

NOTICE OF FILING

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Details of Filing

Document Lodged: Statement of Claim - Form 17 - Rule 8.06(1)(a)
File Number: NSD132/2021
File Title: SWISS RE INTERNATIONAL SE v LCA MARRICKVILLE PTY
LIMITED ACN 601 220 080
Registry: NEW SOUTH WALES REGISTRY - FEDERAL COURT OF
AUSTRALIA



A handwritten signature in blue ink that reads 'Sia Lagos'.

Dated: 26/02/2021 12:08:54 PM AEDT

Registrar

Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.



Form 17

Rule 8.05(1)(a)

Statement of claim

No: _____ of 2021

Federal Court of Australia

District Registry: NSW

Division: General

Swiss Re International SE ARBN 138 873 211

Applicant

LCA Marrickville Pty Limited ACN 601 220 080

Respondent

A. Background

- 1 At all material times the Applicant (**Swiss Re**) was, and is, a foreign company registered in Australia pursuant to the *Corporations Act 2001* (Cth) (**Corporations Act**) and capable of suing in its corporate name and style.
- 2 At all material times the Respondent (**LCA**) was, and is, a company duly incorporated pursuant to the *Corporations Act* and capable of being sued in its corporate name and style.

Filed on behalf of (name & role of party)	Swiss Re International SE, Applicant		
Prepared by (name of person/lawyer)	Carmen Elder	Ref	CLE/CZO/319332/80
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[Form approved 01/08/2011]

3 At all material times, LCA carried on the business of provision of cosmetic treatment
services from a store within the Marrickville Metro Shopping Centre, 34 Victoria Road,
Marrickville, New South Wales.

4 LCA is an “*Insured*” under a policy of insurance providing cover on certain terms and
conditions for business interruption (*Policy*).

Particulars

i. See Section D below.

5 In 2020, the New South Wales Government made certain Public Health Orders in response
to the global pandemic known as “*COVID-19*”.

Particulars

i. See Section B below.

6 In July 2020, LCA made a claim on the Policy in respect of alleged business interruption.

Particulars

i. See Section C below.

7 Swiss Re has declined indemnity in respect of LCA’s claim.

Particulars

i. See Section C below.

8 In October 2020, LCA lodged a complaint with the Australian Financial Complaints
Authority (*AFCA*) in relation to Swiss Re’s declinature of the claim (*Complaint*).

Particulars

i. See paragraph 39 below.

9 AFCA has agreed to allow Swiss Re to treat the Complaint as a test case by commencing these proceedings.

Particulars

- i. See paragraphs 41 and **Error! Reference source not found.** below.

B. The COVID-19 Pandemic

10 On 31 December 2019, the China Country Office of the World Health Organisation (*WHO*) was informed of cases of pneumonia of unknown cause detected in Wuhan City, Hubei Province of China.

Particulars

- i. WHO, Disease Outbreak News, 5 January 2020.

11 During January 2020, the WHO referred to the disease as Novel Coronavirus (2019-nCoV).

Particulars

- i. WHO, Novel Coronavirus (2019-nCoV) Situation Report – 1, 21 January 2020.

12 On 25 January 2020, the first case of Novel Coronavirus (2019-nCoV) in Australia was reported.

Particulars

- i. Ministers Department of Health, First confirmed case of novel coronavirus in Australia, 25 January 2020.

- 13 On 30 January 2020, the WHO recommended that the interim name of the disease causing the outbreak should be “*2019-nCoV acute respiratory disease*”

Particulars

- i. WHO, Novel Coronavirus (2019-nCoV) Situation Report – 10, 30 January 2020.
- 14 On 11 February 2020, the WHO announced it had adopted “*COVID-19*” as a shortened name for the disease.

Particulars

- i. WHO, Novel Coronavirus (2019-nCoV) Situation Report – 22, 11 February 2020.
- 15 On 11 March 2020, the WHO announced its assessment that COVID-19 can be characterised as a pandemic.

