sedgwick

COVID-19 AUSTRALIA UPDATE

Surprises in the detail of the Second Test Case Judgment

In most court decisions there can be surprises, and one could say that the decision of Jagot J in the Second COVID-19 Insurance Test Case had its own share of the unexpected.

In reviewing the decision in the Second Test Cases, the aspects that relate to COVID-19 coverage are vitally important to the parties involved, but COVID-19 is an unusual and, hopefully, unique event. Therefore, answers as to how policies respond to pandemics are perhaps of limited usefulness for the future.

Jagot J's decision contains three points, however, that might well have ramifications for business interruption claims in the future.

Mutually Exclusive principle

One of the important principles outlined by Jagot J was regarding the situation where a clause, e.g. Prevention of Access, had multiple limbs. It might, for example, cover Prevention of Access arising from:

- Outbreak of an infectious disease at the situation
- Murder or violent crime occurring at the situation
- Action of lawful authority to diminish risk to life within 5km of the situation

Her Honour held that where there was overlapping cover, specific and general, then the general should be interpreted to exclude the specific. So, where the Infectious Disease cover was carefully crafted to limit cover to outbreaks at the Situation, or subject to other limitations; to simply then allow the Action of Lawful Authority sub-section to over-ride those limitations and to provide full cover cannot have been the parties' intention.

One could imagine similar examples. If there was a violent crime occurring in the insured's street and a lawful authority closed the street, then the insured would likely say that the action of lawful authority sub-section would cover the loss. However, under Jagot J's principle the lawful authority sub-section would need to be read as having an implied exclusion for actions resulting from murder or violent crime, so cover for that only exists under the specific sub-section, at the Situation.

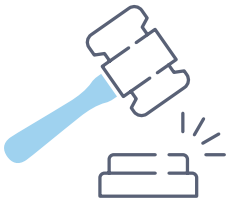
In this case, the overlapping clauses were all sub-sections of the same extension: Prevention of Access. What, however, if the overlap was in independent extensions, e.g. a Prevention of Access clause and a Public Authorities clause? For example, the public authority put up a cordon around a damaged building that prevented access to the insured premises. Often these types of extensions have a 10% limit and following the Christchurch earthquake the question of "stacking" arose: an insured would claim part of the loss as a Prevention of Access with a 10% limit and part as a Public Authorities loss with a separate 10% limit.

The same issue could arise during bushfire, where the loss occurs from both Prevention of Access and action of Public Authority. Is it Her Honour's intention that the more specific clause be identified and take precedence over the other, so that this could no longer be a Prevention of Access claim and could only be a Public Authorities claim?

Furthermore, does the principle apply to items of cover? Practitioners have generally treated it that, absent contrary language in the policy, the insured has the choice of claiming a cost either as an Increased Cost under the Gross Profit item or an Additional Increased Cost, if the cost could be covered under either. Does the specific taking precedence over the general principle apply here, so that a claim must be made under the Increased Cost cover and the Additional Increased Costs is to be impliedly read as excluding economic Increased Costs?

Similarly, in a Material Damage context, if a policy has accidental damage cover (Section 1) and then a separate burglary cover (say, Section 5), but the Section 1 cover does not exclude burglary, then we might have thought that the insured could claim under either section on the basis of whichever was more favourable to it. This might not have been the intention of the drafter, but if Section 1 does not exclude burglary and so it is covered, how does one decline the claim under Section 1? The answer now, according to this judgement, might be that it is impliedly excluded under Section 1 by the presence of more specific cover under Section 5.

Because the judgement considered a very narrow set of facts, as many do, it is not clear how widely the principle expressed by Her Honour should be taken.



Indemnification Aliunde

For many years deductions have been made from business interruption claims to account for overlapping payments made under other policies. For example, where wages are fully insured and the material damage claim pays the value of wages in the stock adjustment or for cleaning up; as this is normally the same wages covered through the gross profit claim there is a deduction made for the overlap.

This deduction was often treated as a "saving", although in reality it was never technically a saving – it was not a reduction in an expense payable out of gross profit.

In the COVID-19 cases Jagot J considered payments that were made by the Government. Her Honour ruled that where the payment was of a compensatory nature, e.g. to pay for staff wages, then to the extent that the business interruption policy covered those wages there should be a deduction. Her Honour referred to the general law of indemnity; at paragraph 782 Her Honour put it succinctly:

> … the application of general principles of law applying to contracts of indemnity where it is only loss that is covered and any payment made in reduction of loss is to be taken into account.

The technical term for this principle is indemnification aliunde, meaning an indemnity from another source. Although the practice for many years has been to deduct such payments, it is helpful that Her Honour has both reiterated that Business Interruption policies are policies of indemnity, and that the general insurance principle of indemnification aliunde applies.

Property as insured

Perhaps the decision with greater ramification for the future is the Market Foods case. This claim had a unique factor not present in the other nine cases decided by Jagot J.

In Market Foods' case one aspect of the Insured's claim was that the presence of the disease represented damage to property that triggered the Denial of Access of Public Authority extensions.

The Denial of Access, Public Authority and other similar extensions were all prefaced with:

Cover under Section 2 is extended to include loss resulting from Business Interruption to property … of a type insured by this Policy … (para 860).

Leaving aside the question of whether disease constitutes damage, one important part of Her Honour's judgement related to the phrase "of a type insured by the Policy". Her Honour ruled that this was more specific than just saying that it had to be damage to something that the policy was capable of insuring, it had to be of a type actually insured:

> The "property" which is then referred to in each section is the type of property which is in fact insured under the policy. It is not the type of property capable of being insured under this policy. In the case of Market Foods, property of the type in fact insured under the policy does not include buildings but does include Contents and Stock, Money and Glass (para 871).

Thus, under this policy, or a policy with a similar wording, if there is damage to the landlord's building then a prevention of access loss suffered by a tenant would not be insured as the tenant has no buildings to insure. Therefore, not having insured a building, they can't claim for damage to another party's building causing contingent business interruption loss.

This is perhaps a more restrictive interpretation than many might have thought applied. Although as always, the impact of this type of interpretation on a particular claim will be dependent on the precise wording.

Appeal outcome

Jagot J's judgement contained some surprises that have potential ramifications for the future. Five of the relevant cases, including Market Foods, are subject to appeal and so whether Jagot J's surprises will be with us in the longer term remains to be seen.

Author

Leon Briggs, BCA (Hons) CA FCLA FCILA ANZIIF (Fellow) CIP
Head of Property & National Executive Adjuster
leon.briggs@au.sedgwick.com

Sources

1. NSD138/2021: Chubb v Market Foods

sedgwick

caring counts | sedgwick.com