Equity Division
Supreme Court
New South Wales

Case Name:	**Giabal Pty Ltd v Gunns Plantations Ltd (In Liquidation)**
Medium Neutral Citation:	[2020] NSWSC 1070
Hearing Date(s):	7 August 2020
Date of Decision:	14 August 2020
Jurisdiction:	Equity - Commercial List
Before:	Ball J

Decision:

1. Pursuant to r 19.2 of the Uniform Civil Procedure Rules 2005 (NSW) (***UCPR***), Catlin Australia Pty Ltd ACN 308 319 786 be joined to the proceeding as the Twelfth Defendant.

2. Pursuant to r 19.2 of the UCPR, Chubb Insurance Australia Limited ABN 23 001 642 020 be joined to the proceedings as the Thirteenth Defendant.

3. Pursuant to s 5 of the *Civil Liability (Third Party Claims Against Insurers) Act 2017* (NSW), the Plaintiffs have leave to continue the proceeding against the Twelfth and Thirteen Defendants.

4. The Plaintiffs have leave to file and serve a Second Further Amended Summons and a Further Amended Commercial List Statement in the form of schedule A and schedule B respectively to the Notice of Motion dated 1 July 2020 (***Motion***).

5. The Twelfth Defendant and Thirteenth Defendant pay the Plaintiffs' costs of paragraphs 1, 2 and 3 of the Motion.

6. The Plaintiffs pay the Third to Eleventh Defendants costs thrown away by reason of the amendments made under paragraph 4 of the Motion.

Catchwords:	PRACTICE AND PROCEDURE - Application for leave to bring or to continue proceedings against insurers under Civil Liability (Third Party Claim Against Insurers) Act 2017 (NSW), s 5 – Whether insurers entitled to disclaim liability – Whether conflict of interest exclusion clause apply – Whether lenders liability exclusion clause applies – Costs follow the event
Legislation Cited:	*Civil Liability (Third Party Claims Against Insurers*) *Act 2017* (NSW) Uniform Civil Procedure Rules 2005 (NSW)
Cases Cited:	*Wayne Tank & Pump Co Ltd v Employers' Liability Assurance Corporation Ltd* [1974] QB 57
Category:	Procedural and other rulings
Parties:	Giabal Pty Ltd (First Plaintiff) Geoffry Edward Underwood (Second Plaintiff) Wayne Leonard Chapman (Third Defendant) Robert Watson and Erica Gay as the legal personal representatives for the estate of the late John Eugene Gay in place of Mr Gay (Fourth Defendant) Rodney John Loone (Fifth Defendant) Leslie Ralph Baker (Sixth Defendant) Robert Henry Graham (Seventh Defendant) Robin Gray (Eighth Defendant) Paul Desmond Teisseire (Ninth Defendant) Andrew Gray (KPMG Partner) (Tenth Defendant) Mathew Gary Wallace (Eleventh Defendant)
Representation:	Counsel: DA Lloyd (Plaintiffs) Self-Represented (Ninth Defendant) J Arnott (Tenth and Eleventh Defendants) DL Williams SC with RD Glover (Proposed Twelfth and Thirteenth Defendants) Solicitors: Piper Alderman (Plaintiffs) Allens Linklaters (Tenth and Eleventh Defendants) Kennedys (Proposed Twelfth Defendant) Wotton+Kearney (Proposed Thirteenth Defendant)
File Number(s):	2018/76580
Publication Restriction:	None

JUDGMENT

Introduction

1 Prior to its collapse in September 2012, the Gunns group of companies carried on Australia's largest integrated hardwood and softwood forest products business and, as part of that business, operated a number of managed investment schemes known as "Woodlot Projects". Under the terms of the schemes, investors became growers of eucalyptus wood on "Woodlots" located in Tasmania which were to be managed and harvested by Gunns Plantations Ltd (In Liquidation) (***GPL***) for fees payable by investors. As part of the schemes Gunns Limited (In Liquidation) (Receivers and Managers Appointed) (***Gunns***), the listed parent company of GPL, agreed to purchase the timber produced by each grower.

