



## HIGH COURT OF AUSTRALIA

Manager, Public Information

30 March 2010

WALLABY GRIP LTD v QBE INSURANCE (AUSTRALIA) LTD & ANOR  
IRENE STEWART (AS LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE  
ANGUS CLUGSTON STEWART) v QBE INSURANCE (AUSTRALIA) LTD & ANOR

[2010] HCA 9

An indemnity insurance contract is a promise by an insurer to indemnify the insured person for a liability arising in the circumstances set out in the contract. If the insured person establishes that those circumstances exist, then the onus is on the insurer to prove any limitation on its liability to indemnify the insured person for the whole amount of damages that a court may determine it is required to pay, the High Court held today.

Angus Stewart died in 2007 from the effects of mesothelioma. Between 1964 and 1967 Mr Stewart was employed by Pilkington Bros (Australia) Ltd, where he was exposed to asbestos dust given off by products he used in his work. The products were supplied by Wallaby Grip Ltd. Prior to his death Mr Stewart commenced proceedings in the Dust Diseases Tribunal of New South Wales against Pilkington's workers' compensation insurer, QBE Insurance (Australia) Ltd, and Wallaby Grip. Both Pilkington and Wallaby Grip were found to have been negligent. Those findings led to a judgment in the sum of \$356,510 in favour of Irene Stewart, in her capacity as the personal legal representative of the estate of her late husband, and were not disputed in these appeals.

At the relevant time s 18(1) of the *Workers' Compensation Act* 1926 (NSW) (the Act) required employers to obtain a policy of insurance from a licensed insurer and the indemnity had to be for an amount of at least \$40,000. Pilkington had obtained a policy of insurance from Eagle Star Insurance Ltd. QBE acknowledged that it was responsible to meet Eagle Star's liability to indemnify Pilkington in respect of the judgment against it, but only up to the statutory minimum of \$40,000 referred to in s 18(1) of the Act. QBE did not produce a copy of the insurance contract in the proceedings before the Dust Diseases Tribunal, and an issue arose as to whether QBE or Mrs Stewart bore the onus of establishing the limit, if any, of QBE's liability under the policy. The primary judge determined that QBE bore an evidentiary onus to prove its assertion that its liability was limited to the statutory minimum.

QBE appealed to the Court of Appeal of the Supreme Court of New South Wales which, by majority, held that the amount of QBE's liability was an essential term of the insurance contract upon which Mrs Stewart relied, and therefore the onus lay with her to establish that QBE's liability was greater than the statutory minimum referred to in s 18(1) of the Act. The High Court granted Mrs Stewart and Wallaby Grip special leave to appeal against the decision of the Court of Appeal.

The High Court unanimously allowed the appeals. Under a contract of insurance an insurer promises to pay money to the insured if the circumstances stated in the policy exist. The insured person must prove the facts which bring the claim within the insurer's promise. In this case Mrs Stewart had to establish that Pilkington was liable for the injuries suffered by her husband and that Pilkington had entered into a contract of insurance, as it was obliged to do under s 18(1) of the Act. The evidence established Pilkington's liability for Mr Stewart's injuries and QBE acknowledged that it had indemnified Pilkington to pay any damages for which Pilkington might be liable. Mrs Stewart had also to prove the extent of her loss, in order to give a value to it, but not to establish

that the loss was within the cover of the contract of insurance. The indemnity given by QBE to Pilkington extended to payment of the amount for which Pilkington was found liable by the primary judge. If QBE sought to argue that the contract provided for a limit on the extent of its liability, the onus of proving the limitation lay on QBE. QBE failed to prove any limitation and thus was liable to indemnify Pilkington for the whole amount of the judgment against it.

The High Court ordered that the orders of the Court of Appeal be set aside, and that QBE's appeal to the Court of Appeal be dismissed with costs.

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QBE appealed to the Court of Appeal of the Supreme Court of New South Wales which, by majority, held that the amount of QBE's liability was an essential term of the insurance contract upon which Mrs Stewart relied, and therefore the onus lay with her to establish that QBE's liability was greater than the statutory minimum referred to in s 18(1) of the Act. The High Court granted Mrs Stewart and Wallaby Grip special leave to appeal against the decision of the Court of Appeal.

