HIGH COURT OF AUSTRALIA

3 November 2010

SELECTED SEEDS PTY LTD v QBEMM PTY LIMITED & ORS
[2010] HCA 37

The High Court today held an insurer could not rely upon an exclusion clause in an insurance policy to deny liability to its insured, a seed merchant, sued by a grower in connection with the supply of seed contaminated with a weed.

The appeal involved the purchase and sale of Jarra grass seed, a type of livestock fodder. The appellant, a seed merchant, bought and sold a batch of Jarra grass seed unaware that it was contaminated with seed of Summer grass, a weed. The seed was purchased, planted, harvested and on-sold several times. With each progressive harvest, the presence of Summer grass seed increased.

Seed traceable to the contaminated batch sold by the appellant was purchased by Mr and Mrs Shrimp. The Shrimps planted the seed for fodder. By this time, the seed was almost entirely Summer grass seed and the Shrimps reaped only Summer grass. They brought proceedings to recover for the damage to their land, and the appellant was eventually joined as a party to the proceedings. The Shrimps' claim was settled and the appellant sought indemnity from its insurer, the respondents, in respect of its contribution to settlement and its costs. The indemnity request was refused.

In the proceedings brought by the appellant in the Supreme Court of Queensland to enforce its insurance policy, the respondents relied upon an efficacy clause in the policy. The clause excluded liability caused or arising from the failure of any product to correctly fulfil its intended use or function and/or meet the level of performance, quality, fitness or durability warranted or represented by the appellant.

The trial judge found for the appellant, concluding that liability for damages arose not from what the product failed to do but from the damage it caused to the Shrimps' property. On appeal, the Queensland Court of Appeal reversed the trial judge's decision, holding that the appellant's liability arose because the seed did not correctly fulfil its represented or warranted quality as Jarra grass seed or correctly fulfil its intended function of producing Jarra grass and seed. By special leave, the appellant appealed to the High Court.

Today, the High Court overturned the Court of Appeal's decision. It held that the liability excluded by the efficacy clause was for property damage caused by or arising from a failure of a product to fulfil its use or function. The damage to the Shrimps' land did not arise out of the failure of the seeds that were sown to fulfil their intended use or function to produce Jarra grass and seed. Rather, the damage was caused by the introduction of Summer grass, a weed, to the land. The insurance policy held by the appellant with the respondents therefore covered the liability to the Shrimps.

- *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.*

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