FEDERAL COURT OF AUSTRALIA

Swiss Re International Se v LCA Marrickville Pty Limited (Second COVID-19 insurance test cases) [2021] FCA 1206

SUMMARY

In accordance with the practice of the Federal Court in cases of public interest, importance or complexity, the following summary has been prepared to accompany the orders made today. This summary is intended to assist in understanding the outcome of this proceeding and is not a complete statement of the conclusions reached by the Court. The only authoritative statement of the Court's reasons is that contained in the published reasons for judgment which will be available on the internet at www.fedcourt.gov.au together with this summary.

These proceedings are the second test case concerning the application and operation of policies of insurance for business interruption or interference in the context of the effects of COVID-19, including government actions which were taken to control the spread of COVID-19.

The insuring clauses in issue generally comprise:

(1) **hybrid clauses**: these provide cover for loss from orders/actions of a competent authority closing or restricting access to premises, but only where those orders/actions are made or taken as a result of infectious disease or the outbreak of infectious disease within a specified radius of the insured premises;

(2) **infectious disease clauses**: these provide cover for loss that arises from either infectious diseases or the outbreak of an infectious disease at the insured premises or within a specified radius of the insured premises;

(3) **prevention of access clauses**: these provide cover for loss from orders/actions of a competent authority preventing or restricting access to insured premises because of damage or a threat of damage to property or persons (often within a specified radius of the insured premises); and

(4) **a catastrophe clause**: this provides cover for loss resulting from the action of a civil authority during a catastrophe for the purpose of retarding the catastrophe.

Other than in one case, NSD 133/2021 Insurance Australia and Meridian Travel, I have concluded that the insuring clauses do not apply in the circumstances of each case. This is principally because in those cases:

(1) the hybrid clauses require the closure of the premises/situation by order/action of a competent authority as a result of human infectious or contagious disease at the premises/situation or within a specified radius of the premises/situation or as a result of any discovery of an organism likely to result in the occurrence of a human infectious or contagious disease at the premises/situation. Although the actions of the authorities applied to the premises/situation, it is not possible to conclude that the orders were made as a result of any circumstance at the premises/situation or within the specified radius; and/or

(2) the policies specifically provide for human infectious or contagious disease in one insuring clause (the hybrid clauses) which applies in specified circumstances (see (1) above), with the consequence that construing other less confined insuring clauses in the same policy (the prevention of access clauses) as applying to a disease would involve profound incongruence and incoherence in the operation of the policy which should be avoided; and/or

(3) in some cases, the order/action of the relevant authority did not require closure of the premises/situation.

As these conclusions are not able to be affected by further evidence, I have informed the parties that I consider I should make declarations in each of these cases, other than NSD 133/2021 Insurance Australia and Meridian Travel, to the effect that the insurer is not liable to indemnify the insured in respect of the insured's claim. The parties will be given an opportunity to inform me of their positions in this regard.

In NSD 133/2021 Insurance Australia and Meridian Travel there is an infectious disease clause which operates by reference to the outbreak of a human infectious or contagious disease occurring within a 20 kilometre radius of the Situation. The clause does not require that the premises/situation be closed. It does not require that the closure be by order/action of a competent authority resulting from the outbreak of a human infectious or contagious disease occurring within a 20 kilometre radius of the Situation. The Meridian Travel premises are located in inner Melbourne and the insurer conceded that there was an outbreak of COVID-19 within a 20 kilometre radius of the Situation. The infectious disease clause therefore applies.

However, there are substantial issues as to whether Meridian Travel can prove that its business was interrupted or interfered with as a result of outbreak of a human infectious or contagious disease occurring within a 20 kilometre radius of the Situation. On the evidence, the principal and perhaps sole cause of the interruption and interference to Meridian Travel's business was action of the Commonwealth Government in banning cruise ships from Australia and banning/restricting international travel to and from Australia. This is a different cause from the insured peril which requires the outbreak of a human infectious or contagious disease occurring within a 20 kilometre radius of the Situation.

Insurance Australia and Meridian Travel will be given an opportunity to consider their respective positions.

I have also concluded that s 61A of the *Property Law Act 1958* (Vic) does not apply to Commonwealth Acts. Accordingly, the insurers cannot rely on s 61A to operate to replace references to the *Quarantine Act 1908* (Cth) with references to the *Biosecurity Act 2015* (Cth). Exclusions in the policies based on the *Quarantine Act 1908* (Cth) therefore do not apply as COVID-19 was not a quarantinable disease under the *Quarantine Act 1908* (Cth).

I have further concluded that under either the general principles of law applying to contracts of indemnity or specific provisions of certain policies, if I am wrong and the insuring clauses do apply, then the insureds' losses are necessarily reduced by Commonwealth JobKeeper payments, relief on franchise fees granted by a franchisor, and rental reductions or abatements granted by a lessor. Those payments would therefore reduce each insured's loss, which would be claimable under the policies, if my conclusions that the insuring clauses do not apply are incorrect.

Other payments, in the nature of act of mercy payments, including a Commonwealth and a number of State grants, were not made to reduce the insureds' losses. Those payments would not reduce each insured's loss, which would be claimable under the policies, if my conclusions that the insuring clauses do not apply are incorrect.

To facilitate the expeditious hearing of an appeal in all matters, I have granted all of the parties leave to appeal.

Jagot J 8 October 2021