

DEFENCE TO FIRST CROSS-CLAIM

COURT DETAILS

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

TITLE OF PROCEEDINGS

First Plaintiff	John Smith
Second Plaintiff	Rosemary Smith
Defendant	Australian Executor Trustees Limited ACN 007869794

FILING DETAILS

Filed for	Liberty Mutual Insurance Company (Third Cross-Defendant) Chubb Insurance Company of Australia Limited (Fourth Cross-Defendant)
Filed in relation to	First Cross Claim
Legal representative	John Kirk Hunter Edmond, Clyde & Co
Legal representative reference	JK/ HT/ 1519487
Contact name and telephone	Helen Tieu, (02) 9210 4400
Contact email	helen.tieu@clydeco.com

PLEADINGS AND PARTICULARS

In answer to the First Cross-Claim Amended Statement of Cross-Claim filed on 23 August 2016 (**Cross Claim**), the Third Cross-Defendant (**Liberty**) and Fourth Cross-Defendant (**Chubb**) (together, the **Excess Insurers**) say as follows (adopting the definitions used in the Cross Claim):

Parties

- 1 The Excess Insurers admit paragraph 1 of the Cross Claim.
- 2 The Excess Insurers admit paragraph 2 of the Cross Claim.
- 3 The Excess Insurers admit paragraph 3 of the Cross Claim.
- 4 The Excess Insurers admit paragraph 4 of the Cross Claim.
- 4A The Excess Insurers admit paragraph 4A of the Cross Claim.
- 4B The Excess Insurers admit paragraph 4B of the Cross Claim.

Policies

2011/2012 AXIS policy

- 5 The Excess Insurers admit paragraph 5 of the Cross Claim.
- 6 The Excess Insurers admit paragraph 6 of the Cross Claim.
- 7 As to paragraph 7 of the Cross Claim, the Excess Insurers:
- a. say that no terms of the 2011/2012 AXIS policy are alleged or identified in the paragraph;
 - b. say that the terms of the 2011/2012 AXIS policy are set out in the following documents:
 - i. Schedule – Financial Institutions Professional Indemnity for Policy No. 311731, signed and issued on 3 February 2012;
 - ii. Endorsements No. 1 to 15, signed on 3 February 2012; and
 - iii. AXIS Specialty Australia, Financial Institutions Professional Indemnity Insurance Policy Wording 0409.
 - c. rely upon all of the terms of the 2011/2012 AXIS policy as if set out in full herein.

2014/2015 AXIS policy

- 8 As to paragraph 8 of the Cross Claim, the Excess Insurers:
- a. deny that Chubb issued the 2014/2015 AXIS policy, but admit that AXIS issued that policy on about 8 December 2014 and admit that AXIS and Chubb severally agreed to provide insurance cover on and subject to the terms and conditions of the 2014/2015 AXIS policy;
 - b. say further:
 - i. the maximum total combined liability of all insurers under the 2014/2015 AXIS policy was AUD20,000,000 for any one Claim and AUD40,000,000 in the aggregate; and

Particulars

- i. 2014/2015 AXIS policy, Clauses 2.1.1, 2.1.2, 6.7, 6.8 and Schedule.
- ii. Chubb's liability under the 2014/2015 AXIS policy was limited to 10% of the insured loss up to a maximum of AUD2,000,000 for any one Claim and AUD4,000,000 in the aggregate.

Particulars

2014/2015 AXIS policy, Co-insurance & Claims Control
Endorsement.

- 9 The Excess Insurers admit paragraph 9 of the Cross Claim.
- 10 As to paragraph 10 of the Cross Claim, the Excess Insurers:
- a. say that no terms of the 2014/2015 AXIS policy are alleged or identified in the paragraph;
 - b. say that the terms of the 2014/2015 AXIS policy are set out in a document entitled "AXIS IOOF Manuscript Financial Institutions Professional Indemnity Insurance Policy," including a Schedule for Policy No. FLP-311731, Policy Wording and Endorsements 1 to 3; and
 - c. rely upon all of the terms of the 2014/2014 AXIS policy as if set out in full herein.