Particulars

- i. WHO, Coronavirus disease 2019 (COVID-19) Situation Report – 51, 11 March 2020.

Listed Human Disease

- 16 Section 42(1) of the *Biosecurity Act 2015* (Cth) (***Biosecurity Act***) empowers the Director of Human Biosecurity to determine in writing that a human disease is a ‘listed human disease’ if the Director considers that the disease may be communicable and cause significant harm to human health.
- 17 On 7 June 2016, the *Biosecurity (Listed Human Diseases) Determination 2016* (***Determination***) came into force.

18 The Determination was made under subsection 42(1) of the *Biosecurity Act*.

Particulars

i. Section 3 of the Determination.

19 As at 7 June 2016, Section 4 of the Determination set out seven human diseases which the Director of Human Biosecurity had determined to be listed human diseases pursuant to section 42(1) of the *Biosecurity Act*.

20 On 21 January 2020, the *Biosecurity (Listed Human Diseases) Amendment Determination 2020* came into force (***Amendment Determination***).

21 The Amendment Determination was made under subsection 42(1) of the *Biosecurity Act*.

Particulars

i. Section 3 of the Amendment Determination.

22 The Amendment Determination had the effect of amending the Determination such that an eighth disease, “*human coronavirus with pandemic potential*” was added to the list of diseases in section 4 of the Determination.

23 In the premises of paragraphs 16 to 22 above, COVID-19 has been declared a listed human disease pursuant to subsection 42(1) of the *Biosecurity Act* since 21 January 2020.

Public Health Orders

24 Section 7 of the *Public Health Act 2010* (NSW) (***Public Health Act***) provides that if the New South Wales Minister for Health considers on reasonable grounds that a situation has arisen that is, or is likely to be, a risk to public health the Minister may take such action and give such directions as the Minister considers necessary to deal with the risk and its possible consequences.

25 On 30 March 2020, the *Public Health (COVID-19 Restrictions on Gathering and Movement) Order 2020* (***Order No. 1***) came into force.

26 Order No.1 was made pursuant to section 7 of the *Public Health Act*.

27 Order No. 1 recorded the directions of the New South Wales Minister for Health and Medical Research (*NSW Health Minister*) that:

(a) a person may not without reasonable excuse leave the person's place of residence;
and

(b) business premises that are beauty salons must not be open to members of the public.

Particulars

i. Subsection 5(1) of Order No.1.

ii. Subsection 7(1)(i) of Order No.1.

28 On 15 May 2020, the *Public Health (COVID-19 Restrictions on Gathering and Movement) Order (No 2) 2020 (Order No. 2)* came into force.

29 Order No.2 was made pursuant to section 7 of the *Public Health Act*.

30 Order No. 2:

(a) revoked Order No.1; and

(b) recorded the NSW Health Minister's direction that business premises that are beauty salons must not be open to members of the public, except for the retail sale of goods and gift vouchers, including gift vouchers for services redeemable at a later date.

Particulars

i. Subsections 7(1)(h) and 13(1) of Order No. 2.

31 On 1 June 2020, the *Public Health (COVID-19 Restrictions on Gathering and Movement) Order (No 3) 2020 (Order No. 3)* came into force.

32 Order No. 3 was made pursuant to section 7 of the *Public Health Act*.

33 Order No. 3:

- (a) revoked Order No.2;
- (b) recorded the NSW Health Minister's direction that business premises used for beauty salons are subject to limitations on the number of persons that may be on the premises, and other restrictions or conditions, including that the premises must have a "*COVID-19 safety plan*" and that the number of persons on the premises at any one time be limited to the lesser of:
 - (i) 10 customers and the business's staff members; or
 - (ii) the total number of persons calculated by allowing 4 square metres of space for each person (including staff members) on the premises.

