

NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 24/02/2021 3:37:10 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: NSD144/2021
File Title: GUILD INSURANCE LIMITED ACN 004 538 863 v GYM FRANCHISES
PTY LTD ACN 611 474 947 & ANOR
Registry: NEW SOUTH WALES REGISTRY - FEDERAL COURT OF
AUSTRALIA



Sia Lagos

Dated: 1/03/2021 10:51:10 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

Gym Franchises Australia Pty Ltd (ACN 611 474 947) and another

Respondents

A. IMPORTANT FACTS GIVING RISE TO THE CLAIM

1. The applicant (**Guild**) was the insurer of the first respondent (**GFA**) and second respondent, Douglas Reason (**Mr Reason**). GFA operates a gym/fitness health centre (the **Business**) in Shop 3, 1 Brygon Creek Drive, Upper Coomera QLD 4209 (the **Business Premises**).
2. The respondents have made a claim on Guild for business interruption due to the effect on GFA's business of the measures implemented by the Queensland Government 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 bases upon which Guild has denied GFA's claim.

The Policy

4. The relevant policy is Fitness Centres Business Insurance Policy P00226450 issued to the respondents by Guild on 10 October 2019 (the **Policy**). The Policy includes an extension entitled "Prevention of Access" (the **Prevention of Access Extension**) which provides business interruption cover to the respondents in the event of an

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inability to trade or otherwise conduct the Business at the Business Premises caused by (page 59 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 diseases or the discovery of an organism likely to result in human infectious or contagious disease at the Business Premises, provided that the infectious or contagious disease is not otherwise excluded from cover under the Policy by the 'Infectious and/or Transmissible Diseases' exclusion.
5. The 'Infectious and/or Transmissible Diseases' exclusion excluded from cover any claim for, directly or indirectly arising out of or in any way connected with the existence or suspected existence of any infectious disease which is deemed to be a quarantinable disease under the Australian *Quarantine Act 1908 (Cth)* and subsequent amendments, irrespective of whether it was discovered on the Business Premises or elsewhere (page 33 of the Policy).
 6. 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 57 of the Policy)

Government Response to COVID-19

7. On 29 January 2020, the Queensland Government declared a public health emergency pursuant to the *Public Health Act 2005 (Qld)*. That declaration has since been extended.
8. 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 included gyms. The directive was later modified by further directives. The requirements

and directives referred to in this paragraph are referred to in this Concise Statement as the **Queensland Government Measures**.

GFA's claim

9. GFA 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 experienced due to the Queensland Government Measures. Guild has denied that the Policy responds to the Claim. GFA does not accept Guild's denial of the Claim.
10. Guild contends that Prevention of Access Extension does not respond because:
 - (a) none of the Queensland Government Measures constituted the intervention of a 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 as is required to engage subparagraph (a) of the Prevention of Access Extension;
 - (b) none of the Queensland Government Measures constituted an order for the closure or evacuation of the whole or any part of the Business Premises as is required to engage subparagraph (c) of the Prevention of Access Extension;
 - (c) at no time has a human infectious or contagious disease or an organism likely to result in human infectious or contagious disease been discovered at the Business Premises as is required to engage subparagraph (c) of the Prevention of Access Extension;
 - (d) if, contrary to (b) above, any of the Queensland Government 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 diseases or the discovery of any organism likely to result in human or contagious disease at the Business Premises as is required to engage subparagraph (c) of the Prevention of Access Extension;
and/or
 - (e) COVID-19 is not caused by an organism likely to result in human infectious or contagious disease.
11. If the Court were to find that the Prevention of Access Extension responds to the Claim, the sum payable to GFA must be reduced to reflect the extent to which any shortfall in its 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)

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

C. THE PRIMARY LEGAL GROUNDS FOR THE RELIEF SOUGHT

13. 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