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Details of Filing

Document Lodged:	Outline of Submissions
File Number:	NSD144/2021
File Title:	GUILD INSURANCE LIMITED ACN 004 538 863 v GYM FRANCHISES PTY LTD ACN 611 474 947 & ANOR
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA

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GUILD INSURANCE LIMITED

REPLY SUBMISSIONS

No. NSD144 of 2021

No. NSD145 of 2021

Federal Court of Australia

District Registry: New South Wales

Division: Commercial and Corporations National Practice Area (Insurance List)

Guild Insurance Limited (ACN 004 538 863)
Applicant in NSD144 of 2021 and NSD145 of 20211

Gym Franchises Australia Pty Ltd (ACN 611 474 947) and another
Respondents in NSD144 of 2021

Dr Jason Michael t/as Illawarra Paediatric Dentistry
Respondent in NSD145 of 2021

A. Introduction

1. These are Guild's submissions in reply to the Respondents' Submissions, filed on 31 August 2021 (referred to herein as **RS**). Unless stated otherwise, we continue to use terms as defined in Guild's Outline of Submissions, filed on 18 August 2021 (referred to herein as **GS**).

2. These submissions are structured as follows. First, we address the contra proferentum rule. Secondly, we address Dr Michael's case, adopting where relevant the headings used by Dr Michael in the RS. Finally, we address Gym Franchises' claim, and again we adopt the headings used in the RS.

B. Contra Proferentum

3. The respondent suggests (RS [17]) that Guild test cases are an appropriate case, if there be ambiguity as to construction, for the application of the *contra proferentum* principle.

4. The authorities make plain that the *contra proferentum* principle is one "of last resort", in the sense that there remains ambiguity after the application of the other relevant principles of construction. *Central Coast Council v Norcross Pictorial Calendars Pty Ltd* [2021] NSWCA 75 at [126]; *Rava v Logan Wines Pty Ltd* [2007] NSWCA 62 at [51]–[56]; *North v Marina* (2003) 11 BPR 21,359 ; [2003] NSWSC 64 at [75]–[77]; *470 St Kilda Road v Robinson* (2013) 308 ALR 411; [2013] FCA 1420 at [68]-[69]. As Campbell J explained in *North v Marina* (at [75]-[77]):

> *[75] The role of the maxim is to enable the court to choose between alternative meanings of the document or clause in question, being meanings which are fairly open. It is not a legitimate use of the maxim to say that two meanings of a particular contractual provision are possible, and that the meaning unfavourable to the proferens should be chosen, if one of those alternative meanings is an unrealistic or unlikely construction of the contract ….*
>
> *[76] It is well-established that the contra proferentum rule is only to be used where the document is otherwise ambiguous … As the statements of law set out in the previous paragraph show, in deciding whether the document is ambiguous, no stretched or artificial notion of ambiguity should be used.*
>
> *[77] Further the contra proferentum rule is a principle of last resort …*

5. This is not a case where, having exhausted all other relevant principles of construction, we are left with alternative meanings of the relevant clauses in question, being meanings which are fairly open. In the premise, there is simply no need, nor basis for resorting to the *contra proferentum* rule.

C. Dr Michael's Case

C.1. Order of a competent government or statutory authority

Competent government or statutory authority

6. As set out in GS [12], the Prevention of Access Extension relies upon closure or evacuation *'by order of a competent government or statutory authority'* for cover under the Extension to be triggered. Dr Michael submits that this element of the Extension is satisfied *'by reason of restrictions imposed on dentists in New South Wales by the Australian Dental Association (**ADA**), the Dental Board of Australia (**DBA**), the Dental Council of NSW (**Dental Council**), and the Australian Health protection Principal Committee (**AHPPC**).'* These set of announcements and recommendations are termed the 'Authority Response – Dr Michael (RS [448]).

7. Dr Michael asserts that the Authority Response – Dr Michael satisfies this requirement because, even if the recommendations were not issued by a '*competent government or statutory authority',* the recommendations constituting the Authority Response – Dr Michael were nonetheless, in effect, transformed into orders of a competent government or statutory authority because they were adopted and re-issued by the DBA, the Dental Council and the Prime Minister (RS [450], [456], [460]).

8. There is a fallacy in that argument: no *orders* were promulgated by the ADA or the AHPPC.

9. The communications forming part of the Authority Response – Dr Michael issued by those bodies, which are accepted by Guild as a *'government or statutory authority'* (GS [29], [32], [35]), must be assessed on their terms for the essential quality of also being an *'order'* for the purposes of the Prevention of Access Extension. Other communications forming the Authority Response – Dr Michael first released by the ADA (including the NSW ADA Branch) and the AHPPC only go as far as providing some context to the communications by those bodies. Dr Michael appears to accept this, in saying that it is *'irrelevant that the orders were first promulgated by'*, for example, the ADA.

10. Further, just because an announcement or recommendation was re-issued or mentioned by an accepted government or statutory authority, it is <u>not</u> transformed into an 'order' for the purposes of the Prevention of Access Extension. To the extent that this contention forms part of Dr Michael's case (c.f. RS [450], [456], [460]), it should be rejected.

11. Dr Michael contends that the "orders promulgated by the ADA and the AHPPC have the necessary quality of being 'orders of a competent government authority' by reason of the backing given to them by the Dental Board of Australia, the Dental Council and the Prime Minister" (RS [456]). The Court should not accept that proposition for at least the following reasons:

    a) ***First***, as noted above (and GS [31], [34]) the ADA and AHPPC only ever issued advice or recommendations. The various communications Dr Michael relies upon cannot properly be construed as communicating an "order";

b) ***Secondly***, it was not within the role or remit of the DBA to *order* dental practitioners to adopt or implement the Guidelines. The fact that a statutory authority may communicate an expectation that practitioners adhere to particular guidelines issued by an industry body does not make those guidelines an order of that statutory authority;

c) ***Thirdly***, the relevant question is whether there was an "order of a competent government or statutory authority" (see RS at [452]). Mere "backing" by a government or statutory authority of recommendations or guidelines issued by another body is not enough. Even less so when the body publishing the Guidelines (in this case the ADA) did not communicate those Guidelines as being compulsory. They were a Guide to assist dentists in exercising their professional judgment on issues relating to their practices and, more importantly, the treatment of their patients in the context of the unfolding pandemic, nothing more;

d) ***Fourthly***, contrary to Dr Michael's submission (at RS [460]), the ADA Guidelines were not "adopted and given force by the DBA and the Dental Council of NSW". The DBA made plain in its email of 23 April 2020[1] and its update of the same date[2] that the Guidelines were not DBA approved and that it did not have the role or remit to require their implementation. At its highest, the DBA expressed an *expectation* that dental practitioners follow the *recommendations* of the AHPPC. The communications from the Dental Council of NSW merely passed on the AHPPC's recommendation. The distinction identified in paragraph 30 and 31 below demonstrates that the Dental Council of NSW was not mandating implementation of the ADA Guidelines or Level 2 or Level 3 restrictions. On any objective view, the mere communication of a recommendation by AHPPC by the Dental Council of NSW cannot seriously be considered an *order* of the Dental Council of NSW.