2011/2012 Liberty policy

- 11 As to paragraph 11 of the Cross Claim, the Excess Insurers:
- a. admit the paragraph;
 - b. say the terms of the 2011/2012 Liberty policy are set out in a document entitled "Liberty International Underwriters – Excess of Loss Insurance Policy", including a Policy Schedule for Policy No. FI-SY-SPC-11-502095, policy wording, a Liberty Mutual AGM General Condition endorsement, a Continuity Date Exclusion endorsement and an Electronic Communications General Condition endorsement; and
 - c. rely upon all of the terms of the 2011/2012 Liberty policy as if set out in full herein.

- 12 The Excess Insurers admit paragraph 12 of the Cross Claim.

2014/2015 Liberty policy

- 13 As to paragraph 13 of the Cross Claim, the Excess Insurers:
- a. admit the paragraph;
 - b. say the terms of the 2014/2015 Liberty policy are set out in a document entitled "Willis Australia Excess Insurance", including a Schedule for Policy No. FI-ME-SPC-14-502095, policy wording and a Retroactive Date Endorsement; and

- c. rely upon all of the terms of the 2014/2015 Liberty policy as if set out in full herein.

14 The Excess Insurers admit paragraph 14 of the Cross Claim.

2011/2012 Chubb policy

15 As to paragraph 15 of the Cross Claim, the Excess Insurers:

- a. admit the paragraph;
- b. say the terms of the 2011/2012 Chubb policy are set out in a document entitled "Chubb Specialty Insurance – Excess Professional Indemnity", including a Schedule for Policy No. 93256886 and Policy Wording; and
- c. rely upon all of the terms of the 2011/2012 Chubb policy as if set out in full herein.

16 The Excess Insurers admit paragraph 16 of the Cross Claim.

2014/2015 Chubb/AXIS policy

17 As to paragraph 17 of the Cross Claim, the Excess Insurers:

- a. admit the paragraph;
- b. say the terms of the 2014/2015 Chubb/AXIS policy are set out in a document entitled "Willis Australia Excess Insurance", including a Schedule for Policy No. 93256886 and a Co-insurance and Claims Co-operation Endorsement;
- c. rely upon all of the terms of the 2014/2015 Chubb/AXIS policy as if set out in full herein;

18 The Excess Insurers admit paragraph 18 of the Cross Claim.

[19 & 20 not used]

Provident

21 The Excess Insurers admit paragraph 21 of the Cross Claim.

22 The Excess Insurers admit paragraph 22 of the Cross Claim.

23 The Excess Insurers admit paragraph 23 of the Cross Claim.

24 The Excess Insurers admit paragraph 24 of the Cross Claim.

25 As to paragraph 25 of the Cross Claim, the Excess Insurers:

- a. admit the paragraph; and

- b. rely upon all the allegations pleaded against AET in the Smith proceeding as if set out in full herein.

AET's claims for indemnity and damages against AXIS, Liberty and Chubb

2011/2012 AXIS policy

- 26 As to paragraph 26 of the Cross Claim, the Excess Insurers:
 - a. admit the paragraph;
 - b. say that no such notice was given to the Excess Insurers during the Period of Insurance for the 2011/2012 Liberty policy and the 2011/2012 Chubb policy; and
 - c. say further that no Claim was made against AET in relation to its role as trustee for debenture holders in Provident during the Period of Insurance for the 2011/2012 Liberty policy and the 2011/2012 Chubb policy.
- 27 The Excess Insurers admit paragraph 27 of the Cross Claim.
- 28 The Excess Insurers admit paragraph 28 of the Cross Claim.
- 29 The Excess Insurers admit paragraph 29 of the Cross Claim.
- 30 As to paragraph 30 of the Cross Claim, the Excess Insurers:
 - a. deny the paragraph; and
 - b. say that, on its proper construction, clause 3.16 of the 2011/2012 AXIS policy applies to exclude cover under that policy with respect to the Smith proceeding.

Particulars

The Excess Insurers will rely on the pleadings in the Smith Proceeding and the terms of the 2011/2012 AXIS policy as if the same were fully set forth herein.

- 31 The Excess Insurers admit paragraph 31 of the Cross Claim.
- 32 The Excess Insurers deny paragraph 32 of the Cross Claim.

