IN THE HIGH COURT OF AUSTRALIA No M24 of 2011
MELBOURNE REGISTRY

BETWEEN **HIH CLAIMS SUPPORT LIMITED (ACN 096 857 635)**

Appellant

and

INSURANCE AUSTRALIA LIMITED (ACN 000 016 722)

Respondent

APPELLANT'S SUBMISSIONS

PART I: Certification of suitability for publication on the Internet

1 These submissions are in a form suitable for publication on the Internet.

PART II: Issues

2 Where an insured has double insurance so that two insurers are under co-ordinate liabilities to make good the same loss and to the same extent, and a third person, by agreement with the insured, makes payment to discharge the liability in exchange for the insured assigning its rights under the contract of insurance it holds with one of the insurers, is that third person entitled to equitable contribution from the other insurer for having discharged the burden of the insurers?

3 Are the liabilities as between the appellant and the insured, and the respondent and the insured, equal and co-ordinate, or is one primary and the other secondary, and if the latter is the case, which is primary and which is secondary, and what are the consequences, if any, for the appellant's claim for relief against the respondent if one is held to be primary and the other secondary?

PART III: Section 78B of the *Judiciary Act* 1903 (Cth)

4 Consideration has been given to the question whether notice pursuant to sec 78B of the *Judiciary Act* 1903 (Cth) should be given with the conclusion that it is not necessary.

PART IV: Citations

5 The reasons for judgment of the trial judge, Hollingworth J, are not reported. The Internet citation is [2009] VSC 434. The reasons for judgment of the Court of Appeal of the Supreme Court of Victoria are also not reported. The Internet citation is [2010] VSCA 255.

Filed on behalf of the appellant
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PART V: Facts

6 The trial proceeded upon a statement of agreed facts and documents tendered by consent. The agreed statement of facts and all the documents before the courts below are to be found in the Appeal Book. The narration of the facts below is drawn from the agreed statement of facts.

7 At the Australian Grand Prix event held at Albert Park in Melbourne in 1998, a large and valuable video screen was damaged when the structure supporting it collapsed. The event was conducted under the auspices of the Australian Grand Prix Corporation ("**the Corporation**"). The Corporation had engaged Screenco Pty Ltd ("**Screenco**") to provide the screen. Screenco engaged RL Dew & Co Pty Ltd ("**Dew**") to erect the scaffolding to support the screen.

8 Drew subcontracted the erection of the scaffolding to Mr Ronald Steele whose business traded as Dragon Scaffolding ("**Steele**"). Parts of the components for the scaffolding to support the screen, including the principal steel beam, were hired by Steele from Highrise Group Pty Ltd ("**Highrise**").

9 Steele's business was insured under a general liability insurance policy issued by World Marines and General Insurances Pty Ltd ("**HIH**"), a company within the HIH Group of corporations ("**HIH Policy**"). The Corporation was insured under a liability insurance policy issued by SGIC General Insurance Ltd ("**SGIC Policy**"). All of that company's rights, liabilities and obligations have since vested in the respondent. The SGIC Policy covered not only the Corporation, but also its contractors and sub-contractors. There is no dispute that Steele was an insured by definition under the SGIC Policy.

10 It is common ground that the HIH Policy and the SGIC Policy gave rise to a co-ordinate liability in those two insurers to make good the same loss to Steele, so that there was "double insurance".

11 The collapse of the screen has led to three substantive proceedings, including this one. On 18 May 1999, Screenco commenced proceedings in the Supreme Court of New South Wales ("**NSW Proceeding**") claiming damages from Dew and Steele, and Dew cross-claimed against Steele for indemnity or contribution. Steele joined Highrise. HIH accepted Steele's claim under the HIH Policy for indemnification in respect of the NSW Proceeding in respect of any liability and for legal costs.