[1] JAM-23
[2] JAM-27

"Order"

12. Dr Michael appears to advance three reasons why the Authority Response – Dr Michael satisfies the definition of *'order'*:

    a) the language used in the announcements was mandatory in nature;

    b) the recommendations were intended to be mandatory and Dr Michael subjectively considered them to be mandatory; and

    c) he was professionally obligated to follow all recommendations issued by his professional, regulatory body.

13. We address each of these contentions in turn.

Mandatory language

14. Dr Michael contends that the use of mandatory language in the titles and content of the various announcements relied upon in the Authority Response – Dr Michael underscores the mandatory nature of the announcements, rendering them "orders" for the purpose of the Prevention of Access Extension (RS [460] – [464]). That submission should not be accepted for at least the following reasons:

    a) ***First***, the real question is whether on a true construction of the various communications, Dr Michael was "ordered" to implement the ADA Guidelines or implement Level 2 or Level 3 restrictions;: he was not. Contrary to the argument advanced by Dr Michael, the issue is not whether the Level 2 and Level 3 restrictions were expressly framed in mandatory terms (c.f. RS at [461]), but whether Dr Michael was ordered to implement the recommendations issued. For the reasons stated in Guild's Submissions (GS at [29]-[35]), none of the missives Dr Michael relies upon could properly be considered an *order* requiring Dr Michael to implement Level 2 or Level 3 restrictions, let alone an order for closure of his Business Premises.

    b) ***Secondly***, none of the recommendations or communications were in mandatory terms. This is not a case of *'form over substance'* as alleged (RS [464]) nor is it the case of a recommendation which is mandatory because it

was issued in advance of *'legally binding measures'* to follow (RS [460]). The communications constituting the Authority Response – Dr Michael were not mandatory in either form or substance (see GS [25]-[35]).

c) ***Thirdly***, Dr Michael's argument is premised on the proposition that restrictions were "imposed" by the ADA, but that is patently not the case when regard is had to the text of the various communications;

d) ***Fourthly***, the submission (RS [461]) that Level 2 and Level 3 restrictions were expressly framed in mandatory terms and so much is clear from their title of "restrictions" is unsound and apt to mislead. The fact is that they sat within a document released by the ADA titled Guidance on Dental Treatment during COVID-19 Pandemic. They were not expressed to be "rules" or "regulations", both of which would suggest they were mandatory. In ordinary usage, 'guidance' means "advice or information aimed at resolving a problem or difficulty": Oxford English Dictionary.

15. The fact that the implementation of Level 2 and Level 3 restrictions was not mandatory is clear when the communications Dr Michael received are considered individually and collectively.

16. On 23 March 2020, Dr Michael received an email from the ADA[3] which relevantly provided (our emphasis):

> ***The ADA's advice*** *is that dental practices should immediately restrict dental treatment to non-aerosol generating procedures and consider the type of patients that receive treatment wherever possible (Level 2) restrictions as per this framework.*

17. Clearly, the email was advisory. The ADA did not use mandatory language.

18. On the same day, Dr Michael received an email from the ADA-NSW Branch.[4] That email was in different terms and promulgated different advice (emphasis in original):

> ... ***ADA NSW is now recommending that dentist minimise the provision of routine dental treatment until 30 April 2020***. ...
>
> ...

[3] JAM-5
[4] JAM-6

> *As health care professionals, ultimately it is up to you to make decisions about your practice. We have developed a guidance document and resources to assist with your decision available here. The current recommendation is that dentist should now operate at Level 2 …*

19. Like the ADA's email, the ADA-NSW Branch email did not express a mandatory requirement to implement Level 2 restrictions. It expressed a recommendation that "dentist minimise the provision of routine dental treatment". It observed that the current recommendation was that dentist should operate at Level 2, but also observed that "ultimately it is up to you to make decisions about your practice". Obviously, at least insofar as the ADA-NSW Branch was concerned, the implementation of particular levels and general adherence to the Guide was ultimately up to the individual practitioner.

20. On 23 March 2020, the ADA released a media statement[5] which relevantly provided:

> *It appears that the government will continue to consider dental services as essential as long as they are provided safely. **The ADA's advice** is that dental practices should immediately restrict dental treatment to non-aerosol generating procedures and consider the types of patients that receive treatment wherever possible (Level 2) restrictions as per this framework (…).*

21. Consistent with the email the ADA sent on the same day, the media release expressed the ADA's advice to practitioners. It did not express a mandatory requirement. It was evident from this media release that the 'framework' that the ADA prepared was aimed at facilitating the continuation of dental services during the pandemic – so much was clear from the opening paragraph, which was in the following terms:

> *Over the last few days, the ADA has been providing expert advice … on a framework … to support the continuation of essential dental service. This is based on a staged, proportionate, pre-planned response to the escalation of COVID-19.*

22. Put in context, the 'framework' was prepared by the peak national body for dentists with the specific aim of allowing dentists to continue to practice during the pandemic.

23. On 24 March 2020 the DBA's COVID-19 update to dental practitioners[6] relevantly provided:

> *While services provided by dental practitioners currently fall within this category (an essential indoor gathering), dental practitioners should consider the risk environment*

[5] JAM-8
[6] JAM-10

> *and public safety when making decisions about whether to defer non-urgent elective dental services.*
>
> *Risk assessments can be used by practitioners to help them decide whether to carry out infection prone procedures such as those that generate aerosols.*
>
> *Practitioners are also reminded that they must comply with the Commonwealth and their respective state and territory jurisdictional health direction and guidance about COVID-19.*

24. Under the heading "Resources to help you manage COVID-19", the DBA's 24 March 2020 release stated (our emphasis):

> *All dental practitioners **must** continue to adhere to the Dental Board of Australia's Guidelines for infection control.*
>
> *Dental practitioners providing care **must** also comply with the Australian Guidelines for the Prevention and Control of Infection in Health Care (2019) …*

25. The mandatory language is in stark contrast to the absence of any reference to the ADA's Guide, which was published the day before. There was no statement by the DBA that dental practitioners must comply with the ADA's Guide; it was not even referred to.

