Judgment Summary
Supreme Court
New South Wales
Court of Appeal

HDI Global Specialty SE v Wonkana No. 3 Pty Ltd [2020] NSWCA 296

Bathurst CJ, Bell P, Meagher JA, Hammerschlag J, Ball J

The Court of Appeal has dismissed proceedings seeking declarations that business interruption caused by COVID-19 was excluded from coverage under two business interruption insurance policies.

The defendants were insured against interruption to their businesses under insurance policies issued by the plaintiff insurers. Each policy contained an extension providing cover for interruption or interference caused by outbreaks of infectious diseases within a 20 kilometre radius of the business premises. Both policies excluded from cover "diseases declared to be quarantinable diseases under the *Quarantine Act 1908* (Cth) and subsequent amendments".

On 16 June 2016, well before either policy had been issued, the *Quarantine Act 1908* (Cth) was repealed and replaced by the *Biosecurity Act 2015* (Cth).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

The insurers denied the defendants' claims under the disease extensions for business interruption caused by COVID-19 on the basis that the exclusion extended to diseases determined to be listed human diseases under the *Biosecurity Act*. They commenced proceedings in the Equity Division seeking declarations that COVID-19 was within the exclusions. The proceedings were removed into the Court of Appeal by Hammerschlag J.

The insurers argued that the words "diseases declared to be a quarantinable disease under the *Quarantine Act 1908* (Cth) and subsequent amendments" should be understood as extending to "diseases determined to be listed human diseases under the *Biosecurity Act 2015* (Cth)", either because the *Biosecurity Act* was a "subsequent amendment" or because the references to the *Quarantine Act* were absurd or obvious mistakes and it was clear that the insurers had intended to refer to the replacement Act.

The Court rejected both arguments. As to the first, the meaning of the words "and subsequent amendments" was unambiguous, and did not extend to legislation replacing the *Quarantine Act* and its mechanism for identifying certain diseases as serious and contagious.

As to the second argument, Bathurst CJ and Bell P held that ordinary principles of construction were not so flexible as to permit the exclusions to be read, contrary to their natural meaning, as referring to "diseases determined to be listed human diseases under the *Biosecurity Act 2015* (Cth)". Meagher JA and Ball J inferred that the parties had not known of the repeal and replacement of the *Quarantine Act* at the time the policies were issued, and held that the court therefore could not have regard to that fact in construing them. It followed that no mistake or absurdity could be identified. While the parties had wrongly assumed that the *Quarantine Act* had not been repealed, that was not a mistake which could be corrected by construing the language of the policies. Hammerschlag J held that although the repeal of the *Quarantine Act* had the consequence that there would be no declarations of quarantinable diseases from that point in time, that did not make the language of the policies absurd.