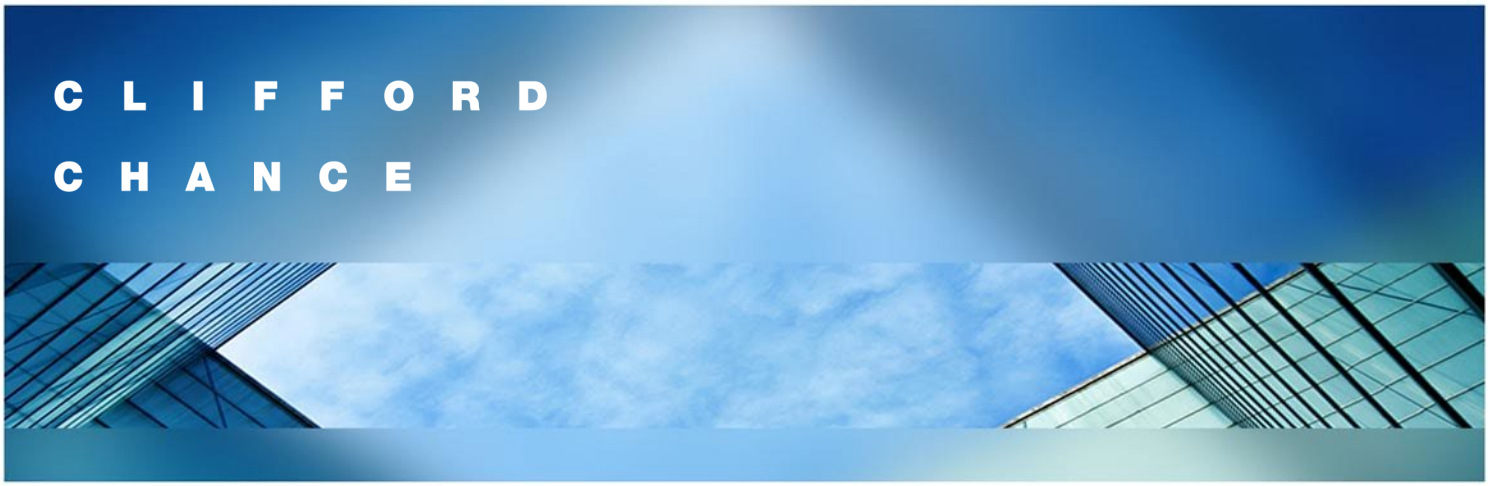

COVID-19: LANDMARK JUDGMENTS IN NSW (AUSTRALIA) AND ENGLAND IN BUSINESS INTERRUPTION INSURANCE TEST CASES

Following a landmark ruling of the English High Court earlier this year, a new judgment of the NSW Court of Appeal provides further insight into the approach of common law courts on COVID-19 business interruption insurance test cases.

Policyholders have won the first Australian test case brought by the insurance industry to fortify its position on rejecting claims made through the COVID-19 pandemic.

On 18 November 2020, the NSW Court of Appeal handed down its much-anticipated decision in *HDI Global Specialty SE v Wonkana No. 3 Pty Ltd* [2020] NSWCA 296 ("**HDI Global**"). In a unanimous judgment, the Court found in favour of insured businesses, ruling that insurers could not rely on certain disease exclusion clauses to deny claims by policyholders for loss caused by business interruption due to COVID-19.

The NSW Court of Appeal judgment comes after the English High Court's judgment in *The Financial Conduct Authority v Arch and Others* [2020] EWHC 2448, handed down on 15 September 2020, which largely found in favour of policyholders. There, proceedings were brought by the UK Financial Conduct Authority in its capacity as a regulatory body to obtain court declarations in respect of coverage and causation issues under 21 sample business interruption policies. The High Court ruled that cover was available under most of the wordings considered. The appeal subsequently 'leapfrogged' the Court of Appeal and was heard by the Supreme Court in a four-day hearing which concluded on 19 November 2020; a judgment is anticipated by January 2021.

Key issues

- NSW and English judgments present a victory for policyholders who are likely to turn to their insurance policies to seek relief for loss arising from business interruption caused by COVID-19.
- The NSW and English courts have shown that orthodox principles of contractual interpretation will be applied to insurance contracts, even if the outcome is not necessarily commercially convenient.
- It remains to be seen whether the NSW decision will be appealed to the High Court of Australia. Pending any appeal, the insurance industry may be on the hook for hundreds of millions of dollars in COVID-linked payouts.
- The UK Supreme Court's decision in the English test case is anticipated by January 2021.

Background to HDI Global

The first, second and third defendants were insured against interruption to their tourist park business for the period 28 February 2020 to 28 February 2021 under a business interruption policy issued by the first plaintiff, HDI Global. The retail business of the fourth defendant was insured under a similar policy for the period 11 May 2019 to 11 May 2020 issued by the second plaintiff, the Hollard Insurance Company Pty Ltd.

The business interruption insurance policies provided cover for interruption or interference caused by outbreaks of certain infectious diseases within a 20km radius of the insured's premises, subject to an exclusion for "*diseases declared*

to be quarantinable diseases under the Australian Quarantine Act 1908 ("**Quarantine Act**") *and subsequent amendments*" ("**Exclusion Clause**").

The Quarantine Act was repealed in June 2016 (i.e. before the commencement of the policy period of cover and the outbreak of COVID-19), and replaced by the *Biosecurity Act 2015 (Cth)* ("**Biosecurity Act**"). The Biosecurity Act did not provide for declarations of quarantinable diseases by the Governor-General but did provide for determinations of a "*listed human disease*" by the Director of Human Biosecurity. On 21 January 2020, COVID-19 was determined to be a listed human disease under the Biosecurity Act.

