2020
A Year In Review

Presented by:

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Business Interruption Insurance v COVID-19

- HDI Global Specialty SE v Wonkana No. 3 Pty Ltd.
- **HDI business interruption policy insured tourist park business.**
- **Thrive Health and Nutrition insured under a similar policy issued by Hollard.**
- Each of the business interruption insurance policies provided cover for interruption or interference caused by outbreaks of certain infectious diseases within a 20 kilometre radius of the insured's premises. In both policies, the extension was subject to an exclusion.

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Business Interruption Insurance v COVID-19

- ***"The cover … does not apply to any circumstances involving 'Highly Pathogenic Avian Influenza in Humans' or other diseases declared to be quarantinable diseases under the Australian Quarantine Act 1908 and subsequent amendments."***

- The Quarantine Act was repealed in 2016 and replaced with the Biosecurity Act 2015.

- On 21 January 2020 COVID-19 was determined to be a listed human disease under the Biosecurity Act.

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Business Interruption Insurance v COVID-19

- Were the references to "*diseases declared to be quarantinable diseases under the Quarantine Act 1908 (Cth) and subsequent amendments*" to be construed as extending or referring to "*diseases determined to be listed human diseases under the Biosecurity Act 2015 (Cth)"* on the basis either;

  A. That the Biosecurity Act constituted a "*subsequent amendment*", or;

  B. That the references to the Quarantine Act were obvious mistakes which should be construed as if they were or included references to the Biosecurity Act.

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Business Interruption Insurance v COVID-19

Dixon CJ in *Halford v Price*

"The printed parts of a non-marine insurance policy, and usually the written parts also, are framed by the insurers, and it is their language which is going to become binding on both parties.

It is therefore their business to see that precision and clarity is attained and, if they fail in this, any ambiguity is resolved by adopting the construction favourable to the assured…"

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COVID-19 Wins

Per Meagher JA and Ball J

"The exclusion adopts a specific mechanism provided for under the Quarantine Act, and no other. The possibility of that Act being repealed was real and would have the consequence that the machinery at least may not have any ongoing operation from the time of its repeal.

The wording does not address that possibility.

To suggest that the words 'and subsequent amendments' include the enactment of the Biosecurity Act is many steps too far."

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COVID-19 Wins

- **Hammerschlag J – Bathurst CJ and Bell P agreeing as to the contractual principles of construction.**

- An insurance policy is a commercial contract and is to be given a business-like interpretation. Interpreting it requires attention to the language used by the parties, the commercial circumstances which it addresses, and the objects which it is intended to secure.

- The meaning of the words chosen is determined objectively by reference to its text, context, and purpose, the question being what a reasonable person would have understood them to mean.

- Preference is given to a construction supplying a congruent operation to the various components of the whole and so as to avoid making commercial nonsense.

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COVID-19 Wins

If it is clear:

1. On the face of a written contract that an error has been made;

2. That the literal meaning of the words used by the parties is an absurdity;

3. What the self-evident objective intention of the parties was, and;

4. What correction is to be made to cure the mistake, orthodox canons of construction will displace the absurd literal meaning by a meaningful and sensible one.

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COVID-19 Wins

This approach:

1. Is to be distinguished from rectification in equity;
2. Is premised upon absurdity, not ambiguity;
3. Applies even where the language used by the parties is unambiguous;
4. Does not apply where to give the words their literal meaning brings about a result which is inconvenient or unjust but not absurd; and
5. Does not give the court a mandate to rewrite an agreement so as to depart from the language used by the parties merely to give a provision an operation which, it appears to the court, might make more commercial sense.

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COVID-19 Wins

The dividing line between that which lacks commerciality and that which is absurd may not always be a bright one.

This is particularly so where, as is the case here, the words used are not incoherent and the exclusion still has work to do because the diseases declared under the *Quarantine Act* to be quarantinable diseases were still identifiable and the repeal of the *Quarantine Act* did not affect or annul "*anything duly done*" under the repealed Act.

