

FIRST CROSS-CLAIM
THIRD FURTHER AMENDED STATEMENT OF CROSS-CLAIM

COURT DETAILS

Court	Supreme Court of New South Wales
Division	Equity
Registry	Sydney
Case number	2015/171592

TITLE OF PROCEEDINGS

Plaintiff	John Smith and Rosemary Smith
	Australian Executor Trustees Limited
Defendant	ACN 007 869 794

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 ABN 38 138 873 211
Number of cross-defendants (if more than two)	4 Refer to Party Details at rear for full list of parties

FILING DETAILS

Filed for	Australia Executor Trustees Limited and IOOF Holdings Limited, Cross-Claimants
Filed in relation to	Cross-claim
Legal representative	Brad Woodhouse, Corrs Chambers Westgarth
Legal representative reference	9116109
Contact name and telephone	Brad Woodhouse, (02) 9210 6859
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[on separate page]

RELIEF CLAIMED

1 A declaration that, in the events which have happened:

- (a) the first cross-defendant, Swiss Re International SE (**Swiss Re**), is liable to indemnify the first cross-claimant, Australian Executor Trustees Limited (**AET**), under financial institutions professional indemnity insurance policy number 311731 issued by AXIS Specialty Europe SE (formerly AXIS Specialty Europe Limited) ABN 19 131 203 122 (**AXIS**) for the period of insurance from 4pm on 30 November 2011 to 4pm on 31 October 2012;
- (b) the third cross-defendant, Liberty Mutual Insurance Company (**Liberty**), is liable to indemnify AET, under excess of loss professional indemnity insurance policy number FI-SY-SPC-11-502095 for the period of insurance from 4pm on 30 November 2011 to 4pm on 31 October 2012;
- (c) the fourth cross-defendant, Chubb Insurance Australia Limited (**CIAL**) is liable to indemnify AET, under excess of loss professional indemnity insurance policy number 93256886 for the period of insurance from 4pm on 30 November 2011 to 4pm on 31 October 2012,

with respect to the plaintiff's claims against AET in this proceeding.

2 In the alternative to prayer one, a declaration that, in the events which have happened:

- (a) Swiss Re and CIAL are liable to indemnify AET, under financial institutions professional indemnity insurance policy number 311731 issued by AXIS for the period of insurance from 4pm on 30 November 2014 to 4pm on 30 November 2015;
- (b) Liberty is liable to indemnify AET, under excess of loss professional indemnity insurance policy number FI-ME-SPC-14-502095 for the period of insurance from 4pm on 30 November 2014 to 4pm on 30 November 2015;
- (c) CIAL and Swiss Re are liable to indemnify AET, under excess of loss professional indemnity insurance policy number 93256886, in the proportion particularised in paragraph 17 below, for the period of insurance from 4pm on 30 November 2014 to 4pm on 30 November 2015,

with respect to the plaintiff's claims against AET in this proceeding.

3 Damages.

4 Costs including interest on costs.

5 Interest pursuant to s. 100 of the *Civil Procedure Act 2005* (NSW).

PLEADINGS AND PARTICULARS

Parties

1. The first cross-claimant, Australian Executor Trustees Limited (**AET**), is and was at all material times:
 - (a) a corporation duly incorporated in accordance with the laws of Australia;
 - (b) a wholly owned subsidiary of the second cross-claimant, IOOF Holdings Limited (**IOOF**); and
 - (c) entitled to sue and be sued in its corporate name and style.
2. The second cross-claimant, IOOF, is and was at all material times:
 - (a) a corporation duly incorporated in accordance with the laws of Australia; and
 - (b) entitled to sue and be sued in its corporate name and style.
3. The first cross-defendant, Swiss Re, is and was at all material times:
 - (a) a foreign corporation registered in accordance with the laws of Australia;
 - (b) entitled to sue and be sued in its corporate name and style; and
 - (c) carrying on business in Australia as an insurer authorised to do so in accordance with the laws of Australia and operating in Australia as a branch.
4. The second cross-defendant, Willis Australia Limited (**Willis**), is and was at all material times
 - (a) a corporation duly incorporated in accordance with the laws of Australia;
 - (b) entitled to sue and be sued in its corporate name and style; and
 - (c) carrying on business as an insurance advisor and insurance broker.
- 4A. The third cross-defendant, Liberty Mutual Insurance Company (**Liberty**), is and was at all material times:
 - (a) a foreign corporation registered in accordance with the laws of Australia;
 - (b) entitled to sue and be sued in its corporate name and style; and
 - (c) carrying on business in Australia as an insurer authorised to do so in accordance with the laws of Australia.

- 4B. The fourth cross-defendant, Chubb Insurance Australia Limited (**CIAL**), is and was at all material times:
- (a) a corporation duly incorporated in accordance with the laws of Australia;
 - (b) entitled to sue and be sued in its corporate name and style; and
 - (c) carrying on business in Australia as an insurer authorised to do so in accordance with the laws of Australia.
- 4C. On or around 12 October 2016, the Federal Court of Australia approved a scheme pursuant to s 17F of the *Insurance Act* 1973 (Cth) whereby the general insurance business of Chubb Insurance Company of Australia Limited (ACN 003 710 647) (**Chubb**) was to be transferred to CIAL (then known as ACE Insurance Limited) and such transfer was subsequently effected on or around 1 November 2016.
- 4D. Pursuant to the scheme pleaded in paragraph 4C, from on or around 1 November 2016, CIAL assumed the liabilities of Chubb under the policies pleaded in paragraphs 8, 15 and 17 below.
- 4E. On or around 10 February 2017, the Federal Court of Australia approved a scheme pursuant to s 17F of the *Insurance Act* 1973 (Cth) whereby the insurance business of the Australian branch of AXIS Speciality Europe SE (formerly AXIS Specialist Europe Limited) (**AXIS**) was to be transferred to the Australian branch of Swiss Re and such transfer was subsequently effected on or around 13 February 2017.
- 4F. Pursuant to the scheme pleaded in paragraph 4E, from on or around 13 February 2017:
- (a) Swiss Re assumed the liabilities of AXIS under the policies pleaded in paragraphs 5, 8 and 17 below; and
 - (b) AET has the same claims on Swiss Re in respect of the policies pleaded in paragraphs 5, 8 and 17 below as it had against AXIS, regardless of when those claims arose.