12 When in January 2000 SGIC refused to accede to a request from HIH for an admission that Steele was insured and entitled to indemnity under the SGIC Policy, HIH and Steele commenced proceedings in the Supreme Court of Victoria against SGIC, which became, for

relevant purposes, the respondent ("**First Victorian Proceeding**"). HIH sought equitable contribution from the respondent and Steele sought indemnity from it.

13 The HIH Group imploded before the NSW Proceeding or the First Victorian Proceeding came on for trial. HIH was placed in provisional liquidation on 15 March 2001 and then wound up by order of the Supreme Court of New South Wales in August 2001. At that point in time, HIH had already paid approximately $80,000 in legal costs on behalf of Steele in respect of the NSW Proceeding.

14 The Commonwealth Government intervened financially to ameliorate the risk of loss to HIH policyholders. The Commonwealth appropriated $640 million by way of the *Appropriation (HIH Assistance) Act* 2001 (Cth) ("**the Act**") to set up a fund for HIH policyholders and named it the HIH Claims Support Scheme ("**the Scheme**"). Section 4 of the Act provided:

> **4 Appropriation**
>
> The Consolidated Revenue Fund is appropriated, to the extent of $640 million, for the following purposes:
>
> (a) providing financial assistance to HIH eligible persons, either directly or indirectly;
>
> (b) meeting administrative costs associated with providing that financial assistance.
>
> Note: An example of indirect financial assistance is the Commonwealth making payments to another person who, under a contract or trust, is required to make payments to HIH eligible persons.

15 By section 3 of the Act, an "HIH eligible person" was defined to be a person who a) is a policyholder, insured or beneficiary under a policy of insurance issued by a HIH company; and b) has suffered financial loss as a result of the insolvency of the HIH companies.

16 On 1 July 2001, the appellant was appointed as trustee and administrator of the Scheme and entered into a "Management Agreement" with the Commonwealth on 6 July 2001. The Scheme was practically administered by the appellant appointing existing functioning insurance companies to act as its agents in the investigation and payment of claims out of the $640 million fund by HIH eligible persons. QBE Management Services Pty Ltd ("**QBE**") was the relevant agent for the appellant in respect of Steele.

17 On 10 July 2001, Steele applied for assistance from the Scheme in respect of HIH's inability to honour its obligations to indemnify Steele and pay for his costs of the NSW Proceedings. An HIH eligible person applied for assistance by way of completing an "Application for assistance" ("**Application**") document and completing an "Offer to assign your policyholder rights" ("**Offer**") document.

18 Both documents required an applicant to fill in details of their HIH policy. The applicant was apprised by the documents of the fact that they were presently an unsecured creditor of the HIH Group and as such were likely to receive less than 50 cents in the dollar and that the first payment would not be made for at least two years. By the Offer document, the applicant was informed that "the Commonwealth Government has agreed that ... it will provide the benefit that would have been provided by HIH under an insurance policy".

19 Applicants were also informed by the Offer document that "[b]y completing, signing and returning this form, you will be offering to assign to [the appellant] your rights under your policy of insurance against the HIH company which issued it, and any rights which you may have against other persons or organisations in connection with your claim under that policy." The document then explained that the applicant would "...also be undertaking to provide all reasonable assistance and co-operation to [the appellant] and other parties".

20 It is convenient to set out exactly what the Offer document conveyed to applicants of the appellant's meaning of "reasonable assistance and co-operation". The examples it gave were:

- filling out the HIH company's claim form and lodging the claim under the original policy;
- co-operating with [the appellant], the HIH company and with any other insurance company which is managing the claim on its behalf;
- fully complying with the terms of the policy;
- providing all reasonable assistance with legal action which [the appellant] may take against any other parties; and
- agreeing to continue to perform and observe all the obligations, conditions and provisions of your HIH policy, as though [the appellant] were the insurer who issues it.

