HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, GUMMOW, KIRBY AND CALLINAN JJ

DANIEL WILKIE APPELLANT

AND

GORDIAN RUNOFF LIMITED (formerly known as
GIO INSURANCE LIMITED) & ANOR RESPONDENTS

Wilkie v Gordian Runoff Limited [2005] HCA 17
7 April 2005
S304/2004

ORDER

1. *Appeal allowed with costs.*

2. *Set aside order 2 of the orders of the Supreme Court of New South Wales made on 18 November 2003 and in its place order "The question be answered 'No'."*

3. *Respondents to pay the costs of and related to the determination of the question in the Supreme Court of New South Wales.*

On appeal from the Supreme Court of New South Wales

Representation:

B W Walker SC with M J Leeming for the appellant (instructed by Speed & Stracey)

M A Pembroke SC with A S Bell for the respondents (instructed by Henry Davis York)

CATCHWORDS

Wilkie v Gordian Runoff Limited

Insurance – Professional indemnity insurance – Directors and officers liability insurance policy – Criminal proceedings instituted against appellant insured – Following Royal Commission, appellant alleged to have permitted misleading information to be provided to company auditor – Appellant claimed for advance payment of defence costs under insurance policy – Availability of advance payment of insured's defence costs subject to respondent insurer not denying indemnity for a claim – Respondent purported to deny indemnity relying on exclusion under the policy for losses arising from dishonest, fraudulent, criminal or malicious conduct – Exclusion enlivened only where conduct admitted by the insured or established to have occurred following adjudication by a court, tribunal or arbitrator – Whether respondent had effectively denied indemnity for appellant's claim – Whether stated reliance upon exclusion sufficient to deny indemnity – Whether exclusion engaged in the circumstances.

1 GLEESON CJ, McHUGH, GUMMOW AND KIRBY JJ. This appeal concerns the construction of a Directors & Officers/Company Reimbursement Policy dated 23 February 2000 ("the Policy"). The primary operation of the Policy is to insure to a limit of $20 million the "Insured" (defined as including past, present and future directors, officers and employees of FAI Insurance Limited ("FAI") and its subsidiaries, collectively called "the Organisation") against certain Loss arising out of any Claim. The Claim must be first made against an Insured and notified in the Period of Insurance and be in respect of any Wrongful Act committed or alleged to have been committed up to 31 May 1999. The terms "Loss", "Claim", "Wrongful Act" and "Period of Insurance" are all defined. The Period of Insurance commenced on 31 May 1999 and ends on 31 May 2006. The text of the definitions of "Loss", "Claim" and "Wrongful Act" appears later in these reasons. The appellant, Mr Wilkie, is within the class of persons each of which is an Insured because at all relevant times he was an executive officer or employee of FAI or a subsidiary of FAI.

2 Where the Policy refers to "GIO", it means GIO Insurance Limited (as the first respondent was then known) for 60 per cent of the limit of liability, and RE Brown Syndicate at Lloyds, London (as the second respondent was then known) for 40 per cent of that limit. In these reasons, unless otherwise indicated, references to GIO are to GIO as defined in the Policy and thus to the respondents collectively. The liability of GIO under the Policy in respect of all Claims does not exceed the limit of liability stated above.

3 The governing law chosen in the Policy is identified as that of the Commonwealth of Australia and of the State where it was issued, which appears to be New South Wales. The result is to attract the application of the *Insurance Contracts Act* 1984 (Cth) ("the Insurance Contracts Act")[1].

The background facts

4 The question of construction of the Policy arises in circumstances where the appellant notified a claim in respect of criminal proceedings and sought the advancement of his Defence Costs (as defined in the Policy) but GIO denied liability, relying upon Exclusion 7, a "dishonesty exclusion".

5 The criminal proceedings were instituted by process issued out of the Local Court at Sydney, on 29 May 2003, on information laid by the Australian Securities and Investments Commission ("ASIC"). The prosecution of the

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1 See s 8 thereof and *Akai Pty Ltd v People's Insurance Co Ltd* (1996) 188 CLR 418.

appellant is for alleged offences under the *Corporations Act* 2001 (Cth) ("the Act"). It is alleged that at Sydney between about 26 June 1998 and 9 September 1998, the appellant, being an officer of FAI General Insurance Company Limited ("FAIG"), permitted the making available to the auditor of FAI, which controlled FAIG, information relating to the affairs of FAIG but with omissions rendering the information misleading in a material respect. The appellant is said thereby to be guilty of an offence under ss 1309(1) and 1311(1) of the Act.