Particulars

- i. Subsections 5(1) and 15(1) of Order No.3
- ii. Item 16 of Schedule 1 to Order No. 3

C. LCA's claim on the Policy

34 On 15 July 2020, Aon sent an email to Swiss Re, attached to which was a letter from LCA dated 3 July 2020 (**Claim Letter**).

Particulars

- i. Email from Aon received by Swiss Re at 11.22 pm, 15 July 2020.

35 In the Claim Letter, LCA stated that:

- (a) it operated the business of a beauty salon from the Marrickville Metro Shopping Centre;
- (b) the business was closed from 26 March to 31 May 2020 as a result of measures enacted by the NSW Government;
- (c) it suffered no "*Damage*" to property for the purposes of Section 1 of the Policy;

(d) the claim made by LCA on the Policy related solely to “*Business Interruption Losses*” for the purposes of Section 2 of the Policy; and

(e) the claim was made under the Prevention of Access Clause (*Policy Claim*).

36 On 29 September 2020, Swiss Re declined to indemnify LCA in respect of the Policy Claim (*Declinature*).

Particulars

i. Letter from Swiss Re to LCA dated 29 September 2020.

37 The grounds for Swiss Re’s Declinature included that:

(a) the Policy provides cover for loss arising from human infectious or contagious disease on the terms set out in cll 9.1.2.1 (*Disease Clause*) and 9.1.2.4 (*Expansion Clause*) only;

(b) the Policy does not otherwise provide cover for loss arising from human infectious or contagious disease; and

(c) the Disease Clause and the Expansion Clause both do not provide cover in respect of the Policy Claim because COVID-19 is a disease declared to be a listed human disease pursuant to subsection 42(1) of the *Biosecurity Act*.

38 On 18 October 2020, LCA challenged Swiss Re’s Declinature and requested it be reversed.

Particulars

i. Letter from LCA to Aon dated 18 October 2020 (*LCA October Letter*).

39 On 26 October 2020, LCA lodged the Complaint with AFCA.

Particulars

i. Letter from LCA to AFCA dated 26 October 2020.

40 On 27 November 2020, Swiss Re affirmed the Declinature.

Particulars

i. Letter from Swiss Re to LCA dated 27 November 2020.

41 Pursuant to Clause C.2.2(f) of AFCA’s Complaint Resolution Scheme Rules (***Rules***), AFCA has agreed to allow Swiss Re to treat the Complaint as a test case by commencing these proceedings.

D. The Policy

42 On or about 17 July 2019, Swiss Re issued the Policy, being a policy of Industrial Special Risks insurance numbered P23089.04-00, to Aesthetics Australia Holdings Pty Ltd and various other entities.

43 The Policy was wholly in writing and comprised:

(a) a schedule headed “*Policy Schedule*” (***Policy Schedule***) and attached Endorsements, dated 17 July 2019; and

(b) a policy wording described as “*Vertex Industrial Special Risks 0818*” dated August 2018 (***Policy Wording***).

Particulars

i. Policy Wording, cl 1.14

ii. Policy Schedule, p 11

44 The Policy Schedule misdescribes the “*Insurer*” as “*Swiss Reinsurance Company*”.

Particulars

i. Policy Wording, cl 1.10

ii. Policy Schedule, p 12

45 The misdescription of the “*Insurer*” referred to in paragraph 44 above arose due to a clerical error.

46 The parties agree that on its proper construction, the reference to “*Swiss Reinsurance Company*” in the Policy Schedule should be read and understood as being a reference to Swiss Re.

47 LCA was listed as an “*Additional Named Insured*” in the Policy Schedule with the consequence that LCA fell within the meaning of “*Insured*” for the purposes of the Policy.

Particulars

- i. Policy Wording, cl 1.9
- ii. Policy Schedule, pp 1 and 8

48 The Policy came into effect at 4.00 pm (Australian Eastern Standard Time) on 30 June 2019 and expired at 4.00 pm (Australian Eastern Standard Time) on 30 June 2020 (*Period of Insurance*).

