FEDERAL COURT OF AUSTRALIA

Rockment Pty Ltd t/a Vanilla Lounge v AAI Limited t/a Vero Insurance

[2020] FCAFC 228

File number:	VID 481 of 2020
Judgment of:	**BESANKO, DERRINGTON AND COLVIN JJ**
Date of judgment:	18 December 2020
Catchwords:	**INSURANCE** – exclusions – construction – clause poorly worded – construction by reference to purpose and context **INSURANCE** – business interruption – exclusion concerning disease – triggered by declaration under *Biosecurity Act 2015* (Cth)
Legislation:	*Biosecurity Act 2015* (Cth) ss 9, 42, 475, 476, 477, 478 *Emergency Management Act* 2004 (SA) ss 23, 25 *Public and Environmental Health Act 2011* (NT) ss 52, 53 *Public Health Act 1997* (ACT) ss 120, 121 *Public Health Act 1997* (Tas) ss 16, 17 *Public Health Act 2005* (Qld) ss 319, 327, 345 *Public Health Act 2010* (NSW) ss 7, 8, 9 *Public Health Act 2011* (SA) s 92 *Public Health Act 2016* (WA) ss 157, 179-191 *Public Health and Wellbeing Act 2008* (Vic) ss 189, 190, 198, 199, 200
Cases cited:	*Arbuthnott v Fagan* [1996] LRLR 143 *Australian Aviation Underwriting Pty Ltd v Henry* (1988) 12 NSWLR 121 *Charter Reinsurance Co Ltd v Fagan* [1997] AC 313 *Evolution Precast Systems Pty Ltd v Chubb Insurance Australia Ltd* [2020] FCA 1690 *Franklins Pty Ltd v Metcash Trading Ltd* (2009) 76 NSWLR 603 *Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd* [2001] EWCA Civ 1047 *HDI Global Specialty SE v Wonkana No. 3 Pty Ltd* [2020] NSWCA 296 *McCann v Switzerland Insurance Australia Ltd* (2000) 203 CLR 579

	Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd (2015) 256 CLR 104 *Onley v Catlin Syndicate Ltd (as the underwriting member of Lloyd's Syndicate 2003)* (2018) 360 ALR 92 *Re Golden Key Ltd* [2009] EWCA Civ 636 *Walton v National Employers' Mutual General Insurance Association* [1973] 2 NSWLR 73
	Derrington D and Ashton R, *The Law of Liability Insurance* (3rd ed, LexisNexis, 2013) Herzfeld P and Prince T, *Interpretation* (2nd ed, Thomson Reuters, 2020)
Division:	General Division
Registry:	Victoria
National Practice Area:	Commercial and Corporations
Sub-area:	Commercial Contracts, Banking, Finance and Insurance
Number of paragraphs:	71
Date of hearing:	27 November 2020
Counsel for the Applicant:	Mr G Watson SC with Mr D Klempfner
Solicitor for the Applicant:	LGM Advisors
Counsel for the Respondent:	Mr J Kirk SC with Mr D Lloyd SC and Mr T Warner
Solicitor for the Respondent:	King & Wood Mallesons

ORDERS

VID 481 of 2020

BETWEEN:	**ROCKMENT PTY LTD (ACN 075 409 700) TRADING AS VANILLA LOUNGE** Applicant
AND:	**AAI LIMITED (ACN 005 297 807) TRADING AS VERO INSURANCE** Respondent

ORDER MADE BY:	**BESANKO, DERRINGTON AND COLVIN JJ**
DATE OF ORDER:	**18 DECEMBER 2020**

THE COURT ORDERS THAT:

1. As to the question:

> Is it sufficient to exclude coverage under the exclusion in clause 8 in section 5 of Insurance Policy SPX015934895 if the claim is for loss or damage that is directly or indirectly caused by or arises from, or is in consequence of, or contributed by a human disease specified in a declaration of a human biosecurity emergency under the *Biosecurity Act 2015* (Cth)?

Answer: "No".

2. The costs of and incidental to the determination of the separate question be costs in the cause.

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

REASONS FOR JUDGMENT

THE COURT:

INTRODUCTION

1 This is the determination of a separate question in proceedings brought by Rockment Pty Ltd trading as Vanilla Lounge (Rockment), for indemnity under a policy of insurance which it held with AAI Limited trading as Vero Insurance (Vero). Rockment seeks indemnity in respect of business interruption losses which it claims it suffered following certain lockdowns imposed by the State of Victoria in response to the COVID-19 pandemic. The question, which concerns the construction of an exclusion in the policy, is as follows:

> Is it sufficient to exclude coverage under the exclusion in clause 8 in section 5 of Insurance Policy SPX015934895 if the claim is for loss or damage that is directly or indirectly caused by or arises from, or is in consequence of, or contributed by a human disease specified in a declaration of a human biosecurity emergency under the *Biosecurity Act 2015* (Cth)?

2 For the reasons which follow, the question ought to be answered "no".

THE CONTEXT OF THE SEPARATE QUESTION

3 The following facts, which appear to be uncontroversial between the parties, are relevant for the purpose of contextualising the separate question.

4 Rockment was at all relevant times the owner of a café and restaurant which traded under the name, "Vanilla Lounge", from premises in the State of Victoria.

5 Relevantly, it held a policy of insurance with Vero for the period from 6 June 2019 to 6 June 2020 (the Policy). The Policy included business interruption cover. That cover provided indemnity for, *inter alia*, any reduction in gross profit "arising from the business being interrupted directly by sudden and unforeseen loss or damage caused by one or more insured events numbered 1 to 12 below occurring during the period of insurance". Event 8 was headed "Infectious diseases, murder, suicide". Under that part of the Policy and following the words, "What we cover", the terms of the insuring clause included the following:

> **Loss** or **damage** as a result of the closure or evacuation of the whole or part of the **premises** by order of a competent government, public or statutory authority as a result of:
>
> (a) infectious or contagious human disease occurring at the **premises**;
>
> …

(d) the outbreak of a notifiable human infectious or contagious disease occurring within a twenty (20) kilometre radius of the **premises**;

(Emphasis in original).

