

## NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 20/08/2021 1:54:06 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 Claim - Form 17 - Rule 8.06(1)(a)  
File Number: NSD137/2021  
File Title: CHUBB INSURANCE AUSTRALIA LIMITED (ABN 23 001 642 020) v  
PHILIP WALDECK  
Registry: NEW SOUTH WALES REGISTRY - FEDERAL COURT OF  
AUSTRALIA



*Sia Lagos*

Dated: 20/08/2021 4:22:07 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 17  
Rule 8.05(1)(a)

## Amended Statement of claim

No. NSD 137 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

**Mr Philip Waldeck**

Respondent

### The parties

- At all material times, the Applicant (**Chubb**) is and was:
  - a company registered under the **Corporations Act 2001 (Cth)** and able to sue in its corporate name and style;
  - a general insurer; and
  - the holder of Australian Financial Services Licence no. 239687.
- The Respondent (**Waldeck**) is a natural person.

### The Policy

- On 25 March 2020, Chubb and Waldeck entered into a written contract of insurance (**the Policy**) which comprised:
  - a Chubb Business Pack Insurance Schedule (**the Schedule**);
  - a Chubb Business Pack Product Disclosure Statement published 03/2019 and numbered Chubb16-156-0319 (**the Wording**).
- The terms of the Policy include, *inter alia*, the following:

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Filed on behalf of (name & role of party) Chubb Insurance Australia Limited, the Applicant

Prepared by (name of person/lawyer) \_\_\_\_\_

Law firm (if applicable) Wotton + Kearney

Tel (02) 8273 9900 Fax (02) 8273 9901

Email Adam.Chylek@wottonkearney.com.au ; Matthew.Foglia@wottonkearney.com.au

**Address for service** Level 26, 85 Castlereagh Street, Sydney, NSW, 2000

(include state and postcode) \_\_\_\_\_

- (a) the policy number of the Waldeck Policy was EPM0018480 (page 3 of the Schedule);
- (b) the Named Insured was Mr Phillip Waldeck (page 3 of the Schedule);
- (c) the Insured Location was 1197 Toorak Road, Camberwell, Victoria 3124 (**the Insured Location**) (page 3 of the Schedule);
- (d) the Policy Period was from 28 March 2020 to 28 March 2021, both 4:00 pm Standard Time at the Address of the Named Insured shown above (page 3 of the Schedule);
- (e) the Policy Form was the Wording (page 3 of the Schedule);
- (f) the term “*Insured Location*” was defined to mean “*the Insured Location(s) stated in the Schedule*” (page 13 of the Wording);
- (g) the term “*Property Insured*” was defined to mean “*property as described in the Schedule that belongs to You or is held by You in trust or on commission for which You are responsible*” (page 13 of the Wording);
- (h) within Section 2 – Business Interruption (Page 24 of the Wording):
 

*“Provided this Section is shown as insured in the Schedule, We will pay the amount of loss resulting from interruption of or interference with Your Business resulting from Insured Damage to Property Insured at the Insured Location that occurs during the Policy Period”;*
- (i) within Section 2 – Business Interruption, Extension C: non damage (**the Disease Extension**) (page 26 of the Wording):
 

***“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 any occurrence or outbreak at the premises of any of the following:*

  - a) *Notifiable Disease, or*
  - ...
  - 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.”*
- (j) the term “*Notifiable Disease*” was defined to mean (page 23 of the Wording):

*“illness sustained by any person resulting from...any human infectious disease or human contagious disease, an outbreak of which the competent local authority has stipulated must be notified to them. Notifiable Disease does not include any occurrence of any prescribed infectious or contagious disease to which the Quarantine Act 1908 as amended applies.”;*

- (k) the term *“Trend in the Business”* (**the Trend Clause**) was defined to mean (pages 23-4 of the Wording):

*“adjustments to provide for the trend of Your Business and variations in other circumstances affecting that Business either before or after the Insured Damage or which would have affected the Business had the Insured Damage not occurred, so that the figures adjusted will 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 Insured Damage.”*

- (l) a General Policy Condition (**the Choice of Law Condition**) that (page 7 of the Wording):

*“Should any dispute arise concerning this Policy, the dispute will be determined in accordance with the law of Australia and the States and Territories thereof. In relation to any such dispute the parties agree to submit to the jurisdiction of any competent court in a State or Territory of Australia.”*

4A The law of the Policy is the law of the State of Victoria by reason of:

- (a) Mr Waldeck, as the Named Insured, being a resident of the State of Victoria at the time of contract and at all relevant times;
- (b) the Insured Location being located in the State of Victoria at the time of contract and at all relevant times;
- (c) the Choice of Law Condition.

