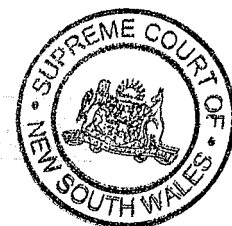


## REPLY

### 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](mailto:mark.wilks@corrs.com.au)

### PLEADINGS AND PARTICULARS

In reply to the Defence filed on behalf of the third and fourth cross-defendants, Liberty Mutual Insurance Company (**Liberty**) and Chubb Insurance Australia Limited (**CIAL**) (together, the **Excess Insurers**), on 26 May 2017, the cross-claimants, Australian Executor Trustees Limited (**AET**) and IOOF Holdings Limited (**IOOF**), plead as follows:

1 AET and IOOF admit paragraph 7(b) of the Defence.

- 2 AET and IOOF admit paragraph 8(b) of the Defence.
- 3 AET and IOOF admit paragraph 10(b) of the Defence and say further that the terms of the 2014/2015 AXIS policy were also set out in additional endorsements dated 29 December 2014 (effective from 4pm on 30 November 2014), 15 January 2015 (effective from 4pm on 30 November 2014) and 24 February 2015 (effective from 4pm on 1 January 2015).
- 4 AET and IOOF admit paragraph 11(b) of the Defence.
- 5 AET and IOOF admit paragraph 13(b) of the Defence and say further that the terms of the 2014/2015 Liberty Policy also included a Limit of Liability endorsement.
- 6 AET and IOOF admit paragraph 15(b) of the Defence.
- 7 Further and in the alternative if, by reason of the matters pleaded in the Defence to the Second Further Amended Statement of First Cross-Claim filed by the First Cross-Defendant (**Swiss Re**) in these proceedings, AET is not entitled to indemnity under the 2011/2012 AXIS policy or the 2014/2015 AXIS policy (and, consequently, the 2011/2012 Liberty policy, the 2014/2015 Liberty policy, the 2011/2012 Chubb policy, or the 2014/2015 Chubb/AXIS policy) with respect to the Smith proceeding (which is denied), for the reasons pleaded in paragraphs 8 to 26 below, AET is entitled to indemnity under:
- a. 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**);
  - b. the excess of loss professional indemnity insurance policy number FI-ME-SPC-502094 for the period of insurance from 4pm on 31 October 2013 to 4pm on 31 October 2014 (**2013/2014 Liberty policy**); and
  - c. the excess of loss professional indemnity insurance policy number 93256886 for the period of insurance from 4pm on 31 October 2013 to 4pm on 31 October 2014 (**2013/2014 Chubb policy**).
- 8 On or about 27 November 2013, AXIS issued the 2013/2014 AXIS policy.
- 9 On or about 9 May 2017, Liberty issued the 2013/2014 Liberty policy.
- 10 On or about 12 February 2015, Chubb issued the 2013/2014 Chubb policy.

- 11 AET is an insured under the 2013/2014 AXIS policy, the 2013/2014 Liberty policy and the 2013/2014 Chubb policy.
- 12 AET relies upon the terms of the 2013/2014 AXIS policy, the 2013/2014 Liberty policy and the 2013/2014 Chubb policy as if they were set out in full herein.
- 13 The period of insurance of the 2013/2014 AXIS policy, the 2013/2014 Liberty policy and the 2013/2014 Chubb policy was subsequently extended to 30 November 2014.
- 14 AET and IOOF repeat paragraphs 26C, 27, 28, 38A and 38N of the Second Further Amended Statement of Cross-Claim.

#### **Particulars**

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

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

#### **Particulars**

Clauses 1.6 and 3.10 of the 2013/2014 AXIS policy

Clause 1.1 of the 2013/2014 Liberty policy

Clause 1 of the 2013/2014 Chubb policy

- 17 The prior notifications pleaded in paragraph 26 and 26A of the Second Further Amended Cross-Claim, and the fact that the notifications pleaded in paragraphs 26C, 27 and 28 of the Second Further Amended Cross-Claim were not provided to Liberty and Chubb at the time they were provided to AXIS, do not exclude indemnity under the 2013/2014 Liberty policy and the 2013/2014 Chubb policy in circumstances where:
- a. all notifications were provided to AXIS as soon as reasonably practicable after AET became aware of the facts notified;
  - b. the claim in relation to the Smith proceeding arose from the facts notified to AXIS;

- c. AXIS is liable to indemnify AET under the 2013/2014 AXIS policy;
- d. pursuant to the 2013/2014 Liberty Policy, Liberty is liable to indemnify AET up to the limit of liability under that policy and in excess of the limit of the 2013/2014 AXIS policy in circumstances where AXIS was liable to indemnify AET under the 2013/2014 AXIS policy;
- e. it was not a condition of the 2013/2014 Liberty policy that AET give notice to Liberty of any notifications given by AET to AXIS under the 2013/2014 AXIS policy; and
- f. pursuant to the 2013/2014 Chubb Policy, Chubb was (and, on and after 1 November 2016, CIAL is) liable to indemnify AET up to the limit of liability under that policy and in excess of the limit of the 2013/2014 AXIS policy and the 2013/2014 Liberty policy in circumstances where AXIS and Liberty are liable to indemnify AET under the 2013/2014 AXIS policy and the 2013/2014 Liberty policy respectively.