21 It is clear what was occurring. The appellant was appointing existing insurers to handle claims under HIH policies as if HIH was administering them and then making payments in accordance with the terms of those policies (if the policy responded) via Commonwealth funding – payments that HIH could no longer afford to make. Acceptance of the offer occurred by a payment by the appellant to the insured of a benefit under the Scheme which entitled the insured to at least 90% of the amount that would have been provided by the original HIH insurer under the insurance policy. The assignment to the appellant of the policy

rights meant that the appellant would then be forced to prove in the liquidation of HIH if it wished to recover some portion of its payments.

22 In October 2001, Steele was informed that he was eligible for assistance under the Scheme, subject to confirmation of his entitlement to indemnity under the HIH Policy. That confirmation was subsequently provided by the appellant through QBE.

23 Steele lost the NSW Proceeding. He and Dew were ordered to pay Screenco $1,461,045 in damages on Screenco's claim plus costs. Steele was also ordered to indemnify Dew for its liability to Screenco for the damages and for the legal costs. Steele's cross-claim against Highrise was dismissed and he was ordered to pay Highrise's legal costs.

24 The appellant paid 90% of the judgment sum on behalf of Steele, 90% of all the costs of all the other parties that Steele had been ordered to pay, and it paid for Steele's defence costs. Steele's liability for the other 10% remains undischarged.

25 That provides the context for the First Victorian Proceeding and Steele's claim for indemnity, and HIH's claim for contribution for one-half of the defence costs it had paid from the respondent.

26 The respondent defended the First Victorian Proceeding not only on the basis that certain exclusions to the SGIC Policy applied, but also on the basis that the payment by the appellant to Screenco and Dew had extinguished that liability of Steele and therefore there was no loss left for it to indemnify. The Court of Appeal ([2007] VSCA 223) agreed with Bongiorno J ([2005] VSC 342) that none of the exclusions applied and gave judgment to HIH on its claim.

27 As for Steele's claim, whereas Bongiorno J had upheld it, the Court of Appeal determined that the indemnity obligations of the respondent to Steele were discharged by the payments which had been made by the appellant. The liability of the respondent to Steele had been made good by the appellant.[1] Steele's application for special leave to appeal to this Court was dismissed on 23 May 2008 by Gleeson CJ and Heydon J.

28 These proceedings were commenced with the appellant seeking equitable contribution from the respondent for one-half of the payments made by the appellant to Steele. For the purposes of the appeal to this Court, a number of issues have fallen by the wayside, including an argument by the respondent that Steele's defence costs were not covered by the SGIC Policy, and a defence of the respondent that the appellant was estopped from commencing

[1] Even as to the undischarged 10% as the assignment according to Ashley JA gave up Steele's rights against the respondent: see [2007] VSCA 223 at [179]. It may be questioned whether that result follows from the assignment, but it is presently immaterial.

this proceeding, in accordance with the principles explained by this Court in *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589, because it did not claim contribution in the First Victorian Proceeding. Justice Hollingworth did not need to decide the question of the defence costs as she found no liability in the respondent to contribution (TJ [151]), and her Honour held that the principles espoused in *Anshun* were not made out (TJ [69]-[70]), and that even if they were, there was a question as to whether the respondent had waived its right, or itself was estopped, from relying on the right, because its position in relying on the *Anshun* argument was "a complete about-face" from the position it adopted in response to a question asked by Heydon J in the 23 May 2008 special leave application (TJ [76]). Her Honour did not need to determine that question, and these issues were not before the Court of Appeal (TJ [82]).

