

## REJOINDER

### COURT DETAILS

Court	Supreme Court of New South Wales
Division	Equity
List	Equity General
Registry	Sydney
Case number	2015/00306222

### TITLE OF PROCEEDINGS

Plaintiff	Innes Creighton
Defendant	Australian Executor Trustees Limited ACN 007869794

### 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	Liberty Mutual Insurance Company (Third Cross-Defendant) Chubb Insurance Australia Limited (Fourth Cross-Defendant)
Filed in relation to	Reply (First Cross-Claim)
Legal representative	Avryl Lattin, Clyde & Co
Legal representative reference	1519487
Contact name and telephone	Dan Robinson, (02) 9210 4408
Contact email	dan.robinson@clydeco.com

### PLEADINGS AND PARTICULARS

In response to the Reply filed on 13 December 2017 (**Reply**), the Third Cross-Defendant (**Liberty**) and Fourth Cross-Defendant (**Chubb**) (together, the **Excess Insurers**) say as follows (adopting definitions used in the Reply, the Second Further Amended Statement of Cross Claim filed on 25 May 2017 (**Cross Claim**) and the Excess Insurers' Defence to the Cross Claim filed on 26 May 2017 (**Defence**), unless indicated otherwise):

#### Further endorsements

1 As to paragraph 3 of the Reply, the Excess Insurers:

- a. admit that terms of 2014/2015 AXIS policy were also set out in the additional endorsements titled "Amended definition of Professional Business endorsement" and "Legal Advice for Estate Planning endorsement", dated 29 December 2014 and 15 January 2015 respectively;
- b. say further that, on 24 February 2015, AXIS sent Willis a copy of an endorsement titled "Amended Financial Services Dispute Resolution Extension" dated 24 February 2015 for Policy No. FLP-311731; and
- c. otherwise do not admit the paragraph.

2 The Excess Insurers admit paragraph 5 of the Reply and say that the endorsement was titled "Limit of Liability Endorsement – Shadforth Insurance Brokers".

*[3 to 6 not used]*

### **Terms of 2013/2014 policies**

7 As to paragraph 7 of the Reply, the Excess Insurers:

- a. deny the paragraph;
- b. refer to paragraphs 8 to 28 below;
- c. repeat paragraph 37 of the Defence;
- d. say that:
  - i. the terms of the 2013/2014 AXIS policy are set out in a document titled "AXIS IOOF Manuscript Financial Institutions Professional Indemnity Insurance Policy", including policy wording, a Schedule for Policy No. FLP-311731 and an endorsement titled "Difference in Conditions Endorsement";
  - ii. the terms of the 2013/2014 Liberty policy are set out in a document titled "Willis Australia Excess Insurance", including policy wording and a Policy Schedule for Policy No. FI-ME-SPC-502094;
  - iii. the terms of the 2013/2014 Chubb policy are set out in a document titled "Chubb Specialty Insurance Excess Professional Indemnity", including policy wording and a Schedule for Policy No. 93256886; and
  - iv. the Excess Insurers rely upon the terms in the 2013/2014 AXIS policy, 2013/2014 Liberty policy and 2013/2014 Chubb policy as if set out in full herein;

- e. say further that AET has no right to be indemnified in respect of the Creighton Proceeding under more than one of the 2011/2012 AXIS policy, 2013/2014 AXIS policy and 2014/2015 AXIS policy; and
- f. say further that:
  - i. Liberty cannot be liable to indemnify AET under the 2013/2014 Liberty policy unless and until the limit of liability under the 2013/2014 AXIS policy has been exhausted; and

**Particulars**

Cause 1.2 of the 2013/2014 Liberty policy.

- ii. Chubb cannot be liable to indemnify AET under the 2013/2014 Chubb policy unless and until the limit of liability under the 2013/2014 Liberty policy has been exhausted.

**Particulars**

Clauses 1 and 3 of the 2013/2014 Chubb policy.

- 8 The Excess Insurers admit paragraph 8 of the Reply.
- 9 The Excess Insurers admit paragraph 9 of the Reply.
- 10 The Excess Insurers admit paragraph 10 of the Reply.
- 11 The Excess Insurers admit paragraph 11 of the Reply.
- 12 As to paragraph 12 of the Reply, the Excess Insurers repeat sub-paragraph 7(d) above.
- 13 The Excess Insurers admit paragraph 13 of the Reply.
- 14 As to paragraph 14 of the Reply, the Excess Insurers repeat paragraphs 27C, 28, 29, 40A and 40N of the Defence.
- 15 As to paragraph 15 of the Reply, the Excess Insurers:
  - a. repeat paragraphs 27C, 28, 29, 40A and 40N of the Defence; and
  - b. otherwise do not admit the paragraph.
- 16 As to paragraph 16 of the Reply, the Excess Insurers admit the paragraph and repeat sub-paragraphs 7(e) and 7(f) above.
- 17 As to paragraph 17 of the Reply, the Excess Insurers:
  - a. do not admit sub-paragraph 17(a) of the Reply;

- b. admit sub-paragraph 17(b) of the Reply;
- c. deny sub-paragraph 17(c) of the Reply, and refer to and repeat paragraphs 19 and 20 below;
- d. as to sub-paragraph 17(d) of the Reply:
  - i. deny the sub-paragraph;
  - ii. repeat paragraph 16 above;
  - iii. say that the 2013/2014 AXIS policy and 2013/2014 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;

**Particulars**

Clause 1.1 of the 2013/2014 AXIS policy and clause 1 of the 2013/2014 Liberty policy.

