Court of Appeal
Supreme Court
New South Wales

Case Name:	**HDI Global Specialty SE v Wonkana No. 3 Pty Ltd**
Medium Neutral Citation:	[2020] NSWCA 296
Hearing Date(s):	2 October 2020
Date of Decision:	18 November 2020
Before:	Bathurst CJ; Bell P; Meagher JA; Hammerschlag J; Ball J
Decision:	(1) Summons dismissed. (2) Declarations that: (a) On the proper construction of the "Tourist Parks & Lifestyle Villages Insurance Policy" issued by the first plaintiff to the first, second, and third defendants for the cover period 28 February 2020 to 28 February 2021, COVID-19 is not a disease declared to be a quarantinable disease under the Quarantine Act 1908 (Cth) and the exclusion in the HDI Disease Benefit is not enlivened. (b) On the proper construction of the "Business Insurance Policy" issued by the second plaintiff to the fourth defendant for the cover period 11 May 2019 to 11 May 2020, COVID-19 is not a disease declared to be a quarantinable disease under the Quarantine Act 1908 (Cth) and the exclusion in the Hollard Disease Cover is not enlivened. (3) Cross-claim is otherwise dismissed.
Catchwords:	CONTRACTS – Construction – Interpretation – Where exclusion clause in insurance policy referred to particular legislation "and subsequent amendments" – Whether replacement legislation a "subsequent

amendment"

CONTRACTS – Construction – Principles – Correction of mistakes by construction – Where policy includes a reference to repealed legislation – Whether parties may be taken to have known of repeal and replacement of repealed legislation as part of surrounding circumstances – Whether reference absurd or clear mistake – Whether reference to be construed as reference to replacement legislation in light of surrounding circumstances

Legislation Cited:

Acts Interpretation Act 1901 (Cth)
Biosecurity Act 2015 (Cth)
Biosecurity (Consequential Amendments and Transitional Provisions) Act 2015 (Cth)
Biosecurity (Listed Human Diseases) Amendment Determination 2020
Biosecurity (Listed Human Diseases) Determination 2016
Quarantine Act 1908 (Cth)
Quarantine Proclamation 1998 (Cth)
Uniform Civil Procedure Rules 2005 (NSW)

Cases Cited:

Allianz Australia Insurance Ltd v Inglis [2016] WASCA 25
Arnold v Britton [2015] AC 1619; [2015] UKSC 36
Ashington Piggeries Ltd v Christopher Hill Ltd [1972] AC 441
Attorney-General of Western Australia v Marquet (2003) 217 CLR 545; [2003] HCA 67
Australian Broadcasting Commission v Australasian Performing Right Association Ltd (1973) 129 CLR 99; [1973] HCA 36
Australian Casualty Co Ltd v Federico (1986) 160 CLR 513; [1986] HCA 32
Bache v Proctor (1780) 99 ER 247; 1 Dougl 384
Big River Timbers Pty Ltd v Stewart [1999] NSWCA 34
Bowes v Chaleyer (1923) 32 CLR 159; [1923] VLR 295
Chartbrook Ltd v Persimmon Homes Ltd [2009] 1 AC 1101; [2009] UKHL 38
Charter Reinsurance Co Ltd v Fagan [1997] AC 313
Cherry v Steele-Park (2017) 96 NSWLR 548; [2017] NSWCA 295
Codelfa Constructions Pty Ltd v State Rail Authority of NSW (1982) 149 CLR 337; [1982] HCA 23
Cornish v Accident Insurance Co Ltd (1889) 23 QBD 453

Dairy Containers Ltd v Tasman Orient Line CV [2005] 1 WLR 215
Darlington Futures Ltd v Delco Australia Pty Ltd (1986) 161 CLR 500
East v Pantiles Plant Hire Ltd (1981) 263 EG 61
Electricity Generation Corporation v Woodside Energy Ltd (2014) 251 CLR 640; [2014] HCA 7
Equuscorp Pty Ltd v Glengallan Investments Pty Ltd (2004) 218 CLR 471; [2004] HCA 55
Fitzgerald v Masters (1956) 95 CLR 420; [1956] HCA 53
Gissing v Gissing [1971] AC 886
Halford v Price (1960) 105 CLR 23; [1960] HCA 38
Homburg Houtimport BV v Agrosin Private Ltd (The Starsin) [2004] 1 AC 715
Impact Funding Solutions Ltd v AIG Europe Insurance Ltd [2017] AC 73; [2016] UKSC 57; [2016] 3 WLR 1422
Inland Revenue Commissioners v Raphael [1935] AC 96
Investors Compensation Scheme Ltd v West Bromwich Building Society [1997] UKHL 28; [1998] 1 WLR 896
Johnson v American Home Assurance (1998) 192 CLR 266; [1998] HCA 14
Kawarau Village Holdings Ltd v Ho [2018] 1 NZLR 378; [2017] NZSC 150
KPMG LLP v Network Rail Infrastructure Ltd [2007] Bus LR 1336
Maggbury Pty Ltd v Hafele Australia Pty Ltd (2001) 210 CLR 181; [2001] HCA 70
Mainteck Services Pty Ltd v Stein Heurtey SA (2015) 89 NSWLR 633; [2014] NSWCA 184
McCann v Switzerland Insurance Australia Ltd (2000) 203 CLR 579; [2000] HCA 65
McHugh Holdings Pty Ltd v Newtown Colonial Hotel (2008) 73 NSWLR 53; [2008] NSWSC 542
Miwa Pty Ltd v Siantan Properties Pte Ltd [2011] NSWCA 297
Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd (2015) 256 CLR 104; [2015] HCA 37
National Australia Bank Ltd v Clowes [2013] NSWCA 179
Noon v Bondi Beach Astra Retirement Village Pty Ltd [2010] NSWCA 202
Pacific Carriers Limited v BNP Paribas (2004) 218 CLR 451; [2004] HCA 35
Phillips v Rafiq [2007] EWCA Civ 74; [2007] 1 WLR 1351
Pink Floyd Music Ltd v EMI Records Ltd [2011] 1 WLR

770; [2010] EWCA Civ 1429
QBE Insurance Australia Ltd v Vasic [2010] NSWCA 166
Rabin v Gerson Berger Association Ltd [1986] 1 WLR 526
Reardon Smith Line v Hansen-Tangen [1976] 1 WLR 989
Risley v Gough [1953] Tas SR 78
Seymour Whyte Constructions Pty Ltd v Ostwald Bros Pty Ltd (In liquidation) (2019) 99 NSWLR 317; [2019] NSWCA 11
Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd (2004) 219 CLR 165; [2004] HCA 52
Westpac Banking Corporation v Tanzone Pty Ltd (2000) 9 BPR 17; [2000] NSWCA 25
Wilkie v Gordian Runoff Ltd (2005) 221 CLR 522; [2005] HCA 17
Wilson v Wilson (1854) 10 ER 811; 5 HL Cas 40
Wood v Capita Insurance Services Ltd [2017] AC 1173; [2017] UKSC 24
Zhang v ROC Services (NSW) Pty Ltd (2016) 93 NSWLR 561; [2016] NSWCA 370
Zhu v Treasurer of the State of New South Wales (2004) 218 CLR 530; [2004] HCA 56

Texts Cited:

Explanatory Memorandum to the *Biosecurity Bill 2014*
Halsbury's Laws of England (Butterworth & Co, 3rd ed, 1958) vol 22
J D Heydon, *Heydon on Contract* (2019, Lawbook)

Category:

Principal judgment

Parties:

HDI Global (First Plaintiff/First Cross-Defendant)
The Hollard Insurance Company Pty Ltd (Second Plaintiff/Second Cross-Defendant)
Wonkana No. 3 Pty Ltd trading as Austin Tourist Park (First Defendant/First Cross-Claimant)
F A Edwards (Second Defendant/Second Cross-Claimant)
C H Edwards (Third Defendant/Third Cross-Claimant)
Key Holding and Investments Pty Ltd as The Trustee for Key Nutrition Unit Trust trading as Thrive Health and Nutrition (Fourth Defendant/Fourth Cross-Claimant)

Representation:

Counsel:
B W Walker SC with T W Marskell (Plaintiffs/Cross-Defendants)
J C Sheahan QC with D T W Wong (Defendants/Cross-Claimants)

	Solicitors: Clyde & Co (Plaintiffs/Cross-Defendants) Clayton Utz (Defendants/Cross-Claimants)
File Number(s):	2020/236073
Publication Restriction:	Nil

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

HEADNOTE

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

The first, second and third defendants were insured against interruption to their tourist park business for the period 28 February 2020 to 28 February 2021 under a business interruption policy issued by the first plaintiff, HDI. The retail business of the fourth defendant was insured under a similar policy for the period 11 May 2019 to 11 May 2020 issued by the second plaintiff, Hollard.