6 Immediately following that paragraph and under the heading, "What we do not cover", was the following:

> **We** will not pay any claim that is directly or indirectly caused by or arises from, or is in consequence of or contributed by:
>
> (a) cleaning, repairing or checking **your premises**; or
>
> (b) highly pathogenic Avian Influenza or any biosecurity emergency or human biosecurity emergency declared under the Biosecurity Act 2015 (Cth), its subsequent amendments or successor, irrespective of whether discovered at the **premises** or the breakout is elsewhere.
>
> (Emphasis in original).

In this clause (referred to as the Exclusion), the causal connection between the claim and the identified causes of loss is cast in wide terms, which accords it an extended operation. The nexus "arises from" and "in consequence of" both require a causal connection, but that connection may be remote. For convenience, the causal connection required by the Exclusion will simply be referred to by the generic expression, "caused by", whilst recognising that it does not accurately express the width of connection used in the clause.

7 As is now well known, in December 2019, the World Health Organisation was informed of the detection of pneumonia of an unknown cause in Wuhan City, Hubei Province in China.

8 On 21 January 2020, a determination was made under s 42(1) of the *Biosecurity Act 2015* (Cth) (*Biosecurity Act*) that "human coronavirus with pandemic potential" was a "listed human disease" within the meaning of that Act, because it was considered that it may be communicable and may cause significant harm to human health.

9 On 25 January 2020, a case of the 2019 novel coronavirus was confirmed in a visitor to Victoria who had travelled from China and, on 15 March 2020, the first case of community transmission of COVID-19 in Victoria was detected. A state of emergency was declared in that State on 16 March 2020, pursuant to the *Public Health and Wellbeing Act 2008* (Vic) (*Public Health and Wellbeing Act*) in response to a serious risk to public health from COVID-19. That state of emergency was extended on several occasions.

10 On 18 March 2020, the Governor-General of the Commonwealth issued the "Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Declaration

2020" pursuant to s 475 of the *Biosecurity Act*, declaring that a "human biosecurity emergency" existed in Australia. As required, the declaration identified the emergency and the conditions giving rise to it in the following terms:

> **6 Nature of human biosecurity emergency and conditions that gave rise to it**
>
> Human coronavirus with pandemic potential is an infectious disease:
>
> (a) that has entered Australian territory; and
>
> (b) that is fatal in some cases; and
>
> (c) that there was no vaccine against, or antiviral treatment for, immediately before the commencement of this instrument; and
>
> (d) that is posing a severe and immediate threat to human health on a nationally significant scale.

11 Whilst the making of the declaration enlivened powers under the *Biosecurity Act* by which the Commonwealth Minister for Health might impose restrictions on human activity, there was no relevant exercise of that power in this case.

12 Following the making of the declaration, a number of directions were made by the Victorian Chief Health Officer under the *Public Health and Wellbeing Act*, limiting human activity across Victoria. For present purposes, it can be assumed that the effect of the directions was that Rockment was required to limit the operations of the Vanilla Lounge whilst the directions remained in force. It can be concomitantly assumed that it suffered a decline in gross profit. These are matters on which findings are not required for the purpose of answering the separate question.

13 On 14 April 2020, Rockment notified Vero that it intended to make a claim on its business interruption cover.

14 On 4 May 2020, Vero advised that it declined cover under the policy by reason of, *inter alia*, the Exclusion.

CONSIDERATION

15 This Court has been asked to identify the causal factor in the Exclusion. The candidates are found in the meaning of the expression "or human biosecurity emergency declared under the *Biosecurity Act 2015* (Cth)". In broad terms, if the causal factor is confined to the declaration made under the *Biosecurity Act*, the Exclusion may have a limited operation, but if it means the emergency, the circumstances giving rise to the emergency, or, as Vero submitted, the listed human disease underlying the emergency, it is likely to have a significantly wider effect.

16 A cognate and sequential, but distinct, issue is based on the fact that the order for the lockdown which caused the claim was made by a different entity from that which made the declaration. The former was State, while the latter was Federal. Nevertheless, if the claim was caused by a lockdown which was in effect caused by an emergency of the specified kind, the chain of causation would link the claim to the emergency of the specified kind, irrespective of the entity that ordered the lockdown. In the circumstances by which this matter was brought before the Court, the parties have asked that this latter issue not be determined, and nothing in these reasons ought to be regarded as doing so.

The parties' contentions

17 Vero had the burden of proof in relation to the Exclusion's operation. Its submissions tended to vacillate. Its primary contention was that the trigger of the clause's operation was loss caused by the existence of a listed human disease which formed the basis of a declaration of a human biosecurity emergency under the *Biosecurity Act*. In the alternative, it advanced a wider submission that the Exclusion operated when the claim was caused by the state of affairs which constituted the human biosecurity emergency which was declared under the *Biosecurity Act* and was therefore a causal source of the claim.

18 To the contrary, Rockment submitted that the language of the causation trigger required by the Exclusion is the making of a declaration of a human biosecurity emergency and that the declaration here did not cause the lockdown and the consequent claim. It argued that the emergency which is necessary to trigger the Exclusion exists only once it is declared to be such and it is not distinct from the declaration itself. The consequence of this interpretation would be that the Exclusion operates only where the loss or damage is causally consequential upon the making of the declaration under the *Biosecurity Act*. So, the submission went, once a declaration is made, the Federal Minister for Health may impose requirements and give directions under the *Biosecurity Act* and it is the loss or damage suffered as a result of closures from these exercises of power which is excluded. Here, it submitted its claimed loss was a consequence of directions made under the State *Public Health and Wellbeing Act*, which rendered it unlawful for it to continue to trade and caused a diminution in its gross profit. Because it was not a loss consequent on or caused by the declaration, it was argued, such loss is not within the scope of the Exclusion.

