SUPREME COURT OF QUEENSLAND

CITATION:	*Selected Seeds P/L v QBEMM P/L & Anor* [2009] QCA 286
PARTIES:	**SELECTED SEEDS PTY LTD** ACN 009 826 016 (plaintiff/respondent) **v** **QBEMM PTY LIMITED** ACN 087 142 569 **QBE INSURANCE (AUSTRALIA) LIMITED** ACN 003 191 035 (defendants/appellants)
FILE NO/S:	Appeal No 4709 of 2009 SC No 7020 of 2008
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	22 September 2009
DELIVERED AT:	Brisbane
HEARING DATE:	4 September 2009
JUDGES:	Holmes and Fraser JJA and White J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal allowed.** **2. Set aside the orders made by the trial judge.** **3. Dismiss the respondent's claim in the Trial Division.** **4. Respondent to pay the appellants' costs of the proceedings in the Trial Division and of the appeal.**
CATCHWORDS:	INSURANCE – POLICIES OF INSURANCE – CONSTRUCTION – where respondent purchased liability insurance from the appellants – where the policy was described as a 'broadform liability policy' – where respondent involved in litigation in relation to its business of supplying seed – where respondent had contracted with a purchaser to supply Jarra grass seed but actually supplied Summer grass seed – where that purchaser in turn supplied the seed to a third party and the seed was then supplied to further parties, eventually causing damage to property – where the respondent was sued by a party and paid $150,000 to settle the claims made against it – where the trial judge declared that the respondent was entitled to indemnity under the insurance policy issued by the appellants for $150,000 – whether the respondent's legal liability to pay the $150,000

fell within the insuring clause – whether there had been an 'Occurrence' which had caused property damage – whether the respondent's liability was excluded from cover under the 'Efficacy Clause'

Allianz Australia Ltd v Wentworthville Real Estate Pty Ltd [2004] NSWCA 100, cited
Australian Broadcasting Commission v Australasian Performing Right Association Ltd (1973) 129 CLR 99; [1973] HCA 36, cited
Australian Casualty Co Ltd v Federico (1986) 160 CLR 513; [1986] HCA 32, cited
Collector of Customs v Pozzolanic Enterprises Pty Ltd (1993) 43 FCR 280; [1993] FCA 456, cited
Commissioner of State Revenue v Politis [2004] VSC 126, cited
Coulton v Holcombe (1986) 162 CLR 1; [1986] HCA 33, cited
Darlington Futures Ltd v Delco Australia Pty Ltd (1986) 161 CLR 500; [1986] HCA 82, cited
Drayton v Martin (1996) 67 FCR 1, cited
GIO General Ltd v Newcastle City Council (1996) 38 NSWLR 558, considered
John Wyeth & Brother Ltd v Cigna Insurance Co of Europe SA/NV & Ors [2000] EWHC 192 (Comm), distinguished
Maggbury Pty Ltd v Hafele Australia Pty Ltd (2001) 210 CLR 181; [2001] HCA 70, cited
McCann v Switzerland Insurance Australia Ltd (2000) 203 CLR 579; [2000] HCA 65, cited
Nittan (UK) Ltd v Solent Steel Fabrication Ltd t/as Sargrove Automation [1981] 1 Lloyd's Rep 633, considered
Pacific Carriers Ltd v BNP Paribas (2004) 218 CLR 451; [2004] HCA 35, cited
Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd (2004) 219 CLR 165; [2004] HCA 52, cited
Wilkie v Gordian Runoff Ltd (2005) 221 CLR 522; [2005] HCA 17, cited

COUNSEL: G A Thompson SC, with K Holyoak, for the appellants
R S Ashton for the respondent

SOLICITORS: Barry & Nilsson for the appellants
Carne Reidy Herd for the respondent

[1] **HOLMES JA:** I agree with the reasons of Fraser JA and with the orders his Honour proposes.

[2] **FRASER JA:** The trial judge declared that the respondent was entitled to indemnity under the insurance policy issued by the appellants for the sum of $150,000 paid by the respondent to settle claims made against it in Federal Court proceedings; and, in respect of the respondent's claim for its legal fees and expenses totalling $685,806.32 which it incurred in defending those claims the trial judge declared that

the respondent was entitled to payment of such costs and expenses as were reasonably incurred in its defence.[1]

[3] The first question in this appeal is whether the trial judge was correct in concluding that the respondent's legal liability to pay the $150,000 fell within the insuring clause in the policy. The second question is whether the trial judge was correct in finding that the respondent's liability was not excluded from cover under the "Efficacy Clause".

