

Ball J 30/7/17

REPLY

COURT DETAILS

Court	Supreme Court of New South Wales
Division	Equity
Registry	Sydney
Case number	2015/00171592

FILED

13 DEC 2017



TITLE OF PROCEEDINGS

Plaintiff	John Smith and Rosemary Smith
Defendant	Australian Executor Trustees Limited ACN 007 869 794

T.K.

TITLE OF THIS CROSS-CLAIM

First Cross-claimant	Australian Executor Trustees Limited
Second Cross-claimant	IOOF Holdings Limited
First cross-defendant	Swiss Re International SE

Number of cross-defendants (if more than two) **4**

FILING DETAILS

Filed for	Australia Executor Trustees Limited and IOOF Holdings Limited, Cross-Claimants
Filed in relation to	First cross-claim
Legal representative	Mark Wilks, Corrs Chambers Westgarth
Legal representative reference	9116109/03
Contact name and telephone	Mark Wilks, (02) 9210 6159
Contact email	mark.wilks@corrs.com.au

PLEADINGS AND PARTICULARS

In reply to the Defence filed on behalf of the first cross-defendant, Swiss Re International SE (**Swiss Re**), on 7 June 2017, the cross-claimants, Australian Executor Trustees Limited (**AET**) and IOOF Holdings Limited (**IOOF**), plead as follows:

- 1 AET and IOOF admit paragraphs 8(a) and (b) of the Defence.
- 2 In answer to paragraph 23A of the Defence, AET and IOOF:

- a. admit Provident is insolvent within the meaning of s 95A of the *Corporations Act 2001 (Cth)*;
- b. admit the holders of debentures issued by Provident under the Trust Deed, which were unpaid as at 18 September 2012, have not received a full return on their investments in the administration of Provident;
- c. admit that on or about 16 April 2015, the receivers of Provident estimated that the likely return of principal to debenture holders of Provident would be in the region of 12 cents of every dollar invested; and
- d. otherwise do not admit the matters alleged therein.

3 In answer to paragraph 25A of the Defence, AET and IOOF:

- (a) admit that the ASOC (as defined in the Defence) included the matters pleaded at sub-paragraphs 25A (a), (b), (c), (d), (e), (f), (g), (h), (i), (j), (k), (l) and (m) of the Defence, amongst other allegations;
- (b) say that, at paragraph 39 of the ASOC, it was alleged that the group members have suffered loss and damage by reason of AET's contraventions of section 283DA(b)(ii) of the Corporation Act 2001 (Cth);
- (c) refer to the claims against AET in the ASOC as if set out in full herein;
- (d) say further that the ASOC was amended by the Further Amended Statement of Claim filed by the Plaintiff (**the Smiths**) on 3 June 2016 and further amended by the Second Further Amended Statement of Claim (**SFASOC**) filed by the Smiths on 30 January 2017;
- (e) refer to the claims against AET in the SFASOC, and AET's defence to those claims as set out in the Defence to the SFASOC filed on 1 March 2017, as if set out in full herein.

4 In answer to paragraph 26 of the Defence, AET and IOOF:

- (a) admit paragraph 26(b) of the Defence;
- (b) say that the non-admission in paragraph 26(d)(i) of the Defence is inconsistent with the positive averment in paragraph 34(f) of the Defence;

- (c) say further that the positive averment in paragraph 34(f) of the Defence constitutes an admission;
- (d) say further that no application has been made for leave to withdraw the admission in paragraph 34(f) of the Defence, and if such an application were to be made, such leave ought be refused;
- (e) say further that, by reason of the matters pleaded in subparagraphs (b) and (d) above, paragraph 26(d)(i) of the Defence is embarrassing, and is liable to be struck-out;
- (f) say further that Swiss Re has failed to identify any fact in relation to which AET failed to give notice to Swiss Re as soon as reasonably practicable after AET became aware of it;

Particulars

Letter from Corrs Chambers Westgarth to Wotton + Kearney 14 August 2017

Letter from Wotton + Kearney to Corrs Chambers Westgarth dated 27 September
2017

Letter from Corrs Chambers Westgarth to Wotton + Kearney 20 November 2017

Letter from Wotton + Kearney to Corrs Chambers Westgarth dated 23 November
2017

- (g) say further that, by reason of the matters pleaded in subparagraph (f), paragraph 26(d)(ii) of the Defence is vexatious and embarrassing, and is liable to be struck-out;
- (h) say further that to the extent paragraph 26 of the Defence does not traverse the allegations in paragraph 26 of the Second Further Amended Statement of Cross-Claim, those allegations are taken to be admitted.

