

NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 1/07/2021 4:35:44 PM AEST and has been accepted for filing under the Court's Rules. Details of filing follow and important additional information about these are set out below.

Details of Filing

Document Lodged: Statement of Agreed Facts
File Number: NSD138/2021
File Title: CHUBB INSURANCE AUSTRALIA LIMITED (ABN 23 001 642 020) v
MARKET FOODS PTY LIMITED (ABN 48 604 308 581)
Registry: NEW SOUTH WALES REGISTRY - FEDERAL COURT OF
AUSTRALIA



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

Dated: 1/07/2021 4:36:58 PM AEST

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 1
Rule 2.13(2)

Statement of Agreed Issues

No. NSD138 of 2021

Federal Court of Australia
District Registry: New South Wales
Division: Commercial and Corporations

Chubb Insurance Australia Limited (ABN 23 001 642 020)

Applicant and Cross-Respondent

Market Foods Pty Limited (ABN 48 604 308 581)

Respondent and Cross-Applicant

AMBIGUITY AND *INSURANCE CONTRACTS ACT 1984* (CTH)-RELATED ISSUES

1. Are Extensions B1, B3, B4 or C of the policy,¹ or any of the components or elements thereof, patently uncertain, ambiguous or flawed?²
2. If the answer to 1 is “yes”:
 - (a) how, and to what extent, does such patent uncertainty, ambiguity or flaw affect the construction of Extensions B1, B3, B4 or C of the policy?³
 - (b) does s 37 of the *Insurance Contracts Act 1984* (Cth) have any application having regard to s 71 and, if so, is s 37 enlivened factually?
 - (c) is Chubb precluded from relying on the parts of the policy affected by such patent uncertainty, ambiguity or flaw by virtue of ss 13, 14 or 37 of the *Insurance Contract Act 1984* (Cth)?

EXTENSION B1⁴

Cover under Section 2 is extended to include loss resulting from Business Interruption to property: (a) of a type insured by this Policy; and (b) at the locations described in points 1. to 8. directly below;

...

1. Denial of Access

damage to any property within 50 kilometres of any Insured Location, which will prevent or hinder the access to or use of the Insured Location....

3. Was there “*Business Interruption*⁵... to property: (a) of a type insured by this Policy; and (b) at the location... described in” Extension B1?
 - (a) Sub-Issue #1: Does the subsistence of the SARS-CoV-2 virus on property, if proven, constitute “*physical loss, destruction or damage... to property*” (**Property Damage**)?
 - (b) Sub-Issue #2: If the answer to Sub-Issue #1 is “yes”, did the Property Damage “*occur... during the Policy Period*”?
 - (c) Sub-Issue #3: If the answer to Sub-Issue #2 is “yes”, was the Property Damage “*caused by an event insured under the Property Damage, Theft, Money, Glass*”?

¹ The word “*policy*” in this document is referable to the Policy and Renewed Policy pleaded in Market Foods’ statement of cross-claim.

² Chubb says this is not an issue for determination but agrees to it being included in this list as it is alleged in Market Foods’ statement of cross-claim.

³ Ibid.

⁴ The issues referred to in 3 to 7 hereunder are drafted on the assumption that the application and interpretation of the relevant elements of Extension B1 of the policy are unaffected by the issues raised in 1 and 2 above.

⁵ That is, “*interruption of or inference with Your Business in consequence of physical loss, destruction or damage occurring during the Policy Period caused by an event insured under the Property Damage, Theft, Money, Glass or General Property Sections*”.

or General Property Sections [of the policy] [or is it excluded by Excluded Cause 2\(a\)](#)⁶?

