

## NOTICE OF FILING

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### Details of Filing

Document Lodged: Concise Statement  
File Number: NSD308/2021  
File Title: QBE INSURANCE (AUSTRALIA) LIMITED (ACN 003 191 035) v  
DAVID COYNE IN HIS CAPACITY AS LIQUIDATOR OF  
EDUCATIONAL WORLD TRAVEL PTY LTD ACN 006 888 179 (IN  
LIQUIDATION) & ANOR  
Registry: NEW SOUTH WALES REGISTRY - FEDERAL COURT OF  
AUSTRALIA



*Sia Lagos*

Dated: 9/04/2021 12:42:12 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

No. of 2021

Federal Court of Australia

District Registry: New South Wales

Division: Commercial and Corporations National Practice Area (Insurance List)

### **QBE Insurance (Australia) Limited (ACN 003 191 035)**

Applicant

### **David Coyne in his capacity as liquidator of Educational World Travel Pty Ltd (ACN 006 888 179) (In Liquidation)**

First Respondent

### **Educational World Travel Pty Ltd (ACN 006 888 179) (In Liquidation)**

Second Respondent

## **A. IMPORTANT FACTS GIVING RISE TO THE CLAIM**

### *A.1 Summary*

1. The applicant (**QBE**) is the insurer of the second respondent (**EWT**). EWT operated a travel agency business in Surrey Hills, Victoria.
2. A general meeting of the members of EWT was held on 30 November 2020, and it was resolved that EWT be wound up and that David Coyne be appointed liquidator.
3. On 22 December 2020, EWT through its broker (Sophie Hutson of Malcom Hutson & Associates Pty Ltd) submitted a claim notification to QBE due to "*original lockdown restrictions and subsequent lockdowns*".
4. On 25 March 2021, EWT, by the First Respondent, made a claim on QBE.

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Filed on behalf of the Applicant

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5. QBE denied the claim. QBE has received other claims involving this form of policy or policies with similar wording. This proceeding is a test case being funded by QBE as to the correctness of the bases upon which QBE has denied EWT's claim.

#### A.2 *The Policy*

6. The relevant policy is a QBE Business Pack Insurance Policy – Office Package 41A843909BPK (the **Policy**).
7. The Policy provides for Business Interruption Insurance which, relevantly, covers loss that results from an interruption of, or interference with, EWT's business in consequence of:

closure or evacuation of all or part of the premises by order of a competent government, public or statutory authority as a result of human infectious or contagious diseases. However, there is no cover for highly pathogenic Avian Influenza or any disease declared to be a quarantinable disease under the *Quarantine Act 1908* (as amended) irrespective of whether discovered at the location of your premises, or out-breaking elsewhere.

(the **Prevention of Access Extension**) (Policy, p. 12)

8. The Policy also contains an adjustments clause which provides that when calculating gross income adjustments are to be made to reflect the trend in the business and any other relevant circumstances (Policy, Definition of Standard income, p. 11).

#### A.3 *Quarantine Act*

9. Prior to 16 June 2016, the *Quarantine Act 1908* (Cth) empowered the Governor-General to declare a disease a quarantinable disease.
10. On 16 June 2016, the *Quarantine Act* was repealed by cl 2 of Schedule 1 of the *Biosecurity (Consequential Amendments and Transitional Provisions) Act 2015* (Cth), which provided that the legislation was repealed with effect from the time of commencement of section 3 of the *Biosecurity Act 2015* (Cth).
11. On and from 16 June 2016, the *Biosecurity Act* empowered the Director of Human Biosecurity to list a human disease as a "listed human disease". If a disease was listed as a "listed human disease", various other provisions of the *Biosecurity Act* conferred further powers on the Commonwealth Government to take actions in relation to that disease. This included empowering the Governor-General to declare a human biosecurity emergency in relation to the disease (section 475(1)) and (for the duration of any such declaration)

*Form NCF1*

empowering the Health Minister to determine any requirement necessary to prevent or control the entry of the disease in Australia, or its emergence, establishment or spread in Australia (section 477(1)).

#### A.4 COVID-19

12. In December 2019, China reported cases of viral pneumonia caused by a novel coronavirus, since named Severe Acute Respiratory Syndrome Coronavirus 2 (SARS-CoV-2).
13. On 21 January 2020, "*human coronavirus with pandemic potential*" was added to the Biosecurity (Listed Human Diseases) Determination 2016 (Cth) as a listed human disease.
14. In February 2020, the World Health Organisation named the disease caused by SARS-CoV-2 Coronavirus 2019 (**COVID-19**).
15. By the Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Declaration 2020 (Cth), the Governor-General declared a human biosecurity emergency to exist in relation to COVID-19. As made, that declaration was in force for a period beginning on 18 March 2020 and ending at the end of 3 months beginning on the day the declaration was registered. The period the declaration is in force has been subsequently extended.