19 Thus, the argument had two limbs: first, that the causal factor required by the Exclusion was the declaration; and second, that the declaration did not cause the claim as the Exclusion

requires. The second proposition obviously depends on a favourable answer to the first, but it is necessary to keep in mind that the second issue is not one on which the parties have, in this application, sought a determination.

Interpretation of the Exclusion

20 It is useful to repeat the relevant words of the Exclusion:

> any claim that is directly or indirectly caused by … any biosecurity emergency or human biosecurity emergency declared under the Biosecurity Act 2015 (Cth) …

21 *Prima facie*, this clearly refers to the cause of the claim as an emergency which is identified as one which is declared under the *Biosecurity Act*, yet neither of the parties adopted that, at least in the first instance, as their preferred construction.

Relevance of the Biosecurity Act

22 The Exclusion adopts the expressions "biosecurity emergency" and "human biosecurity emergency" as circumstances which are declared under the *Biosecurity Act*. By doing so, the parties couched their rights and obligations under the Exclusion by reference to that Act, which necessarily becomes part of its context. It follows that reference to it is permissible for the purposes of construing the policy and, in the course of the hearing, each party referred to various parts of it to support its construction. Some of the more relevant provisions are set out below. Others are discussed later in these reasons.

23 Section 9 relevantly provides the following definitions:

> ***human biosecurity emergency*** means a human biosecurity emergency that is declared to exist under subsection 475(1).
>
> ***human biosecurity emergency declaration*** means a declaration made under subsection 475(1).
>
> ***human biosecurity emergency period*** means the period specified under paragraph 475(3)(c) in a human biosecurity emergency declaration as the period during which the declaration is in force.
>
> ***human disease*** means a disease that has the potential:
>
> (a) to enter Australian territory or a part of Australian territory, or to emerge, establish itself or spread in Australian territory or a part of Australian territory; and
>
> (b) to cause harm to human health.
>
> ***listed human disease*** has the meaning given by section 42.

24 Subsections 42(1) and (2) provide:

42 Listing human diseases

(1) The Director of Human Biosecurity may, in writing, determine that a human disease is a ***listed human disease*** if the Director considers that the disease may:

(a) be communicable; and

(b) cause significant harm to human health.

(2) Before making a determination under this section, the Director of Human Biosecurity must consult with:

(a) the chief health officer (however described) for each State and Territory; and

(b) the Director of Biosecurity.

25 Subsections 475(1) and (3) provide:

475 Governor-General may declare that a human biosecurity emergency exists

(1) The Governor-General may declare that a human biosecurity emergency exists if the Health Minister is satisfied that:

(a) a listed human disease is posing a severe and immediate threat, or is causing harm, to human health on a nationally significant scale; and

(b) the declaration is necessary to prevent or control:

(i) the entry of the listed human disease into Australian territory or a part of Australian territory; or

(ii) the emergence, establishment or spread of the listed human disease in Australian territory or a part of Australian territory.

Requirements for human biosecurity emergency declaration

(3) A human biosecurity emergency declaration must specify:

(a) the listed human disease to which the declaration relates; and

(b) the nature of the human biosecurity emergency and the conditions that gave rise to it; and

(c) the period during which the declaration is in force.

Note 1: The listed human disease specified under paragraph (3)(a) is the ***declaration listed human disease*** (see section 9).

Note 2: The period specified under paragraph (3)(c) is the ***human biosecurity emergency period*** (see section 9).

26 On the making of a declaration, the Minister is given wide powers under the *Biosecurity Act* pursuant to which enforceable "requirements" or "directions" may be given to prevent or control the spread of the listed human disease: see ss 477 and 478 of the *Biosecurity Act*. The power extends to limiting the movement of persons, goods or conveyances and the closure of premises or the prevention of access thereto.

The text of the words used in the Exclusion

27 Turning to a consideration of the text of the cover and Exclusion, it is apparent that there are several indicators which support, to a greater or lesser degree, a construction that the expression "human biosecurity emergency declared under the Biosecurity Act" means that state of affairs which underpinned the making of the declaration. They are:

(a) The word "declared" is used to qualify the relevant subject of the Exclusion, being the "human biosecurity emergency", and it has been used in contradiction to "declaration";

(b) The cover operates with respect to loss arising from any governmental imposed closure and it would be incongruous if the Exclusion were limited to closures imposed by the Commonwealth;

(c) The reference to the amendments and successor to the *Biosecurity Act* tends to support, albeit only slightly, a wider construction than the narrow one advanced by Rockment; and

(d) The concluding words of the Exclusion are inconsistent with the touchstone of the clause being the declaration itself.

28 It is appropriate to consider each of these factors in turn.

The use of the word "declared" in the Exclusion

29 The competing constructions centre on the use of the word, "declared", in the phrase "any … human biosecurity emergency declared under the Biosecurity Act". Outside the *Biosecurity Act*, the expression "human biosecurity emergency" possibly has a comprehensible meaning. The defined meaning of human biosecurity emergency declaration under the *Biosecurity Act* is a declaration made under subsection 475(1), which suggests that the subject, a human biosecurity emergency, exists only when the emergency is declared to exist. Conversely, the wording of the Exclusion appears to assume the emergency's existence prior to the declaration of it being made. The distinction between an emergency and its declaration is clear. However, it is their relationship according to their expression in the Exclusion which is critical.

30 The simple language of the Exclusion indicates that the object of its reference to causation and consequence is an emergency. The Exclusion does not say that it excludes a claim caused by or consequent on a declaration. The ordinary grammatical meaning of the words used do not carry any indication that the subject is the making of a declaration under the *Biosecurity Act*. Had that been the intention, the clause would have used the words "or any declaration of a

human biosecurity emergency" and that is something quite different. The choice of an emergency as the causal factor in the Exclusion is perfectly logical, since a mere declaration without further consequential steps would hardly, if ever, cause loss to the insured, whereas the presence of an emergency which merits a declaration could certainly do so in several ways.