## **COVID-19**

5. On 11 February 2020, the World Health Organisation announced that:
- (a) the virus previously known as *“severe acute respiratory syndrome coronavirus 2”* was officially named *“SARS- CoV-2”*; and
- (b) the disease caused by SARS-CoV-2 previously known as *“coronavirus disease”* was officially named *“COVID-19”* (**COVID-19**).

6. There has never been an occurrence or outbreak of COVID-19 at the Insured Location.

**Quarantine Act and Biosecurity Act**

- 6A Until 16 June 2016, the **Quarantine Act 1908 (Cth)** was in force.
- 6B On 16 June 2016, the **Quarantine Act 1908 (Cth)** was repealed by the **Biosecurity (Consequential Amendments and Transitional Provisions) Act 2015 (Cth)**.
- 6C On 16 June 2016, the **Biosecurity Act 2015 (Cth)** commenced and remained in force at all relevant times thereafter.
- 6D Under section 42(1) the **Biosecurity Act 2015 (Cth)**, a human disease may be determined as a “*listed human disease*” by the Director of Human Biosecurity if the Director considers that a disease may be communicable and cause significant harm to human health.
- 6E On 21 January 2020, the Director of Human Biosecurity determined “*human coronavirus with pandemic potential*” to be a listed human disease under section 42 of the **Biosecurity Act 2015 (Cth)** by amendment to the **Biosecurity (Listed Human Diseases) Determination 2016** through the **Biosecurity (Listed Human Diseases) Amendment Determination 2020 (the Determination)**.

**Particulars**

Listed Human Disease 4(h): “human coronavirus with pandemic potential”.

- 6F COVID-19 has been a listed human disease within the meaning of the **Biosecurity Act 2015 (Cth)** since 21 January 2020.

**Response to COVID-19**

7. On 1 May 2020, the **COVID-19 Omnibus (Emergency Measures) (Commercial Leases and Licences) Regulation 2020** was made under the **COVID-19 Omnibus (Emergency Measures) Act 2020** and was taken to have commenced on 29 March 2020 (**the COVID Regulation**).

**Claim by Waldeck**

8. On or about 9 April 2020, Waldeck sought indemnity under the Disease Extension in respect of the rent he received from the tenant of the Insured Location which was asserted to have been reduced by 40% by operation of the COVID Regulation (**the Claim**).

**Particulars**

Email from Ms Mary Romeo of General Insurance Solutions Pty Limited to Binh Tuan (Andy) Nguyen sent on 9 April 2020.

9. Chubb denied, and denies, the Disease Extension in the Policy responds to the Claim.
10. The Claim is the subject of a complaint to the Australian Financial Complaints Authority (AFCA).

### Particulars

Complaint no. 721608.

11. These proceedings have been commenced with the consent of AFCA under Rule A7.2(b) of the Complaint Resolution Scheme Rules issued by AFCA dated 25 April 2020.

### Interpretation of the Disease Extension

12. On its proper construction, the word “*premises*” as it appears in the Disease Extension means the Insured Location.
13. On their proper construction, the words “*restrict or deny access to the Insured Location*” and “*restriction or denial of use of the Insured Location*” as they appear in the Disease Extension mean the physical restriction and physical denial of access to, and use of, the Insured Location.