The facts

[4] The facts were established by an agreed statement of facts tendered at the trial.

[5] The respondent conducted the business of grain and seed merchants. In February 2003 it contracted to supply Jarra grass seed to S & K Gargan. Under that contract S & K Gargan agreed to sow the seed on their property, grow and harvest a Jarra seed crop, and sell the entire crop of harvested Jarra seed back to the respondent. Between February and May 2003 S & K Gargan planted the seed and grew and harvested a grass seed crop. In or about June or July 2003, with the agreement of the respondent S & K Gargan supplied some of their seed crop, representing it to be Jarra grass seed, to M Gargan. From about September 2003 to April 2004, M Gargan planted that seed and then grew from it and harvested a new grass seed crop.

[6] In about October 2004, M Gargan sold a quantity of his seed, represented to be Jarra grass seed, to Landmark Operations Limited, which conducted a business of farming merchandise supplier in the Northern Territory. In about December 2004 Landmark sold a quantity of the seed to Mr and Mrs Shrimp, representing that it was Jarra grass seed. They planted the seed on their property in the Territory between December 2004 and January 2005, intending to grow a Jarra seed and hay crop from the seed.

[7] In fact the Shrimps grew only Summer grass, rather than Jarra grass. None of the parties was aware that the seed the respondent supplied to S & K Gargan was contaminated with or was substantially Summer grass seed. Each grass is inherently viable, assuming appropriate conditions and cultivation practices. However, Jarra grass has a quality that makes it fit for production of commercial grass seed and good quality palatable stock feed. Summer grass is fit only for low quality stock feed. It is not fit for production of commercial grass seed. Because the presence of Summer grass seed increased with each progressive harvest, the seed M Gargan supplied to Landmark, and which Landmark then supplied to Mr and Mrs Shrimp, was almost exclusively Summer grass seed. The consequence of the planting of Summer grass on Mr and Mrs Shrimp's land was that it would have to be eradicated if the land were to be used as intended or for some similar purpose which was incompatible with the presence of the Summer grass.

[8] In proceedings in the Federal Court Mr and Mrs Shrimp sued Landmark for damages for breach of contract, misleading or deceptive conduct and negligence. Mr and Mrs Shrimp claimed that the introduction of Summer grass caused them loss and damage in four categories:

(a) the costs of eradicating the Summer grass from 340 hectares of their property;

---

1 *Selected Seeds P/L v QBEMM P/L & Anor* [2009] QSC 70.

(b) the loss of use of that land during the eradication program, which was expected to take at least two years;

(c) the loss of profits which would have been derived from the sale of Jarra fodder and Jarra seed;

(d) a diminution in the value of their land, resulting in their contracting to sell that land in December 2007 for less than what would have been the price had the seed been Jarra grass.

[9] Many parties were joined in the Federal Court proceedings. Relevantly, Landmark joined M Gargan, claiming indemnity and contribution against Mr and Mrs Shrimp's claim, and M Gargan in turn joined the respondent, claiming an indemnity and contribution. The respondent was also granted leave to defend Mr and Mrs Shrimp's claim.

[10] M Gargan pleaded in his proposed amended cross-claim against the respondent, which was circulated before the proceedings were settled in March 2008, that the respondent was liable on the following bases: that by reason of the respondent's false or misleading representation to S & K Gargan that the seed was Jarra grass seed, in breach of sections 52 and 53 of the *Trade Practices Act* 1974 (Cth), M Gargan suffered losses which included his potential liability to Landmark and to Mr and Mrs Shrimp; M Gargan suffered the same losses by reason of the respondent's negligence in breach of duties of care it owed to him and to Landmark and Mr and Mrs Shrimp; and the respondent was liable to contribute to Mr and Mrs Shrimp and Landmark's claims as a concurrent wrongdoer in their actions pursuant to Part VIA of the *Trade Practices Act* 1974 (Cth) or Part 2 of the *Proportionate Liability Act* 2005 (NT).

[11] The plaintiff contributed $150,000 to the settlement of the Shrimps' claim. It is common ground that the settlement was a reasonable one in the interests of the respondent and the insurers.

The insuring clause

[12] The policy under which the respondent claimed indemnity for that sum and its costs was a "broadform liability policy". The "coverage" was defined in section 2 of the policy. In cl 2.1, the insurers agreed to pay:

> "(a) all sums which You become legally liable to pay by way of compensation;
>
> (b) all costs awarded against You;
>
> in respect of Personal Injury or Property Damage happening during the Period of Insurance and caused by an Occurrence within the Territorial Limits in connection with Your Business."