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Capar v SPG Investments Pty Ltd

- In March 2010 Mr Capar was employed as a security guard at the Lidcombe Power Centre.
- In the early hours of 17 March 2010 Mr Capar detected an intruder entering the premises. He went to investigate.
- When he confronted the intruder, the intruder who was wielding an axe, threatened to kill him.
- Mr Capar escaped but suffered mental harm as a result of the encounter.
- He brought proceedings against the owner of the premises (SPG), the provider of security at the premises (Business Protection) and his employer (Dynamite Security).
- At first instance he lost against SPG and Business Protection on the basis of a materialisation of an inherent risk (s.5I CLA).

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Capar v SPG Investments Pty Ltd (Cont.)

- Clear that each of the defendants owed a duty of care to plaintiff.
- Previous break-ins should have alerted each of the defendants to weaknesses in the perimeter security of the centre and all should have taken steps to deal with those weaknesses.
- S.5I Civil Liability Act 2002 (NSW)
  - *No liability for materialisation of inherent risk*
    1. *A person is not liable in negligence for harm suffered by another person as a result of the materialisation of an inherent risk.*
    2. *An inherent risk is a risk of something occurring that cannot be avoided by the exercise of reasonable care and skill.*
    3. *This section does not operate to exclude liability in connection with a duty to warn of a risk.*

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Capar v SPG Investments Pty Ltd (Cont.)

Basten JA Mccallum agreeing

"The idea that a person could owe a duty of care in respect of a risk which cannot be avoided by the exercise of reasonable care sounds like an oxymoron. It is possible that this is not so because the formulation of the duty and the identification of the risk may occur at different levels of particularity.

However, the possibility that a defendant could be held liable for breach of a duty of care in respect of a risk, materialisation of which cannot be avoided by the exercise of reasonable care, is clearly incoherent…

In practical terms, s 5I is otiose."

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Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd

- On 8 January 2011, Emily Tapp, who was then 19 years old, participated in a campdraft event at Ellerston, New South Wales. The event was organised by the Association. She fell from her horse while competing and suffered a significant spinal injury. Quantum was agreed $6,750,000.

- Campdrafting described as involving riding a horse at high speed, often in a full gallop, around a course which has pegs. It involves the rider steering the horse around the course. There are a number of risks. The horse could fall by losing its footing or contacting the hooves of the animal being chased. The rider could lose balance and fall off. Horses can be unpredictable animals, as can the livestock which the riders chase in the events.

- Plaintiff had been involved in Campdrafting competitively since she was 6.

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Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd (Cont.)

- Plaintiff failed to establish what had caused the horse to slip and fall and in particular did not establish that there was a deterioration of the campdraft surface which would warrant suspension of the event or other action.

5L No liability for harm suffered from obvious risks of dangerous recreational activities

1. A person (***the defendant***) is not liable in negligence for harm suffered by another person (***the plaintiff***) as a result of the materialisation of an obvious risk of a dangerous recreational activity engaged in by the plaintiff.

2. This section applies whether or not the plaintiff was aware of the risk.

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Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd (Cont.)

Assuming that it had been established that the appellant's horse had fallen by reason of that deterioration in the condition of the arena surface, that would nevertheless have been a manifestation of an obvious risk of the dangerous recreational activity - even if the appellant did not personally know of the risk.

Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd (Cont.)

Risk Warning ?

Agricultural Societies Council of New South Wales Incorporated

Participants Indemnity and Waiver

RISK WARNING — HORSES

The Agricultural Societies Council of New South Wales advises that the participation, including passive participation, in events or activities at an agricultural show contains elements of risk, both obvious and inherent. The risks involved may result in property damage and/or personal injury including death.

1. I the signatory acknowledge, agree and understand that participation, including passive participation, in events and activities at this, or at any show contains an element of risk of injury and I agree that I undertake any such risk voluntarily of my own free will and at my own risk.
2. I the signatory acknowledge, agree and understand that the risk warning at the top of this form constitutes a 'risk warning', for the purposes of Division 5 of the Civil Liability Act 2002 (NSW).
3. I the signatory acknowledge the risk referred to above and agree to waive any and all rights that I, or any other person claiming through me, may have against the Wagga Wagga Show Society in relation to any loss or injury (including death) that is suffered by me as a result of my participation in this show/event.

