

Form 10 (version 6)  
UCPR 9.1This document was eFiled  
on 02 Jul 2021 . Final  
acceptance has been  
given.Principal Registrar &  
Chief Executive Officer**FIFTH CROSS-CLAIM  
CROSS-SUMMONS****COURT DETAILS**

|             |                      |
|-------------|----------------------|
| Court       | Supreme Court of NSW |
| Division    | Equity               |
| List        | Commercial           |
| Registry    | Sydney               |
| Case number | 2018/00076580        |

**TITLE OF PROCEEDINGS**

|                      |   |
|----------------------|---|
| First plaintiff      | <b>Giabal Pty Ltd (ACN 009 863 807)</b> |
| Second plaintiff     | <b>Geoffry Underwood</b>                |
| Third defendant      | <b>Wayne Leonard Chapman</b>            |
| Number of defendants | 11                                      |

**TITLE OF THIS CROSS-CLAIM**

|                        |  |
|------------------------|--|
| First cross-claimant   | <b>Robin Gray</b>  |
| First cross-defendant  | <b>Catlin Australia Pty Limited (ACN 108 319 786) for and on behalf of S.J. Catlin &amp; Others, Syndicate 2003 at Lloyd's</b> |
| Second cross-defendant | <b>Chubb Insurance Australia Limited (ACN 001 642 020)</b>   |

**FILING DETAILS**

|                                |   |
|--------------------------------|---|
| Filed for                      | Robin Gray, Eighth Defendant / First Cross-Claimant |
| Filed in relation to           | Fifth Cross-Claim                                   |
| Legal representative           | Caroline Goulden, Arnold Bloch Leibler              |
| Legal representative reference |   |
| Contact name and telephone     | Caroline Goulden (03 9229 9786)                     |
| Contact email                  | cgoulden@abl.com.au                                 |

**HEARING DETAILS**

|                                 |                         |
|---------------------------------|-------------------------|
| This cross-summons is listed at | 03 Sep 2021<br>09:45 AM |
|---------------------------------|-------------------------|

[on separate page]

## RELIEF CLAIMED

- 1 A declaration that the First Cross-Defendant (**Catlin**) is liable to the First Cross-Claimant and Eighth Defendant (**Eighth Defendant**) up to the 'Limit' of indemnity under the contract of insurance described as 'Financial and Professional Risks Excess insurance' with policy number 923424 (**Catlin Policy**) in respect of:
  - a. any liability of the Eighth Defendant to the Plaintiffs in these proceedings to pay damages, compensation, interest and costs;
  - b. reasonable fees, costs and expenses incurred by the Eighth Defendant in defending the Plaintiffs' allegations in these proceedings.
- 2 A declaration that, subject to the exhaustion of the 'Limit of Liability' under each of the 'Underlying Policies', the Second Cross-Defendant (**Chubb**) is liable to the Eighth Defendant up to the 'Limit of Liability in the aggregate' under the contract of insurance described as 'Elite Excess Investment Management Insurance' with policy number 02CH017094 (**Chubb Policy**) in respect of:
  - a. any liability of the Eighth Defendant to the Plaintiffs in these proceedings to pay damages, compensation, interest and costs;
  - b. reasonable fees, costs and expenses incurred by the Eighth Defendant in defending the Plaintiffs' allegations in these proceedings.
- 3 An order that Catlin pay to the Eighth Defendant:
  - a. the amount of the Eighth Defendant's liability to the Plaintiffs and Group Members, if any and as determined in this proceeding; and
  - b. the Eighth Defendant's reasonable fees, costs and expenses of defending the Plaintiffs' allegations in this proceeding,  
  
up to the 'Limit' of indemnity under the Catlin Policy.
- 4 An order that, subject to the exhaustion of the 'Limit of Liability' under each of the 'Underlying Policies', Chubb pay to the Eighth Defendant :
  - a. the amount of the Eighth Defendant's liability to the Plaintiffs and Group Members, if any and as determined in this proceeding; and
  - b. the Eighth Defendant's reasonable fees, costs and expenses of defending the Plaintiffs' allegations in this proceeding,  
  
up to 'Limit of Liability in the aggregate' under the Chubb Policy.

- 5 Interest.
- 6 Costs.
- 7 Such further order as the Court considers appropriate.

### 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 cross-summons 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



Capacity

Solicitor

Date of signature

1 July 2021

### NOTICE TO CROSS-DEFENDANT

If your solicitor, barrister or you do not attend the hearing, the court may give judgment or make orders against you. The court may also make orders for the payment of costs.