[13] The insurers conceded that the consequences of the planting of Summer grass on Mr and Mrs Shrimp's land constituted "Property Damage". That term was defined in the policy to mean:

> "(a) physical damage to or loss or destruction of tangible property including any resulting loss of use of that property, or

> (b) loss of use of tangible property which has not been physically damaged, lost or destroyed provided such loss of use is caused by an Occurrence."

[14] The issue about the insuring clause at trial was whether there was an Occurrence which had the causative effect required by the clause. Occurrence was defined to mean, so far as presently relevant, an "event which results in Personal Injury or Property Damage, neither expected nor intended from [the respondent's] standpoint." The trial judge concluded that the case was within insuring cl 2.1 of the policy because Property Damage, in terms of paragraph (a) of the definition, was caused by an Occurrence constituted by the planting of the seed on Mr and Mrs Shrimp's land.

[15] The insurers argued that the Occurrence and the Property Damage could not be the same thing because an Occurrence is an event which results in Property Damage. So much was accepted by the trial judge, but the trial judge rejected the next limb of the argument, that the planting of the seed is the same thing as the Property Damage:[2]

> "This submission for the insurers blurs the distinction, common to many contexts of legal liability, between actions and consequences. That distinction is real although in some cases the consequences are instantaneous. The relevant event is the *action* of planting the seed. The consequence of that action was that the land came to be in a damaged *condition.* The submission cannot be accepted."

[16] In this appeal, the insurers argued that their construction derived support from a statement by Kirby P in *GIO General Ltd v Newcastle City Council*[3] to the effect that the "Occurrence" under a similar policy must be limited to the earthquake itself (the cause of the damage), rather than including both the earthquake and the consequential, contemporaneous collapse of that insured's building. As was submitted for the respondent, the trial judge's reasoning does not lead to the anomalous conclusion, which Kirby P was concerned to avoid, that the property damage was caused by itself. The insurers' argument was correctly rejected by the trial judge for the reasons set out in the passage I have quoted.

[17] The insurers next argued that the planting of the seed in Mr and Mrs Shrimp's land did not cause the legal liability in respect of the Property Damage, which arose, if at all, from the antecedent supply of seed. The insurers referred to Sheller JA's analysis in *GIO General Ltd v Newcastle City Council*:[4]

> "Undoubtedly the earthquake of 28 December 1989 was within the definition of an occurrence. But when the phrase speaks of "caused by an occurrence", in my opinion, it speaks in the context of the insured's legal liability for injury or damage from an occurrence which is "causally relevant", a phrase I have taken from *Fleming on the Law of Torts*, 8th ed, (1992), Sydney, Law Book Co, at 194. In that context the occurrence is not the earthquake but the insured's act which rendered it legally liable to pay. Thus, if a structure is unsound because the insured designed it negligently, the fact that its

---

2 [2009] QSC 70 at [21].
3 (1996) 38 NSWLR 558 at 567.
4 (1996) 38 NSWLR 558 at 572.

> collapse was caused by an earthquake does not mean that it was not caused by an occurrence or event of negligence."

[18] The insuring clause in that policy provided indemnity against sums "which the insured shall become legally liable to pay by way of compensation . . . in respect of:

(a) Public Liability
(i) Personal Injury
(ii) Damage to Property
(Other than personal injury and damage to property arising out of Products Liability)

(b) Products Liability
(as defined herein) happening during the period of insurance caused by an occurrence in connection with the Business of the insured…."[5]

[19] That provision was open to the construction that the phrase "caused by an occurrence" qualified the insured liability, but cl 2.1 of the subject policy requires only that the Personal Injury or Property Damage be caused by an Occurrence. It does not require that the respondent's legal liability be caused by an Occurrence. The insurers' construction requires cl 2.1 to be read as if it provided indemnity for sums which the respondent becomes "legally liable to pay by way of compensation…caused by an Occurrence…" That clumsy construction is not suggested by the text of the policy or any other consideration. The insurers argued that it was required by the word "and" in the phrase "Property Damage happening during the Period of Insurance and caused by an Occurrence", but that word requires only that the Property Damage both happen during the period of insurance and be caused by a relevant Occurrence.

[20] The insurers also argued that other clauses of the policy, cls 3.3, 3.4, 3.5 and 3.8, indicate that the policy as a whole was not designed to cover a failure to supply goods in accordance with a contractual or representational description. I will return to those provisions, but it is sufficient here to note that they express exclusions to the cover. I do not regard them as being relevant to this issue.

