Australia from 25 January 2020 to 30 April 2021 and a table of that data is set out in her Honour's reasons. As at 23 March 2020, there had been approximately 2,000 cases (cumulatively) and, by 30 April 2021, that number had increased to approximately 30,000. As her Honour noted, given Australia's population of approximately 26 million, it was not possible to conclude that the occurrence of COVID-19 was widespread (PJ [66]). Indeed, it was far from it and, to a large extent, most cases of infection were of Australians returning from overseas who often remained in quarantine prior to entering the community. Other instances involved sporadic outbreaks originating from returning overseas travellers and, in the main, were locally confined.

135 Her Honour also noted (PJ [67]) that it had been agreed between the parties in *FCA v Arch* that there existed cases of COVID-19 both within the relevant radial areas delineated by the policies and beyond them. On that basis, the government actions could be tested by asking whether it would have acted as it did if there were no cases in the radial areas, to which their Lordships answered, "Yes". A further underlying assumption was that there were a sufficient number of cases in the several radial areas to have caused the government to take the same action with respect to those areas at the least. The primary judge concluded (PJ [68]) that, as these factors were not present in the matters before her, it could not be concluded that each and every known case of COVID-19 in any location in a State was equally effective to cause the actions of the State governments. For that reason, it was not possible to apply the approach adopted by the Supreme Court to causation and, where it was a requirement of a policy, it would be incumbent on the insured to establish that the occasions or outbreaks of COVID-19 at or within a specified distance of a particular place were a relevant cause of the government's action.

136 On the other hand, different considerations arose where an essential element of an insured peril is not the occurrence of a disease but the risk associated with it. In those circumstances, the learned primary judge approached the causation issues in a manner similar to that adopted by the Supreme Court in relation to actual cases of the virus (see PJ [78] – [81]).

137 The learned primary judge did accept (PJ [73]) the Supreme Court's underlying fortuity principle insofar as it concerned the impact of the individual elements of a composite insured peril in a hybrid clause on the question of whether the insured peril was a proximate cause of the loss and as it concerned the operation of trends clauses. In the latter respect, her Honour rejected the "but for" approach adopted in *Orient-Express Hotels Ltd v Assicurazioni Generali SA* [2010] Lloyd's Rep IR 531, but recognised (PJ [74]) the important qualification that the reasoning depended upon the underlying fortuity giving rise to the insured peril being the same as that giving rise to the uninsured peril. In the absence of that coincidence, there would be nothing uncommercial in the policy requiring the effects of the uninsured peril to reduce the amount of the indemnified loss.

138 As her Honour further observed (PJ [75] – [76]), the position in the United Kingdom was the existence of a national COVID-19 pandemic at the time of the government's actions, whereas in Australia the circumstances were different. The actions of the Commonwealth government were responsive to the threat of COVID-19 overseas and the potential for it to enter the country. Conversely, the exercises of power by the several State governments were concerned with the existence of COVID-19 within the respective States and the associated risk of it spreading from known and unknown cases throughout the State. From this, the primary judge held that the Commonwealth government's actions were not caused by the same underlying fortuity as the insured perils in the respective policies. It acted to prevent the entry of COVID-19 into the country and was motivated by the existence of the spread of the disease overseas and the threat presented to Australia by uncontrolled entry of international travellers. Those matters did not have their origin in the existence of cases of COVID-19 in Australia, or the threat of its spreading throughout a State or country, which were the issues in respect of which the policies responded.

139 Her Honour then concluded (PJ [78]) that it was the existence of COVID-19 cases in the State (known) and the associated threat or risk of COVID-19 to persons (from cases both known and unknown) across the State as a whole, which were the causes of State government action. It could not be concluded that any State Government action "was caused by, or resulted from, or

was in consequence of, the existence of any case of COVID-19 at the location or within area required by the insuring provisions" (PJ [79]). It necessarily followed that it was not possible to conclude that the occurrence or outbreak of the disease at any place identified in a policy was the cause of any government measures which may have restricted business operations. Her Honour also held that it was not possible to conclude "that each and every case of COVID-19, including any case within the area defined by the insuring clause, was an equally effective cause of the taking of the State Government action." Rather, the governments acted because they were aware that some cases existed in certain locations, albeit not every location, and that there was a risk to all persons across the State. That risk extended to the location or areas identified in the several insuring clauses. In accordance with the approach of Lords Hamblen and Leggatt JJSC in *FCA v Arch*, her Honour held (PJ [81]):

> Accordingly, an insuring provision requiring the action of the authority to be caused by or result from or be in consequence of the threat or risk of infectious or contagious disease at a location or within a specified area is satisfied, as the threat or risk to each and every person is an equally effective cause of the action of the State Government.

Other regularly arising matters

Occurrence/outbreak and risk/threat

140 Although not contested by any of the parties, it is apt to identify the primary judge's observations (PJ [84]) that a fundamental difference existed between clauses which operate upon the occurrence or outbreak of a disease within an area, and those which operate on the threat or risk of an occurrence or outbreak within an area. That difference is obviously important to keep in mind when ascertaining the reason or reasons for the imposition of government measures which result in business interruption.

"Occurrence" and "outbreak"

141 An important recurring issue in the following reasons is the meaning to be attributed to the words "occurrence" and "outbreak" where they appear in a number of the insuring clauses in dispute. There is no question that the meaning which each word has on any particular occasion will depend upon the context in which it is used. However, absent any textual or contextual indicators that they are to be regarded as having similar, or even interchangeable, meanings they should be given different meanings when used in relation to disease (PJ [91]).

142 The primary judge concluded (PJ [92]) that the meaning of each word was disease dependent and, in that respect, noted that the characteristics of COVID-19 were: (a) it is highly contagious in a non-controlled environment (that is, not in a hospital, quarantine or isolation); (b) people

are likely to be infectious with it prior to becoming symptomatic; and (c) accordingly, the risk to public health was from both known and unknown cases of the disease. In those circumstances, her Honour held (PJ [95]) that an "occurrence" of COVID-19 would mean an event or case of COVID-19 in any setting. It would not matter that the case occurred in a controlled environment where the person infected was in quarantine or isolation and the possibility of transmission was very low.

143 Conversely, her Honour identified (PJ [96]) the usual meaning of the word "outbreak" as being something more than an "occurrence", but not requiring any event of transmission in the community. As such, an "outbreak" of COVID-19 only required a case of active (that is infectious) COVID-19 in the community, in the sense that it occurs in a non-controlled environment, where potential transmission may occur. In the course of her reasons in the LCAM matter, her Honour confirmed that to be the position given the absence of any contrary textual indicators. As she explained (PJ [294]), in the case of a highly contagious disease such as COVID-19, the risk of transmission in a non-controlled setting (that is in the community) is so high that it may readily be inferred that a person with the disease will have transmitted it prior to becoming aware of their infectious status. In this way, her Honour reasoned, it would be most unlikely that the parties required anything more than probabilistic reasoning as to the transmission of the disease between individuals in order for an "outbreak" to have occurred.

144 Although her Honour's conclusion as to the nature of an "outbreak" of COVID-19 was the subject of criticism by the several insurers, in the absence of any contrary textual or contextual influences, it provides an appropriate and workable definition. It should be accepted that the answer to the question of whether an "outbreak" has occurred is disease-dependent. The circumstances which might constitute an "outbreak" of an extremely serious disease are not the same as for a mild or moderate one. That view is supported by the observations of McDonald J of the High Court of Ireland in *Hyper Trust Ltd t/as The Leopardstown Inn v FBD Insurance plc* [2021] IEHC 78 (*Hyper Trust (No 1)*), where his Honour held (at [143]) that an "'outbreak' is capable of consisting of a relatively small number of cases or, where the pathogen is particularly serious, a single instance of disease". Later in his reasons, his Honour referred to the definition provided by the Health Protection Surveillance Centre, a government body, which identified that an outbreak might be constituted by a single case of a disease caused by a significant pathogen such as diphtheria or viral haemorrhagic fever, the latter being the disease caused by the Ebola virus. A similar definition of "outbreak" in relation to COVID-19 appears in the National Health Guidelines for Public Health Units provided by the

Communicable Diseases Network Australia (a part of the Commonwealth Government Department of Health). Whilst this definition was published in May 2021, it is nevertheless supportive of the logic of the primary judge's conclusion. In 2020, any occurrence of COVID-19 in the community might properly be described as an "outbreak" given: (a) it was a new and potentially deadly disease not previously known to occur in humans prior to 2019; (b) it is of significant severity and virulence; (c) there was no known vaccine, nor any cure; and (d) the previously expected number of cases of it was zero.

The insurers' submissions

145 Several of the insurers made submissions as to the meaning of the word "outbreak" when used in relation to a "disease" in expressions such as, "outbreak of a notifiable human infectious or contagious disease". In particular, Swiss Re submitted that "outbreak" requires the existence of multiple persons infected with the disease and that those infections were connected by:

(a) time, in that the persons must have contracted COVID-19 at about the same time;

(b) location, in that those infections must have occurred at the insured "Situation" or within the relevant radius and not elsewhere; and

(c) cause, in that each of those infections must be linked to a common cause originating at the "Situation", or within the radius.

146 These elements were said to derive from the following dictionary definitions of the word "outbreak": (a) a "sudden eruption of anger, war, disease, rebellion etc" from the Australian Concise Oxford Dictionary; (b) "a breaking out; an outburst … a sudden and active manifestation" from the Macquarie Concise Dictionary; and (c) "a time when something suddenly begins, especially a disease or something else dangerous or unpleasant" from the Cambridge Dictionary. So Swiss Re's submission went, these had the consequence that for there to be an "outbreak" of a disease it was necessary that there be a sudden eruption, breaking out or an outburst of it, and that a single instance or multiple unconnected individual instances was insufficient.

147 In support of that Swiss Re relied upon the observation of Lords Hamblen and Leggatt JJSC in *FCA v Arch* at 696 [69] to the effect that a single occurrence of disease could not be regarded an "outbreak", unless the individual cases of disease described as an outbreak have a sufficient degree of unity in relation to time, locality and cause. However, their Lordships' comments are of little assistance with respect to the issue at hand. First, they were concerned with the

meaning of the word "occurrence" rather than "outbreak" and, secondly, it is apparent from the context that their Lordships were not indicating that an "outbreak" of a disease could not be constituted by a single isolated case.

148 Nevertheless, Swiss Re maintained that an "outbreak" necessarily required a confirmed case of transmission. It submitted that, as with an "occurrence", there had to be something happening at a particular time, at a particular place, and in a particular way with the consequence that an event of transmission of the disease was necessary. Absent transmission, there was no relevant "event". The mere presence of a person in the community with the disease was said to be insufficient to amount to an event or a happening which would constitute an outbreak. It further submitted that an approach which considered the severity of the disease did not overcome the requirement for there to be an event or happening at a particular place and time and in a particular way.

Discussion

149 None of the above undermines the primary judge's conclusion. Whilst the dictionary definitions referred to incorporate concepts of suddenness or an outburst of something dangerous, they are comfortably consistent with the primary judge's conclusion. The emergence or discovery of a person in the community with a highly contagious and virulent disease such as COVID-19, in circumstances where the presence of the disease was otherwise unfamiliar or unknown, is an event or happening which satisfies the requirements of the dictionary definitions and is appropriately referred to as an "outbreak". The sudden presence of a hitherto absent, potentially deadly, contagious disease has the appropriate attributes of "sudden eruption" or "active manifestation" of something dangerous or unpleasant indicating its precipitous beginning. In addition, the highly infectious nature of the disease prior to it becoming symptomatic has the consequence that, in an uncontrolled environment, there is a very high likelihood that transmission will have occurred prior to the person discovered to have contracted it knowing that to be the case. This has two consequences. First, it elevates the significance of the discovery of the presence of the disease which then presents a serious public health risk. As those dictionary definitions disclose, the concept of "outbreak" is confined to matters of significance. Secondly, the high probability of it having been transmitted to another or other persons indicates that the event or happening is wider than the mere presence of the person known to be infected. This latter point was relied upon by the trial judge as meeting the insurers' submission that transmission was required.

150 There is little or no justification for the view that, for there to be an "outbreak" of a disease, there must have been a transmission in the particular place where the outbreak is said to have occurred. That is particularly so in the context of a policy of insurance where the outbreak is an element of a composite insured peril. Importantly, the term is used in a policy of insurance as being the cause of action taken by an authority. That necessarily connotes that the "outbreak" has been identified by the authority which then acts upon it in the way required by the cover. In this context, the insurers' submissions slip into commercial absurdity or, at least, unreasonableness. On their construction, if an authority imposed a lockdown involving restrictions on access to the insured's property on becoming aware that a person or a number of persons had been present in the community (in a non-controlled setting) with a potentially fatal and highly infectious and contagious disease for a number of days, the policy would not respond because there was no "outbreak". On the other hand, the policy would respond if the lockdown occurred once the authority had become aware of a case of transmission of the disease. It is difficult to understand why the parties to the policy would have intended the word "outbreak" to have the narrower meaning which would produce that result. The gravamen of the type of cover under discussion is the loss arising from restrictions imposed by authorities responsible for the protection of the health of persons in the community in response to a serious disease and it is obvious that any authority would act expeditiously when such a disease is discovered. It is an unlikely construction that a policy would respond only where the authority acts after knowledge of a case or cases of transmission of a disease rather than on immediately becoming aware of its existence in the community.

151 In this way the expression "outbreak" is to be construed both in its literal and circumstantial contexts, particularly with regard to the circumstances reasonably contemplated by the subject matter of the whole relevant text. Here it is used to describe the circumstances in which a relevant authority might impose a restriction on the insured's business causing loss which would attract the cover. As the restrictions are an element of the concept, the circumstances of their imposition are influential in understanding what is meant by "outbreak". Simply, as it must cause the imposition, it must be of a nature to do so, and indeed must have done so for other elements of the trigger to be considered. That action by an authority would require consideration of a number of factors, including but not necessarily determined by the number of cases. A single case, quickly discovered and isolated, of a mild and only slightly infectious disease and which experience had taught was not likely to spread would not amount to an outbreak since it would not cause the necessary response of the authority. But the known

presence of a single case might well cause such a response if the disease were dangerous, highly infective, with delayed symptoms which withheld warning of its presence so as to obstruct suitable isolation, and which experience had taught could easily spread from a single case. That would be an outbreak. The measure is whether it is such as would cause the authorities to impose restrictions which would cause the insured's loss.

152 Contrary to the insurers' submissions, the meaning of "outbreak" adopted by the primary judge would exclude occasions when a person with a highly infectious disease was present in a particular area, but in circumstances where transmission was not possible or likely. Her Honour held that an "outbreak" requires the presence of an infected person in non-controlled circumstances, and that would exclude a person isolated in hospital or quarantine or, say, travelling in a car through the area, but not stopping and interacting with others. In such situations, the person's presence does not carry any element of seriousness sufficient to establish the existence of an outbreak because there is no highly infectious disease in the community in circumstances where transmission is likely or possible.

153 The meaning attributed by her Honour to the word "outbreak" in relation to a disease with the characteristics of COVID-19 was appropriate, especially in the circumstances which existed in Australia as at March 2020. At that time, COVID-19 was an entirely new and deadly virus, it was not known to have occurred in humans prior to December 2019, it was a severe and virulent disease, and there was no known vaccine or medical cure for it. Indeed, one of the few steps which could be taken to mitigate its spread was the making of government orders affecting the use of premises at which the virus might be transmitted. Based on those characteristics, a single instance of COVID-19 would appropriately be described as sudden and exceeding the number of expected cases, being nil.

The primary judge's conclusion as to the meaning of "outbreak" should be adopted

154 It follows that the primary judge's conclusion as to the meaning of the word "outbreak" when considering highly infectious and virulent diseases such as COVID-19 should be adopted. An "outbreak" of COVID-19 occurs in or at a particular place where there exists a case of active (that is infectious) COVID-19 in the community (in the sense that it occurs in a non-controlled environment). As was apparent from her Honour's discussion of the point, the requirement of the person being "in the community" necessarily incorporates the circumstance of the possibility of transmission to other persons.

155 As will be seen in the discussion that follows, there are no textual or contextual matters in any of the policies which might alter the meaning of "outbreak" from that identified.

Role of an authority in relation to hybrid clauses

156 A further important and recurring issue in the following discussion concerns the causal nexus between the elements of a composite insured peril and, in particular, what is intended where the actions of an authority are said to be conditioned on a particular state of affairs, usually being the existence of a disease. A number of hybrid clauses require the authority to have acted "as a result" of or "as a consequence" of an outbreak of a disease or in response to some other event. Usually, the authorities' actions must result in the interruption of or interference with the insured's business or premises. The recurring issue is whether the insured is required to establish, as matters of fact, first, that the event in consequence of which the authority acted did occur and, secondly, that the authority acted in consequence of it. The position taken by the insureds was that it was sufficient to rely upon the terms of the instruments issued by the authorities and the surrounding circumstances to evidence both matters.

157 The primary judge accepted (PJ [85]) the insureds' submissions and, in doing so, noted that there is a difference between an action resulting from a thing, such as a disease, and the existence of the disease itself. In this sense, the action of an authority can result from a disease even if the authority is mistaken about its existence. However, her Honour (PJ [86]) put to one side the actions of an authority taken arbitrarily, capriciously or in bad faith which the parties to a policy of insurance would not contemplate as being determinative of liability. Otherwise, "where parties have made an insuring provision depend on the action of an authority resulting from some or other thing, they have effectively committed themselves to accept the view of the authority about the thing".

158 The underlying rationale for this approach was that, in relation to the hybrid clauses, it is not the existence of the thing (the disease) which is determinative, but the authority's reasons for acting as it did. In that respect, the primary judge did not accept the parties intended that they would go behind an authority's articulated reasons to ascertain whether it was correct in its assessment of the existence of a relevant occurrence or outbreak of a disease (PJ [86] – [87]). Her Honour considered that this approach accorded with the manner in which hybrid clauses were drafted (usually, action resulting from specified disease) which focussed attention on the reason for the authority's action. It was also held that the insurers' preferred approach did not accord with common sense or a business-like interpretation of the provisions. The concern of

the cover is to indemnify for loss from business interruption caused by the actions of an authority taken as a consequence of a state of affairs. If the authority takes the action because of the state of affairs and the loss is suffered, subject to a clear contrary intention in the policy, it should not be assumed that the parties intended the loss not to be indemnified if the authority is subsequently shown to have been mistaken about that state of affairs.

159 The necessary corollary of the above is that evidence of facts not known to an authority or not relied on by it in deciding to take action will be of little use in ascertaining whether the policy responds. It is the authority's actions and what they resulted from which are of central importance. In this latter respect, her Honour also held (PJ [88]) that the parties to such a policy would be taken to intend that the causal requirement (being that the action of the authority resulted from some other thing) would be objectively determined by what the authority in fact did, what it said about what it did at the time, and the contemporaneous circumstances as they can be inferred to have been known to and considered by it at the time. The parties could not have intended that the subjective state of the authority's mind was in issue, and nor would it be permissible to go behind its actions to demonstrate that it was in error. The effect of this was summarised as follows (PJ [89]):

> Accordingly, the question of what the actions of an authority resulted from is best answered by reference to what the authority did, why the authority said it did what it did, and other contemporaneous explanations and circumstances casting light upon the actions of the authority. It is not answered by subsequent unearthing of facts or opinions not known to or considered by the authority at the time it took the actions.

The insurers' submissions to the contrary

160 The above approach was criticised by the insurers on the basis that the ordinary meaning of the language used in the several clauses did not indicate that the elements of the composite insured peril could be established otherwise than by proof in the ordinary way. It was submitted that the clauses are concerned with whether the objective facts are that the identified event caused the relevant authority's action and there is no room for substituting an element based on the authority's subjective beliefs. It followed, they submitted, that if the authority made an error and caused the shutting down of businesses in the mistaken belief of an outbreak of a disease, the policy would not respond. It was also submitted that the primary judge's approach injected an element of uncertainty into the operation of the clause, particularly in those cases where the authority does not express any reason for its actions. It was said that in such a case the policy could not respond.

The primary judge's interpretation should be adopted

161 Although the matter is not free of doubt, the primary judge's general approach to the construction of the operation of the hybrid clauses should be accepted. It is not necessary to determine whether there is an exception in relation to the conduct of an authority which is subsequently shown to be arbitrary, capricious or in bad faith. Although parties can indicate a contrary intention in the policy wording, it can generally be accepted that when a clause provides for a relevant authority to have acted on the basis that a relevant fact (e.g. an outbreak or an occurrence) existed, there is no requirement for the insured to prove the authority was correct in its assessment that the fact did exist. The reasons of the learned primary judge are substantive and the insurers were unable to demonstrate any error in them.

162 An important characteristic of a hybrid clause is the sequential nature of the separate elements of the insured peril with the final element (e.g. the restriction on the use of premises) being that which most effectively causes the loss. However, the preceding elements and their consecutive occurrence are also important. When they are objectively ascertainable without difficulty, no serious issues would arise in establishing them for the purposes of indemnity. On the other hand, when they involve the responsive actions of an authority consequent upon the occurrence of an event, significantly different questions arise. By incorporating a subjective element in the composite, sequential causative chain, the parties have filtered the occurrence of one element (the event) through the analysis of the relevant authority. This is evident in the LCAM policy where the relevant part of the hybrid clause provided, "by order of a competent authority as a result of an outbreak of a notifiable human infectious … disease". Here, the words "as a result of" incorporates the subjective motivation for the authority's conduct. Necessarily, that involves both its assessment that the outbreak in question existed and the intention to act upon it. As the primary judge reasoned, the effect was that the parties agreed that this part of the insured peril is satisfied where the authority perceives that an outbreak has occurred and, for that reason, makes a relevant order.

163 The alternative approach, as advanced by the insurers, would require the insured to prove that the outbreak occurred, that the authority perceived that had happened, and that it acted accordingly. That would be a substantially more difficult task for the insured in comparison to relying upon the authority's statements as to the existence of an outbreak and its reasons for acting. It would require the insured to prove the medical conditions of the person or persons who had reportedly contracted the disease and, perhaps, the accuracy of any medical diagnosis. On the insurers' case, if reliance on official reports of an outbreak of disease is not sufficient

to establish the existence of the outbreak, nor would be media reports and the like. It may be that in order to substantiate its claim for indemnity the insured would be obliged to subpoena the medical records held by a relevant hospital. It seems somewhat improbable that this is the intention to be gleaned from the policy.

164 Further, there was no commercial rationale advanced, and none is evident from the wording used in the policy, as to why the extent of the insured peril might be confined to instances where the insured can demonstrate that, in addition to the loss having resulted from action by the authority which it took by reason of the disease, the authority was justified in taking that action in the sense that it had some factual basis or was otherwise demonstrated to be within the extent of lawful authority. The insured peril focusses upon the reason motivating the authority to act, not whether there was sufficient justification to support the lawfulness of that action. It follows that, in relation to some of the clauses under consideration, proof of the facts underlying the actions of the relevant authority is not necessary.

165 In the context of business interruption insurance, the ease with which an insured may establish matters relevant to its claim for indemnity may influence questions of construction. The purpose of business interruption insurance is to inject additional funds into a going concern to maintain it as a going concern and, in that respect, to return it to an operational state as soon as possible: *Arbory Group Ltd v West Craven Insurance Services (A Firm)* [2007] Lloyd's Rep IR 491 [48] – [50]; *Adelaide (SA) Pools & Spa Manufacturing and Installation Pty Ltd v Westcourt General Insurance Brokers Pty Ltd (No 2)* [2021] SASC 123 [990]. That being so, a construction which advances the purpose of the cover is to be preferred to one that hinders it. Here, that approach supports an interpretation that the relevant integer of the insured peril is satisfied when it is shown that the authority has acted upon its belief as to the existence of an outbreak. That can be established relatively quickly by reference to the authority's statements and surrounding existing facts. Not only would an insured encounter substantive difficulties if it were required to establish those matters as actual facts, the extended period of time which it would take may well deprive it of the benefit of the cover.

166 The primary judge's approach is consistent with the structure of many hybrid clauses which provide cover following the imposition of restrictions by relevant authorities consequent upon events, the occurrence of which may involve a matter of judgment. For instance, such clauses often identify the events which motivates the authority's action as including "hygiene problems associated with drains or other sanitary arrangements", "incorrect operation of drains or other

sanitary arrangements", "defects in drains or other sanitary arrangements", or discovery of organisms etc. Where an authority imposes restrictions in the apparent belief that such matters have occurred at a premises, it is unlikely that the parties intended that the insured's claim might be denied if the authority were later shown to be in error. These matters involve an evaluative act by the authority and it can be assumed that the parties intended that its public assertions as to the outcome of its evaluation should be accepted by them.

167 Further, hybrid clauses are concerned with the actions of public bodies whose obligations involve the preservation of public health and, in the ordinary course, it is likely that they will need to act expeditiously and with limited information. That is especially so in relation to highly infectious diseases, but it is also applicable to other events such as defective sanitary arrangements, disease from food or injurious matter in food, and the appearance of vermin. An authority, acting in the public interest, is likely to have power to impose restrictions for such reasons even if it is subsequently transpires that it was mistaken about the event. This provides additional support for the primary judge's preferred construction. As the primary judge articulated the point (PJ [87]), "The provisions are intended to operate where an authority takes action because of a thing which causes the interruption or interference to the business which causes loss".

168 For the above reasons, her Honour's conclusion that the parties intended that the causal requirement (that the authority's action "resulted" from a particular event) would be objectively determined by what the authority did, what it said about it at the time, and the contemporaneous circumstances known by, or inferred to be known by, the authority at the time should also be accepted. Indeed, those reasons apply with greater force given that the task of establishing the motivation by which a political body or legal authority has acted is inherently problematic. An insured can identify the public statements of the body in question or the objective facts surrounding the action, but cannot reasonably prove the actual cause of any action by it. Absent the ability of the insured to rely upon those public statements or the objective evidence, how else will it discharge its onus? Even if the restrictions were imposed by a single authorised person, such as a Chief Health Officer, it is most unlikely that the parties intended that insured must adduce evidence from that person as to their actual motivations for the making of any order. If the restriction in question had been imposed by regulation passed by a legislative body, it is even more unlikely the parties intended the insured is to call each and every member who voted in favour of the restriction so as to establish their "true" motivation for voting.

169 Contrary to the insurers' submission, the construction adopted by the primary judge reduces the uncertainty in the operation of the hybrid clause. In the ordinary course, it would be reasonably apparent why an authority has acted to cause premises to be closed. It is not likely that any closure by the exercise of authority would occur without explanation and it would be unusual for a closure to occur without a written instrument being produced which provided such an explanation. Moreover, the objective facts surrounding the authority's actions would usually be sufficiently apparent to ascertain why it acted. Conversely, if the insured were required to prove, as a fact, the occurrence of an outbreak, that would require the ascertainment of information which might not be publicly available or, at least, not obtainable for a significant period of time.

170 Despite the above conclusion, it should not be assumed that the insurers' submissions were without merit. In many cases it can be assumed that the insurer intended, and the insured accepted, any apparent limitation contained in an insuring clause. In the cases at hand, those limitations may include the insured's onus to establish the outbreak as well as the motivation of a relevant authority in imposing restrictions on businesses. However, the circumstances envisaged by the cover may lead to the conclusion that the limitation was not intended to be insurmountable. For instance, where it would be impossible for an insured to establish by first-hand evidence the events or occurrences on which the claim is founded, it is necessary to accept that the parties envisaged alternative modes of proof. That commercial and businesslike construction would extend to cases where proof is also extremely difficult. Naturally, at the other end of the spectrum where proof of the relevant matters is not out of the ordinary, the usual rules would apply and the insured must discharge its onus in the usual way. Whilst the circumstances of the present matters are near the dividing line between exact proof and inferential proof, for the reasons given by the learned primary judge, they fall on the latter side. The degree of difficulty in establishing matters beyond the insured's control and personal knowledge, being the outbreak of disease, knowledge of it by an authority, and its efficacy as the motivation for the authority's action, demonstrate that to be so. It may well be that in the vast majority of cases insurers will accept the public utterances of authorities and admit both the outbreak and its causative effect. However, cases such as the Taphouse appeal demonstrate that will not always be so. The policy's construction in a commercial and businesslike manner depends upon the terms of the policy and how they may actually operate, rather than upon a presumption that in the course of disputed claims an insurer will adopt a reasonable attitude to the contentious facts.

171 It might be added that it is unlikely that any serious disputation would exist around the issue of whether an outbreak of a disease occurred or whether an authority imposed restrictions on the use of premises as a result. Outside of the scenarios propounded in test cases, it is difficult to envisage an occasion in which an insurer might put in issue the veracity of public records relating to the outbreak of a disease and an authority's response to it.

172 In the circumstances of the present appeals it is not necessary to consider the correctness of the qualification adopted by the primary judge when the actions of the authority are arbitrary, capricious, or in bad faith. Given the rationale for accepting the authority's statements as to its reasons for its acting, there is force in the proposition that it should also not matter whether its actions were affected by any of those adverse motivations. Nevertheless, as this issue was not argued by any of the parties there is no need to consider it and it has no impact on any of the appeals.

173 As appears in the following discussion, a number of the insurers made submissions contrary to the above conclusions. Those submissions must be rejected and there is nothing in any of the policies which indicated a contrary intention as to how the particular hybrid clauses might operate.

Section 61A of the *Property Law Act 1958* (Vic)

174 Both the Meridian appeal and the EWT appeal raised issues relating to s 61A of the *Property Law Act 1958* (Vic) (*Property Law Act (Vic)*). That section provides:

> **61A Construction of references to repealed Acts**
>
> Where an Act or a provision of an Act is repealed and re-enacted (with or without modification) then, unless the contrary intention expressly appears, any reference in any deed, contract, will, order or other instrument to the repealed Act or provision shall be construed as a reference to the re-enacted Act or provision.

175 In each appeal, the policy contains an additional benefit clause that is subject to an exclusion that refers to "diseases declared to be quarantinable diseases under the Quarantine Act 1908 and subsequent amendments" (or equivalent wording).

176 In the Meridian policy, the relevant clause is Additional Benefit 8 as set out in the Renewal Schedule to the policy. This relevantly provides:

> 8 Murder, Suicide or Disease
>
> The occurrence of any of the circumstances set out in this Additional Benefit shall be deemed to be Damage to Property used by You at the Situation.

…

(c) The outbreak of a human infectious or contagious disease occurring within a 20 kilometre radius of the Situation.

(d) Closure or evacuation of Your Business by order of a government, public or statutory authority consequent upon:

(1) the discovery of an organism likely to result in a human infectious or contagious disease at the Situation; …

Cover under Additional Benefits 8(c) and 8(d)(1) does not apply in respect of Highly Pathogenic Avian Influenza in Humans or any other **diseases declared to be quarantinable diseases under the Quarantine Act 1908 and subsequent amendments**.

(Emphasis added).

177 In the EWT policy, the relevant clause is Additional benefit 3 to the business interruption section. This relevantly provides:

3. Prevention of access

The indemnity under this section is extended to include interruption or interference with your business in consequence of:

…

c. closure or evacuation of all or part of the premises by order of a competent government, public or statutory authority as a result of a human infectious or contagious diseases [sic]. However there is no cover for highly pathogenic Avian Influenza or any **disease declared to be a quarantinable disease under the *Quarantine Act 1908* (as amended)** irrespective of whether discovered at the location of your premises, or out-breaking elsewhere,

…

which shall prevent or hinder the use of your building or access thereto, or results in a cessation or diminution of trade due to temporary falling away of potential customers.

(Emphasis added).

178 However, before each policy commenced, the *Quarantine Act 1908* (Cth) (*Quarantine Act*) had been repealed and the *Biosecurity Act 2015* (Cth) (*Biosecurity Act*) enacted.

179 In *Wonkana*, the New South Wales Court of Appeal considered two policies of insurance with exclusions that referred to "diseases declared to be quarantinable diseases under the Australian Quarantine Act 1908 and subsequent amendments" (or words to similar effect). Each policy commenced after the *Quarantine Act* was repealed and the *Biosecurity Act* commenced. The insurers argued that the references to "diseases declared to be quarantinable diseases under the Australian Quarantine Act 1908 and subsequent amendments" were to be construed as extending or referring to "diseases determined to be listed human diseases under the

Biosecurity Act 2015 (Cth)". However, the Court unanimously rejected this argument and made a declaration that the exclusion in each policy was not enlivened. Neither of the policies considered in *Wonkana* was governed by Victorian law so no issue arose as to the potential operation of s 61A of the *Property Law Act (Vic)*. There was no equivalent provision in New South Wales.

180 In each of the Meridian and EWT appeals, the insurer argued that the policy of insurance is governed by the law of Victoria and that s 61A of the *Property Law Act (Vic)* operates, such that the reference in the exclusion to "diseases declared to be quarantinable diseases under the Quarantine Act 1908 and subsequent amendments" (or equivalent wording) is to be construed as a reference to "listed human diseases under the *Biosecurity Act*", the *Biosecurity Act* being, it is contended, a re-enactment with modification of the *Quarantine Act*. In its terms, the effect of s 61A is merely that, if it applies, the reference in the exclusion to the *Quarantine Act* would be construed as a reference to the *Biosecurity Act*. However, as the learned primary judge accepted (PJ [180]), s 61A would have the effect for which the insurers contended, if it applied, and there was no challenge to this conclusion on appeal.

181 The primary judge concluded (PJ [112]) that the Meridian policy is governed by the law of Victoria. There was no challenge to this finding on appeal. This was not in dispute in relation to the EWT policy (PJ [108]).

182 However, the primary judge rejected the insurers' contention that s 61A operated. This was for two main reasons.

183 First, the primary judge held (PJ [131]ff) that the reference to "Act" in s 61A means an Act of the Parliament of Victoria. It followed that the section does not apply to the *Quarantine Act* and the *Biosecurity Act*, which are Commonwealth Acts (PJ [151]).

184 Secondly, the primary judge held that, even if (contrary to her earlier conclusion) s 61A could apply to Commonwealth Acts, the *Biosecurity Act* was not a re-enactment with modification of the *Quarantine Act* (PJ [161]).

185 The primary judge also considered an argument advanced by the insured in each of these cases to the effect that the policy evidenced an express contrary intention for the purposes of s 61A. As set out above, the section does not apply where "the contrary intention expressly appears". The insureds in each appeal also contended that, as the parties to the policy chose to refer to quarantinable diseases under the *Quarantine Act* when they could have referred to listed human

diseases under the *Biosecurity Act*, an express contrary intention appeared for the purposes of s 61A. However, the primary judge did not accept this argument (PJ [176]).

186 Insurance Australia and QBE each cross-appealed from the primary judge's conclusion that s 61A does not apply: in the Meridian appeal, Insurance Australia's notice of cross-appeal, Ground 1 and notice of contention, Ground 2; in the EWT appeal, QBE's notice of cross-appeal, Grounds 1 – 3 and notice of contention.

187 In addition, Meridian and EWT each filed a notice of contention by which they contended that her Honour's conclusion in relation to s 61A should be affirmed on an additional ground, namely that a contrary intention expressly appears in their policy.

188 The issues that arose on appeal in relation to s 61A in the Meridian and EWT appeals can be summarised as follows:

(a) whether the reference to "Act" in s 61A includes an Act of the Commonwealth Parliament;

(b) whether the *Biosecurity Act* is a re-enactment with modification of the *Quarantine Act*; and

(c) whether a contrary intention expressly appears in the Meridian and EWT policies for the purposes of s 61A.

The relevant facts

189 There is no issue about the relevant facts, which were set out below (at PJ [115] – [120]) and are repeated in the following paragraphs.

190 The *Quarantine Act* was repealed on 16 June 2016, at the same time as s 3 of the *Biosecurity Act* commenced: see Sch 1 to the *Biosecurity (Consequential Amendments and Transitional Provisions) Act 2015* (Cth).

191 The *Biosecurity Act*, ss 3 to 645, commenced on 16 June 2016: s 2.

192 COVID-19 was not a disease declared to be a quarantinable disease under the *Quarantine Act* (as amended) before its repeal.

193 COVID-19 was determined to be a listed human disease under s 42 of the *Biosecurity Act* on 21 January 2020: *Biosecurity (Listed Human Diseases) Amendment Determination 2020* (Cth).

194 In the EWT appeal, the policy commenced on 6 January 2020 and remained in force until 6 January 2021.

195 In the Meridian appeal, the policy commenced on 22 February 2020 and remained in force until 22 February 2021.

Does the reference to "Act" in s 61A includes an Act of the Commonwealth Parliament?

196 Section 61A of the *Property Law Act (Vic)* has been set out above. The other key relevant provision for the purposes of this issue is s 38 of the *Interpretation of Legislation Act 1984* (Vic) (*Interpretation of Legislation Act*), which relevantly provides:

> In all Acts and subordinate instruments, unless the contrary intention appears—
>
> "Act" means an Act passed by the Parliament of Victoria;
>
> …
>
> "Commonwealth" means the Commonwealth of Australia;
>
> "Commonwealth Act" means an Act passed by the Parliament of the Commonwealth;

197 Thus, one starts with the position that the reference to "Act" in s 61A means an Act passed by the Parliament of Victoria. The issue, then, is whether a contrary intention appears in s 61A, such that the word "Act" in that section encompasses not only an Act of the Victorian Parliament but also includes a Commonwealth Act.

198 The insurers submitted that a contrary intention does appear, such that the word "Act" in s 61A of the *Property Law Act (Vic)* encompasses an Act of the Commonwealth Parliament. They submitted that a contrary intention need not appear from the text of the provision. Indeed, they submitted, that is rarely the case. In particular, they referred to the principles set out in *DRJ v Commissioner of Victims Rights (No 2)* (2020) 103 NSWLR 692 (*DRJ*), where Bell P stated in the context of ss 5(2) and 12 of the *Interpretation Act 1987* (NSW) (at 698 [10]):

> Contrary legislative intention sufficient to rebut or displace the operation of s 12 of the *Interpretation Act* may be evinced by any of the following:
>
> (i) express words: see, for example, *Waller v Freehills* (2009) 177 FCR 507; [2009] FCAFC 89;
>
> (ii) necessary implication: see, for example, *Macleod v Attorney-General for New South Wales* [1891] AC 455 at 457–458;
>
> (iii) reading the Act as a whole: see, for example, *University of Birmingham v Federal Commissioner of Taxation* (1938) 60 CLR 572 at 579–580; [1938] HCA 57;
>
> (iv) if the legislative purpose would otherwise be frustrated: see, for example,

Australian Securities Commission v Bank Leumi Le-Israel (1995) 134 ALR 101; [1995] FCA 1012; or

(v) if the contrary intention is indicated by "the object, subject matter or history of the enactment": see, for example, *Schmidt v Government Insurance Office of New South Wales* [1973] 1 NSWLR 59 at 67–68.

See generally P Herzfeld and T Prince, *Interpretation* (2nd ed, 2020, Lawbook Co), at par 9.280.

199 The insurers placed particular emphasis on paragraphs (iv) and (v) of the above passage and relied upon each of these propositions in the present appeals.

200 The insurers first submitted that the *legislative purpose* of s 61A would be frustrated if its operation were limited to Acts of the Victorian Parliament. They submitted that the purpose of s 61A is to avoid the inconvenience that would otherwise result where a document refers to an Act or provision and the Act or provision is repealed and re-enacted. They submitted that, on the primary judge's construction, the section solves this problem only for references in such documents to Victorian Acts and, accordingly, on this construction, its purpose would be frustrated. By way of example, they referred to a contract governed by Victorian law that was made before the enactment of the *Corporations Act 2001* (Cth) and referred to the uniform companies legislation. In their submission, on the primary judge's construction, insofar as the contract referred to the Victorian component of the national scheme, the section would pick up repeals and re-enactments, but insofar as the contract referred to other Acts of the same uniform scheme, the section would not pick up repeals and re-enactments. The insurers submitted that no purpose could be served by the differential operation of s 61A in this way. To the contrary, they submitted that such an operation would be capricious and absurd.

201 The insurers also contended that a contrary intention appears from the *legislative history* of s 61A, as the word "Act" in the predecessor provisions was not limited to an Act of the Victorian Parliament and there was no intention to change this position when s 61A was enacted.

202 The earliest provision relied on by the insurers is s 27(1) of the *Acts Interpretation Act 1890* (Vic) (the 1890 Act). That section provided:

27. (1) Where any Act mentioned in the Second Schedule to this Act or any Act passed after the commencement of this Act repeals and re-enacts with or without modification any provisions of a former Act, references in any other Act or document to the provisions so repealed shall unless the contrary intention appears be construed as references to the provisions so re-enacted.

(2) Where any Act mentioned in the Second Schedule to this Act or any Act passed

> after the commencement of this Act repeals any other enactment, then unless the contrary intention appears the repeal shall not—
>
> (*a*) revive anything not in force or existing at the time at which the repeal takes effect; or
> (*b*) affect the previous operation of any enactment so repealed or anything duly done or suffered under any enactment so repealed; or
> (*c*) affect any right privilege obligation or liability acquired accrued or incurred under any enactment so repealed; or
> (*d*) affect any penalty forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed; or
> (*e*) affect any investigation legal proceeding or remedy in respect of any such right privilege obligation liability penalty forfeiture or punishment as aforesaid.
>
> And any such investigation legal proceeding or remedy may be instituted continued or enforced and any such penalty forfeiture or punishment may be imposed as if the repealing Act had not been passed.

It is convenient to note at this point that the Second Schedule to the 1890 Act listed some 107 Acts of the Victorian Parliament, all enacted in 1890 as part of a consolidation of existing legislation by the then colony of Victoria: see Browne AA, "Legislative Summary – Victoria 1958 – Consolidation and Reprinting" (1959) 2 Melbourne University Law Review 222 at 223.

203 The insurers submitted that, as a matter of construction, the word "Act" in s 27(1) of the 1890 Act was not limited to an Act of the Victorian Parliament and relied on other sections of the 1890 Act (in particular, ss 3, 4, 5, 6 and 22) that used the word "Act" in a way that included the Acts of other legislatures.

204 The insurers then submitted that the same meaning of "Act" continued in subsequent provisions (discussed below) to the same effect as s 27(1) of the 1890 Act, and that this meaning of "Act" remains in s 61A of the *Property Law Act (Vic)*.

205 It is appropriate now to consider each limb of the insurers' argument.

206 The first limb of the insurers' argument is that, unless "Act" in s 61A of the *Property Law Act (Vic)* is construed as extending to the Acts of other legislatures, its legislative purpose (as outlined above) will be frustrated. Assuming that the purpose of the provision is as described by the insurers, namely to avoid the inconvenience that would otherwise be caused where a document refers to an Act or provision and the Act or provision is repealed and re-enacted, it does not follow that this purpose would be "frustrated" if "Act" means an Act of the Victorian Parliament; it merely means that the purpose is not given effect to the maximum extent possible. Accordingly, it has not been demonstrated that a contrary intention appears on this basis.

207 The second limb of the insurers' argument is based on the legislative history of s 61A. Central to this limb of the insurers' submissions was the contention that the word "Act" in s 27(1) of the 1890 Act encompassed Acts of Parliaments other than the Victorian Parliament. For the following reasons, that contention should not be accepted. First, s 27(1) commenced by referring to "any Act mentioned in the Second Schedule to this Act". As noted above, that Schedule referred only to Acts of the Victorian Parliament. This tends to suggest that the next reference to "Act" is referring to future Acts of the same Parliament. Secondly, s 27(1) provided that references "in any other Act or document" to the repealed provisions were to be construed in a particular way. It is clear that the reference to "Act" in this part of the provision was a reference to an Act of the Victorian Parliament. It may be inferred that the Victorian Parliament was not seeking to address how the Acts of other legislatures should be construed. In oral argument, Mr Herzfeld SC for Insurance Australia accepted that the word "Act" in the phrase "in any other Act or document" in s 27(1) had to be a reference to Acts of the Victorian Parliament. One of the difficulties, then, with the insurers' construction is that the word "Act" would have different meanings within the one section. Thirdly, it seems clear that the word "Act" where it appeared in s 27(2) referred to an Act of the Victorian Parliament. That subsection dealt with the effect of a repealing Act. It provided, among other things, that the repeal would not "revive anything not in force or existing at the time at which the repeal takes effect". In dealing with the effects of a repealing Act, the Parliament of Victoria can only have been concerned with Acts of the Parliament of Victoria. Again, one of the difficulties with the insurers' construction is that it would give different meanings to the word "Act" within the one section.

208 It is true that other sections of the 1890 Act (such as ss 3, 4, 5, 6 and 22) used the word "Act" in a way that expressly or by clear implication included the Acts of other legislatures. However, those provisions dealt with Acts of the United Kingdom or of the colony of New South Wales that were then in force in Victoria, and provided that certain expressions used in those Acts should be interpreted in a particular way that was apposite for the colony of Victoria, and for the citation of those Acts. It was only in that context that the word "Act" was used in a broader sense. However, that context does not apply to s 27(1). For the reasons given above, the word "Act" in s 27(1) must be taken to be a reference to an Act of the Parliament of Victoria.

209 In light of this conclusion, it is unnecessary to discuss in any detail the subsequent provisions. This is because this limb of the insurers' argument depended upon its construction of s 27(1)

of the 1890 Act being accepted. However, for completeness, it is appropriate to set out those subsequent provisions:

(1) In 1915, the Parliament of Victoria (now a State) enacted the *Acts Interpretation Act 1915* (Vic) (the 1915 Act). Section 6(1) of that Act was in substantially the same terms as s 27(1) of the 1890 Act, save that it did not refer to Acts mentioned in the Second Schedule to the 1890 Act. It provided:

> 6. (1) Where any Act passed on or after [1 August 1890], whether before or after the commencement of this Act, repeals and re-enacts with or without modification any provisions of a former Act, references in any other Act or document to the provisions so repealed shall unless the contrary intention appears be construed as references to the provisions so re-enacted.

(2) In 1928, the Parliament of Victoria enacted the *Acts Interpretation Act 1928* (Vic) (the 1928 Act). Section 6(1) of that Act was in the same terms as s 6(1) of the 1915 Act.

(3) In 1958, the Parliament of Victoria enacted the *Acts Interpretation Act 1958* (Vic) (the 1958 Act). Section 7(1) of that Act was in the same terms as s 6(1) of the 1928 Act.

(4) In 1984, the Parliament of Victoria enacted the *Interpretation of Legislation Act*. At this time, s 7(1) of the 1958 Act was, in effect, split into two provisions: s 16(a) of the *Interpretation of Legislation Act* dealt with the aspect concerning with the construction of statutes and subordinate legislation, while s 61A, which was inserted into the *Property Law Act (Vic)* by s 4(4) and item 2 of the Schedule to the *Interpretation of Legislation Act*, dealt with the aspect concerned with the construction of *documents*. Both s 16(a) and s 17(b) of the *Interpretation of Legislation Act* should be set out as they overlap to some extent. They provide:

> **Repeal and re-enactment.**
>
> 16. Where an Act or a provision of an Act is repealed and re-enacted (with or without modification) then, unless the contrary intention expressly appears—
>
> (*a*) any reference in any Act or subordinate instrument to the repealed Act or provision shall be construed as a reference to the re-enacted Act or provision; and
>
> …
>
> **Construction of references in Acts to other enactments.**
>
> 17. A reference in an Act to that Act or to any provision of that Act or to any other Act or to any provision of any other Act or to any subordinate instrument or provision of a subordinate instrument shall, unless the contrary intention appears, be construed—

…

(*b*) if the Act, subordinate instrument or provision in question has been re-enacted or re-made (with or without modification), as a reference to the Act, subordinate instrument or provision as re-enacted or re-made and in force for the time being;

…

(5) As already noted, the *Interpretation of Legislation Act* inserted s 61A into the *Property Law Act (Vic).* It may be inferred that, as the subject matter of the *Interpretation of Legislation Act* was the interpretation of statutes and subordinate legislation, it was considered appropriate for the aspect of s 7(1) of the 1958 Act relating to the construction of *documents* to be located in another Act.

(6) Section 38 of the *Interpretation of Legislation Act* also introduced the definition of the word "Act" set out above. The previous Acts referred to above did not contain a definition of the word "Act".

(7) In 1993, the Parliament of Victoria enacted the *Interpretation of Legislation (Amendment) Act 1993* (Vic). This amended s 17 of the *Interpretation of Legislation Act* by providing that, in that section, a reference to an Act includes a reference to a Commonwealth Act and an Act or ordinance of another State or Territory. Although the insurers submitted that this amendment merely clarified what was already the position under s 17, the better view is that, in making this amendment, the legislature proceeded on the premise that the word "Act" in s 17 did not otherwise extend to a Commonwealth Act or an Act of another State or Territory.

210 Assuming that it is correct to construe the word "Act" in s 27(1) of the 1890 Act as meaning an Act of the Parliament of Victoria, there is nothing in the legislative history that suggests that the word "Act" in the successor provisions in the 1915 Act, the 1928 Act, the 1958 Act and the *Interpretation of Legislation Act* (as enacted) had any different meaning. Nor does the legislative history suggest that the word "Act" in s 61A of the *Property Law Act (Vic)* has any different meaning. Accordingly, a contrary intention does not appear from the legislative history of s 61A for the purposes of s 38 of the *Interpretation of Legislation Act*.

211 It follows that the primary judge was correct to hold that the word "Act" in s 61A means an Act of the Parliament of Victoria and does not include a Commonwealth Act.

***Was the* Biosecurity Act *a re-enactment with modification of the* Quarantine Act?**

212 In light of the conclusion above, it is not necessary to consider this issue. Nevertheless, it is appropriate to make the following brief observations.

213 The insurers do not challenge the primary judge's statement of the applicable principles. The primary judge referred to: *Woolworths Ltd v Lister* [2004] NSWCA 292 [15], [17] – [18] per Handley JA; *Hill v Villawood Sheet Metal Pty Ltd* [1970] 2 NSWR 434 at 437 – 438 per Sugerman P; *Karlsson v Griffith University* (2020) 103 NSWLR 131 (*Karlsson*) at 136 [22], 137 [24] per Payne and White JJA; and *Day v Adam; Ex parte Day* [1989] 2 Qd R 9 at 10 – 11. These authorities emphasise that the question whether a repealed enactment has been re-enacted with or without modification is a question of substance and not of form. An enactment that is entirely new and different will not be a re-enactment. On the other hand, an enactment that deals with essentially the same subject matter to achieve the same or similar ends may constitute a re-enactment.

214 As the primary judge recognised (PJ [160]), the fundamental issue is whether the *Biosecurity Act* as a whole is a re-enactment with modification of the *Quarantine Act*. As her Honour also recognised, a secondary issue is whether provisions of the *Biosecurity Act* are a re-enactment with modification of the relevant provisions of the *Quarantine Act*, namely the provisions relating to the declaration of a disease as a quarantinable disease.

215 The insurers submitted that: the primary judge's reasoning on this aspect tends to get caught up in the minutiae of the two different regimes; stepping back from the differences of detail, the undeniable fact is that the Commonwealth regime for identifying and responding to highly contagious diseases was contained in the *Quarantine Act*; and the regime empowered the Commonwealth Government to identify such diseases from time to time and, if so identified, exercise extraordinary powers directed to their containment.

216 The insurers also submitted: the *Biosecurity Act* dealt with the same subject matter, as was recognised by Hammerschlag J in *Wonkana* (at 653 – 654 [106]); in its essentials, the *Biosecurity Act* replicates the previous scheme; and although the precise machinery is different, it too empowers the Commonwealth Government to identify highly contagious diseases from time to time and, if so identified, exercise extraordinary powers directed to their containment.

217 The insurers referred to the Explanatory Memorandum to the Biosecurity Bill 2014 (Cth). They noted that it: explained that the Bill was necessary because of changes to Australia's biosecurity

risks since the *Quarantine Act* was first drafted (p 7); stated that many powers in the Bill are similar to existing powers under the *Quarantine Act*, but are clearly stated and easier to use (p 9); and stated that "[t]he Bill is intended to replace the century-old *Quarantine Act 1908* … to provide a modern regulatory tool aimed at better managing biosecurity risks in current and future trading environments" (p 19).

218 The insurers did accept that there may have been extensive modifications to update the legislation to take into account developments in biosecurity risks and to replace terms and procedures in old legislation with simpler and more modern ones. However, in their submission, the fundamental subject matter and the object of the two Acts are the same and that, in this respect, the case is relevantly indistinguishable from the re-enactment of the *Trade Marks Act 1955* (Cth) in the *Trade Marks Act 1995* (Cth), considered in *Karlsson*.

219 If, contrary to the conclusion above, s 61A of the *Property Law Act (Vic)* applies in relation to references to Commonwealth Acts, the *Biosecurity Act* was not a re-enactment with modification of the *Quarantine Act*. While it is true that the *Biosecurity Act* replaced the *Quarantine Act* and that the *Biosecurity Act* covers some of the same subject matter as the *Quarantine Act*, the subject matter of the *Biosecurity Act* is more extensive and, to the extent that the subject matter of the two Acts is the same, there are substantive differences between the provisions of the two Acts. The differences are so many and so extensive that it is inapt to describe the *Biosecurity Act* as a re-enactment with modification of the *Quarantine Act*.

220 The background and context of the *Biosecurity Act* is indicated in the Explanatory Memorandum, which stated (p 7):

> Australia's biosecurity system must be underpinned by a modern and effective regulatory framework. Currently, biosecurity is managed under the *Quarantine Act 1908* (Quarantine Act) and related regulations. Australia's biosecurity risks have changed significantly since the Quarantine Act was first drafted over a century ago. Shifting global demands, growing passenger and trade volumes, increasing imports from a growing number of countries and new air and sea craft technology have all contributed to a new and challenging biosecurity environment.
>
> Whilst the Quarantine Act has enabled the effective management of biosecurity risks to date, it has been progressively amended no less than fifty times, mostly to cater for the changing demands placed on the biosecurity system. These amendments have contributed to creating complex legislation that is difficult to interpret and contains overlapping provisions and powers. **Australia's biosecurity system has been subject to review several times, and proposed reforms to strengthen the system have included the development of new biosecurity legislation**.
>
> (Emphasis added).

221 One of the reviews that proposed the development of new biosecurity legislation was the Beale Review: see Beale R, Fairbrother J, Inglis A and Trebeck D, *One Biosecurity: A Working Partnership – The Independent Review of Australia's Quarantine and Biosecurity Arrangements – Report to the Australian Government* (30 September 2008). The covering letter enclosing this report included the following statement:

> Australia's biosecurity system has worked well in the past, and is often the envy of other countries. However, the system is far from perfect and recent events have exposed a number of systemic deficiencies. **The Report recommends far-reaching changes to rectify these problems while enhancing the good aspects of the system.**
>
> The central theme is the development of a seamless biosecurity system that fully involves all the appropriate players—business, other nations, the states and territories and the Australian community—across pre-border, border and post-border risk management measures. …
>
> (Emphasis added).

222 The Explanatory Memorandum, which runs to 434 pages, indicates the scope of the new Act and the extent of the differences between the provisions of the *Biosecurity Act* and the provisions of the *Quarantine Act*. The Explanatory Memorandum provides an overview of the Bill (pp 19 – 20) which includes that:

> The Bill is intended to replace the century-old *Quarantine Act 1908* (the Quarantine Act) to provide a modern regulatory tool aimed at better managing biosecurity risks in current and future trading environments. **The Bill allows for the management of a broader range of biosecurity risks at the border and provides for additional powers to monitor and manage biosecurity risks when they are detected in Australian territory** to help prevent pests and diseases from impacting upon human, animal or plant health, the environment and the economy.
>
> The Bill provides an effective and adaptive range of biosecurity measures to manage the public health risk posed by serious communicable diseases. It will provide a range of measures which can be tailored to accommodate an individual's circumstances and aims to ensure individual liberties and freedoms are considered in conjunction with the disease risk. It will provide for consideration of personal freedoms and rights to review in decision-making. The Bill is consistent with Australia's international obligations under the World Health Organization's *International Health Regulations 2005*.
>
> The legislation enables a risk based approach to compliance, ensuring that enforcement measures are appropriate to achieve the regulatory outcome sought. The Bill aims to reflect the shared responsibility for biosecurity between governments at all levels, business, industries, trading partners and the community. It is designed to promote good governance, shared responsibility, efficient processes and procedural fairness.
>
> The Bill is also designed to draw upon, support and give effect to various international and domestic agreements and obligations. Internationally, these include:
>
> - the *Agreement on the Application of Sanitary and Phytosanitary Measures* (the SPS Agreement)
> - the *International Convention for the Control and Management of Ships'*

Ballast Water and Sediments (the Ballast Water Convention)

- the *International Health Regulations 2005* (International Health Regulations)
- the *Convention on Biological Diversity* (the Biodiversity Convention)
- the *United Nations Convention on the Law of the Sea*, and
- the *Treaty between Australia and the Independent State of Papua New Guinea concerning Sovereignty and Maritime Boundaries in the area between the two Countries* (the Torres Strait Treaty).

Domestically, these include the Intergovernmental Agreement on Biosecurity and various emergency response deeds, including the Emergency Animal Disease Response Agreement, Emergency Plant Pest Response Deed and the National Environmental Biosecurity Response Agreement. The Commonwealth intends to work collaboratively with state and territory governments to complement existing powers and agreements in the management of biosecurity risks (however, the Commonwealth will cover the field in some circumstances, as expressly stated in the Bill).

(Emphasis added).

223 Many of the aspects of the scope and regulatory approach outlined above, reflected in the provisions discussed by the primary judge (at PJ [164] – [168]), differ from those of the *Quarantine Act*. It is fair to say that the changes made by the *Biosecurity Act* were far-reaching. This is not merely a matter of form, but rather is a matter of substance.