The High Court unanimously allowed the appeals. Under a contract of insurance an insurer promises to pay money to the insured if the circumstances stated in the policy exist. The insured person must prove the facts which bring the claim within the insurer's promise. In this case Mrs Stewart had to establish that Pilkington was liable for the injuries suffered by her husband and that Pilkington had entered into a contract of insurance, as it was obliged to do under s 18(1) of the Act. The evidence established Pilkington's liability for Mr Stewart's injuries and QBE acknowledged that it had indemnified Pilkington to pay any damages for which Pilkington might be liable. Mrs Stewart had also to prove the extent of her loss, in order to give a value to it, but not to establish

that the loss was within the cover of the contract of insurance. The indemnity given by QBE to Pilkington extended to payment of the amount for which Pilkington was found liable by the primary judge. If QBE sought to argue that the contract provided for a limit on the extent of its liability, the onus of proving the limitation lay on QBE. QBE failed to prove any limitation and thus was liable to indemnify Pilkington for the whole amount of the judgment against it.

The High Court ordered that the orders of the Court of Appeal be set aside, and that QBE's appeal to the Court of Appeal be dismissed with costs.

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QBE appealed to the Court of Appeal of the Supreme Court of New South Wales which, by majority, held that the amount of QBE's liability was an essential term of the insurance contract upon which Mrs Stewart relied, and therefore the onus lay with her to establish that QBE's liability was greater than the statutory minimum referred to in s 18(1) of the Act. The High Court granted Mrs Stewart and Wallaby Grip special leave to appeal against the decision of the Court of Appeal.

The High Court unanimously allowed the appeals. Under a contract of insurance an insurer promises to pay money to the insured if the circumstances stated in the policy exist. The insured person must prove the facts which bring the claim within the insurer's promise. In this case Mrs Stewart had to establish that Pilkington was liable for the injuries suffered by her husband and that Pilkington had entered into a contract of insurance, as it was obliged to do under s 18(1) of the Act. The evidence established Pilkington's liability for Mr Stewart's injuries and QBE acknowledged that it had indemnified Pilkington to pay any damages for which Pilkington might be liable. Mrs Stewart had also to prove the extent of her loss, in order to give a value to it, but not to establish

that the loss was within the cover of the contract of insurance. The indemnity given by QBE to Pilkington extended to payment of the amount for which Pilkington was found liable by the primary judge. If QBE sought to argue that the contract provided for a limit on the extent of its liability, the onus of proving the limitation lay on QBE. QBE failed to prove any limitation and thus was liable to indemnify Pilkington for the whole amount of the judgment against it.

The High Court ordered that the orders of the Court of Appeal be set aside, and that QBE's appeal to the Court of Appeal be dismissed with costs.

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QBE appealed to the Court of Appeal of the Supreme Court of New South Wales which, by majority, held that the amount of QBE's liability was an essential term of the insurance contract upon which Mrs Stewart relied, and therefore the onus lay with her to establish that QBE's liability was greater than the statutory minimum referred to in s 18(1) of the Act. The High Court granted Mrs Stewart and Wallaby Grip special leave to appeal against the decision of the Court of Appeal.

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The High Court ordered that the orders of the Court of Appeal be set aside, and that QBE's appeal to the Court of Appeal be dismissed with costs.

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QBE appealed to the Court of Appeal of the Supreme Court of New South Wales which, by majority, held that the amount of QBE's liability was an essential term of the insurance contract upon which Mrs Stewart relied, and therefore the onus lay with her to establish that QBE's liability was greater than the statutory minimum referred to in s 18(1) of the Act. The High Court granted Mrs Stewart and Wallaby Grip special leave to appeal against the decision of the Court of Appeal.

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The High Court ordered that the orders of the Court of Appeal be set aside, and that QBE's appeal to the Court of Appeal be dismissed with costs.

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QBE appealed to the Court of Appeal of the Supreme Court of New South Wales which, by majority, held that the amount of QBE's liability was an essential term of the insurance contract upon which Mrs Stewart relied, and therefore the onus lay with her to establish that QBE's liability was greater than the statutory minimum referred to in s 18(1) of the Act. The High Court granted Mrs Stewart and Wallaby Grip special leave to appeal against the decision of the Court of Appeal.