Each of the business interruption insurance policies provided cover for interruption or interference caused by outbreaks of certain infectious diseases within a 20 kilometre radius of the insured's premises (**the Disease Benefit clauses**). In both policies, the extension was subject to an exclusion in relevantly indistinguishable terms. In the HDI policy, the exclusion read:

> The cover ... does not apply to any circumstances involving 'Highly Pathogenic Avian Influenza in Humans' *or other diseases declared to be quarantinable diseases under the Australian Quarantine Act 1908 and subsequent amendments.* (emphasis added)

On 16 June 2016, well before the period of cover for either policy commenced, the *Quarantine Act 1908* (Cth) was repealed and the *Biosecurity Act 2015* (Cth) came into force. The *Biosecurity Act* did not provide for declarations of quarantinable diseases by the Governor-General. Instead, the Director of Human Biosecurity was able in certain circumstances to determine a disease to be a "listed human disease". Before the repeal of the *Quarantine* Act, COVID-19 was not declared to be a quarantinable disease. On 21 January 2020, COVID-19 was determined to be a listed human disease under the *Biosecurity Act*.

The defendant insureds claimed indemnity from HDI and Hollard under the Disease Benefit clauses in their respective policies for business interruption caused by COVID-19. Those claims were declined. By summons filed in the Commercial List of the Equity Division, the insurers commenced proceedings seeking declarations that on the proper construction of each clause, the words "declared to be a quarantinable disease under the *Quarantine Act 1908* (Cth)" are to be read as or as including "determined to be listed human diseases under the *Biosecurity Act 2015* (Cth)".

On 4 September 2020, Hammerschlag J ordered pursuant to *Uniform Civil Procedure Rules 2005*, r 1.21(1)(b) that the proceedings be removed into the Court of Appeal.

The principal issues for determination were:

1. Whether the references to "diseases declared to be quarantinable diseases under the *Quarantine Act 1908* (Cth) and subsequent amendments" should be construed as extending or referring to "diseases determined to be listed human diseases under the *Biosecurity Act 2015* (Cth)" on the basis (a) that the *Biosecurity Act* constituted a "subsequent amendment" or (b) that the references to the *Quarantine Act* were obvious mistakes which should be construed as if they were or included references to the *Biosecurity Act* (**the primary issues**); and

2. If the answer to the first issue is yes, whether the clause should be construed as referring only to diseases that had been subject to a determination under the *Biosecurity Act* at the time of entering into the policy or to diseases so determined during the life of the policy (**the secondary issue**).

The Court held (per Bathurst CJ, Bell P, Meagher JA, Hammerschlag and Ball JJ), dismissing the summons, that COVID-19 is not a disease "declared to be a quarantinable disease under the *Quarantine Act 1908* (Cth) and subsequent amendments", and accordingly was not excluded from the Disease Benefit clauses:

1. On their proper construction, the words "and subsequent amendments" do not extend to or include the *Biosecurity Act*, which was a separate Act:

   (a) the words "and subsequent amendments" should be given their ordinary meaning, which is unambiguous, and does not extend to a new enactment replacing the *Quarantine Act* and its particular mechanism for identifying, by declaration, certain diseases as serious and contagious: [2] (Bathurst CJ and Bell P); [38]-[47] (Meagher JA and Ball J); [120]–[121] (Hammerschlag J);

   (b) the *Acts Interpretation Act 1901* (Cth) does not support the insurers' argument, either directly or by analogy. That Act concerns statutory, as opposed to contractual, construction: [2] (Bathurst CJ and Bell P); [122] (Hammerschlag J).

2. *Per Bathurst CJ and Bell P:* Orthodox principles of contractual construction are not so flexible as to permit "declared to be a quarantinable disease under the *Quarantine Act*" to be read as "determined to be a listed human disease under the *Biosecurity Act*": [5].

3. *Per Meagher JA and Ball J:* Applying ordinary principles of construction to ascertain the parties' objective intention, the language of the clauses does not reflect any mistake in the expression of that intention:

(a) it is to be inferred, as the insurers accepted, that none of the parties was aware at the time the policies were issued that the *Quarantine Act* had been repealed and replaced by the *Biosecurity Act*. It follows that the court is to construe the policies without regard to that fact: [55]-[60]; and

> *Maggbury Pty Ltd v Hafele Australia Pty Ltd* (2001) 210 CLR 181; [2001] HCA 70, considered; *QBE Insurance Australia Ltd v Vasic* [2010] NSWCA 166, applied.

(b) a mistake may be "corrected" by construction only where the literal meaning of the language is inconsistent with the parties' intention ascertained objectively by the application of ordinary principles of construction. It is not possible to correct an agreement merely because that intention was formed and expressed on the basis of an incorrect assumption: [61]-[65].

> *Fitzgerald v Masters* (1956) 95 CLR 420; [1956] HCA 53; *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101; [2009] UKHL 38, considered.

4. *Per Hammerschlag J:* The natural and ordinary meaning of the words in the Disease Benefit clauses do not involve an absurdity sufficient to justify a conclusion that the language should not be given effect. Notwithstanding the repeal of the *Quarantine Act*, the clauses still have a sensible, albeit limited, operation in respect of diseases declared under that Act at the time of its repeal. That result might be regarded as uncommercial, but it is not absurd: [123]-[128].

> *Acts Interpretation Act 1901* (Cth) s 7(2)(b), referred to.

5. *Per Hammerschlag J, Meagher JA and Ball J agreeing:* Having regard to the conclusion on the primary issues, it was not appropriate to determine the secondary issue on a hypothetical basis. It would be artificial and circular to address the question of ambulatory operation on the basis of language or meaning which the Court had held the parties did not choose or intend: [7]; [132].

JUDGMENT

1 **BATHURST CJ AND BELL P**: We have had the benefit of reading in draft the reasons for judgment of Hammerschlag J, and the joint reasons of Meagher JA and Ball J.

2 As their Honours observe, the insurers developed two principal arguments in support of the construction for which they contended. As to the first, Meagher JA and Ball J agree with the reasoning of Hammerschlag J, as do we.

3 To the extent that there is a difference in the reasoning of Hammerschlag J, on the one hand, and Meagher JA and Ball J, on the other hand, in relation to the second of the arguments put by the insurers as identified by Meagher JA and Ball J at [16] of their judgment, that difference principally turns on the fact that Meagher JA and Ball J proceed on the basis that the insurers must be taken to have been mistaken in their reference to the *Quarantine Act 1908* (Cth) (see at [34], [55] and [65]) whereas Hammerschlag J makes no such assumption although "suspects" that a mistake was involved: see at [128]. No evidence was led on behalf of the insurers, however, to confirm such a suspicion.

4 Ultimately, whether the question is looked at on the basis that the insurers were in fact mistaken (as Meagher JA and Ball J do) or on the basis that such a mistake was not established, the result is the same although their Honours employ slightly different reasoning to the same result.

5 The question is one of construction, and of the proper limits and extent to which a contractual document, here the policies of insurance, may be construed in a way which involves a departure from the actual words used by the parties, on their ordinary grammatical meaning. Both Hammerschlag J and Meagher JA and Ball J conclude that orthodox principles of contractual construction are not so flexible as to admit of the insurers' second argument. We are of the same view.

6 We accordingly agree with the orders proposed by Hammerschlag J.

7 **MEAGHER JA AND BALL J**: We have had the benefit of reading the judgment of Hammerschlag J, which explains more fully the circumstances in which these proceedings arise. We agree with the declarations and orders proposed by his Honour. Our reasons for doing so follow. As will be seen, we agree substantially with his Honour's reasons in relation to the first of the two arguments put by the plaintiffs (see [16] below). Our reasons for rejecting the second argument differ somewhat from those given by Hammerschlag J. Finally, we agree with his Honour that it would be artificial to answer the secondary issue on the hypothesis that the language of the policies bears a meaning which, in our view, it does not.

Overview

8 The policies of insurance issued by HDI and Hollard provide cover against the happening of events likely to cause loss or damage in the conduct of a business. The HDI insureds operate a caravan park in Tamworth, New South Wales and were issued insurance for the period 28 February 2020 to 28 February 2021. The corporate insured under the Hollard policy conducts a retail health food store in Maribyrnong, Victoria. That policy was issued on 30 April 2019 providing cover for the period 11 May 2019 to 11 May 2020.

9 The standard form product disclosure statement and policy wording issued by HDI, and current at the time its policy was written, came into effect on 1 January 2020. The form of disclosure statement and policy wording issued by Hollard was adopted with effect from 1 April 2019. Section 2 of each policy provides cover against business interruption. That cover insures against the interruption of, or interference with, the relevant business in consequence of loss or damage to property insured under the policy.

10 Each policy provided "additional" or "extra" business interruption cover, including against the outbreak of an infectious or contagious human disease. Although the language of that cover differed between the policies, each contained an almost identical exception.

