ClarkeKann Lawyers to act in business interruption insurance dispute

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In August 2020, we discussed a pending test case that considered whether insurers could deny liability for small business insurance claims amid the COVID-19 pandemic. The Court found in favour of small businesses, which has resulted in a large number of businesses making claims pursuant to their policies.

These businesses may still find it difficult to make a successful claim however, and ClarkeKann Lawyers has recently been retained to act for a business involved in a dispute with its insurer.

In this article, we consider the decision of the recent test case, and how it will impact small businesses and insurers.

The Issue

Some insurance policies refused cover for any loss caused by a disease specified in the Quarantine Act (Cth). Unfortunately, the Quarantine Act was repealed in 2016 and no longer exists - it was replaced by the Biosecurity Act (Cth).

COVID-19 was determined to be a listed human disease under the Biosecurity Act in March 2020.

Many insurers had failed to change their policies to refer to the Biosecurity Act. When the COVID-19 pandemic was declared, those insurers had not precluded small businesses from making business interruption claims. The position taken by many insurers however was that despite not changing their policies after the Biosecurity Act was introduced, the exclusion clauses in their policies could still be relied on to deny liability for COVID-19 loss.

Facts

The plaintiff was a tourist park which was impacted by the COVID-19 pandemic. The insurer had an exclusion clause in their policy, which stated that the policy did not cover any loss caused by a disease specified in the Quarantine Act, or "subsequent amendments" to the Quarantine Act. The wording of this policy was not changed to reflect the introduction of the Biosecurity Act.

Legal Issues

The two key issues the Court had to determine were:

- whether the reference to 'subsequent amendments' in the policy should be read as referring to the Biosecurity Act; and
- whether the continued reference to the Quarantine Act was an obvious drafting mistake given its repeal, so the clause should be construed as referring to the Biosecurity Act.

Outcome

The Court found in favour of the tourist park. The Court said that 'subsequent amendments' only referred to amendments that were made to the Quarantine Act. The insurance policy didn't consider the possibility that the Quarantine Act would be repealed and replaced. In light of this, it was not appropriate to find that the Biosecurity Act was a subsequent amendment.

The insurers also argued that any reference to the Quarantine Act was an obvious mistake, given that the law had been repealed. The insurers said that the Court should 'correct' this mistake so any reference to the Quarantine Act, should instead refer to the Biosecurity Act.

A Court can modify a contract to give effect to the intention of the parties, because a party drafting a contract can sometimes fail to properly express what they meant to say. The insurers argued that they could not have intended to have the policy operate in reference to a law that no longer existed.

The insurers' argument failed because there had been no mistake; the insurers intended their policies to operate with reference to the Quarantine Act, and that was expressed in their policies. Had the insurers understood the implications of referring to the Quarantine Act, the policy would likely have been changed, but this was not a mistake. Since the error was not with the language the insurers chose, or a misdescription of the legislation, the Court did not have the ability to amend the policy.

Implications

Despite the favourable outcome for the tourist park, small businesses may still face challenges in making business interruption claims. The Insurance Council of Australia (ICA) has indicated that they will appeal the decision to the High Court of Australia. The High Court has not determined whether they will hear the appeal, but until a decision is made, there will be some uncertainty on this ruling.

Furthermore, this decision dealt with a single obstacle in making small business claims. An insurer will review each claim on a case by case basis, and there may be other issues which lead to an insurer refusing liability for a claim.

As demonstrated in this case, insurers do not always get it right when refusing a claim. If you are unsure about your rights pursuant to an insurance policy, it is best to seek legal advice. ClarkeKann Lawyers has considerable experience in insurance disputes and have successfully acted for a number of small businesses.

We will provide further updates if the High Court grants the ICA leave to appeal. In the meantime, if you would like advice on a dispute with your insurer, or an assessment of your insurance contract, please contact Chris Kintis on 02 8235 1251 or your usual ClarkeKann contact.

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