29 Justice Hollingworth dismissed the appellant's claim for equitable contribution from the respondent on two bases. First, her Honour recorded (TJ [127]) an agreement of the parties as to legal principle that the relevant date for determining whether an entitlement to contribution existed was the date of "the insuring clause event" (i.e. the collapse of the screen on 3 March 1998) and not the date of the payments by the appellant. The appellant denies that it ever conceded that point of law in the manner identified by her Honour. Something will be said about the "relevant date" below in these submissions, but the position of the appellant is that such an argument should be considered on its merits because the appellant did not concede the point in the way identified by her Honour, as the appellant's contention is that the claim for contribution must be assessed in light of all the circumstances at the time at which the appellant discharged the co-ordinate liability. Further, and in any event, if it be somehow considered that the appellant made a concession at trial in the terms identified, in a case that proceeded on agreed facts there would be no unfairness in a withdrawal of such a concession (particularly where it was explained and disavowed in the Court of Appeal), and this Court could not possibly be bound by a concession on what the appellant contends is an erroneous proposition of law.

30 On the assumption that 3 March 1998 was the relevant date, her Honour held that even if the liabilities of HIH and the respondent to Steele were equal and co-ordinate, there cannot have been an equal and co-ordinate liability as between the appellant and Steele and the respondent and Steele because the appellant did not come into existence until 2001 and had no obligation to Steele in 1998, as, obviously and additionally, the contract between Steele and the appellant did not come into being until the appellant made a payment under the Scheme (TJ [128]). Further, her Honour said that the position of the appellant could not be

equated with that of HIH, because the assignment of the rights by Steele to the appellant did not put the appellant in HIH's position, but merely allowed it to benefit from Steele's position in relation to HIH (TJ [120]-[126]).

31 The second basis on which her Honour dismissed the claim, and which is agitated by the respondent in Ground 2 of its Notice of Contention, was her Honour's conclusion that the appellant had entered into a "stand alone contract of indemnity" with Steele, which was a primary and higher obligation than the secondary obligation of the respondent (TJ [131]-[139]). Her Honour said that she applied the "general principle enunciated" in *Speno Rail Maintenance Australia Pty Ltd v Hamersley Iron Pty Ltd* (2000) 23 WAR 291 and *Caledonia North Sea Ltd v British Telecommunications plc* [2002] 1 Lloyd's Rep 553.

32 The Court of Appeal, in a joint judgment of Warren CJ, Mandie JA and Beach AJA, dismissed the appeal, but expressed itself as giving different reasons for doing so than those of the trial judge. The two reasons the Court of Appeal gave for dismissing the appeal (reading CA[19]-[24] together) were that the liabilities were not equal and co-ordinate because: First, the liabilities were different because whilst the respondent's liability arose from an indemnity in relation to the collapse of the screen, the appellant' liability was subject to a condition enabling the appellant to prove in the winding up of HIH. Secondly, the creditor did not have equal or substantially equal recourse to each party who was liable, because if the respondent had paid out Steele under the SGIC Policy, it would never have been able to claim contribution from the appellant as if it had done so before 2001, the appellant did not exist, and after 2001 there would have been no cause for a contract to ever come into existence between the appellant and Steele as the appellant would never have needed to make a payment to Steele, that payment, on the hypothesis, had already been made by the respondent.

PART VI: Argument

33 The approach of the Court of Appeal has subverted the basic rationales for the existence of the doctrine of equitable contribution that have been accepted as axiomatic since the doctrine was put on a firmer footing on the equity side of the Court of Exchequer by Eyre LCB in *Dering v Earl of Winchelsea* (1787) 1 Cox 318 [29 ER 1184]. One need not resort to idiosyncratic high ideals to be able to affirmatively state that, in the present case, violence has been done to the notion that "equality is equity". The appellant was not an officious intermeddler that made a payment that merely operated to the financial benefit of the respondent. It paid by reference to a burden in which it shared a "community of interest".

34 Certain features of the relationship of the various identities in the proceedings are undisputed. First, the HIH Policy and the SGIC Policy shared a co-ordinate liability, covering the same peril and guarding against the one loss, to the same extent, so that Steele would have been paid twice in respect of the same loss if paid under the both policies. There was "double insurance" in the sense used by this Court in *Albion Insurance Co Ltd v GIO (NSW)* (1969) 121 CLR 342.