Professional indemnity policies of insurance

5. On or about 3 February 2012, AXIS issued financial institutions professional indemnity insurance policy number 311731 for the period of insurance from 4pm on 30 November 2011 to 4pm on 31 October 2012 (**2011/2012 AXIS policy**).

Particulars

The 2011/2012 AXIS policy is in writing and a copy is available upon request.

6. AET is an insured under the 2011/2012 AXIS policy.

Particulars

The Insured named in the Schedule to the 2011/2012 AXIS policy is "IOOF Holdings Limited & Subsidiaries as defined in the Proposal Form dated 25 October 2011".

AET is a wholly owned subsidiary of IOOF.

AET was listed as a subsidiary of IOOF in attachment PI-1 of the Proposal Form dated 25 October 2011.

7. AET relies upon the terms of the 2011/2012 AXIS policy as if they were set out in full herein.
8. On or about 8 December 2014, AXIS issued, and AXIS and Chubb agreed to provide insurance cover on and subject to the terms and conditions of, financial institutions professional indemnity insurance policy number FLP-311731 for the period of insurance from 4pm on 30 November 2014 to 4pm on 30 November 2015 (**2014/2015 AXIS policy**).

Particulars

AXIS – 90%

Chubb – 10%

The 2014/2015 AXIS policy is in writing and a copy is available upon request.

9. AET is an insured under the 2014/2015 AXIS policy.

Particulars

The Insured named in the Schedule to the 2014/2015 AXIS policy is "IOOF Holdings Limited and its subsidiaries".

AET is a wholly owned subsidiary of IOOF.

10. AET relies upon the terms of the 2014/2015 AXIS policy as if they were set out in full herein.
11. On or about 7 March 2012, Liberty issued excess of loss professional indemnity insurance policy number FI-SY-SPC-11-502095 for the period of insurance from 4pm on 30 November 2011 to 4pm on 31 October 2012 (**2011/2012 Liberty policy**).

Particulars

The 2011/2012 Liberty policy is in writing and a copy is available upon request.

12. AET is an insured under the 2011/2012 Liberty policy.

Particulars

The Insured is defined by the 2011/2012 Liberty policy as “the Named Insured specified in the Schedule and as otherwise defined in the Primary Policy”.

The Named Insured specified in the Schedule is IOOF.

The Primary Policy is the 2011/2012 AXIS policy.

AET otherwise repeats the particulars to paragraph 6 above.

13. On or about 6 August 2015, Liberty issued excess of loss professional indemnity insurance policy number FI-ME-SPC-14-502095 for the period of insurance from 4pm on 30 November 2014 to 30 November 2015 (**2014/2015 Liberty policy**).

Particulars

The 2014/2015 Liberty policy is in writing and a copy is available upon request.

14. AET is an insured under the 2014/2015 Liberty policy.

Particulars

The Insured is defined by the 2014/2015 Liberty policy as “the persons or organisations insured under the Primary Policy”.

The Primary Policy is the 2014/2015 AXIS policy.

AET otherwise repeats the particulars to paragraph 9 above.

15. On or about 6 June 2012, Chubb issued excess of loss professional indemnity insurance policy number 93256886 for the period of insurance from 4pm on 30 November 2011 to 4pm on 31 October 2012 (**2011/2012 Chubb policy**).

Particulars

The 2011/2012 Chubb policy is in writing and a copy is available upon request.

16. AET is an insured under the 2011/2012 Chubb policy.

Particulars

The Insureds are defined by the 2011/2012 Chubb policy as “those persons or organisations insured under the Primary Policy”.

The Primary Policy is the 2011/2012 AXIS policy.

AET otherwise repeats the particulars to paragraph 6 above.

17. On or about 4 April 2016, Chubb and AXIS issued excess of loss professional indemnity insurance policy number 93256886, in the proportions particularised below, for the period of insurance from 4 pm on 30 November 2014 to 4pm on 30 November 2015 (**2014/2015 Chubb/AXIS policy**).

Particulars

Chubb – 80%.

AXIS – 20%.

The 2014/2015 Chubb/AXIS policy is in writing and a copy is available upon request.

18. AET is an insured under the 2014/2015 Chubb/AXIS policy.

Particulars

The Insured is defined by the 2014/2015 Chubb/AXIS policy as “the persons or organisations insured under the Primary Policy”.

The Primary Policy is the 2014/2015 AXIS policy.

AET otherwise repeats the particulars to paragraph 9 above.

19. Not used.

20. Not used.

Provident Capital Limited

21. At all material times since at least 24 November 2005, AET was the trustee for debenture holders in Provident Capital Limited (**Provident**) pursuant to Chapter 2L of the *Corporations Act 2001 (Cth)*.

Particulars

Deed of Amendment dated 24 November 2005.

A copy of the trust deed, and the amendments to the deed made from time to time, are available upon request.

22. On 29 June 2012, on the application of AET, the Federal Court of Australia made orders appointing receivers and managers to Provident.
23. Provident entered into voluntary administration on 18 September 2012 and liquidation on 24 October 2012.
24. On 10 June 2015, John Smith and Rosemary Smith commenced representative proceeding 2015/171592 against AET in this Court (**Smith proceeding**).
25. In the Smith proceeding, the plaintiffs allege, inter alia, that AET breached its duties as trustee for debenture holders in Provident pursuant to Chapter 2L of the *Corporations Act 2001 (Cth)*.

Claims for indemnity and damages against Swiss Re, Liberty and CIAL

2011/2012 AXIS policy

26. On 27 June 2012, AET (through Willis) gave AXIS notice in writing of facts which might give rise to a professional indemnity claim against AET, relating to AET's role as trustee for debenture holders in Provident.

Particulars

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

Email from Pegah Vaghaye of Willis to Olympia Samolis of AXIS dated 27 June 2012.