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An indemnity insurance contract is a promise by an insurer to indemnify the insured person for a liability arising in the circumstances set out in the contract. If the insured person establishes that those circumstances exist, then the onus is on the insurer to prove any limitation on its liability to indemnify the insured person for the whole amount of damages that a court may determine it is required to pay, the High Court held today.

Angus Stewart died in 2007 from the effects of mesothelioma. Between 1964 and 1967 Mr Stewart was employed by Pilkington Bros (Australia) Ltd, where he was exposed to asbestos dust given off by products he used in his work. The products were supplied by Wallaby Grip Ltd. Prior to his death Mr Stewart commenced proceedings in the Dust Diseases Tribunal of New South Wales against Pilkington's workers' compensation insurer, QBE Insurance (Australia) Ltd, and Wallaby Grip. Both Pilkington and Wallaby Grip were found to have been negligent. Those findings led to a judgment in the sum of \$356,510 in favour of Irene Stewart, in her capacity as the personal legal representative of the estate of her late husband, and were not disputed in these appeals.

At the relevant time s 18(1) of the *Workers' Compensation Act 1926* (NSW) (the Act) required employers to obtain a policy of insurance from a licensed insurer and the indemnity had to be for an amount of at least \$40,000. Pilkington had obtained a policy of insurance from Eagle Star Insurance Ltd. QBE acknowledged that it was responsible to meet Eagle Star's liability to indemnify Pilkington in respect of the judgment against it, but only up to the statutory minimum of \$40,000 referred to in s 18(1) of the Act. QBE did not produce a copy of the insurance contract in the proceedings before the Dust Diseases Tribunal, and an issue arose as to whether QBE or Mrs Stewart bore the onus of establishing the limit, if any, of QBE's liability under the policy. The primary judge determined that QBE bore an evidentiary onus to prove its assertion that its liability was limited to the statutory minimum.

QBE appealed to the Court of Appeal of the Supreme Court of New South Wales which, by majority, held that the amount of QBE's liability was an essential term of the insurance contract upon which Mrs Stewart relied, and therefore the onus lay with her to establish that QBE's liability was greater than the statutory minimum referred to in s 18(1) of the Act. The High Court granted Mrs Stewart and Wallaby Grip special leave to appeal against the decision of the Court of Appeal.

The High Court unanimously allowed the appeals. Under a contract of insurance an insurer promises to pay money to the insured if the circumstances stated in the policy exist. The insured person must prove the facts which bring the claim within the insurer's promise. In this case Mrs Stewart had to establish that Pilkington was liable for the injuries suffered by her husband and that Pilkington had entered into a contract of insurance, as it was obliged to do under s 18(1) of the Act. The evidence established Pilkington's liability for Mr Stewart's injuries and QBE acknowledged that it had indemnified Pilkington to pay any damages for which Pilkington might be liable. Mrs Stewart had also to prove the extent of her loss, in order to give a value to it, but not to establish

that the loss was within the cover of the contract of insurance. The indemnity given by QBE to Pilkington extended to payment of the amount for which Pilkington was found liable by the primary judge. If QBE sought to argue that the contract provided for a limit on the extent of its liability, the onus of proving the limitation lay on QBE. QBE failed to prove any limitation and thus was liable to indemnify Pilkington for the whole amount of the judgment against it.

The High Court ordered that the orders of the Court of Appeal be set aside, and that QBE's appeal to the Court of Appeal be dismissed with costs.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*



## HIGH COURT OF AUSTRALIA

Manager, Public Information

30 March 2010

WALLABY GRIP LTD v QBE INSURANCE (AUSTRALIA) LTD & ANOR  
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QBE appealed to the Court of Appeal of the Supreme Court of New South Wales which, by majority, held that the amount of QBE's liability was an essential term of the insurance contract upon which Mrs Stewart relied, and therefore the onus lay with her to establish that QBE's liability was greater than the statutory minimum referred to in s 18(1) of the Act. The High Court granted Mrs Stewart and Wallaby Grip special leave to appeal against the decision of the Court of Appeal.

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The High Court ordered that the orders of the Court of Appeal be set aside, and that QBE's appeal to the Court of Appeal be dismissed with costs.

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The High Court ordered that the orders of the Court of Appeal be set aside, and that QBE's appeal to the Court of Appeal be dismissed with costs.

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