Particulars

UCPR 14.26(1)

- 5 In answer to paragraph 26C of the Defence, says that to the extent the paragraph does not traverse the allegations in paragraph 26C of the Second Further Amended Statement of Cross-Claim, those allegations are taken to be admitted.

Particulars

UCPR 14.26(1)

- 6 In answer to paragraph 30A of the defence, AET and IOOF:
- (a) admit that pursuant to clause 2.1 of the Trust Deed, as amended by the Deed of Amendment dated 24 November 2005, Provident could at any time issue debentures to any person who applied for them under the Trust Deed, subject to the terms of the Trust Deed and the amendments to the Trust Deed made from time-to-time;
 - (b) rely on the terms of the trust deed, and the amendments to the trust deed made from time-to-time;
 - (c) do not admit paragraph 30A(b);
 - (d) otherwise join issue with Swiss Re in relation to the paragraph.
- 7 Further and in the alternative, if AET is not entitled to indemnity under the 2011/2012 AXIS policy or the 2014/2015 AXIS policy with respect to the Smith proceeding (which is denied), for the reasons pleaded in paragraphs 8 to 18 below, AET is entitled to indemnity under the financial institutions professional indemnity insurance policy number FLP-311731 for the period of insurance from 4pm on 31 October 2013 to 4pm on 31 October 2014 (**2013/2014 AXIS policy**) with respect to the Smith proceeding.
- 8 On or about 27 November 2013, AXIS issued the 2013/2014 AXIS policy.
- 9 AET is an insured under the 2013/2014 AXIS policy.
- 10 AET relies upon the terms of the 2013/2014 AXIS policy as if they were set out in full herein.
- 11 The period of insurance of the 2013/2014 AXIS policy was subsequently extended to 30 November 2014.
- 12 AET and IOOF repeat paragraphs 26C, 27 and 28 of the Second Further Amended Statement of Cross-Claim.

Particulars

Section 40(3) of the *Insurance Contracts Act 1984* (Cth)

- 13 AET (through Willis) gave the notifications pleaded in paragraphs 26C, 27 and 28 of the Second Further Amended Statement of Cross-Claim as soon as reasonably practicable after it became aware of the facts notified.
- 14 The prior notifications pleaded in paragraph 26 and 26A of the Second Further Amended Cross-Claim do not exclude indemnity under the 2013/2014 AXIS policy with respect to the Smith proceeding.

Particulars

Clauses 1.6 and 3.10

- 15 On and from 10 June 2015 to 12 February 2017, AXIS, and on and from 13 February 2017, Swiss Re; and have declined to grant AET indemnity under the 2013/2014 AXIS Policy with respect to the Smith proceeding.
- 16 On its proper construction, exclusion clause 3.11 of the 2013/2014 AXIS Policy does not apply with respect to the Smith proceeding.
- 17 Contrary to AXIS' and Swiss Re's conduct pleaded in the previous paragraph, AXIS was and Swiss Re is, liable to indemnify AET under the 2013/2014 AXIS policy with respect to the Smith proceeding.
- 18 By reason of AXIS' and Swiss Re's wrongful declinature of indemnity under the 2013/2014 AXIS policy with respect to the Smith proceeding, AET has suffered and is continuing to suffer, or alternatively will suffer, loss and damage.

Particulars of loss

AET has since 10 June 2015 incurred costs in the defence of the Smith claim.