- (d) Sub-Issue #4: If the answer to Sub-Issue #3 is “yes”, was the Property Damage “at the location... described in” Extension B1?
4. **If the answer to 3 is “yes”, does the subsistence of the SARS-CoV-2 virus on property, if proven, constitute “damage to any property”?**
5. **If the answer to 4 is “yes”, was there damage to any property “within 50 kilometres of any Insured Location” during the Policy Period?**
6. **If the answer to 5 is “yes”, did such damage “prevent or hinder the access to or use of the Insured Location”?**
- (a) Sub-Issue #1: Market Foods contends that the subsistence of the SARS-CoV-2 virus on property caused the Queensland Government Directions⁷ and/or UQ Direction⁸ - which, in turn, “prevent[ed] or hinder[ed] the access to or use of the Insured Location”. If this can be established, is this element of the insuring clause satisfied or must the damage to property prevent or hinder the access to or use of the Insured Location as opposed to the response to such damage by the Queensland Government and/or UQ?
- (b) Sub-Issue #2: If the answer to Sub-Issue #1 above is “yes”, did the subsistence of the SARS-CoV-2 virus on property, if proven, cause the Queensland Government Directions and/or UQ Direction?
- (c) Sub-Issue #3: If the answer to Sub-Issue #2 above is “yes”, did the Queensland Government Directions and the UQ Direction “prevent or hinder the access to or use of the Insured Location”?
7. **If the answer to 6 is “yes”, was there “loss resulting from” the Business Interruption?**

EXTENSION B3⁹

Cover under Section 2 is extended to include loss resulting from Business Interruption to property: (a) of a type insured by this Policy; and (b) at the locations described in points 1. to 8. directly below;

...

3. Property in a Commercial Complex

⁶ [The portion shown in tracked changes has not been agreed by the parties.](#)

⁷ That is, the public health directions issued by the Chief Health Officer of Queensland that are pleaded in Market Foods’ statement of cross-claim.

⁸ That is, the direction issued by the University of Queensland Vice-Chancellor that is pleaded in Market Foods’ statement of cross-claim.

⁹ The issues referred to in 8 to 12 hereunder are drafted on the assumption that the application and interpretation of the relevant elements of Extension B3 of the policy are unaffected by the issues raised in 1 and 2 above.

property in any commercial complex of which the Insured Location forms a part or in which the Insured Location is contained which results in cessation or diminution of Your trade or normal business operations due to a falling away of potential custom...

8. **Was there “*Business Interruption*¹⁰... to property: (a) of a type insured by this Policy; and (b) at the location... described in” Extension B3?**
- (a) Sub-Issue #1: Does the subsistence of the SARS-CoV-2 virus on property, if proven, constitute “*physical loss, destruction or damage... to property*” (**Property Damage**)?
 - (b) Sub-Issue #2: If the answer to Sub-Issue #1 is “yes”, did the Property Damage “*occur... during the policy Period*”?
 - (c) Sub-Issue #3: If the answer to Sub-Issue #2 is “yes”, was the Property Damage “*caused by an event insured under the Property Damage, Theft, Money, Glass or General Property Sections [of the policy]*” or is it excluded by Excluded Cause 2(a)¹¹?
 - (d) Sub-Issue #4: If the answer to Sub-Issue #3 is “yes”, was the Property Damage “*at the location... described in*” Extension B3?
9. **If the answer to 8 is “yes”, does the subsistence of the SARS-CoV-2 virus on property, if proven, constitute “[*damage to*] property”?**
10. **If the answer to 9 is “yes”, was there “*damage to property in any commercial complex of which the Insured Location forms a part or in which the Insured Location is contained...*”?**
- (a) Sub-Issue #1: Does the phrase “*commercial complex*” extend beyond complexes in the nature of shopping centres or industrial complexes?
 - (b) Sub-Issue #2: If the answer to Sub-Issue #1 is “yes”, were the William Street Building, the Herston Building and the UQ Campus (or, alternatively, the UQ Food Court or, alternatively, the Licensed Premises in the UQ Food Court)¹² “*commercial complex[es] of which the Insured Location forms a part or in which the Insured Location is contained*”?
 - (c) Sub-Issue #3: If the answer to Sub-Issue #2 is “yes”, did the SARS-CoV-2 virus subsist on property in the commercial complexes during the Policy Period?
11. **If the answer to 10 is “yes”, did the damage “*result in cessation or diminution of [Market Foods] trade or normal business operations due to a falling away of potential custom*”?**
- (a) Sub-Issue #1: Market Foods contends that the subsistence of the SARS-CoV-2 virus on property caused the Queensland Government Directions and/or UQ Direction - which, in turn, “*result[ed] in [the] cessation or diminution of [Market Foods] trade or normal business operations due to a falling away of potential*

¹⁰ That is, “*interruption of or inference with Your Business in consequence of physical loss, destruction or damage occurring during the policy Period caused by an event insured under the Property Damage, Theft, Money, Glass or General Property Sections*”.