2 Like so many other similar schemes, the schemes were not successful and growers lost substantial sums of money.

3 In these proceedings, the plaintiffs, Giabal Pty Ltd and Mr Geoffry Underwood, as the representatives of growers who acquired an interest in one or more of six of the schemes, who have suffered loss and damage and who have entered into a litigation funding agreement with LCM Operations Pty Ltd, sue to recover that loss from GPL (the first defendant), Gunns (the second defendant), the directors of GPL (***the Directors***) and KPMG, the auditors of compliance plans prepared in connection with the schemes. On 13 April 2018, the Court granted leave to continue the proceedings against GPL and Gunns. That leave was revoked on 4 December 2019, with the result that GPL and Gunns are no longer involved in the proceedings.

4 This judgment concerns a notice of motion dated 1 July 2020 by which the plaintiffs relevantly seek to join Catlin Australia Pty Ltd (now AXA XL) (***Catlin***) and Chubb Insurance Australia Limited (formerly ACE Limited) (***Chubb***) as the twelfth and thirteenth defendants respectively and seek leave to proceed against them under s 5 of the *Civil Liability (Third Party Claims Against Insurers*) *Act 2017* (NSW) (***the Act***). Catlin and Chubb (together, ***the***

Insurers) respectively provided first and third excess layer investment management insurance to GPL, Gunns and the Directors on terms set out in the primary policy (***the Policy***), which was issued by Chartis Australia Insurance Ltd (***Chartis***). Cover under the primary layer has been exhausted. The second and fourth excess layer insurers have agreed to follow the coverage position of Chartis and Catlin.

The Policy

5 Under the terms of the Policy, Chartis and the excess layer insurers (including the Insurers) agree to pay the "Loss" of any "Insured Person" which arises out of a "Claim" first made during the "Policy Period" for a "Wrongful Professional Act" or "Wrongful Managerial Act" and notified to the Insurer as soon as practicable during the "Policy Period".

6 "Insured Person" is defined in cl 4.41 of the Policy to include GPL, Gunns and the Directors. "Policy Period" is defined to be 30 November 2011 to 30 November 2012. "Loss" is defined in cl 4.51 to include "awards of damages … costs or settlements agreed with the **Insurer** for which an **Insured** is legally liable resulting from a **Claim**".

7 "Claim" is defined in cl 4.8 of the Policy in the following terms:

> (i) a written demand or civil, regulatory or arbitration proceeding or **Investigation** seeking compensation for a specified **Wrongful Professional Act;**
>
> (ii) a written demand or civil, criminal, administrative, regulatory or arbitration proceeding or **Investigation** seeking compensation or other legal remedy for a specified **Wrongful Managerial Act**; or
>
> (iii) an **Investigation** in which no **Wrongful Professional Act** or **Wrongful Managerial Act** has been specified.
>
> Any **Claim** arising out of, based upon or attributable to continuous, repeated or related **Wrongful Professional Acts** and/or **Wrongful Managerial Acts** shall be considered a single **Claim**.

8 "Wrongful Professional Act" is defined in cl 4.87 to mean "any actual or alleged act, error, omission in the performance of or failure to perform

Investment Advisory Services by … any **Insured** …". "Wrongful Managerial Act" is defined in cl 4.86 to mean "any matter claimed against an **Insured Person** solely because of his capacity as … a **Director** … or any actual or alleged act, error or omission by … a **Director** … in his capacity as such". "Insured" is defined in cl 4.39 to include an "**Insured Person**". "Investment Advisory Services" is defined in cl 4.45 to mean "the investment advisory services, investment management services and trustee services declared in the **Submission** performed by or on behalf of an **Insured Entity** pursuant to an agreement with a third party: (i) for compensation; or (ii) in conjunction with services for compensation".

9 Two exclusions are relevant: the conflict of interest exclusion and the lenders liability exclusion.

10 The conflict of interest exclusion relevantly provides:

> The **Insurer** shall not be liable to make any payment under any Cover or Extension in connection with any **Claim** made against an **Insured** arising out of, based upon, attributable to or in any way connected with any actual or alleged conflicts of interest (including but not limited to the failure of an **Insured Person** to disclose any actual or alleged conflicts of interest).