224 These observations are not inconsistent with those of Hammerschlag J in *Wonkana* (at 653 – 654 [106]). His Honour recognised that the *Biosecurity Act* "has a more extensive reach in terms of its subject matter than the *Quarantine Act*". Further, although his Honour accepted that the two Acts dealt with the same subject, he was not considering a comparable issue.

225 As noted above, a secondary issue is whether the relevant *provisions* constitute a re-enactment with modification. However, the provisions relating to "listed human diseases" in the *Biosecurity Act* do not constitute a re-enactment with modification of the provisions relating to "quarantinable diseases" in the *Quarantine Act*. First, the person who makes the declaration or determination is different (the Governor-General under the *Quarantine Act*; the Director of Human Biosecurity under the *Biosecurity Act*). Secondly, the criteria for making the declaration or determination are different (no criteria under the *Quarantine Act*; specific criteria in s 42 of the *Biosecurity Act*). Thirdly, the legal consequences of the declaration or determination are substantively different (compare, e.g., ss 2, 4, 18 of the *Quarantine Act*, and ss 44, 45, 46, 51, 52 of the *Biosecurity Act*).

226 Accordingly, the primary judge was correct to hold that the *Biosecurity Act* was not a re-enactment with modification of the *Quarantine Act*. Her Honour was also correct to conclude

that the provisions of the *Biosecurity Act* relating to listed human diseases were not a re-enactment with modification of the provisions of the *Quarantine Act* relating to quarantinable diseases.

227 In light of these conclusions, it is not necessary to consider the third issue identified above, namely whether a contrary intention does expressly appear in the Meridian and EWT policies for the purposes of s 61A of the *Property Law Act (Vic)*.

Section 57 of the *Insurance Contracts Act 1984* (Cth)

228 In each matter, the insureds sought a declaration that its insurer was liable with respect to its claim and that it was also liable to pay interest on the amount for which it was so liable pursuant to s 57 of the *Insurance Contracts Act 1984* (Cth) (*Insurance Contracts Act*). That section provides:

> **57 Interest on claims**
>
> (1) Where an insurer is liable to pay to a person an amount under a contract of insurance or under this Act in relation to a contract of insurance, the insurer is also liable to pay interest on the amount to that person in accordance with this section.
>
> (2) The period in respect of which interest is payable is the period commencing on the day as from which it was unreasonable for the insurer to have withheld payment of the amount and ending on whichever is the earlier of the following days:
>
> (a) the day on which the payment is made;
>
> (b) the day on which the payment is sent by post to the person to whom it is payable.
>
> (3) The rate at which interest is payable in respect of a day included in the period referred to in subsection (2) is the rate applicable in respect of that day that is prescribed by, or worked out in a manner prescribed by, the regulations.
>
> (4) This section applies to the exclusion of any other law that would otherwise apply.
>
> (5) In subsection (4):
>
> ***law*** means:
>
> (a) a statutory law of the Commonwealth, a State or a Territory; or
>
> (b) a rule of common law or equity.

229 Its effect is that, a person who is entitled to be paid an amount under a policy has an additional right to interest on that amount: *Walker v FAI Insurance Ltd* (1991) 6 ANZ Ins Cas 61-081 at

77,277. It is substantially different from the entitlement to interest pursuant to an order of the court under the rules of court. Prior to the insertion of subs (4) and (5), it was uncertain whether s 57 displaced any other right to interest, but that is now the accepted position: *Fitzgerald v CBL Insurance Ltd (No 2)* [2015] VSC 176 (*Fitzgerald (No 2)*) [17] – [19].

230 The period in respect of which interest accrues commences on "the day as from which it was unreasonable for the insurer to have withheld payment": s 57(2). Market Foods alone contended that it was unreasonable for its insurer to have withheld payment from the date on which it made its claim. Each other appellant insured sought interest from the date on which its claim for indemnity was denied, being various dates in 2020.

The reasons below

231 Having regard to the conclusions that, except in one case, the policies did not respond to the insureds' claims, it was strictly unnecessary for the primary judge to consider the claims for interest pursuant to s 57. Nevertheless, in the LCAM matter, her Honour concluded that if Swiss Re were liable to pay any amount under the policy, it had not unreasonably withheld it from the date on which it denied the claim. Further, she determined that it would not be unreasonable for it to continue withholding payment pending the outcome of the test case, including any final determination on appeal. Her Honour's reasoning was that (PJ [415]):

> As Swiss Re submitted: (a) the case is part of a test case proceeding with the co-operation of insurers, insureds, ACFA and other regulators, (b) AFCA agreed to this proceeding being dealt with as a test case, (c) LCA Marrickville has been providing material to supplement and, in part, has changed the basis for its claim as part of this proceeding, and (d) it was not unreasonable for Swiss Re to deny cover in the circumstances which involved sufficient complexity to become the subject of the test case and would not be unreasonable for it to await the outcome of the test case (including any final determination on appeal).

232 That reasoning was adopted by reference in the other matters before her Honour (PJ [516], [631], [696], [785], [842], [969], [1016], [1063], [1142]).

Submissions

233 The appellant insureds' submissions in relation to this issue were broadly uniform. They accepted that an insurer was entitled to a reasonable time to investigate a claim and consider whether to provide indemnity, after which interest based on the section should accrue. In their submissions, although the ascertainment of that date raises a question of fact which depends upon the particular circumstances, the existence of a *bona fide* dispute by an insurer as to its liability is irrelevant. They further submitted that, where a claim is denied, it may be inferred

that a reasonable period of time required by the insurer to investigate and consider the claim has elapsed. That, of course, is subject to the insurer not unduly delaying its consideration of the claim.

234 Those principles were generally not in dispute insofar as most insurers expressly accepted that they represented the "ordinary position" in relation to s 57. However, they added that the words of that section did not require their application as an inflexible rule. The present circumstances were sufficiently exceptional, so they submitted, that it was not unreasonable for them to wait until a final determination of the matters or at least a judgment of the court holding them liable, before paying any amount. They attributed particular significance to the insureds' claims being litigated as part of a test case. Swiss Re also submitted that the basis of LCAM's claim had changed over time and that the insured had yet to provide all material necessary to determine quantum as required by the policy. Insurance Australia made similar submissions in relation to the Meridian and Taphouse appeals.

Consideration

235 It is desirable to turn first to the observations of Beach J in *Australian Pipe & Tube Pty Ltd v QBE Insurance (Australia) Ltd (No 2)* [2018] FCA 1450 (*Australian Pipe & Tube*) where his Honour articulated a commonly shared view as to the section's operation. In particular, he observed (at [291]):

> Under s 57(2), the period in respect of which the insurer is required to pay interest commences on the day on which it became unreasonable for the insurer to refuse to pay the claim. An objectively determined reasonable period is to be given to the insurer to investigate the claim and determine its position. But where that position constitutes a refusal to pay the claim, in circumstances where a court has held that a liability to pay the claim does exist, such refusal cannot relevantly extend this period to the point of adjudication, regardless of whether that position was formed and held bona fide (see *Fitzgerald & Anor v CBL Insurance Ltd* [2014] VSC 493 at [415] and [416] per Sloss J). In short, the award of interest is to be calculated taking into account a reasonable time for completion of the insurer's investigation of the claim.

236 Although the issue of reasonableness is at large and necessarily fact dependent to some extent, it can only ever arise for consideration where an insurer is ultimately found to be liable to pay a relevant amount. In the learned primary judge's reasons (PJ [631] – [632]), Beach J's observations were distinguished on the basis that, as to that point in time, no court had determined the insurer to be liable. With respect, that would appear to be an erroneous foundation for departing from Beach J's reasons. As is explained below, the allegedly

exceptional circumstances of these matters, including the fact that they are being litigated as part of a test case, also do not afford a basis for doing so.

The ALRC Report

237 Section 57 was originally recommended by the Australian Law Reform Commission (ALRC) in its final report, *Insurance Contracts* (Report No 20, 1982) (the ALRC Report), as part of its examination of the adequacy of the law governing contracts of insurance which culminated in the enactment of the *Insurance Contracts Act*. With inconsequential amendments, s 57 was enacted in the form recommended in the draft legislation appended the ALRC Report. In general terms, subs (1) – (3) remain in the form originally enacted, while subs (4) and (5) were introduced by amendments in 1998.

238 According to the report its purpose was to address delay by insurers in meeting claims and the concomitant effect of inflation in eroding the real value of amounts ultimately paid: at 197 – 198 [320]. In particular, the ALRC recognised that an insured may be deprived of full compensation for their loss when a substantial delay occurred and the existing curial powers to award interest were thought to provide inadequate remediation. In particular, the powers of the respective courts were not uniform, existed only in relation to claims which were litigated, and often provided for rates of interest which were well below market rates. By contrast, the uniform requirement that insurers pay interest on claims at a realistic rate, whether or not a claim was litigated, was recommended as one "method of protecting the insured against loss caused by delay in payment of claims". It was also intended to encourage quicker settlements by removing insurers' incentive to delay.

239 The report provides limited guidance as to when it would be "unreasonable" for an insurer to withhold payment. Importantly, the ALRC accepted that some delays were readily explicable on the basis that an insurer requires a reasonable time in which to consider a claim and quantify the amount to which the insured was entitled: at 196 – 197 [319]. In a similar vein, reference was made to an earlier report of the Law Commission of England and Wales which had identified that it was not fair to regard the insurer as withholding payment until a claim to indemnity had been presented and investigated: at 198 [321] quoting Law Commission, *Law of Contract: Report on Interest* (Report No 88, 1978).

240 There is an apparent imprecision between the ALRC's stated concern with delays which went beyond the period of time necessary to consider and quantify a claim, and its recommendation of a provision which applies from "the day as from which it was unreasonable for the insurer

to have withheld payment". Nevertheless, it was the recommended wording which was adopted by the Parliament and it is at least arguable that the issue of reasonableness raised by s 57(2) may take into account further circumstances, including those which the insurers submitted made the present appeals exceptional.

241 The Explanatory Memorandum to the Insurance Contracts Bill 1984 (Cth) provides no further clarification concerning the intended operation of s 57 and identified a similar rationale for the introduction of that provision: at 82 – 83 [188] – [191].

The significance of a bona fide *dispute as to liability*

242 The submission that an insurer was not acting unreasonably in withholding payment until a *bona fide* dispute as to liability was resolved by a court was rejected by Cole J in *Bankstown Football Club Ltd v CIC Insurance Ltd* (unreported, Sup Ct, NSW, 17 December 1993). His Honour's opinion as to the manner in which s 57(2) operated was as follows:

> In my view, section 57 is directed to a determination of the point of time at which empirically, it can be stated that it was unreasonable to decline to make payment. That decision is not to be determined simply by a determination of whether or not there was a bona fide dispute regarding the entitlement to payment. It is rather to be determined by a finding as to whether or not there was liability.
>
> If there was liability found and the insurer to pay, then the presumption must be that the insurer would be deemed to know of that obligation as ultimately determined, even though it may bona fide have held a different view at all times prior to determination, at least at the first instance level, in relation to the question of liability.
>
> A reasonable period is to be given to the insurer to investigate and determine its position but if it adopts an incorrect position in relation to its obligation to pay under the policy, that, in my view, does not mean that simply because that incorrect position is adopted on a bona fide basis, it becomes reasonable for the insurer to decline to pay the sums otherwise due. That seems to me to be the correct interpretation of section 57(2), particularly in circumstances of section 57(1) of the Act, where an insurer is liable to pay to a person an amount under a contract of insurance.

243 This approach was subsequently endorsed by a majority of the New South Wales Court of Appeal: *CIC Insurance Ltd v Bankstown Football Club Ltd* (1995) 8 ANZ Ins Cas 61-232. The issue was not taken on appeal to the High Court: *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 410 – 411, however, it is notable that the majority of that Court described the approach at first instance as being that, "the existence of a bona fide dispute … is not necessarily an answer to the complaint that the insurer has been acting unreasonably": at 410.

244 The approach of Cole J has also been approved in subsequent first instance decisions, including *Hams v CGU Insurance Ltd* (2002) 12 ANZ Ins Cas 61-542 (at 76,363 [27]) and *HIH Casualty & General Insurance v Insurance Australia Ltd (No 2)* (2006) 14 ANZ Ins Cas 61-685 (*HIH Casualty (No 2)*). In the latter decision, Bongiorno J expressed agreement with Cole J's approach and stated (at 75,253):

> Once the court has rejected the insurer's defence to a policyholder's claim, that defence becomes irrelevant as does the fact that the insurer had a *bona fide* belief in its efficacy. To hold otherwise would put a premium on erroneous advice. Taken to its logical extreme, an insurer which relied upon incorrect legal advice or an inadequate report of a loss adjuster to form a belief as to the possibility of its successfully defending a policyholder's claim would be advantaged by having obtained bad legal or loss adjusting advice. The successful policyholder would be correspondingly disadvantaged by the same irrelevant circumstance.

245 In *Sayseng v Kellogg Superannuation Pty Ltd* (2007) 213 FLR 174, Nicholas J further affirmed the correctness of the approach of Cole J. His Honour stated (at 176 – 177 [7]):

> In my opinion it should now be accepted that the correct approach to be taken by the court on this question is that taken by Cole, J in *Bankstown Football Club*. In my assessment, the cases to which I have referred establish that the question of reasonableness is to be judged by reference to the true position in respect of the claim with allowance to be made for the insurer to have a reasonable period of time within which to investigate the claim and to consider its position. The discretionary determination is to be made having regard to the particular circumstances of the case, including the probable issues which require investigation. Under the Act the court is not required to evaluate and pronounce upon the opinion or decision-making process of the insurer. It is not relevant that the insurer acted bona fide in denying the claim, or when the judgment of the court established the insurer's liability to pay it. In short, the award will be calculated on the basis of what the court finds is a reasonable time for completion of the insurer's investigation of the claim. Put another way, in my opinion, the insurer is not automatically liable to pay interest from the day on which it became liable to pay to a person an amount under a contract of insurance. Under s 57(2) liability to pay interest is to be calculated with regard to the day on which it was unreasonable for the insurer to withhold payment of the amount after it had become liable to pay it in response to a claim.

246 Later cases have generally referred with approval to one or more of the approaches of Cole J, Bongiorno J and Nicholas J set out above: see e.g. *McConnell Dowell Middle East LLC v Royal & Sun Alliance Insurance Plc (No 2)* [2009] VSC 49 (*Royal & Sun Alliance*) [42]; *Fitzgerald v CBL Insurance Ltd* [2014] VSC 493 (*Fitzgerald*) [415] – [420]. In *Mutual Community General Insurance Pty Ltd v Khatchmanian* (2013) 17 ANZ Ins Cas 61-974 (*Khatchmanian*), the Victorian Court of Appeal approved the passage from *HIH Casualty (No 2)* set out above and concluded that the primary judge in that case had erred in taking into account the insurer's subjective belief that the insured had committed arson: at 73,482 [42] – [43].

247 The Court of Appeal's approach in *Khatchmanian* of ascertaining the period of investigation justified by the objective circumstances is consistent with the manner in which Beach J described the issue in *Australian Pipe & Tube* [291]. It is also consistent with the underlying purpose ascribed to s 57 in the Explanatory Memorandum and in the ALRC Report. Like more general powers to award interest, the provision is intended to compensate a successful insured for the detriment of being kept out of money to which it is found to have been entitled: *Elders Ltd v Swinbank* (2000) 96 FCR 303 at 312 [32]. That purpose is qualified by the acceptance of the practical need of an insurer for time to determine that it is liable: ALRC Report at 196 – 197 [319].

248 The cases referred to above ultimately establish that what is a reasonable period of time to investigate a claim is a question of fact to be determined objectively by reference to the circumstances of each claim for indemnity which the insurer had to consider: *O'Neill v FSS Trustee Corp* [2015] NSWSC 1248 [29] – [31]. Failed or abandoned defences raised by an insurer in good faith must be ignored in ascertaining that period of time, but the existence of objective circumstances calling for investigation may nevertheless be relevant: *Fitzgerald (No 2)* [22] and the cases there cited. As is explained below, it may also be relevant that the insured failed to provide information reasonably required by the insurer to investigate the claim or that the basis of that claim changed. What is required is a determination of the day on which a reasonable insurer would have paid out the claim on which the insured did succeed, assuming the insurer reached the factual conclusions ultimately found by the court and otherwise adopted the correct view as to its legal position.

249 This conclusion is supported by reference to the insured's general rights under a policy of insurance. The payment of the premium entitles the insured to indemnity upon the sustaining of loss caused by an insured peril and, usually, the making of a claim. As with any contractual right, upon the occurrence of the events giving rise to the right of indemnity the contractual entitlement becomes due, save that it might be expected that the insurer has a sufficient time and information to evaluate the claim. Nevertheless, once the entitlement to payment under the contract arises and is not made, the person so entitled commences to suffer the loss of the use of that money whilst the obligor obtains its benefit. The payment of interest at an appropriate rate by the delaying obligor both disgorges the unjustified benefit received by reason of the improper retention of the funds and restores the payee to its bargained-for position. Neither under the law of contract generally nor insurance law does a mistaken but *bona fide* belief by the obligor that they are not liable to pay the party entitled, alter the actual

rights and obligations between them. In this respect, s 57 operates to ensure that the contractual rights of the insured are fulfilled and the approach adopted by Beach J in *Australian Pipe & Tube* reinforces that.

250 EWT submitted that an insurer's denial of a claim gave rise to an assumption or inference that the time it required to investigate and consider the claim had elapsed by the date of such denial. The authority of *Legal & General Insurance Australia Ltd v Eather* (1986) 6 NSWLR 390 cited in support of that proposition did not concern s 57(2) and is of no assistance in relation to the present issue. Nevertheless, the fact of an insurer's having denied a claim has obvious relevance: see e.g. *Ransley v Chubb Insurance Company of Australia Ltd* [2015] NSWSC 1350 [16]. The highest this can be put is that the fact that an insurer denies a claim whilst possessing the necessary information to make a decision as to indemnity, provides strong inferential support for the conclusion that the reasonable period of time required to consider that information has elapsed by then. However, it is not of itself be conclusive.

Are the circumstances of the present appeals exceptional?

251 In essence, the insurers accepted that *Australian Pipe & Tube* and the earlier cases describe the "ordinary position", but submitted that the exceptional or unique circumstances of these matters make it reasonable for them to continue to withhold payment. The relevant circumstances were most comprehensively stated by Swiss Re in its written submissions as follows:

> a. First, LCAM's claim arises in unique circumstances, which include forming part of an industry test case, advanced with the co-operation of insurers, the Insurance Council of Australia, the Australian Financial Complaints Authority (***AFCA***), and other industry regulators.
>
> b. Secondly, and relatedly, in dealing with the complaint made to it by LCAM in relation to its claim, AFCA agreed to this proceeding being dealt with as a test case (J[1]).
>
> c. Thirdly, LCAM has, over time, changed the basis on which its claim is advanced and is yet to provide Swiss Re with material that would establish the amount to which it would be entitled to receive if cover were available (despite that being a requirement under clause 14.2.1 of the LCAM Policy).
>
> d. Fourthly, to advance the objectives of the test cases, the proceedings were commenced by Swiss Re at an early stage and have been advanced expeditiously, including on appeal, to enable the prompt determination of the issues and any appeals.

252 Those circumstances, and those relied upon by the primary judge (PJ [415]), generally concerned the fact of the litigation of these matters as part of a test case, with the cooperation of the insureds and certain third parties. However, the test case is primarily a vehicle for

litigating the insurers' position for their future guidance. It was not otherwise articulated why the circumstances of the test case had any logical relevance to the issue of reasonableness. In large part, they simply went to demonstrating the bona fides of the insurers' subjective uncertainty as to whether they are liable or belief that they are not liable. The authorities referred to above demonstrate that this underlying feature is not relevant. Far from being exceptional, there is no basis for concluding that the way in which these matters are being litigated is any more relevant to the issue raised by s 57(2) than an insurer's *bona fide* belief as to its liability in relation to an individual claim. The fact that the test case has been advanced with the cooperation of the insureds and third parties does not alter that position, particularly since the insurers have denied their claims. If it was unreasonable for an insurer to withhold payment as from the date on which it denied its insured's claim, it cannot subsequently become reasonable for it to continue to withhold such amount because the insured, amongst others, has agreed to their claim being determined as part of the test case.

253 It is also irrelevant to s 57(2) that an insurer has succeeded at first instance. If that decision is overturned on appeal, it does not reflect the true position against which the question of reasonableness is to be judged: see e.g. *Worth v HDI Global Specialty SE* (2021) 393 ALR 93 (*Worth v HDI Global Specialty*). The reasonableness of an erroneous belief is not relevant to its relevance.

254 The third circumstance identified by Swiss Re may be relevant. In *Fitzgerald*, Sloss J considered a claim for "pre-issue" interest pursuant to s 57 in circumstances where the claim advanced on behalf of beneficiary employees had changed after the issue of proceedings. Having concluded that the claim pursued at trial bore "little resemblance" to the claim either notified to the insurer or pleaded, her Honour rejected the claim for interest: *Fitzgerald* [428], [436], [439]. For reasons parallel to those supporting a reasonable time for an insurer to investigate and consider a claim, that the whole nature of the claim had changed justified a qualification to the general position is sound in principle. The period of time which a reasonable insurer would require to investigate and consider a claim cannot elapse until the claim which ultimately succeeds has actually been advanced or becomes apparent. However, this requires more than amendments to pleadings which do not change the essential nature of the claim: *Royal & Sun Alliance* [45] – [46].

255 The alleged failure to provide information required by the insurer to consider and quantify the amount of a claim is a separate matter but with the same underlying rationale. It may be

relevant that the insured has delayed providing necessary information: see e.g. *Preston v AIA Australia Ltd* [2013] NSWSC 282 [87]. The information which is "necessary" is such information as a reasonable insurer would have required to consider a claim: *Royal & Sun Alliance* [47]; *Triffitt v Australiansuper Pty Ltd* (2007) 214 FLR 407 at 415 [29]. An insurer cannot have reasonably withheld payment merely because the insured had not provided all the information which was ultimately adduced at the final hearing of the matter, nor on the basis that, having had the claim denied, the insured did not subsequently provide information necessary to quantify the amount of the claim: *VL Credits Pty Ltd v Switzerland General Insurance Co Ltd (No 2)* [1991] 2 VR 311 at 320. Instead, it is appropriate to consider when a reasonable insurer would have accepted and quantified the claim, having regard to any actual limitations as to when the necessary information became available: see e.g. *Fitzgerald (No 2)* [23] – [24]. It may also be unreasonable for the insurer to fail to pay its best assessment, from time to time, of the amounts to which the insured is entitled, even if there were other amounts in respect of which a reasonable insurer would not be satisfied the insured was entitled: see e.g. *Kernaghan v Corrections Corp of Australia Staff Superannuation Pty Ltd (No 3)* [2007] FCA 2018 [9].

Conclusion in relation to section 57

256 It follows that the learned primary judge erred in her conclusions, albeit predicated on the assumed position that the insureds were entitled to indemnity, as to the date from when it was unreasonable for the insurers to have withheld payment of any amounts to which the insureds were entitled. Unfortunately, the submissions advanced on appeal do not enable a complete re-examination of that issue in relation to the claim of each appellant insured. Although Swiss Re amongst others advanced the submission that LCAM had changed its claim over time, neither its written nor oral submissions identified the extent to which the claims ultimately advanced at the hearing differed from those which were initially advanced to and rejected by the insurers. Swiss Re also failed to establish that the withholding of any amount to which LCAM was entitled would have been reasonable on the basis that the insured failed to provide information necessary for it to consider and quantify the claim.

257 The fact that an insurer has denied its insured's claim does not give rise to a necessary inference that it became unreasonable as from that date for the insurer to withhold payment of any amounts to which the insured was ultimately found to be entitled. If it were necessary to ascertain such a date, it would be appropriate to invite the parties to provide further submissions

to enable the Court to do so. However, in the circumstances, it is not necessary to do so: apart from the fact that the primary judge answered questions about the issue, the issue is unnecessary to answer in most appeals. The exception is in the Meridian appeal where the insured may be entitled to recover some of its losses and the opportunity for it to do so was left open by the primary judge. In that case the appropriate answer is:

> If Meridian is entitled to cover, further evidence and submissions would be required in relation to interest

258 In relation to the other appeals, subject to variations in the particular questions posed to the Court, the questions relating to the entitlement to interest under s 57 should be answered as follows:

(a) Is the insured entitled to interest?

No.

(b) If yes, from what date?

Unnecessary to answer.

LCA MARRICKVILLE PTY LIMITED V SWISS RE INTERNATIONAL SE – NSD 1079 OF 2021

259 The insured in this matter, LCAM, sought indemnity pursuant to several limbs of a business interruption clause in a policy issued by Swiss Re. Its claim was dismissed at first instance and, on appeal, was confined to an alleged indemnity arising under either a catastrophe clause or a prevention of access clause. Before the primary judge, LCAM had also sought indemnity under a hybrid clause. While no appeal is made in respect of that claim, its existence is acutely relevant to the issues on appeal and, in particular, the proper construction of the catastrophe clause and the prevention of access clause. LCAM's appeal and Swiss Re's cross-appeal also raised more generic issues being, (a) whether, in the assessment of its loss, the insured was required to account for third party payments and benefits which it received and (b) whether the insured was entitled to interest pursuant to s 57 of the *Insurance Contracts Act*.

The relevant facts

260 There was no dispute as to the facts relevant to the issues to be determined by the Court.

261 LCAM is an insured, being an "Additionally Named Insured", under a "Vertex Industrial Special Risks" policy P23089.04-00 placed with Swiss Re (the LCAM policy).

262 It conducts business as a laser therapy clinic offering services such as laser hair removal, cosmetic injectables, and skin treatments from its premises at Marrickville Metro Shopping Centre in the inner west of Sydney. Its premises comprised six treatment rooms, a reception and waiting room, and a storage space. Of the premises' total area of 98 square metres, 77 square metres is open to the public.

263 The LCAM policy comprised a policy schedule with attached Endorsements dated 17 July 2019, and the standard "Vertex Industrial Special Risks 8018" wording dated August 2018. It was issued to LCAM on 17 July 2019, and the period of cover was from 30 June 2019 to 30 June 2020, 4:00 pm local time.

264 In 2020, the New South Wales Government made certain orders which negatively impacted LCAM's business. They were as follows:

(a) on 26 March 2020, the *Public Health (COVID-19 Gatherings) Order (No 2) 2020* (NSW) (NSW Public Health Order (No 2)) came into effect;

(b) on 1 June 2020, the *Public Health (COVID-19 Restrictions on Gathering and Movement) Order (No 3) 2020* (NSW) (NSW Public Health Order (No 3)) came into effect; and

(c) on 7 December 2020, the *Public Health (COVID-19 Restrictions on Gathering and Movement) Order (No 7) 2020* (NSW) (NSW Public Health Order (No 7)) came into effect.

265 LCAM made its claim on the policy on 3 July 2020. Its receipt was acknowledged by Swiss Re on 9 July 2020.

266 On 29 September 2020, Swiss Re declined to indemnify LCAM. LCAM subsequently requested Swiss Re to reverse its declinature, however Swiss Re reaffirmed its determination that the policy did not respond to the claim.

267 On 26 October 2020, LCAM filed a complaint with AFCA in respect of Swiss Re's declinature.

268 Although Swiss Re further considered LCAM's claim for indemnity under its internal dispute resolution review process, it ultimately confirmed its position on 27 November 2020.

Policy wording

269 The structure of the LCAM policy is common to many forms of Industrial Special Risk policies. Section 1 is headed "Property Insurance" which, as the name suggests, is concerned with

property damage and provides cover for damage occurring to the "Property Insured" during the "Period of Insurance", with the indemnity being in the nature of all-risks cover. That is, cover is provided for damage to property, subject to the exclusion of certain items of property identified in cl 5 and the exclusion of certain causes of damage specified in cl 6 (i.e. the "perils" exclusions).

270 Next appears Section 2, headed "Interruption Insurance", which deals with "loss" resulting from the "interruption of or interference with the Business" caused by "Damage" to property occurring during the "Period of Insurance" (cl 9.1.1), and a limited extension which provides cover for "loss" resulting from the "interruption of or interference with the Business" in consequence of certain events occurring during the Period of Insurance which are "deemed to be loss caused by Damage" (cl 9.1.2). It is this clause which is the main subject of disputation.

271 "Damage" is defined in the policy as meaning "physical loss, damage or destruction" and the expression "Property Insured" is defined as meaning:

> all tangible property both real and personal of every kind and description belonging to the **Insured** or for **Damage** to which property the **Insured** is legally responsible or for which the **Insured** has assumed responsibility to insure prior to the occurrence of any **Damage**…
>
> (Original emphasis).

272 By the perils exclusions in cl 6, it is provided that Section 1 does not "cover Damage to any Property Insured caused directly or indirectly by or in connection with or arising from or occasioned through" certain specified matters and, relevantly, cl 6.1.2 specifies:

> any order of any government, public or local authority involving the confiscation, nationalisation, requisition or **Damage** of any property, except acts of destruction at the time and for the purpose of preventing the spread of fire or any other cause not excluded from cover by Clause 6, unless such order involves the demolition of property deemed unsafe following **Damage** not occurring in circumstances which are excluded from cover by Clause 6;
>
> (Original emphasis).

273 However, it is stipulated immediately thereafter that indemnity under Section 1 is extended for:

> …**Damage** caused by the action of a civil authority during a conflagration or other catastrophe for the purpose of retarding same and/or for the reasonable cost of removal of **Property Insured** at the **Situation** for the purpose of preventing or diminishing imminent **Damage** by, or inhibiting the spread of, fire or any other cause not excluded under this **Policy** and for **Damage** resulting from removal carried out in those circumstances.
>
> (Original emphasis).

274 By cl 6.2.4, it is provided that the indemnity in Section 1 of the policy does not cover "Damage to any Property Insured caused by or occasioned through … disease".

275 The insuring clause in relation to business interruption in Section 2 is cl 9.1 which, for present purposes, relevantly provides:

> **9. Extent of Cover**
>
> 9.1 The **Insurer** will indemnify the **Insured** in accordance with the provisions of Clause 10 (Basis of Settlement) against loss resulting from the interruption of or interference with the **Business**, provided the interruption or interference:
>
> 9.1.1 is caused by **Damage** occurring during the **Period of Insurance** to:
>
> 9.1.1.1 any building or any other property or any part thereof used by the **Insured** at the **Situation** for the purposes of the **Business**;
>
> 9.1.1.2 any property belonging to the **Insured** or for **Damage** to which the **Insured** is responsible, while such property is at any storage premises within Australia or at any situation within Australia where the **Insured** has any work or process carried out by others;
>
> …
>
> 9.1.2 is in consequence of:
>
> 9.1.2.1 closure or evacuation of the whole or part of the **Situation** by order of a competent public authority as a result of an outbreak of a notifiable human infectious or contagious disease or bacterial infection or any discovery of an organism likely to result in the occurrence of a notifiable human infectious or contagious disease or consequent upon vermin or pests or defects in the drains and/or sanitary arrangements at the **Situation** but specifically excluding losses arising from or in connection with highly Pathogenic Avian Influenza in Humans or any disease(s) declared to be a listed human disease pursuant to subsection 42(1) of the Biosecurity Act 2015;
>
> 9.1.2.2 murder or suicide or attempted suicide or violent crime or armed robbery occurring at the **Situation**;
>
> 9.1.2.3 injury, illness or disease arising from or likely to arise from or traceable to foreign or injurious matter in food or drink provided from or on the **Situation**;
>
> 9.1.2.4 any of the circumstances set out in Sub-Clauses 9.1.2.1 to 9.1.2.3 (inclusive) occurring within a 5 kilometer radius of the **Situation**;
>
> 9.1.2.5 the action of a civil authority during a conflagration or other catastrophe for the purpose of retarding same;
>
> 9.1.2.6 the action of any lawful authority attempting to avoid or diminish risk to life or **Damage** to property within 5

> kilometres of such **Situation** which prevents or hinders the use of or access to the **Situation** whether any property of the **Insured** shall be the subject of **Damage** or not,
>
> occurring during the **Period of Insurance**. Such events shall be deemed to be loss caused by **Damage** covered by Section 2 of this **Policy**. Furthermore Clauses 12 and 13 shall not apply to the cover provided by this Clause 9.1.2.

(Original emphasis).

276 In these reasons, cl 9.1.2.1 is referred as a "hybrid clause" requiring causation from both the existence of a disease and the conduct of a public authority. Clause 9.1.2.5 is referred to as a "catastrophe clause", and cl 9.1.2.6 is a "prevention of access clause".

277 The word "Situation" is defined by the policy as being:

> the Situation or Situations shown in the **Schedule**. Where the **Situation** specified in the **Schedule** is other than a single address, each separate address at which the **Property Insured** is located shall be one **Situation** for the purposes of this **Policy**, particularly in relation to the **Limit of Liability** and Sub-Limits of Liability.
>
> (Original emphasis).

278 The Schedule specified the "Situation" to be:

> Head Office Units 20 & 21, 39 Herbert St, St Leonards NSW 2065
>
> and elsewhere in Australia including contract sites where the Insured has property or carries on business, has goods or other property stored or being processed or has work done.

279 In the present case, the relevant "Situation" was LCAM's store located at Shop 45, Marrickville Metro Shopping Centre, 20 Smidmore Street, Marrickville NSW 2204.

280 The amounts expressed under the heading "Limit of Liability" in the Schedule were varied by an endorsement which provided:

> The amount(s) set out hereunder represent the Insurer(s) maximum Limit(s) of Liability [sic: for] any one loss or series of losses arising out of any one event at any one Situation used by the Insured, subject to any lesser Limit(s) of Liability specified elsewhere in this Policy. The Policy Limit(s) and Sub Limit(s) are to apply in excess of the relevant deductible(s).
>
> Section 1 & 2 Combined $25,000,000 in respect of the Laser Clinics and Skinstut Head Office - Units 20 & 21, 39 Herbert Street St Leonards NSW 2065;
>
> Section 1 & 2 Combined $10,000,000 in respect of each other locations

281 That "Limit of Liability" was subject to the various sub-limits set out in the Schedule which, relevantly for the issues which were the subject of this appeal, included a sub-limit of $500,000 in the aggregate in respect of a claim under cl 9.1.2.1 (the hybrid clause).

The decision at first instance

282 In order to address the numerous issues raised by the appeal, cross-appeal and notice of contention, it is necessary to reiterate the primary judge's reasons in some detail.

283 As her Honour correctly identified (PJ [201]), the interpretation of contracts and policies of insurance alike requires the Court to consider the words used by the parties in the context of the document as a whole and an attempt should be made to read the document as a coherent and integrated whole. Her Honour recognised that policies may include clauses which have overlapping operation and sometimes potentially inconsistent provisions. It was also observed that, as Allsop CJ said in *Star first instance* (at [166]), "overlap between different clauses of a policy does not require the business person to give meaning to the different clauses to eliminate their overlap with refined precision".

The operation of cll 9.1.2.1 and 9.1.2.4 – the hybrid clause

284 The major issue in relation to LCAM's claim for indemnity under the hybrid clause (cl 9.1.2.1) was the effect of the exclusion relating to losses arising from or in connection with any disease(s) determined to be a listed human disease pursuant to s 42(1) of the *Biosecurity Act*. As to its operation, her Honour held that:

(a) cl 9.1.2.1 distinguishes between a disease which is a notifiable disease (in respect of which there may be cover) and a disease which is a listed human disease under the *Biosecurity Act* (which will be within the exclusion). It was observed (PJ [209]) that the types of diseases capable of being notifiable diseases under the *Public Health Act 2010* (NSW) (*Public Health Act (NSW)*) were far more extensive than those capable of being determined to be listed human diseases under the *Biosecurity Act*;

(b) as matter of construction, the expression "notifiable disease" referred to a "notifiable disease" for the purposes of the *Public Health Act (NSW)* and not a "national notifiable disease" listed under the *National Health Security Act 2007* (Cth) (PJ [210]);

(c) for the purposes of the exclusion, it was not a requirement that the disease in question be determined to be a listed human disease under the *Biosecurity Act* as at the date of the policy's inception and it operated upon diseases determined to be a listed human disease arising during the Period of Insurance (PJ [212] – [213]);

(d) the exclusion applied to an order made as a result of, relevantly, an infectious or contagious disease determined to be a listed human disease under s 42 of the

Biosecurity Act, rather than losses arising directly from the occurrence of the disease (PJ [214] – [215]); and

(e) in the present case, the orders which interrupted LCAM's business each resulted from COVID-19, being a disease that had been determined to be a listed human disease pursuant to the *Biosecurity Act*, with the consequence that the exclusion in cl 9.1.2.1 operated to deny indemnity (PJ [206], [215]).

285 This aspect of her Honour's decision was not subject to any appeal.

***Section 54 of the* Insurance Contracts Act**

286 LCAM also did not appeal from her Honour's determination (PJ [216]ff) that s 54 of the *Insurance Contracts Act* did not apply to the making of determinations under s 42 of the *Biosecurity Act* that a disease is a "listed human disease". It had been submitted that the making of such determinations amounted to "some act of the insured or of some other person", by reason of which the insurer was unable to rely to deny cover. Her Honour's analysis correctly identified that the act of the Director of Human Biosecurity in making legislative instruments, by which diseases were determined to be listed human diseases, were not the acts of a person relevantly connected to or associated with the insured, the insurer, or the LCAM policy which was a necessary element for the operation of s 54.

The effect of exclusion in cl 9.1.2.1 on cll 9.1.2.5 and 9.1.2.6

287 A central issue in the primary judge's decision was the extent to which the exclusion in cl 9.1.2.1 had the consequence of excluding diseases from cover provided by other clauses. Swiss Re had submitted that losses resulting from any disease determined to be a "listed human disease" could not be within the scope of cl 9.1.2.5 (the catastrophe clause) or cl 9.1.2.6 (the prevention of access clause). This was primarily founded upon the proposition that the policy had to be read as a whole so as to give a congruent operation to the insuring promise in cl 9.1.2.1. That clause, it was submitted, was the extent of the parties' agreement as to the basis on which cover would be provided for business interruption consequent upon orders by public authorities in response to disease and should be accorded priority over the more general provisions (cll 9.1.2.5 and 9.1.2.6) which followed. Were it otherwise, cl 9.1.2.1 and the specific $500,000 sub-limit would be rendered substantially redundant or nugatory.

288 Her Honour agreed and concluded (PJ [240]ff) that, reading the policy as a whole, the existence of cl 9.1.2.1 had the consequence that other clauses did not apply to losses arising from or in

connection with diseases within the scope of the exclusion, being those declared to be listed human diseases under the *Biosecurity Act*. Her reasons for that conclusion were as follows:

(1) Clauses 9.1.2.1 and cl 9.1.2.4 (which extends the scope of cl 9.1.2.1) exclusively provide for loss as a result of an outbreak of a notifiable human infectious or contagious disease or bacterial infection or a discovery of an organism likely to result in the occurrence of a notifiable human infectious or contagious disease (in circumstances where cl 9.1.2.3 does not apply) (PJ [241]). Although the cover in cl 9.1.2.3 was of a different nature from that in cl 9.1.2.1, it was possible that occasions might exist where the cover overlapped or where losses excluded from cl 9.1.2.1 were within cl 9.1.2.3.

(2) Whilst cll 9.1.2.5 and 9.1.2.6 generally deal with the same subject matter as cll 9.1.2.1 and 9.1.2.4, in that they all cover loss resulting from the actions of an authority, it is cl 9.1.2.1 which operates in respect of the actions of a public authority consequent upon the outbreak of the specified types of disease (PJ [242]). The broader cl 9.1.2.5, if construed as being capable of applying in relation to disease, would be inconsistent with the specific provision of cl 9.1.2.1 because it would not:

    (a) be confined to notifiable diseases;

    (b) require an order of a public authority;

    (c) require the order to involve closure or evacuation of the whole or part of the Situation;

    (d) exclude "Highly Pathogenic Avian Influenza in Humans" or any disease determined to be a listed human disease pursuant to s 42(1) of the *Biosecurity Act*; or

    (e) be subject to a sub-limit on liability in aggregate of $500,000.

(3) The same conclusion applied to cl 9.1.2.6 for similar reasons (PJ [243]).

(4) Further, were cl 9.1.2.5 and 9.1.2.6 to apply to diseases, they would expunge the careful distinction drawn in cl 9.1.2.1 between notifiable diseases and listed human diseases as well as the requirement for an order of a competent public authority requiring closure or evacuation of a premises (PJ [244]). These matters would render the inconsistency between the provisions to be profound and would not result in a reasonable or commercial operation of that part of the policy.

(5) It was also important to recognise that, as cl 9.1.2.1 applied to an authority responding to an outbreak of disease and cl 9.1.2.6 applied to a *risk* to life, the latter had a

potentially wider field of operation when it came to actions by an authority as a result of a disease (PJ [245]). However, if the latter did apply to a risk to life from a disease, the incongruities referred to above would remain. Further, as cl 9.1.2.6 would operate where there was a mere risk of an outbreak of a disease, it would mean the authority's actions in relation to a risk of disease would have a greater impact than would a perceived actual outbreak of disease.

289 Her Honour further noted (PJ [246]) that, as a matter of construction, cl 9.1.2 was a compendious and structured provision rather than having the appearance of a patchwork of "bolted on" provisions. This indicated that the relevant sub-clauses should have a consistent and coherent application and negated the suggestion that cll 9.1.2.5 and 9.1.2.6 were applicable to the actions of an authority in respect of a disease which would have the consequence that the limitations in cll 9.1.2.1 or 9.1.2.3 could be circumvented. As a result, cll 9.1.2.5 and 9.1.2.6 ought to be construed as not extending to the subject matter covered by cll 9.1.2.1 and 9.1.2.3.

290 Her Honour rejected LCAM's arguments to the contrary (PJ [247]) because:

(a) the existence of the exclusion in cl 9.1.2.1 in relation to listed human diseases was, of itself, sufficient to indicate that cll 9.1.2.5 and 9.1.2.6 were not intended by the parties to apply to diseases;

(b) the existence of the sub-limit on liability for diseases also indicated that to be so;

(c) cl 9.1.2.3 is specific and self-contained and operates according to its terms;

(d) cl 9.1.2.1 is more specific than cll 9.1.2.5 and 9.1.2.6;

(e) whilst there can be an overlap between cll 9.1.2.1 and 9.1.2.3, that is not possible with respect to cll 9.1.2.5 and 9.1.2.6 on the one hand and cl 9.1.2.1 on the other;

(f) the interpretative presumption (arising from giving precedence to specific clauses over more general ones) is not weak; and

(g) the insured peril in cl 9.1.2.1 identifies the extent to which cover is provided for disease other than in cl 9.1.2.3, being a notifiable disease resulting in an order as described but not within the exclusion.

291 Her Honour seemed to accept (PJ [248]) that in the process of construction there is a difference between, on the one hand, mere tautology or redundancy which is common in insurance policies and legal documents of all kinds: *Beaufort Developments (NI) Ltd v Gilbert-Ash NI*

Ltd [1999] 1 AC 266 at 274; and, on the other, incoherence and incongruence. In this matter, the construction advanced by LCAM would result in there being a profound incoherence and incongruence in the policy and, given its careful structuring, that could not have been intended. Indeed, her Honour reached the conclusion (PJ [251]) that reading cll 9.1.2.5 and 9.1.2.6 as applying to diseases would, given the text, context and purpose of the policy, result in commercial absurdity. That conclusion did not depend on LCAM's preferred construction giving the clauses an overlapping operation, but depended on that construction rendering the relevant clauses incongruent (PJ [252]).

292 As a result, her Honour concluded that if the LCAM policy responded to the circumstances at all, it would be via cl 9.1.2.1 (as expanded by cl 9.1.2.4) or cl 9.1.2.3 (PJ [253]).

293 Her Honour added the additional justification for her construction that the hybrid clauses, including that in the LCAM policy, require a "closure or evacuation" of premises or situations in the case of an order resulting from a human infectious or contagious disease (PJ [254] – [255]). Her Honour observed that this requirement made commercial sense because it reflected the intention that persons who would otherwise ordinarily be entitled to enter and remain on the premises are precluded from doing so, thereby achieving the object of restricting the spread of the disease. Conversely, the mere prevention or restriction of access to premises consequent upon damage or threat or risk of damage to persons or properties was logical. The damage or threat of damage contemplated is not of a kind that would spread, such as a human infectious or contagious disease, with the result being that the appropriate measure is the prevention of persons accessing the premises. The awkwardness of the concept of "damage or threat of damage to persons" applying to the risk presented by disease further suggests that the contemplated damage or risk involves physical injury or death, not the kind of harm which might result from disease.

The operation of cll 9.1.2.1 and 9.1.2.4

294 Her Honour construed the words "at the Situation" in cl 9.1.2.1 to qualify "outbreak of a notifiable human infectious or contagious disease" and the entire expression, "discovery of an organism likely to result in the occurrence of a notifiable human infectious or contagious disease" and not merely the words, "discovery of an organism" (PJ [256]). It follows that, if an organism was discovered, whether or not "at the Situation", and was likely to result in the occurrence of a notifiable human disease or contagious disease "at the Situation" (or, under cl 9.1.2.4, within five kilometres of the situation), the clause would be triggered.

295 Her Honour then considered (PJ [258]ff) the issue of whether any of the orders which were made and which resulted in the interruption of or interference with LCAM's business were the result of an "outbreak of a notifiable human infectious or contagious disease" or the "discovery of an organism likely to result in the occurrence of a notifiable human infectious or contagious disease" at or within a five kilometre radius around the Situation. Of particular concern was the issue of whether an insured would be required to identify and establish those matters which actuated the making of the orders or would be entitled to rely upon the recitations on the face of the orders.

296 In accordance with the reasoning in the early part of her judgment, her Honour concluded (PJ [261] – [262]) that clauses of this nature operated such that if, on the face of an instrument, an explanation was provided as to the reason for its making, there would need to be a good reason to attempt to go behind it for the purposes of ascertaining some additional or alternative foundation. Such an occasion would rarely arise and it is unlikely that any relevant evidence could be suitably obtained. On this basis, her Honour held (PJ [263]) that the insured was not required to objectively prove the existence of the relevant disease in order for a provision such as cl 9.1.2.1 to operate. The question of its actual existence was said to be mediated through the authority's order in that the only relevant objective facts were the existence of the order and whether it resulted from the specified circumstances. In this way, an authority might issue an order in the mistaken belief of an outbreak, but the requirements of cl 9.1.2.1 may nevertheless be satisfied. This construction, her Honour held (PJ [267]), made far more commercial sense than requiring the parties to ascertain and potentially dispute the existence or non-existence of the identified circumstances, including by reference to matters that were not known or considered by the authority. As her Honour observed (PJ [268]), the parties had evinced a common intention that the objective actions of the authority determined the availability of cover and that they were "stuck with the actions of the authority taken in the circumstances known to the authority at the time as the determinant of cover".

297 Returning to the essential issue of whether the orders causing the closure or evacuation resulted from the specified circumstances, her Honour held (PJ [270]) that the starting point in most cases must be the terms of the orders made and any accompanying contemporaneous explanatory material. After examining the several orders made pursuant to s 7 of the *Public Health Act (NSW)*, none were capable of being seen as resulting from anything happening at or within a five kilometre radius of the insured Situation. Rather, they were all based on the Minister's concern as to the public health risk that COVID-19 presented to the State of New

South Wales as a whole (PJ [275]). To have concluded otherwise would have rendered the required causal connection between the orders and the five kilometre radius around the Situation to be meaningless. On a textual approach, the orders were not the result of an outbreak of a disease at or within five kilometres of the Situation or the discovery of an organism likely to result in an occurrence of the disease within that area. The circumstances within the radius were not a proximate or any other kind of cause of any of the orders (PJ [279]). Further, proof that there were cases of COVID-19 within the five kilometre radius did not prove that the orders resulted from an outbreak or occurrence of that disease in that area. Although a different approach had been adopted in *FCA v Arch* and *Hyper Trust (No 1)* (PJ [281] – [282]), the insured peril in cl 9.1.2.1 was an order made consequent upon the fact of an outbreak or discovery of an organism, rather than the risk or threat of COVID-19. Further, on the evidence, there was nothing to suggest that the orders were in response to anything which had occurred within the five kilometre radius.

298 Her Honour then went on to consider whether there was an "outbreak" of COVID-19 within the five kilometre radius which might have caused the making of the public health orders. She concluded (PJ [287]) that cl 9.1.2.1 treated the word "outbreak" as being synonymous with "occurrence", being an "event" of such a disease and "something which happens at a particular time, at a particular place, in a particular way": *Axa Reinsurance (UK) plc v Field* [1996] 1 WLR 1026 at 1035. However, her Honour was construing the word "outbreak" in the context of 9.1.2.1 and had recognised that the concept of "outbreak" was disease dependent. In this respect, if the question was whether there was an outbreak of COVID-19, her Honour concluded, in accordance with the reasons referred to previously, that those circumstances would be satisfied by the presence of a person within the community (being a non-controlled setting) with the disease. After considering the evidence adduced by the parties, her Honour concluded that there was nothing capable of supporting a rational inference that, at the relevant times, there was any person with COVID-19 in a non-controlled setting and capable of transmitting that disease within the relevant radius. Therefore, even if the clause was conditioned upon there being an actual outbreak, as opposed to the authority's perception, there was no such outbreak (PJ [310], [314]).

Closure or evacuation by order

299 Her Honour then considered the meaning of the expression "closure or evacuation" and rejected Swiss Re's submission that those words required that the Situation be unable to be accessed or

occupied in any way (PJ [317]). At the very least, the inability to access part of the Situation would satisfy the requirement. Whether a restriction imposed by an order is capable of constituting a closure of the whole or part of the Situation will depend upon the nature of the restriction imposed, the nature of the premises, and the nature of the business being conducted (PJ [318]).

300 In LCAM's case, its business required access by the public for beauty treatment. That Situation could be closed (and was closed) by an order which in substance prevented the public from accessing the business premises (PJ [319]): cf. *Cat Media Pty Ltd v Allianz Australia Insurance Ltd* (2006) 14 ANZ Ins Cas 61-700 at 75,433 [59] – [60] (*Cat Media*). As her Honour noted, the NSW Public Health Order (No 2) required the business premises to be closed to the public which necessarily involved the closure of the Situation (PJ [320]). That conclusion did not change even though a person or persons might still access the office component of the Situation.

301 Her Honour then concluded (PJ [321] – [326]) that it was not until LCAM was entitled to admit members of the public (albeit restricted in number) to its premises for treatment that it could be said that they were not subject to closure.

Conclusions as to cl 9.1.2.1

302 Consequent upon the above conclusions, the primary judge held (PJ [327]) that the exclusion in cl 9.1.2.1 applied such that no cover was provided by that clause either by itself or as expanded by cl 9.1.2.4. Moreover, it was apparent from the face of the NSW Public Health Orders that they did not result from an outbreak of a notifiable human infectious or contagious disease either at the Situation or within five kilometres of it, or the discovery of an organism likely to result in the occurrence of such a disease within five kilometres of the Situation (PJ [328]). It was further held that there was no evidence that there was an outbreak of a relevant disease within the radial area or a discovery of an organism likely to result in an occurrence of a relevant disease within that area, as required by the clause (PJ [329]). Even if such an event might be identified, it would not satisfy the requirement that the order or orders resulted from that fact.

303 As noted earlier, there was no appeal from the learned primary judge's conclusions in relation to the operation of cl 9.1.2.1 either by itself or together with cl 9.1.2.4. However, it was necessary to describe her reasons relating to it in detail given the reliance on its systematic and detailed character as having a major influence on the construction of the other parts of cl 9.1.2.

Clause 9.1.2.5 – the catastrophe clause

304 Her Honour then addressed cl 9.1.2.5 (the catastrophe clause) and immediately observed that, if her conclusion that this clause could not apply to the actions of an authority relating to a disease (by reason of the existence of cll 9.1.2.1, 9.1.2.3 and 9.1.2.4) was wrong, then, in any event, it has nothing to do with disease (PJ [332]). This observation was relied upon by LCAM on appeal as indicating the existence of some error in the primary judge's reasons on the basis that her conclusion was based only upon the observation that the earlier clauses "covered the field" in relation to disease. That submission should be rejected. As is apparent from her Honour's reasons (PJ [333], [337]), the additional conclusion that cl 9.1.2.5 would not apply to diseases was based upon the determinations that:

(a) the words "conflagration or other catastrophe" and "retarding" suggested the existence of a physical event like a conflagration, being a "large and destructive fire";

(b) the catastrophe must be an "other catastrophe" and "retarding" means slowing, delaying, hindering or impeding; and

(c) the linking of "other catastrophe" with "conflagration" indicates that the "other catastrophe" is to be of a kind similar to a conflagration which involves a physical event. In effect, this meant that the maxim *noscitur a sociis* had some relevance.

305 Her Honour also observed (PJ [338]) that, if she was in error about such matters, then the catastrophe clause did respond in the circumstances of the present case. The primary reason for this conclusion was that "the catastrophe of the COVID-19 pandemic started in Australia by no later than 20 March 2020 when Australia closed its borders to all non-citizens and non-residents" (PJ [339]).

Clause 9.1.2.6 – the prevention of access clause

306 The learned primary judge had earlier concluded that the prevention of access clause did not apply to the actions of an authority consequent upon the existence of a disease (by reason of cll 9.1.2.1, 9.1.2.3 and 9.1.2.4). Like the catastrophe clause, her Honour considered that, if she were in error about that, then the prevention of access clause nevertheless had nothing to do with diseases (PJ [342]). Again, LCAM relies upon this conclusion as being in error as it was said to be based solely on the proposition that prior clauses had "covered the field".

307 Her Honour identified (PJ [343]) that the actions of the authority required by cl 9.1.2.6 must be to avoid or diminish risk to life within five kilometres of the Situation and that those actions

must prevent or hinder the use of or access to the Situation. Her Honour relied upon her earlier conclusions as to the operation of the hybrid clause when concluding that this requirement was not satisfied for the prevention of access clause either.

308 However, her Honour observed (PJ [344]) that were she in error about that, she would have accepted that the making of the orders constituted actions of a lawful authority attempting to avoid or diminish risk to life within five kilometres of the situation. In doing so, she rejected the submission that there needed to be a demonstrable risk to life or "Damage" to "Property" within the relevant limited geographical area or that the relevant action must be targeted to reducing that particular risk. In effect, there was no requirement in the clause that the action must result from the perceived existence of a risk within the five kilometre radial area. Moreover, if the action in question could reasonably be described as an attempt to avoid or diminish such a risk, it was irrelevant that it was also capable of being described as an attempt to avoid or diminish risk to life outside of that area. In that respect, the geographical requirement in cl 9.1.2.6 differed from that in cll 9.1.2.1 and 9.1.2.3.

309 Her Honour then concluded (PJ [346]) that the making of the NSW Public Health Orders by their terms was an attempt to avoid or diminish the risk to life in each and every part of New South Wales and that the threat or risk to each and every life in New South Wales was a proximate or equally effective cause of the making of the orders.

310 Her Honour further observed (PJ [350]) that there was no inconsistency between her approaches to cl 9.1.2.1 and cl 9.1.2.6 because, in the former, the order must result from the specified existing circumstances within the five kilometre radius and, in the latter, the action need not be the result of existing circumstances within that locality, but merely be an attempt to avoid or diminish risk of life there. It was further concluded that the NSW Public Health Order (No 2) prevented and hindered the use of and access to the Situation and that subsequent orders might possibly have hindered the use of the Situation by imposing limits on the number of persons who might be there (PJ [351]). It was observed by her Honour that evidence was required to demonstrate that a hindrance or interference had in fact occurred.

Causation and adjustment

311 On the assumption that the foregoing conclusions as to whether the policy responded to the circumstances had been in error, her Honour then considered the arguments relating to causation and adjustment of claims.

312 First, her Honour rejected Swiss Re's contention that, even if an insured peril was established to be a proximate cause of the loss, the "trends clause" operated to require the quantification of loss to be adjusted to provide for the fact that the existence of COVID in the community would have prevented LCAM from trading in any event (PJ [379]). In doing so, her Honour adopted the approach of Lords Hamblen and Leggatt JJSC in *FCA v Arch* to the effect that the trends clause did not require an adjustment for the consequences of an underlying fortuity which was the same fortuity from which the insured peril arose. Her Honour rejected the suggestion that the trends clause could be construed as requiring an adjustment for circumstances involving the same cause of loss as the insured peril. This was because the trends clause could not be taken to have intended that the same underlying cause of insured and uninsured loss would be a circumstance within it. The fact that the trends clause used the expression "but for" was not sufficient to displace the reasoning in *FCA v Arch*. On the other hand, her Honour recognised (PJ [380]) that such a construction depended upon the nature of the insured peril in that, if there was not sufficient symmetry between it and "all effects of COVID-19 generally", the uninsured circumstances would need to be taken into account in the application of the trends clause.

Basis of settlement – amounts saved

313 The primary judge then considered whether certain payments and financial relief that LCAM received from third parties would need to be deducted in calculating the amount that it could recover under the policy, on the assumption that her earlier conclusions about cll 9.1.2.1, 9.1.2.5 and 9.1.2.6 were wrong. In particular, the primary judge considered whether the third party payments and relief would be deducted, either as a "sum saved" pursuant to cl 10.1.3 of the LCAM policy, or under general principles applicable to contracts of indemnity. There were several different types of third party payments and relief, namely: (a) JobKeeper payments; (b) NSW Government grants; (c) rental waiver from a landlord; and (d) franchisor relief (see PJ [383] – [412]). The primary judge held that the savings resulting from JobKeeper and the rental waiver from the landlord had to be accounted for under cl 10.1.3 or general principles of indemnity (PJ [417], [420(5)]). It was further held that the franchisor relief had to be accounted for under cl 10.1.3 (PJ [413]). In relation to the NSW Government grants, her Honour held that these were act of grace payments and did not need to be taken into account (PJ [408]).