6 It is further alleged that at Sydney between about 1 March 1998 and 6 May 1998 and between about 23 June 1998 and 26 June 1998, the appellant, being an officer of FAIG, knowingly failed to act honestly in the exercise of his powers and the discharge of his duties of office with the intention to deceive the auditors of FAI. The appellant is said thereby to have acted contrary to ss 232(2) and 1317FA of the Corporations Law as taken to be included in the Act by s 1401 of the Act.

7 The appellant has not admitted these offences, nor has there been any adjudication of them.

8 The appellant's claim for indemnity was not brought on the primary operation of the Policy. Rather, the claim was for the Defence Costs to be incurred in the appellant's defence of the charges brought against him by ASIC. Extension 9 to the Policy is headed "ADVANCE PAYMENT OF DEFENCE COSTS" and it was upon this that the appellant relied for payment of those costs as and when incurred. The Commonwealth Director of Public Prosecutions supplied the appellant's solicitors with a copy of the brief of evidence and they, in turn, provided a copy to the solicitors for GIO[2]. After a review of this material by counsel for GIO, on 25 September 2003 GIO's solicitors wrote to the appellant's solicitors informing them that their clients "deny indemnity for the claim pursuant to the terms of Exclusion 7 of the Policy".

9 Section 13 of the Insurance Contracts Act implies in the Policy a provision requiring each party to it to act towards the other party with the utmost good faith in respect of any matter arising under or in relation to the Policy. The appellant has not alleged that GIO acted other than in good faith.

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2 The Policy required the Insured "to provide such information and assistance to **GIO** as it reasonably requires ... to enable it to determine its liability under this policy" (Condition 3.4).

10 It also should be noted that the denial by GIO of indemnity was founded solely on Exclusion 7. No other ground based in the terms of the Policy was asserted. Nor did GIO rely upon any of the statutory grounds of avoidance for failure to disclose a matter before contract or for misrepresentation or incorrect statements[3].

The decision of the Supreme Court

11 By his amended summons in the Equity Division of the Supreme Court of New South Wales dated 25 September 2003, the appellant claims, among other relief, a declaration that the respondents were not entitled to rely on Exclusion 7 of the Policy in denying indemnity to him under Extension 9. The appellant also seeks a mandatory order that the respondents pay all the appellant's reasonable Defence Costs as and when they are incurred on condition that the respondents have the right to recover those payments from the appellant in the event, and to the extent, that it be subsequently established by judgment or other final adjudication that the appellant was not entitled to indemnity under the Policy. There have been no pleadings.

12 An order was made by the Supreme Court[4] that the question whether the respondents were entitled to decline to indemnify the appellant be determined as a separate question. The terms of the separate question were then agreed and the matter was promptly heard by the Supreme Court (Nicholas J). On 18 November 2003, his Honour delivered reasons for judgment in which he answered the question "yes" and, thus, answered it adversely to the appellant.

13 In reaching that decision, Nicholas J paid close attention to the decision of the New South Wales Court of Appeal in *Silbermann v CGU Insurance Ltd*; *Rich v CGU Insurance Ltd*; *Greaves v CGU Insurance Ltd*[5], the reasoning in which he regarded as directly applicable to the Policy. This Court granted special leave to appeal directly from the decision of Nicholas J and ordered that the appeal be heard on the same occasion as the then pending appeals in *Silbermann* and *Rich*. However, it became apparent in the course of argument that distinct issues arose in those appeals which did not arise in this appeal.

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3 Insurance Contracts Act, Pt IV, Div 3 (ss 28-33).

4 Pursuant to Pt 31 r 2 of the Supreme Court Rules 1970 (NSW).

5 (2003) 57 NSWLR 469 at 484-488.

