Takeaways of principle from the COVID BI Test Cases

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The Full Federal Court in *Star Entertainment Group Ltd v Chubb Insurance Australia Ltd*[1] and *LCA Marrickville Pty Ltd v Swiss International SE*[2] (*COVID BI Test Cases*) have conveniently set out statements of principles in relation to the construction of insurance contracts as well as proximate cause and causation. The primary purpose of this article is to collate these general statements of principle after a short summary of the key findings in the *COVID BI Test Cases* to set the scene.

The COVID BI Test Cases — a summary

The *COVID BI Test Cases* comprise 10 interrelated COVID-19 insurance cases that were heard in the Full Federal Court in 2021.[3] The primary issue in *COVID BI Test Cases* is the proper construction of policy clauses relating to claims for business interruption in the context of the COVID-19 pandemic. The clauses that were under consideration were:

- hybrid clauses which provide cover for loss from orders or actions of a competent authority closing or restricting access to premises, but only where those orders or actions are made or taken as a result of infectious disease or the outbreak of infectious disease within a specified radius of the insured premises
- infectious disease clauses which provide cover for loss that arises from either infectious diseases or the outbreak of an infectious disease at the insured premises or within a specified radius of the insured premises
- prevention of access clauses which provide cover for loss from orders or actions of a competent authority preventing or restricting access to insured premises because of damage or a threat of damage to property or persons (often within a specified radius of the insured premises) and
- a catastrophe clause which provides cover for loss resulting from the action of a civil authority during a catastrophe for the purpose of retarding the catastrophe

In nine of the 10 proceedings in the *COVID BI Test Cases*, the primary judge determined that business interruption claims are not covered. This was because:

- in relation to the hybrid clauses, it was not possible for the court to conclude that the orders were made as a result of any circumstance at the premises or situation or within the specified radius
- the hybrid clauses of the policies specifically provide for human infectious or contagious disease. To construe the prevention of access clauses as also applying to a disease would involve profound incongruence and incoherence in the operation of the policy and
- in some cases, the order or action of the relevant authority did not require closure of the premises or situation

The appeal against the judgment of the primary judge has been unsuccessful on these issues.[4]

Principle of construction of insurance contracts

A policy is a commercial contract and should be given a business-like interpretation. This requires attention to the language used by the parties, the commercial circumstances which the contract addresses and the objects which it is intended to secure.[5]

Commercial contracts are construed in accordance with the following principles:

- The meaning of the terms of a commercial contract is to be determined by what a reasonable businessperson would have understood those terms to mean.[6]
- The question for consideration is not what each of the parties meant to say, but rather what the objective meaning is to be attributed to the words they have used to express what they have agreed.[7]
- A commercial contract is to be construed so as to avoid it "making commercial nonsense or working commercial inconvenience".[8]
- In the absence of a contrary intention, the construction of a commercial instrument will be approached on the basis that the parties intended

to produce a commercial result and constructions that make for commercial nonsense or would work commercial inconvenience should be avoided.[9]

- Care must be taken to ensure that it is the evident commercial object that is being given effect recognising that minds may differ as to the commerciality of a particular outcome.[10]
- A reasonable commercial construction according to commercial efficacy or common sense is to be preferred to "strict literal meaning" or a "literal interpretation".[11]
- In construing a commercial contract in its context, its terms must be considered as a whole, giving consistent meaning to all its terms and avoiding any apparent inconsistency.[12]
- Preference is to be given to a construction that gives a "congruent operation to the various components of the whole".[13]
- Particular fragments should not be isolated and the overall character ought to not be disregarded. There must be due regard to the overall nature of the instrument, the nature of the transaction or dealing that it records and its commercial purpose as evident from considering all of its terms. This also requires consideration of the style, layout, language and structure of the instrument:
  - — Some commercial instruments present as having been drafted with the coherence and consistency in terminology and grammatical expression that may be expected of an experienced and expert commercial lawyer. In such cases, it is appropriate for the language to be construed by reference to the customary forms adopted in such instruments.
  - — Others present as "a clumsily tailored variation of an ill-fitting off-the-shelf precedent".[14] In such instances, no reasonable businessperson would interpret the instrument with the same eye to differences in language and terminology as might be appropriate for instruments that have a different form of structure and expression.
  - — Some commercial instruments are relatively informal or are brought into existence to meet the exigencies and necessities of everyday commercial life without time or inclination to ensure neatness of grammar and consistency in terminology.
  - — Others present as being carefully considered and settled by those with considerable experience in their drafting. All such characteristics of the instrument as a whole should be brought to account when giving a business-like construction to the instrument.[15]
- Specific provisions will be given effect in preference to general provisions, or specific provisions are given greater weight than general provisions applying to the same subject matter.[16]
- An illustration of the way in which an instrument is construed as a whole such that its provisions fit together is the Anthony Hordern principle,[17] which provides that a general provision will usually be interpreted so that it does not contradict a specific power that imposes "conditions and restrictions which must be observed" in the exercise of the same power.[18]
- Apparently, inconsistent provisions in the same instrument are to be resolved, if at all possible on the basis that one provision qualifies the other and, hence, that both have meaning and effect. This is an aspect of the general rule that documents must be read as a whole.[19]
- Commercial instruments should be construed fairly and broadly without being too astute or subtle in finding defects.[20]
- Issues may arise as to the extent to which there may be regard to surrounding circumstances in the absence of any real ambiguity in the text or for the purpose of demonstrating ambiguity.[21]