#### A.5 COVID-19 measures

16. On 18 March 2020, in response to the spread of COVID-19, the Commonwealth Government issued travel advice for all Australians not to travel overseas.
17. On 19 March 2020, the Commonwealth Government further announced that Australia would be closing its borders to all non-citizens and non-residents from 9pm on 20 March 2020 and that anyone arriving in Australia from overseas, including Australian citizens and permanent residents, was required to self-isolate for 14 days from the date of arrival.
18. On 25 March 2020, the Federal Minister for Health made the Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Overseas Travel Ban Emergency Requirements) Determination 2020 under section 477(1) of the *Biosecurity Act*. Under this instrument an Australian citizen or permanent resident was prohibited from leaving Australian territory as a passenger on an outgoing aircraft or vessel from 12pm on 25 March 2020.

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19. The restrictions referred to in the above three paragraphs are referred to in this concise statement as the **Travel Ban**.
20. As at 25 March 2020, there were 2,415 confirmed cases of COVID-19 in Australia,<sup>1</sup> 518 confirmed cases attributed to Victoria,<sup>2</sup> and 276 confirmed case attributed to the Local Government Area of Boroondara and 220 confirmed case attributed to the Local Government Area of Whitehorse.<sup>3</sup>

#### A.6 *EWT's Claim*

21. On 22 December 2020, EWT's broker lodged a Business Interruption claim notification on behalf of EWT in relation to "new BI claim notification as a result of Covid 19. DOL: 12<sup>th</sup> March [2020] – original lockdown restrictions and subsequent lockdowns".
22. On 25 March 2021, the First Respondent provided the background giving rise to the claim as the World Health Organisation's declaration of COVID-19 as a pandemic and the 25 March 2020 Travel Ban.
23. On 30 March 2021, QBE declined the Claim for the reasons outlined below. EWT does not accept QBE's denial of the Claim.

#### A.7 *Policy wording disputes*

24. In respect of the exclusion for "any disease declared to be a quarantinable disease under the Quarantine Act 1908 (Cth) (as amended)":
- a. QBE 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, such that a disease determined to be a "listed human disease" under the Biosecurity Act falls within the scope of the exclusion; and
  - b. QBE contends that COVID-19 otherwise falls within the exclusion.<sup>4</sup>

<sup>1</sup> Per 'Daily and cumulative number of reported COVID-19 cases in Australia' accessible from: [Coronavirus \(COVID-19\) current situation and case numbers | Australian Government Department of Health](#)

<sup>2</sup> Per 'All Victorian cases by local government area (CSV)' accessible from: [Department of Health and Human Services Victoria | Victorian coronavirus \(COVID-19\) data \(dhhs.vic.gov.au\)](#)

<sup>3</sup> Per 'All Victorian cases by local government area (CSV)' accessible from: [Department of Health and Human Services Victoria | Victorian coronavirus \(COVID-19\) data \(dhhs.vic.gov.au\)](#)

<sup>4</sup> This issue (not including the contention in paragraph 24a relating to section 61A of the *Property Law Act* (Vic)) 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. In the present proceeding, QBE will press its contention *Form NCF1*

25. In addition, QBE contends that the Prevention of Access Extension does not apply as there was no closure or evacuation of EWT's premises by order of a competent government, public or statutory authority.
26. Further, if the Court were to find that the Prevention of Access Extension responded, QBE contends that EWT is not entitled to a complete indemnity because:
- a. the interruption or interference the subject of the claim would have occurred regardless of the Travel Ban, by reason of the other (uninsured) impacts of the COVID-19 pandemic;
  - b. any payment must be adjusted to reflect (uninsured) circumstances affecting the business arising from the COVID-19 pandemic and EWT's decision to close its office, to provide for the trend of the business and in order to calculate the gross income that would have been obtained had the insured damage not occurred.
27. Finally, if the Court were to find that the Policy responds to the Claim, QBE contends that interest only runs pursuant to section 57 of the *Insurance Contracts Act 1984* (Cth) from the date of the adjudication of the Claim.

## **B. THE RELIEF SOUGHT FROM THE COURT**

### *B.1 Interlocutory relief sought*

28. An order pursuant to sections 471B and 500(2) of the *Corporations Act 2001* (Cth), granting leave to proceed against the Second Respondent, along with any other terms imposed by the Court.

### *B.2 Final relief sought*

29. QBE seeks relief in the nature of declarations as to the proper interpretation of the Policy, as set out in the Originating Application.

## **C. PRIMARY LEGAL GROUNDS FOR THE RELIEF SOUGHT**

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

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in paragraph a relating to section 61A of the *Property Law Act*, but will otherwise 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.

*Form NCF1*

**Certificate of lawyer**

I, Louise Massey, certify to the Court that, in relation to the concise statement 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 8 April 2021



Signed by Louise Massey

Lawyer for the Applicant