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INSURANCE COVER FOR COVID-19 RELATED BUSINESS INTERRUPTION LOSSES

Since the advent of COVID-19 there has been much discussion/debate about the extent to which insurance cover for business interruption will respond. In order to provide some clarity, the Insurance Council of Australia ("ICA") instituted a test case in the NSW Supreme Court in August 2020. The case centred around two complaints that were lodged with the Australian Financial Complaints Authority ("AFCA") as part of its dispute resolution process arising out of the rejection of claims for COVID-19 related losses. The NSW Supreme Court fast tracked the case and the NSW Court of Appeal delivered its decision on 18 November 2020 *(HDI Global Specialty SE v Wonkana No. 3 Pty Ltd* [2020] NSWCA 296).

The Particular Case

The test case involved two businesses that held business interruption policies with HDI Global Specialty SE and The Hollard Insurance Company Pty Ltd ("the insurers"). Claims were made consequent upon interruptions caused by COVID-19.

Each policy provided cover for losses sustained by outbreaks of infectious diseases in a 20km radius of the suspect businesses. They also excluded claims arising from diseases:

> "…*declared to be quarantinable diseases under the* Australian Quarantine Act *1908 and subsequent amendments."*

The *Quarantine Act 1908* (Cth) was repealed and replaced by the *Biosecurity Act* 2015 (Cth). The mechanism for the "*declaration*" of a quarantinable disease was replaced upon the commencement of the *Biosecurity Act* with a process where the disease was to be "*listed*" under the Act. The test case involved a determination of whether the exclusion (which required a declaration under the repealed *Quarantine Act*) would apply to claims arising from COVID-19 (which disease was "listed" only under the new *Biosecurity Act*).

Because of the importance of the case, a five member bench of the NSW Court of Appeal was convened. The Court was unanimous in holding that the exclusion did not apply. In particular, the Court held that the words "*and subsequent amendments*" appearing in the exclusion did not allow for the substitution of the old act by the new *Biosecurity Act* when interpreting the policy. This was even so where it was accepted that the parties to the insurance policy had not turned their mind to the fact that, at the time the policy was entered, the old act had been repealed.

What Does This Mean?

The important points arising from this decision are:

1. A strict interpretation of the wording of exclusion clauses is likely to be applied by the Courts.
2. Obsolete and antiquated wording will not be construed in an insurer's favour.
3. Policy wording must be updated as applicable legislation changes.
4. Insured's should not just accept rejection of their claims at face value. Appeal avenues such as AFCA are available and should be explored

The caveat on this decision is that it involved some specific wording relevant to legislation and not every policy will contain an exclusion framed in this way. As always, each individual policy must be read carefully and applied to each insured's particular circumstances. Further, there may be other exclusions in the policy that may still apply to exclude COVID-19 related claims.

The ICA has indicated that it is considering whether the decision warrants an application for special leave to appeal to the High Court. There is a 28-day time limit for the institution of any application.

Other Developments

This decision comes on the back of the decision of the UK High Court delivered on 15 September 2020 in the case of *The Financial Conduct Authority v Arch & Ors*. This was a test case concerning the interpretation of the extent to which 21 business interruption policies from 8 leading insurers were applicable in circumstances where the policy was triggered by either a "*notifiable disease*" or "*a prevention of access*" or a combination of these events. The result in that case also provided some clarity around the interpretation of business interruption policies consequent upon COVID-19 related claims, however the outcome was largely dependent upon the policy wording and the circumstances of the insured in each case.

The ICA announced on 19 November 2020 that following the decision of the NSW Court of Appeal it would consider mounting some further test cases to explore "*outstanding policy matters, including proximity and prevention of access, relating to the pandemic and business interruption insurance*." The intent of these test cases is to avoid the necessity for individual insureds to take action, and to provide clarity across the industry for the future interpretation and application of policies.

If you have questions regarding this decision, please contact:

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