If you are a new party, or an existing party who has not already filed an originating process or appearance, before you can appear before the court you must file at the court an appearance in the approved form.

### HOW TO RESPOND

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

You can get further information about what you need to do to respond to the cross-summons from:

- A legal practitioner.
- LawAccess NSW on 1300 888 529 or at [www.lawaccess.nsw.gov.au](http://www.lawaccess.nsw.gov.au).
- The court registry for limited procedural information.

Court forms are available on the UCPR website at [www.ucprforms.nsw.gov.au](http://www.ucprforms.nsw.gov.au) or at any NSW court registry.

**REGISTRY ADDRESS**

|                |  |
|----------------|--|
| Street address | 184 Phillip Street, Sydney, NSW 2000             |
| Postal address | Supreme Court of NSW, GPO Box 3, Sydney NSW 2001 |
| Telephone      | 1300 679 272                                     |

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## **PARTY DETAILS**

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

### **PARTIES TO THIS CROSS-CLAIM**

#### **Cross-claimant**

**Robin Gray**  
First Cross-Claimant

#### **Cross-defendants**

**Catlin Australia Pty Limited (ACN 108 319 786), for and on behalf of S.J. Catlin & Others, Syndicate 2003 at Lloyds**  
First Cross-Defendant

**Chubb Insurance Australia Limited (ACN 001 642 020)**  
Second Cross-Defendant



Principal Registrar &  
Chief Executive Officer



## FIFTH CROSS-CLAIM COMMERCIAL LIST CROSS-CLAIM STATEMENT

### COURT DETAILS

|             |                      |
|-------------|----------------------|
| Court       | Supreme Court of NSW |
| Division    | Equity               |
| List        | Commercial           |
| Registry    | Sydney               |
| Case number | 2018/00076580        |

### TITLE OF PROCEEDINGS

|                      |   |
|----------------------|---|
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### TITLE OF THIS CROSS-CLAIM

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| First cross-defendant  | <b>Catlin Australia Pty Limited (ACN 108 319 786) for and on behalf of S.J. Catlin &amp; Others, Syndicate 2003 at Lloyd's</b> |
| Second cross-defendant | <b>Chubb Insurance Australia Limited (ACN 001 642 020)</b>   |

### FILING DETAILS

|                                |   |
|--------------------------------|---|
| Filed for                      | Robin Gray, Eighth Defendant / First Cross-Claimant |
| Filed in relation to           | Fifth Cross-Claim                                   |
| Legal representative           | Caroline Goulden, Arnold Bloch Leibler              |
| Legal representative reference |   |
| Contact name and telephone     | Caroline Goulden (03 9229 9786)                     |
| Contact email                  | cgoulden@abl.com.au                                 |

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## A. NATURE OF THE DISPUTE

- 1 The Cross-Claimant is the Eighth Defendant (**Eighth Defendant**) in the proceeding.
- 2 The proceeding is commenced as a representative proceeding under Part 10 of the *Civil Procedure Act 2005* (NSW) by the Plaintiffs on behalf of themselves and other persons (**Group Members**).
- 3 The Plaintiffs allege, amongst other things, that the Eighth Defendant breached his duties as a director of Gunns Plantations Limited (ACN 091 232 209) (in Liquidation) (Receivers and Managers Appointed) (**GPL**) and thereby caused the Plaintiffs loss. The Eighth Defendant denies the Plaintiffs' claims.
- 4 As at the date the proceeding was commenced, the First Defendant was GPL and the Second Defendant was Gunns Limited (ACN009478148) (in Liquidation) (Receivers and Managers Appointed) (**Gunns Ltd**). Leave was granted for the commencement and maintenance of the proceedings against those entities pursuant to s 500 of the *Corporations Act 2001* (Cth) (**Act**) on 13 April 2018. On 4 December 2019, that leave was revoked due to the exhaustion of funds under a primary policy of insurance that had been used to defend the proceedings for the benefit of GPL, Gunns Ltd, the Eighth Defendant and other defendants.
- 5 The first excess layer insurer, the First Cross-Defendant (**Catlin**) and another excess layer insurer, the Second Cross-Defendant (**Chubb**) have denied indemnity to the Eighth Defendant in respect of the Plaintiffs' claims.
- 6 In the Further Amended Commercial List Statement (**Plaintiffs' Contentions**), the Plaintiffs challenge those denials of indemnity pursuant to the *Civil Liability (Third Party Claims Against Insurers) Act 2017* (NSW) and seek to recover directly from Catlin and Chubb the loss they claim to have suffered.
- 7 By this Cross-Claim, the Eighth Defendant also challenges the denials of indemnity, and seeks to recover from Catlin and Chubb his reasonable fees, costs and expenses of defending the claims made against him by the Plaintiffs, and the amount of his liability (if any) to pay to the Plaintiffs damages, compensation, interest and/or costs.