26. The fact that there was no government mandate to implement Level 2 restrictions was made plain by the ADA within its media release of 26 March 2020[7], where it stated:

> *In the absence of a government mandate, that ADA's [sic] has issued a recommendation nationally to apply level 2 restrictions.*

27. The ADA's use of the word 'recommendation' in contradistinction to the use of, say, the word 'mandate', 'direction' or 'requirement' is important. It was never the ADA's intention to mandate Level 2 restrictions. That theme continues through the ADA's subsequent communications, which were always expressed as a recommendation.

28. The email Dr Michael received on 26 March 2020 from the ADA[8] also communicated a recommendation. That email went no further than communicating an excerpt from the advice provided by the AHPPC to National Cabinet in the following terms:

> *AHPPC recommends adopting the 'Managing COVID-19 Guidelines' published by the ADA and implementing a triage system for dental practice. AHPPC recommends all dental practices implement level 3 restrictions as outlined in ADA's guidance. …*

[7] JAM-14
[8] JAM-15

29. The AHPPC's recommendation that dental practitioners adopt the 'Managing COVID-19 Guidelines' published by the ADA and implement Level 3 restrictions was published on 28 March 2020.[9]

30. On 28 March 2020, Dr Michael received an email from the Dental Council of NSW repeating the AHPPC's recommendation. After stating what the AHPPC was, the email continued:

> *The AHPPC has now recommended the adoption of 'Managing COVID-19 Guidelines' published by the Australian Dental Association (ADA) and further the AHPPC recommends that all dental practices implement Level 3 restrictions as outlined in the ADA's guidance document.*

31. Clearly, the Dental Council of NSW was merely passing on the AHPPC's recommendation. It was not itself recommending or advising the adoption of the Guidelines or implementation of Level 3 restrictions, let alone requiring it. The above passage should be contrasted to the following passage appearing later in the email:

> *The Council reiterates the need for dental practitioners to ensure that they continue to fulfil their obligations relating to infection control when practising and comply with the Dental Board of Australia's Guidelines on Infection Control. We have an obligation to ensure patient safety – as well as our own safety and that of our staff.*

32. If the Dental Council of NSW intended to mandate the Guidelines or the implementation of Level 3 restrictions, it would have expressly done so in the way it referred in the email to compliance with the Dental Board of Australia's Guidelines on Infection Control.

33. On 28 March 2020, the DBA issued an alert which merely repeated the AHPPC's recommendation.[10]

34. On 2 April 2020, the DBA and AHPRA released a joint update[11], which relevantly provided (emphasis in original):

> *On 27 March, the Australian Health Protection Principal Committee (AHPPC) released advice to dental practitioners about managing COVID-19. …*
>
> *Their advice reads" 'AHPPC recommends adopting the 'Managing COVID-19 Guidelines' published by the ADA and implementing a triage system for dental*

[9] JAM-17
[10] JAM-18
[11] JAM-19

> *practice. AHPPC recommends all dental practices implement level 3 restrictions as outlined in ADA's guidance. …*
>
> ***The Board expects all dental practitioners …. To follow the AHPPC's recommendation and apply it to their practice setting.***
>
> *Our profession has well-established behaviours and values which provide a framework for ethical decision-making in a wide range of situations. You should continue to apply such guidance as far as it practical, recognising these are unique and challenging circumstances.*

35. As has been noted previously, this update is expressed as "an expectation" of the DBA.

36. The ADA's "expectation" that dental practitioners adopt Level 3 restrictions was repeated on 7 April 2020.[12]

37. On 21 April 2020, Dr Michael received an email from the ADA titled "the Prime Minister has announced a move back to Level 2 restrictions, effective 26th April", which referred to the "easing of restrictions" for dentists.[13]

38. On 22 April 2020, Dr Michael received an email from the Dental Council of NSW[14] which relevantly provided (our emphasis):

> *I am pleased to advise that the National Cabinet has from 27 April 2020* ***recommended*** *relinquishing of level 3 dental service restrictions and the move to level 2 restrictions, as outlined in the Australian Dental Association's Managing COVID-19 Guidelines.*

39. On 23 April 2020, Dr Michael received an email from the DBA which relevantly provided:[15]

> *The AHPPC has announced that it 'supports the current recommendation by the Australian Dental Association (ADA) that Dentists [sic]* now move to level 2 restrictions, which will allow a broader range of interventions to be undertaken, including all dental treatments that are unlikely to generate aerosols …'.*
>
> *The Board expects all dental practitioners to follow the AHPPC's advice. Remember that you must also check with your respective state and territory health department for directives that apply to dental practice.*
>
> *…*

[12] JAM-20; see also JAM-25
[13] JAM-21
[14] JAM-22
[15] JAM-23; see also JAM-27, which was in identical terms.

40. The email expressly touched upon the role of the DBA and its limitations in a public health context:

> *While the emergency response to COVID-19 is a national issue, public health legislation is primarily a power of the states and territories. National Cabinet, put in place to manage the response to the pandemic, takes advice form the AHPPC and makes recommendations which are used to guide state and territory government decisions and their exercise of powers available under the state and territory health Acts. These Acts allow for restrictions to control and prevent the spread of the virus, usually in the form of public health orders.*
>
> *The role of the Board*
>
> *Our role and remit is to protect the public by regulating individual dental practitioners. That National Law does not give authority or power to the National Boards to issue public health orders. That is the responsibility of the government. The role of the regulator is to ensure only health practitioners who are suitably trained and qualified to practise in a competent and ethical manner are registered, with the aim of protecting the public.*

41. Finally, the email offered the following in relation to Guidelines issued by professional bodies or associations (pertinent in the present context to the ADA's Guidelines) (our emphasis):

> *Professional bodies and associations, such as the Australian Dental Association (ADA), have a different but crucial role to play in supporting dental practitioners. The role of association is to represent the professional by promoting it, developing good practice guidance and policy and advocating to government in support of their members. We would expect the associations to suggest practice guides for the AHPPC to adopt in a public health crisis.*
>
> *While* ***the Managing COVID-19 guidelines published by the ADA are not Board-approved Guidelines****, the Board expects all dental practitioners …. to follow the AHPPC's recommendation and apply its advice in their practice setting.*

42. Dr Michael does not suggest that the DBA's email misstates the true position: namely that it was not within the DBA's role and remit to require the implementation of the ADA's Guidelines by practitioners.