18 Further and in the alternative to paragraph 17, the fact that the notifications pleaded in paragraphs 26C, 27 and 28 of the Second Further Amended Cross-Claim were not provided to Liberty and Chubb at the time they were provided to AXIS, does not exclude indemnity under the 2013/2014 Liberty policy and the 2013/2014 Chubb policy in circumstances where:

- a. in the alternative to the allegation in paragraph 17(e) above, it was a condition of the 2013/2014 Liberty policy that AET give notice in writing to Liberty as soon as practicable upon any notice being given by AET to AXIS under the 2013/2014 AXIS policy;

**Particulars**

Clause 3.6 of the 2013/2014 Liberty policy;

- b. it was a condition of the 2013/2014 Chubb policy that AET give notice in writing to Chubb as soon as practicable upon any notice being given by AET to AXIS under the 2013/2014 AXIS policy;

**Particulars**

Clause 9 of the 2013/2014 Chubb policy

- c. AET and/or Willis omitted to give notice in writing to Liberty and Chubb as soon as was practicable after giving the notice to AXIS pleaded in paragraphs 26C, 27 and 28 of the Second Further Amended Cross-Claim;
- d. The omission pleaded in paragraph 18(c) above cannot reasonably be regarded as capable of causing or contributing to a loss in respect of which the 2013/2014 Liberty policy and the 2013/2014 Chubb policy cover; and
- e. in the premises, neither Liberty nor CIAL is entitled to refuse indemnity under, respectively, the 2013/2014 Liberty policy and the 2013/2014 Chubb policy in respect of the Smith proceeding by reason of the omission pleaded in paragraph 18(c) above.

### Particulars

Section 54 of the *Insurance Contracts Act 1984* (Cth).

- 19 On its proper construction, exclusion clause 3.11 of the 2013/2014 AXIS Policy does not apply with respect to the Smith proceeding.
- 20 Swiss Re is liable to indemnify AET under the 2013/2014 AXIS policy.
- 21 From 28 August 2014 to date, Liberty has declined to grant AET indemnity under the 2013/2014 Liberty Policy with respect to the Smith proceeding.
- 22 Contrary to Liberty's conduct pleaded in paragraph 21 above, Liberty is liable to indemnify AET under the 2013/2014 Liberty policy with respect to the Smith proceeding.
- 23 By reason of Liberty's wrongful declinature of indemnity under the 2013/2014 Liberty policy with respect to the Smith proceeding, AET will, if found liable to the Plaintiff and other group members for an amount exceeding the limits of the 2013/2014 AXIS policy, suffer loss and damage.
- 24 Between 28 August 2014 to 31 October 2016, Chubb, and on and after 1 November 2016, CIAL, have declined to grant AET indemnity under the 2013/2014 Chubb Policy with respect to the Smith proceeding.
- 25 Contrary to Chubb's and CIAL's conduct pleaded in the paragraph 24 above, CIAL is liable to indemnify AET under the 2013/2014 Chubb policy with respect to the Smith proceeding.

- 26 By reason of Chubb and CIAL's wrongful declinature of indemnity under the 2013/2014 Chubb policy with respect to the Smith proceeding, AET will, if found liable to the Plaintiff and other group members for an amount exceeding the limits of the 2013/2014 AXIS policy and the 2013/2014 Liberty policy, suffer loss and damage.
- 27 By reason of the matters pleaded in paragraphs 7 to 26 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 Liberty is liable to indemnify AET under the 2013/2014 Liberty policy;
  - (b) a declaration that CIAL is liable to indemnify AET under the 2013/2014 Chubb policy;
  - (c) Damages;
  - (d) Costs including interest on costs; and
  - (e) Interest pursuant to s 100 of the *Civil Procedure Act 2005* (NSW).
- 28 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 Excess Insurers 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

Date of signature



Solicitor on the record, *By his partner*

*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

*Gary Riordan*

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

*[Handwritten Signature]*

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

**Mark Julian Mittelman**  
IOOF Holdings Limited  
ABN 49 100 103 722  
Level 6, 161 Collins Street  
Melbourne VICTORIA 3000  
An Australian legal practitioner within the  
meaning of the Legal Profession Uniform Law (Victoria)