A copy is available upon request.

- 26A. On 24 July 2012, AET (through Willis) gave AXIS further notice in writing of facts which might give rise to a professional indemnity claim against AET, relating to AET's role as trustee for debenture holders in Provident.

Particulars

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

Email from Michael Stanelos of IOOF to Andrew Dawson of Willis (copy to Kelly Butler of Willis) dated 24 July 2012 and email from Andrew Dawson of Willis to Michael Stanelos of IOOF (copy to Kelly Butler of Willis) dated 25 July 2012 recording that the information contained in the former email has been provided to AXIS.

A copy is available upon request.

- 26B. AET (through Willis) gave the notices pleaded in paragraphs 26 and 26A above as soon as reasonably practicable after it became aware of the facts notified.
- 26C. On 27 March 2014, AET (through Willis) gave AXIS notice in writing of further facts which might give rise to a professional indemnity claim against AET, relating to AET's role as trustee for debenture holders in Provident.

Particulars

Email from Michael Stanelos of IOOF to Kelly Butler of Willis (copy to Andrew Dawson of Willis) dated 27 March 2014 and email from Robyn Fraser of AXIS to Kelly Butler of Willis dated 30 March 2014 confirming receipt of the former email.

A copy is available upon request.

27. On 4 August 2014, AET (through Willis) gave AXIS notice in writing of further facts which might give rise to a professional indemnity claim against AET, relating to AET's role as trustee for debenture holders in Provident.

Particulars

Email from Kelly Butler of Willis to Robyn Fraser of AXIS dated 4 August 2014.

A copy is available upon request.

28. On 28 August 2014, AET (through Willis) gave AXIS notice in writing of further facts which might give rise to a professional indemnity claim against AET, relating to AET's role as trustee for debenture holders in Provident.

Particulars

Email from Kelly Butler of Willis to Robyn Fraser of AXIS dated 28 August 2014.

A copy is available upon request.

29. On 3 September 2015, AXIS informed AET that:
- (a) exclusion clause 3.16 of the 2011/2012 AXIS policy applied with respect to the Smith proceeding; and
 - (b) indemnity is not available to AET under the 2011/2012 AXIS policy with respect to the Smith proceeding.

Particulars

Letter from John Melville of AXIS to Andrew Dawson of Willis dated 3 September 2015.

A copy is available upon request.

30. Contrary to AXIS' communication pleaded in the previous paragraph:
- (a) on its proper construction, exclusion clause 3.16 of the 2011/2012 AXIS policy does not apply with respect to the Smith proceeding; and
 - (b) AXIS was, and Swiss Re now is, liable to indemnify AET under the 2011/2012 AXIS policy with respect to the Smith proceeding.
31. On and from 3 September 2015 to 12 February 2017, AXIS, and, on and from 13 February 2017, Swiss Re, have declined to grant AET indemnity under the 2011/2012 AXIS policy with respect to the Smith proceeding.

32. By reason of AXIS' and Swiss Re's continuing wrongful declinature of indemnity under the 2011/2012 AXIS policy with respect to the Smith 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 Smith proceeding.

2014/2015 AXIS policy

33. Further or in the alternative to paragraphs 26 to 32 above, if AET is not entitled to indemnity under the 2011/2012 AXIS policy with respect to the Smith proceeding, for the reasons pleaded in paragraphs 34 to 37 below, AET is entitled to indemnity under the 2014/2015 AXIS policy with respect to the Smith proceeding.
34. On 30 November 2015, pursuant to the 2014/2015 AXIS policy, AET (through Willis) notified AXIS of the claim against it in the Smith proceeding.

Particulars

Email from Andrew Dawson of Willis to Heather Ballantyne and Tony Hynes of AXIS dated 30 November 2015.

A copy is available upon request.

35. The prior notification pleaded in paragraph 26 above does not exclude indemnity under the 2014/2015 AXIS policy with respect to the Smith proceeding.

Particulars

Clause 1.6 and 3.10 of the 2014/2015 AXIS policy.

36. On and from:
- (a) 30 November 2015 to 12 February 2017, AXIS and, on and from 13 February 2017, Swiss Re;
 - (c) 30 November 2015 to 31 October 2016, Chubb and, on and from 1 November 2016, CIAL,

have declined to grant AET indemnity under the 2014/2015 AXIS Policy with respect to the Smith proceeding.

37. Contrary to AXIS', Swiss Re's, Chubb's and CIAL's conduct pleaded in the previous paragraph:

- (a) on its proper construction, exclusion clause 3.11 of the 2014/2015 AXIS policy does not apply with respect to the Smith proceeding; and
- (b) AXIS and Chubb were, and Swiss Re and CIAL now are, liable to indemnify AET under the 2014/2015 AXIS policy with respect to the Smith proceeding.

38. By reason of AXIS', Swiss Re's, Chubb's and CIAL's wrongful declinature of indemnity under the 2014/2015 AXIS policy with respect to the Smith proceeding, AET has suffered and is continuing to suffer, or alternatively will suffer, loss and damage.

Particulars of loss

AET has, prior to and since 30 November 2015, incurred costs in the defence of the Smith proceeding.

2011/2012 Liberty policy

38A. On 17 November 2014, AET (through Willis) gave Liberty notice in writing of facts which might give rise to a professional indemnity claim against AET, relating to AET's role as trustee for debenture holders in Provident, pursuant to the 2011/2012 Liberty policy.

Particulars

Email from Kelly Butler of Willis to Christian Manning of Liberty dated 17 November 2014.

A copy is available upon request.

38B. The fact that AET (through Willis) notified Liberty of facts which might give rise to a professional indemnity claim after the expiry of the 2011/2012 Liberty policy does not affect the validity of the claim on the 2011/2012 Liberty policy in circumstances where:

- (a) on 27 June 2012, AET (through Willis) notified AXIS of facts which might give rise to a professional indemnity claim against AET, relating to AET's role as trustee for debenture holders in Provident.

Particulars

AET relies on the particulars to paragraph 26 above.

