Summary of Judgment

5 Boroughs NY Pty Ltd v State of Victoria;
***Roberts v State of Victoria* [2021] VSC 785**
2 December 2021

In COVID-19 related class actions, the Honourable Justice John Dixon today struck out the statement of claim of 5 Boroughs NY Pty Ltd (**5 Boroughs**), with leave to replead, and summarily dismissed the claim of Jordan Roberts (**Roberts**).

The plaintiffs in each group proceeding sought damages from the State of Victoria for loss suffered during stage 3 and 4 lockdown restrictions (including workplace closures) imposed during the 'second wave' of the COVID-19 virus during 2020, which restrictions were alleged to be the 'inevitable' result of negligence in the hotel quarantine program.

5 Boroughs claimed to represent all Victorian retail businesses, dependent on in-store transactions, who suffered economic loss from the lockdown restrictions. It claimed the State owed retailers a duty to take reasonable care in the implementation of effective infection prevention and control measures in hotel quarantine, so as to avoid causing them economic loss through lockdowns imposed when the virus spread from quarantine.

The State denied that the law recognised any duty of care owed by it to these plaintiffs or the groups of persons they represented.

Justice John Dixon declined to summarily dismiss the retailers' claim without a trial. His Honour found that determining whether the law recognised this novel duty was a question to be resolved on evidence received at a trial. However, his Honour struck out the claim in its entirety with leave to plead the claim afresh because of a lack of clarity and precision in the allegations to go to trial.

Roberts claimed to represent all the owners, operators, controllers, and employees of Victorian businesses affected by the restrictions, who suffered economic loss through lost income or wages, and/or who suffered psychiatric/psychological injury because of the restrictions on the affected businesses. Roberts' claim also sought to impose a novel duty on the State to take reasonable care in the procurement of and supervision of guarding services at the hotel quarantine sites, which was breached by employing private security companies instead of the Australian Defence Force or the police, and to take reasonable care in the provision of infection-control training to the security guards. The State denied that this novel duty of care was known to the law.

Justice John Dixon ruled that because the losses claimed by Roberts and the group members were too far removed from the alleged negligent conduct and the postulated novel duty would risk liability to an indeterminate class of people, no such duty was known to the law. In addition, the decision to appoint private security personnel rather than the ADF/police was a policy matter that is not justiciable in negligence. This claim had no real prospect of success at trial, and was summarily dismissed.