Particulars

- i. Policy Wording, cl 2
- ii. Policy Schedule, p 1

49 The Policy contained two sections of cover, namely:

- (a) Section 1 – Property Insurance; and
- (b) Section 2 – Interruption Insurance.

Particulars

- i. Policy Schedule, p 2

50 It was an express term of the Policy that (subject to its terms and conditions) Swiss Re would indemnify an “*Insured*”, in accordance with the provisions of cl 10 contained in Section 2 of the Policy, against loss resulting from the interruption of or interference with the “*Business*”, provided that the interruption or interference is in consequence of:

- (a) “9.1.2.1 *closure or evacuation of the whole or part of the **Situation** by order of a competent public authority as a result of an outbreak of a notifiable human infectious or contagious disease or bacterial infection or any discovery of an organism likely to result in the occurrence of a notifiable human infectious or contagious disease or consequent upon vermin or pests or defects in the drains and/or sanitary arrangements at the **Situation** but specifically excluding losses arising from or in connection with highly Pathogenic Avian Influenza in Humans or any disease(s) declared to be a listed human disease pursuant to subsection 42(1) of the Biosecurity Act 2015*” (***Disease Clause***); or

Particulars

- i. Policy Wording, cll 1.18 and 9.1.2.1
 - ii. Policy Schedule, p 2
- (b) “9.1.2.4 *any of the circumstances set out in Sub-Clauses 9.1.2.1 to 9.1.2.3 (inclusive) occurring within a 5 kilometer radius of the Situation*” (***Expansion Clause***); or

Particulars

- i. Policy Wording, cll 1.18 and 9.1.2.4
 - ii. Policy Schedule, p 2
- (c) “9.1.2.5 *the action of a civil authority during a conflagration or other catastrophe for the purpose of retarding same*” (***Catastrophe Clause***); or

Particulars

- i. Policy Wording, cl 9.1.2.5
- (d) “9.1.2.6 *the action of any lawful authority attempting to avoid or diminish risk to life or Damage to property within 5 kilometres of such Situation which prevents or hinders the use of or access to the Situation whether any property of the Insured shall be the subject of Damage or not*” (***Prevention of Access Clause***),

Particulars

- i. Policy Wording, cll 1.3, 1.18 and 9.1.2.6
 - ii. Policy Schedule, p 2
- occurring during the “*Period of Insurance*”.

51 It was an express term of the Policy that events falling within cl 9.1.2 of the Policy are deemed to be loss caused by “*Damage*” covered by Section 2 of the Policy (***Deeming Provision***).

Particulars

- i. Policy Wording, cl 9.1.2

52 It was an express term of the Policy that cll 12 and 13 of the Policy shall not apply to the cover provided by cl 9.1.2 of the Policy.

Particulars

i. Policy Wording, cl 9.1.2

53 It was an express term of the Policy that Swiss Re's liability to indemnify an "*Insured*" pursuant to cl 9 of the Policy was subject to:

(a) the "*Limits of Liability*" and any "*Sub-Limits of Liability*" referred to in the Policy Schedule;

(b) the loss being calculated in accordance with the "*Basis of Settlement Clause*", being cl 10 of the Policy Wording;

(c) the Conditions set out in cll 11 and 14 of the Policy Wording.

Particulars

i. Policy Wording, cl 9.4

ii. Policy Schedule, pp 2-4

54 It was an express term of the Policy that, if Swiss Re is liable to indemnify an "*Insured*" under Section 2 of the Policy, that an "*Insured*" is entitled to be indemnified with respect to loss of "*Gross Profit*", being the amount by which the sum of the "*Turnover*" and the amount of the closing stock and work in progress shall exceed the sum of the amount of the opening stock and work in progress and the amount of the "*Uninsured Working Expenses*" as set out in the Policy Schedule.