Interest pursuant to s 57 of the Insurance Contracts Act

314 As discussed previously, her Honour concluded (PJ [415]) that it was not unreasonable in the circumstances for Swiss Re to withhold payment of any amount to which LCAM was entitled pending the resolution of these proceedings, including any final determination on appeal. It followed that interest pursuant to s 57 of the *Insurance Contracts Act* would not be payable in respect of any earlier period. Necessarily, the significance of this conclusion depended on her Honour being incorrect in much of her earlier analysis.

Answers to questions and relief

315 The learned primary judge's reasons record her answers to a series of questions posed by the parties in relation to the operation of the LCAM policy (PJ [356] – [362], [416] – [418]). Some, however, did not need to be answered by reason of the conclusions reached. As further evidence could not affect those conclusions, her Honour subsequently made a declaration to the effect that Swiss Re was not liable to indemnify LCAM in respect of its claim.

The appeals

316 LCAM's appeal from the learned primary judge's decision relates to a number of the questions answered by the primary judge as well as the declaration as to liability. In summary, the grounds of appeal were that the primary judge had erred in:

(a) finding that the catastrophe clause (cl 9.1.2.5) and prevention of access clause (cl 9.1.2.6) were incapable of being engaged in the case of disease (Ground 1);

(b) concluding that the expression "other catastrophe" in cl 9.1.2.5 meant a physical event requiring physical action to be retarded and did not include a pandemic of disease (Ground 2);

(c) finding that Swiss Re was not obliged to indemnify LCAM pursuant to cl 9.1.2.6 (Ground 3);

(d) finding that payments received under the JobKeeper scheme should be deducted from any amount payable to LCAM pursuant to the policy and, in particular, ought to have resolved that question by reference to the construction and application of the policy terms rather than any general law principle of indemnity (Ground 4); and

(e) failing to find that, on any amounts for which Swiss Re was obliged to pay to LCAM, it was obliged to pay interest pursuant to s 57 of the *Insurance Contracts Act* from the date on which it denied indemnity (Ground 5).

317 Swiss Re filed a notice of contention in LCAM's appeal by which it sought to uphold the first instance judgment in certain respects, albeit on different grounds. First, it was asserted that if COVID-19 amounted to a "catastrophe" within the meaning of cl 9.1.2.5, it ought to have been concluded that there was no catastrophe as at the date on which the NSW Public Health Order (No 2) came into force. Secondly, that if cl 9.1.2.6 otherwise responded to the claim, the orders relied upon by LCAM did not constitute an attempt to avoid or diminish risk to life within five kilometres of the Situation. Thirdly, that access to or use of the Situation was not prevented or hindered by the NSW Public Health Orders of 1 and 13 June 2020.

318 By a notice of cross-appeal, Swiss Re appealed from a number of matters arising from the primary judge's decision. It is relevant to note from the outset that some of those matters concerned the operation of cl 9.1.2.1 despite the primary judge's rejection of that clause as a foundation of any liability of Swiss Re to indemnify LCAM and the latter not appealing from that finding. Otherwise, by its cross-appeal Swiss Re challenged the primary judge's answers to certain of the questions which had been posed to her.

319 In summary, the grounds of the cross-appeal were that the primary judge erred in:

(a) concluding that, if clll 9.1.2.1 and 9.1.2.4 (the hybrid clause) otherwise responded to the claim, that a case of active (i.e. infectious) COVID-19 in the community (i.e. in a non-controlled setting) constituted an "outbreak" for the purposes of the hybrid clause (Ground 1);

(b) determining that, if COVID-19 was a "catastrophe" within the meaning of cl 9.1.2.5 (the catastrophe clause) and that clause otherwise responded, then that catastrophe started in Australia by no later than 20 March 2020 (Ground 2);

(c) holding that cl 9.1.2.6 (the prevention of access clause), if it otherwise responded, would respond to the orders of the NSW Government as being an attempt to avoid or diminish a risk to life within five kilometres of the Situation (Ground 3);

(d) failing to conclude that access to or use of the Situation had not been prevented or hindered from 1 June 2020 onwards (Ground 4);

(e) finding that, for the purposes of clll 8 and 10, no adjustments should be made for the existence and risk of COVID-19 in New South Wales (Ground 5); and

(f) holding that amounts received by LCAM pursuant to the NSW "Small Business COVID-19 Support Grant" and "Small Business COVID-19 Recovery Grant" schemes would not have to be accounted for in assessing loss (Ground 6).

LCAM's appeal

The scope of cll 9.1.2.5 and 9.1.2.6 – Appeal, Ground 1

320 This first ground of appeal was, in substance, that full force and effect should be accorded to the words of cll 9.1.2.5 and 9.1.2.6 in which case they would respond to LCAM's claim, notwithstanding that a claim for indemnity under cll 9.1.2.1 or 9.1.2.4 would fail as a result of the exclusion in respect of diseases determined to be listed human diseases under the *Biosecurity Act*. Although by its submissions LCAM may be taken as having accepted that a contextual approach to the policy's interpretation was required, in the application of that approach it sought to substantially limit the impact of the operation of other clauses on the construction of cll 9.1.2.5 and 9.1.2.6. As discussed in the preliminary part of these reasons, an important part of construing a policy as a whole is reconciling the respective operative effects of its provisions.

321 As framed, LCAM's submission as to the basis of the primary judge's determination in relation to this issue is slightly misstated. The essence of her Honour's reasoning was that, whilst each of cll 9.1.2.1, 9.1.2.5 and 9.1.2.6 is concerned with the actions of an authority which adversely impact upon the insured's business at the Situation, only the former clause relates to any actions consequent upon the occurrence of a disease. Further, as cl 9.1.2.1 limits the types of disease which might cause relevant action by an authority and the extent of indemnity under that clause is limited, it would result in profound incongruence were the consequences of an authority's conduct resulting from the occurrence of a disease to be alternatively covered under cll 9.1.2.5 and 9.1.2.6.

322 Before dealing with LCAM's submissions on appeal, it is important to keep in mind the following matters which give context to the issues to be considered. First, LCAM's submissions were advanced in the absence of any detailed consideration of the operation of cl 9.1.2.1, largely due to the absence of any appeal in relation to the primary judge's determination that no cover was available under that clause. As identified previously, her Honour had carefully considered the clause's operation (PJ [200]ff) and especially the exclusion in respect of diseases determined to be listed human diseases under the *Biosecurity Act*. On the assumption that the exclusion did not apply, her Honour also dealt with particular aspects of the clause concerning whether there had been a "closure or evacuation" of the insured premises (PJ [316] – [326]), and whether any such closure was the result of an "outbreak" of disease or the discovery of an organism likely to result in a relevant occurrence (PJ [258] – [315]). The

point to be made here is that the primary judge's analysis of cl 9.1.2.1 demonstrated it to be a comprehensive provision dealing with the consequences of a governmental authority's response to an outbreak of specific diseases, which imposed limitations on the circumstances in which cover would arise, and specifically excluded losses arising from significant diseases, some of which are likely to result in pandemic or pandemic-like circumstances. It is in that light that LCAM's submissions need to be considered and, in particular, because if they are correct, they would have the necessary consequence of rendering the limitations and exclusions of cl 9.1.2.1 nugatory.

323 The second matter to keep in mind is that LCAM's position is that, notwithstanding that its claim was for loss in consequence of an authority's response in connection with a "listed human disease" which engaged the specific exclusion in cl 9.1.2.1, the parties should nevertheless be taken as intending that the claim might be covered by an associated extension. With respect, that would result in the more general clause (cl 9.1.2.6) effectively excluding the operation of the more specific (cl 9.1.2.1). The latter is explicitly directed to the occurrence of a disease by identifying the types of disease which might attract coverage (being notifiable human infectious or contagious disease or bacterial infection), and expressly excluding those in respect of which coverage will not extend (including listed diseases under the *Biosecurity Act*). By it the parties have carefully identified the nature and extent to which coverage will be provided consequent upon the occurrence of a disease. Conversely, cl 9.1.2.6 is broader and directed to the consequences of any type of event which might give rise to a risk to life or Damage to property. Whilst it contains geographical limits relating to the occurrence of the place in respect of which the relevant risk is to occur, the nature of the cause of the risk is untrammelled.

324 For the reasons given previously, LCAM's submissions cannot be accepted. Ultimately, they do not lead to a construction which results in a coherent or congruent operation of the policy as does the construction reached by the learned trial judge. That is sufficient for the purposes of disposing of LCAM's appeal as no error was demonstrated in the primary judge's identification or application of those principles of construction. Further, as Swiss Re submitted, LCAM's submissions did not seek to attack the primary judge's constructional analysis in this respect. That is, perhaps, unsurprising given that her Honour adopted an entirely orthodox approach by seeking to ascertain the manner in which the several clauses might each have a relevantly consistent operation. She sought to ascertain whether cll 9.1.2.5 and 9.1.2.6 could apply to losses arising from or in connection with the actions of an authority consequent upon disease, but concluded that they could not as cl 9.1.2.1 (as expanded by

cl 9.1.2.4) operated in such circumstances (where cl 9.1.2.3 (relating to diseases traceable to food or drink) was not applicable). Whilst, on the ordinary meaning of its terms, cl 9.1.2.5 and 9.1.2.6 might extend to cover the actions of a governmental authority in response to a disease, it is cl 9.1.2.1 which provides the only available cover for loss consequential upon the action of an authority as a result of any outbreak of a notifiable disease.

325 If LCAM's submissions were to be accepted, it would have profound consequences for the policy's operation in relation to the actions of authorities responding to a disease. First, it would negate the restrictions in cl 9.1.2.1 as to the type of diseases which might result in an indemnified loss. It would extend the types of diseases in respect of which the policy responds in that recovery would not be limited to notifiable human infectious or contagious diseases or the discovery of organisms likely to result in them. Similarly, the specific exclusions would be by-passed in that, whilst the consequences of Pathogenic Avian Influenza in humans and diseases determined to be listed human diseases pursuant to s 42(1) of the *Biosecurity Act* are excluded from the cover provided by cl 9.1.2.1, LCAM would be able to recover in respect of any interruption flowing from them under cl 9.1.2.5. It was not explained why the parties would have intended such a result. Further, under cl 9.1.2.1, the scope of losses flowing from the occurrence of a notifiable disease is limited to the consequences which flow from the actions of a public authority making orders, whereas if cl 9.1.2.5 accorded the scope contended for by LCAM, the indemnified loss would extend to that caused by any actions of a civil authority. Again, no coherent reason was advanced as to why the requirement in the former clause that limits cover to the consequences of the making of orders by an authority, should be avoided by reference to that latter clause. A similar comment can be made in relation to the requirement in cl 9.1.2.1 that the authority's orders result in a closure or evacuation of the premises. On the wide construction of cl 9.1.2.5 advanced, that necessity is also rendered irrelevant. It would also have the additional consequences that the geographical limitations in cl 9.1.2.1 (as expanded by cl 9.1.2.4) would be avoided, as would the sub-limit on the insurer's liability of $500,000.

326 The same anomalies would arise were cl 9.1.2.6 to be construed to apply to an authority's response to disease and, although this clause applies in relation to the actions in response to a *risk* to life rather than an outbreak of disease and is therefore potentially much broader, that provides no justification for allowing it to effectively negate the requirements and limitations of cl 9.1.2.1. As the primary judge reasoned (PJ [245]), there is no logical reason for the parties

to have intended that losses arising from government action as a result of a perceived risk of disease should be more extensive than those resulting from action in response to an outbreak.

327 Apart from the above conclusion that, in order to give the policy coherence and its provisions appropriate operative effect, cll 9.1.2.5 and 9.1.2.6 could not apply to disease, the primary judge also concluded that cl 9.1.2 imposed a confined and structured approach to the extension of cover. This was not a case where it might be thought that the individual extensions were accumulated in the policy without any thought as to the manner in which they would interrelate. "Bolted on" is the expression used to denote the aggregation of provisions in that way. Here, cl 9.1 adopts a methodical and logical structure. It divides loss resulting from business interruption between that consequent upon physical damage to property of the insured (cl 9.1.1), and losses from the other causes stated in cl 9.1.2. In the latter, cll 9.1.2.1 and 9.1.2.4 are concerned with the consequences of an authority's action in response to a disease resulting in loss from business interruption and cl 9.1.2.2 applies in relation to the specific events of murder and suicide and serious crimes occurring at the Situation. Clause 9.1.2.3 concerns losses arising from the occurrence of diseases contracted through food or drink. Otherwise, cll 9.1.2.5 and 9.1.2.6 have their spheres of operation in relation to the consequences of the actions of civil authorities in respect of the stipulated matters. This structure of cl 9.1 strongly supports the inference that the several subclauses were intended to have independent spheres of operation. It also supports the conclusion that the more specific clauses such as cll 9.1.2.1 – 9.1.2.4 were intended to apply to the circumstances contemplated by them to the exclusion of the more general clauses such as cll 9.1.2.5 and 9.1.2.6.

328 Before this Court, as it did before the primary judge, LCAM submitted that the relevantly specified actions of the authorities, as well as the reasons for them as referenced in the several clauses, differed thereby giving them distinct fields of operation such that the broader clauses should not be read down. However, that difference is a distinction without any relevant meaning in this context. The short point is that if cll 9.1.2.5 and 9.1.2.6 applied to cover for losses consequent upon the actions of authorities due to the existence of notifiable human infectious or contagious diseases, the limits and restrictions on the cover intentionally imposed by cl 9.1.2.1 would effectively be rendered inefficacious for the reasons identified above.

329 It follows that the primary judge was correct to reject the submission that it was not necessary to read down cll 9.1.2.5 and 9.1.2.6 by reason of the existence of mere tautology or redundancy in the policy of the kind referred to in *Teele v Federal Commissioner of Taxation* (1940) 63

CLR 201 at 207. Quite rightly, her Honour identified (PJ [244], [251]) that, if the policy were construed as suggested by LCAM, it would result in profound incoherence and incongruence and construing cll 9.1.2.5 and 9.1.2.6 as applying to diseases would produce commercially absurd results.

330 Neither her Honour's reasons nor conclusions were shown to have contained any error. Indeed, they were entirely correct and in accordance with well-established principles of contractual interpretation.

331 LCAM also submitted that the primary judge's conclusion as to the scope of cll 9.1.2.5 and 9.1.2.6 was in error because it "sacrifices the ordinary meaning of the language used by the parties", by reading down more general clauses by reference to the more specific hybrid clause (cl 9.1.2.1). There are a number of responses to that submission. First, the primary judge's approach was to consider the subclauses of cl 9.1.2 together and give each appropriate meaning and operative scope, and it was that analysis which disclosed that cll 9.1.2.5 and 9.1.2.6 did not apply in circumstances where the existence of disease resulted in action by an authority. Secondly, even if it were the case that, on the natural reading of cll 9.1.2.5 and 9.1.2.6 they might apply in relation to government action in response to the existence of disease, there is no error in reading them so as to give other and more specific clauses operative effect. It is the consequential impact on the operation of other clauses which provides the occasion for the application of the principle which requires reading clauses in the context of the agreement as a whole so as to permit both a congruent and coherent operation of the policy and the efficacious operation of all provisions. As the authorities referred to earlier in these reasons establish, where possible, effect should be given to every part of an agreement and none should be treated as redundant. This principle was referred to by the New South Wales Court of Appeal in *XL Insurance v BNY Trust Company* as follows (at [72]):

> The applicable principles with respect to redundancy of words in a contract were summarised by Ball J in *AFC Holdings Pty Ltd v Shiprock Holdings Pty Ltd* [2010] NSWSC 985; (2010) 15 BPR 28,199 at [13], as follows:
>
> > The general principle is that the words of a contract should be interpreted in a way which gives them an effect rather than a way in which makes them redundant: *North v Marina* [2003] NSWSC 64 at [45]; *Davuro Pty Ltd v Wilkins* [2000] FCA 1902, (2000) 105 FCR 476 at [152], [230]. That principle does not operate as an invariable rule. In some cases, it may be appropriate to interpret words in a way that makes them redundant. That may be appropriate where the alternative construction of the words is inconsistent with other provisions of the contract or where the alternative construction is inconsistent with the commercial purpose of the contract or where it appears that the words have been included out of abundant caution: see *Re Strand Music Hall Co Ltd;*

Ex parte European and American Finance Co Ltd (1865) 35 Beav 153 at 159; 55 ER 853 at 856 per Sir John Romilly MR; *Dryden Construction Co Ltd v New Zealand Insurance Co Ltd* [1959] NZLR 1336; *Beaufort Developments (NI) Ltd v GilbertAsh NI Ltd* [1999] 1 AC 266 at 273-4 per Lord Hoffmann

332 Here there are no circumstances which justify a construction by which cll 9.1.2.5 and 9.1.2.6 should be read so as to negate the operative effect of cl 9.1.2.1. Whilst it can be accepted that the scope of separate provisions providing cover in policies of insurance might legitimately overlap, for the reasons given by the primary judge (PJ [202], [252]), the present case is not such an instance. The specific cover in cl 9.1.2.1 regulates the extent to which losses arising from government action consequent upon the existence of a disease (other than a food-borne disease) will be indemnified. The nature and extent of the circumstances on which that cover is conditioned would be rendered meaningless were a broad construction be given to cll 9.1.2.5 and 9.1.2.6, as would the specific limit of the insurer's liability for loss arising in that way. For all that to be removed by a broad reading of cll 9.1.2.5 or 9.1.2.6 would necessarily result in incoherence and incongruity.

333 It is apt to mention that LCAM proffered limited explanation of how cl 9.1.2.1 or, for that matter, cl 9.1.2.3 would have any operative effect if cll 9.1.2.5 and 9.1.2.6 were to have the scope for which it contended. That issue is especially important here where loss arising from the conduct of government authorities acting in response to COVID-19 would fall within the express exclusion in cl 9.1.2.1. The simple answer is that they would have little or no operative effect and, for that reason, LCAM's proposed construction tends towards commercial absurdity. For instance, it would follow that loss arising from government action consequent upon the outbreak of an infectious disease outside of the five kilometre radius of the Situation would be covered by cll 9.1.2.5 or 9.1.2.6, even though it would fall outside the specific cover in cl 9.1.2.1. Indeed, even if government action was caused by an excluded disease within that radial area, LCAM submits that any loss would nevertheless be covered by the broader provisions. In the course of submissions, Mr Finch SC submitted that the limitations in cl 9.1.2.1 were "self-contained" in the sense that they applied only to circumstances where that clause applied. However, that was merely another way of rendering them meaningless, because almost any claim under cl 9.1.2.1 could be brought under cll 9.1.2.5 or 9.1.2.6 by which those limitations could be by-passed. Conversely, the construction proposed by Swiss Re and accepted by the primary judge was capable of giving the policy a sensible and rational operation. The hybrid clauses cover losses arising from the actions of authorities in relation to the identified diseases, leaving a wide scope for cll 9.1.2.5 and 9.1.2.6 to operate according to

their terms in relation to the actions of authorities consequent upon other occurrences and events.

334 Mr Finch SC also submitted that the reasonable reader of the policy would not understand that the limitations in cl 9.1.2.1 would apply to other extensions in cl 9.1.2 and, particularly so, because the tailpiece of that clause specifically referred to clll 12 and 13 not applying to it. Clause 12 excluded losses arising from business interruption consequent upon damage to the property identified in cl 5 of Section 1 other than specifically identified property, and cl 13 excluded losses arising from certain specified circumstances. So the submission went, the reasonable reader would assume that any operative exclusion to the scope of clll 9.1.2.5 and 9.1.2.6 would arise from other identified clauses rather than by way of implication of the exclusion in cl 9.1.2.1 being diseases determined to be listed human diseases under the *Biosecurity Act*. A similar submission was made in relation to that part of the policy which identified exclusions applying to all parts of the endorsement. These submissions should not be accepted. On the construction adopted by the primary judge, it is not the exclusion in cl 9.1.2.1 which operates beyond the scope of that clause but that the policy, read as a whole, has the effect that losses consequent upon the action of an authority caused by the occurrence of infectious diseases are solely dealt with by clll 9.1.2.1 and 9.1.2.4, and no other parts of cl 9.1.2. In this respect LCAM's submission mischaracterised the basis on which the primary judge found the policy operated.

Clauses 9.1.2.5 and 9.1.2.6 are not concerned with disease

335 Mr Finch SC further submitted that the primary judge erred in reaching a conclusion that clll 9.1.2.5 and 9.1.2.6 do not apply to disease at all. Her Honour held (PJ [332]) that if her conclusion that cl 9.1.2.5 cannot apply in relation to the actions of authorities relating to disease (by reason of clll 9.1.2.1, 9.1.2.3 and 9.1.2.4) was in error, then she considered that the clause had nothing to do with disease in any event. A similar determination (PJ [342], [343]) was made in relation to cl 9.1.2.6. Mr Finch SC submitted that the primary judge's reasoning erred in the latter conclusion because she had identified no additional reasoning in support of it. However, that submission is founded upon a misunderstanding of her Honour's decision. In the paragraphs referenced, her Honour was simply identifying that if she was wrong in her conclusions with respect to cl 9.1.2.1 being the only one which responds to loss in consequence of the actions of an authority resulting from the occurrence of a disease, by the same reasoning, it (together with clll 9.1.2.3 and 9.1.2.4) were the only ones which responded to loss occurring

as a consequence of a disease. The difference between the two being one was concerned with actions by authorities and the other concerned with diseases.

336 Again, no error has been shown with respect to the primary judge's reasons in this respect.

Conclusion on the impact of cll 9.1.2.1, 9.1.2.3 and 9.1.2.4 on cll 9.1.2.5 and 9.1.2.6

337 It follows that the primary judge's conclusion that when the policy is read as a whole, losses arising from business interruption consequent upon the actions of an authority due to the occurrence of an infectious disease are indemnified, if at all, within the scope of cll 9.1.2.1 and 9.1.2.4, and that cll 9.1.2.5 and 9.1.2.6 do not respond to LCAM's claim. It was accepted by LCAM that its claim under the policy was not met by cll 9.1.2.1, 9.1.2.3 and 9.1.2.4, such that, if cll 9.1.2.5 and 9.1.2.6 did not apply to diseases, Swiss Re was entitled to the declaration that the policy does not respond to its claim in the circumstances before the Court.

338 The necessary consequence of the dismissal of Ground 1 of LCAM's appeal is that Ground 3 must also be dismissed.

Clause 9.1.2.5 – the catastrophe clause – Appeal, Ground 2

339 LCAM submitted that if it were successful in overturning her Honour's conclusions on the general construction issue, such that cll 9.1.2.5 and 9.1.2.6 might be construed according to their terms, its claim fell within cl 9.1.2.5 because the business interruption losses were in consequence of "the action of a civil authority during a conflagration or other catastrophe for the purposes of retarding same". Specifically, it was submitted that the occurrence of COVID-19 in Australia was a "catastrophe" in respect of which the clause responded. Although LCAM did not succeed on that initial issue such that it is not strictly necessary to deal with Ground 2, given the nature of these proceedings as test cases and that the ground was fully argued by both parties, it is not inappropriate to address the submissions made.

340 In summary, the primary judge had concluded that cl 9.1.2.5 did not respond to the claim because: (a) the words "conflagration or other catastrophe" and "retarding" suggested that the clause was concerned with a "physical event" (PJ [333]); and (b) the linking of the "other catastrophe" with a "conflagration" indicated that the "catastrophe" was to be of a kind similar to a "conflagration", involving a "physical event" capable of being retarded (PJ [333], [336]).

341 A similar issue as to the construction of a "catastrophe clause" arose in the Star appeal, but it is important to record that the evidence before the Chief Justice in that matter differed from that before the primary judge. As the Chief Justice observed (at [26]):

> The applicant led a significant body of evidence in support of the proposition that the sudden and unexpected emergence, escape from China and rapid spread throughout the world of a highly infectious and potentially fatal novel pathogen was a *catastrophic* biological event with potential and actual drastic human and economic consequences.
>
> (Original emphasis).

342 Further, Star had submitted that it was the rigor, breadth and intrusiveness of the government intervention and the impact of that intervention which was aptly described as a catastrophe. Ultimately, the Chief Justice accepted (at [202]) that "COVID-19 was, at the relevant time, a global catastrophe with at least an incipient existence in Australia. On Star's submission, for the purpose of characterisation, the pandemic and the response thereto could not be disentangled."

343 LCAM submitted that the primary judge ought to have given the word "catastrophe" its ordinary meaning which, on the assumptions made, she had accepted would include a "pandemic" (PJ [333] citing *Star first instance* [172]) as that would be the meaning given to it by a reasonable person in the position of the prospective insured.

The meaning of "catastrophe"

344 That submission raises the issue of the meaning of the word "catastrophe" which the parties disputed on several levels. It is useful to first consider a number of dictionary definitions. The Oxford English Dictionary (online) provided the following:

> 3. …
>
> b. *esp*. in *Geology*. A sudden and violent change in the physical order of things, such as a sudden upheaval, depression, or convulsion affecting the earth's surface, and the living beings upon it, by which some have supposed that the successive geological periods were suddenly brought to an end.
>
> 4. A sudden disaster, wide-spread, very fatal, or signal. (In the application of exaggerated language to misfortunes it is used very loosely.)

345 Although LCAM acknowledged that many definitions identify suddenness as a characteristic of the word, it submitted that its ordinary usage extends much further and that an earlier version of the Oxford English Dictionary included an additional meaning, being an "event causing great damage or suffering".

346 The Macquarie Dictionary (online) gives the following meanings:

> *noun* 1. a sudden and widespread disaster.
>
> 2. a final event or conclusion, usually an unfortunate one; a disastrous end.
>
> 3. (in a drama) the point at which the circumstances overcome the central motive, introducing the close or conclusion; the denouement.
>
> 4. a sudden violent disturbance, especially of the earth's surface; a cataclysm.

347 It is difficult to deny that common to a number of these definitions is the suddenness and magnitude of the event constituting the catastrophe as well as the implicit characteristic of a physical phenomenon. On the other hand, such temporal matters are relative and depend upon the circumstances. In the case of a novel disease which is highly contagious and virulent, it is possible that, at least, its initial appearance and spread amongst the population could be sufficiently sudden to satisfy any such requirement.

The meaning of the expression "or other catastrophe"

348 Although the foregoing gives an indication of the nature of the meaning of the word "catastrophe", it is necessary to consider the context of the policy. In cl 9.1.2.5, the word used in conjunction with "conflagration" and as part of the composite phrase "or other catastrophe". It can be accepted that in this context the word "conflagration" may colour and give character to "other catastrophe" by the application of the maxim *nocitur a sociis*. It can also be accepted that if there were a number of categories of events identified followed by the words "or other catastrophe", a stronger inference would have arisen that the parties intended to use the word "catastrophe" *ejusdem generis* with any genus so formed. Here, where there is only one comparator mentioned, it may be that the inference to be drawn is less strong. However, the High Court's decision in *Telstra Corp Ltd v Australasian Performing Right Association Ltd* (1997) 191 CLR 140 indicates that a presumption may nevertheless be formed. There, the question was whether the playing of music on hold for the purposes of a telephone service was the transmission of a work for the purposes of the *Copyright Act 1968* (Cth). That Act provided that "the transmission of a work ... to subscribers to a diffusion service shall be read as a reference to the transmission of the work ... in the course of a service of distributing broadcast *or other matter*". The question before the Court was whether the words "or other matter" were wide enough to cover a case where music was transmitted to a telephone caller who was waiting on hold. McHugh J (albeit in dissent) observed (at 166 – 167) that the words cannot be at large or else they would be wide enough to include every combination of words, signs, symbols, sounds or pictures, whatever their source and, unless it was given a restricted meaning, it would

render the word "broadcast" effectively redundant. After referring to the *ejusdem generis* rule, his Honour noted there were numerous cases (which were identified in a footnote) where courts have read the word "other" to mean "other like" even where the specified genus comprises only one category. In his Honour's view, the preferred construction was that "other matter" must be read *ejusdem generis* with "broadcast matter" which thereby limited its scope: at 167. Although the outcome in that case is not especially important, the approach to the particular formulation of words carries weight in the current appeals. It was exemplified in the decision of *Stag Line Ltd v Foscolo, Mango & Co Ltd* [1932] AC 328, which had been referred to by McHugh J, where a charterparty gave liberty to a vessel "to call at any ports in order, for bunkering or other purposes". In that case Lord Buckmaster said (at 334):

> The word "bunkering" must have some demonstrative and limiting effect, and the phrase "or other purposes" following it cannot be so construed as to disregard the effect of the first example and assume that any purpose is thereby permitted. If that were so, the word "bunkering" might be left out.

349 The same interpretive approach was adopted in *Lend Lease Real Estate Investments Ltd v GPT RE Ltd* [2006] NSWCA 207, a decision referred to by the learned primary judge in this matter. There Spigelman CJ expressed the general principle in the following way (at [30] – [31]):

> 30 The general principle of the law of interpretation that the meaning of a word can be gathered from its associated words – *noscitur a sociis* – has a number of specific sub-principles with respect to the immediate textual context. The most frequently cited such sub-principle is the *ejusdem generis* rule. The relevant sub-principle for the present case is the maxim propounded by Lord Bacon: *copulatio verborum indicat acceptationem in eodem sensu* – the linking of words indicates that they should be understood in the same sense. As Lord Kenyon CJ once put it, where a word "stands with" other words it "must mean something analogous to them". (*Evans v Stevens* (1791) 4 TR 224; 100 ER 986 at 987. See also W J Byrne (ed) *Broomes Legal Maxim* (9th ed) Sweet and Maxwell, London (1924) pp373-374.)
>
> 31 However, as Lord Diplock put it in *Letang v Cooper* [1965] 1 QB 232 at 247:
>
> > "The maxim noscitur a sociis is always a treacherous one unless you know the sosietas to which the socii belong."

350 Here, the words are used in a policy of insurance intended by the parties to identify the matters which, if they cause business interruption losses, will result in indemnity and, as such, ought to be given, if possible, a definite rather than diffuse meaning.

351 It was suggested that the *ejusdem generis* rule cannot apply where there exists only one comparator or thing to create the relevant genus: *Deputy Commissioner of Taxation v Clark* (2003) 57 NSWLR 113 at 143 [126]; *Chief Commissioner of State Revenue v Tasty Chicks Pty*

Ltd (2012) 87 ATR 880 at 897 [54]: however, that does not foreclose the existence of other principles of construction which might aid in the delimitation of a word's meaning.

352 In the context of the particular policy, the words "or other" sufficiently connect the word "catastrophe" with "conflagration" with the result that "catastrophe" should be given a meaning which requires that the things within it have the essential characteristics of a conflagration, being a physical event of some magnitude causing widespread physical destruction or loss of life as a result of the unleashing of destructive forces. No error was shown to exist in this approach which was adopted by the primary judge.

The meaning of "catastrophe" in the context of the policy

353 In cl 9.1.2.5, the structure of words used by the parties to express their agreement indicate that the words, "or other catastrophe", ought to be read *ejusdem generis* with "conflagration", so as to limit the scope of the expression to catastrophes which have similar characteristics to a conflagration. The primary judge held these would include a physical event requiring physical action to retard it. There is much force in that conclusion. Here, the insured peril requires the action of an authority in "retarding" the catastrophe which suggests that it must do something or undertake some action for that purpose. In addition, it is not any action of the authority in relation to the catastrophe which is required, it is action for the purpose of retarding the catastrophe. Necessarily, that assumes that the catastrophe itself has commenced and is ongoing, and the responsive action to the physical event involves a physical act which restrains its continued occurrence, direction or expansion. The reasonable business person would not construe the expression "action of a civil authority" as including the making of directions, orders or regulations but rather as the deployment of the physical resources for the purposes of impeding the continuation of the catastrophe. The implementation of measures such as orders or directions imposing travel restrictions, restriction of access to premises, or limits to the number of persons gathering in the one place are not readily regarded as physical action by an authority.

354 LCAM submitted that the primary judge erred in construing "catastrophe" as requiring that the event in question cause or be capable of causing physical damage. It submitted that this was an erroneous reading down of the word and resulted in a tautology because the tailpiece to cl 9.1.2 deemed the losses to be "Damage" under the policy which was defined as "physical loss, damage or destruction". It was further submitted that this deeming provision would be ineffective if "catastrophe" was already subject to an implicit limitation of "physical" damage.

However, this submission is misconceived. As her Honour correctly identified, it was the relevant actions of the authorities which were, "deemed to be loss caused by Damage", for the purposes of the policy's operation. LCAM's submissions to the effect that the tailpiece of cl 9.1.2 deems the catastrophe to be damage misstates the effect of the clause. Secondly, all of the subclauses in cl 9.1.2 are subject to the same deeming provision as was necessary because, as written, the policy provides for the calculation of recoverable loss under the Basis of Settlement clause on the assumption of the suffering of "Damage". Thirdly, as Swiss Re submitted, the primary judge did not determine that physical damage be caused by the catastrophe, but rather that it be a physical event. Finally, LCAM sought to support its submission on the basis that Section 2 of the policy was not concerned with damage to property, but that is incorrect. Clause 9.1.1, which is in Section 2, is concerned solely with business interruption loss arising from damage to the insured property, and cll 9.1.2.5 and 9.1.2.6 extend that to cover loss arising as a result of conflagration or other catastrophe or when the property or life of third parties is being damaged or threatened.

355 A number of parties submitted that it was not necessary that in order for an event to be characterised as a catastrophe it must involve an element of suddenness. That submission sits quite uncomfortably with the above dictionary definitions and those matters which might ordinarily be regarded as catastrophes: volcanic eruption, substantial explosion, earthquake, conflagration, tidal wave, a major deadly gas leak from a factory, cyclone, or hurricane. These examples support the necessity for a catastrophe to be sudden or, at the very least, for it to have a commencement which is relatively certain in time and tend to eschew the inclusion of a state of affairs which emerges relatively slowly or progressively over time.

356 Given the foregoing, the occurrence of a widespread outbreak of a disease, even if it amounts to a pandemic, does not necessarily fall within the concept of a "catastrophe" for the purposes of cl 9.1.2.5.

The construction of cl 9.1.2.5 in the context of the policy

357 The nature of the test cases under consideration somewhat distorts the issues and occasionally leads to some artificiality in the issues posed for consideration. The manner in which the parties addressed cl 9.1.2.5 is a good example. As it could become only truly relevant if LCAM was able to overcome the fundamental construction issue and the impact of cll 9.1.2.1 and 9.1.2.3, the submissions made in relation to its interpretation to both the primary judge and this Court tended to ignore the operative effect of those earlier provisions. Such an approach is

problematic. In any event, even if the impact of the presence of cll 9.1.2.1 and 9.1.2.3 is removed, cl 9.1.2.5 should nevertheless be construed as applying only to actions by lawful authorities in response to significant and sudden physical events capable of causing substantial harm. This is confirmatory of the construction arising from reading the policy as a whole that cover for any loss arising from government action in relation to disease or the consequences of the disease is limited to that provided by cll 9.1.2.1 and 9.1.2.3.

Conclusion as to cl 9.1.2.5

358 It follows that whether the expression "other catastrophe" is construed only in the context of cl 9.1.2.5 or, as would be appropriate, in the context of the whole of the policy, it did not extend to cover the consequences of a disease pandemic. The expression "catastrophe" requires the sudden onset of a physical event of substantial magnitude which results in widespread destruction or loss of life and necessitates physical action to retard it.

Whether account needs to be taken of third party payments – Appeal, Ground 4; Cross-Appeal, Ground 6

359 By Ground 4 of its appeal, LCAM challenged the primary judge's conclusion that the JobKeeper payments it received had to be taken into account in calculating the amount that it could recover under the policy, on the basis that the payments were either a sum saved for the purposes of cl 10.1.3 of the policy or under general principles applicable to contracts of indemnity. Conversely, Swiss Re appealed from her Honour's conclusion to the contrary in relation to grants that LCAM received from the NSW Government. In light of the conclusion that LCAM is not entitled to indemnity under the policy, it is not necessary to consider the issues raised by these grounds. It is preferable not to express a view on them, as they involve making assumptions that are contrary to our reasoning set out above, and it is not necessarily clear which contrary assumptions should be made for the purposes of addressing these issues. In circumstances where the primary judge's conclusions on third party payments and relief are challenged in this cross-appeal, the appropriate course is to set aside the primary judge's answer to the relevant question and substitute the response "Unnecessary to answer".

Whether interest is payable under s 57 of the Insurance Contracts Act – Appeal, Ground 5

360 The issues raised by this ground of appeal are addressed earlier in these reasons. For the reasons discussed there, although the primary judge erred in construing s 57 of the *Insurance Contracts Act*, it does not apply unless an insurer is liable to pay an amount pursuant to the policy of insurance or that Act. Had LCAM been successful in its appeal and established its

entitlement to an indemnity, interest would be payable from that point in time from when it was unreasonable for Swiss Re to refuse to pay the claim. In that analysis, neither Swiss Re's *bona fide* belief that it was entitled to refuse to pay the claim nor the bare fact that these proceedings are in the nature of a test case would be relevant to whether it had acted unreasonably. The primary judge's answers to the relevant question should be amended to "Unnecessary to answer".

Swiss Re's cross-appeal

The meaning of "outbreak" – Cross-Appeal, Ground 1

361 By this ground of its cross-appeal, Swiss Re contested the primary judge's determination that, if cl 9.1.2.1 (the hybrid clause) applied in respect of LCAM's claim, an "outbreak" would be constituted by a single case of active (i.e. infectious) COVID-19 in the community (in a non-controlled setting). The difficulty here is that LCAM did not appeal the primary judge's conclusion in relation to the operation of cl 9.1.2.1, and it follows that there is no present dispute between the parties that the clause operates to resolve the controversy between them. There is a very real risk that by responding to this ground of the cross-appeal, this Court would be engaging in the provision of an advisory opinion, being something it is not empowered to do. In circumstances where the primary judge's answer to the relevant questions are challenged in the cross-appeal in this matter, the appropriate course in this matter is to amend the primary judge's answers to the relevant questions to: "Unnecessary to answer".

Did a catastrophe occur in Australia and when? – Cross-Appeal, Ground 2

362 Although her Honour concluded that cl 9.1.2.5 did not respond to LCAM's claim because, *inter alia*, a catastrophe needed to be a physical event and the outbreak of a disease did not satisfy that criterion, she nevertheless went on to consider whether, if she was in error in the above respect, the clause respond to the occurrence of COVID-19 in Australia. In that scenario, she concluded (PJ [338]) that the NSW Public Health Orders on which LCAM relied were "actions of a civil authority during a catastrophe (the COVID-19 pandemic) to retard that catastrophe so that cl 9.1.2.5 applies" and (PJ [339]) that "on the evidence, the catastrophe of the COVID-19 pandemic started in Australia by no later than 20 March 2020 when Australia closed its borders to all non-citizens and residents".

363 As a result of the conclusions reached above, it is neither necessary nor appropriate to deal with this ground which has been rendered distinctly hypothetical. It follows that the question posed in relation to this ground be answered, "Unnecessary to answer".

Did cl 9.1.2.6 (the prevention of access clause) respond? – Cross-Appeal, Ground 3

364 As mentioned, the primary judge concluded that cl 9.1.2.6 (the prevention of access clause) did not apply to government action taken in response to the occurrence of diseases nor in relation to diseases generally. However her Honour held (PJ [344]) that if those conclusions were in error, then it would have responded to LCAM's claim consequent upon the orders of the New South Wales Government which were an attempt to avoid or diminish a risk of life within five kilometres of the Situation. Swiss Re challenged this conclusion.

Swiss Re's main submission

365 Swiss Re's primary submission was that the relevant action by a lawful authority contemplated by cl 9.1.2.6 must be action which was targeted in the sense that it was undertaken to only "avoid or diminish risk to life or Damage to property within 5 kilometres of the Situation". Mr Williams SC submitted that the order made by the NSW Health Minister on 26 March 2020 did not meet this requirement because it is clear that it was made for the purposes of protecting against the risk to health of persons across the whole of New South Wales. That order provided, *inter alia*:

> **4 Grounds for concluding that there is a risk to public health**
>
> It is noted that the basis for concluding that a situation has arisen that is, or is likely to be, a risk to public health is as follows-
>
> (a) public health authorities both internationally and in Australia have been monitoring international outbreaks of COVID-19, also known as Novel Coronavirus 2019,
>
> (b) COVID-19 is a potentially fatal condition and is also highly contagious,
>
> (c) COVID-19 have now been confirmed in New South Wales, as well as other Australian jurisdictions.

366 The primary judge accepted that the Minister was attempting to avoid or diminish risk to every life across New South Wales and, indeed, that the threat to each and every such life was a proximate or equally effective cause of the order's making. Her Honour held (PJ [347]) that the attempt to protect lives across the State was sufficient to satisfy cl 9.1.2.6 because it necessarily included an attempt to avoid or diminish the risk to life within the five kilometre radius of the Situation.

367 The essential question was whether cl 9.1.2.6 would respond only where the authority's action was directed to an attempt to diminish a risk to life only within five kilometres of the Situation. If so, the corollary was that the clause would not respond where the relevant action, although

taken in an attempt to diminish the risk to life within that area, also attempted to prevent the same or similar risks outside of that area. In support of the substantially narrower construction, Mr Williams SC submitted that the primary judge's approach was inconsistent with her earlier observations in relation to the requirement in cl 9.1.2.1 that there be an outbreak of a relevant disease at the Situation or within five kilometres of it or the discovery of an organism which was likely to result in an occurrence in that area. He further submitted that the learned primary judge erred in her conclusion that (PJ [344]) that there is "no causal requirement between the risk to life within 5 kilometres of the Situation and the action, at least not in the sense that the action must result from the perceived existence of the risk within 5 kilometres of the Situation", because that failed to give proper effect to the relevant nexus. It was said that this conclusion led her Honour to wrongly determine that a state-wide order of the kind made in this case was sufficient to engage its operation.

368 In Swiss Re's written submissions, the following matters were relied upon in support of the above contentions:

(a) that the critical feature of cl 9.1.2.6 was the suffering of loss consequent upon events within the geographical area of a five kilometre radius of the Situation which is the clause's focus;

(b) that the essential geographical limitation in the clause has the consequence that its operation is limited to those actions which are only taken in respect of a "risk to life or damage to property" in the area specifically nominated and there is no textual support for a suggestion that the clause is concerned with the consequences of actions directed to risks anywhere in the world;

(c) as the regulatory response is linked to particular circumstances within the limited area, in that the attempt is to avoid or diminish risk to life within the radius, there must be a link between the localised risk (either real or perceived) and the authority's response; and

(d) that the targeted nature of the authority's response applies to both risk to life and "Damage" to property within the relevant radial area and this highlights the geographical nexus required for the clauses' operation and the requirement for targeted action to a particular localised risk.

The correct operation of cl 9.1.2.6

369 The above submissions should be rejected. As the primary judge determined (and which is not challenged), it is the authority's action which prevents or hinders use of or access to the Situation that is the focus of cl 9.1.2.6 (PJ [278]). Whilst it is a necessary characteristic of that action that it is done with the intention of attempting to diminish risk to life or Damage to property within five kilometres of the Situation, that is a limitation on the types of action which trigger the cover. Importantly, there is nothing in the clause which requires that there be a demonstrable risk to life or Damage to property within the five kilometre radius. That is supported by the fact that the clause operates when an authority seeks to *avoid* a risk to life within the area and, for those purposes, the clause can be seen to operate prior to any relevant risk arising. The clause clearly accommodates pre-emptive action by a lawful authority which is intended to avoid circumstances in which persons within the defined area are put at risk. This is an important element in the present analysis because an attempt to avoid a relevant risk occurring in the relevant area suggests that events have occurred outside of it which give rise to the possibility of the risk extending there. On this basis alone, the learned primary judge was correct to conclude (PJ [344]) that there is no causal requirement in the clause between the existence of a risk to life within the five kilometres and the action, in the sense that the action does not have result from such a risk.

370 On the plain reading of the clause, the requirement is that the action is undertaken to avoid or diminish risk to life in the area specified. It does not contain any words which might suggest that it would respond only if the risks were isolated to that area or the remediating action was confined to that location. The submission that it would operate in an unduly wide manner if the authority's actions were also referable to an attempt to avoid or diminish the relevant risks beyond the radial area is erroneous. First, the actions must include an attempt to avoid or diminish the risk within the area and, secondly, the actions must prevent or hinder the use of or access to the Situation. These constraints limit the nature of the action that might trigger the clause.

371 Nor is there any reason to think that the primary judge's reasoning lacked consistency as Swiss Re submitted. There is nothing in her Honour's earlier reasons which suggests that, for the purposes of cl 9.1.2.1, a relevant outbreak or the likely occurrence needs to be confined to the five kilometres radial area. So long as the events appropriately relate to that area and the authority's orders are directed to it, it would not matter that they also relate to and result from other outbreaks or likely occurrences beyond the boundaries of the identified area. It would be

well within the contemplation of the parties to the policy that when a clause, which has at its centre the outbreak of an infectious disease, is triggered by an outbreak within a defined area, the outbreak will not be confined to that area.

372 With respect, the construction advanced by Swiss Re would impose an unduly narrow operation on cl 9.1.2.6 for which there is no commercial rationale. It would be commercially unreal to read the clause as not responding in circumstances where the relevant risk was almost wholly within the five kilometre radius and marginally outside it. So if there were an outbreak of a disease which was nearly entirely within the five kilometre radius and a small number of cases outside it, on Swiss Re's submissions, the policy could not respond if the authority's action was to avoid or diminish risk to all persons who might be affected by the disease. It is most improbable that such a result was intended.

373 Similar comments can be applied to the correlative submission that the action of the authority must be targeted to the area within the five kilometre radius and to only that area. Swiss Re submitted that, on the assumption that cl 9.1.2.6 applied to disease, if there were an outbreak of an infectious disease at the Situation or in a neighbouring building, the clause would respond to provide cover for consequential business interruption losses so long as the restrictions imposed were wholly within the five kilometre radial area but, if the restrictions extended marginally beyond that area, it would not. There is no textual or contextual support for that construction and it is contrary to any commercial sense when dealing with the actions of an authority in response to the outbreak of an infectious disease.

374 A slightly more nuanced submission was made to the effect that where the regulatory action related to an area that was greater than the 5 km radius (say, perhaps, the whole State), it nevertheless had to be targeted to deal with a specific concern that related to the 5 km radius area. With respect, that proceeded upon the incorrect assumption that a restriction which might be characterised as being targeted to a wider area than the 5 km radius, is not still targeted at each part of that area. Merely because the concern behind the restriction is not a localised concern, in the sense that it is supported by whole of State, it does not follow that there is no relevant risk within the 5 km radius that is sought to be avoided or diminished.

375 The primary judge was correct to conclude that the geographical requirement of cl 9.1.2.6 was quite different to that in cll 9.1.2.1 (as expanded by cl 9.1.2.4) and 9.1.2.3 and her Honour's answers to the questions posed ought not to be disturbed.

Was there a hindrance on the use of the situation – Cross-Appeal, Grounds 1 and 4

376 By these grounds of its cross-appeal, Swiss Re submitted that there was inadvertent inconsistency on the face of the primary judge's reasons between the conclusions expressed and the answer given at PJ [361(c)]. In the course of the reasons, her Honour had expressed the view (PJ [354] – [355]) that certain orders made by the New South Wales Health Minister on 1 and 13 June 2020 potentially hindered the use of the Situation, being LCAM's business premises. Those orders imposed limitations on the number of persons who might attend the premises at the one time. Her Honour had also earlier observed (PJ [351]) that there was no evidence before the Court that use of the premises was in fact hindered. No doubt it would be a matter for the insured to establish that more people wanted to enter the premises than was permitted at any particular time.

377 However, despite the above, the primary judge answered a question relating to this point in the following manner (PJ [361(c)]):

> (c) Was access to or use of the Situation prevented or hindered?
>
> *Yes. The 26 March 2020 order prevented access to and prevented the use of the Situation. The 1 and 13 June 2020 orders hindered use of the Situation.*
>
> (Original emphasis).

378 It was the last sentence in the answer which was challenged. Swiss Re did not take objection to the answer in the first sentence in the sense that it accurately reflected the primary judge's determination and reasoning.

379 Ultimately, LCAM did not dispute that there was an inconsistency between the primary judge's reasons and the answer given, but it was submitted that the error should have been corrected by the trial judge under the slip rule. That would have been one possible resolution and it certainly appears that an error has occurred. It is likely that in the final preparation of the reasons the word "potentially" has been elided from the last sentence of the answer given which should have read, "The 1 and 13 June 2020 orders *potentially* hindered use of the Situation". That alteration to her Honour's orders does not change the effect of the primary judge's decision as between the parties. The answer to this question by the primary judge was in the alternative to the conclusion that the clause did not respond to LCAM's claim in any event; a determination which has been upheld on this appeal. Even if LCAM had succeeded in overturning the other obstacles to recovery under the policy, the proceedings before the primary

judge were not completed and it would have been possible for evidence to be called to ascertain whether any hindrance actually occurred and, if so, the extent.

380 For the purposes of the appeal, the primary judge's answer in relation to the effect of the orders on 1 and 13 June 2020 should be amended accordingly.

The operation of the trends clause – Cross-Appeal, Ground 5

381 By cl 10 of the policy (the Basis of Settlement clause), a number of items of recovery are identified which become available to LCAM on the cover being triggered. In this case, it sought recovery under the Gross Profit section. In that respect, cl 10.1 provides:

> The **Insured** is indemnified with respect to loss of **Gross Profit** calculated in the following manner, namely:
>
> 10.1.1 in respect of reduction in **Turnover**, the sum produced by applying the **Rate of Gross Profit** to the amount by which the **Turnover** during the **Indemnity Period** shall, in consequence of the **Damage**, fall short of the **Standard Turnover**; and
>
> 10.1.2 in respect of Increase in Cost of Working, the additional expenditure necessarily and reasonably incurred for the sole purpose of avoiding or diminishing the reduction in **Turnover** which, but for that expenditure, would have taken place during the **Indemnity Period** in consequence of the **Damage**, but not exceeding the sum produced by applying the **Rate of Gross Profit** to the amount of the reduction thereby avoided.
>
> 10.1.3 There shall be deducted from the amounts calculated in 10.1.1 and 10.1.2 any sum saved during the **Indemnity Period** in respect of such of the charges and expenses of the **Business** payable out of **Gross Profit** as may cease or be reduced as a consequence of the **Damage** (excluding depreciation and amortisation).
>
> (Original emphasis).

382 By cl 8.5 of the policy, the "Indemnity Period" is defined as being:

> the period beginning with the occurrence of the **Damage** and ending not later than the number of months specified in the **Schedule** thereafter during which the results of the **Business** shall have been affected in consequence of the **Damage**.
>
> (Original emphasis).

383 It is to be observed that the intent of the policy is to indemnify the insured in respect of a loss of gross profit and that is achieved by focusing upon the reduction in turnover and identifying the extent to which the insured has suffered a loss of gross profit consequent upon that reduction. However, that consideration is subject to other matters which might affect that initially identified loss of gross profit, such as any increased cost of working or the savings

which arise as a consequence of the impact of the insured peril. Any amount so calculated is subject to the operation of the trends clause at the foot of cl 8 which provides:

> Adjustments shall be made to the **Rate of Gross Profit**, **Standard Turnover**, **Standard Gross Revenue**, **Standard Gross Rentals** and **Rate of Payroll** as may be necessary to provide for the trend of the **Business** and for variations in or other circumstances affecting the **Business** either before or after the date of the **Damage** or which would have affected the **Business** had the **Damage** not occurred, so that the figures as adjusted shall represent as nearly as may be reasonably practicable the results which, but for the **Damage**, would have been obtained during the relative period after the **Damage** occurred.
>
> (Original emphasis).

The primary judge's determination as to the operation of the trends clause

384 As the primary judge observed (PJ [364]), that part of her reasons dealing with this issue was only relevant if all of her previous conclusions as to the responsiveness of the LCAM policy were wrong. The issue is considered here on a similar basis.

385 Before the primary judge, Swiss Re had submitted that it is only the loss resulting from the insured perils which is covered by the policy and the indemnity did not extend to the losses consequent upon the impact of COVID-19 generally. Therefore, even if the insured peril was a proximate cause of a loss, the trends clause required the quantification of loss to be adjusted to "provide for the trend of the Business and for variations in or other circumstances affecting the Business". The effect of this was, in general terms, that the policy would not be productive of recovery for LCAM because the general effects of COVID-19 would have prevented it from trading profitably in any event. At the very least, those effects would have substantially reduced its profitability.

386 In considering this issue, the learned primary judge referred at length to the observations of Lords Hamblen and Leggatt JJSC in *FCA v Arch* as well as the decisions in the *Hyper Trust* cases (*Hyper Trust (No 1)* and *Hyper Trust Ltd t/as The Leopardstown Inn & Ors v FBD Insurance plc (No 2)* [2021] IEHC 279). Her Honour also referred to the discussion of the purpose of such clauses in business interruption insurance by Beach J in *Australian Pipe & Tube*. His Honour had said (at [114] – [115]):

> 114 The adjustment subclause [the trends clause] is designed to give purpose to the principle of indemnity under the policy. As stated in Roberts H, *Riley on Business Interruption Insurance* (10th ed, Thomson Reuters, 2016) at 48:
>
> > Without this clause the policy cannot be regarded as fulfilling the basic principle of an insurance that is to indemnify, because the turnover, charges and profits which would have been realised during a period of

> interruption are hypothetical and never capable of absolute proof. By the use of this clause it is possible to make adjustments in a loss settlement to produce as near as is reasonably possible a true indemnity for an insured's loss, albeit within a restricted period, i.e. the maximum indemnity period and also limited to the sum insured.
>
> …
>
> The other circumstances clause seeks to accommodate all such influences on the business that would have occurred but for the incident itself. This may seem like an enormous, if not insurmountable challenge, but to ignore all these factors and merely rely on the previous year's trading would lead to a lottery in which the insured was either over or under indemnified.

115 Further, as was stated in Honour WB and Hickmott GJR, *Honour and Hickmott's Principles and Practice of Interruption Insurance* (4th ed, Butterworths, 1970) at 444:

> It is essential to ascertain as accurately as practicable the hypothetical results which the business itself would have produced apart from the fire or other peril happening, as to determine what adjustments to the rate of gross profit, the annual turnover and the standard turnover figures would be equitable.

387 There was no dispute in the course of the hearing as to the validity of these principles.

388 The primary judge accepted that the evidence established that LCAM's gross profit in 2020 declined dramatically in the months of February to May 2020 when compared to the corresponding periods in the previous year. Her Honour also accepted (PJ [375]) it to be a matter of "common sense that the required closure of the Situation between 26 March 2020 and 1 June 2020 involved interruption of or interference with the Business in consequence of the insured peril." In that respect, the requirement that LCAM close its premises was a proximate cause of some loss, even if there were other causes such as the effects of COVID-19 generally or orders requiring people to stay at home (PJ [376]).

389 As mentioned, Swiss Re had submitted that, in the application of the trends clause, it was necessary to take into consideration those other causes of the insured's loss so that what was to be ascertained was the position which the insured would have been in but for the occurrence of the insured peril and nothing more. In relation to that submission, the primary judge held (PJ [380]):

> Consistent with [the reasoning in *FCA v Arch*], I am unable to accept the insurers' submissions to the effect that, where a provision uses a "but for" requirement (as the adjustments clause in this case does), it would be to re-write the policy to conclude that the Damage only must be disregarded and the effects of COVID-19 generally must be taken into account as a circumstance that would have affected the business if the Damage had not occurred. The parties could not have intended that an uninsured

> circumstance which is also the same underlying cause of the Damage must be taken into account as a circumstance of the business under the adjustments clause. The emphasis here must be on the sameness of the underlying causes of the insured peril and the uninsured peril. The [sic: That] will depend, in part, on the nature of the insured peril. My point is that, depending on the nature of the insured peril, the concept of "all effects of COVID-19 generally" may not be the same underlying cause as the insured peril. This issue arises, for example, in the Meridian Gravel [sic: Travel] case below.

390 In relation to the same issue, Insurance Australia had submitted that it did not matter whether the Court followed the decision in *FCA v Arch* or the earlier decision in *Orient-Express Hotels Ltd v Assicurazioni Generali SA* [2010] Lloyd's Rep IR 531. Rather, it submitted that what needed to occur was a careful analysis of what might be identified as the "same underlying fortuity" or "same originating cause". It submitted that under its insured's policy the insured peril was the outbreak of the COVID-19 or a specific threat to persons within a defined radial area around the insured's premises. It said that the cause of the government's action was not in response to those localised matters but to the COVID-19 pandemic generally. It followed, so the submission went, that the trends or circumstances which must be ignored when undertaking the relevant counter-factual analysis were only those that arose from the specific outbreak or threat in the localised area and not the broader impacts of the pandemic. That was rejected by the primary judge who held (PJ [382]) that, on the assumption that the policy was triggered by the occurrence of the events within the defined area, the government action was "caused" by the events occurring within New South Wales generally, including those within that defined area. It followed, so her Honour held, that the effects of COVID-19 generally was a concurrent proximate cause of the government action which arose from the same underlying fortuity. That had the consequence that the reasoning in *FCA v Arch* would then apply such that the effects of COVID-19 generally would not be taken into account when applying the trends clause.