¹¹ [The portion shown in tracked changes has not been agreed by the parties.](#)

¹² As such terms are defined in Market Foods’ statement of cross-claim.

custom". If this can be established, is this element of the insuring clause satisfied or must the resultant "cessation or diminution of [Market Foods] trade or normal business operations due to a falling away of potential custom" be caused by the damage to property as opposed to the response to such damage by the Queensland Government and/or UQ?

- (b) Sub-Issue #2: If the answer to Sub-Issue #1 above is "yes", did the subsistence of the SARS-CoV-2 virus on property cause the Queensland Government Directions and/or UQ Direction?
- (c) Sub-Issue #3: If the answer to Sub-Issue #2 above is "yes", did the Queensland Government Directions and the UQ Direction "result in [the] cessation or diminution of [Market Foods] trade or normal business operations due to a falling away of potential custom".

12. **If the answer to 11 is "yes", was there "loss resulting from" the Business Interruption?**

EXTENSION B4¹³

Cover under Section 2 is extended to include loss resulting from Business Interruption to property: (a) of a type insured by this Policy; and (b) at the locations described in points 1. to 8. directly below;

...

4. Public Authority

any legal authority preventing or restricting access to an Insured Location or ordering the evacuation of the public due to damage or a threat of damage to property or persons within 50 kilometres of any Insured Location...

13. **Was there "Business Interruption¹⁴... to property: (a) of a type insured by this Policy; and (b) at the location... described in" Extension B4?**

- (a) Sub-Issue #1: Does the subsistence of the SARS-CoV-2 virus on property, if proven, constitute "physical loss, destruction or damage... to property" (**Property Damage**)?
- (b) Sub-Issue #2: If the answer to Sub-Issue #1 is "yes", did the Property Damage "occur... during the policy Period"?
- (c) Sub-Issue #3: If the answer to Sub-Issue #2 is "yes", was the Property Damage "caused by an event insured under the Property Damage, Theft, Money, Glass or General Property Sections [of the policy]" or is it excluded by Excluded Cause 2(a)¹⁵?

¹³ The issues referred to in 13 to 16 hereunder are drafted on the assumption that the application and interpretation of the relevant elements of Extension B4 of the policy are unaffected by the issues raised in 1 and 2 above.

¹⁴ That is, "interruption of or inference with Your Business in consequence of physical loss, destruction or damage occurring during the policy Period caused by an event insured under the Property Damage, Theft, Money, Glass or General Property Sections".

¹⁵ The portion shown in tracked changes has not been agreed by the parties.

- (d) Sub-Issue #4: If the answer to Sub-Issue #3 is “yes”, was the Property Damage “*at the location... described in*” Extension B4?
14. **If the answer to 13 is “yes”, was there “any legal authority preventing or restricting access to an Insured Location”?**
- (a) Sub-Issue #1: Were the Queensland Government Directions and the UQ Direction actions of a “*legal authority*”?
- (b) Sub-Issue #2: If the answer to Sub-Issue #1 is “yes”, did the Queensland Government Directions and the UQ Direction “*prevent... or restrict... access to an Insured Location*”?
15. **If the answer to 14 is “yes”, were the Queensland Government Directions and the UQ Direction “due to damage or a threat of damage to property or persons within 50 kilometres of any Insured Location...”?**
- (a) Sub-Issue #1:
- (i) Does the subsistence of the SARS-CoV-2 virus on property, if proven, constitute “*damage... to property*”?
- (ii) Does the risk of the SARS-CoV-2 virus subsisting on property, if proven, constitute “*a threat of damage to property*”?
- (iii) Does a person having contracted the COVID-19 disease constitute “*damage to... persons*”?
- (iv) Does the risk of a person contracting the COVID-19 disease constitute “*a threat of damage... to persons*”?
- (b) If the answer to any of the issues in Sub-Issue #1 is “yes”, were the Queensland Government Directions and the UQ Direction due to such damage or threat of damage within 50 kilometres of any Insured Location?
16. **If the answer to 15 is “yes”, was there “loss resulting from” the Business Interruption?**

