

NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 24/02/2021 3:10:38 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: NSD135/2021
File Title: ALLIANZ AUSTRALIA INSURANCE LIMITED (ACN 000 122 850) v
MAYBERG PTY LTD ACN 011 024 070
Registry: NEW SOUTH WALES REGISTRY - FEDERAL COURT OF
AUSTRALIA



Sia Lagos

Dated: 26/02/2021 12:19:57 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.



Concise Statement

No. _____ of _____

Federal Court of Australia

District Registry: New South Wales

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

Allianz Australia Insurance Limited (ACN 000 122 850)

Applicant

Mayberg Pty Ltd (ACN 011 024 070)

Respondent

A. IMPORTANT FACTS GIVING RISE TO THE CLAIM

1. The applicant (**Allianz**) was the insurer of the respondent (**Mayberg**). Mayberg operates a dry-cleaning business at four locations in Queensland.
2. Mayberg made a claim on Allianz for business interruption due to the effect on Mayberg's business of the measures implemented by the Queensland Government in response to the COVID-19 pandemic.
3. Allianz has denied the claim. Allianz has received similar claims involving this form of policy wording arising out of the Queensland Government's response to the COVID-19 pandemic. The proceeding is a test case funded by Allianz as to the correctness of the bases upon which Allianz has denied Mayberg's claim.

The Policy

4. The terms of the Policy are set out in the policy wording contained in the Advisernet Business Pack Insurance Product Disclosure Statement (the **Wording**) and the Insurance Schedule (the **Insurance Schedule**).
5. The Policy:
 - (a) specified the Period of Insurance was from 24 November 2019 to 4pm, 24 November 2020 (Insurance Schedule);
 - (b) included insurance cover for business interruption (page 57 of the Wording);

Filed on behalf of (name & role of party)	Allianz Australia Insurance Limited, Applicant		
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(include state and postcode)			

- (c) defined “*Business*” as the business, occupation, trade or profession as shown in the Insurance Schedule (page 13 of the Wording), which in turn is described as “*Principally Dry Cleaning and any other activity incidental thereto*” (Insurance Schedule);
- (d) defined “*Premises*” as the premises stated as Situation in the Schedule (page 14 of the Wording), which in turn is described as 64 Tingal Road, Wynnum, 66-68 Bloomfield Street, Cleveland, Shop 24, 2-34 Bunker Road, Victoria Point and 681 New Cleveland Street, Gumdale in Queensland (Insurance Schedule);
- (e) defined “*Damage*” as accidental physical damage, destruction or loss (page 57 of the Wording);
- (f) provided additional cover for Loss of Income (as that term is defined on pages 57 and 58 of the Wording) that resulted from interruption to or interference with the Business caused by:
 - i. any legal authority closing or evacuating all or part of the Premises as a result of the outbreak of an infectious disease occurring within a 20-kilometre radius of the Premises. However, no cover was provided for any disease under the *Quarantine Act 1908* (as amended) irrespective of whether discovered at the Premises or out-breaking elsewhere (the **Murder, Suicide and Infectious Disease Extension**) (page 59 of the Wording); or
 - ii. any legal authority preventing or restricting access to the Premises or ordering the evacuation of the public as a result of Damage to or threat of Damage to property or persons within a 50-kilometre radius of the premises, provided the prevention of access or restricted access to the Premises extends for a continuous period greater than 48 hours (the **Prevention of Access by a Public Authority Extension**) (pages 10-11 of the Insurance Schedule);
- (g) contained an adjustment clause which allowed Allianz to reduce any payment made for business interruption to take into account any other influences that would have varied the Income of the Business during the Indemnity Period or savings made that reduced the cost of running the Business during this period (**Adjustment Clause**).

Government Response to COVID-19

6. On 29 January 2020, the Queensland Government declared a public health emergency pursuant to the *Public Health Act 2005* (Qld).

7. From March 2020, the Queensland Government introduced a series of measures to address the COVID-19 pandemic. On 19 March 2020, the Queensland Government introduced social distancing requirements. On 23 March 2020, the Queensland Government introduced the *Non-Essential Business Closure Direction* (Qld) which prohibited a person that owned, controlled or operated a non-essential business or undertaking in Queensland from operating. A non-essential business or undertaking did not include retail business or dry cleaners. The directive was later modified by further directives.
8. On or about 18 March 2020, the Federal Government recommended social distancing measures and restrictions on mass gatherings.
9. The requirements and directives referred to in paragraphs 7 and 8 are referred to in this Concise Statement as the **Government Measures**.
10. When the Government Measures were first introduced in March 2020, there were 319 confirmed cases of COVID-19 in Queensland. There have since been 1,323 confirmed COVID-19 cases in Queensland including 503 in the Brisbane Local Government Area and 29 in the Redland Local Government Area (to 23 February 2021).

Mayberg's claim

11. Mayberg has made a claim under the Policy (the **Claim**) asserting an entitlement to payment under the Murder, Suicide and Infectious Disease Extension or Prevention of Access by a Public Authority Extension in response to a reduction in trade and profit experienced due to the Government Measures. In particular, Mayberg has claimed that the impact of social distancing restrictions and restrictions on non-essential travel and business caused by the Government Measures resulted in a reduction in its trade and profit.
12. On 27 March 2020, Allianz declined the Claim. Mayberg does not accept Allianz's denial of the Claim.
13. On the assumption that COVID-19 is not a '*quarantinable disease under the Quarantine Act 1908 (as amended)*'¹ Allianz contends that the Murder, Suicide and Infectious Disease Extension nevertheless does not respond to the Claim because:
 - (a) the Government Measures did not constitute the closure or evacuation of all or part of the Premises by a legal authority; and/or

¹ This issue was determined by NSW Court of Appeal in *HDI Global Specialty SE & Anor v Wonkana No 3 Pty Limited* [2020] NSWCA 296 in a manner adverse to the interests of Allianz in these proceedings. The decision is presently subject to an application for special leave to appeal to the High Court. Allianz reserves its rights in relation to this issue.
Form NCF1

- (b) the Government Measures were not implemented as a result of an outbreak of an infectious disease within a 20-kilometre radius of the Premises.
14. Allianz contends that the Prevention of Access by a Public Authority Extension does not respond to the Claim because:
- (a) the Government Measures did not prevent or restrict access to the Premises;
 - (b) the Government Measures did not constitute an order for the evacuation of the public; and
 - (c) the Government Measures were not implemented as a result of Damage to or threat of Damage to property or persons within a 50-kilometre radius of the Premises.
15. If, contrary to the above, the Court were to find either extension responds to the Claim, Mayberg is not entitled to a full indemnity because:
- (a) the Interruption the subject of the Claim would have occurred regardless of the Government Measures, by reason of the other (uninsured) impacts of the COVID-19 pandemic; and
 - (b) Allianz is entitled to adjust any payment made for business interruption to reflect the (uninsured) circumstances affecting the Business arising from the COVID-19 pandemic, so that the payment reflects the results that, but for the insured events, would have been obtained during the relevant period.

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

16. Allianz seeks declarations as to the proper construction of the Policy and its application to the prevailing circumstances to reflect the position articulated in paragraphs 13 to 15 above.

C. THE PRIMARY LEGAL GROUNDS FOR THE RELIEF SOUGHT

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

Certificate of lawyer

I, Avryl Jessica Lattin, 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

A handwritten signature in black ink, appearing to read 'Avryl Lattin', written in a cursive style.

Signed by Avryl Jessica Lattin

Lawyer for the Applicant