The issue as developed on appeal

391 Swiss Re advanced substantially the same submissions on appeal as had been made at first instance. It submitted that the trends clause operated to exclude from the assessment of loss any effects of uninsured circumstances which would have impacted the business even if the relevant order or action (within the meaning of cl 9.1.2) had not occurred. It submitted that the evaluative inquiry was to ascertain the "results that the 'Business' would have obtained during the relevant period after the occurrence of the 'order' or 'action' on the hypothesis that the 'order' or 'action' did not occur." This would mean that any loss which might have been caused by the adverse economic effects of COVID-19 generally would have to be extracted

from any assessment of insured loss. Were it otherwise, so it was submitted, it would inflate the value of the indemnity and it would extend cover to the general effects of the consequences of the existence of a notifiable infectious or contagious disease which is no part of the policy's coverage. In its written argument, Swiss Re submitted:

> Thus, the counterfactual required by the Basis of Settlement and Trends Clause requires a comparison with a hypothetical world in which the only element that is removed is that aspect of the Public Health Orders relied upon by LCAM that actually engage cover. In that sense, the LCAM Policy only provides cover to the extent that the "*Damage*" that triggers cover has been causative of the "loss" that must have been suffered to engage cl 9.1.2 of the LCAM Policy.

392 Undoubtedly, this submission is inconsistent with the underlying fortuity principle identified by the UK Supreme Court in *FCA v Arch* which the primary judge accepted. Despite that inconsistency, Swiss Re did not suggest that the underlying fortuity principle was wrong or should not be followed. Instead, it sought to distinguish the circumstances of that case on a number of grounds.

393 Before turning to those alleged points of difference, it is appropriate to recognise that the parties in the appeal were prepared to accept the correctness of the Supreme Court's reasoning in relation to this issue. The principle requires that, in the assessment of insured damage (including in the application of trends clauses), it is necessary to strip out of the hypothetical counterfactual those causes of loss which arise from the same underlying fortuity and "which the parties to the insurance would naturally expect to occur concurrently with the insured peril". In relation to an insured peril which operates on, *inter alia*, the existence of a disease and governmental action in response to it, damage consequent upon the occurrence of the disease or the threat of it is inextricably connected with the insured peril. It both arises from the same underlying fortuity *and* it is something which the parties would naturally expect to occur concurrently with the existence of the government action. Where the presence, outbreak or threat of a disease is of such significance that government or authority action is taken causing interference with the insured's business, there is a high probability that the disease's existence is necessarily adversely impacting the economic conditions in which the insured's business operates. To construe the cover under a policy as being limited to the loss directly attributable to the effect of the governmental orders and not the coincidental effects of the inextricably connected disease would, as the Supreme Court held, deny the cover of any effect. Further, it would necessarily result in a most impractical and non-commercial operation of the policy.

394 Swiss Re submitted that the principle did not apply in relation to the LCAM policy because the loss which was the subject of the cover incorporated the application of the trends clause. In that sense, contrary to the position in *FCA v Arch*, the trends clause could not be dismissed as merely a machinery provision providing for the calculation of loss. Swiss Re submitted that the primary judge accepted this point of distinction, but erroneously concluded (PJ [378]) that "the mere fact that the reference to the required quantification is embedded in the insuring clause does not change its essential nature as a method of calculating loss". It was said that this ignored the express inclusion of words in the insuring clause of "in accordance with the [Basis of Settlement clause]", which was said to be a powerful indicator that the scope of the cover was carefully calibrated so as not to extend to loss associated with any other perils.

395 This submission cannot be accepted. Firstly, the underlying fortuity principle applies generally to a policy of insurance of the nature under consideration as a process of construing the policy terms in a manner so as to give them a sensible commercial operation. The point articulated in *FCA v Arch* related generally to those causal issues arising where cover is extended in relation to an insured peril which, if it occurs, has necessarily associated concomitant sequelae. Absent the application of this principle of construction, the cover would be substantially, if not entirely, made redundant. The substance of the Supreme Court's approach was that a sensible commercial construction of a policy would not construe cover for an insured peril as being limited by the impact of loss causing events which are inherent in the occurrence of the peril itself. That applies when considering whether the insured peril was causative of the insured loss as well as in the assessment of that loss. It cannot matter whether the insuring clause incorporates the operation of a Basis of Settlement clause as occurs in the present case. The effect of not applying the principle of construction will be the same.

396 The second answer is that the principle applies as a process of construction and, in relation to the construction of a trends clause, it is applicable regardless of the connection of that clause to other parts of the policy. In that respect, the distinction which Swiss Re sought to draw between the LCAM policy and those under discussion in *FCA v Arch* produced no relevant difference to the proper construction of the policy.

397 Swiss Re also sought to rely upon several differences between the insured perils in question in *FCA v Arch* and those in the LCAM policy. In the former, the insured peril was the occurrence of illness within a defined radius whereas, in the latter, the substance of the peril was the order or actions of a government authority. For that reason, it was submitted that it was not possible

to conclude that the underlying fortuity of the insured peril in the LCAM policy was the COVID-19 pandemic itself, which was the conclusion reached in *FCA v Arch*. This submission is misconceived. In order for the present question to arise, it would be necessary to assume that the previous conclusions which negated the operation of the policy were incorrect. Therefore, it would be necessary to assume that there had been a relevant outbreak of COVID-19 which had the consequence of cl 9.1.2.1 or 9.1.2.6 operating. If that were so, there would exist some relevantly operative outbreak of COVID-19 in the community. On that basis, it would be possible to regard the existence of COVID-19 as arising from the same underlying fortuity. Alternatively, if the assumed circumstances consists of the facts as presently known and the policy being assumed to respond by cl 9.1.2.6, the underlying fortuity would be the threat of COVID-19 to persons rather than the COVID-19 pandemic itself. The underlying fortuity principle would then operate by requiring the stripping out of the counterfactual those other consequences of the threat of the disease which could conceivably include other orders or directions which hindered the insured's business.

398 It should be observed that, in part, Swiss Re's submissions proceeded upon an analysis focused upon what was the "underlying cause" of the relevant order or action by the government authority, and that the cause was the outbreak within the identified area. With respect, that unduly narrows the principle developed in *FCA v Arch* and accepted by the trial judge. The essential issue is ascertaining the "underlying fortuity" of the insured peril, being the events or circumstances which give rise to the occurrence of the peril. That is broader than the concept of the underlying cause of the peril, although it can be acknowledged that different expressions are used in *FCA v Arch* at 749 [287]. In this respect, it is apparent that the underlying fortuity is fact dependent. The underlying fortuity of an insured peril which has as an element the outbreak of a disease within a defined area, may be an outbreak confined to that area, one extending beyond that area, or one which is epidemic in nature and which merely includes a presence in the defined area. In the present case, and assuming the operation of cl 9.1.2.6, it would have been the threat of COVID-19 which activated the insured peril. Whether that is taken as a threat within five kilometres of the insured premises or within Queensland more generally probably does not matter. It was not shown that the coincidental causes of loss which were sought to be excluded from the counterfactual for the purposes of the trends clause differed depending on which was accepted as being the underlying fortuity. The necessary consequence is that Swiss Re has not established that the contributing causes of loss did not arise from the same underlying fortuity. On the known facts it would appear that they did.

399 It follows that Ground 5 of the cross-appeal also fails.

Conclusion

400 The necessary conclusion from the above is that the appeal and the cross-appeal should be allowed in part but otherwise dismissed. Some of the answers provided by the learned primary judge require some slight amendment.

401 As a result of an agreement between the parties there is no need to make any order with respect to costs.

PROPOSED ORDERS ON THE APPEAL

402 From the foregoing the orders on this appeal should be as follows:

1. The Appeal be allowed in part.

2. The Cross-Appeal be allowed in part.

3. The primary judge's answers to the questions posed be amended as follows:

1. Disease Clause (9.1.2.1) (page 31):

On the proper construction of the Disease Clause:

(a) Did the "Authority Response-LCA Marrickville" cause "closure … of the whole or part of the Situation"?

Answer: in respect of the order of 26 March 2020, yes. In respect of the orders of 1 and 13 June 2020, no.

(b) Was there a closure or evacuation of the whole or part of the Situation?

See 1(a) above.

In assessing:

(i) "closure", must there be physical prevention of access to the Situation (or part of it), or is it sufficient there was a restriction of LCA Marrickville's use of the Situation (or part of it) for its Business and if so, what restriction?

(ii) "evacuation", must there be a physical removal of persons from the Situation (or part of it), or is it sufficient if there was a restriction of LCA Marrickville's use of the Situation (or part of it) for its Business and if so, what restriction?

As to (i), there must be physical prevention of access to the Situation (or part of it) to those who would otherwise be able to obtain access (for example, members of the public).

As to (ii), this does not arise, but the answer would be yes.

(c) Was there an "outbreak" of COVID-19 at the Situation?

This cannot be answered on the evidence.

(i) Does a single person infected with COVID-19 entering the Situation constitute an "outbreak"?

~~*Not necessarily. If the person is able to communicate COVID-19 to other people and is within the community (in the sense of not being in a controlled environment such as quarantine, isolation or a hospital) then, given the nature of COVID-19 and the associated probability of transmission including to persons unknown, a single person infected with COVID-19 entering the Situation who is in a non-controlled setting would constitute an "outbreak" of COVID-19.*~~

Unnecessary to answer.

(ii) With what degree of prevalence do instances of COVID-19 have to occur at the Situation (or elsewhere) in order to constitute an "outbreak" at the Situation?

See (c)(i) above.

(iii) Does the outbreak have to occur at the Situation or can it occur:

A. at the Situation and elsewhere and, if so, where?

B. elsewhere but not at the Situation and, if so, where?

This does not arise. The requirement of cl 9.1.2.1 is an order of a competent public authority as a result of an outbreak of a notifiable human infectious or contagious disease at the Situation (or within the 5 kilometre radius under cl 9.1.2.4) or any discovery of an organism likely to result in the occurrence of a notifiable human infectious or contagious disease at the Situation (or within the 5 kilometre radius under cl 9.1.2.4). This depends not on objective facts but on the cause of the making of the order. The required cause must be an outbreak of a notifiable human infectious or contagious disease at the Situation (or within the 5 kilometre radius under cl 9.1.2.4) or any discovery of an organism likely to result in the occurrence of a notifiable human infectious or contagious disease at the Situation (or within the 5 kilometre radius under cl 9.1.2.4).

If yes to (c), was the "Authority Response-LCA Marrickville" "a result of" that "outbreak"?

No.

(e) Was there a "discovery of [SARS-CoV-2] likely to result in the occurrence of [COVID-19] … at the Situation"?

On the current evidence, no. However, this does not arise for the reasons set out at 1B above.

(i) Does SARS-CoV-2 have to be discovered at the Situation or is it sufficient if it is discovered elsewhere and, if so, where?

No. If SARS-CoV-2 is discovered elsewhere but is likely to result in the occurrence of a notifiable human infectious or contagious disease at the Situation or within the 5 kilometre radius that requirement of cl 9.1.2.1/9.1.2.4 will be satisfied. To satisfy the requirement of likelihood, however, evidence of a person with COVID-19 who is capable of communicating the disease to another person within the radius will be

required. However, this does not arise for the reasons set out at B above.

(ii) Does SARS-CoV-2 have to be likely to result in the occurrence of COVID-19 at the Situation or is it sufficient if it is likely to result in the occurrence of COVID-19 elsewhere and, if so, where?

SARS-CoV-2 must be likely to result in the occurrence of a notifiable human infectious or contagious disease at the Situation or within the 5 kilometre radius.

(f) Was the "Authority Response-LCA Marrickville" "a result of" a "discovery of [SARS-CoV-2] likely to result in the occurrence of [COVID-19] … at the Situation"?

No.

(g) What if any "interruption" or "interference" occurred "in consequence of" any "closure … by order of a competent public authority"?

None.

(h) What is required for there to be an "occurrence" of COVID-19?

A single case of COVID-19 is an occurrence of COVID-19.

2. Biosecurity Act exclusion (clause 9.1.2.1) (page 31)

(a) Is COVID-19 a disease "declared to be a listed human disease pursuant to subsection 42(1) of the Biosecurity Act 2015", in circumstances where it was determined to be a "listed human disease" after the Policy inception date and during the Policy Period?

Yes.

(b) If yes to (a), does section 54 of the *Insurance Contracts Act 1984* (Cth) (ICA) have the effect that the insurer cannot refuse to pay LCA Marrickville's claim by reason only of the determination and can only reduce its liability to the extent that its interests were prejudiced as a result of the determination?

No.

(c) {Swiss Re version; LCA Marrickville does not agree}: If yes to (b), was LCA Marrickville's loss caused or contributed to by the determination?

This does not arise.

(d) {LCA Marrickville version; Swiss Re does not agree}: If yes to (b), could the determination reasonably be regarded as being capable of causing or contributing to LCA Marrickville's loss?

This does not arise.

(e) If yes to (c) and/or (d), to what extent is Swiss Re entitled to refuse to pay the claim?

This does not arise.

(f) If yes to (b) but no to (c) and/or (d), what prejudice, if any, to Swiss Re resulted from the determination and to what extent (if any) should Swiss Re's liability in respect of the claim be reduced?

This does not arise.

(g) If the Biosecurity Act exclusion does apply to exclude LCA Marrickville's loss from cover under the Disease Clause and the Expansion Clause, can such loss be considered for cover under the Catastrophe Clause and/or the Prevention of Access Clause?

No.

3. Expansion Clause (9.1.2.4) (page 31):

On the proper construction of the Expansion Clause:

(a) Issues 1(a), (b), (g), (h) and (i) and 2, above also arise in the context of the Expansion Clause.

The same answers apply as set out above expanded to the 5 kilometre radius.

(b) Was there an "outbreak" of COVID-19 within a five kilometre radius of the Situation?

This cannot be answered on the evidence.

In particular:

(i) Does a person infected with COVID-19 entering, or residing in, the area within five kilometres of the Situation constitute an "outbreak"?

~~*Not necessarily. If the person is able to communicate COVID-19 to other people and is within the community (in the sense of not being in a controlled environment such as quarantine, isolation or a hospital) then, given the nature of COVID-19 and the associated probability of transmission including to persons unknown, a single person infected with COVID-19 entering the Situation who is in a non-controlled setting would constitute an "outbreak" of COVID-19.*~~

Unnecessary to answer.

(ii) With what degree of prevalence do instances of COVID-19 have to occur within five kilometres of the Situation (or elsewhere), or what other characteristics must such instances have, in order to constitute an "outbreak" within a five kilometre radius of the Situation?

See (b)(i) above.

(iii) Does the outbreak have to occur within a five kilometre radius of the Situation only or can the outbreak occur outside a five kilometre radius of the Situation as well and, if so, where?

This does not arise. The requirement of cl 9.1.2.1 is an order of a competent public authority as a result of an outbreak of a notifiable human infectious or contagious disease at the Situation (or within the 5 kilometre radius under cl 9.1.2.4) or any discovery of an organism likely to result in the occurrence of a notifiable human infectious or contagious disease at the Situation (or within the 5 kilometre radius under cl 9.1.2.4). This depends not on objective facts but on the cause of the making of the order. The required cause must be an outbreak of a notifiable human infectious or contagious disease at the Situation (or within the 5 kilometre radius under cl 9.1.2.4) or any discovery of an organism likely to result in the occurrence of a notifiable human infectious or contagious disease at the Situation (or within the 5 kilometre radius under cl 9.1.2.4).

(c) Was the "Authority Response-LCA Marrickville" "a result of" an outbreak of

COVID-19 within a five kilometre radius of the Situation?

No.

In particular, must the relevant order be made in direct response to the specific outbreak within a five kilometre radius of the Situation or is it sufficient if the relevant order is made in response to, or to prevent, the spread of COVID-19 more broadly (e.g. on a regional, state or nationwide scale)?

This depends on the terms of the order.

(d) Was there a "discovery of [SARS-CoV-2] likely to result in the occurrence of [COVID-19]" within a five kilometre radius of the Situation?

On the current evidence, no. However, this does not arise for the reasons set out at 1B above.

(i) Does SARS-CoV-2 have to be discovered within a five kilometre radius of the Situation or is it sufficient if it is discovered elsewhere and, if so, where?

No. If SARS-CoV-2 is discovered elsewhere but is likely to result in the occurrence of a notifiable human infectious or contagious disease at the Situation or within the 5 kilometre radius that requirement of cl 9.1.2.1/9.1.2.4 will be satisfied. To satisfy the requirement of likelihood, however, evidence of a person with COVID-19 who is capable of communicating the disease to another person within the radius will be required. However, this does not arise for the reasons set out at 1B above.

(ii) Does SARS-CoV-2 have to be likely to result in the occurrence of COVID-19 within a five kilometre radius of the Situation, or is it sufficient if it is likely to result in the occurrence of COVID-19 elsewhere and, if so, where?

SARS-CoV-2 must be likely to result in the occurrence of a notifiable human infectious or contagious disease at the Situation or within the 5 kilometre radius.

(e) Was the "Authority Response-LCA Marrickville" "a result of" a "discovery of [SARS-CoV-2] likely to result in the occurrence of [COVID-19]" within a five kilometre radius of the Situation?

No.

4. Catastrophe Clause (9.1.2.5) (page 31):

On the proper construction of the Catastrophe Clause:

(a) {Swiss Re version; LCA Marrickville does not agree}: Was the outbreak of COVID-19 a "conflagration or other catastrophe"?

No.

(b) {LCA Marrickville version; Swiss Re does not agree}: Was COVID-19 and its impact a "conflagration or other catastrophe"?

No.

(c) When did any such "conflagration or other catastrophe" commence and end?

~~*If COVID-19 is a catastrophe within cl 9.1.2.5 it commenced in NSW no later than 20 March 2020.*~~

Unnecessary to answer.

(d) Was the "Authority Response-LCA Marrickville" an "action of a civil authority" implemented "for the purpose of retarding" the "conflagration or other catastrophe"?

No.

(e) What "interruption" or "interference" occurred "in consequence of" any "action of a civil authority"?

None within the meaning of cl 9.1.2.5.

5. Prevention of Access Clause (9.1.2.6) (page 31):

On the proper construction of the Prevention of Access Clause:

(a) Was there a "risk to life … within five kilometres of [the] Situation"?

This does not arise. The requirement is action of a lawful authority attempting to avoid or diminish a risk to life within 5 kilometres of the Situation. There is no requirement to prove as an objective fact a risk to life within 5 kilometres of the Situation.

(i) Does the "risk to life" have to exist within five kilometres of the Situation only or can the "risk to life" exist in areas further [than] five kilometres from the Situation as well and, if so, where?

See (a) above.

(ii) Must the relevant order be made in direct response to the specific "risk to life" within five kilometres of the Situation, or is it sufficient if the relevant order is made as part of an attempt to "avoid or diminish risk to life" of a broader scope (e.g. on a regional, state or nationwide scale)?

There is no requirement in this regard other than action of a lawful authority attempting to avoid or diminish a risk to life within 5 kilometres of the Situation. It does not matter is the authority is also attempting to avoid or diminish a risk to life outside 5 kilometres of the Situation.

(b) Was the "Authority Response-LCA Marrickville" taken in an attempt to avoid or diminish the identified "risk to life"?

No, because cl 9.1.2.6 does not apply to actions of an authority relating to a disease. If this is wrong, yes.

(c) Was access to or use of the Situation prevented or hindered?

Yes. The 26 March 2020 order prevented access to and prevented the use of the Situation. The 1 and 13 June 2020 orders potentially hindered use of the Situation.

In particular, must the use of or access to the Situation for any purpose be prevented or hindered or is it sufficient for use of or access to the Situation for the purposes of LCA Marrickville's Business, to be prevented or hindered?

It is sufficient if use of or access to the Situation for the purposes of LCA Marrickville's Business, is prevented or hindered.

(d) What, if any, "interruption or interference" occurred "in consequence of" any "action of any lawful authority"?

None because cl 9.1.2.6 does not apply to an authority's action in response to a disease.

(e) {LCA Marrickville presses for the underlined words in this paragraph} To what extent would LCA Marrickville's access to or use of the Situation have been prevented or hindered, regardless of the lawful authority's action, and to what extent (if any) does this affect indemnity?

This does not arise.

6. Clause 9.1.2 (page 31):

On the proper construction of clause 9.1.2:

(a) Is Swiss Re's obligation to indemnify an "Insured" in respect of loss resulting from the interruption of or interference with the "Business" in consequence of closure or evacuation of the whole or part of the "Situation" by order of a competent public authority as a result of:

(i) an outbreak of a notifiable human infectious or contagious disease; or

(ii) any discovery of an organism likely to result in the occurrence of a notifiable human infectious or contagious disease,

confined to the terms of the Disease Clause and the Expansion Clause (as it applies to the circumstances of the Disease Clause)?

Clauses 9.1.2.5 and 9.1.2.6 do not apply to actions of an authority in response to a disease.

7. Causation, Adjustment and Basis of Settlement

If clause 9.1.2 of the Policy responds, on the proper construction of the adjustment clause (being the clause in the last sub-paragraph of Clause 8 on p. 29 of the Policy):

(a) Was there any interruption of or interference with LCA [Marrickville]'s Business in consequence of the relevant insured perils in the Disease Clause, the Expansion Clause, the Catastrophe Clause or the Prevention of Access Clause?

While the question does not arise I note that, if I am wrong about the proper construction of any of the insuring clauses, it should follow that there was interruption of or interference with LCA Marrickville's Business in consequence of the relevant insured perils in the applicable clause. The fact that LCA Marrickville may also have suffered loss generally from the existence and risk of COVID-19 in NSW would not mean that the action of the authority would not also be a proximate cause of LCA Marrickville's on the facts.

(b) What adjustment of the Rate of Gross Profit, Standard Turnover, Standard Gross Revenue, Standard Gross Rental and Rate of Payroll is necessary to provide for the "trend" of the Business, "variations" affecting the Business and/or "other circumstances" affecting the Business.

While the question does not arise I note that, if I am wrong about the proper construction of any of the insuring clauses, the adjustments clause does not require any adjustment to be made for the existence and risk of COVID-19 in NSW as it is an essential cause of the Damage.

(c) How, if at all, does adjustment take into account the effect that COVID-19 had

on the Business (other than the effect of the "Authority Response–LCA Marrickville").

While the question does not arise I note that, if I am wrong about the proper construction of any of the insuring clauses, the adjustments clause does not require any adjustment to be made for the existence and risk of COVID-19 in NSW as it is an essential cause of the Damage.

(d) To what extent should account be made for grants, subsidies, abatements or other benefits received by LCA Marrickville when assessing its entitlement to be indemnified for its loss (if any) including but not limited to JobKeeper, other payments made to it by a Commonwealth or State Government and rental relief or rebates?

~~*While the question does not arise I note that, if I am wrong about the proper construction of any of the insuring clauses, LCA Marrickville, either under the general law or cl 10.1.3 would have to account for payments received under the JobKeeper scheme, by way of rental relief, and franchisor relief. It would not have to account for the act of grace payments received from the NSW Government.*~~

Unnecessary to answer

If clause 9.1.2 of the Policy responds, on the proper construction of the Basis of Settlement clause (clause 10):

(e) What is the date of the 'Damage'?

While the question does not arise I note that, if I am wrong about the proper construction of any of the insuring clauses, the date of the Damage would be the date of the first action by an authority satisfying an insuring clause, which would be 26 March 2020.

(f) {LCA Marrickville does not agree that issue (f) should be included in this test case because the factual premise for this issue will be the subject of a separate loss assessment process} To the extent interruption of, or interference with, LCA Marrickville's business was caused by different matters comprising the "Authority Response-LCA Marrickville", to what extent is the resulting loss (if any) to be aggregated for the purposes of applying a limit, deductible and any other conditions of cover?

Insufficient submissions were made to enable this issue to be answered.

8. Interest

(a) Is interest payable by Swiss Re pursuant to section 57 of the ICA?

No.

(b) If yes to paragraph (a), from what date is any such interest payable?

~~*This does not arise. If it did arise, interest would be payable from the date of final determination of this proceeding is Swiss Re is liable to pay under the policy.*~~

Unnecessary to answer.

4. Otherwise the Appeal and the Cross-Appeal be dismissed.

5. No order as to costs.

MERIDIAN TRAVEL (VIC) PTY LTD V INSURANCE AUSTRALIA LIMITED – NSD 1080 OF 2021

403 Before the primary judge, Meridian contended that it was entitled to indemnity pursuant to either a disease clause or a hybrid clause in a policy of insurance it held with Insurance Australia. The claim under the latter was rejected at first instance and was not pursued further on appeal. Necessarily, Meridian's appeal concerns only its claim under the disease clause. The appeal, cross-appeal and notices of contention also raised issues concerning the application of s 61A of the *Property Law Act (Vic)*, accounting for third party payments and benefits that Meridian had received, and whether it was entitled to interest pursuant to s 57 of the *Insurance Contracts Act*.

The relevant facts

404 Meridian operates a travel agency from premises at 159 Burgundy Street, Heidelberg, in the State of Victoria. It has expertise in arranging cruises, solo travel, tailored independent itineraries, exclusive group tours, and special interest tours for music groups and dance troupes. International travel bookings accounted for approximately 90% of its revenue, of which about 65% was derived from international tours and cruises. Domestic travel bookings accounted for the remaining 10%.

405 Meridian had taken out a policy of insurance with Insurance Australia which was referred to as a "Steadfast Office Pack Policy" with policy number 15T4227893 (the "Meridian policy"). It comprised a Renewal Schedule and the Steadfast Office Pack Policy wording and was issued on 17 February 2020 with the period of cover being from 22 February 2020 to 22 February 2021, 4:00 pm.

406 In March 2020, the Commonwealth Government introduced a ban on cruise ships arriving at Australian ports which commenced to have effect on 15 March 2020 (the "Cruise Ship Ban").

407 It is not in dispute that from 25 March 2020, Australian citizens and permanent residents were unable to leave Australia without first obtaining an exemption and that this effectively prevented Meridian's customers or potential customers from leaving the country. The instrument imposing this prohibition was the *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Overseas Travel Ban Emergency Requirements) Determination 2020* (Cth) and was made by the Commonwealth Health Minister on 25 March 2020 pursuant to s 477(1) of the *Biosecurity Act*. The prohibition thereby created is referred to as the "Overseas Travel Ban".

408 From March 2020, a number of directions were made by Victorian Government officials pursuant to s 200(1)(d) of the *Public Health and Wellbeing Act 2008* (Vic) which are relevant to the issues on appeal. These were in force from time to time between March 2020 and February 2021 in all or part of the State and, *inter alia*, prohibited persons from leaving the premises where they ordinarily resided other than for specified reasons (referred to as "stay-at-home" orders), restricted the size of gatherings, and restricted specified kinds of businesses from operating.

409 Meridian made a claim under its policy with Insurance Australia on 15 July 2020 asserting that there was a relevant outbreak of COVID-19 for the purposes of the disease clause by 1 March 2020 and, further, that the several Commonwealth and Victorian Government orders and directions were insured perils under the hybrid clause of the policy.

410 Insurance Australia denied indemnity on 11 August 2020. A review was undertaken following a request from Meridian, but the declinature was affirmed on 28 August 2020.

411 Meridian lodged a complaint in respect of Insurance Australia's decision with AFCA on 9 September 2020.

Policy wording

412 The Meridian policy is a composite one, containing distinct parts, each of which provide a particular form of cover. Section 1, headed "Property", provides cover for property damage. This cover is extended by Section 2, headed "Business Interruption".

413 The principal insuring clause for the business interruption cover provides:

> **Cover**
>
> If the Business carried on by You is interrupted or interfered with as a result of Damage occurring during the Period of Insurance, to:
>
> ["Property Insured" and "property at the Situation"]
>
> We will, after taking account any sum saved during the Indemnity Period in respect of such charges and expenses of the Business as may cease or be reduced in consequence of the interruption or interference, indemnify You in respect of the loss arising from such interruption or interference in accordance with the settlement of claims clause to the sum insured expressed against the relevant item on the Schedule, where the Schedule notes that cover has been selected.

414 The cover under that section is extended by a later clause headed, "Additional Benefits". That clause, which in this case was amended by the endorsements, relevantly provides as follows:

Additional benefits

This section is extended to include the following additional benefits.

Unless expressly stated in the additional benefit, additional benefits 1 to 13 inclusive are payable provided that the sum insured expressed against the relevant item in the Schedule is not otherwise exhausted.

For additional benefits 1 to 9 inclusive We will pay You (depending on the part of this section which is applicable to You) for:

a) 'Item 1 Gross profit'; or

b) 'Item 2 Payroll'; or

c) 'Item 6 Gross rentals'; or

d) 'Item 7 Weekly income'; or

e) 'Item 9 Gross revenue',

resulting from interruption of or interference with Your Business as a result of Damage occurring during the Period of Insurance to, or as a direct result of:

…

8. Murder, Suicide or Disease

The occurrence of any of the circumstances set out in this Additional Benefit shall be deemed to be Damage to Property used by You in the Situation.

(a) Murder or suicide occurring at the Situation.

(b) Injury, illness or disease caused by the consumption of food or drink provided and consumed at the Situation.

(c) The outbreak of a human infectious or contagious disease occurring within a 20 kilometre radius of the Situation.

(d) Closure or evacuation of Your Business by order of a government, public or statutory authority consequent upon:

(1) the discovery of an organism likely to result in a human infectious or contagious disease at the Situation; or

(2) vermin or pests at the Situation; or

(3) defects in the drains or other sanitary arrangements at the Situation.

Cover under Additional Benefits 8(c) and 8(d)(1) does not apply in respect of Highly Pathogenic Avian Influenza in Humans or any other diseases declared to be quarantinable diseases under the Quarantine Act 1908 and subsequent amendments.

415 Some inconsistency in the numbering in the policy arose by reason of the endorsement, although the parties sensibly agreed that the above represented the policy terms. It is apparent that an amendment in the policy's endorsement was intended to alter the wording of clause 2 of the "Additional benefits" clause but incorrectly referred to "Additional Benefit 8". For the

purposes of these reasons, it is referred to as "cl 8" and is identified above accordingly. It is useful to note at this point that the quotation of the form of "Additional Benefit 8" in the reasons of the primary judge (at PJ [438]) is not the correct version although, ultimately, nothing turns on that.

416 It should be observed that cl 8(c) is a disease clause. Its operation is not dependent upon the actions of a government authority and, by its terms, it applies where the occurrence of the disease is the proximate cause of loss. That can be compared to the extension in cl 8(d)(1), which is a hybrid clause requiring particular government action consequent upon a specified circumstance in order for it to respond to any claim.

417 The following definitions applicable to all sections of the policy were relevant to the issues raised on appeal:

> **General definitions**
>
> …
>
> **Business** means:
>
> all activities stated in the Schedule including:
>
> a) the ownership and occupation of the Business Premises by the Insured;
>
> …
>
> **Damage** (with 'Damaged' having a corresponding meaning) means physical loss, damage or destruction.
>
> …
>
> **Property Insured** means buildings, contents, specified items, stock, total contents, tobacco, cigars, cigarettes, and items listed on the Schedule and used in Your Business
>
> …
>
> **Situation** means the locations set out as the situation in the Schedule
>
> '**You**', '**Your**', '**Yours**', '**Insured**' means the person or entity named in the Schedule as the insured.

418 The Renewal Schedule identifies the "Business" as being "Travel Agency Services (Excluding Tour Operators)". The "Situation" is identified as being Meridian's premises in Heidelberg, Victoria. As the primary judge noted, the radial area of 20 kilometres around those premises covered the majority of metropolitan Melbourne.

419 Other provisions of the policy are referred to as required.

The decision at first instance

420 In general terms, the primary judge held (PJ [449] – [451]) that the agreed facts established that there was a relevant "outbreak" within 20 kilometres of Meridian's premises by no later than 30 March 2020. This had been accepted by Insurance Australia. The consequence was that from that date cl 8(c) *prima facie* responded to Meridian's claim in that the insured peril had occurred because the Victorian Government restrictions which were imposed as a result of the outbreak prevented potential customers from attending at Meridian's premises. However, her Honour observed (PJ [481]) that 8(c) would only cover losses arising from a decline in business due to the interference of those potential walk-in customers. A reduction in business transacted by telephone or internet would not be caused by the outbreak. Whilst her Honour observed that on the presently available evidence she was unable to infer that the peril was a proximate or any other cause of Meridian's loss, the possibility that Meridian would be able to establish some insurable loss covered by cl 8(c) arising from the diminution of domestic travel was left open. Nevertheless, her Honour had found (PJ [487] – [489]) that the Commonwealth Government's measures which imposed the Overseas Travel Ban and the Cruise Ship Ban had not arisen from the same "underlying fortuity" as the insured peril for the purposes of cl 8(c) (the disease clause). It followed that, in ascertaining whether the insured peril in cl 8(c) was a proximate cause of the insured loss, it was not possible to ignore the effect of Commonwealth Government's measures, which had the necessary conclusion that the insured peril in cl 8(c) was not a proximate cause of Meridian's loss of income from overseas travel bookings.

421 Her Honour also held (PJ [478]) that cl 8(d)(1) (the hybrid clause) did not respond to Meridian's claim. That clause required closure or evacuation of the business "by order" of a relevant authority, which was not the same thing as the order having the consequence that premises were closed (PJ [459] – [460]). In particular, the Overseas Travel Ban did not close any part of Meridian's business, nor did it impose on any obligation on Meridian to do so (PJ [463]). Rather, it imposed travel restrictions on Australian citizens and permanent residents with the practical consequence that they could not make use of Meridian's business to book international travel. The Victorian Government directions also lacked the requisite operative character because they did not require the closure of Meridian's business (PJ [466] – [468]). Her Honour further concluded (PJ [472]) that the Commonwealth Government actions were not consequent upon "the discovery of an organism likely to result in a human infectious or contagious disease at the Situation", irrespective of which of several possible constructions was given to that clause. For those reasons, cover under the hybrid clause was not available.

422 As previously mentioned, the primary judge had elsewhere concluded that:

(1) Section 61A of the *Property Law Act (Vic)* did not apply (PJ [125]). It followed that the words, "Quarantine Act 1908 and subsequent amendments", which appeared in the Meridian policy in the exclusion in relation to quarantinable diseases under the repealed *Quarantine Act* could not be read as referring to listed human diseases under the *Biosecurity Act* and, consequently, the exclusion did not apply (PJ [440])

(2) The liability of an insurer to indemnify its insured was reduced by the amount of any JobKeeper payments and rental relief it had received either pursuant to the relevant "sums saved" clause in the policy or under general principles applicable to contracts of indemnity (PJ [385] – [405], [621] – [624]). This reasoning was extended by reference to Meridian's receipt of JobKeeper and a rental waiver (PJ [509]). However, her Honour also held that the amounts it had received pursuant to the "Federal COVID-19 Consumer Travel Support Program" and from the Victorian Government "Support Fund" were in the nature of mercy payments which did not need to be taken into account either as sums saved or payments which reduced its loss (PJ [514] – [515]).

(3) It was not unreasonable for the purposes of s 57 of the *Insurance Contracts Act* for an insurer to withhold any amount to which its insured was entitled pending the outcome of the test cases, including any final determination on appeal (PJ [415], [631]). It followed that, if Meridian was entitled to be paid any amounts under the policy, Insurance Australia would not be liable to pay interest on such amounts at least until judgment was delivered (PJ [516]).

423 The learned primary judge's reasons also recorded her answers to the separate questions posed by the parties in relation to the operation of the Meridian policy (PJ [519] – [521]).

424 Both Meridian and Insurance Australia appealed from those answers. Each party also filed a notice of contention identifying grounds on which it sought to uphold aspects of her Honour's decision from which the other party appealed. In summary, these gave rise to the following issues (set out in the order in which they are addressed below):

(a) whether the Overseas Travel Ban and the Cruise Ship Ban were caused by the same underlying fortuity as the insured peril (appeal, Ground 1);

(b) whether third party payments received by Meridian would have to be accounted for in assessing its loss (appeal, Ground 2; cross-appeal, Ground 4);

(c) whether interest was payable by Insurance Australia pursuant to s 57 of the *Insurance Contracts Act* (appeal, Ground 3);

(d) whether s 61A of the *Property Law Act (Vic)* applied such that cover under cll 8(c) and 8(d)(1) did not apply in respect of COVID-19 (Insurance Australia's notice of contention, Grounds 1 and 2; cross-appeal, Ground 1; Meridian's notice of contention, Ground 1);

(e) the proper construction of the word "outbreak" in the disease clause (cross-appeal Ground 2);

(f) the proper construction of the phrase "at the Situation" in cl 8(d)(1) (the hybrid clause) (cross-appeal, Ground 3); and

(g) the proper construction of the phrase "closure or evacuation of Your Business" in the hybrid clause (Insurance Australia's notice of contention, Ground 3).

Meridian's appeal

Whether the Overseas Travel Ban and the Cruise Ship Ban were caused by the same underlying fortuity as the insured peril – appeal, Ground 1

425 The central issue of the first ground of appeal was whether the primary judge erred in concluding that the Overseas Travel Ban and the Cruise Ship Ban did not involve the same "underlying fortuity" as the insured peril in cl 8(c), being the outbreak of COVID-19 within 20 kilometres of Meridian's premises which, it was accepted, had occurred by no later than 30 March 2020. Her Honour noted (PJ [491]) that the significance of this issue of the "underlying fortuity" depended on Meridian establishing that the insured peril was a proximate cause of its loss. In other words, her Honour seemed to say that it was necessary first to ascertain whether the insured peril was a proximate cause of the loss before applying the "underlying fortuity" principle. As appears in the previous discussion of *FCA v Arch* earlier in these reasons, there is some difficulty with this proposition. It is only by stripping out from the hypothetical counterfactual scenario those additional causes of loss which derived from the same underlying fortuity and which the parties naturally expected would occur concurrently with the insured peril, that the efficiency of the insured peril as a cause of the loss could be assessed. It was in this precise way that Hamblen and Leggatt JJSC (733ff [217]ff) deployed the underlying fortuity principle in answer to the insurers' claims that the causative effect of the insured peril had been negated by the overwhelming impact of COVID-19 generally. Returning to the present case, if on any view of the circumstances some unrelated cause of the

loss was so overwhelming as to render any consideration of the causative impact of the insured peril irrelevant, her Honour's comments would be entirely correct.

426 Before this Court, each party assumed the applicability of the "underlying fortuity principle" as identified by the UK Supreme Court in *FCA v Arch* and no submissions were made as to its correctness or as to the manner in which it applied. The parties merely addressed the issue at a general level and focused upon the factual determination by the primary judge as to the connection between the Commonwealth Government travel bans and the outbreak of COVID-19 in Victoria or, at least, within 20 kilometres of the insured's Situation.

The reasons at first instance in more detail

427 Her Honour concluded (PJ [481]) that she was unable to infer from the available evidence that the relevant outbreak of COVID-19 was a proximate or any other kind of cause of Meridian's loss. It was not possible to know what part of the business was attributable to walk-in customers (those who would be affected by the restrictions on movement) and customers who booked by telephone or online (who would be unaffected). Meridian could not claim that the restrictions on access to its premises or on movement would have inhibited telephone bookings from occurring and thereby caused its loss, as any assessment of loss had to be confined to the "those activities of the business which were interrupted by the operation of the insured peril": *FCA v Arch* [281] – [286]. Given the lack of focus on the issue during the hearing below, her Honour was prepared to receive further evidence and hear the parties further about it if appropriate.

428 Her Honour also concluded (PJ [482]) that, as 90% of Meridian's business was international travel, the Overseas Travel Ban must have been "a, if not the sole, proximate cause" of its losses in relation to that aspect of its operations. Conversely, as 10% of its business was domestic travel, the Victorian Government lockdown directions must have been "a, if not the sole, proximate cause" of any losses in that respect.

429 The primary judge then considered whether Meridian could recover any losses of which there were concurrent proximate causes, one being the insured peril (to the extent this was shown to be the case) which arose from the outbreak of the disease within the 20 kilometre radial area and the Victorian Government actions, and the other being the Commonwealth imposed travel bans. In relation to this issue, her Honour accepted (PJ [484]) that the "underlying fortuity" principle identified in *FCA v Arch* was apposite and described its rationale as being:

> To exclude cover where the insured peril is a proximate cause of the loss merely because another proximate cause of loss **arising from the very same circumstances** exists makes no sense provided that the other proximate cause of loss is not itself clearly excluded from cover.
>
> (Emphasis added).

430 If the underlying fortuity was characterised as being the presence and the risk of the spread of COVID-19 in Victoria, there was no difficulty with the proposition that the Victorian Government restrictions had the same underlying cause as the other effects of the presence and risk of the spread of COVID-19 in the State, including the outbreak within the specified radial area of Meridian's premises (PJ [486]).

431 However, the same could not be said of the Commonwealth Government's Overseas Travel Ban and the Cruise Ship Ban which were concerned with the "presence of COVID-19 overseas and the risk that an overseas traveller coming to Australia may bring COVID-19 into any part of Australia", as distinct from the "presence of COVID-19 in the State and the associated risk of the spread of COVID-19 through the State (including the area within the radius…)" (PJ [487] – [488]). In that context, it was not "artificial, contrived and commercially irrational to distinguish between the insured and uninsured perils" (PJ [489]). Her Honour also refused to characterise the underlying fortuity as being "COVID-19 generally".

Meridian's submissions as the underlying fortuity

432 The essence of Meridian's submissions was that her Honour had drawn a false distinction between the "presence of COVID-19 overseas and the risk that an overseas traveller coming to Australia may bring COVID-19 into any part of Australia" and the "presence of COVID-19 in the State and the associated risk of the spread of COVID-19 throughout the State (including the area within the radius or at the insured situation)". It submitted that both the Commonwealth and Victorian Government actions were caused by the presence and the associated risk of the spread of COVID-19 including within Victoria.

433 In support of this submission, reference was made to the Explanatory Statement accompanying the instrument effecting the Cruise Ship Ban which stated that "[t]his Determination is in response to the COVID-19 pandemic, which continues to represent a severe and immediate threat to human health in Australia and across the globe." It was further submitted that, in accordance with the requirements of the *Biosecurity Act*, the Overseas Travel Ban was made because, as the Explanatory Statement identified, the Minister had been advised and was satisfied that, "the outbound travel restriction is necessary to prevent or control the entry,

emergence, establishment or spread of COVID-19 in Australian territory and abroad." Meridian also noted that, by 23 March 2020, there were at least 215 instances of COVID-19 in the 20 kilometre radial area of its premises, which amounted to over 10% of the total number of COVID-19 cases in Australia.

434 In oral submissions, Mr Finch SC for Meridian also analysed the issue in terms of whether the Commonwealth and Victorian Government actions arose from the same underlying fortuity. The apparent logic was that if those actions arose from the same underlying fortuity, then the Commonwealth Government actions and the insured peril arose from the same underlying fortuity, because her Honour had accepted (PJ [486]) that the insured peril and the Victorian Government actions arose from the same underlying fortuity. In this respect, the essence of his submission was that the Commonwealth Government actions had, as at least one of their focuses, the presence of COVID-19 in the State and the associated risk of the spread of COVID-19 throughout Victoria.

Insurance Australia's submissions

435 Insurance Australia supported the primary judge's reasoning that the Commonwealth Government actions in imposing the Overseas Travel Ban and the Cruise Ship Ban did not arise from the same underlying fortuity as the insured peril. In its submission, the fortuity underlying the insured peril, being the outbreak of COVID-19 within 20 kilometres of the insured's premises, did not extend beyond the presence of COVID-19 in Victoria. It further submitted that, as the Commonwealth Government's actions were taken for the purpose of preventing persons bringing further cases of COVID-19 into the country, they did not involve that same underlying fortuity as the insured peril.

Conclusion as to the fortuity underlying the Commonwealth Government actions

436 No error has been demonstrated in the primary judge's conclusion that the imposition of the Overseas Travel Ban and the Cruise Ship Ban did not relevantly derive from the same underlying fortuity as the State Government's directions. Her Honour had found (PJ [486]) that the underlying fortuity of the insured peril, being the outbreak of COVID-19 in the relevant area, was the presence of the disease in the State and the associated risk of it spreading throughout the State. Conversely, the Commonwealth Government actions which then prevented Australian citizens and residents from leaving Australia and cruise ships from arriving were not motivated by that fortuity, but by the presence of the disease overseas and the risk that additional cases might be brought into the country (PJ [487]). The correctness of

that finding is not contradicted by Mr Finch SC's submission which referenced the Minister's power under s 477(1) of the *Biosecurity Act* as being exercisable "to prevent or control: (ii) the … spread of a declaration listed human disease in Australian territory". That is merely one condition on which the power may be exercised. It may also be exercised to prevent or control the "entry" of such a disease into Australia. The pursuit of the latter goal was the obvious motivation for the Overseas Travel Ban and the Cruise Ship Ban. As her Honour found (PJ [488]), the fortuity underlying the Commonwealth Government actions had only the most tenuous connection with the insured peril. It is also relevant to observe that it seems those bans were maintained despite a decrease in the presence and risk of the spread of COVID-19 domestically during the term of the policy.

437 As the primary judge also recognised (PJ [487]), the Commonwealth Government actions were substantively different measures to those taken by the Victorian Government. The latter's stay-at-home orders, restrictions on the size of gatherings, and restrictions on the operation of certain businesses were measures which prevented the inhabitants of the State from interacting and, therefore, minimising the occasions on which COVID-19 may spread. The Commonwealth Government actions were, on the other hand, self-evidently directed to preventing the entry of additional cases into the country and were imposed because of the existence of cases of COVID-19 overseas rather than because of the cases in Victoria.

438 The substantive difference in the underlying fortuity of the different measures is supported by the evidence before the primary judge. Of particular relevance was the Prime Minister's statement on 16 March 2020, announcing the Cruise Ship Ban which indicated that it, "will help avoid the risk of a cruise ship arriving with a mass outbreak of the virus". That underscores that the main purpose of its introduction was to prevent the entry of further cases of the virus into Australia rather than to retard its existing proliferation here.

439 Although not presently necessary to decide, characterising the underlying fortuity as being the global COVID-19 pandemic seems to go too far: cf. *FCA v Arch* at 739 [240]. Indeed, on the appeal, Meridian did not press the argument that "COVID-19 generally" was the underlying fortuity. If that was the underlying fortuity, no distinction could be drawn between the insured and uninsured perils in this matter.

440 The necessary conclusion is that the primary judge was correct to determine that, on the one hand, the Victorian Government actions and the insured peril and, on the other, the Commonwealth Government actions, were not derived from the same underlying fortuity.

441 Neither party addressed the issue raised in *FCA v Arch* in relation to the underlying fortuity principle that, in order for a concurrent cause to be ignored in the consideration of whether the insured peril was a proximate cause of the loss, it had to be characterised as one which the parties might naturally expect to occur concurrently with the insured peril. Had they done so, the issue would have been more readily resolved. Here, the insured peril was the outbreak of a disease within 20 kilometres of the insured's Situation. It may well be expected that when such a circumstance arises, the authorities will require businesses to close their doors and restrict the free movement of residents. That being so, each of those events, if not otherwise part of the insured peril itself, can be ignored as competing causes of the insured loss. However, the imposition of nationwide international travel restrictions is not something which the parties would naturally expect to occur concurrently with the localised outbreak of a disease. That is consistent with the primary judge's findings that those restrictions were motivated by factors other than the outbreak of the disease in Victoria. They, therefore, do not have the necessary characteristics to be causes arising from the same underlying fortuity such that their causative impacts cannot be set up against the insured peril. As the Commonwealth Government travel bans effectively curtailed or destroyed Meridian's business (PJ [463]) by detrimentally impacting that 90% of its business related to international travel, it could not be said that the insured peril was a proximate cause of those losses. Accordingly, there is no basis on which to upset the primary judge's reasons in this respect.

Whether third party payments had to be taken into account – appeal, Ground 2; Cross-appeal, Ground 4

442 On the assumption that Meridian was entitled to indemnity under cll 8(c) or 8(d)(1) of the policy, the primary judge considered whether certain payments and financial relief received by it from third parties ought be deducted when calculating the amount recoverable. In particular, her Honour considered whether those amounts ought be deducted, either as a "sum saved" pursuant to the provisions of the Meridian policy, or under general principles applicable to contracts of indemnity. In doing so she considered several different types of third party payments and relief, namely: (a) JobKeeper payments; (b) Federal COVID-19 Consumer Travel Support Program payments; (c) the Victorian Government's Support Fund; and (d) a rental waiver from its landlord. Her Honour held that the savings resulting from JobKeeper and the rental waiver from the landlord had to be accounted for under the "sum saved" provision or general principles of indemnity (PJ [509]). In so holding, she adopted her reasoning in relation to the LCAM and Taphouse policies (PJ [385] – [405], [621] – [624]).

However, her Honour held that the Federal COVID-19 Consumer Travel Support Program payments and the Victorian Government's Support Fund payments were both in the nature of mercy payments and did not reduce Meridian's insured loss (PJ [514] – [515]).

443 By Ground 2 of its appeal, Meridian challenged the primary judge's conclusion in relation to the JobKeeper payments. By Ground 4 of its cross-appeal, Insurance Australia challenged the primary judge's conclusion in relation to the Federal COVID-19 Consumer Travel Support Program payments and the Victorian Government's Support Fund payments. There was no issue on appeal regarding the rental waiver.

444 In light of the conclusion that Meridian is not entitled to indemnity under cl 8(d)(1) of the policy, it is not necessary or appropriate to consider these issues on the assumption that it is entitled to recovery under that clause. However, given the possibility that Meridian may be entitled to indemnity under cl 8(c), it is appropriate to address them, on the assumption that it is able to produce further evidence to satisfy the causal nexus for recovery under that clause.

The relevant policy terms

445 The "sum saved" provision of the Meridian policy appears immediately after the description of the "Cover" for business interruption in Section 2 of the policy. This section of the policy is set out above, but it is convenient to restate it here:

> **Cover**
>
> If the Business carried on by You is interrupted or interfered with as a result of Damage occurring during the Period of Insurance to:
>
> ["Property Insured…" or "property at the Situation" or "property insured by You"]
>
> We will, after taking into account **any sum saved** during the Indemnity Period in respect of **such charges and expenses of the Business as may cease or be reduced in consequence of the interruption or interference**, indemnify You in respect of the loss arising from such interruption or interference **in accordance with the settlement of claims clause** to the sum insured expressed against the relevant item on the Schedule, where the Schedule notes that cover has been selected.
>
> (Emphasis added).

446 Immediately after those provisions, the policy set out a series of definitions relevant to the cover provided by Section. The following definitions are relevant to the present issues:

> **Annual Revenue** means the Revenue earned during the twelve (12) months immediately before the date of the Damage.
>
> …
>
> **Revenue** means the money paid or payable to You for services provided (and stock in

trade, if any, sold), in the course of operation of Your Business at the premises.

…

Standard Revenue means the Revenue earned within that period during the twelve (12) months immediately before the date of the Damage which corresponds with the Indemnity Period.

447 Further, the Meridian policy defines the word "Damage" for the purposes of all sections of the policy. It is set out above, but for convenience is restated here:

> **Damage** (with 'Damaged' having a corresponding meaning) means physical loss, damage or destruction.

448 Next, there is a section headed, "Settlement of claims", which contains a number of items which provide different bases of settlement. The Renewal Schedule to the Meridian policy specifies that business interruption cover is taken on the "Annual Revenue Basis", with cover of $510,000. The Renewal Schedule also specifies that cover of $25,000 is provided for "Additional increased cost of working". The relevant items under "Settlement of claims" are therefore items 3 and 9, which provide:

> **Item 3 – Additional increased cost of working**
>
> The cost of further expenditure not otherwise payable under this section, necessarily and reasonably incurred during the Indemnity Period in consequence of the Damage, for the purpose of avoiding or minimising a reduction in Gross Profit, Revenue, Payroll, Gross Rentals, Actual Average Weekly Income or resuming or maintaining the normal operation of the Business.
>
> …
>
> **Item 9 – Gross revenue**
>
> This item is limited to loss of Revenue and increase in cost of working. The amount payable as indemnity under this item will be:
>
> a) in respect of loss of Revenue, the amount by which the Revenue earned during the Indemnity Period falls short of the Standard Revenue in consequence of the Damage; and
>
> b) in respect of increase in cost of working, the additional expenditure necessarily and reasonably incurred for the sole purpose of avoiding or diminishing the loss of Revenue which, but for the additional expenditure, would have taken place during the Indemnity Period in consequence of the Damage. However, Our payment will not exceed the amount of reduction in Revenue thereby avoided, less **any sum saved** during the Indemnity Period in respect of **such charges and expenses of Your Business payable out of Revenue as may cease or be reduced in consequence of the Damage**.
>
> (Emphasis added).

449 It may be observed that the gross revenue item contains within it a form of "sum saved" provision. The focus of the submissions was on the "sum saved" provision in the last paragraph

under the heading, "Cover". It is sufficient for present purposes to focus on that provision, as the same issues arise in relation to both "sum saved" provisions.

450 The next part of Section 2 is headed, "Additional benefits". As noted above, Additional benefit 2 ("Murder, suicide or disease") is replaced by a clause set out in the Renewal Schedule. Relevantly, that Additional Benefit 8 ("Murder, Suicide or Disease") states:

> The occurrence of any of the circumstances set out in this Additional Benefit shall be deemed to be Damage to Property used by You at the Situation.
>
> …
>
> (c) The outbreak of a human infectious or contagious disease occurring within a 20 kilometre radius of the Situation.
>
> …

JobKeeper payments

451 The first issue is whether, on the assumption that Meridian is entitled to indemnity under cl 8(c), the JobKeeper payments that it received are to be taken into account under general principles applicable to contracts of indemnity.

452 The primary judge's findings about the JobKeeper program (PJ [388] – [393]) were not controversial below and are not challenged on appeal. These were as follows:

(1) The Commonwealth payment known as JobKeeper was introduced as part of a package of four Acts: (a) the Coronavirus Economic Response Package (Payments and Benefits) Act 2020 (Cth); (b) the Coronavirus Economic Response Package Omnibus (Measures No 2) Act 2020 (Cth); (c) the Appropriation Bill (No 5) 2019-20 (Cth); and (d) the Appropriation Bill (No 6) 2019-20 (Cth).

(2) An entity was eligible to participate if, as at 1 March 2020: (a) the entity carried on business in Australia or was a non-profit body that pursued its objectives principally in Australia; and (b) the entity's turnover has reduced by a relevant percentage ((i) 15 per cent – where the entity is a registered charity (other than certain educational institutions), (ii) 30 per cent – where the employer's aggregated turnover is less than $1 billion, or (iii) 50 per cent – where the employer's aggregated turnover is at least $1 billion): Coronavirus Economic Response Package (Payments and Benefits) Rules 2020 (Cth) ss 7 – 8.

(3) To be eligible to receive the JobKeeper payment, an employer was required to pay an eligible employee a total of $1,500 (pre-tax) in each fortnight for which the employer

was claiming the entitlement during the period March to September 2020. The $1,500 could include amounts that were salary sacrificed into superannuation as well as amounts dealt with in any other way on behalf of the employee as a substitute for their salary and wages (e.g. other salary packaging arrangements such as certain fringe benefits). Payments were then made to the employer monthly in arrears. During the extension phase of JobKeeper (28 September 2020 – 28 March 2021), the payment was tapered and targeted to those businesses that continued to be significantly affected by the economic downturn. Businesses were required to reassess their eligibility with reference to their actual turnover: Coronavirus Economic Response Package (Payments and Benefits) Rules ss 10, 15, 13, 7(c) and 8B.

(4) The object of the Coronavirus Economic Response Package (Payments and Benefits) Act 2020 (Cth) in s 3 "is to provide financial support … to entities that are directly or indirectly affected by the Coronavirus known as COVID-19".

(5) The Explanatory Memorandum that accompanied the Coronavirus Economic Response Package (Payments and Benefits) Bill 2020 and Coronavirus Economic Response Package Omnibus (Measures No. 2) Bill 2020 stated (p 12):

> The Government's consolidated package of $320 billion represents fiscal and balance sheet support across the forward estimates of 16.4 per cent of annual Gross Domestic Product. The support is designed to help businesses and households through the period ahead. This significant action has been taken in the national interest and has been updated in the light of the broader and more prolonged impact of the Coronavirus outbreak.
>
> The package provides timely support to workers, households and businesses through a difficult time. Building on the previous measures, this package will support those most severely affected. It is also designed to position the Australian economy to recover strongly once the health challenge has been overcome.

453 The Explanatory Memorandum continued (p 34):

> 2.8 Under the JobKeeper Payment, businesses significantly impacted by the Coronavirus outbreak will be able to access a subsidy from the Government to continue paying their employees. This assistance will help businesses to keep people in their jobs and re-start when the crisis is over. For employees, this means they can keep their job and earn an income – even if their hours have been cut.
>
> 2.9 The JobKeeper Payment is a temporary scheme open to businesses impacted by the Coronavirus. The JobKeeper Payment will also be available to the self-employed. The Government will provide $1,500 per fortnight per employee for up to six months. The JobKeeper Payment will support employers to maintain their connection to their employees. These connections will enable business to reactivate their operations quickly – without having to rehire staff

– when the crisis is over.

454 Having regard to the terms of the Meridian policy, and on the assumption that Meridian is entitled to indemnity under cl 8(c), the JobKeeper payments are not to be taken into account pursuant to general principles applicable to contracts of indemnity. The express terms of the policy foreclose any application of those principles as the parties have agreed that the loss that is the subject of indemnity is any loss demonstrated by undertaking the agreed calculation in accordance with the settlement of claims clause. The settlement of claims clause records the agreement of the parties both as to the kind and extent of loss the subject of the indemnity. This is the effect of the Cover being an indemnity in respect of a "loss … in accordance with the settlement of claims clause", with the various items of that clause limiting the loss to that which is in consequence of the Damage (which includes the outbreak of a human infectious or contagious disease occurring within a 20 km radius, which is deemed to be Damage). It is not simply a calculation provision. Its application requires an assessment as to whether particular items of loss have been incurred in consequence of the Damage.