Proximate cause

- The rule is to look to the proximate (or direct cause) and not the remote cause of loss or damage in order to determine the liability of underwriters (*causa proxima, non remota spectator* or the immediate cause, and not the remote cause, is to be considered).[22]
- The words "caused" and "directly caused" in an insurance context mean proximate or direct cause. The words "proximate cause" and "direct cause" are used interchangeably.[23]
- ". . . the words 'caused by an accident' naturally refer to the proximate or direct cause of the injury, and not to a cause of the cause, or to the mere occasion of the injury".[24]
- Proximate in this context meant proximate in efficiency rather than last in time.[25]
- A proximate cause is determined based upon a judgment as to the "real", "effective", "dominant" or "more efficient" cause.[26]
- What the proximate cause is, is to be decided as a matter of judgment reached by applying the common sense knowledge of a businessperson or seafarer.[27]

- The proximate cause rule is not divorced in the cases from the terms of the particular policy under consideration but was based upon the inferred mutual intention of the parties and would not apply if it would defeat the manifest intention of the parties.[28]
- There does not need to be a single dominant, proximate or effective cause of loss or damage:
  - — absent any provision in the policy to the contrary, if there are two concurrent causes, one being covered by the policy and the other not, the insured may recover
  - — however, different considerations will apply if there is one cause falling within the policy and the other cause is the subject of an exclusion. If the two causes are concurrent and interdependent, in that neither cause would have caused the loss but for the other, the exclusion clause will prevail: Wayne Tank principle[29]
  - — where the two concurrent proximate causes, one within the policy and the other the subject of an exclusion, are independent, it is:

    > always essential to pay close attention to the terms of any policy and the commercial context in which it was made, for it is out of these matters that the answer to the application of the policy to the facts will be revealed.[30]
    >
    > - if the policy's construction leads to the conclusion that the parties intended that no cover is provided for any loss caused by a particular cause and the loss was so caused, the policy cannot respond
    > - however, if the parties' intention was that the policy would not respond if only the excluded clause was the sole cause of the loss, the existence of that concurrent excluded cause is irrelevant[31]

- The proximate cause rule is capable of applying even where the word "directly" expressly qualifies the word "cause" in a policy.[32]

Conclusion

The above statements of principle comprise the toolkit for every insurance lawyer and ought to form the prism through which every insurance contract is viewed.

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Footnotes

1. *Star Entertainment Group Ltd v Chubb Insurance Australia Ltd* [2022] FCAFC 16; BC202201015.
2. *LCA Marrickville Pty Ltd v Swiss International SE* [2022] FCAFC 17; BC202201019.
3. *Swiss Re International Se v LCA Marrickville Pty Ltd* (2021) 394 ALR 461; [2021] FCA 1206; BC202109569. There were 10 interrelated cases.
4. Above n 2.
5. *McCann v Switzerland Insurance Australia Ltd* (2000) 203 CLR 579 at 589 per Gleeson CJ, at 601–2 per Kirby J and at 642 per Callinan J.
6. Above, cited in *Electricity Generation Corporation v Woodside Energy Ltd; Woodside Energy Ltd v Electricity Generation Corp* (2014) 251 CLR 640 at 656–657 (*Electricity Generation Corp*).
7. *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165; 211 ALR 342; [2004] HCA 52; BC200407463 at [40] per Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ; *Byrnes v Kendle* (2011) 243 CLR 253; 279 ALR 212; [2011] HCA 26; BC201105711 at [17] per French CJ, at [59] per Gummow and Hayne JJ and at [98] per Heydon and Crennan JJ; and *HDI Global Specialty SE v Wonkana No 3 Pty Ltd* (2020) 104 NSWLR 634; [2020] NSWCA 296; BC202011344 at [18]–[19] per Meagher JA and Ball J.
8. *Electricity Generation Corp*, above n 6, at 656–657.
9. *Zhu v Treasurer (NSW)* (2004) 218 CLR 530; 211 ALR 159; [2004] HCA 56; BC200407561 at [82]; *Electricity Generation Corporation*, above n 6, at [35] per French CJ, Hayne, Crennan and Kiefel JJ applied in *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104; 325 ALR 188; [2015] HCA 37; BC201509888 at [51] (*Mount Bruce*); *Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd* (2017) 261 CLR 544; 343 ALR 58; [2017] HCA 12; BC201702067 at [17] per Kiefel, Bell and Gordon JJ (*Ecosse*); and *Liberty Mutual Insurance Company Australian Branch trading as Liberty Specialty Markets v Icon Co (NSW) Pty Ltd* (2021) 396 ALR 193; 154 ACSR 126; [2021] FCAFC 126; BC202106369 at [152].
10. *Maggbury Pty Ltd v Hafele Australia Pty Ltd* (2001) 210 CLR 181; 185 ALR 152; [2001] HCA 70; BC200107781 at [43] per Gleeson, Gummow and Hayne JJ.
11. *Australian Casualty Co Ltd v Federico* (1986) 160 CLR 513 at 520 per Gibbs CJ; *Gollin & Co Ltd v Karenlee Nominees Pty Ltd* (1983) 153 CLR 455 at 464 per Mason, Murphy, Brennan, Deanne and Dawson JJ.
12. *Fitzgerald v Masters* (1956) 95 CLR 420 at 437; *Australian Broadcasting Commission v Australasian Performing Right Association Ltd* (1973) 129 CLR 99 at 109 per Gibbs J (*Australian Broadcasting Commission*); *Mount Bruce*, above n 9, at [46].
13. *Wilkie v Gordian Runoff Ltd* (2005) 221 CLR 522 at 529.