2014/2015 AXIS Policy

- 33 The Excess Insurers deny paragraph 33 of the Cross Claim.
- 34 The Excess Insurers admit paragraph 34 of the Cross Claim.
- 35 The Excess Insurers admit paragraph 35 of the Cross Claim, but:

- a. say that AET has no right to be indemnified in respect of the Smith proceeding under both the 2011/2012 AXIS policy and the 2014/2015 AXIS policy; and
- b. say further that AET does not dispute that the applicable Policy Period, insofar as the 2011/2012 AXIS policy is concerned, is the period from 30 November 2011 to 30 November 2012;

Particulars

Letters from Clayton Utz to Liberty and Chubb both dated 25 February 2016, paragraph 3.1. A copy is available upon request.

36 The Excess Insurers admit paragraph 36 of the Cross Claim.

37 As to paragraph 37 of the Cross Claim, the Excess Insurers:

- a. deny the paragraph; and
- b. say that, on its proper construction, clause 3.11 of the 2014/2015 AXIS policy applies to exclude cover with respect to the Smith proceeding.

Particulars

The Excess Insurers will rely on the pleadings in the Smith Proceeding and the terms of the 2014/2015 AXIS policy as if the same were fully set forth herein.

38 Excess Insurers deny paragraph 38 of the Cross Claim.

2011/2012 Liberty policy

38A As to paragraph 38A of the Cross Claim, the Excess Insurers:

- a. admit that on 17 November 2014, Ms Kelly Butler of Willis sent an email to Christian Manning of Liberty;
- b. will rely on the terms of that email and its attachments as if fully set forth herein; and
- c. otherwise deny the paragraph, and in particular, deny that the correspondence sent on 17 November 2014 was a notice "pursuant to the 2011/2012 Liberty policy".

38B As to paragraph 38B of the Cross Claim, the Excess Insurers:

- a. deny the paragraph;
- b. say the 2011/2012 AXIS policy and the 2011/2012 Liberty policy included express terms to the effect that Liberty will only indemnify AET against Claims

first made against AET during the Period of Insurance (cl 1.1 of the 2011/2012 AXIS policy & cl 1 of the 2011/2012 Liberty policy);

- c. say that no Claim was made against AET in relation to its role as trustee for debenture holders in Provident during the Period of Insurance for the 2011/2012 AXIS policy or the 2011/2012 Liberty policy; and
- d. say that the notification of circumstances referred to in paragraph 38(a) of the Cross Claim was not given to Liberty during the Period of Insurance for the 2011/2012 Liberty policy;
- e. say further that on 17 September 2012, Liberty received two documents entitled "Claims History Report" from Willis, which referred to a "*Potential claim re: Provident Capital*";

Particulars

Email sent from Sharmini Sundaram of Willis to Christian Manning of Liberty on 17 September 2012. A copy is available upon request.

- 38C As to paragraph 38C of the Cross Claim, the Excess Insurers:
 - a. deny the paragraph; and
 - b. will rely on the express terms of the 2011/2012 AXIS policy and the 2011/2012 Liberty policy as if they were fully set forth herein.
- 38D The Excess Insurers admit paragraph 38D of the Cross Claim.
- 38E As to paragraph 38E of the Cross Claim, the Excess Insurers:
 - a. deny the paragraph;
 - b. repeat paragraph 30(b) above;
 - c. say that, on its proper construction, the 2011/2012 Liberty policy excludes cover with respect to the Smith proceeding;

Particulars

Cl 1 of the 2011/2012 Liberty policy and cll 1.1 & 3.16 of the 2011/2012 AXIS policy. Paragraphs 30(b) and 38B(b)&(c) above are repeated.

- d. say further that Liberty cannot be liable to indemnify AET under the 2011/2012 Liberty policy unless and until the limit of liability under the 2011/2012 AXIS policy has been exhausted; and

Particulars

CII 1 & 2.5 of the 2011/2012 Liberty policy.

- e. will rely on the express terms of the 2011/2012 AXIS policy and the 2011/2012 Liberty policy as if they were fully set forth herein.