455 In *Mobis Parts Australia Pty Ltd v XL Insurance Company SE* (2018) 363 ALR 730, one of the issues before the New South Wales Court of Appeal concerned the treatment of depreciation charges under an insurance policy providing cover, in section 2, for business interruption. The policy contained an indemnity in respect of "gross profit" and provided, in cl 7.1.1, a formula for the assessment of such loss: at 770 – 771 [139] – [140]. That formula included the words: "less any sum saved during the Indemnity Period in consequence of the Damage in respect of such of the charges and expenses of the Business payable out of Gross Profit". The issue was whether a depreciation expense that would otherwise have been recorded was an expense payable out of Gross Profit that had been "saved" for the purposes of cl 7.1.1: at 771 – 772 [142] – [143]. In that context, Meagher JA (with whom Beazley P and Leeming JA agreed) stated (at 772 [143]) that the question "must be resolved in accordance with the proper construction of the relevant provisions of the [policy]". His Honour stated (at 772 [146]):

> As the general object of section 2 of the policy is to indemnify Mobis Australia against loss of its gross profit, the prospect of under- or over-indemnification may colour the meaning of the language used: see *Castellain v Preston* (1883) 11 QBD 380 at 386 (Brett LJ).

456 His Honour continued (at 772 – 773 [147] – [149]):

> 147 But the indemnity under section 2 is not simply against "actual loss", unlike that in business interruption wordings generally adopted in the United States, discussed in *Riley* at paras 1.10 and 12.14, and in the "hybrid" policy considered by this Court in *Coalex Pty Ltd v Commercial Union Assurance Co*

of Australia Ltd (1988) 5 ANZ Ins Cas 60-858 at 75,381 (*Coalex v Commercial Union*) (col 2). Rather, the Local Policy **contained a formula for the assessment of the insured loss of gross profit, which** (as noted at [122] above) **qualifies the application of the principle of indemnity** insofar as it might be said to depart from perfect indemnification in some contingency: see also *Coalex v Commercial Union* at 75,380 (col 2). In *Henry Booth & Sons v The Commercial Union Assurance Co Ltd* (1923) 14 Lloyds LR 114 at 114 (col 2), Greer J explained the object of such a formula thus:

> **It is the common practice in policies of this sort, in order to prevent lengthy disputes, that there should be an agreed method of ascertaining the loss.** Sometimes the assessment of the loss is in favour of the assurance company and sometimes the assured, but it is nevertheless good sense to have a method which can be readily applied without difficulty and without raising a great number of points for dispute.

148 It is by reference to these considerations that the reasoning of Flaux J in *Synergy Health* at [251]–[260] must be evaluated. Having found that the insured would "recover an indemnity for more than its *actual loss* in respect of business interruption" if depreciation was not deducted, his Lordship concluded "that, in principle, that saving should be off-set against any claim under the business interruption section of the policy, unless the wording of the policy requires some different conclusion"; indeed, he justified a construction that admittedly "stretche[d]" language in the policy solely by this "principle"— that a court should only conclude that "something in excess of a *full indemnity*" was intended if "no other conclusion is possible": *Synergy Health* at [258].

149 In my respectful opinion, that reasoning gives the indemnity principle unwarranted effect in the face of the language of the policy, and the specific object of the provisions for the assessment of loss. **A reasonable businessperson seeking to understand these lengthy clauses would not begin by assuming that they mean nothing more than the expression "full indemnity for actual loss to gross profit"**, and then proceed to enquire whether anything in the language required otherwise. His or her attention would remain fixed on the sense of the language describing the method for ascertaining the loss as coloured by its immediate and commercial context: see *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104; 325 ALR 188; [2015] HCA 37 at [46]–[52] (French CJ, Nettle and Gordon JJ).

(Bold emphasis added.)

457 There is no reason to disagree with these observations and they ought to be applied in the present case. The purpose of the "Settlement of claims" provisions in Section 2 of the Meridian policy is to provide an agreed method of ascertaining the loss and to thereby avoid lengthy disputes. The reasonable businessperson considering the policy from the point of view of the parties to it would understand them to have agreed upon this methodology as the basis for determining both whether there is a loss as well as the quantum of any loss. The question whether or not there is a loss, as well as the extent of any loss, may otherwise be contestable. The provisions avoid this controversy by setting out the methodology to be used. In light of

these detailed provisions, there is simply no room for general principles applicable to contracts of indemnity to operate in relation to these issues.

458 Insurance Australia relied on *Insurance Australia Ltd v HIH Casualty & General Insurance Ltd (in liq)* (2007) 18 VR 528 in support of the proposition that its promise is to hold Meridian harmless against loss, and not simply to make a payment referable to a basis of settlement: at 555 [159]; (see also PJ [401] – [403]). However, that case is distinguishable. It did not concern a "basis of settlement" or "settlement of claims" provision. Further, the issue in it was far removed from the issue in the present issue. For these reasons, the loss that Insurance Australia promised to hold Meridian harmless against is loss of the kind and extent determined according to the agreed basis of settlement.

459 The primary judge also referred (PJ [402]) to *Worth v HDI Global Specialty* at 137 – 138 [179], which in turn referred to *Globe Church Incorporated v Allianz Australia Insurance Ltd* (2019) 99 NSWLR 470 (*Globe Church*). In fact, *Globe Church* supports the approach taken above: see, in particular, *Globe Church* at 498 [127], 514 [209].

460 The next question is whether, on the assumption that Meridian is entitled to indemnity under cl 8(c), the JobKeeper payments are to be taken into account under the "sum saved" provision. There are two aspects to this. First, the sum saved provision refers to "charges and expenses of [the] Business … as may cease or be reduced", which necessitates determining whether the JobKeeper payments had the effect that charges or expenses ceased or were reduced. Secondly, assuming that such charges or expenses ceased or were reduced, it is necessary to determine whether that occurred "in consequence of the interruption or interference".

461 It is convenient to start with the second aspect. The requirement is that the cessation or reduction of charges or expenses be in consequence of "the" interruption or interference. This takes the reader back to the beginning of the "Cover" section, where reference is made to the insured's business being interrupted or interfered with "as a result of Damage". It is *that* interruption or interference that is being referred to in the "sum saved" provision. The word "Damage" is given an extended meaning by cl 8. Relevantly for present purposes, the "outbreak of a human infectious or contagious disease occurring within a 20 kilometre radius of the Situation" is deemed to be Damage to Property used by the insured at the Situation. Thus, the reference (at the beginning of the "Cover" section) to the insured's business being interrupted or interfered with "as a result of Damage" is to be read as including the insured's business being interrupted or interfered with as a result of the insured peril described in cl 8(c).

Returning, then, to the "sum saved" provision, the concern is with "the" interruption or interference earlier identified, that is, the interruption or interference resulting from the insured peril in cl 8(c). The question, then, is as follows: assuming that Meridian is able to establish on evidence that the insured peril in cl 8(c) is a proximate cause of its loss (as to which, see PJ [481], [485] – [498]), were the JobKeeper payments made and received "in consequence of" the interruption or interference (that is, the interruption or interference resulting from the insured peril in cl 8(c))? As a matter of the application of the policy's provisions, they were not. The criteria for eligibility for JobKeeper payments were financial ones; they did not depend on whether or not there had been an outbreak within 20 km of the premises of the business. Meridian was entitled to the JobKeeper payments regardless of whether or not there was an outbreak within 20 km of its premises. Conversely, had Meridian not met the financial tests for JobKeeper, it would not have been entitled to JobKeeper payments, even if the insured peril in cl 8(c) occurred. Accordingly, the second aspect of the "sum saved" provision (the causal requirement) is not satisfied. It is therefore not necessary to consider the first aspect of the provision.

462 The primary judge was of the view that the JobKeeper payments reduced the insured's loss and expenses in the form of saved wages payments and were therefore to be taken into account (see PJ [509] in the context of Meridian, and PJ [623] – [624] in relation to Taphouse). However, the primary judge did not analyse in detail whether the JobKeeper payments were made and received "in consequence of" the interruption or interference (that is, the interruption or interference resulting from the insured peril in cl 8(c)). In the section of the reasons dealing with *causation* in the context of the Meridian policy, the primary judge relied on *FCA v Arch*. Her Honour considered that, by parity of reasoning, the JobKeeper payments were to be taken into account under the "sum saved" provision (PJ [623]; see also PJ [395])). However, it is necessary for the purposes of the causal requirement in the "sum saved" provision to focus on the criteria for the JobKeeper payments, rather than the general underlying policy of the JobKeeper scheme. Approaching the matter this way, the causal requirement is not satisfied.

463 It follows that the JobKeeper payments are not to be taken into account under the "sum saved" provision.

Federal COVID-19 Consumer Travel Support Program payments

464 The issue here is whether, on the assumption that Meridian is entitled to indemnity under cl 8(c) of the policy, the Federal COVID-19 Consumer Travel Support Program payments that it

received are to be taken into account either under general principles applicable to contracts of indemnity or under the "sum saved" provision.

465 The primary judge made the following findings about the Federal COVID-19 Consumer Travel Support Program based on a summary prepared by Meridian and Insurance Australia (PJ [510] – [513]):

(1) The program was introduced by the Industry Research and Development (COVID-19 Consumer Travel Support Program) Instrument 2020 (Cth), made under the Industry Research and Development Act 1986 (Cth).

(2) The program provided travel agents and tour arrangement service providers with funding to help them remain viable. The grant was intended to provide funding for expenditure that assisted them to continue to trade and process refunds and credits to Australian consumers for travel they were unable to undertake due to the impacts of COVID-19. There have been two rounds of this program, with the first launched on 14 December 2020 and closed on 13 March 2021, and the second launched on 2 May 2021 and closed on 12 June 2021. Each round of the program involved a one-off grant of between $1,500 and $100,000 in the first round, and a subsequent grant of between $7,500 and $100,000 in the second round.

(3) To be eligible, a travel agent or tour operator had to meet a number of requirements including having an annual turnover starting from $50,000 up to a maximum of $20 million, and having received a JobKeeper payment. Applicants were also required to declare that they would make best endeavours to retain staff and meet their obligations to process refunds and travel credits to Australian consumers.

(4) The instrument provides that the "purpose of the program is to alleviate the negative economic impacts of the coronavirus known as COVID-19 on the travel industry by providing immediate, short-term financial support to travel agents, and tour arrangement service providers, that qualify for the 'JobKeeper' scheme": s 5(2).

466 For the same reasons as set out above in relation to the JobKeeper scheme, these payments are not to be taken into account under general principles applicable to contracts of indemnity or under the "sum saved" provision. On that basis, there is no reason to interfere with the primary judge's conclusion with respect to these payments.

Victorian Government's Support Fund

467 The issue is whether, on the assumption that Meridian is entitled to indemnity under cl 8(c) of the policy, the Victorian Government's Support Fund payments that the insured received are to be taken into account either under general principles applicable to contracts of indemnity or under the "sum saved" provision.

468 The primary judge made findings about the Victorian Government's Support Fund based on a summary prepared by Meridian and Insurance Australia (PJ [515]). These payments were part of the "Economic Survival Package to Support Businesses and Jobs" announced by the Victorian Government on 21 March 2020, and were made by way of payroll tax refunds for the 2019-20 financial year. The grants were made "to help Victorian businesses and workers survive the devastating impacts of the coronavirus pandemic".

469 Again, for the same reasons as set out above in relation to the JobKeeper scheme, these payments are not to be taken into account under general principles applicable to contracts of indemnity or under the "sum saved" provision. There is no basis on which to disturb the primary judge's conclusion with respect to these payments.

Whether interest is payable under s 57 of the* Insurance Contracts Act *– appeal, Ground 3

470 The principal issue raised by this ground of appeal has been resolved earlier in these reasons. For the reasons discussed there, although the primary judge erred in construing s 57 of the *Insurance Contracts Act*, it does not apply unless an insurer is liable to pay an amount pursuant to the policy of insurance or that Act. It has not yet been determined whether Insurance Australia is liable to pay any amount to Meridian with the consequence that it cannot be concluded that s 57 applies. If it did, further submissions would be required in order to ascertain the date from which any interest is payable pursuant to s 57(2). In these circumstances the answer given by the primary judge on this issue can be amended by adding:

> If Meridian is entitled to cover, further evidence and submissions would be required in relation to interest.

Insurance Australia's cross-appeal

471 Insurance Australia's cross-appeal and Meridian's notice of contention concern several matters which, in the light of the discussion earlier in these reasons, can be addressed relatively briefly. The issues raised by Insurance Australia's notice of contention are also addressed here.

The application of s 61A of the* Property Law Act (Vic) – *cross-appeal, Ground 1

472 The main issues raised by this ground of the cross-appeal have also been resolved earlier in these reasons. As was explained, s 61A of the *Property Law Act (Vic)* only applies to references to Acts passed by the Victorian Parliament and, furthermore, the *Biosecurity Act* is not a re-enactment with modification of the *Quarantine Act*. For each of those reasons, the words, "Quarantine Act 1908 and subsequent amendments", in the exclusion in cl 8 of the Meridian policy cannot be read as referring to the *Biosecurity Act*, and thus the exclusion does not apply in the circumstances. It follows that this ground of Insurance Australia's cross-appeal, as well the grounds in its notice of contention which depended upon the acceptance of its preferred construction of s 61A, must be dismissed. It is also not necessary to consider Meridian's notice of contention, the sole ground of which concerned whether s 61A applied in the circumstances if it was given the insurer's preferred construction.

The construction of the word "outbreak" in the disease clause – cross-appeal, Ground 2

473 By this ground of its cross-appeal, Insurance Australia challenged the primary judge's construction of the word "outbreak" (PJ [450]). Her Honour's conclusion as to its usual meaning in relation to COVID-19 has been identified above and accepted as being correct. There is nothing in the text and context of the Meridian policy which suggests a different meaning ought to be given to that word and none was identified in the course of submissions. For those reasons, this ground of the cross-appeal should be dismissed.

The construction of the phrase "at the Situation" in the hybrid clause – cross-appeal, Ground 3

474 By this ground of its cross-appeal, Insurance Australia sought to challenge the primary judge's conclusion (PJ [454]) that cl 8(d)(1) (the hybrid clause) did not require the relevant organism to be discovered "at the Situation".

475 This ground of the cross-appeal is also afflicted by the jurisdictional difficulty discussed at the commencement of these reasons. Her Honour concluded (PJ [478]) that the hybrid clause did not respond to Meridian's claim, a conclusion from which the insured did not appeal. It follows that, as between the parties to this appeal, the point is moot and there exists no dispute between them that Meridian is not entitled to recover under that clause of the policy. However, Insurance Australia submitted that her Honour's conclusion as to this point of construction was incorporated into an answer to one of the separate questions and thus constituted an order against which it might appeal. Meridian made no substantive submissions in opposition to that

proposition. In the circumstances, the appropriate course is to replace the primary judge's answer to the relevant questions with "Unnecessary to answer". Also, the following observations are made in relation to the issue.

476 The primary judge recognised (PJ [445]) that the more grammatical construction was that the words "at the Situation" qualified the whole of the preceding phrase and not merely the words "discovery of an organism". However, for the reasons set out below, the preferable construction of the clause, in its context, is that it is the discovery of the relevant organism which must be "at the Situation".

477 *First*, the most grammatical construction is not necessarily to be determinative in the construction of policies of insurance. Many provisions, such as cl 8(d), seek to accommodate a number of different concepts in the one clause, resulting in a less than perfect wording or sentence structure. Here, there is at least some support for the view that the expression "at the Situation" qualifies all that precedes it, because the phrase "likely to result in a human infectious or contagious disease" is adjectival and describes the particular type of organism.

478 *Secondly*, there is substance to the proposition that cl 8(d) is concerned with events occurring "at the Situation" such as vermin or other pests (cl 8(d)(2)) or defects in the drains or other unsanitary arrangements (cl 8(d)(3)). Clauses 8(a) – (c) support that conclusion in that their focus is on events which actually take place by reference to the Situation, being either at it or proximate to it. Whilst this is not an overly weighty indicator, it is consistent with the notion that the cover is in respect of hindrance to the insured's business as a result of events which have a degree of proximity to those operations. The learned primary judge's construction of cl 8(d)(1) is less consistent with those other clauses.

479 *Thirdly*, the requirement for something to be "at the Situation" is more consistent with the discovery of "an organism", as compared to the organism being likely to "result in a … disease at the Situation". The construction that the discovery must be likely to result in a disease at the Situation is awkward compared to the alternative construction requiring the discovery of the organism at the Situation. It is unclear how a disease might "result" at the Situation.

480 *Fourthly*, the construction which triggers cover consequent upon the actions of a relevant authority as a result of the discovery of a disease anywhere in the world will necessarily give rise to difficult questions of causation. It is likely to generate substantial debate about the extent to which the authority's actions were based upon an organism, wherever discovered, and

the extent to which that organism was likely to have the consequence of the occurrence of a relevant disease at the Situation. Whilst it can be accepted that this might be resolved by the authority's articulation of the reasons for its actions.

481 *Fifthly*, although Meridian suggested this construction would result in an uncommercial outcome because it would mean that discovery of an organism at neighbouring premises which causes interruption to the insured's business would not be covered, there is nothing particularly unusual about that result. The same consequences would apply to the other parts of cl 8(d). It is foreseeable that the unsanitary arrangements at neighbouring premises might cause the premises to be closed even though any resulting loss is not covered by the policy. Further, many clauses have geographical or temporal limits such that the non-coverage of claims which fall slightly short of those requirements may appear arbitrary.

482 Meridian further submitted that if the clause were intended to be read as Insurance Australia proposed, the words, "at the Situation", would have followed "discovery of an organism". It is true that the policy could have been as explicit as the Market Foods' policy which refers to, "an occurrence … at the premises of … the discovery of an organism likely to cause Notifiable Disease". Similarly, it may have been worded in the same way as the cognate clause policy in *Star* which refers to, "Any discovery of an organism at the Premises likely to result in the occurrence of a Notifiable Disease". Meridian's submission was that if Insurance Australia intended that it was to be the discovery of the organism which was to occur at the Situation, then similar wording could have been adopted. However, the question is not whether the meaning could have been expressed in clearer terms. It is, what is the meaning of the words actually used. Here, the issue is finely balanced, but the above factors favour Insurance Australia's preferred construction. Although there is some ambiguity in cl 8(d), in this instance, whatever grammatical superiority the construction adopted by the primary judge might have, it should give way to the more consistent interpretation advanced by Insurance Australia.

483 As indicated, given the previous conclusions it is not necessary to determine the cross-appeal on this issue and the learned primary judge's answers to the relevant questions should be amended to, "Unnecessary to answer".

The construction of the phrase "closure or evacuation of Your Business" in the hybrid clause – Insurance Australia's notice of contention, Ground 3

484 In its notice of contention, Insurance Australia sought to uphold the primary judge's conclusion that the hybrid clause did not respond to Meridian's claim on the additional basis that it was not sufficient that only part of the insured's business was closed or evacuated by the relevant order (cf. PJ [461]). As the primary judge's conclusion as to the hybrid clause was not the subject of any part of Meridian's appeal, this ground of the notice of contention was misconceived. It is, therefore, not necessary to deal with this ground of contention.

Conclusion

485 Meridian is entitled to succeed on Grounds 2 and 3 of its notice of appeal and the answers to the questions posed should be modified accordingly. Otherwise the appeal is dismissed.

486 Insurance Australia has not succeeded on any grounds in its notice of cross-appeal, but certain answers to questions should be modified in light of the matters it raised. In these circumstances, it is appropriate to order that the cross-appeal be allowed in part, and to amend the primary judge's answers to questions to the extent indicated above. Otherwise, the cross-appeal should be dismissed.

PROPOSED ORDERS ON THE APPEAL

487 From the foregoing the orders on this Appeal should be as follows:

1. The Appeal be allowed in part.

2. The Cross-Appeal be allowed in part.

3. The primary judge's answers to the questions posed by the parties be amended as follows:

> **9. Disease extension (policy schedule, paragraph (c) of the "Murder, Suicide or Disease" clause (page 5)):**
>
> (a) Did an occurrence of an outbreak of COVID-19 occur within a 20 kilometre radius of the Situation? If so, when?
>
> *Yes. The outbreak occurred by no later than 30 March 2020. Further evidence may prove that the outbreak occurred earlier, by 1 March 2020.*
>
> **10. Evacuation and Closure extension (policy schedule, paragraph (d)(1) of the "Murder, Suicide or Disease" clause (page 5)):**
>
> (a) Was Meridian's Business closed or evacuated by order of a government, public or statutory authority by reason of the "Authority Response-Meridian"?

No

(b) If yes to (a), were those orders consequent upon the discovery of an organism likely to result in a human infectious or contagious disease at the Situation?

~~*This does not arise but, if it did, the answer would be no.*~~

Unnecessary to answer.

(c) {CGU disputes the inclusion of issues (c)-(f)} Did the discovery have to occur at the Situation or could it have occurred elsewhere and, if so, where?

~~*Clause 8(d)(1) requires only that the order be consequent on discovery of an organism (anywhere) likely to result in a human infectious or contagious disease at the Situation.*~~

Unnecessary to answer.

(d) If the outbreak or discovery had to occur at the Situation, did it so occur at the Situation?

~~*There is no requirement that the outbreak occur at the Situation - see cl 8(c). There is no requirement that the organism be discovered at the Situation - see cl 8(d)(1). It is agreed that there was no outbreak of COVID-19 or discovery of the SARS-CoV-2 organism at the Situation.*~~

Unnecessary to answer.

(e) What is required for there to be an "occurrence" of an outbreak [of] COVID-19?

~~*The "occurrence" of an outbreak of COVID-19 means any event of that kind. An "outbreak" of COVID-19 is the occurrence of a single case of COVID-19 while a person is in the community (that is, not in a controlled environment such as quarantine, isolation or a hospital) and who is capable of communicating COVID-19 to another person.*~~

Unnecessary to answer.

(f) What is required for there to be the "discovery" of SARS-CoV-2?

A "discovery" means finding or ascertaining the existence of SARS-CoV-2. It can be inferred that SARS-CoV-2 has been "discovered" at a location if a person with SARS-CoV-2 is found or ascertained to have been at that location during an infectious period.

11. Causation, adjustments and loss (page 21):

If it is found that the Disease extension and/or the Evacuation and Closure extension responds to Meridian's claim:

(a) Was there any interruption of or interference with Meridian's Business which was a direct result of the relevant insured perils?

There is no evidence as yet from which I would infer that the insured perils were a proximate cause of any interruption of or interference with Meridian's business.

(b) If yes to (a), what losses claimed by Meridian resulted from that interruption of or interference with its Business?

This question cannot be answered on the current evidence.

(c) {CGU disputes the inclusion of this issue (c)} Is the term "Adjustment" in the

Business Interruption section of the policy applicable to the calculation of Meridian's claim, having regard to the definitions used in the "Settlement of Claims" clause in the Business Interruption section of the policy.

No.

(d) {CGU version; Meridian does not agree}: Should any adjustment be made to Meridian's business interruption loss by reference to uninsured events relating to the COVID-19 pandemic?

Adjustments should not be made to Meridian's business interruption loss by reference to uninsured events caused by the same underlying fortuity as the insured peril. The fortuity underlying the insured peril is not "COVID-19 generally" but the presence and risk of COVID-19 in Victoria". Adjustments should otherwise be made to Meridian's loss.

(e) {Meridian version; CGU does not agree}: Should any adjustment be made to Meridian's business interruption loss by reference to events (other than the insured perils) relating to the COVID-19 pandemic?

Adjustments should not be made to Meridian's business interruption loss by reference to uninsured events caused by the same underlying fortuity as the insured peril. The fortuity underlying the insured peril is not "COVID-19 generally" but the presence and risk of COVID-19 in Victoria". Adjustments should otherwise be made to Meridian's loss.

(f) What loss is payable in accordance with the terms of the policy?

This question cannot be answered on the current evidence.

(i) Are JobKeeper or other government subsidies to be taken into account in the assessment of any loss and, if so, in what way?

~~*JobKeeper - yes.*~~

JobKeeper - no.

Federal COVID-19 Consumer Travel Support Program - no.

Victorian Government Support Fund - no.

~~*Meridian would have to account for the full amounts paid to it under these schemes as operating to reduce its loss.*~~

(ii) Should rental abatements be taken into account in assessing recoverable loss?

Yes.

(iii) On what dates did the indemnity period/s start and end?

The indemnity period starts on the occurrence of the Damage (which must mean the insured peril) and ends when the results of Meridian's business cease to be affected as a consequence of the damage, such period not exceeding 12 months.

(iv) Further quantum issues may be raised when Meridian provides the information that has been requested by CGU.

Noted.

(g) {Meridian disputes the inclusion of subparagraph (f), as those issues should not be included in this test case in circumstances where CGU has denied indemnity and because the factual premise for these issues will be the subject of a separate loss assessment process} Has Meridian:

(i) provided sufficient information for CGU to determine any amount payable under the policy; and/or

Not to my knowledge.

(ii) failed to respond to reasonable requests for information from CGU?

Not to my knowledge.

(h) If it is found that the policy responds and CGU is liable to pay an amount to Meridian, from what date is interest under section 57 of the ICA payable?

The issue whether Meridian can establish that the insured peril in 8(c) was a proximate cause of any of its loss remains unanswerable on the current state of the evidence. On the current state of the evidence, Meridian has not proved that to be the case. As a result, s 57 has not yet been engaged. If Meridian is entitled to cover, further evidence and submissions would be required in relation to interest.

4. Otherwise the Appeal and the Cross-Appeal be dismissed.

5 No order as to costs.

THE TAPHOUSE TOWNSVILLE PTY LTD V INSURANCE AUSTRALIA LIMITED – NSD 1081 OF 2021

488 In this matter, the learned primary judge concluded that Taphouse was not entitled to indemnity pursuant to either a prevention of access clause or a hybrid clause in the policy of insurance it held with Insurance Australia. Taphouse appealed from those conclusions, as well as her Honour's conclusions that any assessment of its loss had to account for the JobKeeper payments it received, and that interest pursuant to s 57 of the *Insurance Contracts Act* would only be payable from the date of the final determination of these proceedings. By a notice of contention, Insurance Australia sought to uphold the primary judge's conclusions in relation to the prevention of access and hybrid clauses on additional grounds.

The relevant facts

489 The essential facts of this appeal can be briefly stated.

490 At the relevant times Taphouse operated a craft beer bar and restaurant located in Townsville, Queensland.

491 From 23 March 2020, the Queensland State Government promulgated several directions which had the effect of closing, preventing or restricting access to Taphouse's business premises.

They are summarised at PJ [546] and there is no need to refer to them further, save to the extent that it becomes necessary to do so in the discussion below.

492 Taphouse made a claim on its policy by email on or about 24 March 2020. This was ultimately denied on 17 June 2020.

493 Taphouse later sought a review of the declinature, but it was confirmed on 10 July 2020.

Policy wording

494 At the relevant times Taphouse held a "Business Insurance Policy" number 15T8202892 (Taphouse Policy) placed with Insurance Australia. For the purposes of this appeal it can be identified as comprising the three Renewal Schedules issued on 24 September 2019, 28 February 2020, and 26 March 2020, as well as a "Business Insurance Policy" wording issued under the brand name of CGU.

495 The period of insurance under the policy was from 23 September 2019 to 23 September 2020 at 4:00 pm, and the insured "Situation" was identified as Lot 4, City Lane, 373 Flinders Street, Townsville, Queensland 4810, being the site of the craft beer bar and restaurant.

496 The Taphouse policy is a comprehensive business insurance policy containing a number of sections providing cover for property damage and public liability, as well as other specialist forms of cover.

497 Section 1 ("Property") provides indemnity for physical loss or destruction of any real or personal property at the insured premises. This is extended by Section 2 ("Business Interruption") to cover business interruption in certain circumstances.

498 The primary insuring clause in the "Business Interruption" section provides:

> **Cover**
>
> If the *business* carried on by *you* is interrupted or interfered with as a result of *insured damage* occurring during the *period of insurance*, we will after taking account any sum saved during the *indemnity period* in respect of such charges and expenses of the *business* as may cease or be reduced in consequence of the *interruption* or interference, indemnify *you* in respect of the loss arising from such *interruption* or interference in accordance with the Basis of settlement clause, where the *schedule* notes that cover has been selected.

499 The words in italics are defined terms in the policy. Relevantly, "Insured Damage" means:

> 1. In relation to *your* property, *insured damage* means *damage* to *your* property when both the property that is *damaged* and the cause of the *damage* are

covered by:

a) *your* policy under one or more of the following *cover sections*:

…

b) another insurance policy that insures your property and names *you* as the insured.

Provided that:

…

500 "Damage" means:

> …accidental physical damage, destruction or loss. Damaged has a corresponding meaning to damage.

501 The structure of this policy is typical of Industrial Special Risk policies in that it primarily provides indemnity for business interruption losses consequent upon the destruction or loss of the insured's property that is otherwise covered under the policy, most likely by the "Property" section or some other policy. That primary coverage is then extended by a part of the policy headed "Extensions of cover". The relevant extension wording for the purposes of the appeal is as follows:

> This section is extended to include the following additional benefits. Additional benefits 1 to 11 inclusive are payable provided that the *sum insured* expressed against the relevant item(s) in the *schedule* is not otherwise exhausted.
>
> *We* will pay *you* (depending on the part of this section which is applicable to *you*) for:
>
> a) item 1 Gross profit, or
>
> b) item 2 Payroll, or
>
> c) item 6 Gross rentals, or
>
> d) item 7 Weekly income, or
>
> e) item 8 Gross revenue,
>
> resulting from *interruption* of or interference with your *business* as a result of *insured damage* occurring during the *period of insurance* to, or as a direct result of:
>
> …
>
> **7. Prevention of access by a public authority**
>
> *We* will pay for loss that results from an *interruption* of *your business* that is caused by any legal authority preventing or restricting access to *your premises* or ordering the evacuation of the public as a result of *damage* to or threat of *damage* to property or persons within a 50-kilometre radius of *your premises*.

8. Murder, suicide & infectious disease

We will pay for loss that results from an *interruption* of *your business* that is caused by:

a) any legal authority closing or evacuating all or part of the *premises* as a result of:

i. the outbreak of an infectious or contagious human disease occurring within a 20-kilometre radius of *your* premises, however, there is no cover for highly pathogenic Avian Influenza or any disease declared to be a quarantinable disease under the *Quarantine Act 1908* (as amended) irrespective of whether discovered at the location of *your premises*, or out-breaking elsewhere

ii. vermin or other animal pests at the *premises*, or

iii. hygiene problems associated with drains or other sanitary arrangements at the *premises*

iv. bomb threat at or to the *premises*.

b) poisoning directly caused by the consumption of food or drink provided on the *premises*, and

c) murder or suicide occurring at or near the *premises*.

The decision at first instance

502 There is no need to detail the reasoning of the primary judge at this juncture. More detailed reference to her Honour's reasons is made in the discussion below. For present purposes, an identification of the following conclusions is sufficient to provide context to the issues raised on appeal.

503 The primary judge concluded (PJ [561]) that cl 7 of the extensions (the prevention of access clause) did not apply in relation to the effects of the Queensland Government's COVID-19 restrictions. Consistently with her Honour's previous approach, it was held that only cl 8, which specifically provided cover in relation to the deleterious consequences of disease, might respond in the circumstances.

504 However, her Honour also determined that, if her initial conclusion about cl 7 was wrong and it could apply in respect of a disease, it would respond in the circumstances of Taphouse's claim because:

(a) all of the relevant directions were made as a result of a threat of damage to persons within a 50 kilometre radius of the premises as required by cl 7 (PJ [572]);

(b) other than the direction of 29 March 2020, each of the directions made by the Queensland State Government prevented or restricted access to the premises (PJ [584] – [586]); and

(c) the directions caused an interruption to Taphouse's business which resulted in loss (PJ [609]).

505 Her Honour concluded that cl 8 of the extension (the hybrid clause) did not apply on the basis that the directions which caused the closure or evacuation of the insured's premises were not made as a result of the outbreak of an infectious human disease occurring within a 20 kilometre radius of the premises (PJ [588]ff). However, she considered that if she were in error about that conclusion and the Queensland Government's direction of 23 March 2020 did result in the closure of all or part of the premises, cl 8 would apply to provide indemnity for the consequential interruption to Taphouse's business which caused it loss (PJ [604], [609]).

506 In accordance with her Honour's reasons in other matters, it was also concluded that any JobKeeper payments received by Taphouse needed to be taken into account in the assessment of Insurance Australia's liability to indemnify.

507 The learned primary judge had already concluded that:

(1) The liability of an insurer to indemnify its insured was reduced by the amount of any JobKeeper payments it had received either pursuant to the "sums saved" clause in its policy or under general principles applicable to contracts of indemnity. Her Honour's reasoning in relation to this conclusion was reiterated in part in relation to Taphouse (PJ [621] – [624]). However, her Honour also concluded that the Queensland Government's COVID-19 Grants neither reduced Taphouse's loss, nor did it represent a "sum saved" (PJ [628] – [630]).

(2) It was not unreasonable for the purposes of s 57 of the *Insurance Contracts Act* for an insurer to withhold any amount to which its insured was entitled pending the outcome of the test cases, including any final determination on appeal (PJ [415]). The basis for this conclusion is expressed differently in relation to Taphouse, but its essential nature remained the same (PJ [631] – [632]). It followed from that, if Taphouse was entitled to be paid any amounts under the policy, Insurance Australia would not be liable to pay interest on such amounts until its liability to make the payment was determined.

508 Taphouse has appealed from several of her Honour's conclusions. In summary, its notice of appeal and Insurance Australia's notice of contention gave rise to the following issues (set out in the order in which they are addressed below):

(a) whether cl 7 (the prevention of access clause) is capable of applying to interruptions from disease (Appeal, Ground 1);

(b) whether any threat of damage to persons within a 50 kilometre radius of the premises was a sufficient cause of the relevant directions (notice of contention, Ground 1);

(c) the proper construction of the word "outbreak" in cl 8 (the disease clause) (notice of contention, Ground 2(a));

(d) whether the relevant directions were made "as a result" of a relevant "outbreak" (Appeal, Ground 2; notice of contention, Ground 2(b));

(e) whether the direction of 23 March 2020 closed or evacuated all or part of the premises (notice of contention, Ground 2(c));

(f) whether third party payments Taphouse received reduced the amount it could recover in respect of its loss pursuant to the policy (Appeal, Ground 4; notice of contention, Ground 3); and

(g) whether interest is payable by Insurance Australia pursuant to s 57 of the *Insurance Contracts Act* (Appeal, Ground 5).

Is cl 7 (the prevention of access clause) capable of applying to interruptions from diseases – Appeal, Ground 1

509 To a large extent this ground of appeal, and indeed the appeal generally, is determined by the conclusions reached earlier in these reasons as to the requirement to read contractual clauses in the context of the agreement as a whole and, in particular, harmoniously and congruently with each other.

510 The approach of the primary judge (PJ [561] – [564]) was to apply the orthodox principles of interpretation and read cll 7 and 8 congruently and harmoniously, thereby giving each appropriate scope and a sensible commercial operation. Her Honour's construction was supported by the wording of cl 7 which required the occasioning of "damage" which was defined as being, "accidental physical damage, destruction or loss", and, in relation to people, that tended to exclude the suffering of a disease.

511 The precise nature of Taphouse's initial submission in relation to cl 7 was not entirely clear. At its most benign it was that the structure of the policy had the consequence that there was merely some overlap of the coverage provided by cll 7 and 8 and that the policy's operation was unaffected by it. As expanded in the course of address, Taphouse's submissions were as follows. First, that the business interruption extension clause was badly drafted in that cll 7 and 8 did not sensibly follow from the wording of the chapeau of the extensions of cover section. Those opening words indicated that the insurer would indemnify the insured for loss resulting from business interruption as a result of insured damage as a direct result of the matters listed in cll 1 – 11. However, cll 7 and 8 (as with a number of other clauses) did not grammatically follow on from those opening words. Each commences with the words, "We will pay for loss …", and has the appearance of an extension whole in itself. Secondly, it was submitted that cll 7 and 8 were also not congruent with the words of the chapeau in the sense that they are not predicated on damage to the property of the insured whereas the chapeau refers to loss as a result of "insured damage", which necessarily required physical damage to property by reason of the definitions. In these circumstances, Mr Finch SC on behalf of Taphouse submitted that the Court should read the policy "from the point of view of Taphouse", eschewing "a detailed and technical reading that observed that a clause had some provisions which resulted in … overlap", with the result that if there is a clause which appears to provide cover for a claim it should respond regardless of the operation of other clauses in the policy, and that this approach has more force where a policy is inelegantly drafted. He drew upon this latter point for the submission that the obvious infelicities in the policy's drafting had the consequence that in its construction it was not necessary to seek coherence or clarity. In that light, it was submitted that it was permissible to accord cl 7 its full scope of operation without creating any inconsistency or incongruence with the operation of cl 8.

512 For the reasons previously given, these submissions are contrary to the established principles of contractual interpretation as applied by the primary judge and, consequently, fail *in limine*. There is no canon of construction or principle of interpretation which provides that the infelicity of language in a document has the consequence that one might then abandon any attempt to provide it with a sensible congruent meaning. That, however, was the substance of Taphouse's submissions. Despite the nature and scope of the established principles of construction having been explored earlier in these reasons, it is appropriate to consider their specific application to issues raised in this appeal.

513 It was in the context of this appeal that Mr Finch SC particularly sought to rely upon the arbitral award of Lord Mance in *China Taiping Insurance* which has been considered previously in these reasons. As discussed there, the policy wording before his Lordship was substantially different to the terms of the Taphouse policy. It had two very specific and structured clauses, neither of which might be regarded as being more general than the other. No such description applies in this case where cl 7 (the prevention of access clause) is in broad terms and cl 8 (the hybrid clause) is carefully structured and detailed. Other differences include that there was no issue of competing radii as occurs in the present case. Here, the use of the word "damage" and the phrase "threat of damage" in cl 7 raised an important constructional issue. Further, the prevention of access clause in the policy wording considered in *China Taiping Insurance* was, itself, somewhat limited and required the closing down or sealing off of premises and the hybrid clause spoke in wider terms of restrictions on use. In the present matter, the position is reversed in that cl 7 refers to prevention or restriction of access and cl 8 uses the narrower expression of closure or evacuation. Such matters support Lord Mance's conclusion that, in the policy before him, neither clause was clearly more specific than the other. However, that stands in stark contrast to the Taphouse policy. Given these matters, Lord Mance's observations tend to support the primary judge's conclusion to the extent to which her Honour concluded that the more specific provision should be accorded prominence over the more general.

Damage, being "accidental physical damage, destruction or loss" to persons

514 Taphouse broadly submitted that the words of cl 7 indicate its applicability to damage suffered by persons as a result of disease. It was said that, properly construed, cl 7 provides cover in circumstances where the business interruption has been caused by an authority preventing access to the premises, "as a result of *damage* to or threat of *damage* to … persons within a 50 kilometre radius", of the insured premises. Whilst it was accepted that the clause must be read with the policy's definition of "damage", being "accidental physical damage, destruction or loss" which was more appropriate to property damage, it was submitted that its cover was not limited to damage to property. While that latter proposition can be accepted, it does not advance the question of the clause's correct interpretation or the question of the type of damage which the clause requires to have been suffered by persons.

515 It was submitted that the primary judge erred by reading down the word "damage" when concluding that damage to persons from disease was not physical damage to them as that had the effect of excluding one of the meanings which the word might have borne: *Fitness First*

Australia Pty Ltd v Fenshaw Pty Ltd (2016) 92 NSWLR 128 at 135 – 136 [32]. However, her Honour's construction of cl 7 was that the concept of "damage" to a person in the sense used in the policy of being "accidental physical damage, destruction or loss" was "not particularly apt to describe any form of harm to humans be it from physical injury or disease" (PJ [562]). Her Honour found that the harm that the disease could cause to persons did not fall readily and naturally within the concept of damage as used in the policy.

516 No error was shown to exist in the primary judge's approach. Indeed, it was entirely consistent with that identified in the above authority relied upon by Taphouse where Leeming JA said (at 135 [32]):

> But the starting point remains identifying the possible meanings the words chosen by the parties can bear, and reaching a conclusion based upon a consideration of text, context and purpose …

Her Honour accepted the possibility of alternative meanings but concluded that the definition of "damage" was inapt to encompass the effects of disease.

517 As Mr Jackman SC for Insurance Australia submitted, this difference is particularly acute in the context of the Taphouse policy where cl 7 refers to damage and cl 8 to disease such that, given the close proximity of the usage of those words, it can be inferred that they were intended to have different meanings. There is force in that submission and it provides additional support for the primary judge's conclusion.

518 Although Taphouse submitted that the primary judge erred by failing to appreciate the effect of the disjunctive "or" between "property" and "persons" in cl 7, that should be rejected. The foundation of the conclusion reached resulted from the reading of the definition of "damage" into the clause and its consequent inapplicability to persons. Although the word "or" may have been used to co-ordinate the two elements of the sentence being "property" and "persons", each was subject to the requirement that damage as defined occur to them. Had the word "and" been used, the damage or threat thereof would have to be directed to each. There is no merit in this submission.

The incongruence and incoherence of Taphouse's proposed construction

519 The difficulty of reading cl 7 as applying to diseases given the terms of the definition of "damage" was a secondary basis for the construction reached. The primary basis was expressed at PJ [561] where her Honour observed that when cl 7 was read in the context of the policy as a whole and especially cl 8, it was apparent that to read it as applying to disease would "involve

profound incongruence and incoherence and not mere redundancy or tautology", which is a construction best avoided: *Liberty Mutual Insurance Co Australia Branch v Icon Co (NSW) Pty Ltd* (2021) 154 ACSR 126 at 164 – 165 [152].

520 As was the case in the LCAM appeal, the policy under consideration in this appeal included a hybrid clause (cl 8) specifically providing cover in relation to business interruption consequent upon the outbreak of an infectious disease. That, of itself, is an important factor in the construction of the policy. Whilst cl 7 provides broad cover in relation to business interruption caused by any legal authority preventing access to the insured's premises, cl 8 deals specifically with the closure or evacuation of the premises by a legal authority as a result of infectious disease. It would be illogical to suggest that cl 8 is irrelevant when an insured makes a claim consequent upon the outbreak of an infectious disease merely because the claim may be covered by cl 7 if the word "damage" was given an extended meaning. As Insurance Australia submitted it would offend the principle that specific provisions prevail over inconsistent general provisions concerning the same subject matter: *Hume Steel Ltd v Attorney-General (Vic)* (1927) 39 CLR 455 at 465 – 466. Moreover, such construction would render cl 8 "nugatory or ineffective": *Chapmans v Australian Stock Exchange* at 411.

521 As the primary judge's analysis revealed, were cl 7 to apply to the outbreak of infectious diseases, the restrictions and limitations on cover for that occurrence in cl 8 would be circumvented. In particular, her Honour noted (PJ [561]):

(a) the requirement in cl 8 for an authority to close or evacuate the premises by reason of a disease would be negated;

(b) the limitation to the disease occurring within the 20 kilometre radius in cl 8 would be circumvented and the 50 kilometre radius in cl 7 would apply;

(c) the limitation in cl 8 to infectious or contagious human diseases would not apply; and

(d) the exclusions of highly pathogenic Avian Influenza or any disease declared to be a quarantinable disease under the *Quarantine Act 1908* (as amended) in cl 8 would also not apply.

522 In neither its written submissions nor in oral address was Taphouse able to provide an adequate explanation as to how these difficulties with its proposed construction might be ameliorated. An attempt was made to characterise the differences between cl 7 and cl 8 to being, merely, that the former looks to interruption caused by a legal authority "preventing or restricting

access" as a result of "damage to or threat of damage to … persons", and the latter refers to the "outbreak of an infectious or contagious human disease" as the cause of the closure or evacuation and does not require a threat to humans. By this it was intended to suggest that the clauses could have independent spheres of operation. However, as the primary judge concluded (PJ [563]), if damage in cl 7 included the effects of disease, there would be no case in which an authority would close a premises for the purposes of cl 7 by reason of a disease which would not cause harm to people. In other words, if cl 7 applied to disease, there would be no occasion on which cl 8 would apply and cl 7 would not. As a result, the inconsistencies in the operation of the two clauses as referred to above would remain. Further, as the primary judge reasoned, on the assumption that cl 7 applied to diseases, the policy would postulate a circumstance where cover is provided more expansively for the consequences of an authority's actions in relation to threats as compared to actions in response to actual outbreaks. There is little commercial sense in that outcome.

523 The consequence of construing cl 7 expansively would, as her Honour found, create incoherency and incongruity in the policy's operation, not mere tautology. Taphouse's proposed construction would not merely create a circumstance of an overlap of cover provided by different clauses, but an effective circumvention of the expressly agreed limits and restrictions on the insurer's obligation to indemnify in relation to the outbreak of disease. Taphouse's submission that her Honour's approach constitutes a departure from the language of the words for the purposes of giving the policy a superior or preferable commercial operation, should be rejected. It is merely the application of orthodox principles of construction which give effect to all of the policy's provisions. Taphouse's alternative construction would work commercial inconvenience for the reasons given by the trial judge: cf. *Electricity Generation* at 656 – 657 [35].

524 In the course of the appeal, it was again submitted that, assuming cl 7 applied to diseases, there may be some scenarios which might fall within cl 8 but not cl 7, however it is difficult to see how that might realistically occur. It was submitted that a diseases such as gastroenteritis would not cause damage to humans because the symptoms were transient and would not fall within cl 7. This, so the submission went, meant that some meaning could be attributed to cl 8 even on the broad reading of cl 7. However, this submission sought to adopt the position that cl 7 applies to diseases because, on the one hand, they cause physical harm to humans on the one hand but, on the other hand, transitory diseases do not. There was no evidence to establish

that such was the case. There was nothing in this submission that would accord any meaningful operation to cl 8(a)(i) if Taphouse's construction of cl 7 was accepted.

Was any threat of damage to persons within a 50 kilometre radius a sufficient cause of the relevant directions – notice of contention, Ground 1

525 It is convenient at this point to address the first issue raised in Insurance Australia's notice of contention. By this it sought to uphold the primary judge's conclusion that cl 7 did not respond to Taphouse's claim on the basis that any threat to persons within a 50 kilometre radius of the premises was not an equally effective cause of the directions relied upon by Taphouse (Ground 1(b) of the notice of contention). It should be noted that although in the light of earlier conclusions it is not strictly necessary to deal with this ground, it is, nevertheless, appropriate to do so in the circumstances.

526 Insurance Australia did not press Ground 1(a) of its notice of contention which was that Taphouse had failed to establish that, as a fact, that there was "damage to or threat of damage to property or persons" within a 50-kilometre radius of the insured's premises. As the learned primary judge had held (PJ [565]), the question of whether the Queensland Government directions were imposed by reason of damage or threat of damage was to be addressed, initially, by reference to the terms of the directions themselves and any accompanying explanatory material. The submissions advanced by Taphouse and accepted by her Honour (PJ [566]) was that, as by their terms the directions apply to and were made in response to the threat of COVID-19 across the whole of Queensland, they were necessarily also made as a result of the threat of damage to persons within a 50 kilometre radius of the premises. In accepting this, her Honour distinguished between a threat or risk of COVID-19 and the fact of an occurrence or outbreak. She held that, if cl 7 applied to diseases, it would be triggered if the authority took the relevant action as a result of a threat of damage to persons by reason of COVID-19 in the radial area around the insured premises, even if it was in response to the threat to all persons in Queensland.

527 In her reasons, the primary judge considered the relevant powers of the Queensland Government and the Chief Health Officer under the *Public Health Act 2005* (Qld) (*Public Health Act (Qld)*), and the declarations and directions made pursuant to those powers. Her Honour concluded (PJ [568]) that the threat or risk to each and every person in Queensland from COVID-19 was an equally effective cause of the directions made. It was not relevant to this conclusion that Taphouse had not proven that there was any transmission of COVID-19

within 50 kilometres of its premises and it would not have been relevant if the evidence disclosed that there were no cases within that area (PJ [569]). The fact that the directions were the result of the threat considered by the Queensland Chief Health Officer to exist throughout Queensland did not mean that the threat was not considered to exist in relation to the population within 50 kilometres of the premises. That conclusion was supported by the nature of COVID-19 as being a highly infectious and potentially fatal disease. Thus, the learned judge concluded (PJ [570]):

> On this basis, I infer that the proximate cause of the directions was the Chief Health Officer's view that the directions were required to protect each and every person in Queensland from COVID-19. The threat or risk to each person is an equally efficacious cause of the actions taken as the threat or risk to every other person. It does not matter that it cannot be proved that there was community transmission of COVID-19 within the radius.

528 It should be observed that her Honour's references to proximate cause reflects the manner in which this issue was addressed by the parties. However, the causal issue here is as to the link between the two elements of the insured peril where the concept of 'proximate cause' is not relevant unless found to be expressed in the causal language linking the elements of the particular provision describing the insured peril. In cl 7, the insured peril is the authority preventing or restricting access to the premises "as a result of" damage or the threat of damage to persons. The indemnified loss is that which results from interruption to the insured's businesses "that is caused by" the insured peril. Questions of "proximate cause" are relevant to the latter but not self-evidently to whether causal links in a composite insured peril have been satisfied.

Insurance Australia's submissions

529 Insurance Australia's submissions on this point traversed a number of overlapping issues. The first appeared to be that the threat or risk to persons in the area of a radius of 50 kilometres around Taphouse's premises could not be said to be the "proximate cause" of the making of the directions by the Queensland Chief Health Officer. The second seemed to be that the evidence did not support the conclusion that the directions were relevantly caused by the threat to people, but rather by the determinations of the National Cabinet. The third was that it was wrong to extrapolate from a conclusion that the directions were made as a result of the risk to all persons in Queensland that they were relevantly made as a result of a threat to persons within the specified area.

530 In its written submissions, Insurance Australia focused on the first of the above and submitted that the primary judge erred in concluding that the directions made by the Chief Health Officer were made "as a result" of a threat of damage to persons within the 50 kilometre radius of the insured's premises. It submitted that the causal nexus must be considered as if requiring a "proximate cause" between the threat and the making of the directions, and that there was insufficient material to establish that the threat was the "real", "effective", "dominant" or "most efficient" cause of their making. From this, it was submitted that as the cause of the making of the directions was the threat posed by COVID-19 across the whole of Queensland, which was part of the national lockdown policy, it could not be said that threat to persons within 50 kilometres of the insured's premises was the proximate cause of the making of the directions.

531 Insurance Australia's submissions in the above respect are founded upon a misunderstanding of the nature and purpose of "proximate cause". As is discussed in the early part of these reasons, it is a concept used in ascertaining whether an insured peril has caused the loss which is the subject of the insurer's liability to indemnify or whether that loss has been caused by a relevant exclusion. See generally *The Law of Insurance Contracts* [25-2]; Lowry J and Rawlings P, *Insurance Law: Doctrines and Principles* (2nd ed, Hart, 2005) at 225 – 228. Here, the causation issue is not as to the cause of the insured loss, but as to whether, as a link in the existence of the composite insured peril, the directions were "a result of" the identified threat.

532 By framing the question as one of "proximate cause", Insurance Australia created a higher standard for the insured to satisfy than was required by the policy. In the construction of the meaning of the causal links in the elements of the insured peril, no *a priori* standards of causation are imposed and the degree to which the two elements are causally linked is a matter of ordinary construction. Here the expression "as a result of" is used and should be accorded its usual meaning. As the authorities demonstrate, in an appropriate context it can be a particularly broad expression, although not open ended. In *F & D Normoyle Pty Ltd v Transfield Pty Ltd* (2005) 63 NSWLR 502, Ipp JA (with whom McColl JA and Bryson JA agreed) observed (at 515 [90]):

> Further, in my view, while the phrase "arising as a result of", in cl 12, is a particularly broad expression of the notion of causation, it is not open ended. The clause plainly does not connote "proximate cause" or "direct cause", but it could not be construed so as to import an unlimited concept of causation. The clause does involve some causal or consequential relationship (cf *Dickinson v Motor Vehicle Insurance Trust* (1987) 163 CLR 500 at 505). Remoteness must form an element of the meaning of "arising as a result of"; more is required than the mere existence of connecting links between an

> act, neglect or default of the sub-contractor and the liability incurred by the Joint Venture.

533 In *Hu v Kim* [2019] NSWSC 448, Kunc J, immediately prior to citing the above passage with approval, said of the expression "as a result of" (at [74]):

> [74] The phrase "as a result" connotes more than a remote causal link. The online Oxford English Dictionary defines "result" as "to arise as a consequence, effect or outcome of some action, process or design." Similarly, the online Macquarie Dictionary defines "result" as "to spring, arise or proceed as a consequence of actions, circumstances, premises etc" These definitions suggest a clear nexus is required between the liability which may arise, and the First Contract.

534 Nevertheless, it must be kept in mind that the expression has a chameleon-like quality and its meaning will regularly and significantly be influenced by the context in which it is used: *R v Khazaal* (2012) 246 CLR 601, 613 [31]; *Secretary, Department of Family and Community Services v Hayward (a pseudonym)* (2018) 98 NSWLR 599, 618 – 619 [67]; cf *Horsell International Pty Ltd v Divetwo Pty Ltd* [2013] NSWCA 368 [170] – [171]. Here, where the expression appears in a composite insured peril, any narrow construction would substantially reduce the scope of cover with no apparent justification. It is used to specify the required connection between a threat of damage to, *inter alia*, persons and the authority preventing or restricting access to the insured's premises. There is nothing which suggests that the threat must be the sole or predominate cause of the authority's actions or even that it must be the proximately efficient cause. There is no logical rationale for restricting it in that manner and none was suggested by Insurance Australia. This is particularly so where the issue as between the insured and the insurer is that which motivated the actions of a third party authority. As it is not generally within the power of either to specifically weigh the factors which motivate the authority, a reasonable commercial construction would construe the expression "as a result of" as requiring no more than something more than a remote causal link.

535 As the learned primary judge concluded, it was apparent that the cause of the making of the directions was the threat to each and every person in Queensland from COVID-19 which included the threat to those persons within the required radial area. Her Honour further reasoned in accordance with the principles in *FCA v Arch*, that the threat to each person in Queensland was equally efficacious in the circumstances. For the reasons given, there was no need for her Honour to make that determination. All that needed to be decided was whether the Queensland Government's directions, which had the effect of imposing the restrictions in the 50 kilometre radial area, were made "as a result" of the threat to persons in that locality. *Prima facie*, the question answers itself. Logically, if there were no threat to the people in that

area, being some 7,854 km², the restrictions would not have been imposed there. It follows that the threat was more than a remote cause of the restrictions and cl 7 is satisfied in that respect.

536 In these circumstances, it is not strictly necessary to consider the correctness of the primary judge's conclusion that the threat to people in the radial area was an equally efficient cause of the imposition of the restrictions nor it is necessary to ascertain whether it is possible to accept that the threat to each person in the State might be regarded as an effective cause of the restrictions. Nevertheless, it is appropriate to make the following observations on the parties' submissions in relation to this topic.

537 Insurance Australia submitted that, even if the Chief Health Officer had turned her mind to the situation in Townsville and the circumstances then existing within 50 kilometres of Taphouse's premises, they could hardly have been "an equally effective cause" of the directions. Whilst this submission proceeds upon a mistaken appreciation of what was required by the words, "as a result of", it also raises the question of what was, in fact, the cause of the making of the several directions on which Taphouse relied. Those matters were considered in detail by the primary judge who reached the conclusion that they were made as a result of the threat to the health of all Queenslanders from COVID-19. Her Honour set out at length the actions on which Taphouse relied as satisfying the requirements of cll 7 and 8 (PJ [546]). Each was a statutory instrument made by the Queensland Chief Health Officer under s 362B of the *Public Health Act (Qld)* and, on each occasion on which that power was exercised, reference was made to the extant declaration by the Queensland Minister for Health pursuant to s 319 of the *Public Health Act (Qld)*. That declaration indicated the Minister was satisfied that there existed a "public health emergency" due to the outbreak of COVID-19 in China and its pandemic potential and, that, in order to "control the threat and prevent or minimise serious adverse effects on human health in Queensland", emergency powers will be required such that it was appropriate that a declaration of the emergency should be made.

538 The Chief Health Officer's directions were made pursuant to Part 7A of the *Public Health Act (Qld)*, entitled "Particular powers for COVID-19 emergency", which was inserted on 19 March 2020 by the *Public Health and Other Legislation (Public Health Emergency) Amendment Act 2020* (Qld). The main import of those amendments is found in the new s 362B which granted the Chief Health Officer the power to make public health directions if that person "reasonably believes it is necessary to give a direction under this section (a ***public health direction***) to assist

in containing, or to respond to, the spread of COVID-19 within the community". The scope of the directions which might be made is relatively untrammelled and includes restricting the movement of people, requiring people to stay at or in a stated place, requiring persons not to enter or stay at or in a stated place, and restricting contact between persons. As the primary judge noted the Explanatory Note accompanying the amending Act stated that, "COVID-19 represents a significant risk to the health and wellbeing of many Queenslanders", and that the Bill ensured there was, "clear legal authority to make the interventions necessary to mitigate the spread of COVID-19 in the community". The Statement of Compatibility made for the purposes of s 38 of the *Human Rights Act 2019* (Qld) also stated that granting the new powers to the Chief Health Officer was necessary to permit the government to "proactively pursue more prescriptive approaches to respond effectively to this unprecedented public health emergency".

