



## HIGH COURT OF AUSTRALIA

5 October 2011

### WESTPORT INSURANCE CORPORATION & ORS v GORDIAN RUNOFF LIMITED

[2011] HCA 37

Today the High Court allowed an appeal from the Court of Appeal of the Supreme Court of New South Wales and reinstated orders of the primary judge setting aside an arbitral award.

On 10 October 2008, in an arbitration conducted under the *Commercial Arbitration Act* 1984 (NSW) ("the Arbitration Act"), arbitrators delivered the arbitral award in favour of Gordian Runoff Ltd ("Gordian"). The award determined the rights of the parties to treaties for reinsurance ("the treaties") and the effect of s 18B(1) of the *Insurance Act* 1902 (NSW) ("Insurance Act") upon the obligation of Westport Insurance Corporation and four other reinsurers ("the reinsurers") under the treaties to indemnify Gordian.

Gordian was an underwriter of professional indemnity insurance and directors and officers liability ("D&O") insurance. One D&O insurance policy was written for FAI Insurance Ltd ("FAI"), insuring for claims for prior wrongful acts occurring before 31 May 1999 and allowing claims to be made and notified for seven years thereafter ("the FAI policy").

In the arbitration, the dispute between the parties turned upon whether the liabilities of Gordian for claims under the FAI policy were reinsured under the treaties between Gordian and the reinsurers. The central issue was whether the reinsurance treaties covered the FAI policy, given that it covered claims made and notified to Gordian within an extended period of seven years, rather than three years which was said to be the usual period for making claims under the reinsurance treaties. The reinsurers had not been aware of the existence of the FAI policy until 23 February 2001.

The treaties required the dispute to be decided by arbitration in accordance with, and subject to, the Arbitration Act.

Section 18B(1) relevantly provides that the insured shall not be disentitled to be indemnified by the insurer only by reason of any exclusion clause if, on the balance of probability, "the loss in respect of which the insured seeks to be indemnified was not caused or contributed to by the happening of those events or the existence of those circumstances, unless in all the circumstances it is not reasonable for the insurer to be bound to indemnify the insured". The loss in respect of which Gordian sought to be indemnified was its liability on the three year claims. The "particular circumstance" was that the FAI policy covered claims which were made and notified to Gordian in a seven, not three, year period.

Section 29(1) of the Arbitration Act required the arbitrators, relevantly, to make the award in writing and state the reasons for making the award. Under s 38(2), a proceeding described as "an appeal" lay to the Supreme Court "on any question of law arising out of an award".

In their reasons for the award, the arbitrators were not persuaded that the reinsurance treaties covered the FAI policy. However, they found that s 18B(1) of the Insurance Act applied to contracts of reinsurance at the time of the arbitration and, as a result, the reinsurance treaties covered Gordian's liability under the FAI policy in relation to the three year claims.

The reinsurers appealed to the Supreme Court of New South Wales. The primary judge set aside the arbitral award on the basis that the arbitrators had failed to recognise that the agreement by the reinsurers to extend cover under one of the reinsurance treaties was not a limitation or exclusion in the sense contemplated by s 18B(1) of the Insurance Act. The Court of Appeal allowed Gordian's appeal from the decision of the primary judge and refused leave to the reinsurers to "appeal" against the award. The reinsurers appealed by special leave to the High Court.

A majority of the High Court held that the arbitrators, in relying on s 18B of the Insurance Act, were obliged to explain why the steps in that provision were satisfied. The Court held that there was no indication of factual findings in the reasons for the award supporting the inapplicability of the proviso nor supporting its application. The result of the inadequacy of reasons was that the award was set aside. Their Honours also held that s 18B did not apply because the treaties did not exclude or limit the reinsurers liability to indemnify Gordian because the FAI policy was for seven years.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*