EXTENSION C¹⁶

Extension C: non damage

1. Infectious Disease, Murder and Closure Extension

Cover is extended for loss resulting from interruption of or interference with the Insured Location in direct consequence of the intervention of a public body authorised to restrict or deny access to the Insured Location directly arising from an occurrence or outbreak at the premises of any of the following:

- a) Notifiable Disease, or

¹⁶ The issues referred to in 17 to 21 hereunder are drafted on the assumption that the application and interpretation of the relevant elements of Extension C of the policy is unaffected by the issues raised in 1 and 2 above.

- b) the discovery of an organism likely to cause Notifiable Disease;
- c) the discovery of vermin or pests;
- d) an accident causing defects in the drain or other sanitary arrangement;
- e) murder or suicide;
- f) injury or illness sustained by any person resulting from food or drink poisoning or arising from or traceable to foreign or injurious matter in food or drink provided on premises;

leading to restriction or denial of the use of the Insured Location on the order or advice of the local health authority or other competent authority

17. Was there “an occurrence or outbreak [of a Notifiable Disease] at the premises” during the policy period?

- (a) Sub-Issue #1: Does the term “*premises*” mean “*Insured Location*”? If not, what were the relevant “*premises*”?
- (b) Sub-Issue #2: In order for there to be an occurrence of the COVID-19 disease at the premises, can this be established:
 - (i) absent a person infected with the COVID-19 disease attending on the premises; or
 - (ii) by the premises being part of, or in an area where, there has been an occurrence of the COVID-19 disease?
- (c) Sub-Issue #3: In order for there to be an outbreak of the COVID-19 disease at the premises, can this be established:
 - (i) absent a person infected with the COVID-19 disease attending on the premises; or
 - (ii) by the premises being part of, or in an area where, there has been an outbreak of the COVID-19 disease?
- (d) Sub-Issue #4: Having regard to the conclusions reached in respect of Sub-Issues #1 to #3 above, was there “*an occurrence or outbreak [of the COVID-19 disease] at the premises*” during the Policy Period?

18. If the answer to 17 is “yes”, was there an “intervention of a public body authorised to restrict or deny access to the Insured Location directly arising from” such occurrence or outbreak at the premises?

- (a) Sub-Issue #1: Were the Queensland Government Directions and UQ Direction “*intervention[s] of ... public bod[ies] authorised to restrict or deny access to the Insured Location*”?
- (b) Sub-Issue #2: If the answer to Sub-Issue #1 is “yes”, did such interventions “*directly aris[e] from*” the occurrence or outbreak at the premises?

19. **If the answer to 18 is “yes”, did such interventions “lead to the restriction or denial of the use of the Insured Location on the order or advice of the local health authority or other competent authority”?**
- (a) Sub-Issue #1: Did the Queensland Government Directions and UQ Direction “lead to the restriction or denial of the use of the Insured Location”?
- (b) Sub-Issue #2: If the answer to Sub-Issue #1 is “yes”, did the Queensland Government Directions and UQ Direction constitute the “order[s] or advice of the local health authority or other competent authority”?
20. **If the answer to 19 is “yes”, was there “interruption of or interference with the Insured Location in direct consequence of the [Queensland Government Directions and the UQ Direction]”?**
21. **If the answer to 20 is “yes”, was there any “loss resulting from such interruption of or interference with the Insured Location”?**

TREND CLAUSE

22. **If Market Foods is entitled to indemnity under the policy, does the counter-factual required under the Trend Clause only ignore the Insured Damage and permit account to be taken of the presence and effect of COVID-19 other than in respect of the Insured Damage?**