43. On 8 May 2020, Dr Michael received an email from the ADA titled "the National Cabinet approved the move to Level 1 restrictions" for dentists.[16] He received an email from the Dental Council of NSW to the same effect.[17] As noted previously, neither expressed an *order* from either the ADA or Dental Council of NSW.

[16] JAM-29
[17] JAM-30

Subjective intention

44. It is also contended by Dr Michael that despite the actual language used in an "order", it can be considered mandatory if it *'was intended to be received in mandatory terms'* and it was *'understood by the recipient to be mandatory.'* (RS [464]). In response two things can be said:

a) ***First***, the subjective intention of the issuing body, and the subjective understanding of the recipient, are irrelevant. The relevant consideration is whether, objectively, there was an order having regard to the natural and ordinary meaning of that word;

b) ***Secondly***, there is no admissible evidence to support the proposition that the various missives Dr Michael relies upon were "intended to be received in mandatory terms", contrary to their clearly expressed terms. The absence of such evidence is understandable; it would be inappropriate to look behind the terms of a communication or recommendation in determining whether it amounted to an "order".

Professional obligations

45. Dr Michael further contends that the announcements constituting the Authority Response – Dr Michael were "orders" as he, as a dentist, was obligated to follow any advice issued by the regulatory body for dentists (RS [465]).

46. Dr Michael's obligation to respond to or implement guidance issued by the dental regulatory bodies is a separate matter to the question as to whether the recommendations constituting the Authority Response – Dr Michael are properly classified as 'orders' for the purpose of the Prevention of Access Extension. In fact, the recommendations issued concerned business practices of dentists, and, in general terms, guidance on how to operate their practices safely in the context of COVID-19, not a mandatory order to close the dental clinic. How Dr Michael operated his clinic during the COVID-19 pandemic, even with strict abidance of the ADA Guidelines, was a matter for his own professional judgement.

47. Dr Michael's reference to s.41 of the *Health Practitioner Regulation National Law (NSW)* (RS [465]) is obtuse. That section refers to a code or guidelines approved by a National Board. The ADA Guidelines were not approved by the ABA (see paragraph 41 above).

48. We also observe that *Health Care Complaints Commission v Reid* [2018] NSWCATOD 162 at [169] does not support the proposition that "a failure to follow the recommendation of a statement that applies to medical practitioners is capable of constituting unsatisfactory professional misconduct" (see RS at [465]). In *Health Care Complaints Commission v Reid* the Tribunal said (at [169]):

> *[169] We find that the information and recommendations in the statement applied to all gynaecologists in Australia. Whilst strict compliance with the statement was not mandatory (in the sense of being a legally enforceable obligation) it represented best practice. A departure from the statement should only have been made after careful evaluation, in limited clinical circumstances, and after provision of all relevant information to a patient and obtaining her informed consent.*

49. The 'statement' was a reference to the Royal Australian and New Zealand College of Obstetricians and Gynaecology's standard (C-Gyn 20) (at [159]). The Tribunal was dealing with particular 29a of Complaint One.

50. In that case the Health Care Complaints Commission had contended that when the particulars of Complaint One were considered cumulatively, they justified a finding of professional misconduct (at [644]). The Tribunal held that its findings in relation to the particulars established under Complaint One, considered collectively, were so serious that they of themselves warrant a finding of professional misconduct (at [651]). There were 31 particulars to Complaint One, many with multiple components. Thus, it was not the finding in relation to particular 29a of Complaint One that amounted to professional misconduct, but the cumulation of the conduct in relation to each of the particulars.

51. It follows that the Court could not be satisfied that the ADA Guidelines were mandatory because Dr Michael could face disciplinary action for not following them. Whether or not a dental practitioner has engaged in unsatisfactory professional conduct or professional misconduct is far more nuanced. Consideration of what constitutes unsatisfactory conduct and professional misconduct for the purposes of the

National Law was explained by Basten JA in *Chen v Health Care Complaints Commission* [2017] NSWCA 186 at [18]- [20] as follows:

> *The structure of Part 8 of the Health Practitioner Regulation National Law is inconsistent with any generic limitations on the powers conferred in Pt 8, Div 3. Section 149A(1) confers powers to caution or reprimand, impose conditions on registration, order a practitioner to undergo medical or psychiatric treatment or counselling, or complete an educational course, order the practitioner to report on his or her practice and to seek advice in relation to management of the practice. Section 149B allows for the imposition of a fine where the Tribunal finds the practitioner guilty of unsatisfactory professional conduct or professional misconduct. Section 149C provides, as noted above, for the Tribunal to suspend or cancel the practitioner's registration.*
>
> *The circumstances in which cancellation or suspension is available include findings of incompetence, professional misconduct, conviction rendering the practitioner unfit in the public interest and not being a suitable person. The term "professional misconduct" does not have a specific meaning; it is merely a category of "unsatisfactory professional conduct" which is sufficiently serious to justify suspension or cancellation.[14] The phrase "unsatisfactory professional conduct" is broadly defined by reference to 12 separate categories of conduct relating to professional practice. They include demonstrating competence or care below the standard reasonably expected of a practitioner of an equivalent level of training or experience,[15] making a referral in circumstances where the practitioner has a financial interest in giving that referral without disclosing the interest,[16] overservicing [17] and, finally, any other improper or unethical conduct relating to the practice of the practitioner's profession.[18]*
>
> *There is no category of unsatisfactory professional conduct which is not capable, depending on the circumstances, of giving rise to professional misconduct and hence engaging the power of either suspension or cancellation of registration. The only requirement is that it be "sufficiently serious" to justify such an order, a characterisation which must depend upon an evaluative judgment made by the Tribunal. Some, perhaps all, categories include conduct which may reveal a defect of character as to which the Tribunal may conclude that the person should not be allowed to practise his or her profession unless at some future date the practitioner is able to satisfy the Tribunal that the defect has been overcome. Incompetence or inadequate care may in some circumstances be remediable by specific steps; in other circumstances the Tribunal may be concerned that the carelessness, for example, is such as to cast doubt on the suitability of the person to practise medicine. Each of the criteria for cancellation or suspension may be analysed in this way. Each case will depend upon an evaluative judgment to be made by the Tribunal as to the nature and seriousness of the conduct. It follows that the legislative scheme is inconsistent with the implication of the abstract condition sought to be imposed by the practitioner on the language of s 149C(1). [footnotes omitted].*

52. As Basten JA observed, the phrase "unsatisfactory professional conduct" is broadly defined by reference to 12 separate categories of conduct relating to professional practice set out in s.139B of the National Law. Unsurprisingly, those 12 categories of conduct do not include in terms failing to comply with a guideline or statement of an industry body.

