IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No M24 of 2011

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

Appellant

and **INSURANCE AUSTRALIA LIMITED (ACN 000 016 722)**

Respondent

APPELLANT'S REPLY

Reply to Primary Submissions of the Respondent

1 At RS[27], the submission is made that "[i]n the present case, there was no truly common burden in that, as the Court of Appeal observed, if Steele had been paid under the SGIC policy, he would not have made a claim upon the Scheme, and no contract would have come into existence". Similarly, as a submission to deny the appellant's characterisation of the respondent's position, the respondent at RS[23] denies that it received a "windfall" because "[i]t was, by the conduct of Steele and the appellant, relieved of a liability".

2 The reason why the respondent was relieved of a liability is because it wrongly refused to indemnify Steele where HIH fulfilled its obligations and agreed to do so. It is true to say that if Steele had been paid under the SGIC policy then he wouldn't have been able to make a claim for contribution from the Scheme. But he wasn't paid under the SGIC policy because the respondent unjustly denied its obligations. If the respondent had paid when it should have, it would have been entitled to seek contribution from HIH.

3 Likewise, the respondent was relieved of a liability not by the conduct of Steele and the applicant per se, but because it was fortunate enough to hold out on paying what it was obliged to long enough for HIH to collapse and then have the additional fortune of the Commonwealth setting up the Scheme. This is, figuratively, the very definition of a "windfall". In the circumstances of this case, it also happens to be an unjust one against which equity should relieve.

4 Contrary to the submissions of the respondent at RS[16]-[20] the appellant does not eschew the necessity for regard to legal form, but the appellant's reliance on the relationships between the various parties serves to highlight an understanding of coherent legal principle in the context of unusual facts. The respondent criticises the appellant's indicia RS [22]-[31] as not in themselves in each case presenting the relevant question or the complete issue. That is also accepted, but that was not the point of the exercise. The point of the exercise was to provide a

Filed on behalf of the appellant
ADDRESS FOR SERVICE
TressCox Lawyers
Level 9, 469 La Trobe Street
Melbourne VIC 3000

20 May 2011
Tel: (03) 9602 9444
Fax: (03) 9642 0382
DX 402 Melbourne
Ref: Mr Philip Jones

basis for understanding the context in which the unusual relationships came to exist. The appellant also accepts that a "common obligation" is required and that a mere "community of interest" does not suffice RS[18]-[19]. However, the relationships amongst the various actors indicates that a community of interest certainly subsisted. The appellant is attempting to explain those relationships by reference to their legal aspects so that one does not resort to the approach that "...works well enough among tricksters, gamblers, and thieves" of leaving the cards to lie where they fall: cf *Roxborough v Rothmans of Pall Mall* (2001) 208 CLR 516 at 522 [5] per Gleeson CJ, Gaudron and Hayne JJ.

5 Essentially, the respondent's submissions encompass two points. First, the HCSL Contract differed from the nature and quality of the SGIC policy and thus there is no co-ordinate liability: RS [29]-[31]. Secondly, the Commonwealth could have approached matters in many different ways, and should be taken to have assumed the result of the legal forms it chose to accomplish its ends: RS [33]-[42].

6 Too much should not be made of the fact that the Commonwealth wished to have the benefit of proving in the liquidation of HIH: RS [35]. This was not a good deal for the Commonwealth. It was not a commercial decision approached on the basis of careful attention being paid to a negotiation and extracting the most money possible. If paying out on policies in return for proving in a liquidation was worth anything, there would never have been an insolvency. Practically speaking, whether this point favours the appellant or the respondent, this was nothing more than the easiest, all-encompassing way in which the Commonwealth could respond to a perceived public policy need to bail out victims of HIH's collapse. The respondent focuses on the "scope of the appellant's relevant knowledge": RS [41]. The Scheme and the applications were clearly the easiest, simplest way in which distressed members of the community could get some value out of their HIH policies – not by reference to individual cases. That is the practical reality of what is being dealt with. The respondent is right to say that the appellant must face the forms adopted, but the proposed alternatives at RS [42] do not reflect the practical reality of the government intervention. Having, for example, told the community that it was going to set up a scheme for HIH policyholders, the Commonwealth wasn't very well going to make them chase all other insurers: see e.g. RS [42.3].