- (b) the claim in relation to the Smith proceeding arose from the facts notified to AXIS;

- (c) AXIS was, and Swiss Re now is, liable to indemnify AET under the 2011/2012 AXIS policy with respect to the Smith proceeding; and
- (d) pursuant to the 2011/2012 Liberty policy, Liberty was liable to indemnify AET up to the limit of liability under that policy and in excess of the limit of the 2011/2012 AXIS policy in circumstances where AXIS was, and Swiss Re now is, liable to indemnify AET under the 2011/2012 AXIS policy.

Particulars

Clause 1 of the 2011/2012 Liberty policy.

38C. Further or in the alternative to paragraph 38B, the fact that AET (through Willis) notified Liberty of facts which might give rise to a professional indemnity claim after the expiry of the 2011/2012 Liberty policy does not affect the validity of the claim on the 2011/2012 Liberty policy because:

- (a) it was a term of the 2011/2012 Liberty policy that AET give immediate notice in writing to Liberty of any notice given by AET to AXIS under the 2011/2012 AXIS policy;

Particulars

Clause 2.8 of the 2011/2012 Liberty policy.

- (b) AET and/or Willis omitted to give immediate notice in writing to Liberty of the notice given by AET to AXIS pleaded in paragraph 38A above;
- (c) the omission pleaded in paragraph 38C(b) above occurred after the 2011/2012 Liberty policy was entered into;
- (d) the omission pleaded in paragraph 38C(b) above cannot reasonably be regarded as being capable of causing or contributing to a loss in respect of which the 2011/2012 Liberty policy covers; and
- (e) in the premises, Liberty is not entitled to refuse indemnity under the 2011/2012 Liberty policy in respect of the Smith proceeding by reason of the omission pleaded in paragraph 38C(b) above.

Particulars

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

38D. On 14 August 2015, Liberty informed AET that its indicative position was that:

- (a) exclusion clause 3.16 of the 2011/2012 AXIS policy applied with respect to the Smith proceeding; and

- (b) indemnity is not available to AET under the 2011/2012 AXIS policy with respect to the Smith proceeding; and
- (c) therefore, indemnity is not available to AET under the 2011/2012 Liberty policy with respect to the Smith proceeding.

Particulars

Letter from Louise Edmonds of Liberty to AET c/- Willis dated 14 August 2015.

A copy is available upon request.

- 38E. Contrary to Liberty's communication pleaded in the previous paragraph:
- (a) on its proper construction, exclusion clause 3.16 of the 2011/2012 AXIS policy does not apply with respect to the Smith proceeding;
 - (b) AXIS was, and Swiss Re now is, liable to indemnify AET under the 2011/2012 AXIS policy with respect to the Smith proceeding; and
 - (c) therefore, Liberty is liable to indemnify AET under the 2011/2012 Liberty policy with respect to the Smith proceeding, up to the limit of liability under that policy and in excess of the limit of the 2011/2012 AXIS policy.
- 38F. Since 14 August 2015 to date and continuing, Liberty has declined to grant AET indemnity under the 2011/2012 Liberty policy with respect to the Smith proceeding.
- 38G. By reason of Liberty's wrongful declinature of indemnity under the 2011/2012 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 limit of the 2011/2012 AXIS policy, suffer loss and damage.

2014/2015 Liberty policy

- 38H. Further or in the alternative to paragraphs 38A-38G above, if AET is not entitled to indemnity under the 2011/2012 Liberty policy with respect to the Smith proceeding, for the reasons pleaded in paragraphs 38I-38M below, AET is entitled to indemnity under the 2014/2015 Liberty policy with respect to the Smith proceeding.
- 38I. On 30 November 2015, pursuant to the 2014/2015 Liberty policy, AET (through Willis) notified Liberty of the claim against it in the Smith proceeding.

Particulars

Email from Andrew Dawson of Willis to Christian Manning and Louise Edmonds of Liberty dated 30 November 2015.

A copy is available upon request.

- 38J. The prior notification pleaded in paragraph 26 above, does not exclude indemnity under the 2014/2015 Liberty policy with respect to the Smith proceeding.

Particulars

Clause 1.6 and 3.10 of the 2014/2015 AXIS policy incorporated by clause 1.1 of the 2014/2015 Liberty policy.

- 38K. Since 30 November 2015 to date and continuing, Liberty has declined to grant AET indemnity under the 2014/2015 Liberty policy with respect to the Smith proceeding.

Particulars

Letter from Clyde & Co to Corrs Chambers Westgarth dated 22 July 2016.

- 38L. Contrary to Liberty's conduct pleaded in the previous paragraph:
- (a) on its proper construction, exclusion clause 3.11 of the 2014/2015 AXIS policy does not apply with respect to the Smith proceeding;
 - (b) AXIS was, and Swiss Re now is, liable to indemnify AET under the 2014/2015 AXIS policy with respect to the Smith proceeding; and
 - (c) therefore, Liberty is liable to indemnify AET under the 2014/2015 Liberty policy with respect to the Smith proceeding up to the limit of liability under that policy and in excess of the limit of the 2014/2015 AXIS policy.

- 38M. By reason of Liberty's wrongful declinature of indemnity under the 2014/2015 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 limit of the 2014/2015 AXIS policy, suffer loss and damage.

2011/2012 Chubb policy

- 38N. On 17 November 2014, AET (through Willis) gave Chubb notice in writing of facts which might give rise to a professional indemnity claim against AET, relating to AET's role as trustee for debenture holders in Provident, pursuant to the 2011/2012 Chubb policy.

Particulars

Email from Kelly Butler of Willis to Ryan Bloomfield and W Hansen of Chubb dated 17 November 2014.

A copy is available upon request.

38O. The fact that AET (through Willis) notified Chubb of facts which might give rise to a professional indemnity claim after the expiry of the 2011/2012 Chubb policy does not affect the validity of the claim on the 2011/2012 Chubb policy in circumstances where:

- (a) on 27 June 2012, AET (through Willis) notified AXIS of facts which might give rise to a professional indemnity claim against AET, relating to AET's role as trustee for debenture holders in Provident.

