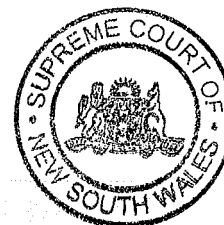


Ball J 30/7/17

## REPLY

### COURT DETAILS

Court	Supreme Court of New South Wales	<b>FILED</b> 13 DEC 2017
Division	Equity	
Registry	Sydney	
Case number	2015/306222	



T.K.

### TITLE OF PROCEEDINGS

Plaintiff	<b>Innes Creighton</b>
Defendant	<b>Australian Executor Trustees Limited</b> <b>ACN 007 869 794</b>

### TITLE OF THIS CROSS-CLAIM

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

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

### FILING DETAILS

Filed for	<b>Australia Executor Trustees Limited and IOOF Holdings Limited, Cross-Claimants</b>
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	<a href="mailto:mark.wilks@corrs.com.au">mark.wilks@corrs.com.au</a>

### 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 AET and IOOF admit paragraph 25A of the Defence.

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

- (a) admit that the ASOC (as defined in the Defence) included the matters pleaded at sub-paragraphs 26A (a), (b), (c), (d), (e), (f) and (g) of the Defence, amongst other allegations;
- (b) say that, at paragraphs 24AV and 50 of the ASOC, it was alleged that the applicant and group members have suffered loss and damage by reason of AET's contraventions of section 283DA 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 (**Creighton**) on 27 June 2016 and further amended by the Second Further Amended Statement of Claim (**SFASOC**) filed by Creighton on 31 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.

5 In answer to paragraph 27 of the Defence, AET and IOOF:

- (a) admit paragraph 27(b) of the Defence;
- (b) say that the non-admission in paragraph 27(d)(i) of the Defence is inconsistent with the positive averment in paragraph 36(f) of the Defence;

- (c) say further that the positive averment in paragraph 36(f) of the Defence constitutes an admission;
- (d) say further that no application has been made for leave to withdraw the admission in paragraph 36(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 27(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 27(d)(ii) of the Defence is vexatious and embarrassing, and is liable to be struck-out;
- (h) say further that to the extent paragraph 27 of the Defence does not traverse the allegations in paragraph 27 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 27C of the Defence, says that to the extent the paragraph does not traverse the allegations in paragraph 27C of the Second Further Amended Statement of Cross-Claim, those allegations are taken to be admitted.

**Particulars**

## UCPR 14.26(1)

- 7 In answer to paragraph 32A 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 32A(b);
  - (d) otherwise join issue with Swiss Re in relation to the paragraph.
- 8 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 Creighton proceeding (which is denied), for the reasons pleaded in paragraphs 9 to 19 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 Creighton proceeding.
- 9 On or about 27 November 2013, AXIS issued the 2013/2014 AXIS policy.
- 10 AET is an insured under the 2013/2014 AXIS policy.
- 11 AET relies upon the terms of the 2013/2014 AXIS policy as if they were set out in full herein.
- 12 The period of insurance of the 2013/2014 AXIS policy was subsequently extended to 30 November 2014.
- 13 AET and IOOF repeat paragraphs 27C, 28 and 29 of the Second Further Amended Statement of Cross-Claim.

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

- 14 AET (through Willis) gave the notifications pleaded in paragraphs 27C, 28 and 29 of the Second Further Amended Statement of Cross-Claim as soon as reasonably practicable after it became aware of the facts notified.
- 15 The prior notifications pleaded in paragraph 27 and 27A of the Second Further Amended Cross-Claim do not exclude indemnity under the 2013/2014 AXIS policy with respect to the Creighton proceeding.

### **Particulars**

Clauses 1.6 and 3.10

- 16 On and from 3 September 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 Creighton proceeding.
- 17 On its proper construction, exclusion clause 3.11 of the 2013/2014 AXIS Policy does not apply with respect to the Creighton proceeding.
- 18 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 Creighton proceeding.
- 19 By reason of AXIS' and Swiss Re's wrongful declinature of indemnity under the 2013/2014 AXIS policy with respect to the Creighton proceeding, AET has suffered and is continuing to suffer, or alternatively will suffer, loss and damage.

### **Particulars of loss**

AET has since 3 September 2015 incurred costs in the defence of the Creighton proceeding.

- 20 By reason of the matters pleaded in paragraphs 9 to 19 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).

21 Further and in the alternative, and in further answer to paragraphs 27, 27A, 27B, 28, 29, 32(a) and (c), 33 and 34 of the Defence, by reason of the matters pleaded in paragraphs 22 to 31 below, Swiss Re is estopped from denying that:

- (a) 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;
- (b) 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
- (c) 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 Creighton proceeding.

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

- (a) 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;
- (b) 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
- (c) 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).

23 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).

- 24 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 22 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.

25 AET and AXIS each knew and intended that the other would act on the basis of the common assumption pleaded in paragraph 22 above.

26 AET will suffer detriment if Swiss Re departs from the common assumption pleaded in paragraph 22 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 Creighton Proceeding.

27 Further and in the alternative to paragraphs 22-26 above, since at least 4 August 2014 AET held the assumption pleaded in paragraph 22 above.

28 AXIS induced AET to adopt and continue to hold the assumption pleaded in paragraph 22 above.

#### **Particulars**

See particulars to paragraph 24 above.

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

29 AXIS knew and intended that AET acted or would act in reliance on the assumption pleaded in paragraph 22 above.

30 By reason of AET's reliance on the assumption pleaded in paragraph 22 above, it will suffer detriment if the assumption is not fulfilled.

#### **Particulars**

See particulars to paragraph 26 above.



31 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 Creighton proceeding, has failed to avoid the detriment pleaded in paragraph 30.

32 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

Date of signature



Solicitor on the record, by his partner

13 Dec - br 2017.

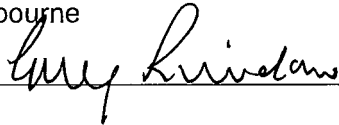
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**AFFIDAVIT VERIFYING**

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.

Signature of witness Identification document relied on 

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)