## B. ISSUES LIKELY TO ARISE

- 1 Whether the matters pleaded by the Plaintiffs against the Eighth Defendant constitute a 'Claim' for one or more 'Wrongful Managerial Acts' within the meaning of the Primary IMI Policy.

## C. CROSS-CLAIMANT'S CONTENTIONS

### Parties

- 1 For the purposes of this Cross-Claim Statement only, the Eighth Defendant refers to and repeats paragraphs 1 and 9 of the Plaintiffs' Contentions.
- 2 Catlin was at all material times:
  - a. a company registered pursuant to the Act and capable of being sued in its own name; and
  - b. the coverholder in respect of a contract of insurance described as 'Financial and Professional Risks Excess insurance' with policy number 923424 (**Catlin Policy**).
- 3 Chubb was at all material times:
  - a. a company registered pursuant to the Act and capable of being sued in its own name; and
  - b. the insurer under a contract of insurance described as 'ACE Elite Excess Investment Management Insurance' with policy number 02CH017094.

### Primary IMI Policy

- 4 GPL and AIG Australia Limited (formerly known as Chartis Australia Insurance Ltd) (**Chartis**) are parties to a contract of liability insurance described as 'Investment Management Insurance' with policy number 107092 (**Primary IMI Policy**).

### Particulars

The Primary IMI Policy comprises a Schedule, policy wording, 15 Endorsements and bears a 'Date of Policy Issuance' of 6 February 2012 and a 'Policy Period' of 20 November 2011 to 30 November 2012.

- 5 The Primary IMI Policy is the primary layer of investment management insurance effected on behalf of GPL for the period 30 November 2011 to 30 November 2012 and included:
  - a. a 'Limit of Liability' of \$2.5 million;
  - b. a 'Special Excess Limit' of \$1 million per 'Non-Executive Director'; and
  - c. a 'Retention' for a 'Non-US Claim/Direct Financial Loss' of \$250,000.
- 6 The Primary IMI Policy relevantly provided for the following cover:



- a. cover for 'Investment Manager Professional Civil Liability' whereby the Insurer will (i) pay the Loss of any Insured Person; and (ii) reimburse any Insured Entity for any Loss it pays on its own behalf or on behalf of an Insured Person, which arises out of a Claim first made during the Policy Period for a Wrongful Professional Act and notified to the Insurer as soon as practicable during the Policy Period: cl. 1.1 of the policy wording;
- b. cover for 'Fund Professional Civil Liability and Management Liability' whereby the Insurer will (i) pay the Loss of any Insured Person; and (ii) reimburse any Fund for any Loss it pays on its own behalf or on behalf of an 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: cl. 1.2 of the policy wording;
- c. cover for 'Investment Management Liability' whereby the Insurer will (i) pay the Loss of any Insured Person; and (ii) reimburse any Insured Entity for any Loss it pays on its own behalf or on behalf of an Insured Person which arises out of a Claim first made during the Policy Period for a Wrongful Managerial Act and notified to the Insurer as soon as practicable during the Policy Period: cl 1.3 of the policy wording.

### **Particulars**

The terms 'Insurer', 'Loss', 'Insured Person', 'Insured Entity', 'Claim', 'Policy Period', 'Wrongful Professional Act', 'Fund', 'Wrongful Managerial Act' are defined in the Primary IMI Policy. The Eighth Defendant refers to those definitions as if they were set out in this Cross-Claim Statement in full.

- 7 The Eighth Defendant is an 'Insured Person' and an 'Insured' under the Primary IMI Policy.
- 8 The matters pleaded by the Plaintiffs against the Eighth Defendant in paragraphs 69, 82 – 83B, 84, 90B – 94A, 102 – 104 of the Plaintiffs' Contentions constitute a 'Claim' for one or more 'Wrongful Managerial Acts' within the meaning of the Primary IMI Policy.