53. One further matter may be observed in relation to the Authority Response – Dr Michael. It includes a raft of communications relating to restrictions on elective surgery. It is not clear what role, if any, they had in relation to the conduct of Dr Michael's Business. He leads no evidence about that, and they do not appear to be relied upon by him in these proceedings. An important observation about the restrictions on elective surgery is that they were expressly aimed at preservation of PPE. To that end, aside from not amounting to an order for the closure of the whole or part of the Business Premises, those restrictions did not arise directly or indirectly from "human infectious or contagious disease … at the Business Premises", or "the discovery of an organism likely to result in human infectious or contagious disease at the Business Premises".

C.2. Closure

54. The only point Dr Michael advances against Guild's submissions as to whether the premises were "closed" (GS [38]-[40]) is that "*it may be open to conclude that the "closure" of the Business in respect of some operations constitute a closure of a "part" of the Business premises*". For the reasons set out in GS [38]-[40], that is not a construction of the words "*closure … of the whole or part of the Business Premises*" that is fairly open. If that was the intention, there would be no need for the words "at the Business Premises" in the chapeau to the Prevention of Access Extension. It may also be observed that where the Policy intended to engage in relation to "use of the Business Premises" and the ability to trade or otherwise conduct the Business from the Business Premises, it used specific language to that effect (see subclause (a) of the Prevention of Access Extension, which engages, inter alia, where the intervention prevents access to *or hinders the use of* the Business Premises and the chapeau to the Business Prevention Extension which refers to an "inability to trade or otherwise conduct" the Business from the Business Premises).

55. Taken to its logical extreme, on Dr Michael's construction any regulation or industry guideline affecting dentists that could be linked to "human infectious or contagious disease at the Business Premises" or "the discovery of an organism likely to result in human infectious or contagious disease at the Business Premises". For example, a change in recommendations regarding the sterilisation of equipment which delayed the changeover between patients and thereby reduced the number which could be seen

in a normal day, could trigger the Prevention of Access Extension. It cannot seriously be contended that the words "closure or evacuation of the whole or part of the Business Premises" manifest such an intention.

C.3. The causative element

56. It is common ground (GS [43]; RS [446]) that to engage the prevention of Access Extension, the order must arise "**directly or indirectly**" from:

a) "human infectious or contagious disease … at the Business Premises"; or

b) "the discovery of an organism likely to result in human infectious or contagious disease at the Business Premises".

57. The Court would not accept the proposition that an order can arise "indirectly" from "human or contagious diseases at the Business Premises" in circumstances where there is no disease at the Business Premises (RS [472]). That requires a construction which entirely ignores the words "at the Business Premises".

58. Dr Michael seems to contend (RS [472]) that an order could arise *indirectly* from "human or contagious diseases at the Business Premises" if it *relates* to a disease which is *not* at the Business Premises. On no rational basis could the words used by the parties bear such a meaning.

59. The relational prepositional phrase "directly or indirectly" states the required causative link between the order and either "human infectious or contagious disease … at the Business Premises" or "the discovery of an organism likely to result in human infectious or contagious disease at the Business Premises". It may be readily accepted that "directly or indirectly" is wider than proximate cause. But in either case, there must be "human infectious or contagious disease … at the Business Premises" or "the discovery of an organism likely to result in human infectious or contagious disease at the Business Premises". The words "directly or indirectly" require, contrary to Dr Michael's submission (RS [472]), that there is some causative link between the "order" and either a "human infectious or contagious disease … at the Business Premises" or "the discovery of an organism likely to result in human infectious or contagious disease at the Business Premises".

60. Put another way, for something to arise *from* another thing, even if "directly or indirectly", the subject it arises from must exist. The short point is that there must first be "human infectious or contagious disease … at the Business Premises" or "the discovery of an organism likely to result in human infectious or contagious disease at the Business Premises". As already noted (GS [55]), it is an agreed fact that Dr Michael was not, at any relevant time, aware of an occurrence of COVID-19 at the Business Premises or the discovery of SARS-CoV-2 at the Business Premises. There is otherwise no evidence of either of these things occurring.

61. Turning to Dr Michael's secondary proposition, the language used by the parties clearly contemplates that the relevant discovery occur at the Business Premises; e.g, the discovery of Legionella bacteria in a building's air-conditioning cooling towers. It was clearly not the intention of the parties that cover be provided in the case of an official response to the 'discovery' – anywhere in the world – of an organism that has the capacity to cause disease on the Business Premises at some future time. Taken to its logical conclusion, this would mean no cover is available under the clause where an already 'discovered' organism is detected at the Business Premises; this cannot have been the parties' intention.

C.4. Causation

62. The Prevention of Access Extension provides Cover for the insured's inability to trade or otherwise conduct their business at the Business Premises in whole or in part.

63. **Cover** is defined on page 25 of the Policy Wording to mean the indemnity provided under the Policy. What is indemnified under the Prevention of Access Extension is the insured's Loss of Income, calculated by reference to the Basis of Settlement Clause.