31 Despite the parties' submissions, the phrase should not be fragmented. It should be read as a whole so that the cause of the claim necessary to trigger the Exclusion is an emergency declared under the *Biosecurity Act*. It is an emergency, but only if it has been declared. The existence of a listed human disease is necessary, albeit not alone sufficient. Nor is it sufficient that it poses a severe and immediate threat, or is causing harm to human health on a nationally significant scale, although that element is required. Also required is that the circumstances of the emergency are such that the declaration is necessary to prevent or control either the entry into Australia of the disease or its emergence, establishment or spread once here. The presence of these characteristics makes possible the making of the declaration which, itself, is also necessary.

32 This construction is perfectly reasonable and straightforward if it is understood that the Exclusion would not be intended to apply to every emergency, but only to those which are serious enough to warrant a declaration under the *Biosecurity Act*, where the magnitude of the risk to the insurer could be very substantial and less capable of anticipation and pre-assessment. In this way, the reference to a declaration is a limiting description of the emergencies to which the Exclusion applies.

33 In summary, this interpretation accords with the understandable use of the word "declared" to characterise the expression "human biosecurity emergency". The declaration is, however, a necessary requirement to limit the nature of the emergency which, in the terms of the Exclusion, is causative of the making of the claim. It adopts the declaration as a benchmark of the types of human biosecurity emergencies which will trigger the Exclusion.

34 It follows that consideration of the ordinary meaning of the words and specifically the use of the word "declared", indicates that the Exclusion operates on the existence in Australia of an emergency in the form of a human disease in circumstances of such seriousness that it becomes the subject of a declaration by the Governor-General under s 475 of the *Biosecurity Act*.

35 Here, the relevant declaration identified the listed human disease to which it related as being "[h]uman coronavirus with pandemic potential". Under the heading "Nature of human

biosecurity emergency and conditions that gave rise to it", the declaration identified that the disease had entered Australia, was fatal in some cases, that there was no vaccine against it or antiviral treatment for it at the time of the declaration, and it posed a severe and immediate threat to human health on a nationally significant scale. This is an apt description of the human biosecurity emergency in respect of which the declaration was made, and it is probably not necessary to attempt to distinguish between the emergency and the circumstances which gave rise to it, as the emergency is, itself, a state of affairs or circumstances which have emerged suddenly and necessitate urgent and immediate action.

36 In part, it was submitted on behalf of Vero that its interpretation (that the relevant event was the listed human disease), sets the relevant occurrence for the operation of the Exclusion on an objective basis rather than, say, the opinion of the insurer as to the seriousness of an infectious disease. Whilst it may not be useful to divert attention to the myriad alternative circumstances on which the clause might operate, it is true that a construction which connects the operation of the Exclusion to an objectively discernible fact has a degree of commercial rationality. But that is not what the Exclusion says, which is the primary consideration. In any event, a construction which identifies the relevant causal element as being the emergency state of affairs which is the subject of a declaration also attaches to an objective element.

The relevant loss-causing closure can be by any government

37 It is useful to reflect first on the overall nature of the language insofar as it applies to this issue and in the light of the above finding that the triggering causal factor of the Exclusion is an emergency which has been declared under the Commonwealth Act. It must be noted that the reference to that Act is only by way of descriptive limiting of the nature of an emergency which can trigger the Exclusion. More particularly, it does not say that the claim must be caused by the Commonwealth declaration: it must be caused by an emergency of that limited kind.

38 The insuring clause covers loss or damage arising from the closure of the premises "by order of a competent government, public or statutory authority" as a result of, *inter alia*, the outbreak of a notifiable human disease. As Vero submitted, the fact that the closures relevant to cover are not limited to exercises of power by the Minister for Health under ss 477 and 478 of the *Biosecurity Act* is significant for the construction of the Exclusion. The Policy must be read as a whole and although the scope of cover is defined by reference to loss arising from enforced closures imposed by any governmental authority, the Exclusion is not framed in equivalent terms.

39 Subparagraph (b) of the Exclusion refers to claims caused by "highly pathogenic Avian Influenza" and, relevantly, a human biosecurity emergency. Vero submitted that any claim will necessarily be consequential upon a governmental order requiring the closure of the premises, as it is only those claims which come within the scope of the cover. Whilst there may be some debate about that, given the width of the words used in the Exclusion's chapeau, as there were no submissions to the contrary and because it makes no difference to the outcome, it is permissible to proceed on that basis. That aside, on Rockment's construction, claims arising from closures caused by Avian Influenza will be excluded regardless of which governmental authority has required the closure, but only claims arising from closures imposed by the Commonwealth by reason of the human biosecurity emergency will be excluded. There is no apparent logical reason for such a distinction, and it might seem to be incongruous to exclude claims arising from restrictions on business activities consequent upon the exercise of power under the *Biosecurity Act* and not exercises of power by other governmental authorities where the reason for the exercise of power is the same underlying cause. If the language made it so, it would be respected, but the language does not do so and indeed, the contrary. Further, *ejusdem generis* reasoning would have the same effect.

40 At this point, it is appropriate to mention an issue raised concerning the relationship between what has been called the insuring clause and the Exclusion in relation to business interruption cover arising from, "Infectious diseases, murder, suicide". On its face, the wording of the Exclusion appears to exclude claims which would be beyond the scope of the insuring clause, which is quite possible, as it is well known that policies sometimes exclude matters which are not within the cover as a means of informing the insured, or *exabundante cautela*. As appears above, Vero eschewed that construction. It submitted that the Exclusion operates to "carve out" a position of the cover provided by the insuring clause: *Walton v National Employers' Mutual General Insurance Association* [1973] 2 NSWLR 73, 84: and has no purpose in excluding claims which are not otherwise within cover. It advanced that construction in support of the above argument that the operation of the policy would be incongruent if the Exclusion only operated in relation to closures imposed by the Federal Government due to the existence of a human biosecurity emergency. However, the incongruity will exist regardless of how the scope of the Exclusion is defined in these respects, even if it is a little less so when the plain meaning of the words of the Exclusion is given effect.