11 The HDI policy deems the occurrence of specified events to constitute "damage to property used by" the insured at the insured location with the result that interruption or interference with the business happening in consequence of such an occurrence is covered. Those events include:

> 1. ...
>
> 3. the outbreak of a notifiable human infectious or contagious disease occurring within a 20 kilometre radius of the location; ...
> ...
> *The cover provided under part* (1) and *(3)* of this Additional benefit *does not apply to* any circumstances involving 'Highly Pathogenic Avian Influenza in Humans' or *other diseases declared to be quarantinable diseases under the Australian Quarantine Act 1908 and subsequent amendments.*
>
> [emphasis added]

12 The Hollard policy provided that it "... will cover You for interruption to or interference with Your Business due to":

> ... (b) an outbreak of an infectious or contagious human disease occurring within a 20 kilometre radius of the Premises, however *there is no cover for* highly pathogenic Avian Influenza or *any other diseases declared to be quarantinable diseases under the Quarantine Act 1908 (Cth) and subsequent amendments* irrespective of whether discovered at the Premises, or out-breaking elsewhere;
>
> [emphasis added]

13 The *Quarantine Act 1908* (Cth) was repealed on 16 June 2016 and replaced with the *Biosecurity Act 2015* (Cth). Under the former a "quarantinable disease" was "any disease declared by the Governor-General, by proclamation, to be a quarantinable disease". That term and concept is not used in the *Biosecurity Act* which provides that a human disease which can be communicable and cause significant harm to human health may be determined to be a "listed human disease".

14 On 21 January 2020, COVID-19 became a listed human disease under the *Biosecurity Act*. Unsurprisingly, at the time the *Quarantine Act* was repealed COVID-19 was not a declared quarantinable disease.

15 HDI and Hollard have declined to indemnify their respective insureds against business interruption due to COVID-19. Each relies on the exception contending that the words (in the form used in the HDI policy) "declared to be quarantinable diseases under the Australian Quarantine Act 1908 and subsequent amendments" are to be construed as if they read "determined to be listed human diseases under the Biosecurity Act 2015 (Cth)".

16 That outcome is said to follow for two reasons. Each relies on the ascertainment of the parties' objective intention through the application of ordinary principles of construction. The first turns on the meaning of the words "and subsequent amendments" which it is submitted should be understood broadly so as to encompass changes that amount to a repeal and replacement of the *Quarantine Act* with another that has a different name but the same substantive purpose and function. The second engages what was referred to by Brightman LJ in *East v Pantiles Plant Hire Ltd* (1981) 263 EG 61 as the "correction of mistakes by construction". The insurers submit that in insurance contracts made in 2019 and 2020 the reference to the *Quarantine Act* is an obvious mistake which can and should be corrected in order to give effect to the objective intention of the parties.

17 Each of these arguments arises only if the other fails: if the second argument succeeds, the first is irrelevant; but the absurdity on which the second turns presumes that the language of the exclusions would not otherwise extend to the *Biosecurity Act*. The proper order in which to address the insurers' arguments is accordingly a matter of some difficulty. As we prefer to consider the natural and ordinary meaning of the parties' language before asking whether that language should be displaced by reference to its broader context, we address them in the order in which we have explained them. Before doing so, it is helpful to set out the relevant principles at some length.

The exercise of construction

18 Construing a written contract involves determining the intention of the parties as expressed in the words in which their agreement is recorded. As Lord

Wright said in *Inland Revenue Commissioners v Raphael* [1935] AC 96 at 142: "It must be remembered at the outset that the court, while it seeks to give effect to the intention of the parties, must give effect to that intention as expressed, that is, it must ascertain the meaning of the words actually used".

19 That task is to be approached objectively. The meaning of the words used must be ascertained by reference to what a reasonable person would have understood the language of the contract to convey: *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165; [2004] HCA 52 at [40]; *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640; [2014] HCA 7 at [35]. That is because the objective theory of contract requires that the legal rights and obligations of the parties turn "upon what their words and conduct would reasonably be understood to convey": *Equuscorp Pty Ltd v Glengallan Investments Pty Ltd* (2004) 218 CLR 471; [2004] HCA 55 at [34], citing Lord Diplock in *Gissing v Gissing* [1971] AC 886 at 906 and *Ashington Piggeries Ltd v Christopher Hill Ltd* [1972] AC 441 at 502.

20 In *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451; [2004] HCA 35 the standard form letters of indemnity issued by BNP facilitated the delivery of cargo by Pacific, a sea-carrier, without production of bills of lading. In its terms each letter constituted an offer to indemnify which could be accepted by Pacific giving delivery of the cargo; in other words a "unilateral" contract (see JD Heydon, *Heydon on Contract* (2019, Lawbook) at [2.220]). Noting that "it was only the documents that spoke to Pacific", the Court concluded that the "construction of the letters of indemnity is to be determined by what a reasonable person in the position of Pacific would have understood them to mean" (at [22]).

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.

22 The language is construed according to its natural and ordinary meaning: *Darlington Futures Ltd v Delco Australia Pty Ltd* (1986) 161 CLR 500 at 510-511. As Lord Mustill said in *Charter Reinsurance Co Ltd v Fagan* [1997] AC 313 at 384 "the inquiry will start, and usually finish, by asking what is the ordinary meaning of the words used". Where the words are unambiguous, they cannot be ignored simply to reach a result that is apparently more commercially convenient: *Australian Broadcasting Commission v Australasian Performing Right Association Ltd* (1973) 129 CLR 99 at 109; [1973] HCA 36.

23 Nevertheless, as Mason J emphasised in *Codelfa Constructions Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337; [1982] HCA 23 at 348, construing a written contract requires more than just assigning the words their ordinary meaning. The Court must consider the "circumstances which the document addresses, and the objects which it is intended to secure": *McCann v Switzerland Insurance Australia Ltd* (2000) 203 CLR 579; [2000] HCA 65 per Gleeson CJ at [22]; *Wilkie v Gordian Runoff Ltd* (2005) 221 CLR 522; [2005] HCA 17 at [15], [16]; *Mt Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104; [2015] HCA 37 at [47]. That the court should know and have regard to the commercial purpose and object of the contract "presupposes knowledge of the genesis of the transaction, the background, the context [and] the market in which the parties are operating": per Lord Wilberforce in *Reardon Smith Line v Hansen-Tangen* [1976] 1 WLR 989 at 995-996.

24 The phrase "the surrounding circumstances" is often used to describe, albeit imprecisely, the matters "external to the contract" (*Mt Bruce* at [48]) to which it is legitimate to have regard. The leading statement as to the admissibility of evidence of surrounding circumstances remains that of Mason J in *Codelfa* at 352:

> The true rule is that evidence of surrounding circumstances is admissible to assist in the interpretation of the contract if the language is ambiguous or susceptible of more than one meaning. But it is not admissible to contradict the language of the contract when it has a plain meaning. Generally speaking facts existing when the contract was made will not be receivable as part of the surrounding circumstances as an aid to construction, unless they were known to both parties, although, as we have seen, if the facts are notorious knowledge will be presumed.

25 That "true rule" does not foreclose resort to evidence of surrounding circumstances to identify and resolve constructional choices arising from the language of the parties. A conclusion as to ambiguity in that language is not a precondition to the consideration of such material: *Cherry v Steele-Park* (2017) 96 NSWLR 548; [2017] NSWCA 295 at [65]-[85] per Leeming JA (Gleeson JA and White JA agreeing).

26 The surrounding circumstances may include the existing state of the law. Citing Lord Hoffman in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1997] UKHL 28; [1998] 1 WLR 896 at 912, the plurality (Gleeson CJ, Gummow and Hayne JJ) in *Maggbury Pty Ltd v Hafele Australia Pty Ltd* (2001) 210 CLR 181; [2001] HCA 70 said at [11]:

> Interpretation of a written contract involves, as Lord Hoffmann has put it: "the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract". That knowledge may include matters of law, as in this case where the obtaining of intellectual property protection was of central importance to the commercial development of Mr Allen's ironing board.

27 The objective theory does not require or permit the words of a contract to be given a meaning that a reasonable person knowing all relevant facts would give them. Rather, the theory requires the court to consider what meaning a

reasonable person in the position of the parties would give those words. That requires the court to consider what the parties may be taken to have known. In this context, the reference in *Maggbury* to facts "which would reasonably have been available to the parties" does not describe a species of constructive notice. As Allsop P (Giles and Macfarlan JJA agreeing) explained in *QBE Insurance Australia Ltd v Vasic* [2010] NSWCA 166 at [35]:

> Constructive notice implies a degree of enquiry by reference to some external standard. Just because something is available to be found does not make it relevant, if the parties did not know of it. The reasonable person may be taken to know of things that go beyond those that the parties thought to be important or those to which there was actual subjective advertence by the parties. Further, the circumstances may include such things as the legal context to the transaction, especially if a market is involved. Nevertheless, the scope of the relevant material is necessarily bounded by the objective task of the reasonable person giving meaning to the words used by the parties in the circumstances in which the contract came to be written, by reference to what the parties knew in the sense stated by Lord Wilberforce in *Reardon Smith*, by Mason J in *Codelfa* and by the High Court in the various cases since *Codelfa*.