11 The lenders liability exclusion relevantly provides:

> The **Insurer** shall not be liable to make any payment under any Cover or Extension in connection with any **Claim** arising out of, based upon or attributable to an actual or alleged:
>
> (i) loan, lease or extension of credit except to the extent such **Claim** arises out of a **Wrongful Professional Act** in the administration of such loan, lease or extension of credit; or
>
> (ii) collection, foreclosure or repossession in connection with any actual or alleged loan, lease or extension of credit.

12 Clause 5.20 of the policy is also relevant. It provides:

> This policy, its Schedule and any endorsements are one contract in which, unless the context otherwise requires:
>
> (i) …

(ii) singular includes the plural, and vice versa

…

The Act

13 Section 4 of the Act permits a third party who has a claim against a person who has insurance cover in respect of the claim to bring an action directly against the insurer in certain circumstances. Section 5 provides:

> **Leave to Proceed**
>
> (1) Proceedings may not be brought, or continued, against an insurer under section 4 except by leave of the court in which the proceedings are to be, or have been, commenced.
>
> (2) An application for leave may be made before or after proceedings under section 4 have been commenced.
>
> (3) Subject to subsection (4), the court may grant or refuse the claimant's application for leave.
>
> (4) Leave must be refused if the insurer can establish that it is entitled to disclaim liability under the contract of insurance or under any Act or law.

The Issues

14 The Insurers contend that leave to join them should be refused under s 5 because they are entitled to disclaim liability under the Policy on the basis of the conflict of interest exclusion and the lenders liability exclusion. The Insurers accept that in order to succeed they bear the onus of satisfying the Court that their entitlement to disclaim liability is "beyond argument", although they maintain that that test is met if the Court is satisfied that the exclusions on their correct construction apply. The hearing proceeded on that basis.

15 It is convenient to focus on the conflicts of interest exclusion. The lenders liability exclusion raises similar issues.

16 The Insurers case in relation to the conflicts of interest exclusion has the following steps or elements:

(1) The exclusion applies in respect of "any Claim" that (to put it at its widest) is "made against an **Insured** … in any way connected with any … actual or alleged conflicts of interest". The fact that the exclusion operates by reference to a "Claim" and operates where the Claim is in any way connected with any alleged (as well as actual) conflicts of interest makes it plain that the exclusion operates by reference to what is alleged in the Claim and not, for example, what is actually proved;

(2) The "Claim" in this case is contained in the Further Amended Commercial List Statement (***the FACLS***) that by their notice of motion the plaintiffs seek leave to file. That leave is not opposed except to the extent that the FACLS seeks to join the Insurers as defendants;

(3) Properly characterised, the FACLS is a Claim that is in some way connected with an alleged conflicts of interest;

(4) Alternatively to (3), the FACLS makes allegations that are sufficient to engage the exclusion and that is sufficient for the exclusion to apply to the whole Claim;

(5) It follows that the Insurers are entitled to disclaim liability under the terms of the Policy and leave must be refused.

17 Critical to the Insurers' argument is the contention built into step (2) that there is only one "Claim" in this case, which is to be found in the FACLS, and that that claim has the character referred to in (3) or (4). That is said to follow from the wording of the exclusion and the definition of "Claim". The exclusion applies in respect of "any Claim" and "Claim" is defined relevantly to mean a "civil … proceeding". In this case, there is only one proceeding and the character of that proceeding is determined by what is set out in the FACLS. The FACLS is a long and quite complicated document about which it will be necessary to say something more. It is sufficient to observe for present purposes that, according to the Insurers, the claim as pleaded has the character referred to in (3). Alternatively, they submit that at least part of the

claim has that character and that by analogy with the principle established in *Wayne Tank & Pump Co Ltd v Employers' Liability Assurance Corporation Ltd* [1974] QB 57 that is sufficient for the exclusion to apply to the whole Claim. That case establishes that where there are two causes of a loss, one falling within the cover provided by an insurance policy and the other falling within an exclusion, the exclusion applies. By analogy it is said in this case that where part of the "Claim" falls within the cover and part falls within the exclusion, the exclusion takes priority and the "Claim" is not covered.

Consideration

18 I do not accept the Insurers' argument. One difficulty with the analysis is the contention that there is only one "Claim" for the purpose of the exclusion.