Particulars

i. Policy Wording, cll 10.1, 8.2, and 8.15

ii. Policy Schedule, p 3

55 It was an express term of the Policy that “*Gross Profit*” is to be calculated as follows (***Basis of Settlement Clause***):

“10.1.1 in respect of reduction in ***Turnover***, the sum produced by applying the ***Rate of Gross Profit*** to the amount by which the ***Turnover*** during the ***Indemnity Period*** shall, in consequence of the ***Damage***, fall short of the ***Standard Turnover***; and

10.1.2 in respect of Increase in Cost of Working, the additional expenditure necessarily and reasonably incurred for the sole purpose of avoiding or diminishing the reduction in ***Turnover*** which, but for that expenditure, would have taken place during the ***Indemnity Period*** in consequence of the ***Damage***, but not exceeding the sum produced by applying the ***Rate of Gross Profit*** to the amount of the reduction thereby avoided.

10.1.3 There shall be deducted from the amounts calculated in 10.1.1 and 10.1.2 any sum saved during the ***Indemnity Period*** in respect of such of the charges and expenses of the ***Business*** payable out of ***Gross Profit*** as may cease or be reduced as a consequence of the ***Damage*** (excluding depreciation and amortisation).”

Particulars

- i. Policy Wording, cll 1.2, 1.3, 8.5, 8.9, 8.14, 8.15, and 10.1

56 It was an express term of the Policy that adjustments shall be made to the “*Rate of Gross Profit*” and to the “*Standard Turnover*” as may be necessary to provide for the trend of the “*Business*” and for variations in or other circumstances affecting the “*Business*” either before or after the date of the “*Damage*”, or which would have affected the “*Business*” had the “*Damage*” not occurred, so that the figures as adjusted shall represent as nearly as may

be reasonably practicable the results which, but for the “*Damage*”, would have been obtained during the relative period after the “*Damage*” occurred (*Adjustments Clause*).

Particulars

- i. Policy Wording, cl 8

E. The proper construction of the Policy

The Disease Clause

57 On the proper construction of the Disease Clause, an “*Insured*” is entitled to indemnity if:

- (a) it suffered loss resulting from the interruption of or interference with its “*Business*”;
and
- (b) the interruption or interference was in consequence of “*closure or evacuation of the whole or part of the Situation*”; and
- (c) the “*closure or evacuation*” was by an order made by a “*competent public authority*”;
and
- (d) the order of the “*competent public authority*” was:
 - (i) as a result of an outbreak of a notifiable human infectious or contagious disease or bacterial infection at the “*Situation*” only, but not as a result of such an outbreak in Australia generally, or another part of Australia, or New South Wales generally, or another part of New South Wales; or
 - (ii) as a result of the discovery of an organism likely to result in the occurrence of a notifiable human infectious or contagious disease at the “*Situation*” only, but not as a result of such a discovery in Australia generally or in another part of Australia, or New South Wales generally or in another part of New South Wales; and

(e) the loss does not arise from and is not in connection with any disease(s) declared to be a listed human disease pursuant to subsection 42(1) of the Biosecurity Act.

58 On the proper construction of the Disease Clause and the *Biosecurity Act*, any disease(s) declared to be a listed human disease pursuant to subsection 42(1) of the *Biosecurity Act* includes a disease so declared after the date on which the Policy was issued, including relevantly COVID-19.