539 The above matters reveal that the directions on which Taphouse relies as preventing or restricting access to its premises, had their origin in the object of minimising the spread of COVID-19 in Queensland and, therefore, in response to the risk or threat of harm to all persons in the State. Although that seems to have been accepted by Insurance Australia, it submitted that it could not be extrapolated that the threat of harm to persons in the radial area around the Taphouse premises was the sole proximate cause of the making of the directions. Whilst the error of that approach has been discussed above, it is appropriate to consider the evidence of the threat posed by COVID-19 to people in the relevant area and its possible impact on the making of the directions.

540 As Taphouse submitted, there was evidence before the primary judge of the presence of COVID-19 in Townsville prior to the making of the Chief Health Officer's first relevant direction on 23 March 2020. The presence of the disease carried with it the concomitant threat of its spread. It was submitted that it should be easily inferred that the Chief Health Officer was aware of these cases prior to the making of the directions and would have treated each and every case of COVID-19 within Queensland, and the threat of its spread, as of approximately equal significance.

541 The statement of agreed facts on which the trial before the primary judge was conducted shows that, as at 23 March 2020, there had been four recorded cases of COVID-19 in the Townsville Hospital and Health Services (Townsville HHS) area, none of which were locally acquired, out of a total of 319 cases in the whole of Queensland, most of which were located in south-eastern

Queensland. This was relied upon by Insurance Australia in support of the submission that it could not conceivably be the case that the threat within 50 kilometres of Townsville was an "equally effective cause of the relevant direction as the threat that existed was in Southeast Queensland". It was submitted that the intensity of the threat resulting from the four cases in Townsville, when compared to the greater number in other parts of Queensland, could not support the conclusion that the threat of the spread of the virus there was "equally efficacious" to the making of the direction and, at most, could only be peripherally relevant. In essence, it was submitted that the threat posed by the COVID-19 cases in southeast Queensland was the effective cause of the making of the directions.

542 The initial difficulty with those submissions is that they are couched in terms of the "proximate cause" of the making of the directions. For that reason, Insurance Australia sought to demonstrate that, whilst the risk to people in Townsville was "a cause" of the order, it was not the effective cause and it sought to undertake a notional apportionment of the influences on the Chief Health Officer when making the decision to make the directions. In this context, Insurance Australia's acknowledgement that the risk to the people of Townsville within 50 kms of the Taphouse premises was "a cause" of the directions effectively determines this issue against it. That is all that is required by cl 7.

543 On the other hand, it should be acknowledged that Taphouse did not cavil with the primary judge's approach of considering whether the words, "as a result of", imported considerations of "proximate cause", and it sought to uphold the primary judge's conclusion that the threat to all persons in Queensland, including those within 50 kilometres of its premises, was an equal proximate causes of the making of the directions.

544 In dealing with Insurance Australia's submissions that proximate cause had not been established, Mr Finch SC first submitted that a direction by the Chief Health Officer as a result of an "undifferentiated" threat to all persons in Queensland satisfied the requirement of cl 7 because it was equally caused by the threat to persons within 50 kilometres of Taphouse's premises. This was founded upon the trial judge's reasoning (PJ [569]) and her partial acceptance of the approach adopted in *FCA v Arch*. So, the reasoning went, where action, such as the making of the directions, results from a widespread threat of harm from a disease, it is likely to result from the threat to all persons within each and every part of that geographical area. That is particularly so in relation to a disease such as COVID-19 which is highly infectious and potentially fatal. Her Honour also considered that it would be fictitious to

attempt to notionally dissect the Chief Health Officer's motivation for the making of the direction by assuming that her concern for the health of persons in the southeast of Queensland was not as great for those in Townsville. Whilst it was accepted that the risk of the disease spreading in areas where there are existing outbreaks or occurrences of the disease is greater, that was not the issue. Here, all parties agreed that the direction was made as a result of the threat to all persons in Queensland by the presence of COVID-19, and the necessary inference from the source of the Chief Health Officer's powers and the directions made was that the threat to each person in Queensland was an equally effective cause. It followed, so her Honour held, that the threat to persons within 50 kilometres of Taphouse's premises was an equally effective cause of the making of the directions.

545 As mentioned, this part of the primary judge's reasoning adopted the approach of the UK Supreme Court in *FCA v Arch* (at 721 [176]) to the effect that because the relevant government measures were "taken in response to information about all of the cases of COVID-19 in the country as a whole" then "all the cases were equal causes of the imposition of national measures". It was submitted by Insurance Australia that her Honour appears to have adopted this reasoning despite her misgivings about its applicability to Australian conditions. However, that is not a correct analysis of the primary judge's conclusions. Her Honour concluded (PJ [68]) that when the issue was one of whether actual outbreaks, occurrences or instances of COVID-19 caused relevant government measures, similar findings to those made in *FCA v Arch* could not be made in the context of the geography of Australia and the limited number of occurrences of COVID-19 here at the relevant times. As the disease did not become widespread throughout the country or a large proportion of the population, it could not be said that each and every known case of COVID-19 in any location in a State was an equally effective cause of the State Government's actions. However, her Honour later identified (PJ [78]) the Supreme Court's approach was apposite to situations where the relevant issue concerned the "threat" or "risk" to each and every person in a State presented by known and unknown cases of COVID-19, given its highly contagious nature.

546 In its submissions, Insurance Australia asserted that the reasoning in *FCA v Arch* was not applicable to the circumstances of the operation of cl 7 because it "cannot be inferred that each and every known case of COVID-19 in any location in a State is an equally effective cause of the State government actions". However, it did not appear to contest the correctness of the reasoning in *FCA v Arch* or its applicability to "a threat or a risk" to each person in a State, but only that it could not apply to an undifferentiated risk to each such person. This submission

proceeded on the basis that an action can be in response to a generalised risk across a wide area, without being equally proximately caused by the existence of the threat or risk within the defined radius. It further submitted that, unlike in *FCA v Arch* where it was accepted that the government's actions were taken in response to each and every case of COVID-19, a similar inference could not be drawn in this case in relation to the threat to each person in Queensland.

547 If it is assumed that the approach to the identification of proximate cause in *FCA v Arch* is correct, as Insurance Australia does, at least on this point, and it is also assumed that the required causal nexus is one of proximate cause, again as Insurance Australia does, there was no error in the primary judge's reasons. By its acceptance of the principles in *FCA v Arch*, Insurance Australia endorsed the fragmentation of the causes of governmental action as well as the attribution of each fragmented part the characteristic of an efficient cause of that action. Once it is accepted that each case of COVID-19 in the United Kingdom can be "treated" as a proximate cause of equal efficiency of governmental action, it must also be accepted that the same process can be applied to the threat of harm from COVID-19 to all people in Queensland. On this basis, no error has been demonstrated in the primary judge's application of that principle.

548 It follows that where a state-wide direction preventing business owners from using their premises is made as a result of the threat to all persons within the State, on the approach in *FCA v Arch*, it must be assumed, in the absence of evidence to the contrary, that the threat or risk to each and every person is a concurrent and equal cause of the direction. In this case, where a radius of 50 kilometres around the centre of Townville would take in the whole of a major regional city and its surrounds, the number of persons who are subject to the threat would be not insignificant. Therefore, to the extent to which it is necessary to decide, the primary judge was correct to conclude that the threat to people within 50 kilometres of the Taphouse premises was an "equally efficacious" or "proximate" cause of the making of the directions by the Chief Health Officer.

549 It must be reiterated that this discussion is founded upon a number of assumptions, including the applicability of the causation principles applied in *FCA v Arch*. The engagement with the parties' submissions should not be taken as an acceptance or adoption of those principles.

550 It was also submitted by Insurance Australia that the statements in the directions to the effect that their purpose was to "assist in containing, or to respond to, the spread of COVID-19 within the community" discloses that they were responses to identified outbreaks of the virus.

However, that is inconsistent with the fact that the directions were applied across the State regardless of whether an outbreak existed in the local communities. Further, the purpose of containing the outbreaks was obviously to prevent the virus spreading and causing harm, being the type of threat which, on the assumptions made, are included in cl 7.

551 Insurance Australia next submitted that it ought to be inferred that the Chief Health Officer made the directions as a result of a resolution made by the National Cabinet on 22 March 2020. This submissions was founded upon a statement by the Prime Minister that day in which he advised that the National Cabinet had agreed, for the purposes of slowing the spread of the virus, to move to more widespread restrictions on social gatherings and the making of the first relevant restriction on the following day. However, that rather bold submission was bereft of support in the material. Importantly, the Prime Ministerial statement indicated that the agreement was to implement measures "through state and territory laws". There was nothing in the statement to suggest that the Chief Health Officer would not faithfully apply the requirements of the *Public Health Act (Qld)* and act in accordance with the power conferred. Again, an attempt to slow the spread of the virus underscores that the action taken was as a result of the threat to the health of persons including those within the 50 kilometre radius of Taphouse's premises.

552 To the above it can be added that the first direction was made on 23 March 2020, three days after the report of a community case in Townsville was sent to the "notifiable conditions register" (NOCS), which was established under Chapter 3 of the *Public Health Act (Qld)*, on 19 March 2020. That fact carries with it an assumption that the deliberations of the National Cabinet and of the Chief Health Officer occurred with knowledge of the risk of a threat to persons in the Townsville area.

Conclusion as to Ground 1 of the notice of contention

553 It necessarily follows that, on the assumptions adopted by the parties and on the assumption that cl 7 does apply to disease, no error has been shown in the learned primary judge's conclusions as to the cause or the efficient cause of the making of the directions relied upon by Taphouse as triggering cl 7. It follows that first ground of the notice of contention fails.

The meaning of "outbreak" in cl 8 – notice of contention, Ground 2(a)

554 The next logically sequential issue is the primary judge's consideration of whether there was an "outbreak" of COVID-19 in the area within 20 kilometres of the Taphouse premises for the

purposes of cl 8 of the Taphouse policy. Her Honour concluded (PJ [597]), in accordance with her reasons in the LCAM matter, to the effect that:

> a single case of COVID-19 within the community within an area capable of communicating COVID-19 to another person and not in a controlled environment (such as quarantine, isolation or a hospital) is a proper foundation for an authority to consider that there is an outbreak of COVID-19 within that area.

555 As has been discussed above, with the clarification that the person infected being "not in a controlled environment" requires them being present in the community in circumstances where transmission to other persons is possible, that is an appropriate descriptor of the concept of "outbreak" in relation to the COVID-19 disease.

556 Insurance Australia's submission that "outbreak" has a narrower construction should be rejected for the reasons expressed previously in these reasons in relation to the meaning of that word. There is no need to repeat that discussion here. Nevertheless, it is apt to observe that the force of her Honour's conclusions is supported by the terms of the insured peril in cl 8 of the Taphouse policy, which relevantly provides:

> any legal authority closing or evacuating all or part of the *premises* as a result of:
>
> i. the outbreak of an infectious or contagious human disease occurring within a 20-kilometre radius of your *premises*

557 The clause operates where the legal authority acts "as a result of" the "outbreak" and, it necessarily follows, that authority must have had some awareness of it. On Insurance Australia's construction, cl 8 will not apply if the authority, which has imposed the restrictions, has an awareness of the existence of a case, or a number of cases, of COVID-19 in the area within 20 kilometres of Taphouse's premises and in non-controlled circumstances, but no knowledge of whether there has been any transmission. On its case, the same would apply even if the authority became aware that the person or persons with the disease had been interacting in the community for a number of days but, again, was unaware of any transmission. In the ordinary course, one would expect that the existence in the community of a person or persons with the disease will become known to the relevant authority well prior to it gaining knowledge of any transmission and it might be thought that, as a matter of prudence, any restrictions will be imposed immediately. If the narrow construction of the word "outbreak" is adopted, cl 8 would only operate where the authority, although becoming aware of a case or some cases of the disease in the community, waited until it ascertained that there was transmission before acting. That would likely deprive it of any operative effect or of any benefit to the insured.

558 The insurer's narrow construction would also impose upon the clause a further uncommercial operation. If four persons from one house within the defined area were diagnosed with COVID-19 and this had the consequence of causing the imposition of a lockdown, the policy would respond only if the transmission occurred in the defined area rather than, say, sometime previously and prior to the persons entering the defined area. It is more likely that the parties intended the policy to operate on an observable fact in the relevantly defined area which is capable of reasonable proof, rather than on the fact of transmission which is not only difficult to establish but all but impossible to identify where and when it occurred. That difficulty is exacerbated when the additional requirement is that the relevant authority acted "as a result" of the outbreak occurring. It is not likely that the parties intended the policy to operate upon such vagaries and uncertainties.

559 It follows that Ground 2(a) of the notice of contention must be rejected.

Were the relevant directions made "as a result" of a relevant outbreak – Appeal, Ground 2; notice of contention, Ground 2(b)

560 It is now appropriate to deal with two overlapping issues, one arising from the notice of appeal, the other from the notice of contention. Insurance Australia takes issue with the primary judge's determination that, for the purposes of cl 8, it was unnecessary for the insured to demonstrate there was, in fact, an "outbreak" of COVID-19 in the area within 20 kilometres of its premises. Taphouse, conversely, appeals the determination that there was no evidence of an outbreak (within the meaning of that term as adopted by her Honour) in the defined radius. It also submitted that the primary judge erred in concluding that the Chief Health Officer's directions were not "as a result of" an outbreak.

Is it necessary to demonstrate, as a fact, that there was an "outbreak" within the specified radius – notice of contention, Ground 2(b)

561 Previously in these reasons, it has been determined that, properly construed, the hybrid clauses under consideration reveal an intention that they are to operate on the closure of or interference with access to the relevant premises by the relevant authority *because* of one of the enumerated events regardless of whether the events had actually occurred. That reasoning also applies in the circumstances of the Taphouse policy. The causal nexus in the hybrid clause does not require the actual existence of the events the subject of the insured peril, but describes the motivation for the action by the local authority in closing or evacuating the premises.

562 This approach to the construction of hybrid clauses is even more apposite to cl 8 of the Taphouse policy where cover is also provided when a legal authority closes the premises "as a result of … hygiene problems associated with drains or other sanitary arrangements at the *premises*". A sensible commercial reading of that clause would require that it operate where the authority closes the premises because of its perception of the existence of relevant hygiene problems. The clause accords the authority an evaluative judgment both as to the existence of the issue and of the action which it takes. It cannot matter that neither the insured or insurer would regard the issue as amounting to a "hygiene problem" so long as the authority does. Similar comments can be made in relation to cl 8(a)(ii) concerning "vermin or other animal pests" at the premises. So long as the authority is motivated by its belief that the relevant pests are at the premises and takes action, the policy would respond, even if the authority is mistaken or is subsequently unable to establish the presence of vermin.

563 Insurance Australia did not establish any error in the primary judge's reasoning as to the operation of hybrid clauses generally or cl 8 of the Taphouse policy in particular. In this context, it again relied upon the words "as a result of" as importing the requirement of "proximate cause" although, for the reasons previously given, no such necessity exists.

Were the restrictions made "as a result" of an "outbreak" within 20 kilometres of the premises – Appeal, Ground 2

564 Taphouse's grounds of appeal in this respect were that the primary judge erred in concluding that there was no evidence of "an outbreak" within 20 kilometres of its premises and that the restrictions were not imposed as a result of any such outbreak.

Was there an "outbreak" prior to 23 March 2020 – Appeal, Ground 2(a)

565 As to the first matter, the primary judge accepted (PJ [601]) that there were 31 cases of COVID-19 recorded in the Townsville HHS region (which extends up to 325 kilometres from Townsville) in the period from January 2020 to May 2021, of which 30 were identified as being "overseas acquired" and one as "interstate acquired", with none being identified as "locally acquired – no known contact" or "locally acquired – contact known". Importantly, her Honour found that there was "no evidence … that there was a single case of a person within the 20 kilometre radius who was in the community with COVID-19 at a time when the person was capable of communicating the disease to others". This conclusion is a purely factual one. However, as it was based on undisputed facts and documents, this Court is in an equally good

position to determine the proper inferences to be drawn: *Warren v Coombes* (1979) 142 CLR 531 at 551; *Fox v Percy* (2003) 214 CLR 118 at 126 – 127 [25].

566 Mr Finch SC for Taphouse submitted that the evidence demonstrated there was an "outbreak" of COVID-19 within 20 kilometres of the Taphouse premises prior to 23 March 2020, when the first of the relevant directions were made and that the primary judge erred (at [594]) by not accepting that the material obtained from the Townsville HHS established that to be so. That evidence consisted of a number of completed case report forms obtained on subpoena from that entity which recorded details of patients who were treated for COVID-19, including identifying their addresses within 20 kilometres of the Taphouse premises, as well as the several dates on which it was expected the disease was contracted, symptoms appeared, hospitalisation occurred, and during which isolation occurred. The forms also identified the dates on which the information about the patient was sent to the NOCS. From this, it was submitted that a number of individuals arrived in Townsville at some time prior to 23 March 2020, became symptomatic and were hospitalised, but that in the intervening period they were not isolated. It was submitted that an inference could be drawn from this information that there were persons (possibly seven) who were in the community (not in a controlled environment) and capable of transmitting the disease to others prior to the making of the first direction.

567 Mr Finch SC submitted that an important piece of information on the forms was the identification of the date on which each was sent to the NOCS. In making this submission, he referred to s 68 of the *Public Health Act (Qld)* which identified that the purposes for which the register was established included:

(a) to identify outbreaks of notifiable conditions so the Commonwealth, the State or a local government can take steps to protect public health (s 68(b));

(b) to help in the identification of persons who have, or may have, contracted a notifiable condition so that the Commonwealth, the State or a local government can take action to prevent or minimise transmission of the notifiable condition (s 68(c)(i)); and

(c) to help in the planning of services and strategies to prevent or minimise the transmission of notifiable conditions (s 68(d)).

568 From this it was submitted that, as the dates on a number of the forms indicate that they were sent to the NOCS prior to 23 March 2020, it is likely that they were used for their intended purpose of informing the taking of action to prevent and minimise transmission and,

consequently, it can be inferred they were seen by the Chief Health Officer and taken into account by her in making the directions.

569 There is force in the submission that the forms produced do establish a probability that, prior to 23 March 2020, certain individuals were within 20 kilometres of the Taphouse premises at a time when they were infected with COVID-19 and in non-controlled circumstances in the community. It suffices to refer to one of the forms which relates to a patient who was recorded as experiencing symptoms on 12 March 2020 and was hospitalised the following day. The identified exposure period for this person was recorded as being 26 February 2020 to 11 March 2020. It appears that he had arrived in Townsville on 11 March having returned by air travel from Sydney. A number of persons were listed as household contacts or close contacts of this individual. As was submitted, in order for the individual to land at the airport, return home from the airport, to travel to hospital and to be in close contact with others, it necessarily followed that he was in the community and in non-controlled circumstances. All of these places just referred to were within 20 kilometres of Taphouse's premises. Similar comments can be made in relation to the other forms.

570 This evidence is sufficient to justify the conclusion that prior to 23 March 2020, there were persons infected with COVID-19 within the community within an area of 20 kilometres of Taphouse's premises and capable of communicating it to others (i.e. not in a controlled environment). In other words, contrary to the learned primary judge's conclusions, it should be accepted that there was an "outbreak" or "outbreaks" of COVID-19 in the area within 20 kilometres of the Taphouse premises prior to 23 March 2020.

571 It is important to acknowledge that neither the documents obtained from the Townsville HHS nor their import were drawn to the primary judge's attention and that somewhat accounts for the different conclusion reached on this issue.

572 Although it does not alter the outcome of the appeal greatly, Taphouse has successfully made out Ground 2(a) of its notice of appeal.

Did the outbreaks result in the making of the directions – Appeal, Ground 2(b)

573 Despite the conclusion that COVID-19 outbreaks had occurred in the radial area of 20 kilometres around the Taphouse premises, it does not follow that they resulted in the making of directions by the Chief Health Officer. In the consideration of this causation issue some reliance can be placed on the reasoning of the primary judge even though her Honour had

concluded that no outbreak had occurred. Her analysis that the restrictions were imposed as a result of the "threat" or "risk" of harm to human health across the whole of Queensland and, therefore, also that threat within 50 kilometres of the Taphouse premises (which were the requirements of cl 7) (PJ [588]), remain valid. In reaching her conclusion, her Honour adapted the proximate cause principles discussed in *FCA v Arch*, and applied them to the underlying cause of the universal "risk" to all persons in the State. Importantly, in this regard, the restrictions in question were state-wide although it was undoubted that the outbreaks of COVID-19 were not. The disease had mostly appeared in the south-east of Queensland and in other particular pockets of the State, including Townsville. This differed substantially from the circumstances confronting the Supreme Court in *FCA v Arch* where the disease had spread widely throughout the country and, so it was said, the restrictions imposed were the result of all such cases. Her Honour's reasoning in the present matter was that, where the restrictions in question were state-wide rather than imposed in the areas or regions where the outbreaks have occurred, there was no relevant connection between those restrictions and the outbreaks. Rather, it was the risk of harm to all persons within the State which emerged as the most likely cause. Hence, it could not be said that any outbreak of COVID-19 within 20 kilometres of the Taphouse property was a proximate cause or, indeed, any cause, of the directions made in this case.

574 The primary judge further observed (PJ [590] – [591]) that the difficulty for Taphouse was that the material on which it relied to establish that the Chief Health Officer's directions resulted from the perceived risk of harm to each and every person in Queensland for the purposes of cl 7, also established that the directions were unconnected to any perceived outbreak of COVID-19 for the purposes of cl 8. There was nothing to suggest that the directions resulted from a perception that there was an outbreak of the disease in each and every part of Queensland, even if they were made to prevent that possibility. Nor was there any hint in the directions or in the circumstances in which they were made that they resulted from the outbreak of COVID-19 within 20 kilometres of the premises.

575 Taphouse cavilled with this conclusion and submitted that, given the existence of cases in Townsville had been known prior to the first direction of 23 March 2020, they must have been a proximate cause of the making of the directions. It was submitted that the directions would not have been made requiring closures in Townsville unless the Chief Health Officer had taken into account the existence of the confirmed cases there. There was, so it was said, no justification for imposing the stringent and wide ranging lockdown orders which deprived

significant portions of the community of their income and personal liberty unless it was as a result of the existence of the cases of COVID-19 in Townsville. It was further submitted that there was no likelihood that the Chief Health Officer would have extended the directions to north Queensland without first informing herself of the information available to the Queensland Government as to the presence of COVID-19 in that area.

576 These matters are speculative. Most importantly, they fail to take into account the somewhat overwhelming fact that the directions were state-wide and applied despite the evidence disclosing the absence an outbreak in each and every locality around Queensland. In oral submissions, Mr Finch SC relied upon the wording of the directions given by the Chief Health Officer in which reference was made to the Health Minister's declaration on 29 January 2020 as follows:

> Further to this declaration, I, Dr Jeannette Young, Chief Health Officer, reasonably believe it is necessary to give the following directions pursuant to the powers under s 362B of the *Public Health Act 2005* to assist in containing, or to respond to, the spread of COVID-19 within the community.

577 It was submitted there was resonance between these words and those in the *Public Health Act (Qld)* concerning the purposes of the NOCS as are set out above. That submission was not developed and it is not particularly easy to identify the alleged resonance beyond the fact that each concerns the occurrence of a highly infectious disease and attempts to mitigate its effect.

578 Ultimately, however, the essence of Taphouse's submission was that the directions would not extend to the whole of Queensland and Townsville in particular, unless there were a reason for doing so. That reason, so the submission went, could only have been the outbreak of COVID-19 in that city. Reference was made to s 362B of the *Public Health Act (Qld)* which granted powers to the Chief Health Officer if that person, "reasonably believes it is necessary to give a direction … to assist in containing, or to respond to, the spread of COVID-19 within the community." From this it was submitted that the Chief Health Officer had no power to make a direction unless she was reasonably satisfied that a threat existed in the community affected by the proposed restriction, and presumably, that this could only occur as a result of a local outbreak.

579 That submission should not be accepted. To do so would imply the existence of substantial limitations on the powers of Queensland's Chief Health Officer. On the ordinary meaning of s 362B, the containing of or responding to the spread of COVID-19 in the community does not require the Chief Health Officer to be satisfied that cases of COVID-19 exist in the community.

The reasonable belief required is that the direction be necessary to assist in containing or responding to the spread of COVID-19. That would include circumstances where there is no presence of COVID-19, but only a threat that it will enter the community. Containing the spread of a disease can be effected by preventing it from entering the community from elsewhere. As the Chief Medical Officer's responsibility extends to the whole of Queensland, it is likely that the expression "community" refers to and means the whole of the Queensland community rather than a particular part of it. As COVID-19 was known to be highly contagious and virulent, it was not obviously unreasonable for the Chief Health Officer to respond to the threat it posed by making the directions applicable across the State. The fact that they applied to the whole of Queensland, including areas where there were no known cases of the disease, is indicative of the threat to all persons being the cause of their making.

580 Mr Finch SC further submitted that, as the several information forms documenting cases of COVID-19 in the Townsville area were sent by the Townsville HHS to NOCS, it should be inferred that the Chief Health Officer took that information into account in making the directions. With respect, no such inference is available. It can be accepted that the Chief Health Officer may have been aware of the fact that cases had been reported by the Townsville HHS and maybe even of the circumstances of the patients and their contraction of the disease. However, the available evidence demonstrated that, at the time of the making of the first relevant direction on 23 March 2020, there were 319 cases known to have occurred in Queensland with the overwhelming majority being in the south-east of the State. It was known, or at least expected, that there were persons travelling throughout the State and that the disease was highly contagious. In these circumstances, the object of the directions imposing restrictions on businesses and movement across the State can more readily be seen as the prevention of the spread of the virus and the possibility of outbreaks, rather than in response to the authorities having perceived the existence of outbreaks. The primary judge was therefore correct to observe (PJ [591]) that there was "no hint in the directions or the context within which they were made that they resulted from a perceived outbreak of COID-19 [sic] within a 20 kilometre radius of the premises". That finding should be affirmed even in the light of the foregoing conclusion that outbreaks of the disease had occurred within that defined area.

581 It should be observed that there existed some discrepancy as to the nature of the information available to the Chief Health Officer as to the occurrence of COVID-19 cases in or around Townsville. Mr Jackman SC for Insurance Australia submitted there was no evidence that the Chief Health Officer saw or was informed of the contents of the reports sent to the NOCS and

this had been accepted by the primary judge (PJ [594]) with the result that the only information available to her was the data published by Queensland Health which was the subject of the agreed facts. Those facts were that, as at 23 March 2020, Queensland Health had recorded only four cases of COVID-19 in the Townsville HHS area and none had been classified as locally acquired. This further supports the conclusion that the direction of 23 March 2020, was not a result of the existence of outbreaks in Townsville region. On the basis of the agreed facts the only inference is that the Chief Health Officer was aware of the existence of cases in Townsville which were not locally acquired and nothing more. There is nothing to support a conclusion that the Chief Health Officer was aware of circumstances which would constitute an outbreak of COVID-19 within the meaning of cl 8.

582 Taphouse has not established that the Chief Health Officer's direction of 23 March 2020 was made "as a result of" an outbreak of COVID-19 cases within 20 kilometres of its premises. That conclusion is unaffected even though it might now be accepted that an outbreak or outbreaks had occurred.

Did the direction of 23 March 2020 close or evacuate all or part of the premises – notice of contention, Ground 2(c)

583 Insurance Australia further submitted that even it were established that the directions were "as a result of" an outbreak of COVID-19 within the defined radius, it did not follow for the purposes of cl 8(a)(i) that they had the effect of "closing or evacuating all or part" of Taphouse's premises, thereby causing the relevant business interruption loss. The direction provided under the heading, "Direction – Non-essential Business or Undertaking":

> 4. A person who owns, controls or operates a non-essential business or undertaking in the State of Queensland must not operate the business or undertaking during the period specified in paragraph 3, including operating at a private residence.

584 Whilst Insurance Australia did not suggest that this did not apply to Taphouse and its business, it submitted that it did not have the effect of "closing or evacuating" all or part of the Taphouse premises. First, it submitted that the ordinary meaning of the word "closing" required the physical closure of all or part of the insured premises. That was accepted by the primary judge who had held (PJ [98]) that "closure" requires that the whole or part of the premises or situation "be closed off from entry by persons who otherwise would ordinarily be entitled to enter and remain on the whole or that part of the premises/situation". Her Honour also held (PJ [603]) that "closure" must be necessary in order to comply with a relevant government order and

cannot follow upon a voluntary decision of a proprietor. Neither of these matters were contested by Insurance Australia. However, it did submit that it was not necessary for Taphouse to close off entry to its premises by reason of the Non-essential Business Closure Direction which, so it said, merely prevented it from allowing customers to remain on the premises to consume food and drink. This, so it was submitted, was exemplified by reason of the fact that, from about 28 March 2020, Taphouse allowed customers to enter its premises for the purposes of purchasing takeaway food and drink. By this time, Taphouse had acquired a licence to sell takeaway alcoholic drinks and was able to operate on a limited basis selling such drinks and takeaway food. From this Insurance Australia submitted that the Non-essential Business Closure Direction did not have the effect of closing Taphouse's premises at all. It submitted that at all times Taphouse was entitled to remain open to provide takeaway food and that it merely chose to close the premises from 23 March 2020 rather than being required to do so by the direction.

585 Working on the assumption that the direction had the effect of preventing Taphouse from operating its business, the primary judge was correct to conclude that it also had the effect of closing the Taphouse premises. In this respect, it is apt to keep in mind that the policy operated in respect of a closure of "all or part of the premises". As her Honour held (PJ [603]), a closure may be effected by a requirement that a business cease operating or operate only in a particular way where the effect is that, in order to comply, the proprietor must prevent persons who would otherwise be entitled to enter and remain on the premises from doing so. In this sense, whether a direction has the consequence of closing a premises can be dependent upon the nature of the business being carried on.

586 Her Honour found (PJ [604]) that, until 28 March 2020, Taphouse was not authorised to sell takeaway food or drink with the result that the direction of 23 March 2020, prevented it from conducting its business and had the effect of closing the premises. The direction had prevented persons remaining on the premises who would otherwise be entitled to enter and remain there only pursuant to the implied licence resulting from the operation of the business. If the business was not permitted to operate, no member of the public was entitled to enter and remain on the premises with the result that they were closed to them.

587 In reaching this conclusion her Honour distinguished the circumstances of Taphouse from those considered by Bergin J in *Cat Media*. In that matter, Cat Media had engaged Pan Pharmaceuticals Ltd (Pan) to manufacture certain pharmaceutical products which it distributed

for sale to the public. As a result of action by the Therapeutic Goods Administration consequent upon certain deficiencies in Pan's manufacturing processes, its licence to operate was suspended leading to its liquidation. The inability of Pan to operate its manufacturing processes prevented Cat Media from having its products manufactured and distributed for sale. It made a claim on its Industrial Special Risks policy with Allianz Insurance Australia (Allianz), including a claim for consequential loss for business interruption expenses under a "defective sanitary arrangements" extension. The defective sanitary arrangements in question were those in the Pan factory. Allianz denied liability. In the course of its proceeding, Cat Media claimed that the notice suspending Pan's licence was an order of a competent public authority that "closed the whole or part" of Pan's premises consequent upon defects in the sanitary arrangements at the insured premises. It was submitted that, if the suspension of the licence caused the whole or some part of the business operations in the premises to cease, it had the consequence of closing the premises. Bergin J disagreed and held (at 75,432 – 75,433 [54], [59]) that the meaning of the word "closure" had to be construed in its context and, in the policy in question, the nature of all of the occurrences or events identified in the extension were such as to require prohibition on physical access to the whole or part of the premises. That conclusion was supported by the use of the word "closure" in association with the word "evacuation". In the result, it was the "prohibition on access to the whole or part of the Premises that is intended by the word 'closure' in the extension clause", being the prevention of physical access to the whole or part of the premises: at 75,433 [59]. Thus, the closure was not caused by the cessation of manufacture due to the suspension of Pan's licence and it followed that the premises were not closed for the purposes of the policy. There was still access to the premises and product was manufactured for the purpose of training staff, analysing and testing product.

588 In the present matter, the learned primary judge held (PJ [604]) that Taphouse's business of a restaurant and bar was quite different to that of a pharmaceutical manufacturer. In its ordinary operation, members of the public were entitled to enter onto the premises and partake of food and beverages there whilst the business was operating. An order which required the business not to operate closes it to those members of the public. The fact that it may have been permissible for the owner and staff to attend for the purposes of maintenance, cleaning or repairs was not to the point. This distinction made by her Honour was correct. In *Cat Media*, there was nothing in the suspension of the licence which directly or indirectly prevented access to the premises. Indeed, it appears that staff continued to access the premises and use it for the

businesses operation, even if not to the full extent. Here, by reason of the direction, Taphouse was not entitled to use the premises for the purpose of conducting a restaurant or a bar. Although staff may have been able to access the area, it could not be used for the conduct of the business because members of the public could not attend there for those purposes. The effect, if not the substance, of the direction was the closure of that part of Taphouse's premises.

589 In addition, cl 8 is conditioned on "any legal authority closing or evacuating all or any part of the premises" and there is no requirement that the closure be "by an order" or "by order". In this sense it can be read as operating when the conduct of the authority has the effect of closing or evacuating the premise. This can be compared to the cognate provision in *Cat Media* which referred to a "closure or evacuation of the whole or part of the Premises *by order* of a competent public authority". That wording requires the order of the authority to both mandate and directly cause the closure of the premises with the concomitant result that "closure" is more likely to be taken as meaning a physical closure rather than the effective result of an action.

590 The primary judge's approach also accorded with that of Lords Hamblen and Leggatt JJSC in *FCA v Arch* (at 715 [151] – [152]), which was that an order or direction preventing the undertaking of a business has the consequence of closing the premises or part of it. In that discussion, where their Lordships were considering a prevention of access clause, they held that an order preventing a restaurant from conducting its business amounts to a prevention of use of the premises normally used for that purpose, and that was so regardless of the fact that the business might also operate a take-away service. That analysis is apt in the present case. Taphouse was prevented from operating its restaurant and bar business and, to that extent, the parts of the premises from which those parts of the business were usually conducted were closed by the direction. The fact that Taphouse might, at all times, have been able to operate a takeaway business by using its kitchen and reception area did not negate the consequence that the seating area, which it usually used for its restaurant business, was closed or that the area set aside for the consumption of alcohol was also closed.

591 Mr Jackman SC for Insurance Australia submitted that the evidence before the primary judge did not establish that for the period prior to 28 March 2020, Taphouse was "not capable for providing takeaway food services" and its contention to the contrary should have been rejected. He submitted that the closure from 23 to 28 March 2020, was the result of a voluntary decision not to open whilst Taphouse did not have a licence to sell takeaway beverages and that, in the interim, it could have sold takeaway food only. The difficulty for Insurance Australia in this

respect is that the evidence on which the primary judge made her findings was given by way of an affidavit from a Mr Mark Rugg whose evidence was accepted. Whilst he was not cross-examined on this point, the parties agreed that no *Browne v Dunn* point would be taken as a result of the absence of cross-examination. Nevertheless, it was open for the trial judge and this Court to accept his evidence at face value for the purposes of concluding that Taphouse was unable to provide takeaway food and drink prior to 28 March 2020.

592 It can be recognised that this point was somewhat sterile in the circumstances where cl 8 operates where only part of the premises are closed by the legal authority and it is not in dispute that the restaurant and bar areas of Taphouse's premises were not able to be used as a result of the directions.

Conclusion as to Ground 2(c) of the notice of contention

593 It follows that Insurance Australia fails on this ground of its notice of contention.

No obligation to indemnify – Appeal, Ground 3

594 It also follows that the primary judge's decision that neither cl 7 nor cl 8 responded to its claim should be affirmed.

Payments received by Taphouse under the JobKeeper scheme – Appeal, Ground 4; notice of contention, Ground 3

595 By Ground 4 of the appeal, Taphouse challenged her Honour's conclusion that, if the insurer was liable to indemnify it, the amount of that liability would be reduced by the amount of the JobKeeper payments it received. By way of Ground 2(c) of its notice of contention, Insurance Australia sought to challenge the primary judge's conclusion to the contrary in relation to the Queensland Government's COVID-19 Grants. In light of the conclusion that Taphouse is not entitled to indemnity under the policy, it is not necessary to consider the issues relating to these payments and benefits received by Taphouse. The primary judge's reasoning and conclusions in relation to those issues was considered in relation to the Meridian appeal. It is preferable not to express a view on them in relation to this appeal as they involve making assumptions that are contrary to the reasoning set out above. The appropriate course then is to set aside her Honour's answer to the relevant question and substitute, "Unnecessary to answer".

Interest under s 57 of the *Insurance Contracts Act* – Appeal, Ground 5

596 The issue raised by this ground of appeal has been resolved earlier in these reasons. As Insurance Australia is not liable to pay any amount to Taphouse, s 57 does not apply. If it did,

further submissions would be required in order to ascertain the date from which any interest is payable. As has been explained above, it is irrelevant to that issue that Insurance Australia held a *bona fide* belief that it was not obliged to indemnify Taphouse and that the current proceedings are in the nature of test cases. The primary judge's answer to the relevant question posed by the parties should be amended to: "Unnecessary to answer".

Conclusion

597 Taphouse is entitled to succeed on Ground 2 of its notice of appeal in relation to the factual finding of whether there was an outbreak of COVID-19 within a 20 kilometre radius of Taphouse's premises. Although the other grounds should be dismissed, given the conclusions which have been reached alterations are required to some of the primary judge's answers to the questions posed. The appeal should therefore be allowed in part and the relevant answers adjusted. The appeal should otherwise be dismissed. As the appeal did not succeed in any relevant particular, there is no need to make any orders on the notice of contention. It sufficies to observe that none of the grounds raised would have succeeded.

598 There is no need to make any order with respect to costs which has been the subject of agreement between the parties.

PROPOSED ORDERS ON THE APPEAL

599 The orders which ought to be made are as follows:

1. The Appeal be allowed in part.

2. The primary judge's answers to the questions posed be amended as follows:

12. Disease clause (clause 8, page 23):

(a) Was all or part of Taphouse's premises closed or evacuated by any legal authority by reason of the "Authority Response-Taphouse"?

No.

(b) If yes to (a), was that closure or evacuation as a result of the outbreak of COVID-19 occurring within a 20 kilometre radius of Taphouse's premises?

No.

13. Prevention of access (POA) clause (clause 7, page 23):

(a) Does the POA clause apply to an outbreak of COVID-19 in light of the separate disease clause?

No.

(b) If yes to (a), did the "Authority Response-Taphouse" involve any legal authority preventing or restricting access to Taphouse's premises or ordering the evacuation of the public?

This does not arise. If it did, then yes, except for the 29 March 2020 order.

(c) If yes to (a) and (b), were those orders as a result of damage to, or the threat of damage to, property or persons within a 50 kilometre radius of Taphouse's premises?

This does not arise.

(d) {CGU disputes the inclusion of this paragraph} Alternatively to (c), how are the words "as a result of … damage to or threat of damage to … persons" to be construed? In particular:

(i) Does the "threat of damage" have to exist within 50 kilometres of the premises only or [can] it exist in areas further than 50 kilometres from the premises as well and, if so, where?

~~*The threat of damage within the 50 kilometre radius must be a proximate cause of the action of the authority. It may be such a cause if the authority considers the threat exists anywhere provided it also considers it exists within the 50 kilometre radius.*~~

The threat of damage within the 50 kilometre radius does not need to be a proximate cause of the action of the authority. It only needs to be more than a remote cause. If the authority considers the threat exists in all parts of the State and the prevention or restriction of access is caused by that threat, the clause will respond because the threat within the 50 kilometre radius is "a cause".

(ii) Must the relevant order be made in direct response to the specific "threat of damage" within 50 kilometres of the Situation, or is it sufficient if the relevant order is made as a result of "threat of damage" both within the radius and of a broader scope (e.g. on a regional, state or nationwide scale)?

See (i) above.

14. Causation, adjustments and loss (page 19)

If it is found that the Disease clause and/or the POA clause responds to Taphouse's claim:

(a) Does the interruption of or interference with Taphouse's business have to be "a direct result" of or "result from" or be "caused by", the relevant insured perils, and if not, what is the relevant test?

The insured peril has to be a proximate cause of the interruption of or interference with Taphouse's business.

(b) Was there any interruption of or interference with Taphouse's business which satisfies the test of causation identified in the answer to (a)?

No. If, however, I am wrong about the application of cll 7 and 8 then Taphouse has proved some loss (reduced turnover evidence) which should be inferred to be result of the relevant proximate cause.

(c) If yes to (b), what losses claimed by Taphouse resulted from that interruption or interference of Taphouse's business?

~~*This cannot be answered on the evidence but the loss would exclude savings from the JobKeeper payments, the Commonwealth Cash Flow Boost and rental waivers or abatement from Taphouse's landlord, but not the Queensland Government's COVID-19 Grant.*~~

Unnecessary to answer.

(d) {CGU disputes the inclusion of this issue (d)} Is the term "Adjustment" in the Business Interruption section of the policy applicable to the calculation of Meridian's [sic, Taphouse's] claim, having regard to the definitions used in the "Settlement of Claims" clause in the Business Interruption section of the policy.

No, but the loss must be in consequence of the damage.

(e) {CGU version; Taphouse does not agree}: Should any adjustment be made to Meridian's [sic, Taphouse's] business interruption loss by reference to uninsured events relating to the COVID-19 pandemic?

Not if the uninsured events are a result of the same underlying cause as the insured peril, in this case being the presence and risk of COVID-19 in Queensland.

(f) {Taphouse version; CGU does not agree}: Should any adjustment be made to Meridian's [sic, Taphouse's] business interruption loss by reference to events (other than the insured perils) relating to the COVID-19 pandemic?

See (e) above.

(g) What loss is payable in accordance with the terms of the policy?

See (c) above.

(i) Are JobKeeper or other government subsidies to be taken into account in the assessment of any loss and, if so, in what way?

See (c) above.

(ii) Should rental abatements be taken into account in assessing recoverable loss?

Yes

(iii) On what dates did the indemnity period/s start and end?

The indemnity period started on the date Taphouse suffered loss from the insured peril and ended 12 months later provided that Taphouse's business continued to be affected as a consequence of the insured peril.

(iv) Further quantum issues may be raised when Taphouse provides the information that has been requested by CGU.

Noted.

(h) {Taphouse does not agree that this issue be included in this test case in circumstances where CGU has denied indemnity and because the factual premise for these issues will be the subject of a separate loss assessment process} Has Taphouse:

(i) provided sufficient information for CGU to determine any amount payable under the policy; and / or

(ii) failed to respond to reasonable requests for information from CGU?

These questions cannot be answered.

(i) If it is found that the policy responds and CGU is liable to pay an amount to Taphouse, from what date is interest under section 57 of the ICA payable?

~~*This does not arise, but it would not be unreasonable for Insurance Australia to withhold payment unless and until it is finally determined to be liable to make payment in this proceeding.*~~

Unnecessary to answer.

3. Otherwise the Appeal be dismissed.

4. No order as to costs.

MARKET FOODS V CHUBB – NSD 1082 OF 2021

600 In this appeal, Market Foods appealed from the primary judge's decision, insofar as it relates to action NSD138 of 2021, *Chubb Insurance Australia Ltd v Market Foods Pty Ltd*. By a brief notice of contention, Chubb sought to maintain a relatively small part of her Honour's reasons on different grounds if a particular part of Market Foods' appeal succeeded.

The relevant facts

601 As with the preceding matters, the factual background giving rise to the issues for determination was not in dispute.

602 Market Foods conducted business as the operator of cafés, a restaurant and a bar from three sites in Brisbane. One in a building opposite to the Royal Brisbane and Women's Hospital (the Herston Insured Location), one located in a government building in the Brisbane CBD (the William Street Insured Location), and one on the campus of the University of Queensland (the UQ Insured Location).

603 The café operated at the Herston Insured Location is on the ground floor of the building which is otherwise a medical office building.

604 Market Foods' operations at the William Street Insured Location comprise a café, restaurant and bar business which was conducted from leased premises in a 46 storey office building. The café is located on the ground floor, the restaurant on the first floor and the bar on the second.

605 The UQ Insured Location operated by Market Foods is a shop tenement in a larger building surrounded by other food outlets with tables and chairs in a common area forming a "food court". It is located in one of the buildings on the UQ campus designated as "Building 63".

606 It was not in dispute that, on 23 March 2020, the Queensland Chief Health Officer issued a direction pursuant to s 362B of the *Public Health Act (Qld)* (the *Non-Essential Business Closure Direction*), which had the effect of requiring two of the businesses to close or restrict their operation to the provision of takeaway orders. On 29 March 2020, a further direction was made (the *Home Confinement Direction*), which had the effect of compelling clientele of Market Foods' businesses to remain at home save, for limited prescribed purposes.

607 There was no dispute that those directions had the consequence of interfering with the business conducted by Market Foods at the various Insured Locations.

608 Market Foods also relied upon a "direction" issued by the UQ Vice Chancellor on 15 March 2020 (the UQ Direction), which had the effect of pausing all coursework teaching at the university for one week from 16 March 2020, albeit that the campus remained open with libraries, study spaces and eating areas all operating normally.

609 It was also not disputed that, at all relevant times, Market Foods held consecutive policies of insurance with Chubb, given the name "Business Pack" policies, which provided, *inter alia*, insurance for property damage and business interruption.

610 Market Foods made a claim under the policy for loss which it claimed to have suffered. Chubb denied that claim.

Policy wording

611 It is convenient to note here that, whereas the policy wording uses the term, "points", to refer to the individual clauses of the extensions to the business interruption cover in the Market Foods policy, her Honour primarily used the term, "item", in her reasons. For the sake of consistency, the latter term has been used in these reasons and the policy wording quoted has been amended to reflect the use of that term.

612 As a result of the breadth of claims advanced by Market Foods at first instance and on appeal, it is necessary to set out the policy terms at length.

> **Introduction**
>
> …
>
> All parts of this Policy, along with the Schedule and any endorsements should be read together and considered as one contract.
>
> The operative Sections of this Policy are as indicated in the Schedule. Unless a particular Section is identified in the Schedule as being 'Insured', it is of no effect and

no cover is granted under it.

…

Headings

Headings have been included for ease of reference and it is understood and agreed that the terms and Conditions of this Policy are not to be construed or interpreted by reference to such headings.

…

General definitions

…

Building(s)

means buildings, including landlords' fixtures and fittings, alterations and decorations therein and thereon including fixed glass (including its framework lettering or any intruder alarm foil attached to it), foundations, walls, gates, fences, car parks, yards, pavements, drains, sewers, piping, cabling, wiring and associated control equipment and accessories only to the extent of Your responsibility and liability.

Business

means the Business described in the Schedule.

…

Insured Location

means the Insured Location(s) stated in the Schedule.

…

Property Insured

means property as described in the Schedule that belongs to You or is held by You in trust or on commission for which You are responsible.

…

Schedule

means the Schedule issued with this policy wording.

…

Section 1 – Property Damage

Definitions

Wherever appearing in this Section 1 – Property Damage, the following definitions apply:

…

Damage or Damaged

means accidental physical damage, destruction or loss.

…

Cover

Provided this Section is shown as insured in the Schedule, We will pay for Damage occurring during the Policy Period and happening at the Insured Location to Property Insured caused by or resulting from a cause not otherwise excluded. How We will settle Your claim is explained in 'How We will pay' within this Section 1.

…

Exclusions

The following exclusions apply to Section 1 of this Policy except where expressly varied.

…

Excluded causes

Section 1 of this Policy does not cover Damage directly or indirectly caused or occasioned by or arising from:

…

2. a) moths, termites or other insects, vermin, rust or oxidation, mildew, mould, contamination or pollution, wet or dry rot, corrosion, change of colour, dampness of atmosphere or other variations in temperature, evaporation, disease, inherent vice or latent defect, loss of weight, change in flavour texture or finish, smut or smoke from industrial operations;

…

Section 2 – Business interruption

…

Definitions

Wherever appearing in this Section 2 – Business Interruption, the following definitions apply:

…

Business Interruption

means the interruption of or interference with Your Business in consequence of Insured Damage that occurs during the Policy Period.

…

Gross Profit

means the amount by which:

• the sum of the amount of the Turnover and the amounts of the closing Stock and work in progress shall exceed;

• the sum of the amounts of the opening Stock and work in progress and the amount of the Uninsured Working Expenses.

The amounts of the opening and closing Stock and work in progress shall be arrived at

in accordance with the Insured's normal accountancy methods due provision being made for depreciation. The words and expressions used in this definition that are not defined in this Policy shall have the meaning usually attached to them in the books and accounts of the Insured.

…

Increased Cost of Working

means the additional expenditure necessarily and reasonably incurred for the sole purpose of avoiding or diminishing the:

1. reduction in Turnover, if Gross Profit is the applicable Basis of Settlement in the Schedule;

2. reduction in Gross Revenue, if Gross Revenue is the applicable Basis of Settlement in the Schedule; or

3. reduction in Rent Receivable, if Rent Receivable is the applicable Basis of Settlement in the Schedule;

and which, but for that expenditure, would have taken place during the Indemnity Period.

Indemnity Period

means the period beginning with the occurrence and ending no later than the Indemnity Period specifically set out in the Schedule [being 12 months] during which the results of Your Business will be affected in consequence of the Insured Damage.

Insured Damage

means physical loss, destruction or damage occurring during the Policy Period caused by an event insured under the Property Damage, Theft, Money, Glass or General Property Sections.

Notifiable Disease

means illness sustained by any person resulting from food or drink poisoning or any human infectious or human contagious disease, an outbreak of which the competent local authority has stipulated must be notified to them. Notifiable Disease does not include any occurrence of any prescribed infectious or contagious diseases to which the Quarantine Act 1908 as amended applies.

Rate of Gross Profit

means the rate of Gross Profit earned on the Turnover during the financial year immediately before the date of the Insured Damage allowing for the Trend in the Business.

…

Trend in the Business

means adjustments to provide for the trend of Your Business and variations in other circumstances affecting that Business either before or after the Insured Damage or which would have affected that Business had the Insured Damage not occurred, so that the figures adjusted will represent as nearly as may be reasonably practicable the results which but for the Insured Damage would have been obtained during the relative period after the Insured Damage.

Turnover

means the money paid or payable to You for goods sold and delivered and for services rendered in the course of Your Business at the Insured Location(s).

…

Cover

Provided this Section is shown as insured in the Schedule, We will pay the amount of loss resulting from interruption of or interference with Your Business resulting from Insured Damage to Property Insured at an Insured Location that occurs during the Policy Period.

Loss will be calculated in accordance with the Basis of Settlement, and subject to the Indemnity Period and applicable Sum Insured.

Basis of Settlement

A. Gross Profit

Loss will be calculated by:

a) applying the Rate of Gross Profit to the difference between Turnover during the Indemnity Period and the Standard Turnover;

b) adding the Increased Cost of Working incurred during the Indemnity Period, but only to the extent that the reduction in Gross Profit is reduced; and

c) subtracting any sum saved during the Indemnity Period in respect of such of the charges and expenses of Your Business payable out of Gross Profit as may cease or be reduced in consequence of the Insured Damage.

If the Sum Insured for Gross Profit at the beginning of each Policy Period is less than the sum produced by applying the Rate of Gross Profit to eighty percent (80%) of the Annual Turnover (or its proportionately increased multiple where the Indemnity Period exceeds twelve months), We will pay a proportion of the loss of Gross Profit.

The proportion that We will pay will be the same as the proportion that the Sum Insured for Gross Profit bears to eighty per-cent (80%) of the Annual Turnover (or its proportionally increased multiple if appropriate).

This provision will not apply if Your claim is for less than 10% of the Sum Insured for Gross Profit.

If You hold a salvage sale during the Indemnity Period, the Turnover from the salvage sale shall be deducted from any reduction in Turnover.

…

Extensions B: Following damage at locations not occupied by you

Cover under Section 2 is extended to include loss resulting from Business Interruption to property: (a) of a type insured by this Policy; and (b) at the locations described in [Items] 1. to 8. directly below;

1. Denial of Access

damage to any property within 50 kilometres of any Insured Location, which will prevent or hinder the access to or use of the Insured Location. This extension will not

apply to property of any supply undertaking from which You obtain electricity, gas, water or telecommunication services.

…

3. Property in a Commercial Complex

property in any commercial complex of which the Insured Location forms a part or in which the Insured Location is contained which results in cessation or diminution of Your trade or normal business operations due to a falling away of potential custom.

4. Public Authority

any legal authority preventing or restricting access to an Insured Location or ordering the evacuation of the public due to damage or a threat of damage to property or persons within 50 kilometres of any Insured Location.

…

Extension C: non damage

1. Infectious Disease, Murder and Closure Extension

Cover is extended for loss resulting from interruption of or interference with the Insured Location in direct consequence of the intervention of a public body authorised to restrict or deny access to the Insured Location directly arising from an occurrence or outbreak at the premises of any of the following:

a) Notifiable Disease, or

b) the discovery of an organism likely to cause Notifiable Disease;

c) the discovery of vermin or pests;

d) an accident causing defects in the drain or other sanitary arrangement;

e) murder or suicide;

f) injury or illness sustained by any person resulting from food or drink poisoning or arising from or traceable to foreign or injurious matter in food or drink provided on premises;

leading to restriction or denial of the use of the Insured Location on the order or advice of the local health authority or other competent authority.

Cover under this Extension does not include the costs incurred in cleaning, repair, replacement, and recall or checking of property.

…

613 The cover under the policy was for Property Damage, Business Interruption, Theft, Money, Glass, and Public and Products Liability. In respect of Property Damage, there was cover for contents, stock, glass and money, but not for buildings.

614 The period of insurance under the policy, being covered by back-to-back policies, was from 31 August 2019 to 31 August 2021.

615 In respect of the policy period of 31 August 2019 to 31 August 2020, the Insured Locations were specified in the schedule as being the Herston Insured Location, the William Street Insured Location, and the UQ Insured Location. For the period from 31 August 2020 to 31 August 2021, the William Street Insured Location was omitted from the cover.

The decision at first instance

616 It is important to recognise, as the primary judge did, that the particular manner in which the Market Foods policy operates is limited as a consequence of the insured's choice of cover. That had consequences for the submissions which it advanced at first instance and which it sought to make on appeal. As Chubb submitted, if the initial conclusions of the primary judge as to the proper construction of the policy are not disturbed, the matters on which Market Foods seeks to appeal largely do not arise.

617 For present purposes, it is necessary to consider *only* that part of the primary judge's reasons which, for the purposes of Market Foods' indemnity claim, construed the cover in a way that limited Chubb's liability. Other parts of her Honour's reasons are discussed later as necessary.

618 This initial primary point concerned the restrictions on the scope of cover provided by the policy as a result of Market Foods' choice to seek indemnity in respect of damage to only contents, stock, glass and money. In brief, her Honour concluded that business interruption cover under the policy was derivative upon the scope of property damage cover and, as Market Foods's property damage cover was only in respect to contents, stock, glass and money, the business interruption cover was correspondingly limited to loss consequent upon damage to those types of property. As Market Food's claim for indemnity in the present case was not based upon such damage, it was not within the scope of cover.

619 Her Honour's reasoning in this respect (PJ [864] – [867]) was as follows:

(a) the primary cover under Section 2 of the policy was cover for "loss resulting from interruption of or interference with Your Business resulting from Insured Damage to Property Insured at an Insured Location";

(b) the expression, "Property Insured", was defined to mean "property as described in the Schedule that belongs to you or is held by You in trust or on commission for which You are responsible";

(c) in this case, the property so described was contents, stock, money and glass, but did not include buildings;

(d) "Insured Damage" was defined as being "physical loss, destruction or damage occurring during the Policy Period caused by an event insured under the Property Damage, Theft, Money, Glass or General Property Sections"; and

(e) therefore, if at one of its Insured Locations Market Foods suffered the physical loss, destruction or damage of contents, stock, glass or money, it would be indemnified from interruption or interference with its business resulting from that event.

620 It is not in doubt that Market Food's claim to indemnity is not founded upon any sustaining of damage to contents, stock, glass or money.

621 Extension B under Section 2 provides that cover is extended to "include loss resulting from Business Interruption to property: (a) of a type insured by this Policy; and (b) at the locations described in [Items] 1. to 8. directly below". The expression, "Business Interruption", is defined as "the interruption of or interference with Your Business in consequence of Insured Damage that occurs during the Policy Period", while "Insured Damage" means "physical loss, destruction or damage occurring during the Policy Period caused by an event insured under the Property Damage, Theft, Money, Glass or General Property Sections". As the primary judge observed (PJ [869] – [870]), Extension B is concerned with business interruption consequent upon the physical loss, destruction or damage to property at the identified locations, but the property in question is not "Property" as defined. Under this extension, it is (a) property belonging to others (b) which is damaged (in a way that would be covered under the policy if it were Insured Property, being as per the Property Damage, Theft, Money, Glass or General Property Sections), and (c) if it is located at any one of the identified location at Items 1 to 8.

622 As her Honour further held (PJ [871]), the types of property, the damage to which might trigger cover under Extension B, was limited to the type of property actually insured under the policy (contents, stock, glass or money), and did not extend to the types of property which could be insured but were not actually within the cover specified by the Schedule. The latter might have included buildings, but Market Foods chose not to obtain such cover.

623 As to the locations described in Items 1 to 8, the primary judge noted (PJ [872]) that Item 1 identified property within 50 kilometres of any Insured Location, Item 3 identified property in any commercial complex of which the Insured Location forms a part or in which the Insured Location is contained, and Item 4 identified property or persons within 50 kilometres of any Insured Location. These were the required locations in which the property, the damage to which might trigger cover under Extension B, must be located. It was, however, recognised

that the structure and language of Extension B contained certain infelicities, especially in respect of the manner in which the preamble related to Items 1 to 8 (PJ [873]). Despite those, the primary judge reasoned (PJ [874]) that the words of the preamble to Extension B identified that is was concerned with Business Interruption as defined (being interruption or interference with the insured's business in consequence of physical loss, destruction or damage) to property other than that owned by the insured. Further, even if Item 4 was regarded as extending that concept to the threat of physical loss, destruction or damage to property or persons, the central concept remained that the extension is concerned with physical loss, destruction or damage to property (of the type insured under the policy) other than that owned by the insured.