Particulars

AET relies on the particulars to paragraph 26 above.

- (b) the claim in relation to the Smith proceeding arose from the facts notified to AXIS;
- (c) AXIS was, and Swiss Re now is, liable to indemnify AET under the 2011/2012 AXIS policy with respect to the Smith proceeding; and
- (d) pursuant to the 2011/2012 Chubb policy, Chubb was, and CIAL now is, liable to indemnify AET up to the limit of liability under that policy and in excess of the limit of the 2011/2012 AXIS policy and the 2011/2012 Liberty Policy in circumstances where AXIS was, and Swiss Re now is, liable to indemnify AET under the 2011/2012 AXIS policy.

Particulars

Clause 1 of the 2011/2012 Chubb policy.

38P. Further or in the alternative to paragraph 38O, the fact that AET (through Willis) notified Chubb of facts which might give rise to a professional indemnity claim after the expiry of the 2011/2012 Chubb policy does not affect the validity of the claim on the 2011/2012 Chubb policy because:

- (a) it was a condition of the 2011/2012 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 2011/2012 AXIS policy;

Particulars

Clause 9 of the 2011/2012 Chubb policy.

- (b) AET and/or Willis omitted to give notice in writing to Chubb as soon as was practicable after giving the notice to AXIS pleaded in paragraph 26 above;
- (c) the omission pleaded in paragraph 38P(b) above occurred after the 2011/2012 Chubb policy was entered into;

- (d) the omission pleaded in paragraph 38P(b) above cannot reasonably be regarded as being capable of causing or contributing to a loss in respect of which the 2011/2012 Chubb policy covers; and
- (e) in the premises, CIAL is not entitled to refuse indemnity under the 2011/2012 Chubb policy in respect of the Smith proceeding by reason of the omission pleaded in paragraph 38P(b) above.

Particulars

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

38Q. On 14 August 2015, Chubb informed AET that its present view was that:

- (a) exclusion clause 3.16 of the 2011/2012 AXIS policy applied with respect to the Smith proceeding;
- (b) indemnity is not available to AET under the 2011/2012 AXIS policy with respect to the Smith proceeding; and
- (c) therefore, indemnity is not available to AET under the 2011/2012 Chubb policy with respect to the Smith proceeding.

Particulars

Letter from Belinda Thatcher of Chubb to Andrew Dawson and Kelly Buller of Willis dated 14 August 2015.

A copy is available upon request.

38R. Contrary to Chubb's communication pleaded in the previous paragraph:

- (a) on its proper construction, exclusion clause 3.16 of the 2011/2012 AXIS policy does not apply with respect to the Smith proceeding;
- (b) AXIS was, and Swiss Re now is, liable to indemnify AET under the 2011/2012 AXIS policy with respect to the Smith proceeding; and
- (c) therefore, Chubb was, and CIAL now is, liable to indemnify AET under the 2011/2012 Chubb policy with respect to the Smith proceeding up to the limit of liability under that policy and in excess of the limits of the 2011/2012 AXIS policy and the 2011/2012 Liberty policy.

38S. On and from 14 August 2015 to 31 October 2016, Chubb (and, on and after 1 November 2016, CIAL) has declined to grant AET indemnity under the 2011/2012 Chubb policy with respect to the Smith proceeding.

38T. By reason of Chubb's and, on and after 1 November 2016, CIAL's wrongful declinature of indemnity under the 2011/2012 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 2011/2012 AXIS policy and the 2011/2012 Liberty policy suffer loss and damage.

2014/2015 Chubb/AXIS policy

- 38U. Further or in the alternative to paragraphs 26 to 32 and 38N to 38T above, if AET is not entitled to indemnity under the 2011/2012 Chubb policy with respect to the Smith proceeding, for the reasons pleaded in paragraphs 38V to 38Y below, AET is entitled to indemnity under the 2014/2015 Chubb/AXIS policy with respect to the Smith proceeding,
- 38V. On 30 November 2015, AET (through Willis) notified Chubb and AXIS of a professional indemnity claim against it in the Smith proceeding, pursuant to the 2014/2015 Chubb/AXIS policy.

Particulars

Email from Andrew Dawson of Willis to Dev Jhanji, Belinda Thatcher, Alison Percival and Joleene Samson of Chubb and Heather Ballantyne and Tony Hynes of AXIS dated 30 November 2015.

A copy is available upon request.

- 38W. The prior notification pleaded in paragraph 26 above does not exclude indemnity under the 2014/2015 Chubb/AXIS policy with respect to the Smith proceeding.

Particulars

Clause 1.6 and 3.10 of the 2014/2015 AXIS policy incorporated by clause 1 of the 2014/2015 Chubb/AXIS policy.

- 38X. On and from:
- (a) 30 November 2015 to 31 October 2016, Chubb (and, on and after 1 November 2016, CIAL); and
 - (b) 30 November 2015 to 12 February 2017, AXIS (and, on and after 13 February 2017, Swiss Re),

have declined to grant AET indemnity under the 2014/2015 Chubb/AXIS policy with respect to the Smith proceeding.

Particulars

Letter from Clyde & Co to Corrs Chambers Westgarth dated 22 July 2016.

Letter from Wotton + Kearney to Corrs Chambers Westgarth dated 4 July 2016.

- 38Y. Contrary to Chubb's (and, on and after 1 November 2016, CIAL's) and AXIS's (and, on and after 13 February 2017, Swiss Re's) conduct pleaded in the previous paragraph:
- (a) on its proper construction, exclusion clause 3.11 of the 2014/2015 AXIS policy does not apply with respect to the Smith proceeding;
 - (b) AXIS was, and Swiss Re now is, liable to indemnify AET under the 2014/2015 AXIS policy with respect to the Smith proceeding; and
 - (c) therefore, Chubb and AXIS were, and CIAL and Swiss Re now are, liable to indemnify AET under the 2014/2015 Chubb/AXIS policy with respect to the Smith proceeding in the proportion particularised at paragraph 17 above up to the limits of liability under that policy and in excess of the limit of the 2014/2015 AXIS policy and the 2014/2015 Liberty policy.
- 38Z. By reason of Chubb's (and, on and after 1 November 2016, CIAL's) and AXIS's (and, on and after 13 February 2017, Swiss Re's) wrongful declinature of indemnity under the 2014/2015 Chubb/AXIS 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 2014/2015 AXIS policy and the 2014/2015 Liberty policy, suffer loss and damage.

