

NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 23/04/2021 4:20:49 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:	NSD145/2021
File Title:	GUILD INSURANCE LIMITED ACN 004 538 863 v DR JASON MICHAEL T/AS ILLAWARRA PAEDIATRIC DENTISTRY
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA



A handwritten signature in blue ink that reads "Sia Lagos".

Dated: 23/04/2021 4:20:52 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. NSD145 of 2021

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

Dr Jason Michael t/as Illawarra Paediatric Dentistry

Respondent

A. IMPORTANT FACTS GIVING RISE TO THE CLAIM

The Respondent's business and insurance policy

1. The respondent (**Dr Michael**) is a dentist trading as Illawarra Paediatric Dentistry, located at Level 2, 172-174 Keira Street, Wollongong, NSW 2500.¹
2. Subject to some matters of detail, there is no dispute as to the material terms of the respondent's insurance policy (**Policy**) with the applicant (**Guild**).²

Authority response to COVID-19

3. From February 2020, Commonwealth and New South Wales (and other state and territory) authorities made a number of orders which had the effect of closing or evacuating Dr Michael's business (**Authority Response-Dr Michael**). The Authority Response-Dr Michael includes what Guild describes as the "Government and Industry Measures", but is broader.

¹ Further particulars as to Dr Michael'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 The reference to "inability to trade or otherwise conduct the Business" ought be a reference to "inability to trade or otherwise conduct the Business in whole or in part during the Period of Cover" (cf the chapeau to [4]). The adjustment clause in the Policy is as follows: "an adjustment shall be made as may be necessary to reflect the trend in the Business and any other variations in the Business or other circumstances affecting the Business, either before or after the Damage occurring, or which would have affected the Business had the Damage not occurred in order that the figures thus adjusted represent as nearly as may be reasonably practicable the Income which would have been received during the relative period after the Damage occurred".

Filed on behalf of (name & role of party)

Dr Jason Michael, the Respondent

Prepared by (name of person/lawyer)

Christopher Michael Erfurt, Lawyer for the Respondent

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The orders which Dr Michael says comprise the Authority Response-Dr Michael will be contained in the Agreed Facts.³

Dr Michael's claim

4. On 27 March 2020, following the Authority Response-Dr Michael, Dr Michael made a claim under the Policy. Dr Michael claimed he was entitled to indemnity under the business interruption cover of the Policy, because he had experienced, and would experience, a loss of income due to the Authority Response-Dr Michael. He stated, among other things, that his loss of income was due to government restrictions in place due to the COVID-19 pandemic.
5. Guild has denied Dr Michael's claim.

A preliminary matter (paragraph 10(b) of Guild's Concise Statement)

6. Dr Michael did not assert in his claim that the Authority Response-Dr Michael constituted the intervention of a lawful authority resulting from threat or damage to property in the immediate vicinity of the Business Premises which prevented access to or hindered the use of the Business Premises (paragraph (a) of the prevention of access clause). That issue was not before AFCA and, as such, is not a matter in dispute.

Construction and response of the Policy

7. Dr Michael claims that paragraph (c) of the prevention of access clause of the Policy (**POA Extension**) provides cover for the reasons set out below.
8. In the POA Extension, the word(s):
 - a. *"inability to trade or otherwise conduct Your Business at the Business Premises in whole or in part"* include the policyholder's inability to generate income or otherwise carry on the whole or a part of the policyholder's business activities;
 - b. *"closure or evacuation of the whole or part of the Business Premises"* include not just physical closure or movement of persons from the Business Premises, but also restriction of access or use of the entirety or a part of the Business Premises for the purpose of carrying on the whole or a part of the policyholder's business activities;
 - c. *"order of a competent government or statutory authority"* includes orders of the type involved in the Authority Response- Dr Michael, and the authorities who promulgated the Authority Response-Dr Michael (including by industry bodies and other bodies such as the Dental Council of New South Wales, the Dental Board of Australia, and the Australian Dental Association).
 - d. *"human infectious or contagious diseases"* include COVID-19;

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

- e. *“organism likely to result in human infectious or contagious disease”* include SARS-CoV-2; and
 - f. *“the discovery of an organism likely to result in ...”* mean the discovery of an organism in any location, where that organism is likely to result in human infectious or contagious disease at the Business Premises.
9. The POA Extension responds to Dr Michael’s claim, and Dr Michael is entitled to indemnity, because:
- a. there was inability to trade or otherwise conduct the business at the Business Premises (in whole or part) because Dr Michael had to comply with the Authority Response-Dr Michael (including the statements issued by professional and industry bodies), and the restrictions placed upon the number of patients that could attend the surgery at any one time and the treatments he was able to provide;

Particulars

- (i) Dr Michael had to comply with statements issued by professional and industry bodies as a failure to do so was liable to attract professional disciplinary action which, inter alia, could result in a finding that he was not a fit and proper person for general registration in the profession, or had engaged in professional misconduct or unsatisfactory professional conduct.
 - (ii) Dr Michael could also be liable for damages awarded by an Australian Court to any patient who suffered loss as a result of his non-compliance with such statements.
 - (iii) Further particulars will be provided.
- b. there was closure or evacuation of the whole or part of the Business Premises by order of a competent government or statutory authority, since the Authority Response-Dr Michael restricted access or use of the entirety or a part of the Business Premises for the purpose of carrying on the whole or a part of the policyholder’s business activities; and
 - c. that arose directly or indirectly from the discovery of SARS-CoV-2, which (due to its high transmissibility and rapid and wide spread across New South Wales and Wollongong) was likely to result in human infectious or contagious disease (namely, COVID-19) at the Business Premises.

Trends and Adjustment Clause

10. Contrary to paragraph 12 of Guild’s Concise Statement, Dr Michael 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-Dr Michael, and individual and public responses to COVID-19);
- b. alternatively, the loss was caused by multiple effective concurrent causes;
- c. in any case, Dr Michael is entitled to complete indemnity where there are insured and uninsured (but not excluded) causes of loss; and
- d. 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

11. Dr Michael seeks:

- a. a declaration that Guild Insurance Limited is liable to indemnify Jason Michael under the “Additional Benefits” (Prevention of Access) clause of the Dentist Business Insurance ADA members policy P00076362;
- b. 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.
- c. a declaration that Jason Michael is entitled to interest pursuant to section 57 of the *Insurance Contracts Act 1984* (Cth) on any amount for which Guild Insurance Limited is liable under the Dentist Business Insurance ADA members policy P00076362 to pay Jason Michael in respect of the claim, calculated from the date Guild 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

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

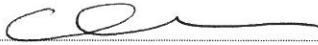
D. THE ALLEGED HARM SUFFERED

13. By reason of the interruption of or interference with his business, Dr Michael 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 Respondents, 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 Respondents