624 It followed that the cover so provided is an extension of the cover under Section 2 (being Business Interruption consequent upon physical loss, destruction or damage belonging to the insured) to the losses arising from business interruption consequent upon that same type of damage being sustained to the same type of property albeit owned by others.

625 The result of the above analysis was (PJ [875]) that Extension B did not provide cover in respect of disease. In particular, a disease does not involve physical loss, destruction or damage to property or the threat of physical loss, destruction or damage to property of the kind contemplated by Extension B. As her Honour reasoned, it would be "profoundly inconsistent and incongruous with the entire context of Extension B to understand it as applying to potential damage to property from a disease or potential harm to persons from a disease." In particular, the contextual construction of the expression, "physical damage", indicates that it should be construed as requiring more than the mere presence of a virus which will become inactive over time and can be cleaned away.

626 Her Honour also relied on the fact that Extension B was expressly tied to "loss resulting from Business Interruption to property: (a) of a type insured by this Policy" (PJ [878]). The definition of "Business Interruption" limits cover to physical loss, destruction or damage caused by an insured event under, *inter alia*, the Property Section. In that section, Excluded Cause 2(a) excludes cover for Damage directly or indirectly caused or occasioned by or arising from "contamination" or "disease". Accordingly, disease was found to be a kind of damage to property (of a type that is insured by the policy) in respect of which cover was excluded.

627 The primary judge further relied upon the important contextual factor of the existence of Extension C (PJ [879] – [880]). It is not limited in the same way as Extension B, but rather extends cover in Section 2 to "loss resulting from interruption of or interference with the

Insured Location in direct consequence of" certain specified circumstances which are set out in sub-paragraphs (a) – (f). In particular, subparagraphs (a) and (b) specifically deal with Notifiable Diseases "at the premises". As her Honour reasoned, if Extension B applied to disease, Extension C would be rendered meaningless and the limitations in it negated. That is, Extension B would apply to any disease and not be limited to only those which were Notifiable Diseases, the exclusion in relation to Notifiable Diseases (relating to diseases to which the *Quarantine Act* applies) would be bypassed, and the requirement in (a) and (b) that the outbreak or discovery of an organism occur at the premises would be negated. In that latter respect, Item 4 of Extension B would extend the area in which the Notifiable Disease could trigger the policy to any place within 50 kilometres of the premises which is entirely inconsistent with Extension C requiring the occurrence or outbreak of the disease to be "at the premises".

628 The dissonance between the operations of Extension B and Extension C, if the former is construed as Market Foods submitted, would create a "profound incongruence and incoherence between provisions of the policy" as her Honour found (PJ [881]). Extension B should not be read in a manner which would render redundant both the exclusion of disease in Section 1 and the limitations on the cover for Notifiable Diseases in Extension C. It followed that, although Extension B contained some drafting infelicities, they were not insuperable and it could not be tortured into covering business interruption losses caused by the occurrence of a disease.

629 The learned primary judge acknowledged that Extension B contained some drafting inconsistencies in relation to the connections between the preamble and the particular items of cover. The words "damage to" in Item 1 were not required and, on a strict reading, that is correct (PJ [882]). Another inconsistency arose in relation to Item 4 which also does not sit comfortably with the preamble to Extension B (PJ [883]). The preamble restricts cover to business interruption following from physical loss, destruction or damage to property of the type insured under the policy, and Item 4 is concerned with an authority preventing access to an Insured Location consequent upon damage or threat of damage to property or persons. Nevertheless, as the learned primary judge concluded, that inconsistency does not have the consequence that it is permissible to dispense with the limitations imposed by the preamble.

630 Her Honour rejected (PJ [885] – [892]) Market Food's submission that Chubb's reliance on the terms of the policy as properly construed or reliance on any particular clause of the policy, amounted to acting with an absence of utmost good faith or a contravention by Chubb of s 37 of the *Insurance Contracts Act*.

The general scope of Item 4 of Extension B

631 Pivotal to the primary judge's decision was the conclusion that Item 4 of Extension B did not apply to disease. On that basis, no directions of any governmental authority consequent upon COVID-19 could trigger its operation. There were two major foundations for this conclusion. First, that Extension B was by its terms concerned with the occurrence of physical loss, destruction or damage to property of a type insured under the policy and, secondly, that Extension C provided the only available cover in relation to business interruption consequent upon the existence of disease.

632 The primary judge's conclusion in that respect, which was central to the result in this matter, was as follows.

633 First, as her Honour observed (PJ [894]), if Market Foods had included damage to buildings in the cover provided by the policy, the manner in which Item 4 operated might have been more easily identified. In that case, Item 4 would be triggered where there was damage or a threat of damage to a building not owned by Market Foods within 50 kilometres of an Insured Location as a result of which any legal authority prevented or restricted access to an Insured Location. A simple example might be where an access road leading to an Insured Location is closed due to a building adjacent to the road becoming unstable as a result of deteriorating foundations, slippage or fire. Similarly, such a building might constitute a threat of damage to persons within 50 kilometres of the Insured Location, due possibly to falling debris or the building toppling, and access might be restricted on that basis.

634 Market Foods did not obtain insurance in relation to buildings, but limited its cover to contents, stock, glass and money. The consequence is that the cover under Extension B is correspondingly limited to the business interruption consequences of damage to property of that type (PJ [895]). Understanding how the policy operates in this respect and on the limited form of insurance obtained in order to provide cover, Item 4 of Extension B would require:

(a) that contents, stock, money or glass at some location must have suffered physical loss, destruction or damage. This is because physical damage to such property is, "damage to property: (a) of a type insured by this Policy", as required by the preamble of Extension B;

(b) the physical damage in (a) must consequentially involve physical damage or the threat of physical damage to either other property (of any kind) within 50 kilometres of any Insured Location or to persons within 50 kilometres of any Insured Location; and

(c) due to that physical damage or the threat of physical damage to other property or persons referred to in (b), the legal authority acts to prevent or restrict access to any Insured Location.

635 The primary judge observed (PJ [897]) that this construction did not re-write Item 4 if it and the preamble are read together. Her Honour noted of the construction:

(1) It gives effect to the words "property: (a) of a type insured by this Policy" in the preamble by limiting cover to the consequences of damage to contents, stock, money or glass.

(2) It gives effect to the requirement that cover is for Business Interruption to property and that requires that there is "Insured Damage" to property which is defined to mean "physical loss, destruction or damage".

(3) Item 4 requires that the damage or threat of damage to other property or persons must be within 50 kilometres of any Insured Location, rather than the damage to property of a type insured under the policy.

(4) Contrary to Market Foods' submission, it is not absurd to require both physical damage to property of a type insured under the policy as well as damage or the threat of damage to other property or persons within the 50 kilometre radius. As her Honour observed, the clause is a standard one and, as such, intended to apply to the full potential range of property which might be insured under the policy. That being so, it should not be judged by reference to every type of property which might be insured. The purpose of Item 4 is to identify a particular type of event which is the source of business interruption losses which are indemnified under the policy. That event, being a composite one, is where there has been damage to property not belonging to the insured (but being of a type that is in fact insured by the policy) where that damage involves damage or the threat of damage to persons or other property (of any kind) within 50 kilometres of any Insured Location as a result of which a legal authority prevents or restricts access to an Insured Location. Necessarily, as with all policies, where business interruption cover is anchored to damage to the property insured by the policy, the narrower the scope of property covered, the narrower will be the scope of the business interruption cover. There is nothing illogical about this construction. As the primary judge observed:

> While Market Foods proposes that only the "most stupefied obscurantist" could contemplate item 4 having this meaning, that is what item 4 says. The

> fact that it might be difficult (but by no means impossible) to conceive of circumstances which might engage item 4 if the property insured by the policy is limited does not mean that item 4 is commercially absurd;

(5) There is no irreconcilable ambiguity created by the question of whether the property the subject of the damage or threat of damage in the substance of Item 4 can be the same property as "property: (a) of a type insured by this Policy" in the preamble. Whilst that may give rise to a question of construction, it does not make the policy uncertain. On the ordinary meaning of the words used, there is no reason why, if the property is of a type insured under the policy and is within 50 kilometres of the Insured Location, damage or the threat of damage to it cannot be the cause of the actions of any legal authority preventing or restricting access to that property. So, if the policy extended to buildings, business interruption losses consequent upon a local authority preventing access to the building where the Insured Location was situated due to damage to the building itself (such as from fire) would be covered.

(6) It is a commercial and businesslike interpretation of Item 4. Moreover, it is harmonious with the primary cover for business interruption which provides cover for business interruption loss caused by physical loss, destruction or damage to the insured's own property at an Insured Location. Item 4 of Extension B merely provides the same type of cover for business interruption losses resulting from the same type of damage to the same type of property, albeit extending to that owned by other persons, where that damage causes an authority to prevent or restrict access to an Insured Location because of damage or a threat of damage to property or persons within the specified radius.

(7) To construe Item 4 as providing cover in relation to "any legal authority preventing or restricting access to an Insured Location … due to … a threat of damage to … persons within 50 kilometres of any Insured Location" would be to re-write the cover and ignore the plain words of the preamble of Extension B (PJ [898]). There is nothing illogical about reading Item 4 consistently with those words and harmoniously with the nature of the policy which generally ties the business interruption cover to the consequences of "Physical Damage" as defined to a particular type of property.

636 Her Honour set out her conclusions as to the operation of Item 4 of Extension B, being that (PJ [901]):

(a) it does not apply to disease at all which is the exclusive province of Extension C;

(b) it is confined to physical loss, destruction or damage of property of a type that is insured under the policy; being in this case contents, stock, glass and money but not buildings;

(c) Item 4 does not apply as a general "prevention of access" clause providing cover for the consequences of an authority preventing or restricting access to an Insured Location due to damage or a threat of damage to persons within 50 kilometres of any Insured Location, as that would impermissibly elide the words of the extension's preamble; and

(d) in the context of Extension B, COVID-19 or the pathogen SARS-CoV-2 virus on property cannot constitute Insured Damage with requires physical damage to property.

637 Her Honour also held that Item 4 of Extension B (at PJ [901]):

> …applies to (relevantly) any legal authority preventing or restricting access to an Insured Location due to damage to property and an associated or causally connected threat of damage to property of a type that is insured by the policy (being contents, stock, glass and money) or damage to property and an associated or causally connected threat of damage to property of a type that is insured by the policy which is associated or causally connected with damage or a threat of damage to persons, if both the property and the persons are within a 50 kilometre radius of an Insured Location

638 For the purposes of the major issues in the appeal, it is not necessary at this point to detail the remainder of her Honour's reasons.

The issues on appeal

639 As the primary judge observed, having reached the above conclusion as to the operation of Item 4 of Extension 4, everything else which she said as to the operation of Extension B of the policy was obiter. Chubb's major submission was that Market Foods' appeal did not appear to challenge the primary judge's reasoning or conclusions (at PJ [901]) as to the fundamental construction of Item 4. At best, Ground 1 of the appeal raised the issue of the application of the *contra proferentem* rule which Market Foods contended ought to be deployed such that Item 4 is to be construed as operating free from any constraints in the preamble and read as "any legal authority preventing or restricting access to an Insured Location … due to … a threat of damage to … persons within 50 kilometres of any Insured Location". If this limited challenge to the initial part of the primary judge's reasons fails, it would follow that the remainder of the appeal would be nugatory.

640 There is undoubted difficulty in ascertaining the real points in dispute in this appeal given the myriad issues raised by Market Foods' notice of appeal and the opacity of the written submissions. It is perhaps best to regard the notice of appeal as a guide to those matters requiring determination.

Item 4 of Extension B and the *contra proferentem* rule – Appeal, Grounds 1 and 4

641 Market Foods' initial ground was that Item 4 of Extension B was ambiguous and defectively drafted with the consequence that its construction ought to be controlled by the operation of the *contra proferentem* rule or, alternatively, ss 13 and 14 of the *Insurance Contracts Act.* If this approach is adopted, so Market Foods submitted, Item 4 would be read as a stand-alone clause, unrestricted by the terms of the preamble to Extension B. It would, therefore, provide indemnity for Market Foods under the policy free of the limitations contained in the preamble to Extension B or those inherent in the cover provided by Extension C.

642 In its written submissions, Market Foods sought to parse or atomise Extensions B and C in an attempt to advance the proposition that the disparate parts produced a disjointed operation when read together. Its approach eschewed any effort to read obviously defined words and phrases in accordance with the definitions provided and sought to find inconsistency or awkwardness where none existed. With respect, it is inappropriate to attempt to read the policy with an eye attuned to the detection of error or inconsistency. As has been identified earlier in these reasons, such documents should be read through the eyes of a reasonable person in the position of the parties attempting to give them a common sense and businesslike construction. It is, with respect, the obligation of the court to give meaning to the words the parties have chosen to record their bargain, if it is possible to do so. It should not attempt to discern inconsistency so as to provide a gateway for giving the words a meaning which will provide one party with a better bargain.

643 Mr Walker SC for Chubb submitted there was no need to address each of the exaggerated linguistic infelicities in the policy terms on which Market Foods relied, because the primary judge had noted those which mattered and had nevertheless been able to accord the extensions sensible and coherent meanings. That submission should be accepted. When the construction of the policy terms reached by the primary judge is analysed, it is clear that most of the alleged inconsistencies dissipated and her Honour had regard to any which remained in the course of considering the proper construction.

644 It is appropriate to first turn to Extension B and Market Foods' submissions as to the alleged errors in the primary judge's reasons. Here, the greatest difficulty is Market Foods' failure to confront the primary judge's clearly expressed conclusions as to the construction of Item 4 which are set out above. The submissions advanced both orally and in writing tended to misstate the primary judge's conclusions and purported to address those misstatements. For

instance, in the address to this Court (ts 187 (37 – 38)), it was inferred that the primary judge had held for the purposes of Item 4 that there had to be damage to property of the type insured under the policy within 50 kilometres of the relevant Insured Location, whereas her Honour had concluded that was not the case (PJ [895] and [897](3)). Her Honour had, in fact, referred to the consequential damage being to, "other property (of any kind) within 50 kilometres" (PJ 895). It was also implied (ts 187 (38 – 42)) that her Honour had construed the clause as requiring that there had to be a consequential threat to property *other* than property of the type insured by the policy, although the primary judge had rejected that that was required and had expressly accepted that the threat of damage to property of the type insured under the policy alone could trigger the clause (PJ [897(5)]).

Did Extension B apply to disease?

645 Market Foods' principal submission was that the primary judge had erred in concluding that Extension B did not apply to disease. The reasons which led her Honour to that conclusion, and which were adopted by Chubb, were based on an interpretation which read Extension B according to its terms, including the defined terms, and in the context of the policy, especially the effect of Extension C.

No error was demonstrated in the primary judge's reasons as to the meaning of "damage"

646 As Chubb submitted in the course of the appeal, Market Foods' submissions on this issue avoided confronting the fact that her Honour's conclusions were founded upon the orthodox approach of reading the policy as a whole, including considering the disputed words in the context of the policy. Instead, Market Foods focused attention on the words "damage or threat of damage to … persons", and submitted that the word "damage" should be given its so-called natural meaning and include damage sustained by the suffering of a disease. It further submitted that, as used, the word "damage" was ambiguous and that ambiguity should be resolved in its favour by not confining the word to physical damage.

647 However, as recognised by the primary judge, Market Foods's submissions failed to acknowledge the impact of the definitions of "Business Interruption" and "Insured Damage" which require the existence of "physical loss, destruction or damage" to property. In that way, the preamble to Extension B requires the loss causing events in Items 1 to 8 to be, or to derive from, such damage and that damage of a similar nature is sustained, albeit consequentially upon the occurrence of the initial damage. As applied to Item 4, it follows that the "damage or threat of damage to property or persons" is that which is, as her Honour found, a consequence of the

damage in the preamble. Further, the incorporation of the definition of "Insured Damage" required that the damage arise from an "event" insured under some but not all of the sections of the policy and, as her Honour observed, "contamination" or "disease" were excluded events. Her Honour had also emphasised that the damage identified in the preamble to Extension B had to occur to property of the type insured under the policy and that it be at one of the locations nominated in the Items in Extension B. All of these matters pointed to the word "damage" in Item 4 being confined to "physical damage".

648 It should be accepted that Market Foods' failure to confront the primary judge's reasoning has the consequence that it has failed to demonstrate an appellable error on this point and that is sufficient to dismiss these grounds of the appeal. For so long as Item 4 is constrained by the words in the preamble to Extension B, it requires the occurrence of physical damage to property which expressly is not caused by disease or contamination.

649 Next, in an attempt to decouple Item 4 from the preamble and to create ambiguity, Market Foods submitted that, on the primary judge's interpretation, Item 4 had no workable operation because the preamble did not specify the location of the property which might be the subject of "physical loss, destruction or damage". It is, however, difficult to discern how that gives rise to any ambiguity in the clause's operation. The absence of any limitation as to that matter means the damage to property may occur anywhere, so long as it causes damage or a threat of damage to property or persons within 50 kilometres of any Insured Location and that, in turn, gives rise to the actions of the authority. Mr Morris QC for Market Foods submitted that this meant that the policy had almost unlimited reach and might extend to damage occurring to property in a foreign country. That resort to extreme examples is unwarranted. On the basis of her Honour's construction, the initial damage to property must result in damage or threat of damage to property or persons within 50 kilometres of the Insured Location. It is self-evident that if damage to property (of the type insured under the policy) causes damage or a threat of damage to other property (within the 50 kilometre radial area), it must necessarily have a relatively close physical proximity to the other property. It is difficult to see how damage to property in an overseas location could cause damage, or give rise to a threat of damage, to other property or persons within the identified radial area, and Mr Morris QC offered no explanation as to how that might occur.

650 It was also submitted that it was not possible to accord a sensible *literal* reading of the preamble of Extension B with Item 4. Whilst that may be so, as the primary judge reasoned, that did not

justify jettisoning the preamble altogether, along with all of its inherent restrictions. Indeed, it would be impossible to completely separate the two elements as Item 4, by itself, provides no cover. In order for it to have some operative effect Item 4 would require, at least, some connection with the preamble. Once that is recognised, there is no reason why the essential element of the preamble, being the physical loss, destruction or damage to property of particular types due to an insured cause, should be excluded. Where it is possible to give sensible meaning to the preamble and the words of Item 4, as did the primary judge, there seems little reason to adopt an interpretation which merely ignores the preamble altogether.

Chubb's response

651 In response to this first ground, Chubb initially relied upon the reasons of the primary judge and added nothing further. It was right to do so. As mentioned, nothing raised in the written or oral submissions of Market Foods undermines the soundness of her Honour's conclusions. Whilst Item 4, when read with the preamble to Extension B, gave rise to some lack of clarity as to the precise connection between them, the construction her Honour adopted has the benefit of giving both appropriate work to do. Importantly, it gave overriding effect to the words of the preamble, which is necessarily the essence of the purpose of a preamble in relation to the items which follow. Those items are to be read as being within the penumbra of the preamble, being loss resulting from interruption or interference with the business as a consequence of (as per the definition of "Business Interruption") physical loss, destruction or damage occurring during the Policy period caused by an event insured under the identified sections of the policy (as per the definition of "Insured Damage") to property of a type insured under the policy (as required by the preamble). These combined elements defined the general nature of the cause of loss to which Extension B would respond – loss flowing from damage to the property of others – and Items 1 to 8 further particularise the instances in which that indemnity would be provided. It was entirely correct for the primary judge to construe Item 4 as part of the generally defined scope of cover and to provide an interpretation which gave effect to the structure of the policy. By contrast, Market Foods' submissions sought to deny Item 4 any relevant relationship to the requirements of the preamble. That is, with respect, a far more radical interpretation than identifying a commercial and businesslike construction which flows from reading the clauses together.

652 Chubb also submitted that the damage referred to in Item 4 was or could be one and the same damage as that referred to in the preamble, and this is discussed in more detail below.

Regardless, on either construction, the policy would not include damage to persons suffered as a result of a disease.

653 It follows that the primary judge was correct to conclude that there is nothing in Item 4 which would lead to the conclusion that it would provide cover for loss caused by the actions of an authority due to persons suffering a disease or being at risk from a disease. In order to reach that conclusion, it would have to be severed entirely from the preamble, but to do so would render it meaningless. It follows that the construction proposed by Market Foods is not open.

The effect of Extension C

654 Although the primary judge concluded that Extension B did not apply to disease on the basis of the words of that extension and the definitional meanings of the phrases used, her Honour's view was supported by the contextual matter of the existence of Extension C. As discussed below, that clause is a detailed and structured clause, complete in itself, providing cover in relation to the outbreak or occurrence of disease. When reading the policy as a whole and the clauses in context, the existence of such a clause provides a powerful contextual reason for confining the cover provided by broader and more general clauses. The observations made previously in these reasons on that issue are equally applicable to the submissions made in this appeal. The non-application of those orthodox principles would result in profound incongruence and incoherence because it would effectively negate the exclusions and limitations in Extension C.

No ambiguity

655 The consequence of the foregoing is that, contrary to Market Foods' submissions, the word "damage" in Item 4 was not ambiguous in the sense that it gave rise to two different meanings of relatively equal weight. The construction reached by the primary judge that neither Extension B nor Item 4 applied to disease should be accepted. Market Foods' submissions simply ignored the context of Extension B and Item 4, and did not engage with the irresistible logic of the primary judge's reasons.

The alternative construction is not workable

656 It was then submitted by Market Foods that, as it was not possible to work out the meaning of the word "damage" in the clause by reference to the literal interpretation, context or by giving it a sensible commercial construction, it was necessary to construe it against the insurer. It followed, so the submission went, that the word should be construed as "any damage" and, in

relation to persons, would include the damage suffered by or from disease. As Mr Morris QC submitted, this would have the consequence of excluding from the operation of Item 4 the requirement that there be "Business Interruption" as that term is defined. The effect would be that Item 4 would be liberated from any requirement that the losses be consequential upon the suffering of "Business Interruption to property" meaning "[physical loss, destruction or damage … caused by an event insured …] to property: (a) of a type insured under the policy". Again, this submission does not involve any attempt to read the words of Item 4 in context. If accepted, it would have the result that the business interruption losses to which Market Foods would be entitled pursuant to Item 4 would not be limited to those which flow from the occurrence of damage caused by an event in respect of which the policy otherwise indemnifies the insured. That construction would also set at naught the policy's exclusions as to the causes of loss, especially disease, and the submission can be rejected for that reason.

No room for the operation of the contra proferentem *rule*

657 In the absence of any established otherwise unresolvable ambiguity, there is no foundation for the application of the *contra proferentem* rule. Its role in the construction of documents has been dealt with elsewhere in these reasons and those comments are applicable to Market Foods' erroneous attempt to use it as a first order rule in relation to Extension B.

Sections 13 and 14 of the Insurance Contracts Act

658 Market Foods further submitted that it could achieve its construction by restraining Chubb from relying on its preferred interpretation on the basis that in doing so Chubb would breach its obligations of utmost good faith. That submission is considered fully later in these reasons and, for the reasons given there, there is no substance to it.

Conclusion on the main issue

659 As was the position at first instance, Market Foods' failure to establish that, on its face, Item 4 of Extension B applied to disease has the consequence that its claim for indemnity cannot succeed and the appeal fails insofar as it relates to Extension B. The necessary consequence of that is that there is no need to deal with Chubb's notice of contention.

660 Despite that conclusion, as a number of additional matters were addressed on the assumption that Market Foods succeeded on that ground, it is appropriate to address them to some extent.

Was damage sustained by reason of the existence of SARS CoV-2 on the property?

661 By an alternative submission, Market Foods submitted that if physical damage was a requirement of Extension B, it was satisfied in the present case because the SARS-CoV-2 virus must have been at one of the premises in question. In relation to this submission, it must be kept in mind that the point is only relevant if it is accepted that the damage required is not confined to that occurring to property of the type insured under the policy. Contrary to the primary judge's conclusion, it assumes that damage sustained to "buildings" is sufficient. The insurmountable difficulty for Market Foods is that it failed to address any substantive submissions to the primary judge's conclusion that the clause is anchored in damage being sustained to property of the type insured; being in this case, contents, stock, money and glass. Whilst that conclusion stands, as it should, this contention should be rejected.

662 There are other difficulties in relation to this issue. The learned primary judge dealt with it on the basis that cover might be provided under Item 1 of Extension B. Somewhat inconsistently, the submissions advanced on appeal by Market Foods are founded upon the misunderstanding that the reasons relate to the potential operation of Item 4. There was no appeal in relation to the primary judge's conclusions as to the operation of Item 1 of Extension B and that tends to render the point raised somewhat illusory.

663 The primary judge dealt with this issue, at least in relation to Item 1 (PJ [906] – [926]). She held that, on the assumptions made, the term "property" would then be given its ordinary meaning of "a thing which can be owned" and not its legal relational meaning: *Yanner v Eaton* (1999) 201 CLR 351 at 365 – 367 at [17] – [21]; and if the word "damage" is also not confined by the definition of "Insured Damage", it would have its ordinary meaning of "injury or harm that impairs value or usefulness": Macquarie Dictionary (online). In this way, the ordinary meaning of the phrase, "damage to property", concerns some physical harm done to some physical thing.

664 On the adoption of that wide definition, the submissions advanced were to the effect that SARS-CoV-2 is a virus which can subsist on property "for varying durations of time" and cause infection to persons who come into contact with it, even if it does not remain infectious on property indefinitely. The facts agreed between Chubb and Market Foods included that the SARS-CoV-2 virus subsists on property for varying durations of time and if, while it is subsisting on property, a person comes into contact with it, there is a risk that the person could become infected with the COVID-19 disease. Market Foods submitted that it could be inferred

that SARS-CoV-2 was present on property not belonging to it within 50 kilometres of any Insured Location, that this involved "damage" to that property, and that this damage was a proximate cause of the preventing or hindering the access to or use of the Insured Location.

665 In relation to the effect which the presence of SARS-CoV-2 on the surface of objects has, the primary judge held (PJ [911]):

> … It may be accepted, as Dr Shiers said, that the coating of the virus has no chemical activity or enzymatic properties that can cause a physical or chemical alteration to or degradation of materials. The virus stays on the surface due to electrostatic and ionic interactions with the surface which do not physically alter the surface. …

666 Her Honour concluded (PJ [912]) that the mere presence of SARS-CoV-2 virus on the surface of property is not capable of constituting "damage to property" within the scope of Extension B. That part of Item 1 would only be satisfied by the presence of SARS-CoV-2 virus if a much broader meaning of "damage" was adopted. However, her Honour further held (PJ [914]) that, even if the presence of the virus on surfaces amounted to "damage", it was not within Item 1 of Extension B because that clause required that the damage "will" prevent or hinder the access to or use of the Insured Location and it was not sufficient that it "may" or was "likely to" have that effect. At best, the presence of the virus could never provide any physical prevention or physical hindrance of access or use of any Insured Location.

667 Her Honour ventured further and, on the assumption that no physical prevention or hindrance was required for Item 1 and on the further assumptions in the agreed facts relating to the reasons for the imposition of the Queensland Government's directions, held (PJ [920]) that the presence of the virus on a surface within 50 kilometres of an Insured Location was a proximate cause of the making of those directions. However, be that as it may, her Honour also held (PJ [923]) that, *for the purposes of Item 1*, it did not follow that the damage to the property (being the presence of SARS-CoV-2 virus) was the proximate cause of the prevention or hindrance of access to the Insured Location. For Item 1, it is the very damage to the property which must, in and of itself, prevent or hinder access to or the use of any Insured Location. That requirement could not be satisfied in this case where it was not known when the virus was present or where, with the result that it could not have prevented or hindered access to the premises. Rather, it was the directions which had that effect. Those same difficulties would apply with greater force if, as had been held, Item 1 required that the damage be to property of the type insured under the policy being contents, stock, glass or money within the required 50 kilometres and

even that ignores the requirement in the preamble to Extension B that the damage be caused by an event insured (which did not include disease or contamination due to Excluded Cause 2(a)).

Market Foods' submissions

668 As mentioned, this part of Market Foods' appeal is misconceived in that it misapprehends that the primary judge was concerned with Item 4 of Extension B, whereas her Honour was dealing with Item 1. That is sufficient to reject all of its submissions in relation to this ground.

669 Further, as was submitted by Mr Walker SC, Market Foods' submissions proceeded upon the basis that the primary judge misunderstood the nature of "damage" required by the preamble to Extension B. It had submitted that the primary judge "interpolated" the requirement in the preamble for the sustaining of damage to property. Again, that is in error. The primary judge merely applied the definitions of "Business Interruption" and "Insured Damage" as expressly required by the policy. Again, this fundamental error is sufficient to reject this ground of appeal.

670 It was further submitted by Mr Morris QC that the primary judge erred as to the meaning which she gave to the word "damage" as it was used in the policy. It was submitted that a phenomenon which causes a physical alteration to property which renders it less valuable and utile while the physical alteration has effect and requires remediation, is also "damage". It followed, so the submission went, that "damage" was sustained to property when its surface was adulterated with an infectious pathogen capable of causing disease.

671 Again, these submissions were affected by the appellant's failure to appreciate the manner in which the policy's definitions operated. In any event, there is no need to delve into hypothetical scenarios founded on assumption upon assumption in relation to the question of the meaning of "damage". It is, as Chubb submitted, sufficient to consider the words as used in the policy and a proper construction of the policy's terms. In this way, the real question is what is meant by the word "damage" when used in the expression of "physical loss, destruction or damage". In relation to this, no substantive submission by Market Foods undermined the conclusion of the primary judge which gave appropriate weight to the adjective "physical" as it affects the word "damage", and that too is sufficient to reject this ground of appeal.

672 Regardless, in an attempt to give the parties the most assistance possible as to the meaning of the policy, the primary judge was prepared to decide whether it would respond if all that was required was the sustaining of "damage" to property *per se*. In doing so, her Honour referred

to the decision in *Ranicar v Frigmobile Pty Ltd* [1983] Tas R 113, where Green CJ held (at 116) that "'damage to' when used in relation to goods, is a physical alteration or change, not necessarily permanent or irreparable, which impairs the value or usefulness of the thing said to have been damaged". It is to be noted, however, that the Chief Justice was not there concerned with "physical damage" but "damage" *per se*. He observed (at 117) that, although the storage of scallops at temperatures higher than the required -18ºC caused changes due to enzymic activity and chemical oxidation of the fats in them, such changes did not constitute damage. In particular, those changes were not such as to significantly affect their marketability, edibility or other material qualities. On the other hand, the fact that they were kept at higher temperatures did have the effect of causing "damage" for the purposes of the policy of insurance under consideration because it affected their usefulness; i.e. their marketability under the terms of the extant contracts of sale which required them to kept at or below -18ºC, despite the irrelevant physical changes.

673 The primary judge also relied upon the observations of Allsop CJ in *R&B Directional Drilling Pty Ltd (in liq) v CGU Insurance Ltd (No 2)* (2019) 369 ALR 137, where his Honour held in respect of the policy under consideration that physical injury required more than any material impairment of functionality or purpose: at 165 [134]. In that case, although the placing of material (concrete) within an underground metal tunnel rendered it defective and requiring the removal of the impediment, the tunnel was not physically damaged: at 166 [136].

674 Her Honour also referred to some English authorities which had held that the siltation of a riverbed was damage even though the silt could be removed: *Jan de Nul (UK) Ltd v Axa Royale Belge SA* [2002] 1 Lloyd's Rep 583; and that a ship could be damaged by a leak of hydrochloric acid which could be cleaned from the surface of the ship without changing its physical quality: *Losinjska Plovidba v Transco Overseas Ltd (The "Orjula")* [1995] 2 Lloyds Rep 395; but considered they did not reflect the weight of authority in Australia.

675 It is not necessary to determine whether those decisions are compatible with the position in Australia and any difference between the approaches in the two jurisdictions was not addressed by Market Foods in any detail, either in its written or oral address. It suffices to observe that no error was demonstrated in the primary judge's conclusion that, other than by adopting an expansive meaning of the word "damage", it could not be said that it was constituted by the presence of the SARS-CoV-2 virus on the surface of an object. It is plain that the primary judge correctly recognised the transitory nature of the consequences of the virus if located on

the surface of a thing. Its effect will dissipate in a relatively brief period of time after which there is no remaining impact on the object. It is not altered to a state where to use it again requires some form of remediation.

676 To the above, it can be added that the policy requires the sustaining of damage to property by the events insured against under the other sections of the policy. As has been mentioned previously, Excluded Cause 2(a) excluded cover pursuant to Section 1 ("Property Damage") for Damage to Property Insured "directly or indirectly caused or occasioned by or arising from" both "contamination" and "disease". This effectively negates any claim based upon the allegation that relevant damage under the policy was sustained by the presence of the SARS-CoV-2 virus on any property, as the preamble to Extension B requires that such damage be caused by an insured event.

677 Finally, it should be observed that this ground of appeal was advanced despite that Market Foods not otherwise seeking to overturn the alternative grounds on which her Honour had concluded that Item 1 of Extension B would not have responded to the claim. There is no substance in this ground and it must be rejected.

***The obligations of good faith ss 13 and 14 of the* Insurance Contracts Act**

678 It is appropriate now to consider Market Foods' submissions in reliance on ss 13 and 14 of the *Insurance Contracts Act* which were advanced together with the submissions relating to the *contra proferentem* rule. In essence, it submitted that Chubb was prevented by ss 13 and 14 from relying upon any ambiguous terms in the policy to the detriment of Market Foods' claim for indemnity.

679 The primary judge disposed of Market Foods' submissions in this respect (PJ [885] – [889]) where she held that the infelicities in Extension B were not such as to make it a failure to act with the utmost good faith for Chubb to rely upon the policy as drafted. After stating the principles concerning the duty of utmost good faith which were said to interlock with the *contra proferentem* rule, her Honour held that Chubb's reliance on its construction of the policy terms would not involve any lack of good faith, even if it were necessary to resort to the *contra proferentem* rule to give the clause meaning. As it was, reliance on that canon of construction was not needed in order to give the extension a commercially sensible meaning. It followed that there was no lack of good faith and s 13 was not engaged. Similarly, s 14 was not engaged. Her Honour noted (PJ [889]) that she was "unable to discern from the lengthy submissions of

Market Foods how any reliance by Chubb on the terms of the policy involves any failure to act with the utmost good faith." The same can be said of the submissions advanced on appeal.

680 Market Foods' central submission was that either s 13 or s 14 was engaged due to the "practical impossibility for any insured to glean from the printed words of the Policy", the meaning advanced by Chubb. It is, so the submission went, "the exemplar of a case in which some form of notification from Chubb, expressed in plain English, might have succeeded where the wording of the Policy failed, in conveying to Market Foods the inadequacy and inutility of the Policy for which it paid premiums to Chubb".

681 This submission flounders simply because it is not impossible to glean the policy's meaning. It was construed by the primary judge, and correctly so, in accordance with orthodox principles of construction and absent the need to resort to the *contra proferentem* rule. The alleged difficulties with the policy were magnified and, indeed, greatly exaggerated by Market Foods in its submissions and were often the result of its failure to read the policy as a whole or the provisions in context. It is true that there is inelegance in the drafting and some lack of clarity in the manner in which the terms of the policy operated together, but they did not make the provisions unintelligible. There was nothing which might be apt to mislead the reader into thinking that the cover was greater than it might be thought to be. The ordinary objective reader would have noted the existence of Extension C and appreciated that, with its limitations and exceptions, it provided the cover for business interruption arising from the occurrence of a Notifiable Disease. No sensible commercial person would think that the limits of that clause could be by-passed by relying on a provision providing cover consequent upon the sustaining of "physical loss, destruction or damage" when the loss is consequent upon the occurrence of a disease.

682 A second difficulty with Market Foods' submissions is that it proceeds upon the assumption that the identification of the policy's true meaning would be a practical impossibility for any insured. However, as Chubb submitted, it has not been proven that the actual insured had any such issue with the policy as drafted. That is important where ss 13 and 14 are fact specific and apply in relation to the actual circumstances existing between an insured and insurer. They do not have some overriding authority which renders them applicable despite the reality of the parties and their knowledge. It is relevant that Ms Harcourt of Market Foods was called as a witness and, whilst referring to the policy, made no mention of having any difficulty with its terms or even of having read it. It is also relevant that the policy was placed through a broker,

General Security Australia Insurance Brokers Pty Ltd, and no person from that firm was called to give evidence of their understanding of the policy.

683 The only possible conclusion is that there was no evidence that any person from Market Foods or acting on its behalf did not understand the policy's operation and this is sufficient to dispose of any suggestion of a lack of good faith on the part of Chubb. In any event, the policy was capable of meaningful construction by orthodox principles. Even if ambiguity could result in ss 13 or 14 preventing an insurer from relying on a clause's true meaning, which is doubtful, such ambiguity would necessarily have to be greater than exists in the present case. Otherwise, there was no merit in Market Foods submissions in relation to ss 13 and 14.

684 By Grounds 2 and 3 of its notice of appeal Market Foods also challenged further aspects of the primary judge's conclusions in relation to Item 4 of Extension B. All of the substantive submissions in support of these grounds have been dealt with above.

Extension C – Appeal, Grounds 5 – 7

685 Before the primary judge, Market Foods submitted that, if Extension B did not apply to disease, it was entitled to indemnity under Extension C which contains express cover for business interruption losses directly arising from an occurrence or an outbreak at the premises of, *inter alia*, a Notifiable Disease or the discovery of an organism which is likely to cause such a disease. This extension is in the nature of a hybrid clause, providing cover in respect of the losses sustained as the result of an "intervention of a public body authorised to restrict or deny access to the Insured Location", where the intervention directly arises from an "occurrence or outbreak" at the premises of a Notifiable Disease or the discovery of a relevant organism.

686 It was not in dispute that, as at the time of the orders which affected Market Foods' businesses, COVID-19 was a Notifiable Disease for the purposes of Extension C. On 30 January 2020, the *Public Health (Coronavirus (2019–nCoV)) Amendment Regulation 2020* (Qld) amended the *Public Health Regulation 2018* (Qld) by making "coronavirus 2019–nCoV" a "notifiable condition" for the purposes of the *Public Health Act (Qld)*. The effect of this amendment was that, pursuant to s 70 of the Act, a doctor was obliged to give notice to the relevant authority if an examination of a person indicated that the person has or had a "clinical diagnosis notifiable condition", or has or had a "provisional diagnosis notifiable condition".

687 For the purposes of Extension C, there was no issue between the parties that the directions made by the Queensland Government led to restriction or denial of the use of the Insured

Locations. Further, it was not disputed that those directions involved the intervention of a public body authorised to restrict or deny access to the Insured Location. Rather, the relevant issue before the primary judge was whether the directions directly arose from an occurrence or outbreak "at the premises" of a Notifiable Disease or the discovery of an organism at the premises likely to cause a Notifiable Disease for the purposes of Extension C.

The primary judge's reasons as to Extension C

688 Her Honour held (PJ [943]) that the expression, "directly arising", when it appears in Extension C means nothing different from "proximate cause" and, in doing so, referred to the relevant discussion in *FCA v Arch* at 717 – 731 [162] – [211]. There was no appeal from this conclusion in this matter. However, as has been noted above, the concept of "proximate cause" is irrelevant to the consideration of the required strength of a causal nexus between two elements of a composite insured peril. It should be acknowledged that the majority in *FCA v Arch* (at 732 [213]) did suggest that similar concerns may arise in relation to that issue. This point was not raised before the primary judge, although the submissions of a number of the insurers on appeal proceeded upon the assumption that concepts of proximate cause were relevant to the nexus between the elements of a composite insured peril. Undoubtedly, it was in the insurer's interests to advance that proposition as it has the necessary consequence of reducing the scope of cover. That aside, it can be accepted that the word, "directly", in Extension C requires that there be a direct causal relationship between the outbreak of a disease and the intervention of the public authority. Whilst that might equate to "proximate cause", it is not something which needs to be decided in these appeals.

689 In any event, her Honour determined (PJ [946]) that the word, "premises", in Extension C referred to the buildings in which the insured's businesses were located, including their curtilages. As it is essential to understanding Market Foods' submissions, it is helpful to set out her Honour's later reasoning (PJ [946] – [947]) in this particular respect:

> 946 I do not accept Market Foods' argument that "premises" extends to land in the vicinity of the Insured Locations. Specifically I do not accept that land beyond the immediate curtilages of the Herston building and the William Street building form part of the premises. The premises in these cases are defined by the extent of the buildings. For example, the mere fact that a person with COVID-19 walked past the outside of these buildings on the footpath would not establish that there was an occurrence or outbreak of COVID-19 at the premises. Nor would it establish that there was an occurrence of the discovery of the SARS-CoV-2 virus at the premises…
>
> 947 As discussed, I also do not accept that in the case of the UQ Insured Location the relevant "premises" is the whole of the UQ campus. There is no ambiguity

> about the meaning of the word "premises" which should be resolved contra proferentem. The word takes its ordinary meaning of "2. (plural) a. the property forming the subject of a conveyance. b. a house or building with the grounds, etc., belonging to it" (Macquarie Dictionary Online).

690 Her Honour also rejected the suggestion that an outbreak or occurrence of COVID-19 within the "area" around the Insured Locations would satisfy the requirement that the occurrence or outbreak be "at the premises" (PJ [946]).

691 There was no evidence that the directions which caused the interruption or interference with the Insured Locations were made because of an occurrence or outbreak of COVID-19 or the discovery of the SARS-CoV-2 virus at these premises (PJ [945]). Indeed, as there was no evidence of any cases of COVID-19 within any of the premises in which the Insured Locations were situated, there was also no relevant occurrence or outbreak in relation to which Extension C would apply. In this regard, her Honour included a diagram in her reasons which illustrated the relatively significant distance between Building 63, the premises in which the UQ Insured Location was located, and the buildings which had been visited by students who were subsequently diagnosed with COVID-19 (PJ [948]).

692 In relation to the issue of whether the Queensland Government directions "directly arose" from an occurrence or outbreak at the premises or the discovery of an organism there, her Honour referred to earlier comments made in relation to NSD137/2021: *Chubb v Waldeck* (PJ [942]).

Was there an "occurrence" or "outbreak" of COVID-19 "at the premises"?

693 Market Foods' overarching complaint on appeal in relation to Extension C concerned the primary judge's conclusion that there was no "occurrence" or "outbreak" at Market Foods' various premises. There were various aspects to this ground of its appeal.

The meaning of "occurrence" or "outbreak"

694 Market Foods initially criticised the primary judge's reasons (PJ [946]) on the basis that, so the submission went, her Honour held that the word, "outbreak", should effectively be read as "occurrence" or otherwise be given a meaning not affected by its contextual setting. However, that criticism was misguided. Her Honour did not find that there could only ever be an "outbreak" if a COVID-19 infected person attended inside the relevant premises. Rather, her Honour was merely concerned with the concept and proper construction of the word, "premises". It might be noted also that this complaint did not correspond to any of the numerous grounds set out in Market Foods' notice of appeal.

Whether it was sufficient that the premises were in the area of an outbreak or occurrence

695 In its written submissions, Market Foods submitted that, as a Notifiable Disease would be highly infectious and contagious and would spread quickly throughout the community, the parties to the policy would expect that a public body would take action in response to all instances of the disease. In doing so, any imposed restrictions would extend well beyond a particular building and its surrounds. From this it was submitted that the requirement in Extension C that there be an outbreak or occurrence of a disease *at the premises* would be satisfied merely if the relevant premises were located in the area where the outbreak or occurrence occurred.

696 In support of this construction, it was submitted that it was more natural to speak of an outbreak of disease as occurring in more widely defined geographical areas such as suburbs, cities or States. Furthermore, having regard to the virulent nature of diseases and the unknown scope of its spread, it would be rare for an outbreak to be confined to the four walls of a particular location or its curtilages, and this suggests that it was sufficient for the purposes of Extension C that the outbreak or occurrence be located in those wider geographical areas.

697 It was then said that the critical integer of Extension C was the actions of the public authority in imposing restrictions and, that being so, the existence of a person with COVID-19 in a particular place is less relevant than the particular locality or area from which there is potential for the disease to spread. The rationale of this submission was somewhat difficult to grasp, but appeared to be that because an authority might be less concerned as to the precise location of an outbreak, the clause should be given a broader interpretation. The logic of that is not detectible and the submission proceeds on the unestablished assumption that relevant authorities are less concerned about the precise location of an outbreak. There was no evidence of that and nothing to suggest that it had been so understood between the parties.

698 Market Foods submitted that the construction adopted by the primary judge would have the result that an insured would have difficulty in establishing that any infected person was actually within their premises. It further submitted that if the parties intended that the disease had to occur within the insured's premises they could have made it more certain by the use of phrases such as "within", "in" or "inside". In these circumstances, it was submitted that to require the insured to establish that the outbreak or occurrence of the disease was within the premises would render the cover meaningless or non-existent.

699 The foregoing submissions of Market Foods assiduously avoided any attempt to construe the words of Extension C in the manner in which they appear in the clause. Rather, they seek to rewrite the clause in more favourable terms. On this issue the clause is sufficiently clear. It specifically provides that the intervention by the public authority to deny or restrict access must "directly arise from an occurrence or outbreak *at the premises*". It does not matter whether, in discussing the occurrence of a disease generally, identification of its location might occur by reference to wide geographical areas. Nor is it relevant that the disease is likely to occur in the community in areas beyond the four walls of the insured's premises. The insured peril is concerned with the actions of the public authority "directly arising from" an outbreak or occurrence at those premises. This is consistent with the other events listed in Item 1 of Extension C, being the discovery of vermin or pests (1(c)), an accident causing defects in drains or other sanitary arrangements (1(d)), murder or suicide (1(e)), or food or drink poisoning (1(f)). Each such event is more appropriately referable to the insured's idiosyncratic specific location rather than any broader area such as the suburb or city in which an Insured Location is situated.

700 Market Foods' submission that the insured would be prejudiced by the difficulty in establishing the occurrence of the infectious disease at its premises is overstated. After all, Extension C only operates when the intervention of the public authority "directly arises" from the outbreak or occurrence on the premises. In this regard, her Honour had referred (PJ [942]) to an earlier part of her reasons in relation to the use of "outbreak" and "occurrence" in the policy with which another matter before her was concerned. There, she had noted (PJ [821] – [822]) that the true issue was not whether there was an occurrence or outbreak *at the premises* but "whether there was an intervention … directly arising from an occurrence or outbreak … or the discovery of an organism": it would not matter that the authority acted on an incorrect factual basis as to there being an outbreak or occurrence at particular premises. In addition, it is likely that the words used by the public body when imposing any intervention will identify the reasons for its actions. If the restrictions are imposed as a result of an outbreak of a notifiable disease at the premises, it is most probable that this would be made clear in any notification. It is also apparent that government tracing of persons affected by a serious infectious disease is to be expected when an outbreak occurs, as has happened with COVID-19, such that the occurrence at the premises would become apparent. It is not to the point that the policy might have differently expressed the requirement that the outbreak or occurrence happen at the premises.

The question is what is the meaning of the words actually used and, in the case of Extension C, that is clear.

701 Chubb's submissions that Market Foods has attempted to construe particular words of Extension C in the abstract and divorced from their context should be accepted. As should its further submission that Market Foods has overlooked that the actual requirement, which is derived from the definition of "Notifiable Disease", that it is not the disease but the illness resulting from a disease of the type described which is to be detected at the premises. That definition supports the conclusion that the cover is provided in respect of illness arising out of events which have some relevant nexus to the premises from which the insured undertakes business, rather than from broader risk existing in the community.

The meaning of "premises"

702 The next complaint concerned the primary judge's conclusion that the word, "premises", where it appears in Extension C, referred to the building in which an Insured Location was situated and its curtilages (PJ [944], [946]). As an initial observation, however, her Honour's approach was entirely logical given that the actual sites from which Market Foods carried on business were identified in the extension as the "Insured Locations". But for that, it would have been reasonable to regard the word, "premises", as being those locations. As it is, the use of the expression, "Insured Location", as a description of the place from where business is conducted, supports the conclusion that the word, "premises", was intended to refer to something different. Logically, that would be the next larger, recognisable, physical unit which, in this case, is the buildings housing each of the Insured Locations.

703 In relation to the UQ Insured Location, the primary judge concluded (PJ [947]) that the relevant "premises" was Building 63 on the UQ campus, being that in which Market Foods' café business was located. Mr Morris QC submitted that, instead, "the premises" should mean the whole of the UQ campus constituting approximately 1,500 hectares and the numerous buildings spread widely across it. However, the oral submissions in support of this point were largely repetitive of the written submissions which have been dealt with above. To that it can be added that the meaning of the word, "premises", in the Market Foods policy is sufficiently clear and, as was identified by the primary judge, means the buildings in which the Insured Locations were located. Her Honour (PJ [947]) noted that, as used in the policy, the word takes its ordinary meaning of "a. the property forming the subject of a conveyance. b. a house or building with the grounds, etc., belonging to it" (Macquarie Dictionary Online)." Extension C

refers to loss resulting from interference or interruption with the Insured Location in direct consequence of a public authority's intervention directly arising from an occurrence or outbreak "at the premises". Whilst it might possibly have been the case that "premises" meant the actual tenement from which business was conducted, as that is "the Insured Location", it must follow that the word, "premises", assumes its next natural meaning of the building in which the tenement is located, and the term is limited by the extent of the buildings. This may or may not involve some extension of the usual meaning of the term, "premises", however, there is no logical construction which might extend the term beyond the immediate curtilages of the building in which the Insured Locations are sited.

704 Under the policy, the UQ Insured Location is "Level 2, Room 215, University of Queensland Chancellor's Place, St Lucia Queensland". The evidence showed that Building 63 was connected to Building 62. However, it also shows that the UQ campus is extensive with a multitude of buildings, some connected but many separate, and wide open spaces including extensive lakes. The primary judge correctly rejected the submission that the whole of the campus might be the "premises" for the purposes of the policy. As her Honour reasoned, if a single entity occupies a large tract of land, involving numerous separate and distinct buildings, it is most unlikely that a relevant outbreak or occurrence in one building could affect the status or safety of another separate and distinct building. The fact that the clause operates in relation to the occurrence of injury resulting from food poisoning "at the premises" supports that conclusion. It is unlikely that the cover was intended to extend to loss from interference with the Insured Location resulting from such an event occurring some hundreds of metres away in different buildings separated by large open spaces and, perhaps, operated by persons other than the insured.

705 Chubb submitted that the building in which the Insured Location is situated must be the outer limit of "the premises" on the basis that Extension C is conditioned, not simply on an outbreak or occurrence with general consequences, but on an outbreak or occurrence which results in the restriction or denial of use of the Insured Location. There is much force in that submission as the wording of the tailpiece of Extension C reinforces that the insured perils are generally insured centric and concerned with the circumstances at or around the place from where it conducts business.

706 Further, the construction proposed by Market Foods would have the consequence of Chubb becoming the insurer of risks across the whole of the UQ campus. That is contrary to the terms

of Extension C which provide cover closely tied to the risks associated with the Insured Location and premises as opposed to some broader area. Had the parties intended a wider risk to be covered, it is likely that it would have been effected by the identification of the occurrence of specific events within a radius of the particular insured location. Extension C is not such a clause.

707 In addition, once one moves beyond the building and its curtilages, the myriad potential areas which might be described as "the premises" becomes indeterminate and would undoubtedly be productive of great uncertainty. As Chubb submitted, "Cover of the type provided by Extension C is conditioned by physical and geographical markers, not the cultural significance or popularity of a particular location nor its relationship to some wider but distinct and well-defined geographical area." Whilst the broader concept of "the premises" might have some traction where there exists some popularly known geographical indicators such as a university, the same would not be so in relation to other insured locations. For instance, the Herston Insured Location and the William Street Insured Location consist of a tenement or tenements in office buildings. If "the premises" is to extend beyond the buildings and their curtilages, its boundaries would be illusory and incapable of definition. This difficulty inherent in Market Foods' submission in this respect is exposed by the illustration referred to by the primary judge that there would be an occurrence or outbreak of a disease "at" the William Street Insured Location if a person, infected with the disease, walked past the building on the footpath. That is a far from natural construction and it does not lead to a sensible operation of the policy.

Conclusion as to the meaning of "at the premises"

708 For the foregoing reasons, Market Foods's submissions as to the meaning of the expression, "at the premises", should be rejected. The actual language of Extension C is sufficiently clear and requires that cover is confined to the consequences of events at the place where the insured conducts its business and it is this which must provide the relevant nexus between the Insured Location and the outbreak or occurrence.

709 It was at this point that Market Foods again sought to invoke the *contra proferentem* rule as supporting its construction. The nature of that "rule" or principle of construction has been discussed previously and there is no need for any detailed repetition here. It is a rule which applies at the conclusion of the process of construction where there remains two (or more) competing interpretations of relative equal weight and real ambiguity remains. It is not a tool to provide a conclusive meaning to a word, phrase, expression or clause when ambiguity is first

encountered. Were that to be so, it would be applied in every case and its application may, on occasion, have the consequence of setting all other rules of construction at naught. In its written submissions, Market Foods clearly sought to advance a case that the rule was one which applied on any occasion when ambiguity was detected. Whilst that was not persisted with in the course of address, no attempt was made to otherwise locate the rule within the process of interpretation.

710 Here, the process of construction engaged in by the learned primary judge did not reveal two genuinely available alternatives to the meaning of the expression, "the premises". Through a process of orthodox construction, her Honour identified the true meaning and no error has been shown in that process or in the conclusions. It necessarily follows that there was no scope for the application of the *contra proferentem* rule.

Did the Queensland Government directions "directly arise" from the occurrence or outbreak of COVD-19 on the UQ campus?

711 The learned primary judge further reasoned (PJ [951]) that, if she was wrong that at the UQ Location "the premises" were Building 63, there nevertheless was no outbreak of COVID-19 on the UQ campus which caused the making of the directions by the Queensland Chief Health Officer. This further precluded Market Foods' reliance on Extension C. Her Honour reasoned that, whilst prior to the making of the directions there were three persons known to have COVID-19 who visited the campus, there were many others in Queensland (144 cases by 19 March 2020 and 319 cases by 23 March 2020) and it was not possible to conclude that the three known cases were the proximate cause of the making of the directions.

712 Her Honour also held that the reasoning in *FCA v Arch* (at 722 – 728 [179] – [197]) – to the effect that every case of COVID-19 could be regarded as an equal proximate cause of the taking of the measures in the United Kingdom – did not apply in the geographical circumstances of Queensland. In particular, for the purposes of Extension C, the intervention by the authority had to directly arise from an outbreak or occurrence of the disease "at the premises". In this appeal, the three known cases of COVID-19, being students who had visited the UQ campus, could not be shown to be a cause of any kind of the making of the directions. On the facts it could not be said that any one known case was a sufficient cause of the making of the Queensland Government directions and it was not even apparent that the known cases themselves would have been a sufficient cause (PJ [953]). It had to be inferred that the risk

presented by both known and unknown cases was the cause and Extension C did not respond to the consequences of government action taken in response to such risks.

713 Her Honour articulated (PJ [954] – [955]) the point of distinction between the circumstances before the Supreme Court and the present matter as being that in *FCA v Arch* it was assumed that the number of cases of COVID-19 inside the relevant radial areas defined by the policy were sufficient of themselves to have caused the institution of the government's measures. No such assumption could be made in the present case where the actual cause of the making of the directions was a matter in respect of which proof was required. As it was, there was no evidentiary foundation from which to draw any inference that the known cases at the UQ campus (if contrary to the above conclusion it can be regarded as the premises) were a proximate (or other) cause of the making of the Queensland Government directions.

714 Her Honour further concluded (PJ [957]) that the terms of the UQ Direction did not support the inference that it was made as a consequence of the then three known cases of persons with COVID-19 having visited the campus. To the contrary, its terms indicated that it was made in response to the measures which had been announced by the Queensland Government. Had the occurrences at the UQ campus been the cause of the direction, it would have been reasonable for the Vice Chancellor to have so indicated and the direction would have prevented persons from attending the campus. Instead, in reference to the latest discovery of a student with COVID-19 having visited the campus, he merely encouraged all persons to adhere to the government's guidelines on social distancing.

715 Finally, her Honour had earlier concluded that the UQ direction did not involve a "restriction or denial of the use of the Insured Location" and that the Vice Chancellor and President of UQ was not "a public body authorised to restrict or deny access to the Insured Location" (PJ [958] – [959]). It was also not the case that the intervention by the Vice Chancellor involved a "restriction or denial of the use of the Insured Location on the order or advice of the local health authority or other competent authority" as required by the tailpiece of Extension C.

The issues raised on appeal from the above conclusions

716 As is apparent, the issues which follow are only relevant if the primary judge's finding that "the premises" in which the UQ Insured Location was sited was Building 63 was incorrect and, instead, it was the whole of the UQ campus. On that assumption, it is known that there were three known cases of persons infected with COVID-19 who attended there.

717 Market Foods' submissions initially proceeded upon the assumption that the requirement that there be an "outbreak [of Covid] at the premises" was satisfied merely by the relevant premises being situated in an area where there was an outbreak – in this case, the City of Brisbane and in the suburbs in which the Insured Locations were situated. So the submission went, a finding that the outbreak was a sufficient proximate cause of the government's directions ought to have followed. The difficulty here is that there is nothing in the wording of Extension C which supports the conclusion that if an outbreak occurs in an area in which the premises are situated, the outbreak occurs "at the premises". This form of submission was rejected above as being wholly inconsistent with the policy's terms.