[21] Finally in this respect, the insurers argued that the planting found to be the relevant Occurrence was too far removed from any conduct by the respondent to be "in connection with" the respondent's business as required by cl 2.1. The trial judge did not consider this point, for the very good reason that it was not pleaded or pursued at the trial. Nevertheless, there being no factual dispute and no contention that the respondent would be prejudiced if the Court considered this new argument, it is expedient to deal with it.[6]

[22] The phrase "in connection with" allows for considerable width and flexibility in the necessary casual relationship between an Occurrence and the respondent's Business.[7] In *Drayton v Martin*[8] Sackville J said:

> "Of course, the meaning of the phrase "in connection with", whether used in a statute or in a contract, must depend on the context:

---

5 The clause is set out in the judgments at first instance: (1995) 8 ANZ Ins Cas 61-249, in the judgment of Bainton J at 75, 791, and (1994) 8 ANZ Ins Cas 61-227, in the judgment of O'Keefe CJ at 75, of 489. As the respondent's counsel pointed out, there appears to be a typesetting error in the form of the clause set out at (1996) 38 NSWLR 558 at 560.

6 See *Coulton v Holcombe* (1986) 162 CLR 1 at 7-8.

7 See, for example, *Collector of Customs v Pozzolanic Enterprises Pty Ltd* (1993) 43 FCR 280 at 208, 290.

8 (1996) 67 FCR 1 at 32.

Burswood Management Ltd v Attorney-General (Cth) (1990) 23 FCR 144 at 146. Nonetheless, the width of the ordinary meaning of the phrase is indicated by a passage from the judgment of Wilcox J in *Our Town FM Pty Ltd v Australian Broadcasting Tribunal* (1987) 16 FCR 465, at 479-480:

> "The words 'in connection with' have a wide connotation, requiring merely a relationship between one thing and another. They do not necessarily require a casual (sic) relationship between the two things: see *Commissioner for Superannuation v Miller* (1985) 8 FCR 153 at 154, 160, 163. They may be used to describe a relationship with a contemplated future event: see *Koppen v Commissioner for Community Relations* (1986) 11 FCR 360 at 364; *Johnson v Johnson* [1952] P 47 at 50-51. In the latter case the United Kingdom Court of Appeal applied a decision of the British Columbia Court of Appeal, *Re Nanaimo Community Hotel Ltd* [1945] 3 DLR 225, in which the question was whether a particular court, which was given 'jurisdiction to hear and determine all questions that may arise in connection with any assessment made under this Act, had jurisdiction to deal with a matter which preceded the issue of an assessment. The trial judge held that it did, that the phrase 'in connection with' covered matters leading up to, or which might lead up to, an assessment. He said, [1944] 4 DLR 639:
>
> > "One of the very generally accepted meanings of "connection" is "relation between things one of which is bound up with or involved in another"; or, again, "having to do with". The words include matters occurring prior to as well as subsequent to or consequent upon so long as they are related to the principal thing. The phrase "having to do with" perhaps gives as good a suggestion of the meaning as could be had."
>
> This statement was upheld on appeal."

[23] The insurers relied on the statement by Kirby P, with whose reasons Powell JA agreed, in *GIO General v Newcastle City Council*[9] that it could not be said, on any reasonable construction of the phrase "in connection" that the "occurrence", in that case the earthquake, occurred in connection with the business of the insured City of Newcastle. I have found no relevant analogy between that case and this one. The respondent's supply of grass seed to S & K Gargan occurred in the course of the respondent's business of "grain and seed merchants" described in the policy schedule. The subsequent chain of causation - the planting of the respondent's grass seed, the supply and subsequent planting, growth and harvesting of a second generation of seed, the planting of that seed and the consequential growth, harvesting, supply and then re-supply to and planting on Mr and Mrs Shrimp's land of a third generation of seed - seems unremarkable in the context of the respondent's business. Reasonable parties in the position of the insurers and the respondent would surely have contemplated that this relationship between the planting of seed on Mr and Mrs Shrimp's land and the respondent's business as

---

9 (1996) 38 NSWLR 558 at 567.

grain and seed merchants constituted a "connection" within the meaning of the insuring clause.

[24] I would affirm the trial judge's conclusion that the respondent's liability was within cl 2.1 because Property Damage, which happened during the period of insurance, was caused by an Occurrence constituted by the planting of the seed on Mr and Mrs Shrimp's land. I have therefore found it unnecessary to consider the respondent's notice of contention, under which the respondent challenged the trial judge's conclusion that the Property Damage was not caused by an Occurrence constituted by the respondent's supply of seed.