35 Secondly, when the appellant made payment to Steele under the Scheme, it discharged the liability of the respondent to ever indemnify Steele under the SGIC Policy. At all times until the payment by the appellant, the respondent was liable to make good Steele's loss and would have remained so had the appellant not paid. The very reason why the Court of Appeal determined that Steele could not seek indemnity from the respondent in the First Victorian Proceeding was that the payment by the appellant had discharged the obligation of the respondent.

36 Thirdly, the payment by the appellant under the Scheme was not paid on a whim, or by reference to some vague, undefined standard, or by reference to a totally independent set of factors from the question of insurance. The only reason that Steele received any money from the appellant was that it was found that he had a HIH policy that responded to the loss suffered. The HIH Policy was the very factum upon which the payment was made. Money was appropriated by the Commonwealth from Consolidated Revenue only to pay "HIH eligible persons". Existing insurers, acting as claims managers, assessed the applications of all persons by reference to the terms of their HIH policies. The Commonwealth was providing "...the benefit that would have been provided by HIH under an insurance policy" so long as Steele complied with the terms of the HIH Policy.

37 Much was made in the Court below of the relationship between the appellant and HIH, and that the appellant had acquired its rights from Steele and not from HIH. Nothing was made of the point of the position in which the Court's judgment would leave the respondent, which is surely relevant in light of the Court's quotation of Story in [22] that the doctrine of contribution "...has an equal foundation in morals 'since no-one ought to profit by another man's loss where he himself has incurred a like responsibility'".

38 In order to give proper meaning to the sentiment of that quotation, attention should have been paid, with respect, to the following consequence of the Court's decision. Viewed objectively, the respondent was always responsible until payment by the appellant for 100% of Steele's liability. Had the appellant not paid Steele the respondent would have continued to be exposed to payment for 100% of Steele's liability. Had the respondent paid under the

SGIC Policy as it was required to do, instead of seeking to avoid paying Steele for three years after the event, and had it paid after HIH became insolvent, it would have been potentially exposed to 100% liability because the company it wished to seek contribution from was insolvent: *Mahoney v McManus* (1981) 180 CLR 370 at 376.

39 Yet, the Court of Appeal have acceded to the submission of the respondent that it not pay 50%, when it was always obliged to pay 100%, even though the appellant paid by reference to the HIH Policy. Pomeroy said about contribution that "[n]o more *just* doctrine is found in the entire range of equity; and although it is now a familiar rule of the *law*, it should not be forgotten that its conception and origin are wholly due to the creative function of the chancellor" (emphasis in original).[2] It is just because the "...doctrine is evidently based upon the notion that the burden in all such cases should be equally borne by all the persons upon whom it is imposed."[3]. That was the very catalyst for Lord Chief Baron Eyre's seeding of the doctrine. The respondent has, in the present case, escaped its insurance burden entirely. The burden that the appellant discharged was in substance the one and same burden that was shared by the respondent.

40 In *Friend v Brooker* (2009) 239 CLR 129 at 149 [42], the joint judgment, by reference to the decision of Gummow J in *Street v Retravision (NSW) Pty Ltd* (1995) 56 FCR 588 at 597, said that "...it is no answer to a claim for contribution that co-ordinate liabilities which are of the same nature did not arise from the one instrument or at the same time or at those which arose later were incurred with knowledge". Aside from its obvious relevance as a statement of the law by this Court, its further relevance comes from the misapplication by the trial judge of the decision in *Street v Retravision*, which the respondent seeks to support by its Notice of Contention, and a failure by the Court of Appeal to appreciate that the present relationships formed the necessary "community of interest' referred to in *Friend v Brooker* to support the proposition that the liabilities in the present case were co-ordinate and of the same nature. It is also relevant to note, for the points that follow, that the position on contribution, and the questions of relationships of liability, was settled remarkably similarly on both sides of the Atlantic in the 19th century. Bispham succinctly stated the position in the following manner:

> The circumstance that the sureties are bound by different instruments, or at different times, does not affect the right of contribution, provided always that they are bound for the same debt, and really occupy towards each other the position of co-sureties.