### **Catlin Policy**

- 9 By their agent, Catlin, the members of S.J. Catlin & Others, Syndicate 2003 at Lloyds entered into the Catlin Policy.

### **Particulars**

The Catlin Policy comprises a Schedule, policy wording, and the Proposal (which is expressly incorporated into the Catlin Policy by clause 1 of the policy) and bears a certificate date of 1 February 2012 and a 'Period of Insurance' from 30 November 2011 to 30 November 2012.

- 10 The Catlin Policy is the first excess layer of investment management insurance effected on behalf of GPL with a 'Limit' of \$10 million.
- 11 It is a term of the Catlin Policy that the Insurer will indemnify an Insured against his legal liability to pay damages or compensation for and/or arising out of any event covered by the Underlying Policies and in the manner and to the extent stated in the Catlin Policy.

#### **Particulars**

Clause 1 of the Catlin Policy.

The terms 'Insurer', 'Insured' and 'Underlying Policies' are defined in the Catlin Policy and the Eighth Defendant refers to those definitions as if set out in full in this Cross-Claim Statement.

- 12 The Primary IMI Policy is an 'Underlying Policy' within the meaning of the Catlin Policy.
- 13 The Eighth Defendant is an 'Insured' within the meaning of the Catlin Policy.

#### **Chubb Policy**

- 14 GPL and Chubb are parties to the Chubb Policy.

#### **Particulars**

The Chubb Policy comprises a Schedule, Endorsement and Policy Wording and the Policy Period is from 30 November 2011 to 30 November 2012.

- 15 The Chubb Policy included a 'Limit of Liability in the aggregate' of \$2.5 million.
- 16 It was a term of the Chubb Policy that:
- a. Chubb would provide insurance coverage to the Insureds during the Policy Period up to the Limit of Liability excess of the Underlying Limit: cl 1.1.
  - b. the Chubb Policy was subject to the same terms, conditions and limitations as contained in the Primary Policy and that in no event would the Chubb Policy

provide cover that was broader than would be provided under the Underlying Policies: cl. 1.3.

### Particulars

Clauses 1.1 and 1.3 of the Chubb Policy.

The terms 'Insureds', 'Policy Period', 'Limit of Liability', 'Primary Policy' and 'Underlying Policies' are defined in the Chubb Policy and the Eighth Defendant refers to those definitions as if set out in full in this Cross-Claim Statement.

17 The Primary IMI Policy is the 'Primary Policy' under the Chubb Policy.

18 The Eighth Defendant is an 'Insured' under the Chubb Policy.

19 By reason of:

- a. the terms of the Primary IMI Policy; and
- b. the matters pleaded in paragraph 8 above,

if in these proceedings, the Plaintiffs and Group Members obtain orders against the Eighth Defendant for compensation, damages, interest and costs, then such relief will be 'Loss' resulting from one or more 'Wrongful Managerial Acts' within the meaning of the Primary IMI Policy.

20 By reason of:

- a. the terms of the Primary IMI Policy; and
- b. the matters pleaded in paragraph 8 above,

the reasonable fees, costs and expenses incurred by the Eighth Defendant in defending the Plaintiffs' Contentions are 'Defence Costs' and therefore constitute 'Loss' resulting from one or more 'Wrongful Managerial Acts' within the meaning of the Primary IMI Policy.

21 In the premises, Catlin will be liable to pay to the Eighth Defendant the amount of any compensation, damages, interest or costs the Eighth Defendant is ordered to pay the Plaintiffs and/or the Group Members, and the amount of the reasonable fees, costs or expenses incurred by the Eighth Defendant in defending the Plaintiffs' Contentions, up to the 'Limit' of its indemnity.

22 In the premises, and subject to the exhaustion of the limits of indemnity applying to the 'Underlying Policies' (within the meaning of the Chubb Policy), Chubb will be liable to pay to the Eighth Defendant the amount of any compensation, damages,

interest or costs as the Eighth Defendant is ordered to pay the Plaintiffs and/or the Group Members, and the amount of the reasonable fees, costs and expenses incurred by the Eighth Defendant in defending the Plaintiffs' Contentions, up to the 'Limit of Liability'.