The signatory must continually indemnify the Wagga Wagga Show Society on a full indemnity basis against any claim or proceeding that is made, threatened or commenced and any liability, loss (including consequential loss and loss of profits), damages or expense (including legal costs on a full indemnity basis) that the Wagga Wagga Show Society incurs or suffers, as a direct or indirect result of the undersigned's participation in any event held by the Wagga Wagga Show Society." (emphasis original)

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Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd (Cont.)

- Volunteer Defence?
- 61 Protection of volunteers.
- A volunteer does not incur any personal civil liability in respect of any act or omission done or made by the volunteer in good faith when doing community work:
  A. organised by a community organisation; or
  B. as an office holder of a community organisation.
- Contended by Association (in this case incorporated) that they had the benefit of that defence because their liability arose vicariously through its members who performed the work voluntarily.
- Personal civil liability = "*volunteer*" can only be a natural person.

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Bauer Media Pty Ltd v Khedrlarian

- Plaintiff was employed by a labour hire company, Demand Personnel Pty Ltd, and performed work at the premises of Bauer Media Pty Ltd.
- The plaintiff alleged injuries to her neck, shoulders and wrists were the result of a failure by Bauer and Demand to provide her with a safe system of work.
- Bauer is a magazine publisher and distributer. Printed editions of magazine titles would be delivered to the premises where the particular orders of individual newsagencies would be compiled and bundled before being distributed.

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Bauer Media Pty Ltd v Khedrlarian (Cont.)

- The plaintiffs role primarily involved selecting the number of magazine titles required for each order and placing them on a conveyor belt.
- There were a number of other tasks that were available, such as labelling the bundles. Workers were in fact encouraged to change tasks periodically.
- No previous or subsequent claims of injury from the same process.
- In the District Court, the only material particular of negligence identified was a failure to ensure a proper system of task rotation took place to reduce or eliminate the risk of injury.
- NSWCA unanimously allowed the appeal and entered a judgment for Bauer and the employer.
- *"[n]o conclusion of negligence can be arrived at until, first, the mind conceives affirmatively what should have been done."*

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Bauer Media Pty Ltd v Khedrlarian (Cont.)

Curtis ADCJ

"The obvious precaution available to Demand Personnel was to refuse to supply the services of the plaintiff to the defendant until Job Rotation was introduced. That imposed no burden."

NSWCA

"Capitalising the term "Job Rotation" did not identify with any greater precision what it required. The proposition that the employer should refuse to place any person with the appellant in that part of its packing process would clearly have destroyed part of the employer's operation."

"In the absence of evidence as to a precaution which should have been taken by a reasonable designer of the system of work at the appellant's premises, being a precaution which was shown to obviate or, in practical terms reduce the risk of injury to an acceptable level, a finding of breach of duty was not open."

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Lee v Strelnicks; Souaid v Nahas; Cassim v Nguyen; Rixon v Arsalan

- All four matters involved claimants whose vehicles had been damaged through no fault of their own.
- The question posed in each of the cases was, especially in respect of prestige vehicles, where a claimant has a “need” for a replacement vehicle, what constitutes reasonable expenditure on hiring that replacement vehicle for the purpose of determining recoverable damages.
- The first inquiry in such a case is as to “need” for the use of the damaged vehicle. If the claimant would not have had any need to use the damaged vehicle during the period taken for repair, there would be no entitlement to damages.
- Like for Like?

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Lee v Strelnicks; Souaid v Nahas; Cassim v Nguyen; Rixon v Arsalan (Cont.)

Emmett AJA

"The cost of hiring a replacement vehicle that is equivalent in as many respects as possible to the damaged vehicle will be the means whereby the claimant is put in the position in which he, she or it would have been but for the wrongdoing."