14. *Ecosse*, above n 9, at [51] per Gageler J.
15. Above n 1, at [14].
16. The maxim generalia specialibus non derogant, generalibus specialia derogant.
17. The Anthony Hordern principle is an application of the maxim generalia specialibus non derogant, generalibys specialia derogant: above n 1, at [79]–[80]; *Trust Co (Nominees) Ltd v Banksia Securities Ltd (recs and mgrs apptd) (in liq)* [2016] VSCA 324; BC201610865 at [46]; *Hume Steel Ltd v Attorney-General (Vic)* (1927) 39 CLR 455 at 466.
18. *BMW Australia Ltd v Brewster; Westpac Banking Corp v Lenthall* (2019) 269 CLR 574; 374 ALR 627; [2019] HCA 45; BC201911310 at [206] per Edelman J; *Greencapital Aust Pty Ltd v Pasminco Cockle Creek Smelter Pty Ltd (Subject to Deed of Company Arrangement)* [2019] NSWCA 53; BC201902127 at [51]–[52] per Leeming JA, Sackville and Emmett AJJA agreeing; and *Macquarie International Health Clinic Pty Ltd v Sydney Local Health District* (2020) 103 NSWLR 443; 383 ALR 688; [2020] NSWCA 161; BC202007215 at [269]–[270] per Bathurst CJ, Bell P and McCallum JA agreeing; above n 1, at [79]–[81]; above n 2, at [58].
19. *Re Media Entertainment & Arts Alliance; Ex parte Hoyts Corporation Pty Ltd* (1993) 178 CLR 379 at 386 per Mason CJ, Brennan, Dawson, Toohey, Gaudron and McHugh JJ; above n 1, at [82].
20. *Australian Broadcasting Commission*, above n 12, at 109–110.
21. *Mount Bruce*, above n 9, at [48]–[49] and [52] per French CJ, Nettle and Gordon JJ and at [111] per Kiefel and Keane JJ.
22. *Lasermax Engineering Pty Ltd v QBE Insurance (Australia) Ltd* [2005] NSWCA 66 at [39].
23. Above, at [41].
24. *Australian Casualty Co Ltd v Federico* (1986) 160 CLR 513 at 521 per Gibbs CJ.
25. *Leyland Shipping Co Ltd v Norwich Union Fire Insurance Society Ltd* [1918] AC 350 at 369 per Lord Shaw (*Leyland Shipping*); *Global Process Systems Inc v Syarikat Takaful Malaysia Bhd* [2011] UKSC 5 at [19] per Lord Saville and at [49] per Lord Mance (*The "Cendor MOPU"*); *Sheehan v Lloyds Names Munich Re Syndicate Ltd* [2017] FCA 1340; BC201709819 at [77] (*Sheehan*); above n 1, at [110] per Derrington and Colvin JJ.
26. *Leyland Shipping*, above n 25, at 370 per Lord Shaw; *Wayne Tank and Pump Co Ltd v Employers Liability Assurance Corp Ltd* [1974] QB 57 at 66 per Lord Denning MR (*Wayne Tank*); *Sheehan v Lloyds Names Munich Re Syndicate Ltd* [2017] FCA 1340 at [77]; *LCA Marrickville Pty Limited v Swiss Re International Se* [2022] FCAFC 17 at [110] per Derrington and Colvin JJ.
27. *The "Cendor MOPU"*, above n 25, at [19] per Lord Saville and at [49] and [79] per Lord Mance; *Sheehan*, above n 25, at [77]; above n 1, at [110] per Derrington and Colvin JJ.
28. Above n 22, at [45].
29. *Wayne Tank*, above n 26.
30. *McCarthy v St Paul International Insurance Co Ltd* (2007) 157 FCR 402; 239 ALR 527; [2007] FCAFC 28; BC200701593 at [104].
31. Above, at [90], [104] and [114]; *Midland Mainline Ltd v Eagle Star Insurance Co Ltd* [2004] 2 Lloyd's Rep 604 at 606; *Sheehan*, above n 25, at [77]; above n 1, at [110]–[111] per Derrington and Colvin JJ.
32. Above n 22, at [46]. Above n 1, at [109]–[110] per Derrington and Colvin JJ.