The "Efficacy Clause"

[25] The second question is whether cover was excluded by the "Efficacy Clause". Under that heading, this clause provides:

> "(FAILURE TO GERMINATE, GROW - FOR PLANTS, SEEDLINGS ETC)
>
> ENDORSEMENT ATTACHING TO AND FORMING PART OF POLICY NUMBER: QD 1029740 BFL
>
> IT IS HEREBY AGREED AND DECLARED THAT WITH EFFECT FROM: 31/03/2002
>
> The following additional EXCLUSION is added to this Policy:-
>
> This Policy does not cover any liability arising directly or indirectly from or caused by, contributed to by or arising from:-
>
> 1. the failure of any Product to germinate or grow or meet the level of growth or germination warranted or represented by the Insured; or
>
> 2. the failure of any Product to correctly fulfil its intended use or function and/or meet the level of performance, quality, fitness or durability warranted or represented by the Insured."

[26] The insurers argued that liability was excluded by the second limb of the Efficacy Clause. The trial judge found that, although the intended use or function of the seed supplied by the respondent was that it should produce Jarra grass and Jarra seed and it failed to fulfil that use or function, the respondent's liability for damages for Mr and Mrs Shrimp's losses arose from the damage caused by the planting of the wrong grass seed on their property rather than from what the Jarra grass seed purportedly supplied by the respondent failed to do. The trial judge said about the four different categories of loss and damage (described in paragraph 8 above) which Mr and Mrs Shrimp suffered as a result of the planting of the wrong grass seed on their land that:[10]

> "The damage to the property was the result of what was done to that land. The land was contaminated by the planting of Summer grass seed and by the subsequent growth of the grass. The losses to Mr and Mrs Shrimp from that property damage, according to their pleading, were those within (a) and (b) as I have summarised their case above at paragraph [7]. They also had a contract with their supplier under which they were entitled to receive Jarra grass seed. They lost the

---

10 [2009] QSC 70 at [27].

> benefit of that contract and thereby lost the profits which they would have derived from planting seed of that description. Undoubtedly this was the principal basis for their claims for the expectation loss within (c) above. It may have been the case that some of those losses were recoverable also upon alternative causes of action pleaded by Mr and Mrs Shrimp. Nevertheless, these different parts of the claimants' case illustrate the distinction which is presently relevant. In essence, it is the distinction between, on the one hand, the detrimental consequences of what was done to the land and, on the other, the consequences of the land not being improved (by planting Jarra seed) as it should have been."

[27] The trial judge referred to *John Wyeth & Brother Ltd v Cigna Insurance Co of Europe SA/NV & Ors*,[11] in which that distinction was made. That insured sought its legal costs in defending claims brought against it for damages for alleged negligence in its manufacture and sale of certain drugs. Langley J held that the purpose of the efficacy exclusions in those policies was to exclude from cover claims which, as the insured's counsel had put it, "were for failing to make the Claimant better or failing to prevent some condition arising (eg contraception or vaccines)", whereas the claims against the insured were "claims for injuries because the drugs caused dependency and injury which either did not pre-exist or did not do so to the same degree." The exclusion did not apply because the insured's liability was for the injury which its product inflicted, rather than for the drug's failure to achieve the benefit which was its intended purpose. The trial judge considered that *John Wyeth & Brother Ltd v Cigna Insurance Company of Europe SA/NV & Ors* was not distinguishable on the ground that Langley J had found that the insurer's interpretation of the policy "would have emasculated much of the cover":[12] the insurers' construction of the Efficacy Clause would also substantially affect the extent of the cover.

[28] At the trial, the insurers relied upon *Nittan (UK) Ltd v Solent Steel Fabrication Ltd*.[13] A claimant who manufactured smoke detector units acquired an electronic device from the insured. The failure of that electronic device to perform its intended function, of controlling the temperature in the cabinet in which the claimant's goods were tested, caused the cabinet to overheat and the resulting damage to it and the claimant's smoke detector units. An exclusion which was in terms similar to the Efficacy Clause was held to operate. The trial judge distinguished that decision on the ground that an intended purpose of that insured's product was to prevent damage to property of the nature which in fact occurred.

Summary of the arguments in the appeal

[29] The insurers argued that the trial judge was mistaken in characterising the relevant "liability" as being "for Property Damage, being the damage to the Shrimps' land";[14] that focussed inappropriately on the nature of the damage, rather than the content of the respondents' legal liability; whether the respondent's liability fell within the policy provisions depends upon its substance, rather than upon any particular

---

11 [2000] EWHC 192 (Comm). On appeal, Waller LJ, with whom Dyson LJ and Sir Murray Stuart-Smith agreed, held that Langley J's reasoning was "clearly right": *John Wyeth & Brother Ltd v Cigna Insurance Company of Europe SA/NV & Ors* [2001] EWCA Civ 175 at [14].