28 This approach focuses attention on the words used, and not on the subjective intentions and beliefs of the parties as to what they have agreed. But it does not do so at the expense of ignoring the fact that what the court is seeking to do is ascertain what the parties agreed.

29 There is no special rule which applies to the construction of exclusion or limitation clauses in contracts of insurance (see, for example McClure P in *Allianz Australia Insurance Ltd v Inglis* [2016] WASCA 25 at [25]). As Lord Hodge (with whom Lords Mance, Sumption and Toulson agreed) uncontroversially observed in *Impact Funding Solutions Ltd v AIG Europe Insurance Ltd* [2017] AC 73; [2016] UKSC 57 at [7]:

> An exclusion clause must be read in the context of the contract of insurance as a whole. It must be construed in a manner which is consistent with and not repugnant to the purpose of the insurance contract. There may be circumstances in which in order to achieve that end, the court may construe the exclusions in an insurance contract narrowly.

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 ...

The construction of the words "and subsequent amendments"

32 Both policies exclude from the infectious or contagious human disease business interruption cover "diseases declared to be quarantinable diseases under the *Quarantine Act 1908* (Cth) and subsequent amendments".

33 Each insurance was offered on the terms of a standard form wording introduced by a product disclosure statement, which adopted a conversational and plain English style, referring to the parties as "we" and "you". That the policy wording sets out the details of what is and is not covered is emphasised, and the insured or prospective insured is invited to read it carefully. Each disclosure statement makes clear that words in the policy with "special" meanings have been defined. All of this is consistent with the insurers proposing and accepting that the language adopted in the standard form wording be understood by reference to what it conveys "as a matter of contemporary language read in the context of the whole policy" (*Australian Casualty Co* at 525).

34 In oral argument senior counsel for the insurers did not contest that the construction of the policies should be addressed on the basis that the parties did *not* know and were not to be taken to have known that the *Quarantine Act* had been repealed in June 2016, well before the policies were entered into. That undoubtedly reflects the reality of the position. It is not to be inferred that the insurers knowingly issued a policy which adopted, as a means of defining part of the cover, a statutory regime which at that time had been repealed, and had not applied since June 2016.

35 In what follows we address the meaning of the language in question by reference to what a reasonable person in the position of the insured would have understood it to convey. However, we consider that the meaning is the same if considered by reference to the understanding of a reasonable person in the position of the parties.

36 Commencing then with the language, the words in question are part of an exclusion or limitation upon the cover provided in respect of infectious or contagious human disease. The exclusion operates with reference to specific diseases, either a named disease (Avian Influenza) or other diseases declared under the *Quarantine Act*. The latter provision applies if a disease has been "declared" as a "quarantinable disease", which in turn depends on whether whatever is necessary under that Act by way of a "declaration" has

happened. None of this appears to be controversial as to the legal meaning of language which is not ambiguous.

37 The reasonable person would then pause. Most significantly, for the second part of the exclusion to be engaged a disease must have been declared to be a quarantinable disease under that Act. The insurers have chosen a specific mechanism for determining which infectious or contagious human diseases should be excluded. That adopted is contained in the *Quarantine Act* and presumably is intended to identify serious and highly contagious diseases.

38 There remains the phrase "and subsequent amendments". The word "amendments" when used with reference to a specific Act refers to legislative changes made to that Act. That is the ordinary meaning of that word and on the face of it, the context does not suggest it has any other meaning. What work does "subsequent" do? The clause refers to the *Quarantine Act.* All amendments to that Act will necessarily be "subsequent" to its enactment in 1908. However it is possible someone might read the reference to the *Quarantine Act* as being to that Act in its form at the commencement of the relevant period of insurance, in the case of the HDI policy 28 February 2020 and in the case of the Hollard Policy 11 May 2019. It is likely that the word "subsequent" has been included to make clear that the "amendments" referred to include those made to the *Quarantine Act* after the commencement of the relevant period of insurance. Otherwise, that word is superfluous. However that is not unusual in policies of insurance or commercial contracts more generally.

39 In response to a query as to what the position might be if during the period of insurance the *Quarantine Act* was repealed, the reasonable person in the position of the insured, not knowing that the *Quarantine Act* had in fact been repealed before the insurance was issued, would likely respond: well, one would need to understand whether the diseases declared to that point in time continue to answer the description of "declared" quarantinable diseases for the purposes of the exclusion. If they do, the exclusion operates in respect of them. If they do not, it does not operate at all. That is a problem for the

insurer. Furthermore the exclusion could not apply to contagious diseases emerging after the repeal of the Act. That may also be a problem for the insurer. These outcomes could have been avoided by more careful drafting. (At this point it might be noted that the HDI policy, in specifying the circumstances in which the policy might be cancelled, refers to those circumstances as provided by the *Insurance Contracts Act 1984* (Cth) "or any subsequent legislation".)

40 If asked, in the context of the repeal and replacement of the *Quarantine Act* during the period of insurance, whether provisions of the replacement Act might trigger the operation of the exception during the balance of the policy period, that reasonable person would likely respond: the exception only refers to "amendments" to the *Quarantine Act*, and the enactment of other legislation with a different mechanism for identifying diseases does not answer that description. For the exception to apply there must be a declaration under the *Quarantine Act*. The insurers must have appreciated that Act might be repealed and replaced during the period of insurance. If they had wanted to secure the efficacy of the exception against that possibility they could have done so by different language.

41 The construction apparent from this analysis is not that contended for by the insurers, whose argument proceeds as follows.

42 The parties must have understood there was a possibility that the law relating to quarantine could be altered, not merely by amendment of the *Quarantine Act* but also by its repeal and replacement. Had they intended only to pick up amendments to that Act, they would have used the well-recognised expression "as amended". By choosing the expression "and subsequent amendments", a reasonable person would take them as referring to something more; and unless it refers to something more, the word "subsequent" is redundant. The exclusion is a limitation on additional or extra cover in respect of the outbreak of an infectious or contagious human disease. It is ambulatory in the sense that it covers any disease, whether the disease is known or unknown at the inception of the policy. The exclusion is

obviously intended to exclude diseases which are sufficiently serious to attract a public health response. But if the words "and subsequent amendments" are read as "as amended", in the face of the repeal and replacement of the *Quarantine Act*, the exclusion operates only by reference to diseases that were declared under the *Quarantine Act* to that point in time.

43 Accordingly, so the argument proceeds, the words "and subsequent amendments" are to be understood broadly and as encompassing changes that amount to a repeal and replacement of the statute with another that has the same substantive purpose and function, namely the designating of certain diseases as serious. It is submitted that the *Biosecurity Act* meets that description, and that therefore the policy exclusion extends to "listed human diseases" determined under that Act.

44 There are a number of difficulties with this argument. First and foremost, the expression "and subsequent amendments" is not ambiguous and only describes amendments to the *Quarantine Act*. The repeal and replacement of that legislation with other legislation is not within the ordinary meaning of those words. Secondly, the word "subsequent" is not redundant. It makes clear that there may be amendments to the *Quarantine Act* within the policy period. Thirdly, even if "subsequent amendments" is redundant because the reference to the *Quarantine Act* is to be understood as being to that Act as originally enacted, the presumption against that word being treated as mere surplusage, and of no effect, is not a strong one (see *Big River Timbers Pty Ltd v Stewart* [1999] NSWCA 34 at [16]); and in any event, that presumption does not justify giving "amendments" a meaning which it does not reasonably bear, namely as encompassing changes that amount to a repeal and replacement of the *Quarantine Act* with legislation that has the same substantive purpose and function.

45 Fourthly, whilst from the insurer's perspective the purpose of the provision in question may be to exclude diseases which are sufficiently serious to attract a public health response, it has not chosen that language to describe the exclusion or how it is to operate. The exclusion adopts a specific mechanism

provided for under the *Quarantine Act*, and no other. The possibility of that Act being repealed was real and would have the consequence that the machinery at least may not have any ongoing operation from the time of its repeal. The wording does not address that possibility. To suggest that the words "and subsequent amendments" include the enactment of the *Biosecurity Act* is many steps too far.

46 As Lord Mustill observed in *Charter Reinsurance Co Ltd* at 388:

> There comes a point at which the court should remind itself that the task is to discover what the parties meant from what they have said, and that to force upon the words a meaning which they cannot fairly bear is to substitute for the bargain actually made one which the court believes could better have been made. This is an illegitimate role for a court.

47 This first argument should be rejected.

Correcting the language by construction

48 It is an ordinary feature of human communication that what a person means may be obvious even though what they write or say, taken literally, is nonsense, or means the opposite. Contracts are not an ordinary mode of human communication, and courts do not "readily accept" that mistakes have been made in the drafting of a formal document: *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101 at 1114; [2009] UKHL 38 at [23] (Lord Hoffman). But contracts are nevertheless to be read on the basis that their drafters will on occasion fail to express correctly what they intend to say. The "correction" of mistakes by interpretation is therefore an aspect of "the single task of interpreting the agreement ... in order to get as close as possible to the meaning which the parties intended": *KPMG LLP v Network Rail Infrastructure Ltd* [2007] Bus LR 1336 at 1351 (Carnwath LJ); *Chartbrook* at [23].