The defendant insureds claimed indemnity from their respective plaintiff insurers for business interruption caused by COVID-19. These claims were denied based on the Exclusion Clause. The insurers subsequently commenced proceedings seeking declarations that the Exclusion Clause was to be construed as including diseases determined to be a listed human disease under the Biosecurity Act.

Two issues fell for determination by the NSW Court of Appeal:

1. whether the Exclusion Clause was to be interpreted as extending or referring to diseases listed as human diseases under the Biosecurity Act because: (i) the Biosecurity Act constituted a "subsequent amendment" to the Quarantine Act; or (ii) references to the Quarantine Act were obvious mistakes which should be construed as if they were or included references to the Biosecurity Act ("**Primary Issue**"); and
2. if the answer to the first issue is yes, whether the Exclusion Clause should be construed as referring only to diseases that had been subject to a determination under the Biosecurity Act at the time of entering into the policy or to diseases so determined during the life of the policy ("**Secondary Issue**").

Summary of judgment in HDI Global

Taking an orthodox approach to contractual interpretation, the five judges of the NSW Court of Appeal determined that on a proper construction, the terms of the Exclusion Clause did not extend or refer to the Biosecurity Act. Therefore, COVID-19 did not fall within the scope of the Exclusion Clause so as to exclude the plaintiff insurers' liability with respect to business interruption caused by the pandemic.

The Court of Appeal focused on the ordinary meaning of the words contained in the Exclusion Clause, finding, amongst other things, that: (i) "*and subsequent amendments*" were unambiguous and did not extend to an entirely new replacement enactment; and (ii) "*diseases declared to be a quarantinable disease under the Quarantine Act*" were not so flexible as to include diseases determined to be a listed human disease under the Biosecurity Act.

As to whether there was a 'mistake', Hammerschlag J held that whilst there was a suspected mistake on the part of the insurers in not amending their policies to refer to the Biosecurity Act, suspicion was not enough to correct a mistake and there was no basis to suspect that the insureds had overlooked anything. Further, whilst the natural and ordinary meaning of the Exclusion Clause might have an uncommercial effect, the terms still had a sensible, albeit limited, operation in respect of diseases declared under the Quarantine Act prior to its repeal. They were not sufficiently absurd to justify a departure from the language of the contract.

In slightly different (but inconsequential) reasoning, Meagher JA and Ball J determined that on the face of the contract, there was nothing in the language of the Exclusion Clause to reflect any 'mistake' in expressing the parties' objective intentions. Whilst it appeared that the parties were not aware of the repeal and replacement of the Quarantine Act at the time of entering into the policies, an agreement could not be corrected merely because the parties' intention (ascertained objectively through ordinary principles of contractual interpretation) was formed and expressed based on an incorrect assumption (i.e. that the Quarantine Act was in force). Rather, this simply meant that in interpreting the Exclusion Clause, the Court could not have regard to the fact that the Quarantine Act had been repealed and replaced by the Biosecurity Act.

In view of its conclusion on the Primary Issue, the Court of Appeal did not consider it appropriate to determine the Secondary Issue on a hypothetical basis.

The Insurance Council of Australia, the representative body for the general insurance industry in Australia which funded the case, has announced that it will urgently review the judgment and the grounds on which special leave to appeal against the decision to the High Court of Australia might be sought.

Comparison against the English case

The NSW judgment, while of broad application to insureds across Australia, is narrower in scope than the English case for several reasons. As it mainly served to answer a preliminary coverage question, its effect is confined to policies which contain the Exclusion Clause (or wording akin to it). Having surmounted the exclusion hurdle, it is likely that policyholders affected by the NSW judgment will next have to grapple with the same conditionality and causation issues that have already been addressed by the English High Court. In this respect, the declarations which have been issued by the English court may be of guidance.

In the English case, the High Court considered – beyond exclusions – the substantive meaning of three categories of insuring clauses: (i) disease, where cover is triggered by the occurrence of a notifiable disease within a defined area; (ii) prevention of access, which cover prevention of use/access because of government/relevant authority action; and (iii) hybrid blends of the first two types. Each clause was analysed to determine the necessary triggers for coverage as well as the causal link between said triggers and alleged loss – the result is a comprehensive list of declarations that specify e.g. how the presence of COVID-19 ought to have 'manifested', what amounts to a 'prevention' or 'hindrance' of access to premises, and whether trends clauses can operate to reduce the value of cover, under individual policies.

Despite the expansive nature of the High Court judgment, parties argued in the Supreme Court that some confusion remains in relation to certain declarations. Given the complexity of the subject matter and the relative brevity of the NSW judgment, it appears likely that more litigation is on the horizon for Australian insurers and insureds.

Key takeaways

- Both cases were treated expeditiously by the judiciary; the NSW case was referred from the Commercial List of the NSW Supreme Court to the Court of Appeal (with a larger bench no less) and the English one 'leapfrogged' its way to the UK Supreme Court. This reflects the significance of business interruption insurance to the general public in this pandemic; it is estimated that the wordings considered in the English case could potentially affect some 370,000 policyholders alone.
- Judges in both cases heavily relied on orthodox principles of contractual interpretation to reach their findings, with the English court in particular holding that a proper construction of the policies rendered separate consideration of causation questions unnecessary. Suggestions that policies could be subject to rectification to cure some default or other in the absence of absurdity were given short shrift.
- All of the policies considered provided cover for infectious diseases by means of an extension to business interruption cover triggered by physical damage. Accordingly, it remains the case that insureds who did not purchase such extra cover will not, in the vast majority of cases, be indemnified against their losses arising from the coronavirus pandemic under business interruption insurance policies.

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