

NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 24/02/2021 3:16:44 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: NSD136/2021
File Title: ALLIANZ AUSTRALIA INSURANCE LIMITED (ACN 000 122 850) v
THE STAGE SHOP PTY LTD (FORMERLY VISINTIN PTY LTD) ACN
114 449 571
Registry: NEW SOUTH WALES REGISTRY - FEDERAL COURT OF
AUSTRALIA



Sia Lagos

Dated: 26/02/2021 12:21:32 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

The Stage Shop Pty Ltd (formerly Visintin Pty Ltd) (ACN 114 449 571)

Respondent

A. IMPORTANT FACTS GIVING RISE TO THE CLAIM

1. The applicant (**Allianz**) was the insurer of the respondent (**Visintin**). Visintin operates a stage clothing and costume business.
2. Visintin made a claim on Allianz for business interruption due to the effect on Visintin's business of the measures implemented by the South Australian 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 South Australian 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 Visintin's claim.

The Policy

4. The terms of the Policy are set out in the policy wording contained in the Steadfast 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 30 July 2019 to 4pm on 30 July 2020 (page 1 of the Insurance Schedule);
 - (b) included insurance cover for business interruption (page 60 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 shown and described in the Schedule (page 10 of the Wording), which in turn is described as “*Clothing retailing including boutique*” (page 3 of the Insurance Schedule);
- (d) defined “*Premises*” as the premises listed in the Schedule as the Situation and from which Visintin operates the Business (page 12 of the Wording), which in turn is described as 3 Leigh Street, Adelaide and 48 Johns Road, Ottoway in South Australia (pages 4 and 5 of the Insurance Schedule);
- (e) defined “*Damage*” as the physical loss, destruction or damage (occurring during the Period of Insurance) from the operation of a peril or Event insured against under the “Property Damage” Section, the “Theft” Section, the “Money” Section, the “Glass” Section or the “General Property” Section of the Policy (page 60 of the Wording);
- (f) provided additional cover for interruption or interference with Visintin’s Business:
 - i. due to closure or evacuation of the whole or part of the Premises during the Period of Insurance as a result of the outbreak of a notifiable infectious or contagious disease occurring within a 20-kilometre radius of the Premises (**Infectious disease, etc Extension**) (page 66 of the Wording);
 - ii. caused by an order of any legal authority which prevents or restricts access to the Premises provided that the order result from threat of damage to property or persons within 50-kilometre radius of the Premises and the prevention of access or restricted access to the Premises extends for a continuous period greater than 48 hours (**Prevention of Access Extension**) (page 6 of the Insurance Schedule);
- (g) as part of the cover for business interruption, covered a reduction in Turnover calculated by applying the Rate of Gross Profit to the Shortage in Turnover during the Indemnity Period (page 63 of the Wording);
- (h) defined “*Turnover*” as the amount (less discounts allowed) paid or payable by Visintin for goods sold and delivered and for services rendered during the course of the Business at the Premises (page 61 of the Wording);
- (i) defined the “*Rate of Gross Profit*” as the Rate of Gross profit, expressed as a percentage, earned on the Turnover during the financial year immediately before the date of the Damage to which such adjustment will be made as may

be necessary to provide for the trend of the Business either before or after the Damage or which would have affected the Business had the Damage not occurred, so that the adjustment figures 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 (page 60 of the Wording);

- (j) defined "*Shortage in Turnover*" as the amount by which the Turnover during a period will, in consequence of the Damage, falls short of the part of the Standard Turnover which related to that period (page 61 of the Policy); and
- (k) defined the "*Indemnity Period*" as the period beginning from the time when the interruption or interference affects the results of the Business in consequence of the Damage and ending at the expiration of the maximum period specified in the Insurance Schedule or, in the case of Weekly Revenue, ending at the earliest of either the expiration of the maximum period specified in the Schedule or when the Weekly Revenue during that period equals or exceeds 95% of the Standard Weekly Revenue (as those terms are defined in the Policy).

Government Response to COVID-19

- 6. On 15 March 2020, the South Australian Government declared a public health emergency under section 87 of the *Public Health Act 2011 (SA)*.
- 7. From March 2020, the South Australian Government introduced a series of measures to address the COVID-19 pandemic. On 23 March 2020, the South Australian Government introduced the *Non-Essential (and other Gatherings) Closure Direction* which directed persons that controlled or operated 'defined premises' to close those premises in so far as it was necessary to prohibit access to members of the public. Defined premises included theatres and live performance theatres but did not include retail businesses. The directive was later extended and modified by further directives. On 19 November 2020, the South Australian Government introduced the *Emergency Management (Stay at Home) (COVID-19) Direction 2020* and the *Emergency Management (Stay at Home No 2) (COVID-19) Direction 2020* which required all persons in South Australia to stay at home and all businesses to cease operations, except for limited reasons from 12.01 am on 19 November 2020 to 12.01 am on 25 November 2020. On 20 November 2020, the South Australian Government introduced the *Emergency Management (Stay at Home No 3) (COVID-19) Direction 2020*, restating the stay-at-home directions to now apply until 12:01am on 22 November 2020. The stay-at-home directions were revoked with effect from 12:01am on 22 November 2020. The requirements and directives referred to in this paragraph are referred to in this Concise Statement as the **South Australian Government Measures**.

8. When the South Australian Government Measures were first introduced in March 2020, there were 134 confirmed cases of COVID-19 in South Australia.
9. There have since been 612 confirmed COVID-19 cases in South Australia including 167 in the Adelaide Local Government Area and 28 in the Port Adelaide Enfield Local Government Area (to 22 February 2021).

Visintin's claim

10. On 21 March 2020, Visintin closed its shop at 3 Leigh Street, Adelaide and stood down all employees.
11. Visintin has made a claim under the Policy (the **Claim**) asserting an entitlement to payment under the Infectious disease, etc Extension or Prevention of Access Extension in response to a reduction in trade and profit experienced due to the South Australian Government Measures. In particular, Visintin claims that the South Australian Government Measures required its customers to cease operating and resulted in a reduction in its trade and profit. Visintin also claims that an outbreak of COVID-19 first occurred in South Australia at the Adelaide Airport, which is 6.8 kilometres from the Premises, and therefore within a 20-kilometre radius.
12. On 24 May 2020, Allianz declined the Claim. Visintin does not accept Allianz's denial of the Claim.
13. Allianz contends that the Infectious disease, etc Extension does not respond to the Claim because:
 - (a) the Premises were not closed or evacuated in whole or in part during the Period of Insurance; and
 - (b) if, contrary to (a) above, the Premises were closed or evacuated in whole or in part by any of the South Australian Government Measures during the Period of Insurance, it was not as a result of the outbreak of a notifiable infectious or contagious disease occurring within a 20-kilometre radius of the Premises.
14. Allianz contends that the Prevention of Access Extension does not respond to the Claim because:
 - (a) the South Australian Government Measures did not prevent or restrict access to the Premises; and
 - (b) the South Australian Government Measures did not result from 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, Visintin is not entitled to a full indemnity because:
- (a) the interruption or interference the subject of the Claim would have occurred regardless of the South Australian Government Measures, by reason of the other (uninsured) impacts of the COVID-19 pandemic; and
 - (b) Allianz is entitled to adjust any payment 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 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



Signed by Avryl Jessica Lattin

Lawyer for the Applicant