49 As the exercise is one of construction, the "meaning which the parties intended" can only be ascertained objectively, in accordance with the principles summarised earlier in these reasons. Construing a written agreement in accordance with those principles may reveal that its literal meaning is quite different from the meaning it was intended to bear. The

latter is to prevail. As Lord St Leonards observed in *Wilson v Wilson* (1854) 10 ER 811 at 823; 5 HL Cas 40 at 70, construing an indemnity in favour of John Wilson for the debts of "John", in a separation agreement between John and Mary Wilson:

> Then has the Court a power to rectify the error without doing any violence to the words? because I entirely reject any intention of putting violence upon words. We are bound as a Court of Justice to put a rational construction upon words, and to give to every word its proper sense. I do not think that I am breaking in upon any rule in advising your Lordships to consider "John" as erroneously inserted, as it clearly appears by the context to have been, instead of "Mary," and by so considering it to make that part compatible with the rest, and thus give effect to what was the clear intention of the parties.

50 The application of this principle is ordinarily dependent on the satisfaction of two criteria: that the literal meaning of the language of the agreement is absurd; and that it is clear what the parties' objective intention "is to be taken to have been": *Seymour Whyte Constructions Pty Ltd v Ostwald Bros Pty Ltd (in liq)* (2019) 99 NSWLR 317; [2019] NSWCA 11 at [8]. Substantially the same approach has been adopted in England: see Brightman LJ's formulation of the two conditions in *East v Pantiles*, and the qualifications subject to which those conditions are to be understood, as explained in *KPMG v Network Rail* and summarised in *Chartbrook* at [22]-[24]; and the discussion in *Mainteck Services Pty Ltd v Stein Heurtey SA* (2015) 89 NSWLR 633; [2014] NSWCA 184 at [119]-[120] (Leeming JA). Three points should be made about the criteria which must be satisfied.

51 First, "absurdity or inconsistency" may not strictly be required: cf *Fitzgerald v Masters* (1956) 95 CLR 420 at 426-427; [1956] HCA 53 (Dixon CJ and Fullagar J). The reasons of the plurality in *Fitzgerald v Masters* made no reference to such a requirement, treating the problem simply as one of the discernment of the parties' intention from the whole of the agreement, while earlier authorities referred only to the presence of a "palpable" or "obvious" mistake: *Bache v Proctor* (1780) 99 ER 247; 1 Dougl 384 (Buller J); *Wilson v Wilson* at ER 822, 823 (Lord St Leonards). There is accordingly much to be said for the modern English position, which requires a "clear" mistake: *Pink Floyd Music Ltd v EMI Records Ltd* [2011] 1 WLR 770; [2010] EWCA Civ

1429 at [21] (Lord Neuberger MR, Laws and Carnwath LJJ agreeing on that point). In any event, if absurdity is required, "something opposed to reason" will suffice: *Miwa Pty Ltd v Siantan Properties Pte Ltd* [2011] NSWCA 297 at [13] (Basten JA, McColl and Campbell JJA agreeing).

52 Secondly, satisfaction of the first criterion follows from satisfaction of the second. Where it is clear that the literal meaning of contractual language is inconsistent with the parties' objective intention discerned from the agreement as a whole, there is a clear mistake, and likely also absurdity in the relevant sense. What the first criterion reflects is that a court will not lightly conclude that "imperfections and infelicities and ambiguities" in the language of an agreement reflect a mistake, rather than the give and take of commercial negotiation: *Seymour Whyte* at [10], citing *Chartbrook* at [23].

53 Finally, the application of those criteria should not obscure the fact that the question remains one of the ascertainment of the parties' objective intention through the application of ordinary principles of construction. That is not to say that the two criteria need not be satisfied. It is rather to emphasise that they are merely steps involved in reasoning to a conclusion that by one word or phrase the parties meant something else.

54 The insurers contend that it is absurd to interpret the reference to the *Quarantine Act* as a reference to that Act when it has been repealed. The parties could not have intended the exclusion to operate by reference to an Act that no longer exists. In response, the insureds submit that the reference to the repealed Act does not reveal or involve absurdity. The repeal of the *Quarantine Act* did not affect the list of diseases declared under it at the time of its repeal, and the exclusion is still able to operate by reference to that list. It is true that over time the exclusion would fall short of its apparent purpose of excluding liability for losses suffered in connection with the most serious communicable diseases (as is the case with COVID-19). Such a result might be regarded as sub-optimal or uncommercial, but it could hardly be said to be absurd.

55 This analysis assumes that the diseases declared at the time of repeal continue to engage the application of the exclusion, a matter we do not finally determine (cf [39] above). Assuming that it does, there is force in the insureds' submissions. However, in our opinion there are more fundamental problems with this aspect of the insurers' case. There was no suggestion by either the insurers or the insureds that any of them knew the *Quarantine Act* had been repealed and replaced by the *Biosecurity Act* at the times the policies were issued. It should be inferred, as senior counsel for the insurers accepted, that the insurers were not aware of that fact when drafting and issuing their policies. It follows that in construing the policies the Court cannot have regard to the fact of the repeal of the *Quarantine Act*, and there is accordingly no basis for identifying any mistake in the parties' language. While there is a sense in which the policies reflect a "mistake" – an incorrect assumption that the *Quarantine Act* had not been repealed – the relevant principle is concerned only with correcting the imperfect expression of the parties' objective intention.

Regard cannot be had to the fact of repeal in construing the policies

56 This conclusion follows from two propositions. Each has been referred to above. The first is that the only surrounding circumstances to which regard may be had in construing an agreement are those known to both parties. The second is that matters of law are to be treated in the same way as any other surrounding circumstance.

57 Something more should be said about each of those propositions. As to the first, it is not wholly clear whether statements in English authorities that regard may be had to circumstances "reasonably available" to be known by the parties are consistent with the principles set out at [27] above: cf *Arnold v Britton* [2015] AC 1619; [2015] UKSC 36 at [15], [21]; *Wood v Capita Insurance Services Ltd* [2017] AC 1173; [2017] UKSC 24 at [10], [28].

58 Any such divergence is likely to have few practical consequences. Evidence of what a party actually knew may be both self-serving and of limited use.

Inferences can and ordinarily will be drawn about what was known on the basis of what was available to be known: as Mason J observed in *Codelfa* at 352, "if the facts are notorious knowledge of them will be presumed". And because what a party knew is not what a party had in mind, the "reasonable person may be taken to know of things that go beyond those that the parties thought to be important or those to which there was actual subjective advertence": *QBE v Vasic* at [35]; and see *Reardon Smith* at 997. In this case the difference is inconsequential. The insurers did not contend that knowledge of the repeal and replacement of the *Quarantine Act* had been reasonably available to them.

59 As to the second, decisions of this Court subsequent to *Maggbury* have likewise justified making reference to "legal" or "legislative" context on the basis that it forms part of the surrounding circumstances without any suggestion that legal knowledge should be treated differently from knowledge of other circumstances or things: *QBE v Vasic* at [35]; *Zhang v ROC Services (NSW) Pty Ltd* (2016) 93 NSWLR 561; [2016] NSWCA 370 at [95]-[98]. What contracting parties may safely be taken to have known about the law will depend on their legal sophistication, and the significance of the matters of law relevant to their agreement: see for example *Maggbury* at [11]; *Zhang* at [98]; *Phillips v Rafiq* [2007] EWCA Civ 74; [2007] 1 WLR 1351 at [25].

60 There is no reason to doubt the correctness of this approach. A line between legal and factual background would not be easy to draw. In this case, for instance, that the *Quarantine Act* had been repealed was significant essentially as a factual matter having the consequence that there would be no future declarations of quarantinable diseases (and not that any past declarations may not have statutory effect). Further, treating matters of law like any other surrounding circumstance provides a neat answer to the otherwise difficult question, "where does one stop with knowledge of law?": *Rabin v Gerson Berger Association Ltd* [1986] 1 WLR 526 at 539 (Balcombe LJ). It is necessary to stop somewhere: as senior counsel for the insurers submitted, it would be not only fictional but "tyrannous" to impute to

contracting parties, or the reasonable person in their position, knowledge of the present state of all primary and secondary legislation.