38F The Excess Insurers admit paragraph 38F of the Cross Claim.

38G The Excess Insurers deny paragraph 38G of the Cross Claim.

2014/2015 Liberty policy

38H The Excess Insurers deny paragraph 38H of the Cross Claim.

38I The Excess Insurers admit paragraph 38I of the Cross Claim.

38J The Excess Insurers admit paragraph 38J of the Cross Claim, but:

- a. say that AET has no right to be indemnified in respect of the Smith proceeding under both the 2011/2012 Liberty policy and the 2014/2015 Liberty policy; and
- b. repeat the matters pleaded in paragraph 35(b) above.

38K The Excess Insurers admit paragraph 38K of the Cross Claim.

38L As to paragraph 38L of the Cross Claim, the Excess Insurers:

- a. deny the paragraph;
- b. repeat paragraph 37(b) above;
- c. say that, on its proper construction, the 2014/2015 Liberty policy excludes cover with respect to the Smith proceeding;

Particulars

CII 1.1 & 1.2 of the 2014/2015 Liberty policy and cl 1.1 & 3.11 of the 2014/2015 AXIS policy.

- d. say further that Liberty cannot be liable to indemnify AET under the 2014/2015 Liberty policy unless and until the limit of liability under the 2014/2015 AXIS policy has been completely eroded;

Particulars

CII 1.1 & 1.2 of the 2014/2015 Liberty policy.

- e. say further that because of the matters pleaded in paragraph 35(b) above, the limits of liability under the 2014/2015 AXIS policy cannot be eroded; and

- f. will rely on the express terms of the 2014/2015 AXIS policy and the 2014/2015 Liberty policy as if they were fully set forth herein.

38M The Excess Insurers deny paragraph 38M of the Cross Claim.

2011/2012 Chubb policy

38N As to paragraph 38N of the Cross Claim, the Excess Insurers:

- a. admit that on 17 November 2014, Ms Kelly Butler of Willis sent an email to Messrs Bloomfield and Hansen of Chubb;
- b. will rely on the terms of that email and its attachments as if fully set forth herein; and
- c. otherwise deny the paragraph, and in particular, deny that the correspondence sent on 17 November 2014 was a notice "pursuant to the 2011/2012 Chubb policy".

38O As to paragraph 38O of the Cross Claim, the Excess Insurers:

- a. deny the paragraph;
- b. say the 2011/2012 AXIS policy and the 2011/2012 Chubb policy included express terms to the effect that Chubb will only indemnify AET against Claims first made against AET during the Period of Insurance (cl 1.1 of the 2011/2012 AXIS policy & cl 1 of the 2011/2012 Chubb policy);
- c. say that no Claim was made against AET in relation to its role as trustee for debenture holders in Provident during the Period of Insurance for the 2011/2012 AXIS policy or the 2011/2012 Chubb policy; and
- d. say further that the notification of circumstances referred to in paragraph 38O(a) of the Cross Claim was not given to Chubb during the Period of Insurance for the 2011/2012 Chubb policy.

38P As to paragraph 38P of the Cross Claim, the Excess Insurers:

- a. deny the paragraph;
- b. repeat sub-paragraphs 38O(b)&(c) above and say the effect of 2011/2012 Chubb policy is that Chubb is entitled to refuse indemnity in respect of a claim first made after the Period of Insurance, whether or not AET gave or omitted to give Chubb a notice as soon as practicable after giving AXIS a notice under the 2011/2012 AXIS policy; and
- c. will rely on the express terms of the 2011/2012 AXIS policy and the 2011/2012 Chubb policy as if they were fully set forth herein.

38Q The Excess Insurers admit paragraph 38Q of the Cross Claim.

38R As to paragraph 38R of the Cross Claim, the Excess Insurers:

- a. deny the paragraph;
- b. repeat paragraph 30(b) above; and
- c. say that, on its proper construction, the 2011/2012 Chubb policy excludes cover with respect to the Smith proceeding;

Particulars

Cl 1 of the 2011/2012 Chubb policy and cl 1.1 & 3.16 of the 2011/2012 AXIS policy. Paragraphs 30(b) and 38O(b)&(c) above are repeated.

