

NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 23/04/2021 4:19:50 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:	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: 23/04/2021 4:19:54 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.



Concise Statement in Response

No. NSD136 of 2021

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

The Respondent's business and insurance policy

1. The respondent (**Visintin**) is a shop servicing clients in the performing arts industry in South Australia and parts of rural Australia by providing theatre companies, dance schools, high schools, drag queens and the general population with costumes, uniforms, make-up, props, shoes and other items.¹
2. Subject to some matters of detail, there is no dispute as to the material terms of Visintin's insurance policy (**Policy**) with the applicant (**Allianz**).²

¹ Further particulars as to Visintin's business and COVID-19's impact on it will be in the Outline Document to be served on the applicants pursuant to paragraph 3.a. of the Order dated 16 March 2021.

² "Premises" was defined in the Policy as "the places" in the Schedule (not "the premises" in the Schedule) "at which and from which" the policyholder operated. The second Premises was 48 St Johns Road, not 48 Johns Road. "Premises" also "includes Buildings and land within the legal boundaries". "Damage" was defined in the Policy as "physical loss, destruction or damage ..." rather than "the physical loss, destruction or damage ...". Allianz's citation of the infectious diseases extension omits clause 4(a), which will be relevant to the construction of the Policy. Further, clause 4(b) of that extension refers to "notifiable human infectious ..." rather than "notifiable infectious" disease. "Turnover" in the Policy is defined as amounts paid or payable "to" Visintin – not "by" it, as expressed in Allianz's Concise Statement. "Rate of Gross Profit" in the Policy refers to adjustments in the plural (not singular) and provision for the trend of the Business "and for variations in or other circumstances affecting Your Business ...".

Filed on behalf of (name & role of party)

The Stage Shop Pty Ltd (formerly Visintin Pty Ltd), the Respondent

Prepared by (name of person/lawyer)

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Authority response to COVID-19

3. From February 2020, Commonwealth and South Australian (and other state and territory) authorities made a number of orders which had the effect of preventing or restricting access to, and/or closing or evacuating Visintin's premises (**Authority Response-Visintin**). The Authority Response-Visintin includes what Allianz describes as the "South Australian Government Measures", but is broader. The orders which Visintin says comprise the Authority Response-Visintin will be contained in the Agreed Facts.³

Visintin's claim

4. On or about 21 March 2020, following the Authority Response-Visintin, Visintin closed its shop at 3 Leigh Street, Adelaide on certain days, and stood down all of its casual employees (other than one casual employee who worked an average of 18 to 20 hours per week). On 24 April 2020, Visintin made a claim on the Policy. Visintin claimed it was entitled to indemnity under the business interruption cover of the Policy, because it experienced a reduction in trade and profit due to the Authority Response-Visintin. It stated, amongst other things, that the Authority Response-Visintin caused it to close its shop, and that an outbreak had occurred within 20 kilometres of the shop.
5. Allianz has denied Visintin's claim.

Construction and response of the Policy

6. Visintin claims that the Infectious disease, etc extension (**Disease Clause**) and the Prevention of Access endorsement (**POA Endorsement**) provide cover for the reasons set out below.

Disease Clause

7. In the Disease Clause, the word(s):
 - a. "*closure or evacuation of the whole or part of the Premises*" include not just physical closure or movement of persons from the Premises, but also restriction of access or use of the entirety or a part of the Premises for the purpose of carrying on the whole or a part of the policyholder's business activities;
 - b. "*closure*" or "*evacuation*" include closure or evacuation by the policyholder and do not require that the closure or evacuation be by the order of a government or other authority;
 - c. "*outbreak*" includes a single instance or a widespread phenomenon extending to the vicinity of the Premises; and
 - d. "*notifiable human infectious or contagious disease*" includes COVID-19.
8. The Disease Clause responds to Visintin's claim, and Visintin is entitled to indemnity,

³ References to the Agreed Facts are to the statements of agreed facts (paragraph 5 of the Order dated 16 March 2021).

because:

- a. there was interruption or interference with Visintin's business due to closure or evacuation of the whole or part of the Premises, since the Authority Response-Visintin caused Visintin to take required action, including closing the shop for four days a week (instead of one) and when open, opening for limited hours; and
- b. that interruption was "*as a result of the outbreak of a notifiable human infectious or contagious disease occurring within a 20 kilometre radius of the Premises*" because from (at least) 1 February 2020, there were 2 cases of COVID-19 within that radius.