14 The question determined adversely to the appellant by Nicholas J was drawn in precise terms as follows:

> "In circumstances where:
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> 1. The [appellant] wrote to the [respondents] and notified a claim ('the ASIC Claim') as described in the affidavit of [the appellant's solicitor] sworn 16 September 2003;
>
> 2. The [respondents] on 25 September 2003 wrote to the [appellant] stating that '[the first respondent] and [the second respondent] deny indemnity for the claim pursuant to the terms of Exclusion 7 of the Policy';
>
> 3. The [appellant] has not admitted that his conduct falls within Exclusion 7;
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> 4. The conduct referred to in Exclusion 7 has not been 'subsequently established to have occurred following the adjudication of any court, tribunal or arbitrator'; and
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> 5. The [appellant] does not, for the purposes of the determination of this separate question, allege that the [respondents] acted other than in good faith in writing the letter referred to in paragraph 2 above,
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> then:
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> Are the [respondents] free of any obligation to indemnify the [appellant] under [Extension 9] of the Policy when the basis relied upon by the [respondents] in their letter of 25 September 2003 was solely Exclusion 7 of the Policy?"

The terms of the insurance policy

15 In *McCann v Switzerland Insurance Australia Ltd*[6], after observing that, as a commercial contract, a policy of insurance should be given a businesslike interpretation, Gleeson CJ added:

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6 (2000) 203 CLR 579 at 589 [22]; cf at 600-601 [74].

"Interpreting a commercial document requires attention to the language used by the parties, the commercial circumstances which the document addresses, and the objects which it is intended to secure".

16 The immediate questions of construction of the Policy turn upon the relationship between Extension 9 and Exclusion 7. In construing the Policy, as with other instruments, preference is given to a construction supplying a congruent operation to the various components of the whole[7]. Counsel for the appellant submitted that his construction gives effect to this precept, and put to one side any principle of interpretation resolving doubts in the appellant's favour as one of the Insured[8].

17 The body of the Policy is an instrument of 16 pages, each headed with the GIO logo. However, the appellant's counsel prudently eschewed any recourse to the maxim *verba chartarum fortius accipiuntur contra proferentem*[9] for the interpretation of an insurance policy agreed between the parties, all of which were organisations involved in the business of insurance.

18 Before coming to the text of the particular provisions identified in the question for separate determination, namely Extension 9 and Exclusion 7, it is convenient to identify other basic provisions of the Policy by reference to the sections into which the body of the Policy is divided.

19 The instrument is divided into sections headed "INSURING CLAUSE A", "INSURING CLAUSE B", "AUTOMATIC EXTENSIONS", "OPTIONAL EXTENSIONS", "EXCLUSIONS", "CONDITIONS" and "DEFINITIONS". Insuring Clause A is headed "DIRECTORS AND OFFICERS LIABILITY". It contains what has been described earlier in these reasons as the primary operation of the Policy. The claim for Defence Costs which the appellant makes is not made under this primary operation of the Policy. But an appreciation of Insuring Clause A and cognate provisions assists an understanding of the claim which is made. Insuring Clause A states:

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7 See *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381-382 [69]-[71].

8 cf *Andar Transport Pty Ltd v Brambles Ltd* (2004) 78 ALJR 907 at 911 [17], 922-923 [68], 930-931 [122]-[124]; 206 ALR 387 at 392-393, 408-409, 419-420.

9 "The words of an instrument should be taken most strongly against the party proffering them."

> "**GIO** will pay on behalf of the **Insured**, all **Loss** arising from any **Claim** first made against an **Insured** during the **Period of Insurance** and notified to **GIO** during the **Period of Insurance** by reason of any **Wrongful Act** PROVIDED THAT the **Organisation** is not required or permitted to indemnify the **Insured** for such **Loss**."

This directs the reader to several of the terms appearing in the section headed "DEFINITIONS". Definition 1 states:

> "**Claim** means any:
>
> (i) written communication to the **Insured** or to the **Organisation**, which *alleges* a **Wrongful Act** by the **Insured**; or
>
> (ii) writ, summons, application or other original legal or arbitral proceedings, cross claim, or counter claim: issued against or served upon the **Insured** and *alleging* a **Wrongful Act**; or
>
> (iii) criminal proceeding commenced by a summons or charge against the **Insured** *alleging* a **Wrongful Act**." (emphasis added)

Each paragraph of this definition fixes upon a written communication or legal process characterised by the *allegation* therein of a Wrongful Act. It is par (iii) of the definition of "Claim" which is applicable to the present case, but it will be apparent from the balance of the definition that it covers many allegations in civil process of a Wrongful Act where negligence or breach of fiduciary duty, rather than conscious wrongdoing or other dishonesty, is involved.