Alternative basis of claim under s. 54 of the *Insurance Contracts Act 1984 (Cth)*

39. Further or in the alternative, if, contrary to the allegations above, exclusion clause 3.16 of the 2011/2012 AXIS policy applies in relation to the claim against AET in the Smith proceeding, by reason of the matters pleaded in paragraphs 40 to 43 below, neither Swiss Re nor the other insurers referred to in paragraphs 11 and 15 above may refuse to indemnify AET with respect to the Smith proceeding in reliance upon that exclusion clause.
40. If, which is denied, on its proper construction, exclusion 3.16 of the 2011/2012 AXIS Policy applies with respect to the Smith proceeding, then the effect of that contract of insurance, and of the contracts of insurance referred to in paragraphs 11 and 15 above, is that the insurers of those contracts may refuse to pay AET for any claim directly or indirectly arising from the insolvency or external administration of any issuer of unlisted and/or unrated debentures.

Particulars

Exclusion clause 3.16 of the 2011/2012 AXIS policy;

41. Provident omitted to obtain a rating or a listing for the debentures it issued.
42. The omission pleaded in paragraph 41 above occurred after the 2011/2012 AXIS policy was entered into.
43. The omission pleaded in paragraph 41 above could not reasonably be regarded as being capable of causing or contributing to a loss in respect of which the aforesaid policies provide cover.
44. In the premises, Swiss Re may not refuse to pay AET's claim with respect to the Smith proceeding by reason only of the fact that the debentures issued by Provident were not rated or listed.

Particulars

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

- 44A. If, by reason of the matters pleaded in paragraphs 39 to 44 above, Swiss Re may not refuse to pay AET's claim with respect to the Smith proceeding by reason only of the fact that the debentures issued by Provident were not rated or listed, it follows that:
 - (a) Liberty may not refuse to pay AET's claim under the 2011/2012 Liberty policy with respect to the Smith proceeding by reason only of the fact that the debentures issued by Provident were not rated or listed; and
 - (b) CIAL may not refuse to pay AET's claim under the 2011/2012 Chubb policy with respect to the Smith proceeding by reason only of the fact that the debentures issued by Provident were not rated or listed.

Claims against Willis

Claim in respect of all policies

45. Further or in the alternative, if:
 - (a) exclusion clause 3.16 of the 2011/2012 AXIS policy and/or exclusion clause 3.11 of the 2014/2015 AXIS policy operate to allow Swiss Re, Liberty and/or CIAL to decline to indemnify AET with respect to the Smith proceeding; or
 - (b) the timing of the notifications pleaded in paragraphs 38A and 38N above operate to allow either or both of Liberty and CIAL to decline to indemnify AET with respect to the Smith proceeding;

then AET makes the following claims against Willis.

46. On or about 25 August 2010, IOOF, IOOF's subsidiaries including AET, and Willis entered into an agreement pursuant to which Willis agreed to provide professional "financial lines" insurance broking services to IOOF and its subsidiaries for a fee (**Willis Retainer**).

Particulars

The terms of the Willis Retainer were partly express and partly implied.

To the extent that the terms of the Willis Retainer were express, they were in writing and they were oral and ~~were~~ comprised of the following documents:

- (a) IOOF Financial Lines Invitation to Tender dated 17 May 2010;
- (b) Willis Tender Response dated 9 July 2010;
- (c) email from John Grant of Willis to Gary Riordan of IOOF dated 12 August 2010;
- (ed) email ~~from~~ Gary Riordan of IOOF to John Grant of Willis dated 25 August 2010;
- (e) telephone conversation between Gary Riordan of IOOF and John Grant of Willis on 25 August 2010.

Copies of these documents are available upon request.

To the extent that a term of the Willis Retainer was implied, the implication arises by law.

47. The Willis Retainer included the following express terms:
- (a) Willis would regularly review and evaluate IOOF and its subsidiaries' exposure to insured and insurable risks against the level of coverage provided by IOOF's insurance policies;
 - (b) Willis would negotiate effective insurance coverage, including professional indemnity insurance coverage, for IOOF and its subsidiaries;
 - (c) Willis would procure insurance, including professional indemnity insurance, for IOOF and its subsidiaries which was, as far as possible, fit for purpose;
 - (d) Willis would evaluate IOOF's current insurance coverage against the insurable risks identified through the insurance risk assessment process;
 - (e) Willis would assist in the effective management of claims and potential claims against IOOF's insurance policies; and

- (f) Willis would manage any claims or potential claims against IOOF's insurance policies in a quick and professional manner.

Particulars

Financial Lines Invitation to Tender dated 17 May 2010;

Willis Tender Response dated 9 July 2010;

Email from John Grant of Willis to Gary Riordan of IOOF dated 12 August 2010;

Email from Gary Riordan of IOOF to John Grant of Willis dated 25 August 2010;

Telephone conversation between Gary Riordan of IOOF and John Grant of Willis on 25 August 2010.

- 47A. On or about 7 November 2012, IOOF, IOOF's subsidiaries including AET, and Willis extended the Willis Retainer to 2015.

Particulars

Letter from Willis to IOOF dated 7 November 2012.

Letter from IOOF to Willis dated 7 November 2012.

48. The Willis Retainer included an implied term that Willis would exercise reasonable care, skill and diligence in providing insurance broking, insurance advisory and claims management services to IOOF and its subsidiaries

Particulars

The term is implied by law.