No mistake in the parties' expression of their objective intention

61 The conclusion that the reference to the *Quarantine Act* cannot be corrected by construction is entirely consistent with earlier cases. It has been said that "conceptual" errors may be corrected by construction: *Seymour Whyte* at [7]. That is, however, to say no more than that misdescriptions and misnomers may be corrected despite having conceptual consequences, as is made clear by the reference to *McHugh Holdings Pty Ltd v Newtown Colonial Hotel* (2008) 73 NSWLR 53; [2008] NSWSC 542. *McHugh Holdings* concerned a clause of a lease which purported to restrain the "lessor and each guarantor [of the lessee]" from trading within a 1 km radius of the leased premises if an election was made by the lessee not to renew the lease. The reference to the lessee's guarantors, and the absurdity of restraining the lessor (which did not trade) from trading near its own premises, sufficed to show that the parties must have intended to restrain the *lessee*.

62 *National Australia Bank Ltd v Clowes* [2013] NSWCA 179 likewise demonstrates the limited sense in which "conceptual" mistakes may be corrected by construction. In that case, references in loan agreements to a mortgage "over" a company title flat were read as references to a mortgage of the shares, the holding of which entitled their owner to occupy the flat on the basis that the literal words were "legal nonsense". The parties' objective intention, to grant and take security over the source of the borrowers' rights to their flat, was, on the other hand, "self-evident". (Indeed, as Leeming JA observed at [6], both parties "were well aware" of the true position, and in fact executed a mortgage and charge expressed as being over the shares, after the first loan but before the second and third.)

63 It is also instructive to consider the two mistakes in the agreement in *Fitzgerald v Masters*. Clause 8 of that agreement, a contract for the sale of land, purported to incorporate the "usual conditions of sale in use or approved

of by the Real Estate Institute of New South Wales relating to sales by private contracts of lands held under the *Crown Lands Act* ... so far as they are *inconsistent* herewith" (emphasis added). The incorporation of inconsistent terms, rather than terms that were consistent or not inconsistent, was absurd, and an obvious and correctable error which could not have reflected the parties' intention. More problematic was that no usual conditions of sale "relating to sales by private contracts of lands held under the *Crown Lands Act*" existed. The question for the Court in relation to that mistake was simply whether "the parties did not intend to contract otherwise than by reference to the terms of a document which they mistakenly believed to exist"; that is, whether cl 8 was severable: at 427 (Dixon CJ and Fullagar J). There was no question of the correction of any defect referable to that mistaken belief.

64 As these examples illustrate, the intention against which the literal meaning of contractual language is to be measured must be capable of being discerned objectively from the language itself. For that reason, "correction" by construction is concerned with errors of *expression*. Something must have "gone wrong with the *language*" of the agreement, as Lord Hoffman put it in *Chartbrook* at [25] (emphasis added). That requirement does not turn on any restriction to mistakes evident "on the face" of an agreement. Even where regard is properly had to surrounding circumstances, the task remains one of construing the language of the agreement in its context.

65 The difficulty in this case is that nothing has gone wrong in the relevant sense with the provisions of the policies in question: they correctly express the intention they objectively disclose. The mistake was at an anterior stage. It would have been logical, had the insurers realised that the *Quarantine Act* had been repealed, for the policy wording to have referred instead to "diseases determined to be listed human diseases under the Biosecurity Act 2015". But to conclude as much is not to hold that by their language they are to be taken to have conveyed an intention to refer to listed human diseases under the *Biosecurity Act*. That they did not was not a problem with the language they chose, or a misdescription of the legislation to which they objectively intended to refer, any more than it would have been had the

Quarantine Act been repealed and replaced early in the policy period rather than in 2016. The Court has no power to correct an agreement to reflect what might have been agreed, or even what would have been agreed, had the parties, or the relevant party, not assumed the *Quarantine Act* remained in force.

66 It follows that the insurers' argument that the reference to the *Quarantine Act* can be "corrected" by construction cannot be upheld.

67 **HAMMERSCHLAG J**: The 2019-nCov acute respiratory disease (**COVID-19**) pandemic has caused major business disruption in Australia.

68 This test case concerns the construction of exclusion provisions in insurance policies issued by the plaintiffs to the defendants providing business interruption cover.

69 The proceedings were commenced in the Commercial List of the Equity Division, but were, because of their wider significance, removed to this Court under *Uniform Civil Procedure Rules 2005* (NSW) Rule 1.21(1)(b).

BACKGROUND

70 At all material times, the first, second, and third defendants conducted a business known as the Austin Tourist Park in Tamworth, NSW, and the fourth defendant conducted a business known as Thrive Health and Nutrition in Maribyrnong, Victoria.

71 The first plaintiff (**HDI**), under a contract of insurance styled "Tourist Parks & Lifestyle Villages Insurance Policy" (**the HDI Policy**), insured the first, second, and third defendants for business interruption in the period 28 February 2020 to 28 February 2021.

72 The second plaintiff (**Hollard**), under a contract of insurance styled "Business Insurance Policy" (**the Hollard Policy**), insured the fourth defendant for business interruption in the period 11 May 2019 to 11 May 2020.

73 HDI and Hollard will be referred to collectively as **the insurers** and the HDI Policy and the Hollard Policy will be referred to collectively as **the policies**. The defendants will be referred to collectively as **the insureds.**

74 The HDI Policy[1] covered business interruption, relevantly, in the following terms (the **HDI Disease Benefit**):

> ***Murder, suicide or disease*** – The occurrence of any of the circumstances set out below will be deemed to be damage to property used by you at the location:
>
> ...
>
> 3. the outbreak of a notifiable human infectious or contagious disease occurring within a 20 kilometre radius of the location;
>
> ...
>
> The cover...does not apply to any circumstances involving 'Highly Pathogenic Avian Influenza in Humans' **or other diseases declared to be quarantinable diseases under the Australian Quarantine Act 1908 and subsequent amendments**. [emphasis added]

75 The Hollard Policy[2] covered business interruption, relevantly, in the following terms (the **Hollard Disease Cover**):

> **Infectious disease, etc.**
>
> We will cover You for interruption to or interference with Your Business due to:
>
> ...
>
> b) an outbreak of an infectious or contagious human disease occurring within a 20 kilometre radius of the Premises, however there is no cover for highly pathogenic Avian Influenza **or any other diseases declared to be quarantinable diseases under the Quarantine Act 1908 (Cth) and subsequent amendments** irrespective of whether discovered at the Premises, or out-breaking elsewhere. [emphasis added]

76 For present purposes, these provisions, which will be referred to as **the clauses**, are indistinguishable.

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[1] Pages 18 and 19 of the HDI Policy. Neither the HDI Policy nor the Quarantine Act defines "notifiable human infectious or contagious disease".
[2] Page 35 of the Hollard Policy.

77 On 16 June 2016, the *Quarantine Act 1908* (Cth) (**the Quarantine Act**) was repealed and the *Biosecurity Act 2015* (Cth) (**the Biosecurity Act**) came into force.[3]

78 Thus, the policies provide for the exclusion from cover of particular diseases by reference to a repealed Act.

79 The *Quarantine Act*[4] defined "quarantinable disease" to mean:

> ...any disease declared by the Governor-General, by proclamation, to be a quarantinable disease.

80 Section 13(1)(ca) of the *Quarantine Act* provided:

> **13 Proclamation of ports of entry etc.**
>
> (1) The Governor-General may, by proclamation:
>
> ...
>
> (ca) declare a disease or pest to be a quarantinable disease or quarantinable pest, as the case may be;

81 Section 2B(1) provided:

> **2B Proclamation in event of epidemic**
>
> (1) Where the Governor-General is satisfied that an epidemic caused by a quarantinable disease or quarantinable pest or danger of such an epidemic exists in a part of the Commonwealth, the Governor-General may, by proclamation, declare the existence in that part of the Commonwealth of that epidemic or of the danger of that epidemic.

82 Division 2 of Part IV of the *Quarantine Act* provided for the exercise of a range of coercive statutory powers to quarantine vessels, installations, persons, and goods in relation to a quarantinable disease.

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[3] It was repealed by the *Biosecurity (Consequential Amendments and Transitional Provisions) Act 2015* (Cth).

[4] Quarantine Act s 5. The provisions of the Quarantine Act referred to in this judgment are as how they were immediately before its repeal. The original Act comprised 87 sections spanning 15 pages. By the time of its repeal, it spanned 288 pages. The original definition of "Quarantinable disease" was "smallpox, plague, cholera, yellow fever, typhus fever, or leprosy, or any other disease declared by the Governor-General, by proclamation, to be a quarantinable disease."

83 As at the date of repeal of the *Quarantine Act* the following were quarantinable diseases:[5]

- Cholera;
- Highly Pathogenic Avian Influenza in Humans;
- Human swine influenza with pandemic potential;
- Middle East respiratory syndrome;
- Plague;
- Rabies;
- Severe Acute Respiratory Syndrome;
- Smallpox;
- Viral haemorrhagic fevers of humans; and
- Yellow fever.

84 The term "quarantinable disease" does not appear in the *Biosecurity Act*. The *Biosecurity Act* uses the phrase "listed human disease", which it defines in s 9 to have the meaning given by s 42. Section 42(1) provides:

> **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.