The reference to the Biosecurity Act, its amendments and successor

41 Vero also submitted that the reference in the Exclusion to "the Biosecurity Act 2015 (Cth), its subsequent amendments or successor", supports the conclusion that the clause does not operate upon the making of the declaration. Any amended or successor Act may not operate in the same manner as the presently constituted *Biosecurity Act*, in that it may involve a different mechanism for identifying the disease or circumstances which condition the exercise of power by the Commonwealth Executive. This, so it submitted, has the consequence that the substance of the circumstances with which the clause is concerned (being a pandemic disease) is the relevant factor to be considered, as opposed to the manner in which they are identified (being the making of a declaration). Whilst there is some force in this submission, it is somewhat limited and it invites altogether too much speculation as to what future enactments might require. Moreover, if any future enactment did not include the concept of a "human biosecurity emergency" or the requirement for a declaration, it is not likely that the clause would be effective to exclude liability by reference to some perceived parallel set of circumstances. It is unlikely, for instance, that if any future enactment reverted to the process of declaring diseases; such as was the process under the former *Quarantine Act 1908* (Cth); it may well be difficult for Vero to submit that the clause in the subject policy would operate on the making of a declaration. Although a Court might be able to discern that the general purpose of the clause is to exclude cover in the circumstances of a pandemic, that general purpose is unlikely to overcome the absence of words which effectively establish that as the full effect of the clause's operation. So much can be seen from the result in the recent decision of the New South Wales Court of Appeal in *HDI Global Specialty SE v Wonkana No. 3 Pty Ltd* [2020] NSWCA 296 (*Wonkana*). There, the insurer's general desire to exclude cover for business interruption arising from a pandemic may have been apparent, but that was not the intention of the document as derived from the words used by the parties.

42 There is little support for Vero's construction to be found in this particular textual element of the clause.

The relevance of the concluding words of the Exclusion

43 Vero submitted that its construction, that the listed human disease is the subject of the Exclusion, rather than the declaration itself, is supported by the closing words, "irrespective of whether discovered at the premises or the breakout is elsewhere." It would be nonsensical to speak of the declaration being "discovered" at the insured's premises and Rockment was not

able to identify any construction which might avoid this incongruity. In order to give the words some sensible application, one would have to read them as being applicable only to the expression, "highly pathogenic Avian Influenza". That is not an immediately self-evident construction and it amounts to a rewriting of the Policy.

44 Further, but only upon acceptance of the relationship between the insuring clause and the Exclusion accepted by the parties, it would also encounter the difficulty that it would significantly cut down the scope of the Exclusion relating to a human biosecurity emergency to those cases where it occurred on the premises or the outbreak occurred within a twenty kilometre radius of the premises. That would be a most surprising restriction to place on an exclusion which related to conditions brought about by pandemic-like conditions.

45 Vero's main submission was that the concluding words integrate most comfortably with the causal element being the "listed human disease" which is the subject of the emergency. That may well be so, but that seeks to substitute that expression for the words "human biosecurity emergency" and acceptance of that construction would also involve a rewriting of the clause. Alternatively, it submitted that the expression should be read as the state of affairs which constitute the emergency which, itself, is the subject of the declaration. That conclusion conforms to the actual words used, but there is still some tension with the concluding words. It is not usually thought that an emergency, such as one which would support the making of a declaration, would be confined to a particular premises and nor is it usually said that an emergency "breaks out".

46 It is unnecessary to observe that the clause is badly drafted in this respect and those familiar with similar clauses might hypothesise that it is the result of inadequately amending an earlier iteration of the clause which may have referred to "diseases declared under … the *Australian Quarantine Act*": cf the policy wording in *Wonkana*. Whether that is so or not is beside the point, save that it might provide an explanation for the form in which it now appears.

47 Ultimately, the least tortured construction or that which is more coherent with the meaning of the words used, is that it is the state of affairs which creates the emergency which might be discovered at the premises or break out elsewhere. As Mr Kirk SC for Vero submitted, the essence of that state of affairs, the emergency, is the existence of a disease of great severity and significance and it is not inconceivable that it could be "discovered" at the premises. Here, had persons who were working at the Vanilla Lounge been found to have contracted COVID-19, it might broadly be said that the emergency had been, at least in part, discovered there. Similarly,

the emergency may not have been located there but was present in the State of Victoria as a consequence of significant community transmission of the disease. In that sense, the emergency might exist elsewhere than at the insured's premises, but government imposed lockdowns may nevertheless have caused the closure of its premises.

Alleged unintended consequences of Vero's construction

48 Rockment submitted that acceptance of Vero's construction has unusual and unexpected consequences which the parties could not have reasonably intended. It said that if the Exclusion operates in relation to the "listed human disease" which is the subject of a declaration, the effect of the declaration would continue after the emergency declared had passed. On this basis, so the submission went, Vero's construction would subvert the policy's coverage, as the cover for losses arising as a result of closure orders from a competent government entity would be narrowed each time a disease becomes the subject of a declaration.

49 This submission should not be accepted. The alleged cover-limiting consequences of the adoption of Vero's proposed construction are likely to be more chimerical than real. First, as has been indicated above, it is the emergency rather than the disease which is the trigger of the Exclusion and that emergency will no longer be a declared emergency once the declaration lapses.