~~14. In respect of the exclusion of “any prescribed infectious or contagious disease to which the Quarantine Act 1908 as amended applies” from the definition of the term Notifiable Disease (the Exclusion):~~

~~(a) Chubb contends that COVID-19 falls within the Exclusion<sup>1</sup>; and~~

~~(b) Further or alternatively, Chubb contends that section 61A of the Property Law Act 1958 (Vic), applies to the Policy and has the effect that the reference to the repealed Quarantine Act is to be construed as a reference to the Biosecurity Act 2015 (Cth), such that a disease determined to be a listed human disease under the Biosecurity Act falls within the scope of the Exclusion<sup>2</sup>.~~

[14 Section 61A of the Property Law Act 1958 \(Vic\) provides that:](#)

~~<sup>1</sup>This issue (not including the contention in paragraph (b) relating to s 61A of the Property Law Act) has been the subject of the test case determined adversely to the insurer by the NSW Court of Appeal in *HDI Global Specialty SE & Anor v Wonkana No 3 Pty Limited* [2020] NSWCA 296. The decision is presently subject to a special leave application. On this issue, Chubb will abide by the result of the determination of the NSW Court of Appeal in *HDI* if special leave is not granted, and the determination of the High Court of Australia if special leave is granted.~~

~~<sup>2</sup>Although this issue has not yet been the subject of judicial determination, Chubb does not presently press this issue as the claim is subject to a complaint to AFCA and AFCA has not given its consent pursuant to A.7.2 and C.2.2(f) of the AFCA Complaints Resolution Scheme Rules to raise this issue in these proceedings.~~

*“Where an Act or a provision of an Act is repealed and re-enacted (with or without modification) then, unless the contrary intention expressly appears, any reference in any deed, contract, will, order or other instrument to the repealed Act or provision shall be construed as a reference to the re-enacted Act or provision.”*

- 14A On its proper construction, the term “Act” as it appears in section 61A of the **Property Law Act 1958 (Vic)** refers to an Act passed by the parliament of the Commonwealth or any State or Territory of Australia.
- 14B The **Quarantine Act 1908 (Cth)** was repealed and re-enacted (with modification) as the **Biosecurity Act 2015 (Cth)** within the meaning of section 61A of the **Property Law Act 1958 (Vic)**.
- 14C By reason of the matters alleged in paragraphs 14 to 14B above, the words “*Quarantine Act 1908*” as they appear in the definition of Notifiable Disease in the Disease Extension shall be construed as a reference to “*Biosecurity Act 2015*”
- 14D On their proper construction, the words “*prescribed infectious or contagious diseases to which the Quarantine Act 1908...*” as they appear in the definition of Notifiable Disease in the Disease Extension shall be construed as “*listed human diseases to which the Biosecurity Act 2015...*”
- 14E In the alternative, on their proper construction, the words “*prescribed infectious or contagious diseases to which the Quarantine Act 1908...*” as they appear in the definition of Notifiable Disease in the Disease Extension shall be construed as “*prescribed infectious or contagious diseases to which the Biosecurity Act 2015...*”

#### **Non-response of the Disease Extension**

15. The Disease Extension does not respond to the Claim as:
- (a) there was no occurrence or outbreak of COVID-19 at the Insured Location at all so there was no occurrence or outbreak of a Notifiable Disease at the premises within the meaning of the Disease Extension; and
  - (b) the COVID Regulation imposed no physical restriction on the use of, or access to, the Insured Location so did not restrict or deny access to the Insured Location or lead to the restriction or denial of the use of the Insured Location within the meaning of the Disease Extension.
  - (c) COVID-19 is not a Notifiable Disease as it is a listed human disease to which the **Biosecurity Act 2015 (Cth)** as amended applies or, in the alternative, is a prescribed infectious or contagious disease to which the **Biosecurity Act 2015 (Cth)** as amended applies by reason of the matters alleged at paragraphs 14 to 14E above.

**Interpretation of the Trend Clause**

16. On its proper construction, the words “*Insured Damage*” as they appear in the Trend Clause should be read as “*Insured Peril*” in respect of the Disease Extension.
17. On its proper construction, the Insured Damage (Insured Peril) for the purposes of the Disease Extension includes any 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 illness sustained by any person resulting from any human infectious or contagious disease, an outbreak of which the competent local authority has stipulated must be notified to them.
18. On its proper construction, the counter-factual required under the Disease Extension only ignores the Insured Damage (Insured Peril) referred to in paragraph 17 above and may take into account the presence and effect of COVID-19 other than in respect of the Insured Damage (Insured Peril) referred to in paragraph 17 above.

Date: [20 August 2021](#)



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Signed by

This pleading was prepared by Adam Chylek, lawyer.

**Certificate of lawyer**

I, Adam Chylek, 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~~ [20 August](#) 2021



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Signed by Adam Chylek  
Lawyer for the Applicant