19 With one qualification, the definition of "Claim" is not directed at determining what counts as a single claim. Rather, it is directed at determining the characteristics of an assertion of right that satisfies the requirements of a "Claim" for the purposes of the Policy. The Policy is self-evidently what is usually described as a "claims made and notified" policy – that is, it provides cover against loss arising from claims made and notified during the period of cover rather than loss arising from events occurring during that period. An important issue in relation to policies of that type is what is to count as a claim for the purposes of the policy. The definition of "Claim" in the Policy seeks to answer that question. Specifically, it states that the claim must be a written demand or proceeding of an identified type.

20 In order to simplify the drafting, the definition, like the insuring clause that contains the defined term, is expressed in the singular. However, that does not mean that the definition was intended to identify what was to count as a single claim for the purposes of the Policy where that question is important. That is apparent from the last paragraph of the definition. One case where it is important to know whether a "Claim" is to count as a single claim or multiple claims for the purposes of the Policy is in the application of the deductible. If the deductible applies to each "Claim", as is often the case, it is important to

know how many claims there are to work out how many deductibles apply. The last paragraph of the definition of "Claim" is a typical aggregation clause that is intended to resolve that question by stating that "Any **Claim** arising out of, based upon or attributable to continuous, repeated or related **Wrongful Professional Acts** and/or **Wrongful Managerial Acts** shall be considered a single **Claim**". The expression "Any Claim" at the beginning of this sentence cannot be understood as necessarily identifying a single "Claim". If it did, the definition would be circular. It would state unhelpfully that a single Claim was to be considered a single Claim. Instead, the expression "Any Claim" is to be read as identifying the character of the subject of the sentence (that is something that is a written demand or proceeding) and not its number; and the sentence is to be read as saying that a thing or things that have that character are to be treated as a single Claim for the purposes of the Policy if the conditions identified in the sentence are satisfied. That point is reinforced by cl 5.20(ii), which states that "the singular includes the plural and vice versa". Interpreting the definition of "Claim" in this way no doubt creates linguistic infelicities, but the sense of what is intended is clear; and the infelicities can be seen as a consequence of the particular drafting techniques that have been employed to simplify the language of the Policy and make its drafting more economical.

21 The application of the aggregation clause in the case of the Policy is complicated by the fact that the deductible (referred to in the Policy as a "Retention") applies to "Loss". It states (in cl 5.5) that "The **Insurer** shall only be liable for the amount of each **Loss** … that is in excess of the **Retention**"; and Loss itself is defined by reference to a Claim. But none of that matters for present purposes. The point is that it is evident from the last paragraph of the definition of "Claim" that that definition is concerned with subject-matter, not number.

22 A similar point applies to the conflicts of interest exclusion (and the lenders liability exclusion, for that matter). It is important to know what counts as a single claim for the purpose of the application of the conflicts of interest exclusion because the exclusion applies by reference to a "Claim". It

excludes liability in respect of a Claim that has the requisite character. It does not exclude liability in respect of other Claims that do not have that character. But the answer to the question what constitutes and what does not constitute a single Claim for the purposes of the exclusion is not to be found in the definition of the term. The use of the defined term "Claim" in the exclusion is obviously intended to pick up Claims covered by the insuring clause. But like the use of the defined term in the insuring clause, it is not intended to answer the question what counts as the claim for the purpose of the application of the exclusion – except that of course it must be made by way of a demand in writing or a proceeding of the relevant type. In particular, it is not saying that because there is one proceeding, there can only be one claim for the purpose of the application of the exclusion.

23 In contrast to the position in relation to the Retention, the Policy offers no guidance on how assertions of right that meet the description of a "Claim" are to be aggregated or disaggregated for the purpose of the application of the exclusion. But plainly in the case of a single proceeding that makes disparate allegations, it makes no sense to aggregate those disparate allegations into one Claim and ask whether that Claim has a particular character for the purposes of the application of the exclusion. And equally it makes no sense to apply the exclusion to a set of allegations that have nothing to do with conflicts of interest simply because it can be said that another set of allegations do and the two sets of allegations are made in the same proceeding. Such a conclusion would go beyond the purpose of the exclusion and invite manipulation of the result by the commencement of multiple proceedings. Instead, what is necessary is a careful examination of the allegations that are made. To the extent that they have the required character, the exclusion applies. To the extent that they do not, it does not.