50 Second, there is a reasonably strong argument that, even on Vero's interpretation, the Exclusion operates only in relation to declarations which are current. By s 475(4) of the *Biosecurity Act*, the human biosecurity emergency period can be of only a limited duration and, in any case, not longer than three months. It may be extended for further periods of three months under s 476 but, in general terms, only when the emergency conditions persist. Once the declaration has expired at the end of what is described in the *Biosecurity Act* as the "human biosecurity emergency period", the listed human disease is no longer one identified in a declaration. Similarly, the relevant human biosecurity emergency is also at an end, as it is no longer the subject of the declaration. It follows that there is no ongoing diminution in cover consequent upon the making of declarations as Rockment contended.

51 Third, even on Vero's construction, it is not every listed human disease which will trigger the Exclusion, but only those which are identified in a declaration and, it is fair to say, there is no known use of that power other than during the current pandemic. Certainly, none were identified to the Court. It is not likely that in the 12 month period of policy coverage, the cover

will be whittled down too much by the repeated use of the power in s 475 by the Governor-General.

Commerciality of construction and the purpose of the Exclusion

52 It is now appropriate to turn to consider whether any identified commercial purpose of the Exclusion might aid in its interpretation.

53 In construing a contractual provision, generally it is the words used by the parties to which attention ought to be focused. As Lord Mustill said in *Charter Reinsurance Co Ltd v Fagan* [1997] AC 313 at 384 in relation to the interpretation of a policy of insurance, "the inquiry will start, and usually finish, by asking what is the ordinary meaning of the words used". That ought to occur here. Whilst there is no doubt that policies of insurance are commercial documents and ought to produce a commercial result and, as such, should be given a businesslike interpretation: *Onley v Catlin Syndicate Ltd (as the underwriting member of Lloyd's Syndicate 2003)* (2018) 360 ALR 92 at 100 – 101 [33] (*Onley v Catlin Syndicate*): primary importance ought usually be given to the ordinary meaning of the words upon which the parties have agreed.

54 However, disputes as to contractual interpretation necessarily imply that the ordinary meaning of the words used do not satisfactorily expose any clear construction and, in part, those opposing constructions can sometimes be assayed by reference to the commercial result which they produce. In *Onley v Catlin Syndicate* (at 100 – 101 [33]), the Full Court identified the principles on which insurance policies are construed, emphasising an approach that kept in mind that they are commercial agreements which the parties intend will produce a commercial result, consistent with a businesslike interpretation. In this respect, the context in which the policy is entered into, to the extent to which it is known by both parties, will assist in identifying its purpose and commercial objective: *McCann v Switzerland Insurance Australia Ltd* (2000) 203 CLR 579 [22] *per* Gleeson CJ; *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104 (*Mount Bruce Mining v Wright Prospecting*) [47]; *Franklins Pty Ltd v Metcash Trading Ltd* (2009) 76 NSWLR 603 [19] *per* Allsop P; *Evolution Precast Systems Pty Ltd v Chubb Insurance Australia Ltd* [2020] FCA 1690 [25]. Nevertheless, considerations of the commerciality of any particular construction must be confined to their proper place. In *Mount Bruce Mining v Wright Prospecting* at 117 [50], French CJ, Nettle and Gordon JJ observed:

> Other principles are relevant in the construction of commercial contracts. Unless a

> contrary intention is indicated in the contract, a court is entitled to approach the task of giving a commercial contract an interpretation on the assumption "that the parties … intended to produce a commercial result". Put another way, a commercial contract should be construed so as to avoid it "making commercial nonsense or working commercial inconvenience".

This approach was recently applied by the Court of Appeal in New South Wales in *Wonkana* at [54] *per* Meagher JA and Ball J; [124] – [125] *per* Hammerschlag J, to the effect that an interpretation is commercial if it is not commercially absurd. In other words, the topic of commerciality of a particular construction is relevant only when the lack of commerciality is so pronounced that it will indicate that some different construction must have been intended.

55 As was stated in *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640 at 656 – 657 [35] (approving an observation by Arden LJ in *Re Golden Key Ltd* [2009] EWCA Civ 636 at [28]):

> [U]nless a contrary intention is indicated, a court is entitled to approach the task of giving a commercial contract a businesslike interpretation on the assumption "that the parties ... intended to produce a commercial result". A commercial contract is to be construed so as to avoid it "making commercial nonsense or working commercial inconvenience".
>
> (Footnotes omitted).

See also *Simic v New South Wales Land and Housing Corporation* (2016) 260 CLR 85 at 111 [78] *per* Gageler, Nettle and Gordon JJ. The different formulations were explained as meaning the same thing in *Mount Bruce Mining v Wright Prospecting* at [51] by French CJ, Nettle and Gordon JJ where their Honours said that the formulations are two ways of putting the same proposition (see above).

56 Therefore, references to a commercial result are not intended to invite a consideration of the actual financial consequences for each of the parties of a particular construction in the events which have occurred by the time that a dispute arises. Such inquiries would quickly descend into an assessment with hindsight as to what a fair and reasonable contract might provide given the circumstances that have unfolded. It would be contrary to the very certainties that the law of contract seeks to provide as to the allocation of risks, rights and obligations, if the meaning of agreements were to be adjudicated by reference to such an imprecise foundation. The places to which it might lead are demonstrated by the present case. On the one hand, Vero may intimate that a narrow operation of the Exclusion would have considerable financial consequences for its business. Whether that was so would require an evaluation of matters such as the nature and extent of its business, the kinds of risks that it manages as an insurer,

the premiums that it collects and the number of policies that it has written on the same terms. On the other hand, Rockment may point to the financial consequences for its business if the Exclusion was to apply and the extent to which the coverage is important for its financial survival.