718 The second limb of Market Foods' submission was that the reasoning of the majority of the Supreme Court in *FCA v Arch* should be applied to the effect that each case of COVID-19 in Queensland should be treated as a sufficient proximate cause of the Queensland Government directions. However, as Chubb submitted, the policy in *FCA v Arch* was in quite different terms to that presently under consideration. In particular, the relevant disease clause in that case was triggered by the occurrence of a Notifiable Disease within 25 miles of the insured's premises. That area of approximately 2,000 square miles comprised a broad geographical area taking in a not insignificant part of the country and a sizeable portion of the population. By comparison, the area of the premises the subject of the Market Foods policy is minute and that is true even if the premises was regarded as being the UQ campus. More significantly, by the time of the taking of government measures in the United Kingdom, COVID-19 had spread across the country and throughout a large proportion of the population. In such circumstances, the cases of COVID-19 within the areas defined by the policies and those outside could each be regarded proximate causes of the measures which were introduced on a national scale. By comparison, there were limited instances of the disease in Australia in 2020 and 2021. It had not spread extensively throughout the country and it infected only a relatively small number of persons. In these circumstances, the assumptions which were made in *FCA v Arch* could not be made here; namely:

(a) even if there were no cases within the radial area of 25 miles, the same government measures would have been made applying to that area because of the widespread nature of the outbreak; and

(b) the measures affecting the area within the 25 mile radius would have been taken if there had been no cases of the disease beyond that area.

719 On the assumption that there were three cases at the UQ campus, it could not be assumed that the Queensland Government directions would still have been made because of them. Neither could it be inferred that each and every case was a cause of the making of the directions. Indeed, as has been discussed previously, it was the risk from known and unknown cases which impelled the government to make the directions it did. As Chubb submitted, whilst it might be expected that a reasonable reader would not expect that any outbreak of a disease would be confined to the relevant premises and neither would the government's response, Extension C requires that the outbreak or occurrence "at the premises" be a direct cause of the intervention. That requirement cannot be glossed over and there was no evidence before the Court available to satisfy it in Market Foods' case.

720 Market Foods submitted that the information available to her Honour was sufficient to draw the inference that, even if there were no known cases outside of the UQ campus, the Queensland Government would have taken steps to restrict the use of or access to the campus. This was said to follow from the fact that the government did the same thing on a broader basis in relation to all known cases in Queensland. The fallacy in that submission is that there was nothing in the government's actions which might suggest that to be so. While the Queensland Government may have responded in one way in response to in excess of 300 cases in the State, it cannot be assumed it would respond in a like manner in respect of the UQ campus in response to three cases. The evidence before the Court shows that, as at 1 March 2020, there were nine cases in Queensland and the government took no action for some weeks later and only after there were in excess of 300 cases. None of this suggests that the restrictions actually imposed would have been a response to the occurrence of three cases in the one general area. Contrary to Market Foods' submission, there was not a skerrick of evidence on which it might have relied to support the inference claimed.

721 Market Foods further submitted that the learned primary judge had concluded that it did not matter how many cases of COVID-19 may have occurred at the UQ campus, it would not have been possible to draw the inference that they were the cause of the directions. This was yet another of the numerous misstatements of the nature of the primary judge's reasons contained in Market Foods' written submissions. What, in fact, her Honour concluded was that that cases on the UQ campus had to be a cause (possibly the proximate cause) of the Queensland Government directions and this was a matter which had to be proven. As the primary judge held (PJ [953]), Market Foods failed to establish that those cases were a relevant cause.

722 Market Foods submitted that there was an illogicality between two of the primary judge's findings. First, the conclusion that she could not draw the inference that the three known cases at the UQ campus were a proximate cause of the directions (PJ [951]). The second, being her earlier conclusion when dealing with Item 1 of Extension B, that "it is impossible to avoid the conclusion that the existence or potential existence of COVID-19 on the surface of property within 50 kilometres of any Insured Location was a (but not necessarily the only) proximate cause of the Queensland Government directions" (PJ [920]). It was said that it was illogical that the mere presence of COVID-19 on the surface of property was a sufficient cause but that three actual cases was not.

723 However, this submission is also misguided and seeks to compare different considerations. The agreed facts relevant to the primary judge's consideration of Item 1 of Extension B included that the Chief Health Officer was aware of the risk of fomite transmission of SARS-CoV-2, that this awareness informed the making of the government's directions and that the purpose of the directions was to contain or respond to the spread of COVID-19 within the community, including via fomite and person-to-person transmission. Importantly, the discussion in relation to Item 1 of Extension B was concerned with the government's actions based upon the risk of the spread of COVID-19 from known and unknown cases which existed across the State of Queensland. In that context, her Honour reasoned that each risk might well constitute a cause of the directions. By comparison, Extension C requires the actual outbreak or occurrence of the virus to be a relevant cause. It is not a "risk based" clause but requires that it be established that the directions directly arose from the known cases at the premises. The circumstances did not exist to support that conclusion.

724 Finally, Market Foods submitted that the Court should conclude that the "occurrence" was the COVID-19 pandemic itself as the minority did in *FCA v Arch* and as the Divisional Court held at first instance. With respect, the differences in circumstances and policy wording between that of the Market Foods policy and that considered by the Supreme Court make acceptance of that impossible. The invitation by Market Foods was, in effect, for the Court to entirely rewrite the Market Foods policy terms to align with those considered in *FCA v Arch* and then construe them in a similar manner despite the entirely different circumstances in which they operate. That, of course, the Court cannot do.

725 It follows that, even on the assumptions which were made in favour of Market Foods by the primary judge, no relief would be available under the policy in respect of its claim to indemnity pursuant to Extension C of the Market Foods policy.

726 For the purposes of this issue, neither party challenged the correctness of *FCA v Arch* (insofar as it considered the concept of proximate cause) and, accordingly, there is no need to consider that. It is sufficient to observe that the primary judge's conclusion was that the circumstances in Australia were such that the same approach was unwarranted. That conclusion was not shown to be incorrect.

JobKeeper and other benefits received – Appeal, Grounds 8 – 10

727 The primary judge also considered whether certain payments of financial relief that Market Foods received from third parties would be deducted in calculating the amount it could recover under the policy, on the assumption that it was entitled to indemnity. Ultimately, she held that the savings resulting from JobKeeper payments and rental reductions had to be accounted for, either as a "sum saved" under Item (c) of the "Gross Profit" clause, or under general principles applicable to contracts of indemnity (PJ [967]).

728 In light of the conclusion that Market Foods is not entitled to indemnity under the policy, it is not necessary to consider these issues. It is preferable not to express a view on these issues, as they involve making assumptions that are contrary to our reasoning set out above. It is not necessary to adjust any of the primary judge's answers to questions in relation to these issues.

Conclusion

729 In the light of the foregoing the appeal should be dismissed. There is no need for any alteration to the answers given by the learned primary judge.

PROPOSED ORDERS ON THE APPEAL

730 The orders which should be made are:

1. The appeal is dismissed.

2. There is no order as to costs.

COYNE V QBE INSURANCE (AUSTRALIA) - NSD 1076 OF 2021

731 By this appeal, Mr David Coyne, in his capacity as liquidator of EWT and EWT appeal from certain parts of the decision of the primary judge concerning the proceedings, *QBE Insurance*

(Australia) Limited v David Coyne (in his capacity as liquidator of Educational World Travel Pty Ltd) (NSD 308/2021). For its part, QBE filed a notice of cross-appeal relating to parts of the primary judge's conclusions. Each party also filed a notice of contention in the other's appeal.

The relevant facts

732 The business operated by EWT was that of a travel agency which principally arranged outbound tours for Australian secondary school students to international destinations.

733 The business was carried on from premises located at 441 Canterbury Road, Surrey Hills, Victoria (referred to as the "location" in the policy) where members of the public were able to enter to transact business, although it was not operated as a "walk-in" retail travel agency. EWT also operated its business online through a website.

734 Relevantly, EWT was issued a policy of insurance under QBE's Office Package "Business Pack Insurance Policy" QM208 with the policy number 41A843909BPK (the EWT policy). The period of cover was from 6 January 2020 to 6 January 2021, 4:00 pm.

735 The Commonwealth Government's Overseas Travel Ban (implemented by the *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Overseas Travel Ban Emergency Requirements) Determination 2020* (Cth)) came into effect on 25 March 2020 and, at around the same time, the Victorian Government's first "Stay at Home" direction was issued. The latter imposed lockdowns in Victoria in the period between 30 March 2020 to 31 May 2020, to "address the serious public health risk posed to Victoria by Novel Coronavirus 2019", by effectively prohibiting persons in Victoria from leaving their home other than for a few specified reasons.

736 The Stay at Home direction was replaced on 31 May 2020 by "Stay Safe" direction which provided that a person may only leave their residence to attend work where it was not reasonably practicable for them to work from home. It was extended from time to time until 5 August 2020.

737 In an affidavit filed in the proceedings dated 18 June 2021, Mr Ross Camfield, EWT's sole director, deposed that the company's primary product was arranging tours of the United States for Australian secondary schools and that this accounted for approximately 80% of its business. He further stated that from mid-March 2020, as a result of the Overseas Travel Ban and COVID-19, there was uncertainty as to EWT's ability to provide pre-booked travel or to offer

future travel to international destinations, including to the United States. The ban had the result that EWT's sales representatives ceased attending schools so as to carry out promotional activities as schools were either closed or were not considering travel for their students. The ban also prevented tours that were booked from departing Australia from April 2020 and had the consequence that schools began to cancel or defer their future travel arrangements. The necessary consequence was the cancellation of many tours and requests for refunds of amounts paid in respect of them.

738 EWT closed its business premises on 31 March 2020, and they remained closed save for when Mr Camfield and his daughter accessed them from time to time to process refunds.

739 On 5 August 2020, the *Restricted Activity Directions (Restricted Areas) (No. 6)* (the Victorian Workplace Closure directions) were issued. They were successively re-made and were not lifted until 9 November 2020. Clause 7(1) of the first direction provided:

> 7 **Closed Work Premises**
>
> (1) A person who owns, controls or operates a **Closed Work Premises** in the Restricted Area must not permit persons to attend that premises during the restricted activity period.
>
> …
>
> (Original emphasis).

740 The expression "Closed Work Premises" was defined to mean, "a Work Premises that is not a Permitted Work Premises". EWT's premises were not a "Permitted Work Premises".

741 On 30 November 2020, EWT ceased to trade and Mr Coyne was appointed as its liquidator.

742 EWT has made two claims under the QBE policy in relation to two separate periods of time. The first is for the period from the initial closure of the premises on 31 March 2020 to 5 August 2020. That claim was said to be consequent upon the impact of the making of the Overseas Travel Ban. The second is in respect of the period from 6 August 2020 when the Victorian Government made the Victorian Workplace Closure directions until 9 November 2020 when they were revoked. In respect of that latter period, EWT relies upon the impact of both the Overseas Travel Ban together with the Victorian Workplace Closure direction.

Policy wording

743 The EWT policy provides the following cover with respect to business interruption:

Cover

This section insures:

- loss of income during the indemnity period;
- which results directly from the effect on the business of loss or damage to any property which is insured and for which you would have been entitled to indemnity (if no excess had applied) under either:
    - the 'Property, Crime or General property' sections of this Policy (unless otherwise shown), or
    - any other Policy which provides the same insurance cover as provided under these sections of the Policy.
- for the amounts set out below.

You may choose to insure your loss of income in a number of ways:

Cover 1 is for loss of gross income,

…

Cover 3 is for additional cost of working,

…

What we will pay

We will pay the amounts set out below only if you have chosen the relevant cover.

Cover 1. - Gross income

If you have chosen to insure gross income we will pay you:

a. the difference between the standard income and the gross income earned by you during the indemnity period, and

b. any amount that you expend with our consent for the sole purpose of minimising any reduction of gross income as a result of the loss or damage.

However we will not pay any more than the amount by which reduction in gross income is minimised less any expenses saved as a result of the loss or damage.

...

Cover 3. – Additional cost of working

If you have chosen to insure the additional cost of working we will pay the additional expenditure you reasonably incur to minimise the effect of the loss or damage to the business during the indemnity period.

We will not pay any more than the sum insured for additional cost of working shown in the Policy Schedule. This cover is additional to the cover provided under the Property section, additional benefit 'Additional cost of working'.

…

Additional benefits

…

If you have chosen to insure gross income or weekly income under this section, we will also pay the following, provided the sum insured for that cover is not exhausted:

…

3. Prevention of access

The indemnity under this section is extended to include interruption or interference with your business in consequence of:

a. damage by any insured event covered by the Property section to property within a twenty (20) kilometre radius of your premises or to property forming part of or contained in a complex of which the location forms part,

b. bomb threat,

c. closure or evacuation of all or part of the premises by order of a competent government, public or statutory authority as a result of a human infectious or contagious diseases [sic]. However there is no cover for highly pathogenic Avian Influenza or any disease declared to be a quarantinable disease under the *Quarantine Act 1908* (as amended) irrespective of whether discovered at the location of your premises, or out-breaking elsewhere,

d. closure or evacuation of all or part of the premises by order of a competent government, public or statutory authority as a result of:

i. food poisoning, murder or suicide within a twenty (20) kilometre radius of your premises;

ii. vermin or other animal pests at the location;

iii. incorrect operation of drains or other sanitary arrangements at the location;

which shall prevent or hinder the use of your building or access thereto, or results in a cessation or diminution of trade due to temporary falling away of potential customers.

…

(Original emphasis).

744 For the purposes of the business interruption cover, EWT elected cover for loss of gross income and additional cost of working.

The decision at first instance

745 In summary, the primary judge found that both the Overseas Travel Ban and Victorian Workplace Closure directions were the result of COVID-19 within the meaning of cl 3(c) of the QBE policy (PJ [1107], [1115]). However, her Honour also found that the closure of

EWT's premises was not "by order" of a relevant authority within the meaning of that clause (PJ [1123] – [1124]).

746 Her Honour accepted (PJ [1096]) that the Victorian Workplace Closure directions required the closure of EWT's premises because they did not merely prevent business operations from being carried out, but required that EWT "must not permit persons to attend that premises" other than in the limited circumstances identified. That, in effect, was a closure of premises "by order" of a competent authority. Her Honour also accepted (PJ [1097]) QBE's submission that cl 3(c) required a prevention of physical access to premises by persons, but concluded that this requirement was satisfied. In that respect, it was held that the prevention of access itself need not be physical as the required cause was the prevention of physical access. It was further held that there did not need to be prevention of physical access to the whole of the premises, and it was sufficient if the prevention applied to people who would ordinarily be entitled to enter and remain on the premises. As the Victorian Workplace Closure directions had these consequences, there was a closure of the premises "by order".

747 However, importantly for the main ground of appeal, the primary judge concluded (PJ [1108]) that the Overseas Travel Ban did not satisfy the above criteria as, in particular, it did not require the closure of the premises. While it was accepted (PJ [1109]) that the Workplace Closure Directions required the closure of the premises, her Honour also concluded (PJ [1121]) that the requirement only attached to circumstances where the premises would otherwise not be closed. In this case, she concluded (PJ [1119]) that Victorian Workplace Closure directions were not a proximate cause of the closure of the premises as the Overseas Travel Ban remained in force at the relevant times and was the proximate cause of the closure. It was further concluded that the directions did not prevent or hinder the use of the premises because they had already been closed and, furthermore, did not result in a cessation or diminution of trade as it had already been destroyed by the Overseas Travel Ban (PJ [1125] – [1126]).

Closure of premises "by order" – Appeal, Ground 1

748 Ground One of the appeal was that the primary judge erred in determining that the reference in cl 3(c) to a closure "by order of a competent government, public or statutory authority" means a closure "required by" the relevant order as opposed a closure "caused by" it (PJ [1102]).

749 Whilst the above recitation of the primary judge's reasons disclose that her Honour reached the conclusion that the Victorian Workplace Closure directions, which commenced on 5 August 2020, required the closure of the premises and otherwise satisfied the criteria in cl 3(c), the

difficulty for EWT was that, by that time, its operations had been closed for a number of months consequent upon the effect of the Overseas Travel Ban. In order for EWT to succeed, it needed to establish that the Overseas Travel Ban also triggered cl 3(c). That required showing that the closure of the premises consequent upon the ban amounted to a "closure or evacuation of all or part of the premises *by order* of a competent government … authority", a proposition rejected by the learned primary judge.

750 There is no need at this point to set out the primary judge's reasons in detail. The submissions made on appeal reflect those which were made below and the reasoning of the primary judge is referred to as and when needed.

Does "by order" mean "required by"?

751 EWT submitted the primary judge erred by concluding (PJ [1102]) that the expression "by order" when used in the context of cl 3(c) means that closure of the premises was required by the order, in that sense that one of its substantive requirements was that the premises be closed.

752 Mr Slattery QC for EWT accepted that the preposition "by" is capable of a wide range of meanings and that the intended meaning is to be determined by the context in which it appears. However, he submitted that in cl 3(c) it could equally mean "caused by" as much as it might mean "required by". He submitted that the former interpretation of the word "by" is to be preferred because it imports the familiar concept of "proximate cause". In this respect, he submitted that the order of the competent authority was the "dominant", "operative" or "efficient" cause of the closure or led "inevitably" to the closure of the insured's premises as a "natural sequel" or "natural consequence".

753 It is, with respect, not easy to understand why the words of the policy should be so interpreted. The causal nexus of "by order" is not concerned with the connection between the insured loss and the insured peril. It relates to the causal nexus between the elements in the composite insured peril of the closure of the premises and the actions of the relevant authority. As has been discussed previously, there is no reason why the causal nexus used in a composite insured peril, such as a hybrid clause, should be construed in the same manner as would the nexus between the peril and the loss; that is with a predisposition that the cause required is a proximate one. There is no imperative in the construction of that part of the clause to require that the relevant cause be an effective or efficient one. On this occasion where the causal nexus of "by order" is, on its face, more stringent than an efficient cause, it was in the insured's interests to

advance the proposition that the causal nexus should be interpreted as meaning "proximate cause".

754 In support of the above submissions, Mr Slattery QC submitted that courts have expressed a predisposition or preference for adopting proximate cause as the relevant causal relationship in contracts of insurance and have adopted a presumed intention to that effect unless the policy wording otherwise provides. He relied on the observations of the New South Wales Court of Appeal in *Lasermax* [5]. However, in that case, the Court was expressly considering the causal nexuses between the insured loss and the insured peril. It was not concerned with other causal nexus which might connect elements of a composite peril. Mr Slattery QC also referred to *Sheehan* [77]; *FCA v Arch* [168]; *Leyland Shipping Co Ltd v Norwich Union Fire Insurance Society Ltd* [1918] AC 350 at 355, 364; and *Board of Trade v Hain Steamship Co Ltd* [1929] AC 534, but again, each were concerned with the quality of the usual causal nexus between a loss and an insured peril. None were concerned with the causal relationship under consideration.

755 The primary judge was correct to conclude that the context in which the expression "by order" was used indicates that it was intended to be narrower than "caused by". In cl 3(a) where the expression "damage *by* any insured event" is used, it can legitimately be said that "by" means "caused by". However, where the expression is "by order", as it is in cl 3(c) and (d), it signifies that the cause of the closure is to be required by the order itself. As the primary judge concluded (PJ [1102]), the expression "by order" incorporates the requirement that the nature of the order is one mandating the closure, in and of itself, in the sense that it must require the closure of the premises. To read "by order" as simply meaning "caused by" would elide the requirement that the closure or evacuation of the premises be "by" the order. It would, as her Honour observed, have the consequence that the closure may occur as a result of a voluntary decision of the insured in response to some order of an authority which did not actually require the premises to be closed. Were that to be so, it would afford the insured great latitude as to from when the policy would operate and an insurer would face considerable difficulties in going behind the insured's motivation for closing the premises. Mr Slattery QC submitted that this was ameliorated because the order must be the proximate cause of the closure. However, on the construction which he proffered, the causal connection would necessarily be indirect given that it is filtered through the insured's subjective thoughts. It is also wrong to describe the nexus of "caused by" as connoting proximate cause.

756 It was further submitted by EWT that the word "by" in cl 3(c) should have the same meaning given to that word in cl 3(a) where it is used in the expression "damage by any insured event", which was accepted by the trial judge as meaning "caused by". However, to read the clause in that manner would be to ignore the reality that the causal nexus in cl 3(c) is agreed to be "by order", rather than merely "by". To read the clause as submitted by EWT would be to give it a considerably broader operation than the words permit. It would be equivalent of a clause that indemnified against loss in consequence of closure or evacuation "as a result of" or "because of" the order of a relevant authority, whereas by its terms cl 3(c) imposes the additional element that the closure or the evacuation be required by the order itself. Contrary to EWT's submissions, the clause does not include a closure of premises by an insured in response to changed trading conditions caused by an order which does not itself require closure of the premises.

757 The primary judge's construction is supported by the fact that the clause also operates on the "evacuation" of the premises by order of the authority. The physical clearing of persons from premises sits comfortably with the expression "by order", being one which both requires the evacuation of the premises and causes it to occur. It is not natural to speak of premises being evacuated "by order" of an authority where the emptying of people from the premises occurs indirectly as a result of an order which does not specifically require it.

758 In its written submissions, EWT further claimed that its preferred construction was supported by the *contra proferentem* rule on the basis that the words "by order" gave rise to two genuinely available alternative interpretations and that QBE was the profferer of the policy terms. As has been discussed earlier, the *contra proferentem* rule is a rule of construction which applies as a last resort where, after the usual process of construction, there exist two possible meanings of relatively equal weight and real doubt remains as to which is to be preferred. It has no application in the present circumstances where the interpretation accepted by the primary judge is more consistent with the ordinary meaning of the words and the context in which they are used. The rule cannot be used to displace a clearly more correct construction.

Conclusion as to the construction of cl 3(c)

759 It follows that the meaning of the disputed part of cl 3(c) is that the closure or evacuation of all or part of the premises must be the result of an order of a relevant authority which both mandates that the closure occurs and, in fact, causes that to happen. EWT's submissions as to the meaning of "by order" in cl 3(c) must therefore be rejected.

Was the closure "by" the Overseas Travel Ban? – Appeal, Ground 2

760 In relation to Ground 2, EWT submitted that the primary judge also erred by finding that the closure of the premises in late March 2020 was not "by" the Overseas Travel Ban within the meaning of cl 3(c), despite it being a proximate cause of the closure (PJ [1115]).

761 The primary judge held (PJ [1107]) that the Overseas Travel Ban had been made by a competent government authority, being made by the Commonwealth Health Minister under s 477(1) of the *Biosecurity Act*; that a proximate cause of the making of the Overseas Travel Ban was the human infectious disease COVID-19; and the ban was a proximate cause of Mr Camfield's decision to close the premises. However, in accordance with the above reasoning, it was determined that the closure was not "by order" of the ban in the sense that the closure was not required by it.

762 This ground of appeal fails as a consequence of the failure of the first ground.

Was the closure from 6 August 2020 "by order" of the Victorian Workplace Closure directions? – Appeal, Ground 3

763 By this ground, EWT submitted that, on the basis that the expression "by order" in cl 3(c) imposed the requirement that the order must, itself, mandate the closure of premises, and the primary judge accepted that Victorian Workplace Closure directions "required the premises to be closed from 6 August to 9 November 2020", her Honour erred in concluding that the directions did not have the effect of actually closing the premises. The essence of her Honour's reasoning was that, as Mr Camfield had deposed that he had closed EWT's premises on 31 March 2020 as a consequence of the impact of the Overseas Travel Ban on the business, the Victorian Workplace Closure directions, which commenced on 6 August 2020, did not have the effect of closing the premises (PJ [1119] – [1124]).

764 Mr Slattery QC for EWT submitted that, in her reasoning, the primary judge identified that the closure of the premises had to be caused by the order of the government authority and suggested that this involved some "shifting content" of the meaning of the word "by" as used by her Honour and exposed error. It was submitted that if the expression "by order" only meant "required by", then that was satisfied in this case where the relevant directions had that characteristic.

765 However, those submissions proceed upon a misreading of the primary judge's reasons. As identified above, the expression "by order" was construed as requiring both that the order

mandate the closure of the premises and that it, in fact, had that causal effect. Her Honour did not conclude, as EWT's submissions would suggest, that all that was needed was that the order require the closure of premises. It would, with respect, be a strange interpretation of the clause were it to operate when an order stipulated that the premises be closed without actually causing that to occur. That is not a businesslike interpretation. The cover provided is for interruption to the business in consequence of the closure of the premises caused by order of a government authority which mandates that closure to occur, the order being a result of human infectious or contagious disease. It is not cover in respect of orders which have no effect.

766 Mr Slattery QC submitted that the primary judge erred by regarding a closure as a single event occurring once at a particular time, whereas it was, in fact, an ongoing state of affairs which existed so long as the premises were not open. On this basis it was submitted that as of 6 August 2020 and every day thereafter whilst the Victorian Workplace Closure directions were in place and until 9 November 2020, there was a relevant closure of the premises required by those directions. That submission is artificial, based as it is on the misreading of the primary judge's reasons. Here, the Overseas Travel Ban had the consequence that EWT closed its business premises and it did so at the end of March 2020. That ban continued and there was no suggestion that it ceased having a severe, ongoing, detrimental impact on EWT's business. It was not suggested that, despite the continuance of the ban, EWT intended to reopen its premises. As that was the position as at 6 August 2020 when the first Victorian Workplace Closure directions came into effect, it could not be said that the direction had any impact on the use of the premises. It simply did not have any causative effect in relation to the closure at all.

767 Nevertheless, EWT submitted that once the Victorian Workplace Closure directions came into effect, those orders and the Overseas Travel Ban were equal or concurrent proximate causes of the closure of the business with the consequence that cl 3(c) responded in respect of the losses which occurred thereafter. It was submitted that, although the premises may not have been open "but for" the Victorian Workplace Closure directions as a result of the impact of the Overseas Travel Ban, after 6 August 2020 the premises could not have been open "but for" the Overseas Travel Ban, due to the impact of the Victorian Workplace Closure directions.

768 Again, these submissions failed to keep in focus that the issue is as to the cause of the closure of the premises and not the loss consequent upon the closure. As Mr Slattery QC acknowledged during the appeal, this question does not really involve issues of proximate

cause. Properly articulated, the question is whether EWT's premises which were closed by the Overseas Travel Ban were subsequently and thereafter closed "by order" of the Victorian Government as a result of the Victorian Workplace Closure directions. On the basis that the expression "by order" requires both that the order mandate the closure and have that effect, the answer to the question must necessarily be in the negative. The directions did not cause the closure of the premises which were already closed.

769 The primary judge dealt with this issue on the basis on which it was agitated by the parties. Her Honour identified that the ascertainment of the proximate cause of insured loss is an issue of fact and was correct to observe (PJ [1119]) that the search is for the effective, essential or dominant cause of the insured loss, keeping in mind that there may be more than one. The evidence before the primary judge was unequivocal in this respect. The Overseas Travel Ban was the cause of the closure of the premises because it had created a substantial and sustained downturn in EWT's business, a sequelae which had not ceased. When the first Victorian Workplace Closure directions came into effect, they had no impact on the operation of the premises. The premises were closed, had been closed for some time, and there was no prospect of them opening whilst the ban remained in place. On no factual causal analysis could it be said that, "but for" the Victorian Workplace Closure directions, the premises would have been open and, in circumstances such as the present, the satisfaction of the "but for" test was a minimum requirement for establishing causation. Whilst it might be accepted that absent the making and impact of the Overseas Travel Ban, the Victorian Workplace Closure directions would have caused EWT to close its premises, that was not the context in which the direction came into effect.

770 Mr Slattery QC additionally submitted that the Victorian Workplace Closure directions were a concurrent proximate cause of EWT's loss from 6 August 2020 along with the Overseas Travel Ban because they were equally effective causes of the closure after that date. In support of that he submitted that, if both the ban and the directions had been made at the same time and in the same form when the Victorian Workplace Closure directions had been first made, it could not have been said that the latter was not a proximate cause. Whilst that might be accepted, the difficulty is that the scenario postulated tends to support the primary judge's conclusion. Here, the Overseas Travel Ban was made first and its impact had the consequence of closing of the premises. The Victorian Workplace Closure directions took effect much later and could not be said in any way to be "concurrent" with the ban. In the consideration of concurrent proximate causes, there must be simultaneous causes of the loss such as in the example referred to in *FCA*

v Arch at 723 [182], where Lords Hamblen and Leggatt JJSC referred to the example of two hunters who simultaneously shoot a hiker who is behind some bushes and the medical evidence establishes that either bullet would have killed the hiker instantly, even if the other bullet had not been fired. But there is no similarity in the present case where the insured loss was caused by the initial event of the Overseas Travel Ban which continued to keep the premises closed. As the primary judge noted (PJ [1120]):

> … the Overseas Travel Ban (hunter 1) shot and killed the business and then the Victorian Workplace Closure directions (hunter 2) shot the dead body. The sole cause of death is hunter 1, the Overseas Travel Ban. The Overseas Travel Ban was and remained a sufficient cause of the closure. There was no scope for any other cause to operate.

771 No error was shown in the learned primary judge's conclusion that the closure of EWT's premises was not caused by Victorian Workplace Closure directions, and it follows that this ground of the appeal should be rejected.

Did the Victorian Workplace Closure directions prevent or hinder the use of the premises? – Appeal, Ground 4

772 This ground could only have relevance if the appellant succeeded on Grounds 1, 2 and 3 of its appeal. It is that the primary judge erred in concluding (at [1125]) that the Victorian Workplace Closure directions "did not in fact prevent or hinder the use of the premises because the insured had already closed the premises". This submission relied upon the requirement in the tailpiece of cl 3 that the insured perils are of a nature:

> which shall prevent or hinder the use of your building or access thereto, or results in a cessation or diminution of trade due to temporary falling away of potential customers.

773 EWT submitted that the learned primary judge erred by identifying that it was the order that must have the effect of preventing or hindering the use of the building or access thereto or result in a cessation or diminution of trade. Rather, so the submission went, it is the "closure or evacuation of all or part of the premises" which is to have this effect.

774 With respect, this appears to involve a somewhat narrow reading of the primary judge's reasons. It is apparent from the reasoning which had preceded the impugned part of her Honour's reasons that her references to "the order" was shorthand for the closure of the premises effected by the order in question. Even if that were not so, the conclusions reached are not vitiated. The point made by her Honour was that the Overseas Travel Ban had the consequence of destroying EWT's business and the closure of the premises with the consequence that the Victorian Workplace Closure directions could have no relevant effect.

They could not cause the closure of the business which was already closed, they could not have the effect of preventing or hindering the use of the premises which were not being used, they could not result in a cessation or diminution of trade due to temporary falling away of potential customers because the trade had been destroyed, and they could not interrupt or interfere with the business which was effectively defunct to the extent that it operated from the premises: cf. *FCA v Arch* at 740 [243] – [244].

775 It is, with respect, very difficult to identify the point of EWT's submission. In the circumstances, neither the Victorian Workplace Closure directions nor any notional closure nominally caused by it could have any of the consequences prescribed by the tailpiece of the prevention of access clause.

776 EWT further submitted that, although the business closed at the end of March 2020, by reason of the Overseas Travel Ban, the ban did not compel its closure but, as the Victoria Workplace Closure direction required the premises to be closed from 6 August to 9 November 2020, a reasonable business person would understand that legal compulsion to constitute an additional hindrance on EWT's used of its building or access thereto. In this respect, it was submitted that "hindrance" was not synonymous with "prevention" and connoted "something being rendered more difficult" and was something less than "prevent". On that basis it was submitted that the Victorian Workplace Closure directions hindered (if not prevented) the use of EWT's building or access thereto.

777 That submission should also not be accepted. Whilst it may be true that the direction rendered access to the premises unlawful and subject to a penalty if the restriction was breached, it had no actual or real impact on EWT's intended use of the premises. It had closed them and did not require access to or use of them. The matters referred to in the tailpiece of cl 3 are not mere theoretical requirements. They are matters which require satisfaction in fact. In circumstances where the insured was no longer using or intending to use its premises, no order, however stringent, can have the effect of preventing or hindering their use by the insured.

Causation of loss under cl 3 – Appeal, Ground 5

778 By this ground, EWT contends that the learned primary judge erred in her conclusion that the expression "in consequence of" in the chapeau of cl 3 required more than that the insured peril be "a cause" or "a contributing factor" to the relevant business interruption or interference. Her Honour held (PJ [1132]) that expression concerned the causal relationship between the interruption or interference and the insured peril and, whilst it did not contemplate indirect

causation (in the sense of extending to encompass a mere cause of a cause), nor did they require the cause to be an effective, dominant, essential or proximate cause. The essence of EWT's submission is that the primary judge sought to impose a higher degree of causation than the words "in consequence of" required.

779 This issue is a pure question of the proper construction of the expression "in consequence of" in the context in which it is used. It is used as the required nexus between the insured peril and the insured loss. For the reasons which have been set out previously there are logical grounds for requiring that the insured peril be "the efficient cause" of the loss, but it is undoubted that the parties may, by clear words, alter the presumption such that something less or more is required. In this matter, QBE supported the primary judge's interpretation and did not suggest that the expression was limited to the "proximate cause" of the loss. It can be accepted that the primary judge determined the issue as it was advanced by the parties despite the fact that it would not be unusual for the words "in consequence of" as used in cl 3 to impose a requirement of "proximate cause": *FCA v Arch* at 717 [162].

780 In these circumstances, her Honour's conclusion as to the scope of the expression "in consequence of" can be accepted. Importantly, it is consistent with the authorities to which her Honour referred. The expression requires that there be an event which "follows as an effect or a result" of another, although it need not be the dominant cause: *Reseck v Federal Commissioner of Taxation* (1975) 133 CLR 45 at 51, and although requiring causation, "the term 'consequence' — with its emphasis on effect — places less emphasis on the proximity of cause and effect than the term 'cause' may do in various contexts": *Container Handlers* at 107 [45]. So, in an insuring clause, although requiring that there be some causal nexus between the loss and the insured peril, that "nexus is less than a direct or proximate relationship as required by the words 'caused by'": *XL Insurance v BNY Trust Company* at 77,407 – 77,408 [62]. Whilst EWT relied on a number of other authorities in support of the broader interpretation, the meanings of the expression as used in taxation legislation: *McIntosh v Federal Commissioner of Taxation* (1979) 25 ALR 557: or social security legislation: *McAuliffe v Secretary, Department of Social Security* (1991) 23 ALD 284 at 295; *Director-General of Social Services v Hales* (1983) 47 ALR 281 at 300 – 301: are not especially persuasive.

781 With respect, the primary judge's conclusion on this issue is plainly correct. The phrase, "in consequence of", is used in cl 3 as the causal nexus between the insured loss and the insured perils and there are good commercial reasons for reading the clause as requiring real causality

between the insured peril and the loss. It is uncommercial for the insurer to be responsible for every loss which is consequent upon the happening of an insured peril, no matter how tenuous the connection. Conversely, the insured perils in cl 3 are somewhat specific and that narrows the occasions on which the clause will respond. On that basis, it is not difficult to accept the appropriateness of the causal nexus being less than the proximate cause, and the expression "in consequence of" tends to suggest that to have been intended. These reasons further support the construction accepted by the primary judge.

782 Here, in order for cl 3(c) to have any effect the following must occur: (a) there is a relevant disease; (b) as a result of which an order is made by a relevant authority; (c) by which the premises are closed; and (d) the closure prevents or hinders the use of the premises or access to it or results in a cessation or diminution of trade due to temporary falling away of potential customers. It is only the loss which is "in consequence of" this composite peril which is indemnified. In general terms, so long as items (a) and (b) are satisfied, it is the loss which is a consequence (being the effect of) the closure of the premises which hinders its use or access to it or results in a diminution of trade by the fall in customers, which is recoverable under the policy.

783 This was addressed by the primary judge (PJ [1134] – [1138]) who, after considering the cognate discussion in *FCA v Arch* at 748 – 749 [281] – [286], observed that it is only the loss which results from the insured peril which is recoverable and not other losses which are the result of other causes (such as COVID-19 more generally). Her Honour noted that, although EWT used the premises as its administrative centre from which sales were effected, no sales were transacted by persons entering there. For EWT, the Overseas Travel Ban effectively terminated its business by eliminating the demand for tours, but did not do so by closing the premises from which the business was conducted. In that way, the insured peril (the causally effective elements of which were the closure of the premises having the effect of preventing or hindering the use of the premises or of diminishing trade) did not result in EWT suffering an interruption to its business. As her Honour observed, had the Overseas Travel Ban not eliminated the business, EWT could have continued to operate irrespective of the closure of the premises. It was permitted to use the premises for limited purposes and its staff were able to work from home. This reinforced her Honour's conclusion that, even if the Overseas Travel Ban had caused the closure of the premises, the requirement for interruption or interference with the business "in consequence" of the closure would not be satisfied.

784 The necessary conclusion is that, even on the broadest interpretation of "in consequence of", it could not be said that EWT's losses from interference or interruption to its business were "the effect of" or followed from the insured peril. This ground of appeal also fails.

Can the business interruption be "in consequence of" any one or more of the elements of the insured peril? – Appeal, Ground 7

785 It is convenient to deal with Ground 7 of the appeal prior to Ground 6. Each of them covered similar issues, although Ground 7 was broader than Ground 6 and it is fair to say possibly encompasses it entirely.

786 The substance of this ground is that, in applying the relevant causal nexus, the primary judge erred by limiting the requirement of business interruption or interference to the consequence of only one element of the insured peril, relevantly, the "closure" of the premises. So the submission went, the correct causal inquiry, once all the elements of the insured peril were satisfied, was whether the business interruption or interference was suffered in consequence of any one of those three elements. On this approach, the losses which flowed from the outbreak of the disease would be covered even if they were not consequent upon the closure of the business and were caused otherwise than as a result of the closure. This was said to accord with a reasonable businessperson's interpretation of cl 3 and would give it a commercial and businesslike construction.

787 The ramification of this submission is that, if cl 3 responded to EWT's claim, the indemnity for loss was not limited to that which was "in consequence" of the closure of the premises which prevented access to the premises or a diminution in trade (paraphrasing these latter requirements), but extended to the entire effects of the infectious disease which resulted in the government order. It was further submitted that if the Court focused only on the effects of the closure of the premises, the scope of the cover would depend upon issues of timing and the extent of the impact of the underlying infectious disease in a manner in which the reasonable business person would not have understood.

788 In support of this, Mr Slattery QC submitted that as the composite peril requires all three components to be in existence at once, this tells the reasonable reader that all three elements would be affecting the business at once. That, of course, is not correct. The infectious disease which results in an order may not occur near the insured's premises and yet the relevant authority may impose a relevant closure order. This was a common experience in a number of Australian States at the relevant times where, as a consequence of the risk of the spread of

COVID-19, orders were made restricting access to business premises despite the absence of the existence of the virus in the locality of the premises or it otherwise having any impact on the business.

789 Next, it was submitted that, as the occurrence of the infectious disease was logically first in time and was sufficiently serious to warrant government orders, by the time of the happening of the insured peril it would have had far reaching detrimental consequences to the insured's business. From this it was submitted that the reasonable insured would appreciate that damage will be sustained to their business beyond that caused by any closure order and would expect that loss to be within the policy's indemnity. For the reasons identified above, this submission is founded upon a false premise. It is quite possible for orders to cause the closure of a business before the relevant infectious disease has otherwise caused loss. One might expect that once an outbreak of an infectious disease is identified, authorities will usually respond rapidly. It may be that in the extreme example of an international pandemic a perception may change, but it would be unusual to interpret a policy by regard only to its response to exceptional events. Moreover, the clause does not in fact require an occurrence or outbreak of a disease, but merely that the order is made as a result of a disease. It is not correct to assume that in every case a relevant order will be preceded by any significant impact on the insured's business by the underlying disease.

790 It was then submitted that as, the existence of the disease is necessarily the first in time, it can be expected that the business will have sustained damage prior to any closure and that the reasonable reader would conclude that, as diseases are not generally excluded, their effects will be covered. Again, the underlying assumption is misplaced.

791 The fundamental difficulty with these attempts at identifying textual support for the proffered construction is that they completely ignore the causal nexus between the disease, the order, and the closure as well as their required sequence. In effect, it is assumed that the reasonable reader will not regard as relevant the sequence or the causal requirements so evidently present in the clause. That is, they will ignore the words "in consequence of closure or evacuation of … the premises" as well as the tailpiece of cl 3. It is only by this process that the construction advanced by EWT can be sustained.

792 An attempt was made to support the construction by reference to an example consequent upon the presence of vermin at the insured premises in respect of which cover is provided in cl 3 (d). It was submitted that it would be incongruous for cover not to be provided to a person who

voluntarily closes their business as a result of the presence of vermin before an order of an authority is made, but cover would be provided if the insured waited until the order's making. However, as the primary judge observed (PJ [1117]), if the proximate cause of the closure of the business is the existence of vermin, the subsequent making of the order cannot have any relevant causal effect, let alone be the proximate cause of the closure and subsequent loss. The position would be different if the insured, having eradicated the vermin, then sought to reopen only to be prevented by the continuance of the order. At that point the closure order as a result of vermin would be the cause of the business interruption.

793 Mr Slattery QC maintained there was support for this construction in *Hyper Trust (No 1)*. That matter involved four insureds, all of whom operated public houses and held policies of insurance with FBD Insurance. The insureds claimed they were entitled to be indemnified under those policies for loss caused by the interruption to their businesses consequent upon lockdowns which were imposed as a result of the COVID-19 pandemic in Ireland. One relevant extension provided:

> The Company will also indemnify the Insured in respect of (A), (B) or (C) above [the relevant losses] as a result of the business being affected by:
>
> (1) Imposed closure of the premises by order of the Local or Government Authority following:
>
> (a) Murder or suicide on the premises
>
> (b) Food or drink poisoning on the premises
>
> (c) Defective sanitary arrangements, vermin or pests on the premises
>
> (d) Outbreaks of contagious or infectious diseases on the premises or within 25 miles of same.

794 McDonald J observed (at [127]) that parties disagreed as to the nature of the insured peril in extension (1)(d). The insurer had submitted that it was simply the closure of the premises. His Honour considered this to be problematic because it would substantially reduce the extent of any recovery under the policy as the insureds would have to show that the losses suffered by them stemmed from the closure as opposed to the outbreaks of COVID-19 giving rise to the closure. The insureds submitted that the relevant peril was a composite one involving all of the constituent elements of extension (1)(d) being "that the business has been affected by (a) an imposed closure (b) by order of a local or government authority, following (c) an outbreak of infectious disease on the premises or within a 25 mile radius." Of this his Honour said (at [127]):

> If the plaintiffs are right in their contention that extension (1) (d) covers a composite peril, this may enable them, in making their case, to rely on each of these elements of the composite peril as causes of their losses at least for as long as the composite peril continued in existence.

795 His Honour held that the construction favoured by the insured should prevail, stating (at [133]):

> … In the case of extension (1), it is clear, in my view, that what is covered is not an effect on the business by an imposed closure but an effect arising from an imposed closure by an order made by either a local authority or a government authority "*following*" one or more of the specific circumstances described in sub-paras. (a) to (d). While counsel for FBD has sought to characterise the circumstances described in sub-paras. (a) to (d) as restrictions or limitations on the cover available, it seems to me that the more natural and obvious way to describe the matters set out at sub-paras. (a) to (d) is that they constitute words of definition of the relevant risk or peril which is covered. Rather than breaking up the clause in the manner suggested by FBD, it seems to me that the clause needs to be read as a whole. In my view, that is how the clause would be read by a reasonable person standing in the shoes of the parties to these proceedings. … When read in that way, it seems to me that one does not pause at the reference to imposed closure and regard everything which follows as a limitation or restriction on those words. One would read the clause as a whole in order to understand the precise perils which are covered by the extension. FBD is essentially telling the policy holder what it will indemnify under this extension. In order to understand what FBD will indemnify, it is necessary to read the entire extension.

796 His Honour later said (at [177]):

> … In my view, FBD is wrong to suggest that cover is only available in respect of losses proximately caused by imposed closure. That fails to describe the full terms of the peril which is described in extension (1) (d). As explained above, that peril is a composite one which involves both an imposed closure and an outbreak of infectious disease which is a cause (in the manner outlined above) of the imposed closure. All of the elements of the composite peril must be borne in mind.

797 EWT also relied on his Honour's later observations at [215]:

> In the course of the hearing, it was accepted by all parties to these proceedings that, in identifying the appropriate counterfactual it is necessary to strip out the insured peril. … In this context, having regard to the terms of extension (1) (d), it is clear that the peril envisages outbreaks of an infectious or contagious disease which are sufficiently serious to warrant intervention by the authorities by means of an order to close public houses within a 25 mile radius. For as long as the closure endures, the outbreaks are an inherent element of the peril and, for that reason, it seems to me that, for the duration of the period of closure, both the closure and the effects of outbreaks of the disease must be stripped out of the counterfactual. Whether that involves a stripping out of all of the effects of the disease or only the effects of the outbreaks within a 25 mile radius is a separate question.

798 It is apparent from his Honour's reasons (at [127]) that he was concerned that the insurer's contested construction of the policy would restrict recovery to losses which arose as a result of the closure of the premises and that the insured would be denied recovery if the effect of the infectious disease in the community would have caused the loss in any event. In essence, his

Honour encountered the same difficulty as had the Supreme Court in *FCA v Arch* in relation to business interruption cover based on localised cause not responding to loss caused by events of much greater magnitude. Whereas the Supreme Court had resolved this by the adoption of the "underlying fortuity" principle, McDonald J steered a different course. (The decision in *FCA v Arch* was delivered only three weeks prior to the publication of his Honour's reasons in *Hyper Trust (No 1)*). His Honour held that, if the peril was a composite one, it had the advantage that the insured was entitled to recover for losses caused by any of the elements regardless of whether the loss flowed from the closure of the business.

799 This particular point of contention arises in relation to two issues. First, the insured may only recover loss proximately caused by the insured peril and, secondly, in business interruption policies, the amount of any indemnity is reduced by the operation of "trends" clauses. In relation to the first, the usual rule is that if it cannot be said that the insured's loss would not have occurred "but for" the insured peril, in the sense that the loss would have occurred for other reasons, the peril cannot be said to have caused the loss. In respect of the clauses under consideration (and in respect of those in cognate cases), the insurers have submitted that the policies do not respond because the insured would have suffered the losses caused by the closures ordered by authorities by reason of the pre-existing general impact of COVID-19 on the businesses. One method of avoiding that consequence is to identify the relevant counterfactual for the purposes of assessing causation as one in which each element of the composite insured peril is "stripped out". If the insured peril is taken to include each and every element of the composite peril (as if an insured peril of its own), the counterfactual will be a scenario which is absent of the effects of COVID-19. On the other hand, if a narrow view is taken of the insured peril (being the closure of the premises), the counterfactual would include the effects of COVID-19 and, thereupon, may deny any substantive causative effect from the peril. In *FCA v Arch* the Supreme Court found that the underlying fortuity principle provided a safe passage between Scylla and Charybdis.

800 In trends clauses, the amount of any indemnity is often reduced by reference to those matters which would have affected the insured's business "but for" the occurrence of the insured damage. If then, the insured peril is narrow (in *Hyper Trust (No 1)*, the closure of the premises by the local authority's order) those circumstances which would be taken into account to reduce the amount of indemnity would include the detrimental effects of COVID-19 generally. If, on the other hand, the insured peril was identified broadly, such as including the existence of COVID-19, its effects would not be taken into account so as to reduce the amount of the

indemnity. Rather than adopt the "underlying fortuity" principle favoured by the UK Supreme Court in *FCA v Arch*, McDonald J adopted the unique approach of construing the composite insured peril as covering any loss caused independently by any element of the insured peril. This approach appears to have been adopted from the first instance decision in *Financial Conduct Authority v Arch Insurance (UK) Ltd* [2020] EWHC 2448, where the conclusion was reached in relation to a similar clause that the insured was indemnifying itself from being in a situation in which all elements of the clause were present, which apparently carried with it the notion that each of the elements might then individually give rise to indemnifiable loss. The consequence of adopting this approach in *Hyper Trust (No 1)* was that the loss caused by the insured peril was not negated by a counterfactual which included the presence of COVID-19: at [215]. That element was "stripped out" of the counterfactual as being part of the insured peril. McDonald J also adopted the proposition identified in *FCA v Arch* and *JJ Lloyd Instruments Ltd v Northern Star Insurance Co Ltd (The 'Miss Jay Jay')* [1987] 1 Lloyd's Rep 32 to the effect that where there exist two concurrent proximate causes, one of which is insured and the other not, but not excluded, the concurrent proximate cause is also excluded in the counterfactual for the purpose of identifying the loss caused by the insured peril. His Honour concluded (at [220]) that, to the extent that COVID-19 may be a concurrent proximate cause of the plaintiff's losses alongside the closures caused by the locally occurring outbreak of COVID-19, that concurrent factor must also be stripped out of any counterfactual. His Honour adopted the same approach (at [236]) in relation to the trend clauses in that case.

801 It can be accepted that a similar approach was identified by the minority in *FCA v Arch* (Lord Briggs JSC with whom Lord Hodge DPSC agreed) (at 756 – 758 [317] – [324]). Their Lordships' *obiter* on this topic does not, with respect, add much to the discussion.

802 Mr Slattery QC submitted that this approach should be applied in the present case and that the sequential and composite insured peril can be dissected into its separate integers or elements, each of which may then provide a separate peril in respect of which an indemnity can arise. So the submission went it would follow that, if cl 3(c) applied in a particular case it would provide cover for all losses suffered by the insured regardless of whether they were caused by the closure of the premises. With the greatest respect, this amounts to a rewriting of the clause. As indicated above, the clause only operates where there has been (A) an infectious or contagious disease, as a result of which (B) an order is made by the relevant authority which (C) requires and causes the closure of the premises (D) which prevents or hinders the use of or access to the building or results in a cessation of trade due to a temporary falling away of

potential customers, (E) in consequence of which there is interruption or interference with the business. That is symbolically represented as A→B→C→D→E in which the arrow between D and E represents the causing of loss. On the approach advanced by Mr Slattery QC, so long as those elements have occurred, the indemnity will extend to loss flowing from the general effects of the infectious disease regardless of the other elements; that is A→E.

803 A useful example of the difficulty which arises by the adoption of this approach can be derived from the primary judge's reasons (PJ [1134]) where her Honour considered the scenario identified by the majority in *FCA v Arch* at 748 – 749 [281] – [286]. In that example, an insured has two sources of business, one is affected by an insured peril (restriction of access consequent upon COVID-19) although the other, being web-based sales, is not but is adversely affected by the occurrence of COVID-19. On the approach adopted by the Supreme Court and the primary judge, the indemnified loss is limited to that which flowed from the consequences of the insured peril and the indemnity does not extend to the loss from the web-based business. However, on the approach advanced by Mr Slattery QC, while the insured peril is occurring (being a restriction of access as a result of COVID-19) any losses flowing from the occurrence of the pandemic are recoverable regardless of whether they are caused by the closure of the premises. Such a result strongly suggests that the construction adopted has re-written the policy terms.

804 A further difficulty with the proposed construction is that it appears to permit recovery by the insured in respect of all losses caused by any element of the composite insured peril regardless of how long prior to the manifesting of the insured peril that damage was caused. With respect, that would be a rather bizarre result. It may be that the construction advanced by EWT was to apply in circumstances where the effect of COVID-19 generally and the consequences of a closure order occurred simultaneously, as seemed to be the scenario underlying the observations of McDonald J in *Hyper Trust (No 1)*. Or it may be that the damage from COVID-19 generally is only available once all elements of the peril have occurred. However, if that is to be the intended result there is no mechanism in the policy which supports it.

805 There is, with respect, no commercial rationale for a reading of cl 3 which would have the result that EWT would be indemnified for losses which it sustained other than in consequence of the occurrence of the insured peril, which includes the closure of the premises.

806 Moreover, whatever may be the result where there exists simultaneous and concurrent causes of loss with one being a proximate cause covered by the policy, that can have no relevance to the circumstances of the present case where the uninsured peril of the Overseas Travel Ban had

already occasioned the destruction of EWT's business prior to the occurrence of the insured peril. On EWT's case, once the closure orders were made, it was entitled to recover all the losses consequent upon the presence of COVID-19, including as occasioned by the Overseas Travel Ban regardless that, of itself, it could not give rise to indemnified loss and regardless that the insured peril did not occasion loss. No valid construction of the policy could orchestrate such a result.

807 It follows that the construction of cl 3(c) proffered by EWT as the foundation of Ground 7 should be rejected with the consequence that this ground also must fail.

Did the Overseas Travel Ban cause an interruption or interference with EWT's business? – Appeal, Ground 6

808 By this ground EWT asserted that the primary judge erred by concluding that, even if the Overseas Travel Ban caused the closure of the premises, and thus satisfied cl 3(c), the requirement for interruption or interference with the business in consequence of the insured peril was not satisfied (PJ [1138]). This ground is partially dealt with above and relates to the construction of the expression "in consequence of" as specifying a relational effect between the insured peril and the loss. However, as EWT's written submissions reveal, it is also centrally dependent upon the adoption of the construction contended for in Ground 7. Necessarily, this ground also fails as a result of the rejection of Ground 7.

Interest under s 57 of the *Insurance Contracts Act* – Appeal, Ground 8

809 The operation of s 57 of the *Insurance Contracts Act* had been dealt with earlier in these reasons. As EWT failed on its primary grounds of appeal, it follows that QBE is not liable to pay any amount to its insured and, therefore, it cannot be concluded that s 57 applies. This is, in part, for different reasons to those expressed by the primary judge. In the circumstances, the appropriate course is to amend the primary judge's answer to the relevant question to: "Unnecessary to answer".

Answers to the questions posed – Appeal, Ground 9

810 Apart from the primary judge's answer to the question relating to interest, no other change is required to the primary judge's answers to the questions posed by the parties.

QBE's cross-appeal and notice of contention; EWT's notice of contention

811 QBE cross-appealed in relation to the primary judge's conclusion that s 61A of the *Property Law Act (Vic)* did not apply to the reference to "the *Quarantine Act 1908* (as amended)" in the

EWT policy and that, therefore, the exclusion in cl 3(c) did not apply in the circumstances. The inapplicability of s 61A to references to a Commonwealth Act in the policies has been considered earlier in these reasons, as has the conclusion that the *Biosecurity Act* was not a re-enactment with modifications of the repealed *Quarantine Act*. Each of those conclusions has the consequence that QBE's cross-appeal and notice of contention fail. It is also not necessary to consider the issues raised by EWT's notice of contention.

PROPOSED ORDERS ON THE APPEAL

812 The result of the foregoing is that the appeal be allowed in part and that there be a slight variation to the answers given by the primary judge. The orders should be as follows:

1. The appeal be allowed in part.

2. The cross-appeal be dismissed.

3. The primary judge's answers to the questions posed by the parties be amended as follows:

Property Law Act

1. Does section 61A of the *Property Law Act 1958* (Vic) apply to the policy, such that the reference to the repealed *Quarantine Act 1908* (Cth) is to be construed as a reference to the *Biosecurity Act 2015* (Cth), and such that a disease determined to be a "listed human disease" under the *Biosecurity Act 2015* (Cth) falls within the scope of the exclusion from cover for business interruption?

No.

Prevention of access (POA) extension (page 12)

2. Was there "closure or evacuation of all or part of the [insured's] premises" within the meaning of the policy?

No.

3. If the answer to 2 is 'yes', was it due to any one or more of the directions as set out in Annexures A and B of the Statement of Agreed Facts?

No.

4. If the answer to 3 is 'yes', was it an order by a competent government, public or statutory authority as a result of a human infectious or contagious disease?

This does not arise, but if it did arise all of the actions on which EWT relied were orders of a competent government, public or statutory authority as a result of a human infectious or contagious disease.

5. If the answer to 3 and 4 is yes, did the "closure or evacuation of all or part of the premises":

(a) prevent or hinder the use of the insured's building or access thereto;

or

No.

(b) "result in" a cessation or diminution of trade "due to" the temporary falling away of potential customers?

No.

6. Was there "interruption or interference with" the insured's business within the meaning of the policy?

No.

7. If the answer to 6 is yes, was the interruption or interference "in consequence of" closure or evacuation of all or part of the premises within the meaning of the policy?

No.

Loss

8. Whether, having regard to the answers to issues 1 – 7 above, the Policy responds to EWT's claim for indemnity.

No.

Concurrent Causes

9. If the answer to issue 8 is "yes", whether:

(a) the appropriate counter-factual for the purposes of the "Standard Income" definition in the Policy may take into account the presence and effect of COVID-19 as relevant circumstances, so that any payment to be made reflects the results that but for the insured events, would have been obtained during the relevant period (less any expenses saved as a result of the loss or damage); or

This does not arise.

(b) to the extent EWT suffered loss that was caused concurrently by events or circumstances referable to the outbreak of COVID-19 other than as a consequence of the matters set out in 2 to 7 above, the Prevention of Access Extension in the Policy covers EWT for the loss resulting from any such concurrent causes of that loss.

This does not arise.

Interest

10. Is interest under section 57 of the Insurance Contracts Act payable? If so from what date is interest payable?

~~*This does not arise, but it would not be unreasonable for QBE to withhold payment unless and until it is finally determined to be liable to make payment in this proceeding.*~~

Unnecessary to answer.

4. The appeal otherwise be dismissed.

5. There be no order as to costs.

I certify that the preceding seven hundred and sixty-six (766) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices Derrington and Colvin.

Associate:

Dated: 21 February 2022