7 The real issue in the present case is whether the legal form of an individual entering into an HCSL contract on payment as a means of realising their otherwise defunct HIH policy, can be seen as a reason, in equity, to obscure the fact that the appellant was paying on the HIH policy and thereby relieving the respondent of a burden it shared in common with HIH. Of course the appellant loses this appeal if the question is as the respondent puts it whether the HCSL Contract

was a different contract from the HIH Policy. The appellant accepts that the legal forms are different. What it maintains is that for the purposes of the doctrine of contribution, the relevant obligation of the appellant was a common one with that of the respondent – the Commonwealth expressly said "...it will provide the benefit that would have been provided by HIH under an insurance policy". As this Court said in *Friend v Brooker* at 239 CLR 148 [38] "[w]ere equity not to intervene, then it would remain within the power of the creditor so to act as to cause one debtor to be relieved of a responsibility shared with another". This case highlights that principle. Steele, a tradesman running his own scaffolding business, had been rebuffed by the respondent and the liability accepted by HIH. When HIH collapsed, was he really going to turn back to the respondent which ended up fighting any claim to indemnity to the Victorian Court of Appeal and losing, or was he going to fill out a form under a Commonwealth Scheme which recognised an obligation that HIH had already accepted? In the present circumstances, it is relevantly, as a matter of equitable principle, unjust that the respondent should be entitled to rely on the natural tendency of those circumstances as a way of avoiding contribution.

8 It is for this reason that the appellant submits that the remarks of Lord Ross in *BP Petroleum Development Ltd v Esso Petroleum Co Ltd* [1987] SLT 345 are apposite. In that case BP was liable under a contract with the Shetland Islands Council for the cost of damage to the Council's jetty. Esso was had an obligation to pay pursuant to s 74 of the *Harbours, Docks and Piers Clauses Act* 1847. The Outer House held that the obligations of the two parties were "substantially the same". As such, Lord Ross held that they could properly be regarded as being under a common obligation or liable for the same debt even though their respective obligations had different sources. His Lordship said at 348:

> [T]he origins of the obligation placed on the pursuers and the defenders are separate and distinct, but the obligation is a common one because each has to perform substantially the same obligation

9 That case was referred to with apparent approval by four of the five Justices in *Burke v LFOT Pty Ltd* (2002) 209 CLR 282 see Gaudron A-CJ and Hayne J at 292-293 [15]-[16]; McHugh J at 303 [49]-[50]; Kirby J at 317-318 [92]. As Gaudron A-CJ and Hayne J said at 293 [16], "...the requirement that liability be 'of the same nature and to the same extent', as stated in *BP Petroleum*, is apt to include notions of equal or comparable culpability and equal or comparable causal significance". Likewise, McHugh J at 305 [56] said that in the circumstances, Lord Ross had decided that "...it would inequitable to order BP to pay the entire sum when its doing so would result in Esso having to pay nothing".

10 The appellant contends that the obligations of the appellant and the respondent are substantially the same and co-ordinate. For the reasons advanced in the submissions in chief the

payment of the appellant reflected the same obligation of insurance by reference to the HIH Policy that the respondent was also obliged to pay.

Response to Notice of Contention

11 The respondent faintly supports its submissions on the date for determining entitlement to contribution in two short paragraphs: RS [45]-[46]. The appellant has dealt with this point in its submissions in chief. The cause of action being relied upon is one of contribution. It is axiomatic that the relevant date for the inquiry is the date of payment said to found the equity.

12 In respect of the argument concerning primary and secondary liability the respondent focuses on the terms of the HCSL Contract and Scheme to establish the proposition that the liability of the appellant is primary. Of course, establishing that proposition achieves no further benefit for the respondent than if the appellant fails on its case *viz* that the liabilities are co-ordinate. After all, the respondent has paid no contribution so is not seeking to recover anything from the appellant on the basis that the obligation was truly primary and therefore no payment should have been made.

13 The respondent's examination of the terms of the HCLS Contract and Scheme RS [54]-[61] establish the only relevant differences between the HIH Policy and the appellant's payment as being certain pre-conditions of eligibility and a limit of 90% payment. In all other relevant respects, the payment was made upon the terms of the HIH Policy. In its submissions in chief, the appellant put, by reference to the relevant authorities, why it was inappropriate to seek to rely on any supposed presumption that a contractual indemnity is always primary and an insurance contract is secondary – that is far as one can take *Caledonia* and *Speno* (as the respondent seems to acknowledge RS [52]). In any event, the appellant by its Notice of Appeal does not ask this Court to hold that the respondent's obligation was primary, simply that the liabilities are co-ordinate. Therefore, the respondent's notice of contention point that the appellant's liability is primary fundamentally engages no different analysis (as shown by Gummow J in *Street v Retravision*) than the task necessary to determine whether the liabilities are co-ordinate.

Dated 20 May 2011

Bret Walker
Tel: (02) 8257 2527
Fax: (02) 9221 7974
Email: maggie.dalton@stjames.net.au

Peter Kulevski
Tel: (02) 9376 0611
Fax: (02) 9210 0636
Email: peter.kulevski@banco.net.au