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[2] *Pomeroy's Equity Jurisprudence*, 5th edn (1941), vol 2, §411
[3] ibid.

> But if each suretyship is a distinct and separate transaction (as for distinct and separate portions of the same debt), the right of contribution will not exist.[4]

Although not expressed that way by the Courts below, it was really a misunderstanding of the principles underlying the last part of that statement, principles that the Courts have clearly elucidated since *Craythorne v Swinburne* (1807) 14 Ves Jun 160 [33 ER 482], that led both the Court below and the trial judge, for different reasons, to hold that the liabilities were not co-ordinate.

41 There is really no qualitative difference between what has occurred here and if the Commonwealth, or some other person, had bought up the HIH policies through a novation or had the rights assigned to them directly by HIH. It would have been equally true under a novation or assignment from the insurer that if the respondent had paid before the novation or assignment and when HIH was insolvent, that the respondent would not have been able to seek contribution from the Commonwealth because the rights in the Commonwealth did not yet exist. This would also fall foul of the "equal and substantial recourse" that the Court of Appeal found so determinative. But how, with respect, is that the relevant question? First, the way the Court of Appeal expressed itself in the first part of [23] is a truism of any double insurance case. The insured never has a right of recourse against the insurer that hasn't paid when their indemnity has already been satisfied. The point issimply that the appellant has satisfied more than its fair share of the indemnity by reference to the HIH Policy that leads to the question of contribution arising? This also answers the question of the "relevant date" for the purposes of the inquiry. The entitlement of the appellant to make a claim for contribution in equity stems from the presence of "an equity" founding the case for that intervention: *Friend v Brooker* at 148 [38]. Simply put, that equity arose in the present case when the appellant made payment to discharge the co-ordinate liability. The date of the insurance clause event is a relevant date for understanding the context of the milieu of facts, but does not have the significance ascribed to it by the trial judge.

42 If the Court of Appeal is right, insurers could wait for the bail out of any other insurer that may arise as a result of e.g. financial mismanagement or natural disaster, before paying in cases of double insurance in order to avoid liability entirely in cases of double insurance. Steele went to HIH first in this case, and HIH correctly accepted indemnity where the respondent wrongfully, as it was held, did not, and then in that sense Steele was drawn to the Scheme due to the position taken by HIH as opposed to the recalcitrance of the respondent. As Helsham J said in *Government Insurance Office of New South Wales v Crowley* [1975] 2

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[4] Bispham, *The Principles of Equity*, 5th edn (1893), §330.

NSWLR 78 at 83, a court is entitled when faced with a problem of contribution "...to take into consideration all matters which go towards ensuring that there is a just result". It may be rhetorically asked what does the Court of Appeal's support for the respondent in this case do to a key rationale given historically as supporting the basis for contribution that as between several interested parties it should not rest with the creditor by his choice of remedies to determine ultimately where the burden will fall? How did the appellant and respondent not share the same community of interest?