57 In this case, both parties resorted to reliance upon the alleged "purpose" of the Policy and the Exclusion in support of their respective submissions, but very little was submitted as to the manner in which "purpose" can be used and the occasions on which it might be employed to override the ordinary meaning of the words used. It must be kept in mind that the purpose or object of a policy or of a particular provision is not some vague and malleable notion to which reference can be made to guide the construction of ambiguous provisions. It must be logically and rationally ascertained from the language used by the parties, the surrounding circumstances, and the general nature of the provision in question: *Australian Aviation Underwriting Pty Ltd v Henry* (1988) 12 NSWLR 121 (*AAU v Henry*). Where there is debate about the meaning of a provision there will, of course, often be a tension between the need to consider the words which the parties actually used and the purpose which the clause was intended to achieve. Both, however, are relevant. As Sir Thomas Bingham MR (as he then was) said in *Arbuthnott v Fagan* [1996] LRLR 143: "Construction is a composite exercise, neither uncompromisingly literal nor unswervingly purposive": see also *Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd* [2001] EWCA Civ 1047 [13]; *Charter Reinsurance Co Ltd v Fagan* [1997] AC 313, 350. In the absence of any substantive submissions and because both parties seemed to accept that the Court was entitled to entertain their proffered ethereal notions of "purpose" to assist in the determination of the Policy's construction, there is no need to consider the issue in depth. However, as the authors of *Interpretation* (2nd ed, Thomson Reuters, 2020) observe at [25.30] pp 513 – 515, reliance on notions of purpose for the interpretation of private agreements has its limits and four major difficulties exist:

(1) "Purpose" is something that must be assessed objectively and frequently it is not clear and is highly contestable;

(2) "Purpose" is something which may be assessed at various levels of abstraction;

(3) A document may contain competing purposes and questions may arise as to the extent to which a provision intends to advance one of those purposes; and

(4) Even where an underlying purpose can be discerned, the extent to which it can inform meaning is limited by the words used.

58 It can be accepted in this case that the purpose of the Exclusion is to remove certain claims of loss or damage from the scope of cover provided by the insuring clause. That cover is limited to loss and damage arising from orders for the closure of the premises by reason of the existence of infectious disease at the premises or an outbreak of a notifiable human disease within twenty kilometres. It might also be accepted that the purpose of the Exclusion is to exclude claims arising from closures in respect of significant disease emergencies so that it is not limited to claims arising from a disease outbreak occurring within a specified radius of the insured premises, and its words expressly provide that it may be "elsewhere". Further, the reference to "highly pathogenic Avian Influenza" is an indication that the Exclusion is concerned with losses arising from the outbreak of diseases of a significant nature.

59 In this light, a construction which identifies the state of affairs, that emergency which supports the making of a declaration, as the cause of any closure relevant to the Exclusion is consistent with the general purpose to modify the generality of the insuring promise to keep it within the bounds of a reasonable risk to cover. Cover for loss arising from the consequence of a pandemic disease could for an insurer be, as in the case of pollution, a high risk which would normally be excluded: Derrington D and Ashton R, *The Law of Liability Insurance* (3rd ed, LexisNexis, 2013) 10-2 p 1828: or specifically included only at an appropriately priced premium. The risk could be heightened by the indeterminacy of the period during which a highly infectious disease might disrupt business and, consequently, the amount of loss which the insured might suffer. In this sense, a construction which makes the presence of Avian Influenza or of the emergency the trigger of the Exclusion reasonably promotes its purpose. Conversely, that reasonably commercial purpose is not advanced by a construction which would confine the Exclusion to a narrow operation in relation to the presence of a highly infectious disease.

60 In support of its submission in this regard, Vero asserted that evidence of the parties' contemplation that emergency events might occur and result in drastic action may be found in the existence of Commonwealth, State and Territory legislation which make provision for such an event, citing the *Public Health and Wellbeing Act* ss 189, 190, 198-200; *Public Health Act 2010* (NSW) ss 7-9; *Public Health Act 2005* (Qld) ss 319, 327, 345; *Emergency Management Act* 2004 (SA) ss 23, 25; *Public Health Act 2011* (SA) s 92; *Public Health Act 2016* (WA) ss 157, 179-191; *Public Health Act 1997* (Tas) ss 16, 17; *Public Health Act 1997* (ACT) ss 120, 121; *Public and Environmental Health Act 2011* (NT) ss 52, 53. However, in the absence of evidence it is not to be assumed that the parties were mutually aware of the state of the law.

61 Support was also sought to be drawn from certain intergovernmental agreements between the Commonwealth and the States such as the "Emergency Response Plan for Communicable Disease Incidents of National Significance: National Arrangements" (8 May 2018) and the "Intergovernmental Agreement on Biosecurity" (3 January 2019). These were relied upon by Vero to support its submission that it and Rockment would have been aware that, in the case of a pandemic, it would be the State governments which would most likely impose restrictions and closures of businesses. So the submission went, Rockment's construction of the policy which would exclude losses arising from the making of the declaration and any direction or requirement by the Minister for Health, but not from closures ordered by State governments, would limit the Exclusion's operation in a manner inconsistent with its purpose. Again, without any evidence in support, this assumes the parties' mutual knowledge of the law in that respect and that they would mutually have turned their minds to its implications in the respects indicated and with the same result. The conclusion promoted is not tenable. In any case, the conclusion already reached makes it unnecessary to employ this proposition.

62 In its outline of argument filed for the purposes of this application, Vero submitted that the Court should accept that it would be uncommercial for insurers to provide cover against losses arising from pandemics and that, if it were found that losses from such events were covered, it would impose a potentially unsustainable strain on the resources of insurers. It claimed that for that reason, in common with other insurers, it was not prepared to accept the risk. These submissions were ostensibly advanced as referrable to the background facts on which the Court might rely to construe the policy, but there was no evidence from which they might be established. They were clearly not background facts. In the course of oral submissions Vero further advanced some propositions which were intended to emphasise the magnitude of the damage to its business if this decision were adverse to it. Again, there was no evidence to support the implications behind the propositions advanced.

63 None of these submissions are relevant to the Court's decision and they have not been taken into account. Apart from the fact that Courts could expect that insurers are not likely to offer high-risk cover for matters such as pollution or pandemics, save pursuant to express provisions, the economic impact of the Court's decision on Vero or other insurers has, and has had, no bearing on the outcome of this case.