### **Declination of indemnity**

- 23 These proceedings were commenced by the Plaintiffs against the Eighth Defendant on 8 March 2018.
- 24 By letters dated 3 May 2018 and 7 December 2018, AIG Australia Limited (formerly Chartis) confirmed cover for the Eighth Defendant under the Primary IMI Policy in respect of the Plaintiffs' claim.
- 25 By letter dated 14 February 2019, Catlin set out its formal position on policy response to the effect that the Plaintiffs' claims in this proceeding were excluded from coverage and that no indemnity would be provided (**Catlin Position**).

### **Particulars**

The exclusions relied upon were those contained in Endorsements 4 (Lender's Liability) and 15 (Conflict of Interest); clause 3.8/Endorsement 11 (Insolvency).

Catlin also reserved its rights in respect of exclusions in clause 3.1 (Prior Knowledge), clause 3.3 (Established Misdeeds), clause 3.13 (Contractual Liability), clause 3.14 (Fees and Commissions), Endorsement 8 (Forecast Exclusion) and Endorsement 9 (Failure to Insure).

- 26 By letter dated 29 May 2019, Chubb set out its formal position on policy response to the effect that the Plaintiffs' claims in this proceeding were excluded from coverage and that no indemnity would be provided (**Chubb Position**).

### **Particulars**

The exclusions relied upon were those contained in Endorsements 4 (Lender's Liability) and 15 (Conflict of Interest); clause 3.8/Endorsement 11 (Insolvency).

- 27 On 4 December 2019, leave to proceed against GPL pursuant to s 500 of the Act was revoked due to the exhaustion of cover under the Primary IMI Policy.

### **Particulars**

Decision of Ball J delivered *ex tempore* on 4 December 2019.

28 By reason of the terms of the Primary IMI Policy, the Catlin Policy and the Chubb Policy pleaded above, a determination of the correctness or otherwise of the Catlin Position and Chubb Position:

- a. is material to the operation of the Catlin Policy and the Chubb Policy; and
- b. affects the extent to which the Catlin Policy and the Chubb Policy will attach to, or will cover, any liability of the Eighth Defendant to the Plaintiffs and/or Group Members in the proceeding.

29 In the premises:

- a. there is a justiciable controversy between Catlin and Chubb on the one hand and the Eighth Defendant on the other as to the proper construction of the Primary IMI Policy and the application of that policy to the Plaintiffs' claims against the Eighth Defendant;
- b. the Court has jurisdiction to entertain the claims of the Eighth Defendant and the power to grant the declaratory relief sought by him.

#### **D. QUESTIONS APPROPRIATE FOR REFERRAL TO A REFEREE**

None

#### **E. QUESTIONS APPROPRIATE FOR REFERRAL TO A REFEREE**

The Eighth Defendant participated in a mediation with the Plaintiffs in the proceeding on 25 June 2019, which was unsuccessful. The Eighth Defendant is willing to attempt a mediation involving the Cross-Defendants at an appropriate time.

**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

A handwritten signature in black ink, appearing to read 'C. Gould', with a long horizontal flourish extending to the right.

Capacity

Solicitor

Date of signature

1 July 2021

## 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](http://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.nsw.gov.au/> or at any NSW court registry.

## REGISTRY ADDRESS

|                |  |
|----------------|--|
| Street address | 184 Phillip Street, Sydney, NSW 2000             |
| Postal address | Supreme Court of NSW, GPO Box 3, Sydney NSW 2001 |
| Telephone      | 1300 679 272                                     |

**AFFIDAVIT VERIFYING**

Name Robin Gray  
 Address 11 Beech Road, Norwood Tasmania 7250  
 Occupation Director  
 Date 1st July 2021

I say on oath:

- 1 I am the cross-claimant in the Fifth Cross-claim.
- 2 I believe that the allegations of fact in the statement of cross-claim are true.

SWORN at Launceston  
 in Tasmania  
 Signature of deponent



Name of witness  
 Address of witness ROBERT JOHN HEGARTY  
 9-13 GEORGE STREET  
 Capacity of witness LAUNCESTON TAS 7250  
 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.  
 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.  
 I have confirmed the deponent's identity using the following identification document:

Driver Licence

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 cross-claim statement.

**PARTIES TO THIS CROSS-CLAIM****Cross-Claimant****Robin Gray**

First Cross-Claimant

**Cross-Defendants****Catlin Australia Pty Limited (ACN 108 319 786), for and on behalf of S.J. Catlin & Others, Syndicate 2003 at Lloyds**

First Cross-Defendant

**Chubb Insurance Australia Limited (ACN 001 642 020)**

Second Cross-Defendant