POA Endorsement

9. In the POA Endorsement, the words:

- a. "*an order of any legal authority*" include any action of the type involved in the Authority Response-Visintin;
- b. "*prevents or restricts access to the Premises*" are not limited to physical prevention or restriction of access, but also include prevention or restriction of access to the whole or part of the Premises for the purpose of carrying on the whole or a part of the policyholder's business activities; and
- c. "*threat of damage to property or persons within 50 kilometre radius of the Premises*" include the potential for loss or harm to people caused in whole or part by a disease, including COVID-19.

10. The POA Endorsement responds to Visintin's claim, and Visintin is entitled to an indemnity, because:

- a. there was interruption to the Business caused by "*an order of any legal authority which prevents or restricts access to the Premises*", in that the Authority Response-Visintin prevented or restricted access to the Premises for the purpose of carrying on the policyholder's business activities, in the form of preventions and restrictions on Visintin's customers, the public and at the Premises; and
- b. the orders resulted from threat of damage to persons within a 50 kilometre radius of the Premises, namely loss or harm from COVID-19.

Trends and Adjustments Clause

11. Contrary to paragraph 15(a) of Allianz's Concise Statement, Visintin is entitled to complete indemnity. This is because:

- a. the loss was caused by one indivisible cause (being COVID-19, which comprises the COVID-19 pandemic, the Authority Response-Visintin, and individual and public responses to COVID-19);

- b. alternatively, the loss was caused by multiple effective concurrent causes of loss; and
 - c. in any case, Visintin is entitled to a complete indemnity where there are insured and uninsured (but not excluded) causes.
12. Further, contrary to paragraph 15(b) of Allianz's Concise Statement, the counter-factual required under the adjustment clause ignores the insured peril and also trends or circumstances arising out of the same underlying or originating cause as the insured peril, namely the COVID-19 pandemic.

B. THE RELIEF SOUGHT FROM THE COURT

13. Visintin seeks:

- a. a declaration that Allianz Australia Insurance Limited is liable to indemnify The Stage Shop Pty Ltd (formerly Visintin Pty Ltd) under Extra Covers 4(b) of the Business Pack 152RN00078COM;
- b. a declaration that Allianz Australia Insurance Limited is liable to indemnify The Stage Shop Pty Ltd (formerly Visintin Pty Ltd) under the Prevention of Access 48 hours minimum interruption endorsement of the Business Pack 152RN00078COM;
- c. a declaration that the counter-factual required under the adjustment clause ignores the insured peril and trends or circumstances arising out of the same underlying or originating cause as the insured peril, namely the COVID-19 pandemic; and
- d. a declaration that The Stage Shop Pty Ltd (formerly Visintin Pty Ltd) is entitled to interest pursuant to section 57 of the *Insurance Contracts Act 1984* (Cth) on any amount for which Allianz Australia Insurance Limited is liable under the Business Pack 152RN00078COM to pay The Stage Shop Pty Ltd (formerly Visintin Pty Ltd) in respect of the claim, calculated from the date Allianz Australia Insurance Limited should reasonably have paid the claim in accordance with its contractual obligation to do so.

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).

D. THE ALLEGED HARM SUFFERED

15. By reason of the interruption of or interference with its business, Visintin has suffered loss. Particulars as to loss will be in the Outline Document.

Certificate of lawyer

I, Christopher Michael Erfurt, certify to the Court that, in relation to the Concise Statement in Response filed on behalf of the Respondent, the factual and legal material available to me at present provides a proper basis for each allegation in the Response.

Date: 23 April 2021



Signed by Christopher Michael Erfurt

Lawyer for the Respondent