"The loss that the claimant suffers, which gives rise to the relevant "need", is the deprivation of the use of the damaged vehicle, not simply deprivation of the use of a means of transportation. The loss will not be compensated by a replacement vehicle that simply provides the same form or means of transport."

Lee v Strelnicks; Souaid v Nahas; Cassim v Nguyen; Rixon v Arsalan (Cont.)

White JA

"It can be inferred that the plaintiff will have a reasonable need for a 'commensurate' vehicle, or a 'reasonably equivalent' vehicle, or a 'reasonable substitute', or a 'broadly comparable' replacement vehicle."

"…the loss suffered by a plaintiff who has lost the use of a prestigious vehicle is not merely the inconvenience of not having a vehicle but the loss of a vehicle which has the safety, luxury and prestige of the damaged vehicle."

"Once [the onus of establishing need] is discharged, the onus of establishing that the hire of the particular replacement vehicle was unreasonable lies on the defendant."

Moore v Scenic Tours

- Representative proceedings were commenced in the Supreme Court against Scenic by Mr Moore on his behalf and that of approximately 1,500 other passengers of 13 Scenic cruises.

- The river cruise was promoted in Scenic's tour brochure as “a once in a lifetime cruise along the grand waterways of Europe”, with guests on board the Scenic vessel treated to “all inclusive luxury”.

- The cruise was severely disrupted by adverse weather conditions. Instead of cruising for ten days as scheduled in the itinerary, Mr Moore's experience was of many hours spent travelling by bus; he cruised for only three days.

  The cruise also began on board a different vessel to the luxurious Scenic Jewel; and by the time the cruise concluded in Budapest, the Moores had changed ship at least twice.

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Moore v Scenic Tours (Cont.)

- Proceedings were brought under the ACL, in particular it was alleged that failed to exercise due care and skill in the supply of the tours, in breach of the guarantee in s 60.

- The tours were said to have been unfit for the purpose for which they were acquired and not of the nature and quality promised, in breach of the guarantees in s.61.

- Scenic knew or should have known about the weather disruptions that were likely to occur to each scheduled itinerary; and it chose not to cancel the cruises or inform the passengers in a timely manner to give them the opportunity to cancel their booking.

- Garling SCJ found Scenic had breached the guarantees but held that s.16 of the CLA did not apply to damages suffered overseas and awarded a sum for distress and disappointment.

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Moore v Scenic Tours (Cont.)

- NSW Court of Appeal upheld the finding that Scenic had breached the ACL Guarantees.
- Agreed that s.16 of the CLA was picked up and applied by s.275 of the ACL.
- Disagreed with the primary judge that the CLA did not apply to an award for damages suffered outside Australia – rather it governed the awarding of damages in New South Wales by a court or tribunal.
- Accordingly because Mr Moore did not exceed 15% of a most extreme case the award of damages for disappointment and distress was set aside.

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Moore v Scenic Tours (Cont.)

- High Court agreed with the NSW CA that s.275 of the ACL picked up and applied s.16 of the CLA.
- …But disagreed that damages for disappointment and distress occasioned by a breach of contract were damages caught by s.16 CLA.
- High Court reaffirmed it decision in *Baltic Shipping Co v Dillon (2012) 248 CLR*.
- General rule that damages could not be recovered for injured feelings caused by a breach of contract.

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Moore v Scenic Tours (Cont.)

- Exception for *“claims for "damages for distress, vexation and frustration where the very object of the contract has been to provide pleasure, relaxation …”.*

- Such a claim was to be distinguished from claims where the distress and disappointment was consequent on physical injury (as in Insight Vacations).
  Mr Moore made no claim that he had suffered any physical injury or recognised psychiatric illness by reason of his experience.
- Accordingly, the damages which were awarded to Mr Moore were not subject to the threshold imposed by s.16 of the CLA because they were not an award of personal injury damages which is all that s.16 of the CLA governs.

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Questions

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Thank you for joining us!

A link to the recording of this webinar will be sent to all attendees later this week.

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