12 [2000] EWHC 192 (Comm) at 44.

13 [1981] 1 Lloyd's Rep 633.

14 [2009] QSC 70 at [26].

manner in which the claim against the respondent is framed;[15] the respondent's liability was based upon a representation by the insured that the seed which it supplied was Jarra seed; and the trial judge must have overlooked or failed to give the necessary breadth to the opening words of the Efficacy Clause, "arising directly or indirectly". The Efficacy Clause should be given its very broad, literal meaning, particularly because it is in the form of a separate endorsement to the printed policy, thus objectively suggesting an intention to adapt the standard terms of the policy. On that argument, the distinction drawn by the trial judge between the failure of the respondent's product to fulfil its use or function and the damage the product did to the Shrimps' land was irrelevant. What was done to the land was the planting of seeds which did not function as intended. If the seeds had functioned as intended or fulfilled their intended use then there would have been no damage to the land.

[30] The respondent argued that the trial judge's construction was correct. The construction of the exclusion contended for by the insurers would result in there being no cover available to the respondent for customers' claims arising out of mis-labelling of a product, contamination of a product, or accidental injury to a product (for example, caused by a failure of refrigeration during transport), with the result that the products liability cover in the policy would be of very doubtful worth. As the trial judge observed, the insurers' construction would result in an exclusion with a far reaching operation.[16] The respondent argued that the exclusion did no more than recognise the fact that the products liability policy was not intended to operate as a product guarantee. If, for example, Jarra seed was not as good as it was promoted to be, a complaint by a customer would not be within the policy, but there was no warrant for extending the exclusion to a case in which a customer suffered loss because the Jarra seed was substantially contaminated by Summer grass seed. The claim here was not based upon the failure of the seed to perform as Jarra grass to a claimed standard, but rather upon the fact that the adulterated condition of the product damaged the Shrimps' property. The respondent refuted the insurer's assertion that the policy was not designed to cover a failure to supply goods that met a contractual or representational description, pointing out that the very business of the insured was to supply goods pursuant to a contract of supply.

[31] The parties also referred to other provisions of the policy, which I discuss in the next section of these reasons, as providing support for their opposing arguments.

Discussion

[32] The distinction made in *John Wyeth & Bros Ltd v Cigna Insurance Co of Europe SAMD & Ors* has a beguiling simplicity about it, but in my respectful opinion factual differences and the differences between the clause in the *Cigna* policies and the Efficacy Clause render the decision of no real assistance here. The relevant clause in those policies excluded indemnity for liability in respect of "bodily injury… resulting from the failure of the …insured's products to perform the function or serve the purpose intended…". The Efficacy Clause refers to the different causal relationship between the respondent's liability (rather than Property Damage) and the failure of the respondent's product to fulfil its intended function or represented quality. The opening words of the Efficacy Clause, "arising directly or

---

15 The insurers referred to *Allianz Australia Ltd v Wentworthville Real Estate Pty Ltd* (2004) 13 ANZ Ins Cas 61-598; [2004] NSWCA 100 at [23] – [24] per Mason P (with whom Sheller JA and Pearlman AJA agreed), citing *West Wake Price & Co v Ching* [1957] 1 WLR 45 at 55-6, *Elders Ltd v Swinbank* [1999] FCA 798 at [97]-[107], *State of New South Wales v AXA Insurance Australia Ltd* (2002) 54 NSWLR 626; 12 ANZ Ins Cas 61-522.

16 [2009] QSC 70 at [30].

indirectly from or . . . contributed to by . . . ", also connote a much broader causal relationship[17] than the phrase in the *Wyeth* policies "resulting from". That the expression of the causal relationship in the Efficacy Clause should be given its broad, literal meaning is strongly suggested by the contrast between it and the different and more narrowly expressed causal relationship in the insuring clause ("Property Damage … caused by an Occurrence") and in the definition of Occurrence ("event which results in … Property Damage").

[33] The difference between the nature of the third party claim in this case and that in *Wyeth* is also significant. In that case the claimants alleged that their use of the insured's drug caused them personal injury, such as drug dependency and withdrawal symptoms. That alleged injury thus arose from some alleged inherent vice in the drug. It was quite distinct from any injury resulting from the mere failure of the drug to fulfil its intended purpose of curing or preventing illness. In this case the agreed facts make it clear that there was nothing inherently harmful to property in the seeds which the respondent supplied. The damage to the Shrimps' property occurred only because the seeds the Shrimps planted, and thus, derivatively, the respondent's seeds, were allegedly unsuitable for the uses to which the Shrimps' wished to put them. More relevantly in terms of the Efficacy Clause, the respondent's only alleged liability to M Gargan and others, including Mr and Mrs Shrimp, arose only because the seed the respondent supplied did not correctly fulfil its represented or warranted quality as Jarra seed or correctly fulfil its intended use or function of producing Jarra grass and seed. On a literal construction of the provision, the liability for which the respondent sought indemnity was plainly excluded.