49. At all material times Willis owed IOOF and its subsidiaries, including AET, a duty of care to exercise reasonable care, skill and diligence in providing insurance broking, insurance advisory and claims management services to IOOF and its subsidiaries (the **Willis Duty of Care**).
50. Pursuant to the Willis Retainer, Willis negotiated and procured on behalf of IOOF and its subsidiaries, inter alia, the following professional indemnity policies of insurance:
- (a) the 2011/2012 AXIS policy;
 - (b) the 2011/2012 Liberty policy;
 - (c) the 2011/2012 Chubb policy;
 - (d) the 2014/2015 AXIS policy;
 - (e) the 2014/2015 Liberty policy; and

- (f) the 2014/2015 Chubb/AXIS policy.
51. Each of:
- (a) the 2011/2012 Liberty policy and the 2011/2012 Chubb policy was subject to the exclusions contained in the 2011/2012 AXIS policy, including the "Unlisted, Unrated Debenture Exclusion" in exclusion clause 3.16 of that policy; and
 - (b) the 2014/2015 Liberty policy and the 2014/2015 Chubb/AXIS policy was subject to the exclusions contained in the 2014/2015 AXIS policy, including the "Unlisted, Unrated Debenture Exclusion" in exclusion clause 3.11 of that policy.
52. Each of AXIS (and, on and after 13 February 2017, Swiss Re), Liberty and Chubb (and, on and after 1 November 2016, CIAL) has declined to grant indemnity to AET with respect to the Smith proceeding pursuant to those of the following professional indemnity policies of insurance to which they are party:
- (a) the 2011/2012 AXIS policy;
 - (b) the 2011/2012 Liberty policy;
 - (c) the 2011/2012 Chubb policy;
 - (d) the 2014/2015 AXIS policy;
 - (e) the 2014/2015 Liberty policy; and
 - (f) the 2014/2015 Chubb/AXIS policy,
- and, in doing so, has relied upon the "Unlisted, Unrated Debenture Exclusion" in exclusion clause 3.16 of the 2011/2012 AXIS policy and/or exclusion clause 3.11 of the 2014/2015 AXIS Policy.
53. ~~In breach of the express terms of the Willis Retainer pleaded in paragraph 47, Willis failed, on and from 25 August 2010, to:~~
- ~~(a) perform any, or any adequate, review and evaluation of AET and IOOF's exposure to insured and insurable risks against the level of coverage provided by IOOF's insurance policies;~~
 - ~~(a) negotiate insurance coverage, including professional indemnity insurance coverage for AET that was effective in obtaining coverage for liabilities incurred in the ordinary course of its business;~~
 - ~~(b) procure insurance, including professional indemnity insurance for AET, that was, as far as possible, fit for purpose;~~

- ~~(c) evaluate, or properly evaluate, AET's current insurance coverage against the insurable risks identified through the insurance risk assessment process;~~
- ~~(d) give notice to Liberty under the 2011/2012 Liberty policy as soon as practicable that the notice pleaded in paragraph 26 above had been given to AXIS under the 2011/2012 AXIS policy; and~~
~~give notice to Chubb under the 2011/2012 Chubb policy as soon as practicable that the notice pleaded in paragraph 26 above had been given to AXIS under the 2011/2012 AXIS policy.~~

54. In breach of the express terms of the Willis Retainer pleaded in paragraph 47 and further or in the alternative in breach of the implied term pleaded in paragraph 48 and the duty of care pleaded in paragraph 49, Willis failed, on and from 25 August 2010, to:

- (a) arrange or recommend professional indemnity insurance cover, or other alternative cover, for AET that was sufficiently adapted to the nature and extent of its business and its commercial and legal risks;
- (b) exercise reasonable care and skill in negotiating and effecting insurance coverage for AET that did not include exclusions in the nature of the "Unlisted, Unrated Debenture Exclusion" or alternatively insurance coverage which exempted AET's operations from exclusions in the nature of the "Unlisted, Unrated Debenture Exclusion";
- (c) perform any, or any adequate, risk assessment of AET's insurance risks taking into account the nature of its operations, including its role as trustee for debenture holders holding unlisted and/or unrated debentures;
- (d) advise IOOF and/or AET of the effect, or possible effect, that the "Unlisted, Unrated Debenture Exclusion" would have in relation to its insurance coverage for liabilities arising from its role as the trustee for debenture holders holding unlisted and/or unrated debentures and promissory notes; and
- (e) advise IOOF and/or AET to obtain and maintain an adequate level of professional indemnity insurance coverage for liabilities arising from its role as the trustee for debenture holders holding unlisted and/or unrated debentures and promissory notes;
- (f) give notice to Liberty under the 2011/2012 Liberty policy as soon as practicable that the notice pleaded in paragraph 26 above had been given to AXIS under the 2011/2012 AXIS policy; and

- (g) give notice to Chubb under the 2011/2012 Chubb policy as soon as practicable that the notice pleaded in paragraph 26 above had been given to AXIS under the 2011/2012 AXIS policy.
- 54A. In breach of the implied term pleaded in paragraph 48 and the duty of care pleaded in paragraph 49, Willis failed to:
- (a) inform IOOF and/or AET that AXIS had offered terms for professional indemnity insurance coverage for the period from 4pm on 30 November 2014 to 4pm on 30 November 2015 which did not include the "Unlisted, Unrated Debenture Exclusion"; and
- (b) seek instructions from IOOF and/or AET in relation to the offer pleaded in subparagraph (a).

Particulars

Letter from Leia de Closey of AXIS to Andrew Dawson of Willis Australia dated 11 November 2014.

A copy is available upon request.

55. The risk that AET would, by reason of the operation of the "Unlisted, Unrated Debenture Exclusion", be exposed to harm in the form of an uninsured liability arising from its role as the trustee for debenture holders holding unlisted and/or unrated debentures and promissory notes:
- (a) was foreseeable;
- (b) not insignificant; and
- (c) in the circumstances, a risk in relation to which a reasonable person in the position of Willis would have taken the precautions pleaded in paragraph 54.

Particulars

Section 5B(1) of the *Civil Liability Act 2002* (NSW).