The Expansion Clause

59 On the proper construction of the Expansion Clause as applicable to the circumstances contained in the Disease Clause, an “*Insured*” is entitled to indemnity if:

(a) it suffered loss resulting from the interruption of or interference with its “*Business*”;

and

(b) the interruption or interference was in consequence of “*closure or evacuation of the whole or part of the Situation*”; and

(c) the “*closure or evacuation*” was by an order made by a “*competent public authority*”;

and

(d) the order of the “*competent public authority*” was:

(i) as a result of an outbreak of a notifiable human infectious or contagious disease or bacterial infection occurring within a 5 km radius of the “*Situation*” only, but not as a result of such an outbreak in Australia generally or in another part of Australia, or New South Wales generally or in another part of New South Wales; or

(ii) as a result of the discovery of an organism likely to result in the occurrence of a notifiable human infectious or contagious disease occurring within a 5 km radius of the “*Situation*” only, but not as a

result of such a discovery in Australia generally or in another part of Australia, or New South Wales generally or in another part of New South Wales and not as a result of such a discovery in another part of Australia and/or New South Wales; and

(e) the loss does not arise from and is not in connection with any disease(s) declared to be a listed human disease pursuant to section 42(1) of the Biosecurity Act.

60 On the proper construction of the Expansion Clause as applicable to the circumstances contained in the Disease Clause, and the *Biosecurity Act*, any disease(s) declared to be a listed human disease pursuant to subsection 42(1) of the *Biosecurity Act* includes a disease so declared after the date on which the Policy was issued, including relevantly COVID-19.

Catastrophe Clause

61 On the proper construction of the Catastrophe Clause, an “*Insured*” is only entitled to indemnity if:

(a) it suffered loss resulting from the interruption of or interference with its “*Business*”;

and

(b) the interruption or interference was in consequence of the action of a civil authority;

and

(c) that action occurred during a conflagration or other catastrophe for the purpose of retarding that conflagration or other catastrophe; and

(d) the loss does not arise from an outbreak of a notifiable human infectious or contagious disease or bacterial infection (including any disease declared to be a listed human disease pursuant to section 42(1) of the Biosecurity Act).

62 On the proper construction of the Catastrophe Clause, an outbreak of a notifiable human infectious or contagious disease or bacterial infection (including relevantly COVID-19) is not within the meaning of “*conflagration or other catastrophe*”.

Prevention of Access Clause

63 On the proper construction of the Prevention of Access Clause, an “*Insured*” is only entitled to indemnity if:

- (a) it suffered loss resulting from the interruption of or interference with its “*Business*”;
and
- (b) the interruption or interference was in consequence of the action of a lawful authority;
and
- (c) the action of the lawful authority was taken in an attempt to avoid or diminish risk to life, or “*Damage*” to property, within 5 km of the relevant “*Situation*”, but was not taken in an attempt to avoid or diminish risk to life:
 - (i) in Australia generally, or in another part of Australia; or
 - (ii) in New South Wales generally, or in another part of New South Wales; and
- (d) the action prevented or hindered the use of, or access to, the relevant “*Situation*”.

Cover for human infectious or contagious disease

64 On the proper construction of cl 9.1.2 of the Policy, the obligation of Swiss Re to indemnify an “*Insured*” in respect of losses resulting from the interruption of or interference with the “*Business*” in consequence of closure or evacuation of the whole or part of the “*Situation*” by order of a competent public authority as a result of an outbreak of a notifiable human infectious or contagious disease or any discovery of an organism likely to result in the occurrence of a notifiable human infectious or contagious disease is confined to the

obligation contained in cl 9.1.2.1 (i.e. the Disease Clause) and cl 9.1.2.4 (i.e. the Expansion Clause) as it applies to the circumstances in cl 9.1.2.1.

65 On the proper construction of cl 9.1.2 of the Policy, the obligation of Swiss Re to indemnify an Insured in respect of loss resulting from the interruption of or interference with the “*Business*” does not extend to loss arising from or in connection with any disease declared to be a listed human disease pursuant to section 42(1) of the *Biosecurity Act*, including, relevantly, COVID-19.

F. The Policy does not respond to LCA’s claim

66 For the purposes of the Policy Claim, the “*Situation*” was LCA’s business premises at the Marrickville Metro Shopping Centre.