[34] The principles of contractual interpretation sometimes require departure from the literal meaning of a contractual provision. The interpretation of an insurance policy, like the interpretation of any other written contract, involves the ascertainment of the meaning which its language 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 contract.[18] As is also the case in any commercial contract, a court should adopt a businesslike interpretation of an insurance policy.[19] A court may depart from the strictly literal meaning of a particular provision if an alternative construction which the words will bear is more reasonable and more in accord with the parties' probable intention;[20] "the whole of the instrument has to be considered, since the meaning of any one part of it may be revealed by other parts, and the words of every clause must if possible be construed so as to render them all harmonious one with another" and "it will be permissible to depart from the ordinary meaning of the words of one provision so far as is necessary to avoid an inconsistency between that provision and the rest of the instrument."[21]

---

17 See, for example, *Commissioner of State Revenue v Politis* [2004] VSC 126 per Nettle J at [20].

18 *Australian Casualty Co Ltd v Federico* (1986) 160 CLR 513 at 520 per Gibbs CJ, at 525 per Wilson, Deane and Dawson JJ; *Maggbury Pty Ltd v Hafele Australia Pty Ltd* (2001) 210 CLR 181 at 188 per Gleeson CJ, Gummow and Hayne JJ; *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451 at [22]; *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 at [40].

19 *McCann v Switzerland Insurance Australia Ltd* (2000) 203 CLR 579 at 589 per Gleeson CJ; *Wilkie v Gordian Runoff Ltd* (2005) 221 CLR 522; [2005] HCA 17 at [15] per Gleeson CJ, McHugh, Gummow and Kirby JJ.

20 *Australian Casualty Co Ltd v Federico* (1986) 160 CLR 513 at 520 per Gibbs CJ.

21 *Australian Broadcasting Commission v Australasian Performing Right Association Ltd* (1973) 129 CLR 99 at 109 per Gibbs J. See, in the insurance context, *Wilkie v Gordian Runoff Ltd* (2005) 221 CLR 522 at [16].

[35] The parties joined issue upon the effect of other provisions of the policy as throwing light upon the intended cover. The respondent's argument in this respect focussed principally upon the description of the policy as a "broadform" liability policy. The respondent argued that the policy was intended to provide a substantial cover for products liability, and that this aim would be defeated by acceptance of the insurers' construction of the Efficacy Clause. The proposition that a substantial products liability cover was intended is arguably consistent with other provisions:

> "Broadform Liability Policy
>
> . . .
>
> 1. Definitions
>
> . . .
>
> 1.18 "Your Products" means
>
> Any goods, products and property (after they have ceased to be in Your possession or under Your control), which are or is deemed to have been manufactured, grown, extracted, produced, processed, constructed, erected, installed, repaired, serviced, treated, sold, supplied or distributed by You (including any container thereof other than a vehicle).
>
> . . .
>
> 3. Exclusions
>
> This Policy does not cover liability in respect of:
>
> 3.3 Product defect
>
> Property Damage to Your products if the damage is attributed to any defect in them or to their harmful nature or unsuitability.
>
> 3.4 Loss of use
>
> Loss of use of tangible property which has not been physically injured, or lost or destroyed resulting from:
>
> (a) a delay in or lack of performance by or on Your behalf of any agreement;
>
> (b) the failure of Your Products to meet the level of performance, quality, fitness or durability expressly or impliedly warranted or represented by You, but this exclusion does not apply to the loss of use of other tangible property resulting from the sudden and accidental physical damage to or loss or destruction of Your Products after they have been put to use by any person or organisation other than one of You designated in paragraphs 1.17(a) or 1.17(b).
>
> 3.5 Product recall
>
> Claims arising out of or resulting from the withdrawal, inspection, repair, replacement or loss of

use of Your Products or of any property of which they form a part, if such Products or property are withdrawn from the market or from use because of any known or suspected defect or deficiency in them.

. . .

3.8 Contractual liability

Any obligation assumed by You under any agreement or contract except to the extent that:

(a) the liability would have been implied by law;

(b) the liability arises from a provision in a contract for lease of real or personal property other than a provision which obliges You to effect insurance or provide indemnity in respect of the subject matter of that contract;

(c) the liability is assumed by You under a warranty of fitness or quality as regards to Your Products;

(d) the obligation is assumed under those agreements specified in the Schedule."