43 That is why, in the appellant's submission, the differences between the Court of Appeal's reasons for dismissing the appeal, and the trial judge's primary/secondary analysis are more chimerical than real. Unlike *Friend v Brooker* no-one disputes that in this case that both the appellant and the respondent had a relevant liability to Steele. In that sense the pertinent question is akin to that in *Burke v LFOT Pty Ltd* (2002) 209 CLR 282 where the inquiry is to be characterised as being whether the nature of the liabilities make it inequitable for the respondent in this case not to make payment to the appellant. The real question for this Court to decide is whether the substance of the liabilities were equal and co-ordinate in that they reflected a "community of interest". Describing them as "on a different level of liability" as in *Street v Retravision*, or as primary/secondary obligations as did the trial judge (because supposedly contracts of insurance are usually secondary so QED no liability in this case), is really just the mirror proposition of saying that they were not equal or that there was no community of interest. The task for this Court is, with respect, as Gummow J did in *Street v Retravision*, and Dixon J did in *A M Spicer & Son Pty Ltd (in liquidation)* (1931) 47 CLR 151 at 185, and this Court did in *Burke v LFOT*, and as the English, Australian and American courts have been doing for about 200 years, to analyse the substance of the liabilities to determine whether the just result is that they be accorded a co-ordinate status so that they are a like responsibility that should be borne equally, or whether, in substance, the two liabilities are so unlike one another that it is just that the appellant bear the primary and only responsibility for the payments made. Given the circumstances in this case, the call for contribution should be properly seen as fair distribution of the indemnity obligation that both the HIH Policy and SGIC Policy responded to: see *Commercial & General Insurance Co Ltd v Government Insurance Office (NSW)* (1973) 129 CLR 374 at 380.

44 This question of reaching the just conclusion on the inquiry of whether the liabilities are sufficiently similar or dissimilar for the purposes of the doctrine, has been pursued throughout the cases beginning with *Craythorne v Swinburne*. It also has been a controlling concern of the doctrine of subrogation, which as Bispham said, is the means by which

contribution is often enforced.[5] It was in that sense that Lord Mansfield was compelled to ask "who is first liable?" in *Mason v Sainsbury* (1782) 3 Doug KB 61 at 64 [99 ER 538 at 540] as a justification for providing a means for individuals to pursue those primarily liable. The focus there is on avoiding the inequity of allowing a discharge of the ultimately responsible third party: see *Registrar General v Gill* (NSWCA, unreported, 16 August 1994, Gleeson CJ and Priestley JA at 7); *Somersall v Friedman* [2002] 3 SCR 109 at [50] (Supreme Court of Canada); *Caledonia*. The trial judge made much of this distinction, drawing on *Caledonia* in that context. It is an error, however, to draw from those cases any proposition that the contracts of indemnity are always primary to contracts of insurance and conclude that determines the result in the present case (TJ [131]). The present circumstances are entirely different from a related commercial transaction where an indemnifier is placed above the secondary insurer whose liability arises upon default of the indemnifier.

45 In what sense is the appellant in this case so much more responsible for the liability to Steele so as to put its interest on a level that would make it inequitable for the respondent to contribute? The respondent's liability to pay the indemnity was not dependent on the default of someone else so that it can be described as a less responsible and therefore more "deserving" surety of a surety: see eg *Craythorne v Swinburne; Fox v Royal Bank* [1976] 2 SCR 2; *Scholefield Goodman & Sons Ltd v Zyngier* [1986] AC 562. The respondent in this case is not some sub-surety stranger to the principal vehicle of liability, or a re-insurer – it was in precisely the same boat as HIH, whose responsibilities the appellant took over. In no regard were its obligations to Steele somehow secondary or collateral to those of the appellant: *Armitage v Pulver* 37 NY 494 (1868).

46 Likewise, the appellant is not in the position of some rogue tortfeasor or primary wrongdoer being compared to a relatively innocent insurer that compels equity to make the appellant pay in full without recourse to the insurer. Nor is the appellant's position equivalent to the misleading vendor in *Burke v LFOT* seeking to make a windfall by seeking contribution from the hapless solicitor. It is the respondent in this case who seeks a windfall benefit.

47 Indeed, if anything, the respondent is the party who had the primary obligation to indemnify Steele. The appellant stepped in to ensure that those exposed to the collapse of HIH would have a fund available to them. That fund would retain more assets to achieve those ends if other insurers met their responsibilities to their insureds. Payment of contribution in cases such as this is not only just, it ameliorates the diminishment of the fund allowing more

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[5] Bispham, *The Principles of Equity*, 5th edn (1893), §335

HIH policyholders to benefit or the Consolidated Revenue to have money returned it. Whilst monitoring the health of the Consolidated Revenue is not the responsibility of the respondent, it does illustrate the fact that as between the parties, it is not unjust to require the respondent to pay contribution.