64. The Basis of Settlement Clause provides, under the heading Loss of Income:

> *We will pay You the amount by which the Income during the Indemnity Period shall fall short of the Income which would have been received by You during the Indemnity Period if the Damage had not occurred:*
>
> …

65. There are relevant defined terms:

a) **Income** is defined on page 50 of the Wording to mean "money paid or payable to You for … services rendered in the course of the Business at the Business Premises and any other income payable to the Business for the twelve months (12) immediately preceding the date of the Loss but excluding Rent";

b) **Indemnity Period** is defined on page 50 of the Policy Wording to mean:

> *the period stated in the Schedule and commencing from the date of the of the Damage and ending not later than:*
>
> *(a) the last day of the Indemnity Period during which period the Income of the Business or Rent shall be affected in consequence of the Damage; or*
>
> *(b) the date when the Income of the Business .. is no longer affected;*
>
> *whichever occurs first.*

The period stated in the Schedule was 12 months.

c) **Damage** is defined within the General Definitions section of the Policy Wording (page to 25) mean "accidental physical damage to or destruction of Business Property or Your Vehicle which occurs during the Period of Cover".

66. Obviously, "Damage" when used in the Basis of Settlement Clause in relation to the Prevention of Access Extension is intended to refer to the insured peril, namely the closing or evacuation of the Business Premises by order of a competent government or statutory authority.

67. In *Europa Plus SCA SIF v Anthracite Investments (Ireland) Plc* [2016] EWHC 437 (Comm); [2016] All ER (D) 58 (Mar) at [30] Popplewell J observed:

> *Where the Court is interpreting a contractual provision which uses a defined term, the starting point for a textual analysis will often be the defined meaning, because the fact that the parties have chosen to use it in the provision being interpreted is often an indication that they intended it to bear its defined meaning when so used. Often, but not always. It is a common experience that defined terms are not always used consistently by contractual draftsmen throughout a commercial contract. Where a defined term is used inconsistently within a contract, so as sometimes to bear the defined meaning and sometimes a different meaning, the potency of the inference that the parties intended it to bear its defined meaning in a particular provision is much*

diminished. The question becomes whether they intended to use it in its defined meaning, as in some other clauses, or as meaning something other than its defined meaning, as in different other clauses. Even where there is no inconsistency of use within the contract outside the provision being interpreted, it does not follow that effect must always be given to the defined meaning. If, as is well known, parties sometimes use defined terms inappropriately, it follows that they may have done so only once, in the provision which is being interpreted. The process of interpretation remains the iterative process in which the language used must be tested against the commercial consequences and the background facts reasonably available to the parties at the time of contracting. Such an exercise may lead to the conclusion that the parties did not intend the defined term to bear the defined meaning in the provision in question. That is no different from the Court concluding that the parties intended a word or phrase to have a different meaning from what would at first sight seem to be its ordinary or natural meaning.

68. In other words, having regard to the context, "Damage" in the Basis of Settlement Clause will take on a different meaning (to its defined meaning) when subclause (c) of Prevention of Access Extension is engaged.

69. Guild does not accept that Dr Michael has led sufficient evidence to satisfy the Court that there was a loss. Four observations are made about the evidence Dr Michael refers to in RS [479]:

a) ***First***, Dr Michael has not provided Guild with any evidence that he suffered loss, whether during the course of these proceedings, at the time of making his claim on the Policy in March 2020 or during the intervening period;

b) ***Secondly***, Dr Michael's evidence that appointments were cancelled does not establish that any loss occasioned thereby was caused by what he contends was the order closing his Business Premises. The following deficiencies may be observed:

(i) There is no evidence about how the number of cancellations compares to the number of cancellations before Level 2 and Level 3 restrictions;

(ii) There is no evidence as to who cancelled the appointments (Dr Michael, or the patient) and why the appointments were cancelled;

(iii) Absent evidence to the contrary, one doesn't know whether any of those patients cancelled their appointments for reasons unrelated to the Level 2 or Level 3 restrictions;

(iv) To the extent that any of the cancellations related to the Level 2 or Level 3 restrictions, there is no evidence of whether such appointments were rebooked or occurred once restrictions eased, recognising that at their highest, the restrictions recommended deferral of treatment and not cessation of such altogether; and

c) ***Thirdly***, there is no evidence from which the Court would be satisfied that the loss (if the profit and loss statements showed one), resulted from the "inability to trade or otherwise conduct the Business". Loss may have been suffered for many other reasons, unrelated to Level 2 or Level 3 restrictions.

70. Dr Michael is required, under the terms of the Policy, at his own expense, to provide Guild with such books of account and other Business books, computer records and other documents, proofs, information, explanations and other evidence as Guild may require for the purpose of investigating or verifying a claim under the Policy (General Conditions, Claim Cooperation, page 37 of the Policy Wording). He has not done so.

71. Dr Michael submits (RS [481]) that he does not cavil with the proposition that he has at least a *prima facie* onus to prove the loss claimed. That is not a proposition that Guild embraces. Dr Michael must establish the entirety of his claimed loss. There is no basis under the terms of the Policy, or at general law, to support the proposition that an insured has only a *prima facie* onus to prove the loss claimed. In any event, for the reasons stated in paragraph [69] above, Dr Michael has not established, even at a *prima facie* level, that he suffered a loss.

72. It is also misguided to submit, in view of the evidence led by Dr Michael, that if Guild seeks to establish that one part of Dr Michael's loss of gross profit was caused by something else, it was open for it to do so (but it has not) (RS [481]). That submission has no foundation. Close to 18 months after making his claim, Dr Michael has not articulated his loss. With that background, it cannot seriously be suggested that Guild are, or have ever been, in a position to establish that part of asserted loss was caused by something other than Level 2 or Level 3 restrictions. It may also be observed that

Dr Michael's submissions on this point refer to the concept of "loss of gross profit", which is not what the Prevention of Access Extension indemnifies; it indemnifies Loss of Income, which is calculated by reference to the Basis of Settlement clause. The focus is on Income, as Dr Michael acknowledges (RS [486]).

C.5. Adjustment clause

73. It is uncontroversial that a contract of insurance covering business interruption losses is intended to provide indemnity and indemnity only. The starting point is that the Policy must be construed as a contract of indemnification only: *British Traders' Insurance Company Ltd v Monson* [1964] HCA 24; (1964) 111 CLR 86 at 94.

74. In reference to the indemnity principle, Brett LJ observed in *Castellain v Preston* (1883) 11 QBD 380 at 386:

> *…if ever a proposition is brought forward which is at variance with it, that is to say, which either will prevent the assured from obtaining a full indemnity, or which will give to the assured more than a full indemnity, that proposition must certainly be wrong.*

75. It is from the prism of these well-established principles that the operation of the Basis of Settlement Clauses is to be considered. The Basis of Settlement Clause adjusts loss and damage sustained by the insured so as to place the insured in a position that is 'as near as may be reasonably practicable' to the position the insured would have been in had the damage not occurred.