- d. say further that Chubb cannot be liable to indemnify AET under the 2011/2012 Liberty policy unless and until the limits of liability under the 2011/2012 AXIS policy and the 2011/2012 Liberty policy have been exhausted; and

Particulars

Cll 1 & 3 of the 2011/2012 Chubb policy.

- e. will rely on the express terms of the 2011/2012 AXIS policy and the 2011/2012 Chubb policy as if they were fully set forth herein.

38S The Excess Insurers admit paragraph 38S of the Cross Claim.

38T The Excess Insurers deny paragraph 38T of the Cross Claim.

2014/2015 Chubb/AXIS Policy

38U The Excess Insurers deny paragraph 38U of the Cross Claim.

38V The Excess Insurers admit paragraph 38V of the Cross Claim.

38W The Excess Insurers deny paragraph 38W of the Cross Claim and say:

- a. the 2014/2015 AXIS Policy includes express terms to the effect that:
 - i. AET is not entitled to be indemnified for any Claim directly arising from any fact or circumstance of which written notice has been given under any previous insurance policy (cl 3.10); but
 - ii. cover will be provided in respect of such a Claim provided AET first became aware of the facts that might give rise to the Claim after the Continuity Date (cl 1.6);
- b. the 2014/2015 Chubb/AXIS Policy includes express terms to the effect that:

- i. coverage is provided on the same terms and conditions as the 2014/2015 AXIS Policy, except as specifically noted in the 2014/2015 Chubb/AXIS Policy (preamble, cll 1.1 & 1.3); and
- ii. the "Continuity Date" is 30 November 2014 (item 4 of the Schedule);
- c. the Smith proceeding is a Claim directly arising from a fact or circumstance of which written notice was given under a previous insurance policy; and

Particulars

Paragraphs 25 to 28 of the Cross Claim.

- d. AET first became aware of facts that might give rise to the Smith proceeding before 30 November 2014.

Particulars

Paragraphs 25 to 28 of the Cross Claim.

38X The Excess Insurers admit paragraph 38X of the Cross Claim.

38Y As to paragraph 38Y of the Cross Claim, the Excess Insurers:

- a. deny the paragraph;
- b. repeat paragraph 37(b) above;
- c. say that, on its proper construction, the 2014/2015 Chubb/AXIS policy excludes cover with respect to the Smith proceeding;

Particulars

Cll 1.1 & 1.2 of the 2014/2015 Chubb/AXIS policy and cl 1.1 & 3.11 of the 2014/2015 AXIS policy.

- d. also repeat paragraphs 38W(a) to (d) above and say that, on its proper construction, the 2014/2015 Chubb/AXIS policy excludes cover with respect to the Smith proceeding;
- e. say further that Chubb cannot be liable to indemnify AET under the 2014/2015 Chubb/AXIS policy unless and until the limits of liability under the 2014/2015 AXIS policy and the 2014/2015 Liberty policy have been completely eroded;

Particulars

CII 1.1 & 1.2 of the 2014/2015 Chubb/AXIS policy.

- f. say further that because of the matters pleaded in paragraph 35(b) above, the limits of liability under the 2014/2015 AXIS policy and the 2014/2015 Liberty policy cannot be eroded; and
- g. will rely on the express terms of the 2014/2015 AXIS policy and the 2014/2015 Chubb/AXIS policy as if they were fully set forth herein.

38Z The Excess Insurers deny paragraph 38Z of the Cross Claim.

AET's alternative s 54 claim

39 The Excess Insurers deny paragraph 39 of the Cross Claim.

40 As to paragraph 40 of the Cross Claim, the Excess Insurers:

- a. admit the paragraph; and
- b. say further that, on its proper construction exclusion clause 3.16 of the 2011/2012 AXIS policy applies with respect to the Smith proceeding.

41 The Excess Insurers say that the debentures issued by Provident were unrated and unlisted, but otherwise deny paragraph 41 of the Cross Claim.

42 The Excess Insurers deny paragraph 42 of the Cross Claim.

43 The Excess Insurers deny paragraph 43 of the Cross Claim.

44 The Excess Insurers deny paragraph 44 of the Cross Claim.

44A The Excess Insurers deny paragraph 44A of the Cross Claim.