The Disease Clause

67 There was no outbreak of COVID-19 at the “*Situation*”.

Particulars

i. LCA October Letter

68 No organism likely to result in the occurrence of COVID-19 has been discovered at the relevant “*Situation*”, namely LCA’s business premises at the Marrickville Metro Shopping Centre.

Particulars

i. LCA October Letter

69 Orders No. 2 and 3 did not require the “*closure or evacuation of the whole or part of the Situation*”.

Particulars

i. Orders No. 2 and 3

70 In the premises, the “*Situation*” was not wholly or partly closed or evacuated by order of a competent public authority as a result of:

- (a) an outbreak of a notifiable human infectious or contagious disease or bacterial infection at the relevant “*Situation*”, namely LCA’s business premises at the Marrickville Metro Shopping Centre; or
- (b) as a result of the discovery of an organism likely to result in the occurrence of a notifiable human infectious human or contagious disease at the relevant “*Situation*”, namely LCA’s business premises at the Marrickville Metro Shopping Centre.

Particulars

i. LCA October Letter

71 Further, and in the alternative, COVID-19 was declared to be a listed human disease pursuant to subsection 42(1) of the *Biosecurity Act* with the consequence that any loss arising from or in connection with COVID-19 is excluded from the cover afforded by the Disease Clause.

72 By reason of the matters set out in paragraphs 67 to 71 above, LCA is not entitled to indemnity in respect of the Policy Claim under the Disease Clause.

The Expansion Clause

73 Each of Orders No.1, 2, and 3 were made as part of a general, New South Wales wide and/or Australia wide response to COVID-19, and were not made:

- (a) as a result of an outbreak of a notifiable human infectious or contagious disease or bacterial infection within a 5 km radius of the “*Situation*”; or
- (b) as a result of any discovery of an organism likely to result in the occurrence of a notifiable human infectious human or contagious disease within a 5 km radius of the “*Situation*”.

74 Orders No. 2 and 3 did not require the “*closure or evacuation of the whole or part of the Situation*”.

Particulars

i. Orders No. 2 and 3

75 In the premises, the relevant “*Situation*” was not wholly or partly closed or evacuated by order of a competent public authority:

(a) as a result of an outbreak of a notifiable human infectious or contagious disease or bacterial infection within a 5 km radius of the “*Situation*”, namely LCA’s business premises at the Marrickville Metro Shopping Centre; or

(b) as a result of any discovery of an organism likely to result in the occurrence of a notifiable human infectious human or contagious disease within a 5 km radius of the “*Situation*”.

76 Further, and in the alternative, COVID-19 was declared to be a listed human disease pursuant to subsection 42(1) of the *Biosecurity Act* with the consequence that any loss arising from or in connection with COVID-19 is excluded from the cover afforded by the Expansion Clause as it relates to the matters covered by the Disease Clause.

77 By reason of the matters set out in paragraphs 73 to 76 above, LCA is not entitled to indemnity in respect of the Policy Claim under the Expansion Clause as it relates to the matters covered by the Disease Clause.

The Catastrophe Clause

78 On the proper construction of the Catastrophe Clause, Orders 1, 2, and 3 were not action taken by a civil authority during:

(a) a conflagration; or

(b) other catastrophe,

for the purpose of retarding that conflagration or other catastrophe.

79 By reason of the matters set out in paragraphs 64, 65 and 78 above, LCA is not entitled to indemnity in respect of the Policy Claim under the Catastrophe Clause.

The Prevention of Access Clause

80 Orders No.1, 2 and 3:

(a) were actions by the New South Wales Minister for Health attempting to avoid or diminish risk to public health in the State of New South Wales and/or Australia generally; and

(b) were not actions by a lawful authority attempting to avoid or diminish risk to life within 5 km of LCA's premises at the Marrickville Metro Shopping Centre for the purposes of the Prevention of Access Clause.

81 By reason of the matters set out in paragraphs 64, 65 and 80 above, LCA is not entitled to indemnity in respect of the Policy Claim under the Prevention of Access Clause.