76. The usual operation of a basis of settlement clause ought to be uncontroversial: where the foundation for loss recoverable under a typical basis of settlement clause is loss of gross profit or turnover, the basis of settlement clause provides a mechanism by which that amount is calculated with reference to what the insured would have been expected to earn in the indemnity period 'but for' the insured peril, including taking into account any savings, or other mitigation steps that served to reduce that loss.

77. The trends clause (sub clause (iv) of the Basis of Settlement Clause) requires contemplation of what would have happened but for the insured Damage.

78. The task under the Basis of Settlement Clause is to determine the extent to which the diminution of Income during the Indemnity Period is attributable to the relevant

proximal cause of Damage at the premises: *FCA v Arch Insurance (UK) Ltd* [2021] UKSC 1, [162] – [163].

79. The calculation of the amount of loss within the indemnity period is based on the period leading up to the insured peril. To avoid either a windfall gain or windfall loss, such adjustment requires temperament by a trends clause. In *Australian Pipe & Tube Pty Ltd v QBE Insurance* [2018] FCA 1450 at [114] Beach J observed (citing *Riley on Business Interruption Insurance*), in relation to a trends clause:

> *Without this clause the policy cannot be regarded as fulfilling the basic principle of an insurance that is to indemnify, because the turnover, charges and profits which would have been realised during a period of interruption are hypothetical and never capable of absolute proof. By the use of this clause it is possible to make adjustments in a loss settlement to produce as near as is reasonably possible a true indemnity for an insured's loss, albeit within a restricted period, i.e. the maximum indemnity period and also limited to the sum insured.*

80. Relevantly, and with regard to the exceptional circumstances underpinning the continuing COVID-19 pandemic in the broader Australian context, such continuing state of affairs has given rise to a 'new normal' operating environment which has fundamentally and for the foreseeable future, indelibly changed the way Australians now live and work.

81. To this end, the effects of COVID-19 are widespread and ongoing, with both Governmental and social changes having been extensive and varied.

82. Many of these Government responses and social changes have had protracted impacts and have created a 'new COVID standard period', meaning new trading conditions that persist in Australia and which will form the basis of expected performance for businesses nationwide. As a consequence, adjustments made under the Basis of Settlement must consider a counter-factual that allows for the 'new COVID standard period'.

83. Expressed in another way, the COVID standard period would be considered as variations in or other circumstances affecting the Business before or after the date of the insured peril, or which would have affected the Business had the insured peril not occurred. It incorporates factors that would have eventuated and confronted the insured Business irrespective of the insured peril (i.e. any closure or evacuation that triggered cover under sub-paragraph (c) of the Prevention of Access Extension).

84. Without applying the trends clause in this way, the indemnity (if any) calculated in respect of loss arising from the inability to trade would not put the insured back in the position that they would have been in but for the occurrence of the insured peril.

85. In this regard, Guild's submissions are consistent with [217] of the original IAG submission and [464] of the original Chubb submissions: the broader impacts of the pandemic and the presence and effect of COVID-19 generally, other than in respect of the insured peril (which is confined to the Business Premises), must be taken into account in adjusting the claims of Dr Michael and GFA under the trends clause.

C.6. Third party payments

86. Dr Michael characterises payments received under the JobKeeper and Cash Flow Boost schemes as "third party payments" (RS [486]) and submits that those payments do not fall within the definition of Income, and therefore should not be factored into the adjustment of his claim (RS [486]). That analysis is flawed for at least the following reasons:

a) ***First***, Dr Michael's submissions in relation to third party payments focuses on the chapeau of the Basis of Settlement Clause but ignores the balance. As Dr Michael correctly observes (RS at [485]), the Basis of Settlement Clause provides a carefully calibrated calculation of the loss covered by the Prevention of Access Extension. JobKeeper payments and the Cash Flow Boost fall within subclauses (i) and (iv) of the Basis of Settlement Clause, which expressly provides an allowance for those payments as an amount saved (under (i)), or as "other circumstances affecting the Business" requiring the loss to be adjusted to represent as nearly as may be reasonably practicable the Income which would have been received during the relevant period after the Level 2 or Level 3 restrictions were imposed (under (iv)).

b) ***Secondly***, contrary to Dr Michael's submission that JobKeeper payments were intended to assist employees and not the business (RS [711(b)]), Rule 5 of the *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020 (Cth)* ('**the CERP Rules**') made it expressly clear that the JobKeeper payment "…*is intended to assist businesses affected by the Coronavirus to cover the costs of wages of their employees*….". In any event,

the intention of the Commonwealth in establishing the JobKeeper scheme has no relevance to how payments received by the insured under the scheme are to be treated under the Basis of Settlement Clause, which is directed towards providing an indemnity for insured loss whilst avoiding windfall gains.

c) ***Thirdly***, Dr Michael's contention (RS [711(b)]) that JobKeeper payments were not linked to the losses of small business, or to the losses arising from the insured peril, is incorrect. The eligibility requirements set out at Rule 7 of the CERP Rules for entities to access the JobKeeper scheme included satisfaction of a decline in turnover test which was more fully set out at Rule 8. This was further clarified by the simplified outline at Rule 5, which provided (our emphasis):

> ***A business that has suffered a substantial decline in turnover*** *can be entitled to a jobkeeper payment each fortnight for each eligible employee. It is a condition of entitlement that the business has paid salary and wages of at least the amount of the jobkeeper payment to the employee in the fortnight.*
>
> ***A business that has suffered a substantial decline in turnover*** *can also be entitled to a jobkeeper payment each fortnight for one business participant who is actively engaged in operating the business.*

D. Gym Franchises Claim

D.1. The Claim

87. At RS [501], Gym Franchises contends that the Prevention of Access clause is engaged by reason of the following orders, made by the Chief Health Officer of Queensland:

a) the 23 March 2020 *Non-essential Business Closure*; and

b) the 28 June 2020 Fitness Industry COVID Safe Plan, read with the 1 June 2020 *Restrictions on Business, Activities and Undertakings Direction*.