85 The Director of Human Biosecurity is the person who occupies, or is acting in, the position of Commonwealth Chief Medical Officer.[6]

86 On 7 June 2016, by the *Biosecurity (Listed Human Diseases) Determination 2016*, the following had been determined to be listed human diseases under s 42 of the *Biosecurity Act*:

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[5] *Quarantine Proclamation 1998* (Cth) cl 21.
[6] Biosecurity Act ss 9, 544(1).

- Human influenza with pandemic potential;
- Middle East respiratory syndrome;
- Plague;
- Severe acute respiratory syndrome;
- Smallpox;
- Viral haemorrhagic fevers; and
- Yellow fever.

87 It is to be observed that the lists overlap somewhat.

88 On 21 January 2020, by the *Biosecurity (Listed Human Diseases) Amendment Determination 2020*, the Director of Human Biosecurity determined "human coronavirus with pandemic potential" to be a listed human disease (**the COVID determination**). It is not in dispute that the determination was made in respect of COVID-19.

89 On 7 May 2020 and 10 July 2020 respectively, Hollard and HDI declined indemnity to the defendants.

90 The insurers' position is that cover does not extend to loss caused by COVID-19 because the contractual words "declared to be a quarantinable disease under the *Quarantine Act 1908* (Cth) and subsequent amendments" are properly to be read as "determined to be listed human diseases under the *Biosecurity Act 2015* (Cth)".

91 The primary issue is whether the clauses should be so construed. The insurers seek declarations to that effect. The insureds, by way of cross-claim, seek declarations that COVID-19 is not a disease declared to be a quarantinable disease under the *Quarantine Act* and that the exclusion clause in the policies is not enlivened.

92 The secondary issue, which will arise only if the clauses are to be construed as the insurers contend and then only in relation to the Hollard Policy, is

whether only listed human diseases determined to be such as at the date of policy inception are excluded, or whether the exclusion also applies to listed human diseases determined to be such by the Director of Human Biosecurity at any time during the cover period.

93 It is common cause that the COVID determination was made after the Hollard Policy incepted and during its cover period, and before the HDI Policy incepted.

94 On the hypothesis that they succeed on the primary issue, the insurers seek declarations that the exclusions in each policy are enlivened in respect of any listed human diseases determined under the *Biosecurity Act* during the cover period. The insureds correspondingly seek declarations that the cover is not enlivened for diseases determined to be listed human diseases during the cover period.

QUARANTINE ACT VERSUS BIOSECURITY ACT

THE INSURERS' CONTENTIONS

95 HDI and Hollard submit that the words "declared to be a quarantinable disease under the *Quarantine Act 1908* (Cth) and subsequent amendments" are to be read as "determined to be listed human diseases under the *Biosecurity Act 2015* (Cth)".

96 First, they argue that the words "and subsequent amendments" comprehend, on their proper construction, the *Biosecurity Act*, which replaced the *Quarantine Act*. They argue that these words anticipate the evolution over time of the statute referred to, which evolution includes its repeal and replacement by another enactment which may be differently named but has the same substantive purpose and function.

97 They submit that, by analogy, s 10(b) of the *Acts Interpretation Act 1901* (Cth) supports this construction. That section provides:

10 References to amended or re-enacted Acts

Where an Act contains a reference to a short title that is or was provided by law for the citation of another Act as originally enacted, or of another Act as amended, then:

...

(b) where that other Act has been repealed and re-enacted, with or without modifications, the reference shall be construed as including a reference to the re-enacted Act as originally enacted and as amended from time to time;

98 They argue that the "Quarantine Act 1908" is a short title provided by law for its citation, that the *Biosecurity Act* is no more than a re-enactment of the *Quarantine Act*, and that it follows that references in the policies to the *Quarantine Act* are properly to be construed as references to the *Biosecurity Act*.

99 Second, they argue that to construe the reference to the *Quarantine Act* as a reference to that Act only and amendments to that Act as amendments to that Act only, is absurd because:

(1) the *Quarantine Act* had been repealed and replaced by the *Biosecurity Act* by the time the policies were entered into, and the parties cannot be taken to have intended to refer to a statute incapable of being amended because it had been repealed;

(2) the parties self-evidently intended the policies to refer to the operative legislation in force at the time of the policies and during the cover periods which dealt with quarantinable diseases; and

(3) it is irrational and commercial nonsense for the parties to have excluded diseases determined to be quarantinable diseases under repealed legislation but not listed human diseases determined under the equivalent legislation in force at the time the policies were issued and during the cover period.

THE INSUREDS' CONTENTIONS

100 The insureds submit that reading the words "and subsequent amendments" as including an Act which replaces the *Quarantine Act* is an impermissible distortion of the word "amend", which in its ordinary meaning does not include rescission in its entirety. They further submit that the words "and subsequent amendments" simply refer to the *Quarantine Act*.

101 Further, they submit that the insurers' contention involved not only reading the reference to *Quarantine Act* as being to the *Biosecurity Act* but also that the words "declared to be quarantinable diseases" in the relevant clauses in the policies would also require rewriting on the insurers' construction because, under the *Biosecurity Act*, quarantinable diseases are not specified by declarations made by the Governor-General (as under s 13(ca) of the *Quarantine Act*) but rather by determinations of "listed human diseases" issued by the Commonwealth Director of Human Biosecurity (following consultation with the Chief Health Officer of each State and Territory and the Commonwealth Director of Biosecurity) pursuant to s 42 of the *Biosecurity Act*.

102 They submit that the *Acts Interpretation Act 1901* (Cth) gives no support to the insurers because it concerns statutory, not contractual, construction.

103 They submit that to give the chosen words their clear and unambiguous effect involves no absurdity. They submit that the words exclude cover for a fixed and certain list of diseases, namely those which had already been declared to be quarantinable diseases under the *Quarantine Act*.

104 They submit that the repeal of the *Quarantine Act* does not render this identification either nugatory or obscure. The list is simply static.

105 They submit that the clear wording of the policies should not readily be departed from to permit insurers to deny cover. They submit that absurdity requires more than inutility or even unreasonableness and that absurdity is not here present.

THE BIOSECURITY ACT

106 Before dealing with the parties' respective contentions, it is appropriate to make some observations about the *Biosecurity Act*, which reveal that while its structure is different to the *Quarantine Act*, its objects of protecting against biosecurity risks align with those of the *Quarantine Act*. It is plain that the *Biosecurity Act* replaced the *Quarantine Act*, albeit that it has a more extensive reach in terms of its subject matter than the *Quarantine Act*.

107 The preamble to the *Biosecurity Act* describes it as:

> An Act relating to diseases and pests that may cause harm to human, animal or plant health or the environment, and for related purposes.

108 Section 4(a) provides:

> **4 Objects of this Act**
>
> The objects of this Act are the following:
>
> (a) to provide for managing the following:
>
> (i) biosecurity risks;
>
> (ii) the risk of contagion of a listed human disease or any other infectious human disease;
>
> (iii) the risk of listed human diseases or any other infectious human diseases entering Australian territory or a part of Australian territory, or emerging, establishing themselves or spreading in Australian territory or a part of Australian territory;
>
> (iv) risks related to ballast water;
>
> (v) biosecurity emergencies and human biosecurity emergencies;
>
> ...

109 Chapter 2 comprises sections 33 to 116 and is entitled, "Managing biosecurity risks: human health". Part 1 of Chapter 2 comprises sections 33 to 42 and is entitled, "General protections and listing human diseases".

110 Part 2 of Chapter 2 comprises sections 43 to 58 and is entitled, "Preventing risks to human health". It enables the Health Minister to prescribe requirements in relation to individuals and operators of aircrafts and vessels that are entering or leaving Australian territory, and to determine biosecurity measures for the purposes of preventing a specified behaviour or practice that causes, or contributes to, the entry into, or the emergence, establishment or spread in, Australian territory or a part of Australian territory of a specified listed human disease.

111 Part 3 of Chapter 2 comprises sections 59 to 108 and is entitled, "Managing risks to human health: human biosecurity control orders". It provides for the imposition of a human biosecurity control order on an individual if the individual might have a listed human disease.

112 Section 475(1) provides:

> **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.

113 The Explanatory Memorandum to the *Biosecurity Bill 2014* includes the following:

> 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.

The Bill provides a strong regulatory framework that enables the management of biosecurity risks in a modern and responsive manner and enhances Australia's capacity to manage biosecurity risks into the future.

...

The Bill contains a range of biosecurity measures to manage the public health risk posed by serious communicable diseases. To reflect the new way in which human health risks are managed, it includes a range of measures that can be tailored to accommodate an individual's circumstances and aims to ensure individual liberties and freedoms are considered, as well as the risk posed by the disease. The Bill will allow for measures such as passenger entry and exit screening, the management of exotic diseases onshore and provide for the review of human biosecurity decisions, to ensure that the use of powers and exercise of functions under the Bill are balanced against an individual's rights.