The Policy does not respond

82 By reason of the matters set out in paragraphs 66 to 81.

(a) the Policy does not respond to the Policy Claim; and

(b) LCA is not entitled to indemnity from Swiss Re under the Policy in respect of the matters the subject of the Policy Claim.

G. Swiss Re's alternative case

83 The matters set out in this section are advanced in the alternative.

The Basis of Settlement and Adjustments Clauses

84 If the Policy responds to the Policy Claim, Swiss Re's liability to indemnify LCA is to be determined in accordance with the Basis of Settlement Clause and the Adjustments Clause.

85 On the Proper Construction of the Basis of Settlement Clause, the Adjustments Clause and the Deeming Provision:

- (a) if indemnity is available under the Disease Clause or the Expansion Clause, the “*Damage*” for the purposes of calculating “*Gross Profit*” is the closure or evacuation of the whole or part of the “*Situation*” by order of a competent public authority in the circumstances set out in the Disease Clause;
- (b) if indemnity is available under the Catastrophe Clause, the “*Damage*” for the purposes of calculating “*Gross Profit*” is the action of the civil authority taken in the circumstances set out in the Catastrophe Clause;
- (c) if indemnity is available under the Prevention of Access Clause, the “*Damage*” for the purposes of calculating “*Gross Profit*” is the action of a lawful authority in the circumstances set out in the Prevention of Access Clause, which prevents or hinders the use of or access to the “*Situation*”.

86 On the proper construction of the Basis of Settlement Clause, the Adjustments Clause, and the Deeming Provision, in determining the “*Gross Profit*”, it is necessary to make adjustments to provide for the trend of the “*Business*”, and for variations in or other circumstances affecting the “*Business*” or which would have affected the “*Business*”:

- (a) if indemnity is available under the Disease Clause or the Expansion Clause, as it applies to the circumstances set out in the Disease Clause, on the assumption that there had been no closure or evacuation of the whole or part of the “*Situation*” by order of a competent public authority in the circumstances set out in the Disease Clause;
- (b) if indemnity is available under the Catastrophe Clause, on the assumption that there had been no action of a civil authority taken in the circumstances set out in the Catastrophe Clause;

(c) if indemnity is available under the Prevention of Access Clause, on the assumption that there had been no action of a lawful authority in the circumstances set out in the Prevention of Access Clause, which prevented or hindered the use of or access to the “*Situation*”.

87 The trend of the “*Business*”, and the variations in or other circumstances affecting the “*Business*”, or which would have affected the “*Business*”, include the effect of COVID-19 generally and any health measures taken in respect thereof other than those referred to in paragraph 85(a)-(c) above.

Section 57 of the *Insurance Contracts Act*

88 If, in the alternative, Swiss Re is liable to make payment under the Policy in respect of the Policy Claim, LCA is not entitled to interest pursuant to s 57 of the *Insurance Contracts Act* 1984 (Cth) on any amount for which Swiss Re is liable under the Policy to pay to LCA in respect of the Policy Claim for any period prior to the determination of LCA’s entitlement to indemnity under the Policy in these proceedings, including the ascertainment of the amount for which Swiss Re is liable in accordance with the Basis of Settlement Clause.

H. Relief

89 Swiss Re seeks the relief set out in the Originating Application.

Date: 24 February 2021



Signed by Carmen Elder
DLA Piper Australia
Lawyer for the Applicant

This pleading was prepared by Clancy O'Donovan and settled by David L. Williams SC and Ross D. Glover of counsel.

Certificate of lawyer

I, Carmen Elder, certify to the Court that, in relation to the statement of claim filed on behalf of the Applicant, the factual and legal material available to me at present provides a proper basis for each allegation in the pleading.

Date: 24 February 2021



Signed by Carmen Elder
DLA Piper Australia
Lawyer for the Applicant