- iv. say that the 2013/2014 AXIS policy and 2013/2014 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; and

**Particulars**

Clause 1.1 of the 2013/2014 AXIS policy and clause 1 of the 2013/2014 Chubb policy.

- v. 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 2013/2014 AXIS policy, 2013/2014 Liberty policy or 2013/2014 Chubb policy.
- e. admit sub-paragraph 17(e) of the Reply, and repeat sub-paragraph 17(d) above;
- f. as to sub-paragraph 17(f) of the Reply:
  - i. repeat and rely upon sub-paragraphs 17(d) and 17(e) above and sub-paragraphs 40L(e) and 40Y(e) of the Defence;

- ii. say further that the maximum total combined liability of all insurers under the 2013/2014 AXIS policy was AUD20,000,000 for any one Claim and AUD40,000,000 in the aggregate;

**Particulars**

2013/2014 AXIS policy, Clauses 2.1.1, 2.1.2, 6.7, 6.8 and Schedule.

- g. refer to and repeat paragraphs 27, 27A, 27C, 28 and 29 of the Defence; and
- h. will rely on the express terms of the 2013/2014 AXIS, 2013/2014 Liberty policy and 2013/2014 Chubb policy as if they were fully set forth herein.

18 As to paragraph 18 of the Reply, the Excess Insurers:

- a. deny the paragraph;
- b. repeat paragraph 17 above;
- c. say further that:
  - i. the effect of the 2013/2014 Liberty policy is that Liberty 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 Liberty a notice as soon as practicable after giving AXIS a notice under the 2013/2014 AXIS policy; and
  - ii. the effect of the 2013/2014 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 2013/2014 AXIS policy;
- d. refer to and repeat paragraphs 27C, 28 and 29 of the Defence; and
- e. will rely on the express terms of the 2013/2014 AXIS, 2013/2014 Liberty policy and 2013/2014 Chubb policy as if they were fully set forth herein.

**Indemnity under 2013/2014 AXIS policy**

19 As to paragraph 19 of the Reply, the Excess Insurers:

- a. deny the paragraph; and
- b. say that, on its proper construction, clause 3.11 of the 2013/2014 AXIS policy applies to exclude cover with respect to the Creighton proceeding.

### **Particulars**

The Excess Insurers will rely on the pleadings in the Creighton Proceeding and the terms of the 2013/2014 AXIS policy as if the same were fully set forth herein.

- 20 As to paragraph 20 of the Reply, the Excess Insurers deny the paragraph and repeat paragraph 19 above.

#### **Indemnity under 2013/2014 Liberty policy**

- 21 The Excess Insurers deny paragraph 21 of the Reply, and say that AET has never made a claim under the 2013/2014 Liberty policy with respect to the Creighton proceeding.
- 22 The Excess Insurers deny paragraph 22 of the Reply, and repeat paragraphs 7 to 21 above.
- 23 The Excess Insurers deny paragraph 23 of the Reply, and repeat paragraph 22 above.

#### **Indemnity under 2013/2014 Chubb policy**

- 24 The Excess Insurers deny paragraph 24 of the Reply, and say that AET has never made a claim under the 2013/2014 Chubb policy with respect to the Creighton proceeding.
- 25 The Excess Insurers deny paragraph 25 of the Reply, and repeat paragraphs 7 to 23 above.
- 26 The Excess Insurers deny paragraph 26 of the Reply, and repeat paragraph 25 above.

#### **Relief**

- 27 The Excess Insurers deny paragraph 27 of the Reply and say that AET and IOOF are not entitled to any relief as 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

29 / 3 / 18

**AFFIDAVIT VERIFYING**

Name James Thomas  
 Address Level 38, 1 Farrer Place Sydney, NSW Australia 2000  
 Occupation Technical Claims Manager, Professional & Financial Risks  
 – Asia Pacific  
 Date 29 March 2018

I affirm:

- 1 I am employed as a Technical Claims Manager, Professional & Financial Risks – Asia Pacific 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 rejoinder are true.
- 3 I believe that the allegations of fact that are denied in the rejoinder are untrue.
- 4 After reasonable inquiry, I do not know whether or not the allegations of fact that are not admitted in the rejoinder are true.

Sydney


AFFIRMED at

Signature of deponent

Name of witness

Address of witness

Capacity of witness

  
 Christian McDowell  
 Level 15, 333 George St, Sydney NSW 2000  
 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:

Driver's licence # 11995840  
 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 38, 225 George St, Sydney NSW 2000  
 Occupation Team Leader, Financial Lines Claims – GBU  
 Date 28 March 2018

I say on oath:

- 1 I am employed as a Team Leader, Financial Lines Claims - GBU 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 rejoinder are true.
- 3 I believe that the allegations of fact that are denied in the rejoinder are untrue.
- 4 After reasonable inquiry, I do not know whether or not the allegations of fact that are not admitted in the rejoinder are true.

SWORN at Sydney

Signature of deponent



Name of witness

Christian McDowell

Address of witness

Level 15, 333 George St 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:

Drivers licence # 13390610

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.]