20 Definition 19 states:

> "**Wrongful Act** means: any error, misstatement, misleading statement, act, omission, neglect, or breach of duty committed, or attempted or made (or so alleged) by the **Insured** in the performance of their duties to the **Organisation** or any matter claimed against the **Insured** solely by reason of the **Insured** serving the **Organisation**."

The term "Loss" is the subject of Definition 8. This states:

> "**Loss** means: the total amount which the **Insured** and/or the **Organisation** *becomes legally obligated to pay as a result of a **Claim*** made against the **Insured** for a **Wrongful Act**. **Loss** includes: damages, judgements, settlements, costs and **Defence Costs**. **Loss** *does not include*: fines or penalties imposed by law, punitive or aggravated or exemplary or

multiple damages, taxes, or matters uninsurable under the law pursuant to which this policy is construed." (emphasis added)

21 The first sentence of this definition fixes upon that total quantification which is the product of the resolution of the allegations constituting a Claim into a legal obligation to make payment. The third sentence is important for the present case and for any case in which the claim in question is a criminal proceeding within the meaning of par (iii) of the definition of "Claim". GIO is not obliged by Insuring Clause A to pay any fines or penalties which may be imposed upon the appellant, these being uninsurable. The value of the Policy to the appellant as the particular Insured in question thus is limited to the identification in the second sentence of "Loss" of "Defence Costs".

22 Definition 2 provides:

"**Defence Costs** means: those costs or charges or expenses, *incurred* in defending or investigating or monitoring **Claims** or related appeals. **Defence Costs** does not include: wages or salaries or fees of the **Insured**, nor the cost of time spent by the **Organisation**." (emphasis added)

23 Accordingly, the responsibility of GIO in its primary obligation under Insuring Clause A in the present case is to pay costs, charges or expenses when they have been incurred by the appellant in defending or investigating or monitoring the criminal proceedings instituted by ASIC and related appeals. This is because the term "Loss" is defined relevantly as meaning "the total amount" which the Insured "becomes legally obligated to pay", including "Defence Costs", which, in turn, are costs "incurred". That primary obligation is not of great assistance to the appellant in his situation where he requires an assured source of financial provision in the continuing task of the preparation of his defence to the ASIC charges against him.

24 It should also be observed that the primary obligation is conditioned by the limitation in Condition 3.1. The Insured is not to incur Defence Costs:

"without prior written consent from **GIO** (such consent not to be unreasonably withheld). **GIO** shall not be liable for any ... Defence Costs to which it has not so consented."

25 Further, and in any event, the primary obligation to pay all "Loss" is qualified by what appears in the Policy in the section headed "EXCLUSIONS". There are 15 items under that heading. (There is also an additional exclusion attached to the Policy relating to Loss arising out of any reinsurance contract issued by the Organisation.) Each exclusion is introduced by the words "[t]his

policy does not insure **Loss** arising out of any **Claim**". As has been indicated earlier in these reasons, whilst the content of the term "Claim" is identified by the description of allegations made, the term "Loss" looks to the resolution of those allegations by the accrual of a legal obligation to make a payment. Many of the 16 items of exclusion are described by reference to the nature of the allegations in the Claim. Examples are allegations of bodily injury or loss of tangible property (Exclusion 2), allegations first made against the Insured prior to the Period of Insurance (Exclusion 10), and (Exclusion 14) allegations based upon information contained in or omitted from a "Prospectus" (a defined term). Exclusion 4(i) fixes upon the forum in which the process is instituted (a court in the United States of America or Canada).

26 Exclusions 5, 6 and 7 are of a distinct and different character[10]. For example, it is not enough to attract Exclusion 6 that the allegations in the process are based upon insider trading in securities; the phrase "in fact" is introduced and, as appears below, is given a defined meaning.