[36] Clause 3.3 excludes product liability only where the relevant damage is to the product itself, and cl 3.5 excludes product liability only for claims arising or resulting from withdrawal etc of the insured's products because of known or suspected defects or deficiencies in them. Clause 3.4 excludes liability resulting from the matters described in (a) and (b) (subject to the narrow exception to the exclusion in (b), which is inapplicable here), but only where the respondent's delay or lack of performance or the failure of its products to meet warranted or represented levels of performance etc results in "[l]oss of use of tangible property which has not been physically injured, or lost or destroyed . . .". As I mentioned in paragraph 14 above, there was physical damage to the Shrimps' land. Although the respondent was sued only by M Gargan for his economic loss, the respondent's liability to M Gargan, like any liability to the Shrimps or others, was "in respect of" the injury to the Shrimps' land. The qualification in the introductory words of cl 3.4 is consistent with the view that the products liability cover comprehended by cl 2.1 was intended to extend to liability of the character which is here in issue. Clause 3.8 excludes liability in respect of obligations assumed by the insured under any agreement or contract, except to the extent described in paragraphs (a)-(d). The expression of those exceptions from the exclusion is also consistent with the view that products liability indemnity was intended in respect of the matter described in (a)-(d), which include, in (c), liability in respect of any obligation assumed by the respondent under an agreement or contract by way of a warranty of fitness or quality as regards the insured's seeds.

[37] The respondent's supply of seed was a core part of the respondent's business of "grain and seed merchants" described in the policy schedule. In this context, and putting to one side for the moment the effect of the Efficacy Clause, the breadth of the language of cl 2.1 in this "broadform" policy and the carefully expressed limits upon the reach of the exclusion clauses I have identified suggest that cl 2.1 was

intended to provide a substantial indemnity in respect of the insured's liability arising out of its supply of its products.[22] That is, however, no justification for rejecting the literal meaning of the Efficacy Clause. The conventional approach of construing exclusion clauses independently of each other is here required by the terms of the Efficacy Clause itself. It is in the form of a separate endorsement which expresses a new agreement for an additional exclusion. Plainly it was intended to exclude cover which otherwise fell within the insuring clause and which other exclusion clauses left intact.

[38] A literal construction of the Efficacy Clause does reduce the extent of cover for products liability, but it still provides cover for liabilities arising on various bases. The policy remains a "broadform liability policy". It may be that the nature and extent of the residual products liability cover is unclear, but that of itself forms no basis for disregarding the apparent effect of the exclusion clause. As Griffiths LJ observed in *Nittan (UK) Ltd v Solent Steel Fabrication Ltd*,[23] "the exception must be given its plain meaning, and I do not think that we are entitled, although I was at one time tempted, to seek some means of narrowing the meaning of the exception in order to produce a policy content more readily identifiable".

[39] For the reasons I earlier gave, on the facts of this case the distinction made in *John Wyeth & Brother Ltd v Cigna Insurance Co of Europe SAMD & Ors* is irrelevant under the Efficacy Clause. The emphatic and unambiguous text of that provision also leaves no scope for any relevant application of the principle, often applied in construing insurance polices, that ambiguities are to be construed against the interests of a party which drafted the contract.[24] In my view the liability asserted against the respondent in this case clearly fell within the exclusion.

Proposed Order

[40] I would allow the appeal and set aside the orders made by the trial judge. The respondent's claim in the trial division should be dismissed. The respondent should be ordered to pay the appellants' costs of the proceedings in the Trial Division and of the appeal.

[41] **WHITE J:** I have read the reasons for judgment of Fraser JA and agree with his Honour's reasons and the orders which he proposes.

---

22 There are other provisions, not discussed in argument, which arguably suggest the same view: cl 3.15 excludes claims in respect of Personal Injury or Property Damage "caused by or arising out of Your Products" knowingly exported to the United States of America or Canada; and there are conditions in clause 4.10 that the respondent must take all reasonable precautions to prevent Personal Injury and Property Damage "and to prevent the manufacture, sale or supply of defective Products…", and at its own expense take reasonable action to trace, recall or modify any of its products "containing any defect or deficiency" of which it has knowledge or reason to suspect.

23 [1981] 1 Lloyd's Rep 633 at 640.

24 See *Darlington Futures Ltd v Delco Australia Pty Ltd* (1986) 161 CLR 500; [1986] HCA 82 at 510 – 511.