88. Gym Franchises contends (at RS [501.b.]) that the latter Direction provided that an "indoor sporting centre, including gyms" was permitted to operate only in accordance with the Industry COVID Safe Plan, and in accordance with certain conditions, including that it could only be "open if supervised [sic] and staff are available to conduct regular cleaning and enforce social distancing", there is "minimal use of communal facilities": and "no spectators". That is not entirely correct; a gym was only required to comply with the Industry Safe Plan if it exceeded the limit of 20 people at a time.

89. Clause 6 and 7 of the Direction provided:

> *6. A person who owns, controls or operates a restricted business, activity or undertaking in the State of Queensland, including operating at a private residence, may operate the business, activity or undertaking to the extent permitted in Column 2 of the table at paragraph 14.*
>
> *7. Despite paragraph 6, a person who owns, controls or operates a restricted business, activity or undertaking may operate with more than the maximum number Column 2 if they operate in compliance with:*
>
> *a. an Industry COVID SAFE Plan, a Site Specific COVID SAFE Plan, or a Professional Sporting Code COVID SAFE Plan as approved by the Chief Health Officer or a delegate; and*
>
> *b. any conditions set out in the relevant plan or any conditions imposed by the Chief Health Officer or a delegate; and*
>
> *c. any additional conditions provided in this Direction.*

90. For gyms, the restrictions referred to in clause 6 were as follows (as set out in column 2 of the table at paragraph 14):

> *Limited to up to 20 people at a time and must comply with the additional conditions provided in paragraph 21 below.*

The conditions in paragraph 21 were:

> *a. participants must bring their own equipment where possible (for example, gym or yoga mat);*
>
> *b. frequent environmental cleaning and disinfecting should be maintained for equipment by facility staff;*
>
> *c. only open if supervised and staff are available to conduct regular cleaning and enforce social distancing;*
>
> *d. no contact sports or contact skills training (for example, boxing with a partner, tackling or wrestling) unless with a member of your household;*
>
> *e. no spectators, except for up to one parent/carer per child if necessary;*
>
> *f. minimise use of communal facilities*

91. Gym Franchises has not led any evidence establishing that it ever had more than 20 people at a time and thus was required to comply with the Industry COVID Safe Plan.

D.2. Closure of a whole or part of the Business Premises

92. In essence, Gym Franchises submission on this issue comes down to this proposition: "closure of the Business Premises" encompasses restrictions on the type of business that could be operated from the Business Premises. That proposition was addressed by us at GS [38]-[42]. We reiterate two reasons why the Court would not accept the proposition that "*closure of whole or part of the Business Premises*" encompasses restrictions on the type of business that could be operated from the Business Premises:

a) ***First***, having regard to the context and the clause as a whole, if subclause (c) of the Prevention of Access Extension was intended to operate in that way, express words to that effect would have been used. The Prevention of Access Extension distinguishes between the Business, the Business Premises and use of the Business Premises. The chapeau to the Prevention of Access Extension refers expressly to the insured's "inability to trade or otherwise conduct Your Business at the Business Premises". If subclause (c) of the Prevention of Access Extension was intended to capture orders that hinder the use of the Business Premises (which is the construction Gym Franchises contends for),

the parties would have used specific words to that effect. Subparagraph (a) provides a helpful comparison, there the words "**hinders the use of the Business Premises**" are used. The chapeau to the Prevention of Access Extension also provides a helpful comparison.

b) ***Secondly***, Gym Franchises' construction ignores the first part of subclause (c) of the Prevention of Access Extension (i.e. the words "the closure or evacuation of the whole or part of the Business Premises by"). Those words have no work to do on Gym Franchises' construction because the extension would engage if there were an inability to trade or otherwise conduct [the Business] at the Business Premises … caused by order of a competent government or statutory authority …". That does not correspond with an orthodox application of well-established principles of contractual interpretation.

D.3. Causative element

93. Guild repeats the submissions made on this issue in relation to Dr Michael's claim.

94. The problem with the submission that "the compelling common-sense judgment in the present case is that the relevant directions were the dominant cause of GFA's loss of profit" (RS [519]) is that Mr Reason's evidence establishes that Gym Franchises' suffered loss unrelated to the two directions Gym Franchises relies upon.

95. On 23 March 2020, Gym Franchises' lease for the Coomera Premises was terminated.[18] It had to vacate the premises by 1 April 2020.[19] On 17 April 2020, the gym was relocated to the Helensvale Premises.[20] Between 1 and 12 June 2020, the fit out of the Helensvale Premises was completed.[21] The gym reopened on 12 June 2021, and membership fees were reactivated.[22]

96. If follows from the above evidence that between 1 April 2020 and 12 June 2020, Gym Franchises did not have an operational gym.

[18] Reason at [16(c)]
[19] Reason at [16(c)]
[20] Reason at [17].
[21] Reason at [21].
[22] Reason at [23].

97. Losses attributed to the termination of the first lease are not covered by the Policy. Obviously, Gym Franchises could not charge membership fees when it did not have an operational gym. Costs associated with moving premises and fit out of the new premises are not covered by the Policy. None of these matters have been accounted for by the insured. Having regard to that evidence, the proposition that the proximate cause of a reduction in Gym Franchises' gross profit "is plainly the insured peril" (RS [521]) cannot seriously be maintained.

98. In the week before the hearing, long after it was ordered to do so and some 18 months after it made its claim on the Policy, Gym Franchises has provided Guild with its profit and loss statements for the 2019 and 2020 calendar years, as well as the 2021 calendar year to June 2021. Gym Franchises has provided no other material in relation to alleged loss. In that context, it cannot seriously be said that if Guild sought to establish that some of its loss of gross profit was caused by something else, it was open for it to do so (but it has not) (RS [521]). Guild still does not know what loss Gym Franchises claims. One thing is for certain, it cannot be some unquantified "loss of gross profit" as yet unidentified by the insured in the documents provided because those documents do not identify what part of the reduction in income and "gross profit" is attributable to the termination of first lease, the costs of fitting out the new Business Premises or the acknowledged inability to operate the Business between 1 April 2020 and 12 June 2020 for reasons unrelated to the order said to have triggered the cover available under the clause.

D.4. Causation

99. Guild repeats the submissions made on this issue in relation to Dr Michael's claim.

D.5. Adjustment clause

100. Guild repeats the submission made on this issue in relation to Dr Michael's claim.

D.6. Third party payments

101. Guild repeats the submission made on this issue in relation to Dr Michael's claim.

Date: 3 September 2021

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