- 19 By reason of the matters pleaded in paragraphs 8 to 18 above, in the alternative to the relief sought in the Second Further Amended Statement of Cross-Claim, AET and IOOF are entitled to the following relief:
- (a) A declaration that Swiss Re is liable to indemnify AET under the 2013/2014 AXIS policy;
 - (b) Damages;
 - (c) Costs including interest on costs; and
 - (d) Interest pursuant to s 100 of the *Civil Procedure Act 2005* (NSW).

20 Further and in the alternative, and in further answer to paragraphs 26, 26A, 26B, 27, 28, 30(a) and (c), 31 and 32 of the Defence, by reason of the matters pleaded in paragraphs 21 to 30 below, Swiss Re is estopped from denying that:

- (e) on 27 June 2012, 25 July 2012, 27 March 2014, 4 August 2014 and 28 August 2014, AET (through Willis) gave AXIS notice in writing of facts that might give rise to a claim;
- (f) AET gave notice of such facts as soon as was reasonably practicable after AET became aware of them but before the insurance cover provided by the 2011/2012 AXIS policy (in the case of the notifications given on 27 June 2012 and 25 July 2012) and the 2013/2014 AXIS policy (in the case of the notifications given on 27 March 2014, 4 August 2014 and 28 August 2014) expired; and
- (g) the facts stated in the notifications given on 27 June 2012, 25 July 2012, 27 March 2014, 4 August 2014 and 28 August 2014 give rise to the Smith proceeding.

21 From at least 4 August 2014 (or alternatively, 28 August 2014), AET and AXIS adopted a common assumption that:

- (h) the notifications given by AET (through Willis) on 27 June 2012, 25 July 2012, 27 March 2014 and 4 August 2014 (or alternatively the notifications given on those dates and 28 August 2014) constituted notice in writing of facts which might give rise to a claim against AET;
- (i) the claim which the facts might give rise to was a professional indemnity claim against AET, relating to AET's role as trustee for debenture holders in Provident; and
- (j) any claim by debenture holders against AET relating to AET's role as trustee for debenture holders in Provident would be a claim arising from facts stated in the notifications given on 27 June 2012, 25 July 2012, 27 March 2014 and 4 August 2014 (or alternatively the notifications given on those dates and 28 August 2014).

22 Since at least 4 August 2014 (or alternatively, 28 August 2014), no further information relevant to the effectiveness of the notifications given by AET (through Willis) on 27 June 2012, 25 July 2012 and 4 August 2014 (or alternatively the

notifications given on those dates and 28 August 2014) has become available to AXIS (and, from 13 February 2017, Swiss Re).

- 23 Between 4 August 2014 (or alternatively, 28 August 2014) and 10 August 2016, AET and AXIS acted in accordance with the common assumption pleaded in paragraph 2121 above.

Particulars

In about September 2014, John and Rosemary Smith filed Summonses for Examination in Supreme Court of New South Wales proceedings commenced by them as eligible applicants for the purposes of Division 1 of Part 5.9 of the *Corporations Act 2001 (Cth)* with respect to Provident and served the Summonses for Examination on AET officers and employees.

AXIS, by its email to Willis dated on or about 8 October 2014, stated that indemnity was granted to AET in respect of those Summonses for Examination by reference to AXIS' file PI 5942, which file was opened by AXIS in respect of the notifications given by AET (through Willis) on 27 June 2012 and 25 July 2012 pursuant to the 2011/2012 AXIS policy with respect to Provident Capital.

In doing so, AXIS acknowledged that the Summonses for Examination arose from the facts notified by AET (through Willis) to AXIS on 27 June 2012 and 25 July 2012.

AXIS, by its email to Willis dated on or about 22 October 2014, stated that the purpose of the Summonses for Examination was to investigate whether AET may have breaches its duties as trustee pursuant to section 283DA of the *Corporations Act*.

At no time prior to the expiry of the period of insurance of the 2013/2014 AXIS policy on 30 November 2014, or thereafter until 10 August 2016, did AXIS assert that the notifications given by AET (through Willis) to AXIS on 27 June 2012, 25 July 2012, 27 March 2014, 4 August 2014 and 28 August 2014 were not valid or effective.