27 The provisions respecting Exclusion 7 are as follows:

> "This policy does not insure **Loss** arising out of any **Claim**:
>
> ...
>
> 7. based upon, attributable to, or in consequence of:
>
> (i) any dishonest, fraudulent, criminal or malicious act or omission; or

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10 The text of Exclusion 5 is as follows:

> "[This policy does not insure **Loss** arising out of any **Claim**] based upon, attributable to, or in consequence of any **Insured** having gained in fact any personal profit or advantage or receiving any remuneration to which such **Insured** was not legally entitled".

That of Exclusion 6 is:

> "[This policy does not insure **Loss** arising out of any **Claim**] based upon, attributable to, or in consequence of any **Insured** having in fact improperly benefited from securities transactions as a result of information that is not available to other purchasers and sellers of such securities".

(ii) any deliberate breach of any statute, regulation or contract;

where such act, omission or breach has in fact occurred ...

Notwithstanding the above

...

(ii) Exclusions 5, 6 and 7 shall not apply to any **Insured** who had no direct personal involvement in, or knowledge of, the matters upon which the operation of those Exclusions are based.

For the purposes of Exclusions 5, 6 and 7, the words 'in fact' shall mean that the conduct referred to in those Exclusions is admitted by the **Insured** or is subsequently established to have occurred following the adjudication of any court, tribunal or arbitrator."

28 An admission or establishment by adjudication within the meaning of this last paragraph of Exclusion 7 would be an answer to a claim made to recoup Defence Costs which have been incurred. But the issue on this appeal turns upon what GIO contends is an anterior operation of Exclusion 7 upon another part of the Policy.

29 The primary obligation under Insuring Clause A is accompanied by a number of additional benefits or "extensions". One class of these is included in the Policy automatically; the other is not included unless indicated in the Schedule to the Policy. In the section headed "AUTOMATIC EXTENSIONS", 10 extensions are specified. Each extension is subject to the terms, conditions, limitations and exclusions of the Policy. The appellant relies upon Extension 9. This states:

"**9. ADVANCE PAYMENT OF DEFENCE COSTS**

If **GIO** elects not to take over and conduct the defence or settlement of any **Claim**, **GIO** will pay all reasonable **Defence Costs** associated with that **Claim** as and when they are incurred PROVIDED THAT:

(i) ***GIO** has not denied indemnity for the **Claim***; and

(ii) the written consent of **GIO** is obtained prior to the **Insured** incurring such **Defence Costs** (such consent not to be unreasonably withheld).

> **GIO** reserves the right to recover any **Defence Costs** paid under this extension from the **Insured** or the **Organisation** severally according to their respective interests, *in the event and to the extent that it is subsequently established* by judgement or other final adjudication, *that they were not entitled to indemnity under this policy*." (emphasis added)

Stipulation (ii) is the counterpart to Condition 3.1, set out above, which also requires prior written consent which is not to be unreasonably withheld. In Extension 9, stipulation (ii) supplies content to the term "reasonable" in the obligation that "GIO will pay ...".

Analysis of the Policy

30 It is stipulation (i) to Extension 9 which is of central importance for this appeal. The respondents submit that Extension 9 has no operation in the circumstances of this case because it cannot be said that "GIO has not denied indemnity for the **Claim**". To the contrary, by the letter from their solicitors dated 25 September 2003, the respondents effectively denied indemnity by stating that they did so "pursuant to the terms of Exclusion 7 of the Policy".

31 What then is the relationship between Extension 9 and Exclusion 7 as it bears upon the separate question decided by the Supreme Court in the present case?

32 It is important to note that Exclusion 7 speaks of "**Loss** arising out of any **Claim**", and that, as already indicated, "Loss" is so defined as to refer to the primary obligation under Insuring Clause A in respect of accrued obligations of payment. Extension 9 provides a distinct cover beside that under Insuring Clause A which obliges GIO to pay "all **Loss** arising from any **Claim**". What is removed by Exclusion 7 is "**Loss** arising out of any **Claim**" which is based upon, attributable to or in consequence of any matter detailed in the text of that Exclusion. There thus is a correlated operation between Insuring Clause A and Exclusion 7.

33 No such correlation is immediately apparent between the text of Extension 9 and of Exclusion 7. The latter is inaptly drawn to exclude the former. To say that the Policy "does not insure **Loss** [including Defence Costs] arising out of any **Claim**" the allegations in which are based upon or attributable to any criminal act or omission is not to address an obligation to pay all reasonable Defence Costs of meeting those allegations as and when the costs are incurred.