AET claims against Willis

45 The Excess Insurers do not plead to paragraphs 45 to 56 of the Cross Claim as those paragraphs contain no allegations against either of the Excess Insurers.

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 defence to the claim for damages in these proceedings has reasonable prospects of success.

Signature



Capacity

Solicitor on the record

Date of signature

12 October 2016

AFFIDAVIT VERIFYING

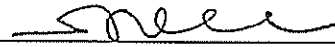
Name James Thomas
 Address Level 27, 1 Macquarie Place, Sydney NSW 2000
 Occupation Technical Claims Manager, Speciality Casualty – Asia Pacific
 Date 12 October 2016

I say on oath / affirm:

- 1 I am employed as a Technical Claims Manager, Speciality Casualty – Asia by the Third Cross-Defendant and I am authorised to make this affidavit on its behalf.
- 2 I believe that the allegations of fact contained in the defence are true.
- 3 I believe that the allegations of fact that are denied in the defence are untrue.
- 4 After reasonable inquiry, I do not know whether or not the allegations of fact that are not admitted in the defence are true.

SWORN / AFFIRMED at Sydney

Signature of deponent



Name of witness

ROLAND EVERINGHAM

Address of witness

LEVEL 27, 1 MACQUARIE PLACE, SYDNEY

Capacity of witness

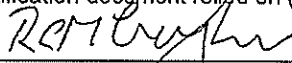
SOLICITOR (LS 19189).

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. [OR, delete whichever option is inapplicable]
~~#I did not see the face of the deponent because the deponent was wearing a face covering, but I am satisfied that the deponent had a special justification for not removing the covering.*~~
- 2 #I have known the deponent for at least 12 months. [OR, delete whichever option is inapplicable]
~~#I have confirmed the deponent's identity using the following identification document:~~

Identification document relied on (may be original or certified copy) †

Signature of witness



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

[* The only "special justification" for not removing a face covering is a legitimate medical reason (at April 2012).]

[† "Identification documents" include current driver licence, proof of age card, Medicare card, credit card, Centrelink pension card, Veterans Affairs entitlement card, student identity card, citizenship certificate, birth certificate, passport or see Oaths Regulation 2011.]

AFFIDAVIT VERIFYING

Name Belinda Thatcher
 Address Level 29, 2 Park Street, Sydney NSW 2000
 Occupation Senior Technical Examiner – Financial Lines
 Date 11 October 2016

I say on oath / affirm:

- 1 I am employed as a Senior Technical Examiner – Financial Lines by the Fourth Cross-Defendant and I am authorised to make this affidavit on its behalf.
- 2 I believe that the allegations of fact contained in the defence are true.
- 3 I believe that the allegations of fact that are denied in the defence are untrue.
- 4 After reasonable inquiry, I do not know whether or not the allegations of fact that are not admitted in the defence are true.

SWORN / AFFIRMED at Sydney

Signature of deponent



Name of witness

Angela Harvey

Address of witness

Level 29, 2 Park Street, Sydney NSW 2000

Capacity of witness

Solicitor.

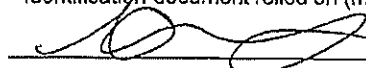
And as a witness, I certify the following matters concerning the person who made this affidavit (the deponent):

- 1 #I saw the face of the deponent. [~~OR, delete whichever option is inapplicable~~]
~~#I did not see the face of the deponent because the deponent was wearing a face covering, but I am satisfied that the deponent had a special justification for not removing the covering.*~~
- 2 #I have known the deponent for at least 12 months. [~~OR, delete whichever option is inapplicable~~]
 #I have confirmed the deponent's identity using the following identification document:

Credit Card

Identification document relied on (may be original or certified copy)†

Signature of witness



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

[* The only "special justification" for not removing a face covering is a legitimate medical reason (at April 2012).]

[† "Identification documents" include current driver licence, proof of age card, Medicare card, credit card, Centrelink pension card, Veterans Affairs entitlement card, student identity card, citizenship certificate, birth certificate, passport or see Oaths Regulation 2011.]