On 16 March 2015, AXIS confirmed indemnity to AET (through Willis) with respect to the Creighton proceeding in accordance with the terms, conditions and exclusions of the 2011/2012 AXIS policy. In doing so, AXIS acknowledged that the

Creighton proceeding arose from the facts notified by AET (through Willis) to AXIS on 27 June 2012 and 25 July 2012.

Also on 16 March 2015, AXIS confirmed indemnity to AET (through Willis) in respect of the Summonses for Examination pursuant to the 2013/2014 AXIS policy.

24 AET and AXIS each knew and intended that the other would act on the basis of the common assumption pleaded in paragraph 21 above.

25 AET will suffer detriment if Swiss Re departs from the common assumption pleaded in paragraph 21 above.

Particulars

AET lost the ability to exercise its statutory right to give further notice pursuant to section 40(3) of the *Insurance Contracts Act 1984 (Cth)* during the period of insurance of the 2013/2014 AXIS policy.

AET will not have the benefit of indemnity under the 2011/2012 AXIS policy, or alternatively the 2013/2014 AXIS policy, with respect to Smith Proceeding.

26 Further and in the alternative to paragraphs 21 to 25 above, since at least 4 August 2014 AET held the assumption pleaded in paragraph 21 above.

27 AXIS induced AET to adopt and continue to hold the assumption pleaded in paragraph 21 above.

Particulars

See particulars to paragraph 23 above.

AET also relies on the failure of AXIS to request clarification or further detail in respect of the notifications.

28 AXIS knew and intended that AET acted or would act in reliance on the assumption pleaded in paragraph 21 above.

29 By reason of AET's reliance on the assumption pleaded in paragraph 21 above, it will suffer detriment if the assumption is not fulfilled.

Particulars

See particulars to paragraph 25 above.

30 AXIS, in not admitting that the notifications given on 27 June 2012, 25 July 2012, 27 March 2014, 4 August 2014 and 28 August 2014 were valid and effective notices under s 40(3) of the *Insurance Contracts Act 1984* (Cth) in respect of the claim made against AET in the Smith proceeding, has failed to avoid the detriment pleaded in paragraph 29.

31 Except to the extent that they constitute admissions of the allegations in the Second Further Amended Statement of Cross-Claim, AET and IOOF otherwise join issue with Swiss Re as to the other matters pleaded in the Defence.

SIGNATURE OF LEGAL REPRESENTATIVE

I certify under clause 4 of Schedule 2 to the *Legal Profession Uniform Law Application Act 2014* that there are reasonable grounds for believing on the basis of provable facts and a reasonably arguable view of the law that the claim for damages in this reply has reasonable prospects of success.

Signature



Capacity

Solicitor on the record, by his partner

Date of signature

13 December 2017

[on separate page]

AFFIDAVIT VERIFYING

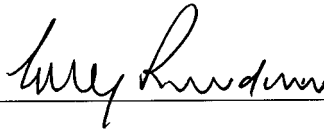
Name Gary Riordan
Address Level 6, 161 Collins Street, Melbourne, Victoria
Occupation General Counsel
Date

I say on oath:

- 1 I am the General Counsel of the first cross-claimant and second cross-claimant and am authorised to make this affidavit on their behalf.
- 2 I believe that the allegations of fact contained in the reply are true.
- 3 I believe that the allegations of fact that are denied in the reply are untrue.
- 4 After reasonable inquiry, I do not know whether or not the allegations of fact that are not admitted in the reply are true.

SWORN at Melbourne

Signature of deponent



Name of witness

Address of witness

Capacity of witness Solicitor

And as a witness, I certify the following matters concerning the person who made this affidavit (the **deponent**):

- 1 I saw the face of the deponent.
- 2 I have known the deponent for at least 12 months.

Not applicable.

Identification document relied on

Signature of witness



Note: The deponent and witness must sign each page of the affidavit. See UCPR 35.7B.

Mark Julian Mittelman
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An Australian Legal Practitioner within the
meaning of the Legal Profession Uniform Law (Victoria)