- 55A. The risk that AET would, by reason of the failures pleaded in paragraphs 53(a), 53(b), 54(a) and 54(b) above, be exposed to harm in the form of an inability to claim indemnity under the 2011/2012 Liberty policy and the 2011/2012 Chubb policy in respect of claims arising from the facts notified to AXIS:
- (a) was foreseeable;
- (b) not insignificant; and

- (c) in the circumstances, a risk in relation to which a reasonable person in the position of Willis would have taken the precautions pleaded in paragraph 54.

Particulars

Section 5B(1) of the *Civil Liability Act 2002* (NSW).

56. By reason of the breaches pleaded in paragraphs 53, 54 and 54A, AET has suffered and is continuing to suffer, or alternatively will suffer, loss and damage.

Particulars

In relation to the breaches pleaded in paragraphs 53, 54 and 54A above, AET relies on s. 5D of the *Civil Liability Act 2002* (NSW).

AET entered into the said professional indemnity policies of insurance containing the "Unlisted, Unrated Debenture Exclusion" in exclusion clause 3.16 of the 2011/2012 AXIS policy and/or exclusion clause 3.11 of the 2014/2015 AXIS Policy, when it would not otherwise have done so.

Alternatively, AET lost the valuable chance to obtain professional indemnity policies of insurance which did not contain the "Unlisted, Unrated Debenture Exclusion" in exclusion clause 3.16 of the 2011/2012 AXIS policy and/or exclusion clause 3.11 of the 2014/2015 AXIS Policy, or alternatively professional indemnity policies of insurance which exempted AET's operations from the "Unlisted, Unrated Debenture Exclusion".

AET has, since 10 June 2015, incurred costs in defence of the Smith proceeding in relation to which it has not been granted indemnity under any of the said professional indemnity policies of insurance.

AET has incurred the cost of prosecuting the first cross-claim against AXIS/Swiss Re, Liberty and Chubb/CIAL.

In relation to the breaches pleaded in paragraphs 53(a), 53, 54(a) and 54(b) above, an inability to claim indemnity under the 2011/2012 Liberty policy and the 2011/2012 Chubb policy.

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 statement of cross-claim has reasonable prospects of success.

I have advised the cross-claimant that court fees may be payable during these proceedings.

These fees may include a hearing allocation fee.

Signature

Cory

Capacity

Brad Woodhouse

BY HIS EMPLOYED SOLICITOR

Date of signature

*27/8/18**CATHERINE OLBENBURG***NOTICE TO CROSS-DEFENDANT**

If you do not file a defence you will be bound by any judgment or order in the proceedings so far as it is relevant to this cross-claim.

HOW TO RESPOND

Please read this statement of cross-claim very carefully. If you have any trouble understanding it or require assistance on how to respond to the cross-claim you should get legal advice as soon as possible.

You can get further information about what you need to do to respond to the claim from:

- A legal practitioner.
- LawAccess NSW on 1300 888 529 or at www.lawaccess.nsw.gov.au.
- The court registry for limited procedural information.

You can respond in one of the following ways:

- 1 If you intend to dispute the cross-claim or part of the cross-claim,** by filing a defence and/or making a cross-claim.
- 2 If money is claimed, and you believe you owe the money claimed,** by:
 - Paying the cross-claimant all of the money and interest claimed.
 - Filing an acknowledgement of the claim.
 - Applying to the court for further time to pay the claim.
- 3 If money is claimed, and you believe you owe part of the money claimed,** by:
 - Paying the cross-claimant that part of the money that is claimed.
 - Filing a defence in relation to the part that you do not believe is owed.

Court forms are available on the UCPR website at <http://www.ucprforms.justice.nsw.gov.au/> or at any NSW court registry.

REGISTRY ADDRESS

Street address

184 Phillip Street, Sydney

Postal address

Supreme Court of NSW, GPO Box 3, Sydney, 2001

Telephone

(02) 9230 8628

[on separate page]

AFFIDAVIT VERIFYING

Name GARY WILLIAM RIORDAN
Address LEVEL 6, 161 COLLINS STREET MELBOURNE
Occupation GENERAL COUNSEL
Date 24 AUGUST 2018

I say on oath / ~~affirm~~:

- 1 I am the General Counsel of the first cross-claimant and the second cross-claimant and am authorised to make this affidavit on their behalf.
- 2 I believe that the allegations of fact in the statement of cross-claim are true.

SWORN / ~~AFFIRMED~~ at MELBOURNE

Signature of deponent



Name of witness

Mark Julian Mittelman
IOOF Holdings Limited
ABN 49 100 103 722

Address of witness

Level 6, 161 Collins Street
Melbourne VICTORIA 3000

Capacity of witness

~~Justice of the Peace~~ / Solicitor

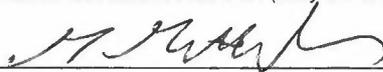
An Australian Legal Practitioner within the
Legal Profession Uniform Law (Victoria)

And as a witness, I certify the following matters concerning the person named in 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.]

PARTY DETAILS

A list of parties must be filed and served with this statement of cross-claim.

PARTIES TO THIS CROSS-CLAIM

Cross-claimants

Australian Executor Trustees Limited,
First cross-claimant

IOOF Holdings Limited, Second cross-
claimant

Cross-defendants

Swiss Re International SE, First cross-
defendant

Willis Australia Limited, Second cross-
defendant

Liberty Mutual Insurance Company, Third
cross-defendant

Chubb Insurance Australia Limited, Fourth
cross-defendant

DETAILS ABOUT CROSS-DEFENDANTS THAT ARE NEW PARTIES

First cross-defendant

Name **Swiss Re International SE**
Address Tower Two International Towers Sydney
Level 36, 200 Barangaroo Avenue

Sydney NSW 2000

Second cross-defendant

Name **Willis Australia Limited**
Address Level 16, 123 Pitt Street
Sydney NSW 2000

Third cross-defendant

Name **Liberty Mutual Insurance Company**
Address c/- Ashurst Australia
Level 26, 181 William Street
Melbourne Victoria 3000

Fourth cross-defendant

Name **Chubb Insurance Australia Limited**
Address Level 29, 2 Park Street

Sydney NSW 2000