34 But it is that very lack of congruence which reinforces the effect of the vital provision, stipulation (i) to Extension 9. The obligation the Extension imposes is to make advance payments of Defence Costs at times when, by hypothesis, the liability to indemnify in respect of the Claim may be uncertain because it awaits adjudication. The obligation so imposed is limited by the proviso in stipulation (i). This is expressed in broader terms than a denial of indemnity to pay Defence Costs in advance. Rather, it is concerned with a denial of "indemnity for the Claim", that is to say, of indemnity in respect of the process alleging a Wrongful Act.

35 By the letter of 25 September 2003, GIO in terms denied indemnity for the Claim. The letter referred to the findings of a Royal Commission into the affairs of FAI and to the "voluminous evidence contained in the Crown brief". That founded the statement made that Exclusion 7 applied. In this fashion, GIO had taken the stance that it "denied indemnity for the Claim", the expression used in stipulation (i).

36 But was that sufficient to disengage Extension 9? The appellant's submission that it was not sufficient to do so should be accepted. This is because in such an action to enforce observance of Extension 9, it is no answer by GIO merely to point to a purported denial of indemnity for the Claim which, in turn, would be insufficient to meet an action for breach of the primary obligation of GIO under Insuring Clause A, were such an action to be brought. The efficacy in law of the purported denial based upon Exclusion 7 must be open to challenge in either case. The fact having legal consequences upon which stipulation (i) operates, is a denial of indemnity for the Claim which is then effective in the terms of the assigned ground of denial.

37 Exclusion 7 does not read "where, in the opinion of the Insurer, such act, omission or breach has occurred", nor does it provide for determination of the question by an independent decision-maker (a so-called Queen's Counsel or Senior Counsel clause). The exclusion clause does not found a denial of indemnity for a Claim unless and until the phrase "in fact" operates in its defined sense. In the present case, the conduct referred to in Exclusion 7 had not been admitted by the appellant. Nor had the occurrence of that conduct been established by adjudication. It could not be suggested, nor was it, that any findings by the Royal Commission matched that description.

38 The appellant accepts that such an adjudication might be in the very action upon the primary obligation of GIO under Insuring Clause A; the efficacy of the denial of indemnity for the Claim would be seen only in the outcome of that action. But that is not the present case. This arises where advance payment is

sought, upon the very hypothesis that the ultimate outcome of the prosecution of the appellant is uncertain.

39 That "gap" between present uncertainty and ultimate resolution is met in the second paragraph of Extension 9. This reserves to GIO a right of recovery if it be subsequently established that the appellant was "not entitled to indemnity under this policy" because, for example, GIO had made good its denial based on Exclusion 7.

40 That reservation of a right of recovery may not always be a right of great value. But given the width of the "umbrella" extended by the definition of "Insured", this could not be said to be an inevitable outcome. On the face of things, when the Policy was issued, the Insured included a corporate group of considerable substance. On the other hand, if the party making an unsuccessful Claim against an Insured itself lacked substance, Defence Costs ultimately awarded to that Insured would not be recovered. Further, with respect to an unsuccessful prosecution, recovery of costs would depend upon limited legislative provision in that regard[11].

41 The contrary case put by GIO is that it is sufficient that GIO chooses, necessarily in good faith, to deny indemnity for the Claim on a ground stated in Exclusion 7, to then and there disengage Extension 9. This is said to be so even in circumstances in which the then present availability of that ground can only later be established "in fact". However, this construction would permit GIO to rely upon a provision such as Exclusion 7 in anticipation of its operation. To that extent, the recovery right in Extension 9 would be deprived of work to do and there would be denied a consistent and harmonious operation in both Exclusion 7 and Extension 9 of the phrase "is subsequently established".

