FEDERAL COURT OF AUSTRALIA

Star Entertainment Group Limited v Chubb Insurance Australia Ltd [2022] FCAFC 16

LCA Marrickville Pty Limited v Swiss Re International SE [2022] FCAFC 17

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 Full Court. The only authoritative statement of the Full 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.

The Full Court of the Federal Court today handed down judgment in six appeals which raise issues concerning business interruption insurance policies and the COVID-19 pandemic.

The six appeals were heard together over a period of five days in November 2021.

Star Entertainment v Chubb Insurance

The first appeal – *Star Entertainment Group Ltd v Chubb Insurance Australia Ltd* – was an appeal by Star Entertainment and associated entities from a judgment of Chief Justice Allsop. At first instance, it was held that Star Entertainment was not entitled to indemnity under its insurance policy for loss from business interruption caused by government orders directed to restricting the spread of COVID-19.

The Full Court, comprising Justices Moshinsky, Derrington and Colvin, in a joint judgment, held that the appeal should be dismissed, with costs.

The appeal raised a number of issues concerning the proper construction of the insurance policy. The claim by Star Entertainment both before the primary judge and on appeal relied upon the terms of a particular memorandum (memorandum 7) to the business interruption part of the policy. The insurers in their submissions relied, in particular, on another memorandum (memorandum 9), which extended cover to include loss resulting from any occurrence of a "notifiable disease". The

expression “notifiable disease” expressly excluded diseases listed under the *Biosecurity Act 2015* (Cth). COVID-19 is such a disease.

The Full Court concluded that, reading memorandum 7 in the context of the policy as a whole, including in particular memorandum 9, memorandum 7 did not provide cover for the losses from business interruption claimed by Star Entertainment. The Full Court summarised its reasons in paragraph 36, in which it stated: “Memorandum 9 expresses the full extent of the liability of the Insurers under the Policy in respect of the subject matter which it addresses. Relevantly for present purposes, that subject matter is loss resulting from the interruption of Star's business by reason of the occurrence of human infectious or contagious disease.” The Full Court held that, to the extent that the generally expressed terms of memorandum 7 might be said to encompass action taken by a lawfully constituted authority to confine the spread of a disease such as COVID-19, the scope of memorandum 7 is to be read down so as to avoid inconsistency with the language of memorandum 9.

LCA Marrickville v Swiss Re

The other five appeals were brought by five insureds – LCA Marrickville, Meridian Travel, the Taphouse Townsville, Market Foods, and the liquidator of Educational World Travel – from a judgment of Justice Jagot.

At first instance, there were ten proceedings (referred to as the Second COVID-19 insurance test cases), which were test cases 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.

Other than in the case involving Meridian Travel, Justice Jagot concluded that the insuring clauses did not apply in the circumstances of each case.

In the proceeding involving Meridian Travel, Justice Jagot held that the infectious disease clause applied. However, Justice Jagot also held that there were substantial issues as to whether Meridian Travel could 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. In that proceeding, Meridian Travel and the insurer (Insurance Australia) were given the opportunity to consider their positions in light of the reasons at first instance.

In five of the proceedings, the insured appealed to the Full Court.

The Full Court, comprising Justices Moshinsky, Derrington and Colvin, substantially agreed with the conclusions of Justice Jagot in each of the five proceedings. In particular, the Full Court agreed that in each of the cases other than Meridian Travel, the insuring clauses did not apply. In relation to Meridian Travel, the Full Court substantially agreed with the conclusions of Justice Jagot.

One of the issues dealt with by Justice Jagot was an argument raised by some of the insurers relying on s 61A of the *Property Law Act 1958* (Vic). Section 61A provides that where an Act is repealed and re-enacted, any reference to the repealed Act is to be construed as a reference to the re-enacted Act. The insurers argued on the basis of this provision that, where an exception to cover referred to the *Quarantine Act 1908* (Cth), which had been repealed before the policy commenced, it should be read as a reference to the *Biosecurity Act 2015* (Cth). Justice Jagot rejected this argument on several bases, including that s 61A applies to Acts of the Victorian rather than the Commonwealth Parliament. The Full Court held that s 61A did not apply, for substantially the same reasons.

However, the Full Court came to a different view to Justice Jagot with respect to certain subsidiary issues. In particular, the Full Court came to a different view as to whether, if an insured was entitled to recover, it would need to account for certain payments or benefits received from third parties, such as JobKeeper payments. The Full Court also came to a different view as to the payment of interest by an insurer, in the event that an insurer were liable to provide indemnity.

In light of these conclusions, it was necessary to amend the primary judge's answers to certain of the questions posed by the parties. Accordingly, in four of the five appeals, the appeal (and, if applicable, the cross-appeal) was allowed in part, and the relevant answers were amended. Otherwise, the appeal and the cross-appeal were dismissed.

In the Market Foods appeal, the Full Court decided that the appeal should be dismissed.

MOSHINSKY, DERRINGTON AND COLVIN JJ
21 FEBRUARY 2022