COVID-19 Business Interruption Insurance – Some Guidance from the Land Down Under

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Introduction

In our earlier briefing note, we discussed the guidance for three types of non-damage (disease, prevention of access or hybrid) policy extensions provided by the UK Commercial Court in *The Financial Conduct Authority v Arch & Others* [2020] EWHC 2448 (Comm).

Not too long ago, the Court of Appeal of New South Wales handed down its judgment on the construction and application of exclusion clauses in insurance policies – *HDI Global Specialty SE v Wonkana No. 3 Pty Ltd* [2020] NSWCA 296 ("***HDI v Wonkana***"). We share some guidance that may be gleaned from this judgment.

Background of *HDI v Wonkana*

The policies included an exclusion clause to the disease extension. In effect, the disease cover is not triggered when the disease is one that has been "*declared to be quarantinable diseases under the [Australian] Quarantine Act 1908 (Cth) and subsequent amendments*".

Unknown to both the policyholder and the insurer, the Quarantine Act 1908 (Cth) was repealed years before the policies incepted (and accordingly, COVID-19 was never declared to be a quarantinable disease). In its place, the Biosecurity Act 2015 (Cth) was enacted. The Biosecurity Act did not provide for declarations of quarantinable disease but provides for circumstances whereby a disease may be determined to be a listed human disease.

Given the repeal of the Quarantine Act, the Court was asked to determine whether the exclusion clause could be construed as "*diseases determined to be listed human diseases under the Biosecurity Act 2015 (Cth)*", so that the disease cover would not be triggered.

Decision in *HDI v Wonkana*

The Court held that "*diseases declared to be quarantinable diseases under the Quarantine Act 1908 (Cth) and subsequent amendments*" could not be construed as "*diseases determined to be listed human diseases under the Biosecurity Act 2015 (Cth)*". The Court came to this same conclusion by three different reasonings.

Bathurst CJ and Bell P approached the issue based on the orthodox principles of contractual construction. They decided that these principles are not so flexible as to allow a departure from the actual words, on their ordinary grammatical meaning, used by the parties.

Meagher JA and Ball J took the approach of correcting a mistake in contractual clauses.

- As a starting point, contracts are construed objectively, by reference to what a reasonable person would have understood the language of the contract to convey. Where the language is unambiguous, it cannot be ignored to reach a more commercially convenient result. Where the language is ambiguous and susceptible to more than one meaning, surrounding circumstances (including the existing state of the law) are admissible to assist the interpretation of the contract.

- The justices determined that parties have chosen a specific mechanism – declarations of quarantinable diseases under the Quarantine Act – to determine excluded diseases. The reference to "*subsequent amendments*" should be understood to extend only to amendments to the Quarantine Act (and not to new legislation enacted to replace the Quarantine Act). To do otherwise goes against the ordinary meaning of those words.

- The justices rejected that there was a mistake in the drafting of the exclusion clause. Unless the literal meaning is absurd and the parties' objective intention is clear, the Courts do not readily accept that mistakes have been made in the drafting of a formal document. Referring to the exclusion clause, whilst the exclusion is limited to only those quarantinable diseases in the Quarantine Act before its repeal, this cannot be described as an absurd result (although it may be an uncommercial result).

Hammerschlag J's approach echoed the objective construction of commercial contracts. If the literal meaning leads to absurdity and there is a self-evident objective intention to cure this absurdity, then the absurd meaning can be displaced with a sensible one. However, there was no absurdity in the exclusion clause. It still has some commercial purpose to exclude those diseases declared under the Quarantine Act. As such, the Court should not substitute its own commercial judgment for that of the parties. If insurers had wanted 'listed human diseases' under the Biosecurity Act to be excluded, they should have rectified the policy.

<u>Takeaways</u>

Whilst the application of *HDI v Wonkana* may appear limited to the Australian context, some guidance may still be gleaned in the insurance context.

First, *HDI v Wonkana* confirms that insurance policies are to be construed objectively. For pandemic related business interruption claims, insofar as it is argued that disease extensions were intended to cover localised disease outbreaks (instead of a pandemic), it is important to bear in mind that the objective intention of parties at the point of contract is what matters.

Second, *HDI v Wonkana* also confirms that the Court's role in construing policies is to give effect to the clear and unambiguous meaning, not to substitute the Court's commercial

judgment for that of the parties. When dealing with pandemic related business interruption claims, policyholders and insurers should take note of the clear and unambiguous meaning of the policy instead of what is more commercially convenient to either of them.

How We May Assist

Since the declaration of a pandemic, our lawyers have been assisting all stakeholders in the insurance industry, insurers, brokers and policyholders, with business interruption insurance claims arising from the pandemic. To date, we have assisted commercial, hospitality and retail property owners, as well as international construction companies, with advancing and supporting COVID-19 related claims and negotiating renewal premiums for insurance policies.

We would be delighted to assist you or your company in considering its insurance coverage.

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