24 Nor do I think that the issue is analogous to the one that arose in *Wayne Tank.* That case was concerned with a situation where there were two causes of a loss, one covered by the insuring clause and the other covered by an exclusion. By including the exclusion, the parties must have intended it to apply, whether or not the claim was otherwise covered. In this case, the issue

is what counts as a single claim for the purpose of the application of the exclusion. As I have explained, there is no reason why the parties would have intended the exclusion to apply to allegations that did not have the character by reference to which it operated.

25 A second difficulty with the Insurers' analysis is that it is by no means obvious as the Insurers assert that the question whether there is a connection between the Claim and any actual or alleged conflicts of interest is to be determined by the construction or characterisation of the FACLS alone. The Insurers focus on the word "alleged" in the exclusion. But the exclusion also applies where there is a connection between the Claim and an actual conflict of interest. Whether such a connection exists cannot be answered simply by characterising the FACLS. Rather, the exclusion appears to leave it open to the Insurers to contend that, whatever is alleged, there was an actual conflict of interest that was sufficiently connected to the Claim that the exclusion should apply.

26 Even where the connection is said to exist between the Claim and an alleged conflict of interest, the existence of the connection may not be obvious from the pleading alone. The true nature of the Claim may only become apparent once it is fleshed out by evidence and submissions. During the hearing of the motion, Mr Williams SC, who appeared for the Insurers, made frequent reference to the fact that the FACLS had been "sanitised" by the removal of allegations of conflicts of interest or allegations that appeared to have that character. His point appeared to be that sanitisations of that sort could not hide the true nature of the Claim. But equally, it might be said that the true nature of the claim or claims will not be revealed until those claims have been fleshed out by the evidence, and once fleshed out it may become apparent that one or more of the claims cannot properly be said to have the required connection to a conflict of interest.

27 It is not necessary for the purposes of the present application to analyse the application of the exclusions to the whole of the claims made in the FACLS. That is better done once the claims have been fully developed and it is known

which if any of them succeed. It is sufficient for present purposes to observe that the FACLS appears to contain allegations that do not fall with the exclusions.

28 One example suffices. It is alleged in the FACLS that under the terms of each Scheme, Gunns was responsible as agent of GPL for rearing and maintaining the trees in the Woodlots (defined in the FACLS as the "Maintenance Services") and GPL was responsible for paying the owners of the land on which the trees were grown (which included Gunns group companies and third parties) fees referred to as "Forestry Right Fees". As against the Directors of GPL, it is alleged (in para 82 of the FACLS) that in breach of their duties as directors they failed to "exercise the degree of care and diligence that a reasonable person would exercise if they were in the officer's position (as required by s 601FD(1)(b) of the [*Corporations Act 2001* (Cth)]". The following particulars, among others, are given of that allegation:

> (a) The GPL Directors failed to ensure that GPL paid the Forestry Right Fee, performed the Maintenance Services;
>
> (b) The GPL Directors failed to ensure that GPL had funds available to cover liabilities including the Forestry Right Fees, performance of the Maintenance Services;
>
> (c) The GPL directors failed to ensure that GPL's agent, Gunns Ltd, paid the Forestry Right Fees and performed the Maintenance Services;
>
> (d) The GPL Directors failed to cause GPL to issue any notice to Gunns Ltd of a breach of the Maintenance Services Sub-contracting Agreements due to Gunns Ltd's failure to pay the Forestry Right Fees and perform the Maintenance Services;
>
> (e) The GPL Directors failed to exercise GPL's right to terminate the Maintenance Services Sub-contracting Agreements with Gunns Ltd due to Gunns Ltd's failure to pay the Forestry Right Fees and perform the Maintenance Services;
>
> (f) The GPL Directors failed to cause GPL to call upon the GPL Bank Guarantee in a timely manner; …

29 In para 91 of the FACLS, it is alleged that "But for the GPL Directors' failure to ensure performance of the Maintenance Services and payment of the Forestry Right Fees for the Gunns Woodlot Schemes (by requiring that sufficient funds be maintained to cover these costs, and/or ensuring that any

agent appointed to do so was performing those services), the [growers] would not have suffered the [losses that they claim]".