48 There is no support in the cases for distinguishing, for the purposes of the doctrine of contribution, the relevant interests of the appellant and respondent. It would be inequitable to allow the respondent to escape liability in this case because its co-insurer collapsed and a third party picked up the responsibilities, not through novation or assignment from the insolvent insurer, but by way of an assignment from the insured. If HIH had not collapsed, the respondent would have had to pay contribution. If no-one had come along to fund the Scheme, the respondent would have had to pay the full indemnity because Steele would have been likely forced to chase the respondent as the solvent insurer. The appellant paid upon the existence of the HIH Policy. That is the co-ordinate liability that the respondent was always exposed to, and which was not consequent upon the failure or default of some higher order liability. The relationship between the appellant, administering the HIH Policy, and the respondent, responsible for the SGIC Policy, was a shared community of interest. It would be inequitable for the appellant, in the circumstances, to bear the burden of payment to Steele without contribution from the respondent who was found, despite resistance, to have no defence under the SGIC Policy, except for the fact that the appellant had discharged the respondent's burden.

PART VII: Legislation

Appropriation (HIH Assistance) Act 2001 (Cth) – (the legislation is comprised of only four, relatively short, sections).

PART VIII: Orders sought

1. Appeal allowed.

2. Set aside the orders of the Court of Appeal of the Supreme Court of Victoria and, in their place, order that the appeal to that Court be allowed and that judgment be entered for the appellant in the amount of $907,522.08 with interest.

3. Order 2 be conditioned upon the appellant paying to the respondent one-half of any amounts received by the appellant upon any proofs as a creditor in the liquidation of World Marine and General Insurances Pty Ltd in respect of the policy of insurance assigned to the appellant by Mr Ronald Steele.

10 **4.** The respondent to pay the costs of the appellant in this Court and in the Court of Appeal of the Supreme Court of Victoria and at the trial before Hollingworth J.

Dated: 8 April 2011

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Counsel for the appellant

Appropriation (HIH Assistance) Act 2001

No. 74, 2001

Appropriation (HIH Assistance) Act 2001

No. 74, 2001

An Act to appropriate money to provide financial assistance to HIH eligible persons, and for related purposes

Contents

Appropriation (HIH Assistance) Act 2001

No. 74, 2001

An Act to appropriate money to provide financial assistance to HIH eligible persons, and for related purposes

[*Assented to 30 June 2001*]

The Parliament of Australia enacts:

1 Short title

This Act may be cited as the *Appropriation (HIH Assistance) Act 2001*.

2 Commencement

This Act commences on the day on which it receives the Royal Assent.

3 Definitions

In this Act, unless the contrary intention appears:

HIH company means any of the following:

(a) CIC Insurance Limited;
(b) FAI General Insurance Company Limited;
(c) FAI Reinsurances Pty Limited;
(d) FAI Traders Insurance Company Pty Limited;
(e) HIH Casualty and General Insurance Limited;
(f) HIH Underwriting and Insurance (Australia) Pty Limited;
(g) World Marine & General Insurances Pty Limited.

HIH eligible person means a person who:

(a) is a policyholder, insured or beneficiary under a policy of insurance issued by a HIH company; and
(b) has suffered financial loss as a result of the insolvency of the HIH companies.

4 Appropriation

The Consolidated Revenue Fund is appropriated, to the extent of $640 million, for the following purposes:

(a) providing financial assistance to HIH eligible persons, either directly or indirectly;
(b) meeting administrative costs associated with providing that financial assistance.

Note: An example of indirect financial assistance is the Commonwealth making payments to another person who, under a contract or trust, is required to make payments to HIH eligible persons.

[*Minister's second reading speech made in—*
House of Representatives on 7 June 2001
Senate on 25 June 2001]

(110/01)