Answering the separate question

64 How then should the question posed for the Court be answered? To reiterate the question is:

> Is it sufficient to exclude coverage under the exclusion in clause 8 in section 5 of Insurance Policy SPX015934895 if the claim is for loss or damage that is directly or indirectly caused by or arises from, or is in consequence of, or contributed by a human disease specified in a declaration of a human biosecurity emergency under the *Biosecurity Act 2015* (Cth)?

65 The question posed is one that concerns the proper construction of the Exclusion. It reflects the manner in which the issues were joined between the parties in the particular factual circumstances of the present case. Nevertheless, as formulated, it poses difficulties. The conclusion reached above is that a claim which is consequent upon loss arising from a government ordered closure of the insured's premises caused by the declared emergency is within the scope of the Exclusion, however, the question posed seeks to refine the issue to whether a connection between the claim and the existence of the listed human disease (which is specified in the declaration) is sufficient. No doubt it was advanced because it is relevant to the circumstances of the present matter where the emergency was declared by the Commonwealth, but the limitations on Rockment's trading were imposed by the State of Victoria. Vero's preferred construction, that the essence of the Exclusion's causal factor is the listed human disease, may well facilitate the establishment of the connection required for its triggering, but it is a significant departure from the ordinary meaning of the words used. Vero's desired outcome is that once a disease becomes the subject of a human biosecurity emergency declaration, any claim consequent upon a closure required because of the disease's presence will fall within the Exclusion.

"Disease" and "emergency" are conceptually different

66 The listed human disease is conceptually different from the human biosecurity emergency. A disease may become a listed human disease under s 42 of the *Biosecurity Act* but not ever become specified in a declaration of an emergency. So too, a listed human disease specified in a declaration, of itself, is not the emergency. An emergency of a particular character must exist in order for there to be a declaration under the *Biosecurity Act.* Whether the emergency requires, as part of its state of affairs, all of the matters which must exist under the *Biosecurity Act* before there can be a declaration of an emergency was a matter that was not explored in argument. It appears likely that the emergency must be one which "is posing a severe and immediate threat, or is causing harm, to human health on a nationally significant scale": s 475(1)(a) of the *Biosecurity Act*. It may also require the additional quality that the declaration was required to prevent or control the entry of it into Australia or its emergence, establishment or spread. On the other hand, it might be said that once a listed human disease is specified in

a declaration, it must necessarily follow that the state of affairs which constituted an emergency which justified the making of the declaration was the threat or existence of the disease.

67 Even if it could be said that there is a close relationship between a listed human disease specified in a declaration of emergency and the emergency itself, in any consideration of the Exclusion's operation it would be an error to divert attention away from the impact of the existence of the emergency on the making of the claim. The parties have chosen the causal consequences of the emergency on the making of a claim as the Exclusion's focus, even if the required connection can be somewhat remote and needs only be "a" cause of the claim. In this respect, it is not enough if governmental action leading to the closure of the insured's premises is occasioned only by the existence of the listed human disease specified in a declaration. For example, it is possible that, in a country as large as Australia, a human biosecurity emergency might be declared by reason of the risk of widespread entry or establishment of a listed human disease, but that some large parts of the country might be relatively free of it. In those circumstances a small outbreak may occur in a hitherto unaffected area, occasioning the closing of premises by local authorities so as to prevent its spread even though no circumstances of the emergency exist in that particular locale and the governmental action is not influenced by the fact of the existence of the declared emergency elsewhere. It is neither possible nor desirable to speculate how rare such an occasion might be, but, if it arose, there would be a causation issue as to whether the Exclusion applied that would not be answered by the fact that an exercise of local governmental power was a result of the same disease that was the subject of a current declaration under the *Biosecurity Act*. Other possibilities might be contemplated. Different questions may arise where the Exclusion is being applied where the declaration is in respect of an emergency with different characteristics to the COVID-19 pandemic.

68 Necessarily, ascertaining whether the Exclusion operates in a particular case will require an examination of the causes for any governmental imposed closures. Where they occur as a result of directions or requirements made under the *Biosecurity Act* consequent upon the making of a declaration, it is likely that the causal connection will be easily satisfied. Where, as in the present case, the closures were pursuant to the exercise of power by a State or local authority, albeit after the making of the declaration, the position is less clear and consideration may have to be given to intergovernmental agreements and protocols between the State and Federal body politics and the practical realities of the circumstances which arise once the Governor-General has made a declaration. In that consideration, it needs to be kept in mind that, for the purposes of the Exclusion, the causal connection between the emergency and any

governmental action can be remote, with the consequence that once the declaration is made it might be difficult to deny its causative impact. However, as the parties have specifically asked the Court not to determine any issue of whether the closures imposed by the Victorian State government were caused by the existence of the emergency, it is appropriate that this point not be taken further.

How then should the question be answered?

69 It follows that the question should be answered in the negative. It is not sufficient to exclude cover under the Exclusion if the claim is somehow causally connected to a human disease specified in a declaration of a human biosecurity emergency. The clause operates to exclude a claim which is "directly or indirectly caused by or arises from, or is in consequence of or contributed to by" the human biosecurity emergency declared under the *Biosecurity Act*. That question of causation is a matter of fact to be answered in the circumstances of each particular case.

70 It should be emphasised that the negative answer to the question is in direct response to the question posed and the circumstances in which the Court is asked to answer it. Whilst it is the answer for which Rockment contended, the Court has not accepted its construction. Conversely, whilst Vero contended that the question be answered "yes", the construction accepted by the Court is closer to its alternative construction than any proffered by Rockment.

Costs

71 Given the reasons for the conclusion as to the answer to the question, the appropriate order as to costs is that costs be in the cause.

I certify that the preceding seventy-one (71) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices Besanko, Derrington and Colvin JJ.

Associate:

Dated: 18 December 2020