The human health provisions of the Quarantine Act, particularly those relating to isolation and treatment, have rarely been used in the last 20 years. It is expected that the human health provisions contained in the Bill will also be seldom used. However it is important that legislative powers are available to manage serious communicable diseases should they occur. This has been particularly highlighted by the recent announcements by the World Health Organization that diseases such as polio and Ebola virus disease have met the conditions for Public Health Emergencies of International Concern.

THE LEGAL PRINCIPLES

114 An insurance policy is a commercial contract and is to be given a business-like interpretation. Interpreting it requires attention to the language used by the parties, the commercial circumstances which it addresses, and the objects which it is intended to secure. The meaning of the words chosen is determined objectively by reference to its text, context, and purpose, the question being what a reasonable person would have understood them to mean. Preference is given to a construction supplying a congruent operation to the various components of the whole and so as to avoid making

commercial nonsense: see *McCann v Switzerland Insurance Australia Ltd* (2000) 203 CLR 579 at 589 [22]; [2000] HCA 65; *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451 at [22]; *Zhu v Treasurer of the State of New South Wales* (2004) 218 CLR 530 at 559 [82]; [2004] HCA 56; *Wilkie v Gordian Runoff Ltd* (2005) 221 CLR 522 at 528 [15]; [2005] HCA 17; *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104 at 117; [2015] HCA 37.

115 No special rule applies to the construction of exclusions in contracts of insurance, but in some cases the normal rules of construction will make it appropriate to interpret an exclusion narrowly: *Allianz Australia Insurance Ltd v Inglis* [2016] WASCA 25 at [25]; *Impact Funding Solutions Ltd v AIG Europe Insurance Ltd* [2016] 3 WLR 1422; [2016] UKSC 57 at [7].

116 If it is clear:

(1) on the face of a written contract that an error has been made;

(2) that the literal meaning of the words used by the parties is an absurdity;

(3) what the self-evident objective intention of the parties was; and

(4) what correction is to be made to cure the mistake,

orthodox canons of construction will displace the absurd literal meaning by a meaningful and sensible one.

117 This approach:

(1) is to be distinguished from rectification in equity;

(2) is premised upon absurdity, not ambiguity;

(3) applies even where the language used by the parties is unambiguous;

(4) does not apply where to give the words their literal meaning brings about a result which is inconvenient or unjust but not absurd; and

(5) does not give the Court a mandate to rewrite an agreement so as to depart from the language used by the parties merely to give a provision an operation which, it appears to the Court, might make more commercial sense.

See: *Wilson v Wilson* (1854) 10 ER 811; 5 HL Cas 40 at 66-7; *Fitzgerald v Masters* (1956) 95 CLR 420 at 437; [1956] HCA 53; *Westpac Banking Corporation v Tanzone Pty Ltd* (2000) 9 BPR 17; [2000] NSWCA 25 at [21]; *Noon v Bondi Beach Astra Retirement Village Pty Ltd* [2010] NSWCA 202 at [46]; *Miwa Pty Ltd v Siantan Properties Pte Ltd* [2011] NSWCA 297 at [18]; *National Australia Bank Ltd v Clowes* [2013] NSWCA 179 at [34]-[38]; *Seymour Whyte Constructions Pty Ltd v Ostwald Bros Pty Ltd (In liquidation)* (2019) 99 NSWLR 317 at 322-3 [6]-[11]; [2019] NSWCA 11.

118 Finally, the *contra proferentem* principle has some continuing but perhaps limited vitality: see *Homburg Houtimport BV v Agrosin Private Ltd* (The Starsin) [2004] 1 AC 715 at [144]; *Dairy Containers Ltd v Tasman Orient Line CV* [2005] 1 WLR 215 at [12]; *Kawarau Village Holdings Ltd v Ho* [2018] 1 NZLR 378; [2017] NZSC 150 at [171]–[173]; *McCann v Switzerland Insurance Australia Ltd* (2000) 203 CLR 579; [2000] HCA 65 at [74].

DISPOSITION

119 The insurers' first submission involves the constructional choice as to whether the words "*Quarantine Act 1908* (Cth) and subsequent amendments" refer to amendments to the *Quarantine Act* or comprehend a reference to the *Biosecurity Act*, which replaced it.

120 In my view, the correct constructional choice is that the words do not comprehend a reference to an entirely new replacement enactment: *Risley v Gough* [1953] Tas SR 78 at 79; *Attorney-General of Western Australia v*

Marquet (2003) 217 CLR 545 at 564 [46]; [2003] HCA 67. They are a reference to the *Quarantine Act* as it stands from time to time.

121 This construction is supported by the fact that the clauses take up the exact formulation used by the *Quarantine Act*, "declared to be a quarantinable disease". The insurers' submission requires these words to be read as the different formulation and mechanism used by the *Biosecurity Act*, "determined to be a listed human disease". The two enactments regulate the same subject matter and have the same general objects, but by different standards and procedures.

122 The *Acts Interpretation Act 1901* (Cth) does not support the insurers. It concerns statutory, not contractual, construction.

123 I turn to the insurers' second submission. They do not seek rectification but rely only on construction. They do not suggest that the words are unclear or ambiguous. They say that they are absurd.

124 In a commercial context, absurdity is more than just lacking in genuine commercial good sense. It entails commercial nonsense, to the point where it is obvious that the parties did not mean what they said and obvious what they meant to say.

125 But the dividing line between that which lacks commerciality and that which is absurd may not always be a bright one. This is particularly so where, as is the case here, the words used are not incoherent and the exclusion still has work to do because the diseases declared under the *Quarantine Act* to be quarantinable diseases were still identifiable and the repeal of the *Quarantine Act* did not affect or annul "anything duly done" under the repealed Act: *Acts Interpretation Act 1901* (Cth) s 7(2)(b).

126 The Court does not substitute, by way of construction, its own commercial judgment for that of the parties. The Court also does not weigh the

importance of conditions which the parties have put into their contracts: see *Bowes v Chaleyer* (1923) 32 CLR 159 at 191; [1923] VLR 295.

127 Whilst, it seems to me, it would have made better commercial sense for the parties to have referred to a current Act rather than one repealed four years earlier, to have excluded diseases identified under the current Act, and to have chosen words to allow for the exclusion of serious diseases which break out during the cover period, what they did agree is not a clear mistake and, if it is, it does not rise to the level of absurdity.

128 One may suspect that, in not amending their policy documents to refer to the *Biosecurity Act*, a mistake was involved. Suspicion is insufficient. There is no basis to suspect that the insureds overlooked anything. If the insurers had made a mistake and they wished to contend that the insureds shared in that mistake when entering the policy, it was open to seek to rectify the policies but no such application was made.

129 It is not clear that the parties intended the words in question to allow for an ambulatory, rather than a static, list of excluded diseases. Allowing for a static and certain, rather than a moving, list cannot be said to be unworkable or absurd. It is not obvious that the parties intended to pick up replacement legislation.

130 The insureds correctly pointed out that had the *Quarantine Act* been repealed before policy inception and no other Act had taken its place, there would have been no basis for the words not to have been given their literal meaning. Diseases earlier declared to be quarantinable diseases under the *Quarantine Act* would have been excluded, as they will be on the literal meaning of those words.

131 It follows that the summons must be dismissed and the primary declarations sought by the insureds are properly to be made.

AMBULATORY OPERATION

132 Having regard to the conclusion on the primary issue, the secondary issue of construction does not arise. It is, in my view, not appropriate to deal with it on the hypothesis that the insurers had succeeded. This is because any question of construction would turn on the selection of the words which the parties would hypothetically be found to have intended. The construction of those presumed words would be artificial and entail circularity because the selection itself would need a judgment as to whether the parties intended ambulatory operation. The words they in fact chose are not absurd, do not allow for ambulatory operation, and it cannot be said that it is clear that they intended ambulatory operation.

CONCLUSION

133 I would make the following orders.

(1) Summons dismissed.

(2) Declarations that:

(a) On the proper construction of the "*Tourist Parks & Lifestyle Villages Insurance Policy*" issued by the first plaintiff to the first, second, and third defendants for the cover period 28 February 2020 to 28 February 2021, COVID-19 is not a disease declared to be a quarantinable disease under the *Quarantine Act 1908* (Cth) and the exclusion in the HDI Disease Benefit is not enlivened.

(b) On the proper construction of the "*Business Insurance Policy*" issued by the second plaintiff to the fourth defendant for the cover period 11 May 2019 to 11 May 2020, COVID-19 is not a disease declared to be a quarantinable disease under the *Quarantine Act 1908* (Cth) and the exclusion in the Hollard Disease Cover is not enlivened.

(3) Cross-claim is otherwise dismissed.

134 The parties agreed that there should be no order as to costs, to the intent that each should pay their own.

****

I certify that the preceding 134 paragraphs are a true copy of the reasons for judgment herein of the Honourable Justice Anthony Meagher and of the Court.

18.11.2020
Dated

Associate