

NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 24/02/2021 3:45:55 PM AEDT 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: Concise Statement
File Number: NSD145/2021
File Title: GUILD INSURANCE LIMITED ACN 004 538 863 v DR JASON
MICHAEL T/AS ILLAWARRA PAEDIATRIC DENTISTRY
Registry: NEW SOUTH WALES REGISTRY - FEDERAL COURT OF
AUSTRALIA



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

Dated: 1/03/2021 10:54:42 AM 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.



Concise Statement

No. of

Federal Court of Australia

District Registry: New South Wales

Division: Commercial and Corporations National Practice Area (Insurance List)

Guild Insurance Limited (ACN 004 538 863)

Applicant

Dr Jason Michael t/as Illawarra Paediatric Dentistry

Respondent

A. IMPORTANT FACTS GIVING RISE TO THE CLAIM

- 1. The applicant (**Guild**) was the insurer of the respondent (**Dr Michael**). Dr Michael operates a dental practice called Illawarra Paediatric Dentistry (the **Business**), located at Level 2, 172-174 Keira Street, Wollongong, NSW 2500 (the **Business Premises**).
- 2. The respondent has made a claim on Guild for business interruption due to the effect on Dr Michael's business of the measures recommended by the Government and relevant industry bodies in response to the COVID-19 pandemic.
- 3. Guild has denied the claim. Guild has received similar claims involving this form of policy wording. The proceeding is a test case funded by Guild as to the correctness of the basis upon which Guild has denied Dr Michael's claim.

The Policy

- 4. The relevant policy is a Dentists Business Insurance Policy P00076362 issued to Dr Michael by Guild on 30 September 2019 (the **Policy**). The business interruption cover provided by the Policy includes an extension entitled "Prevention of Access" (the **Prevention of Access Extension**), which provides cover in the event of an inability to

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trade or otherwise conduct the Business at the Business Premises caused by (page 53 of the Policy):

- (a) the intervention of any lawful authority resulting from threat of damage to property in the immediate vicinity of the Business Premises which prevents access to or hinders the use of the Business Premises; or
- (b) the closure or evacuation of the whole or part of the Business Premises by order of a competent government or statutory authority arising directly or indirectly from human infectious or contagious disease or the discovery of an organism likely to result in human infectious or contagious disease at the Business Premises.

- 5. The Policy also includes an adjustment clause which permits Guild to adjust any sum payable under the Prevention of Access Extension to reflect any other circumstances affecting the Business which would have affected the Business had the Damage not occurred in order that the payment thus adjusted represents as nearly as reasonably practicable the Income (as that term is defined) which would have been received during the relevant period (the **Adjustment Clause**) (page 51 of the Policy).

Australian Government and Industry Response to COVID-19

- 6. On 25 March 2020, the Australian Government announced that it would be suspending all non-elective surgery, commencing at 11:59pm on 25 March 2020.
- 7. Between 18 and 31 March 2020, the NSW Government issued the *Public Health (COVID-19 Mass Gatherings) Order 2020*, the *Public Health (COVID-19 Gatherings) Order 2020*, the *Public Health (COVID-19 Places of Social Gathering) Order 2020*, the *Public Health (COVID-19 Gatherings) Order (No 2) 2020*, the *Public Health (COVID-19 Gatherings) Order (No 3) 2020* and the *Public Health (COVID-19 Restrictions on Gathering and Movement) Order 2020*. Excluded from the effect of each Order was gathering at a hospital or other medical or health service facility as necessary for the normal business of the facility.
- 8. Between March and May 2020, the Australian Dental Association (**ADA**) and Australian Health Protection Principal Committee (**AHPCC**) recommended the imposition of various restrictions on and modifications to dental practises to manage potential exposure to COVID-19.
- 9. These restrictions and modifications are referred to in this Concise Statement as the **Government and Industry Measures**.

Dr Michael's claim

10. Dr Michael has made a claim under the Policy (the **Claim**) asserting an entitlement to payment under the Prevention of Access Extension in response to a reduction in trade and profit due to the Government and Industry Measures. Guild has denied that the Policy responds to the Claim. Dr Michael does not accept Guild's denial of the Claim.
11. Guild contends that the Prevention of Access Extension does not respond because:
- (a) Dr Michael was able to trade or otherwise conduct the Business at the Business Premises in whole or in part during the period of cover;
 - (b) none of the Government and Industry Measures constituted the intervention of any lawful authority resulting from threat of damage to property in the immediate vicinity of the Business Premises which prevented access to or hindered the use of the Business Premises;
 - (c) the Business Premises were not closed or evacuated in whole or part;
 - (d) none of the following entities qualify as a "competent government or statutory authority" under subparagraph (c) of the Prevention of Access cover:
 - i. the ADA;
 - ii. the AHPPC;
 - iii. other relevant state or territory dental bodies, including the Dental Council of NSW;
 - (e) if, contrary to (c) above, the Government and Industry Measures constituted an order for the closure or evacuation of the whole or any part of the Business Premises, such order did not arise directly or indirectly from human infectious or contagious disease or the discovery of any organism likely to result in human infectious or contagious disease at the Business Premises as is required to engage subparagraph (c) of the Prevention of Access Extension; and/or
 - (f) COVID-19 is not caused by an organism likely to result in human infectious or contagious disease.

12. If the Court were to find that the Prevention of Access Extension responds to the Claim, the sum payable to Dr Michael must be reduced to reflect the extent to which any shortfall in Income (as that term is defined) during the relevant period was caused by other (uninsured) impacts of the COVID-19 pandemic.

B. THE RELIEF SOUGHT FROM THE COURT (AND AGAINST WHOM)

13. Guild seeks declarations as to the proper construction of the Policy.

C. THE PRIMARY LEGAL GROUNDS FOR THE RELIEF SOUGHT

14. The primary ground for the relief sought is section 21 of the *Federal Court of Australia Act 1976* (Cth).

Certificate of lawyer

I Gareth Edward Horne 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 Gareth Edward Horne

Lawyer for the Applicant