30 It is difficult to see why this claim is not an independent claim for the purposes of both exclusions. If those facts were the only ones alleged and made out, the plaintiffs would be entitled to succeed against the Directors independently of any other allegations made in the FACLS.

31 It is equally difficult to see why either exclusion applies to that claim. It might be said that the reason the GPL Directors failed to do the things set out in the particulars to para 82 of the FACLS was a conflict of interest in that they preferred the interests of Gunns over those of GPL. In that respect, another allegation in the FACLS, on which Mr Williams placed considerable emphasis, is that between 2002 and 2011 GPL, in breach of its obligations, advanced approximately $486 million to Gunns from money it held on trust for growers and between 2004 and 2009 it paid dividends to Gunns of $118 million. It might be said that those allegations are tied together with the allegations against the Directors set out above because their failures can be explained by those payments and the payments themselves were made as a result of an actual conflicts of interest or in substance are alleged to have been made because of a conflicts of interest. One difficulty with that contention is that it is not obvious what the conflict of interest is that caused the payments to be made. Another difficulty is that that is not what is alleged in the FACLS. The allegations that are made against the Directors are equally consistent with other reasons for their alleged failings, such as ineptitude and oversight.

32 It is even less clear how the lenders liability exclusion applies. The allegations against the Directors that have at their heart the breaches of duty alleged in para 82 of the FACLS are not concerned with any loan, lease or extension of credit.

33 Two points follow from what has been said in relation to this particular claim against the Directors. First, as this particular claim stands, it cannot be said that the claim falls within the scope of the exclusions. Consequently, it cannot

be said that the exclusions are engaged in relation to all the allegations in the FACLS. Second, as the claim is fleshed out by the evidence, it is possible that the claim when properly understood could change in a way which attracts the operation of one or other of the exclusions. But that is not a reason for refusing leave now.

Conclusion and Orders

34 For the reasons given, I am not satisfied on the basis of the material currently before the Court that the Insurers are entitled to disclaim liability. No other ground was advanced for refusing leave to proceed against the Insurers. As I have said, there is no objection to the form of the FACLS.

35 That leaves the question of costs. It is common ground that the plaintiffs should pay the third to eleventh defendants costs thrown away by reason of the amendments. That leaves the costs of the motion. In my opinion, it is appropriate that the Insurers should pay those costs insofar as those costs relate to the application for leave to proceed against them. The Insurers opposed that leave and have been unsuccessful. The issues on the motion are sufficiently distinct from the issues in the proceedings that the costs should not await the outcome of the proceedings or abide their outcome.

36 Accordingly, the orders of the Court are:

(1) Pursuant to r 19.2 of the Uniform Civil Procedure Rules 2005 (NSW) (***UCPR***)**,** Catlin Australia Pty Ltd ACN 308 319 786 be joined to the proceeding as the Twelfth Defendant.

(2) Pursuant to r 19.2 of the UCPR, Chubb Insurance Australia Limited ABN 23 001 642 020 be joined to the proceedings as the Thirteenth Defendant.

(3) Pursuant to s 5 of the *Civil Liability (Third Party Claims Against Insurers) Act 2017* (NSW), the Plaintiffs have leave to continue the proceeding against the Twelfth and Thirteen Defendants.

(4) The Plaintiffs have leave to file and serve a Second Further Amended Summons and a Further Amended Commercial List Statement in the form of schedule A and schedule B respectively to the Notice of Motion dated 1 July 2020 (***Motion***).

(5) The Twelfth Defendant and Thirteenth Defendant pay the Plaintiffs' costs of paragraphs 1, 2 and 3 of the Motion.

(6) The Plaintiffs pay the Third to Eleventh Defendants costs thrown away by reason of the amendments made under paragraph 4 of the Motion.

****

I certify that this and the preceding 14 pages are a true copy of the reasons for judgment herein of Justice Ball.

Dated: 14 August 2020
Associate: Maria Kourtis