42 Extension 9 is subject to all the exclusions of the Policy, including Exclusion 7. It becomes necessary to relate the concept of denying indemnity in stipulation (i) of Extension 9 to the requirement in Exclusion 7 that the specified misconduct "has in fact occurred", that is, has been admitted or established by adjudication. Putting the possibility of admission to one side, where there is, for example, an allegation of a criminal act, an element necessary for the operation of Exclusion 7 is adjudication of criminal guilt. It is not the fact of criminal conduct that enlivens the exclusion; it is the fact of adjudication of guilt, ordinarily by conviction. The evident purpose of the concluding words of Exclusion 7 (and the corresponding words in Exclusions 5 and 6) is to deprive

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11 cf *Costs in Criminal Cases Act* 1967 (NSW).

the Insured of an entitlement to indemnity only where there has been a curial finding of misconduct of a kind specified. Where, by hypothesis, there has been no such finding, a necessary element of the exclusion is missing. In those circumstances, there is as yet no ground to which GIO can point as a legal basis for a denial of indemnity. The denial of indemnity of which Extension 9 speaks is a refusal of indemnity on a ground for refusal provided by the Policy, not a statement which foreshadows that indemnity will be refused if and when a ground for refusal becomes available.

43 It was submitted by GIO that to accept the appellant's construction of Exclusion 7 and Extension 9 would deprive stipulation (i) to Extension 9 of the operation which it evidently was designed to have of protecting GIO against an obligation to pay all reasonable Defence Costs associated with a Claim as and when those costs are incurred in a situation where GIO had already denied indemnity for that Claim itself. However, there will be many instances of items in the list of exclusions which in an appropriate case may be so utilised. The Claim may have been brought in a court in the United States or Canada (Exclusion 4(i)); be based upon bodily injury or damage to tangible property (Exclusion 2); predate the Period of Insurance (Exclusion 10); or be based upon information contained in or omitted from a Prospectus (Exclusion 14). The denial may have been in reliance upon one of the statutory grounds of avoidance in Pt IV, Div 3 of the Insurance Act (ss 28-33). No such ground was taken here by GIO in its letter of 25 September 2003 denying liability.

Conclusion: Exclusion 7 was not engaged

44 Exclusions 5, 6 and 7 were cast in a distinct form. This sets them apart and rendered Exclusion 7 insusceptible of a notional anticipatory and completed operation to disengage Extension 9 in the manner asserted by GIO.

45 The construction of the Policy should be preferred which leads to an answer that GIO was not free of any obligation to indemnify the appellant under Extension 9, on a basis located in Exclusion 7.

46 No doubt, where possible, courts should endeavour to give the same construction to commercial instruments used in various jurisdictions[12]. The appellant sought to bolster his case by reference to a body of authority in the

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12 *McCann v Switzerland Insurance Australia Ltd* (2000) 203 CLR 579 at 601 [74].

United States[13] in which policies having some resemblance to that in question here were construed favourably to the case for the plaintiff insured. However, a different emphasis in approach to construction of contracts generally, and insurance contracts in particular[14], and an apparent lack of identity between significant features of the policies, make it unsafe to attempt to strengthen the conclusion already reached in these reasons by reliance upon those materials. In the conclusion which we have reached, it is unnecessary. The most that can be said about the results of the United States authorities is that they support upholding the commercial purpose of this form of policy which is, relevantly, to afford assistance with defence costs when an insured is faced by allegations of wrongdoing, including criminal wrongdoing. The terms of Exclusion 7 ("in fact") are compatible with that commercial purpose. It would require clearer exclusionary language than appears to deprive the Insured of the benefit of the Policy for which the premium has been paid.

Orders

47 The appeal should be allowed with costs. Order 2 of the Supreme Court entered 2 July 2004 should be set aside and in place thereof it should be ordered that "[t]he question be answered 'No'". Costs of, and related to, the determination of the question in the Supreme Court should be paid by the respondents.

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13 Including *Pepsico Inc v Continental Casualty Company* 640 F Supp 656 (1986); *Little v MGIC Indemnity Corporation* 836 F 2d 789 (1987); *National Union Fire Insurance Company of Pittsburgh v Brown* 787 F Supp 1424 (1991).

14 For example, in *Little*, the Court of Appeals for the Third Circuit recorded as basic principles of Pennsylvania law respecting construction of insurance policies that a policy which, viewed as a whole, is reasonably susceptible to more than one interpretation is ambiguous, and any such ambiguity must be resolved against the insurer.

48 CALLINAN J. This Court (Gleeson CJ, McHugh, Gummow, Kirby, Hayne and Heydon JJ, Callinan J dissenting) in *Andar Transport Pty Ltd v Brambles Ltd*[15] recently reaffirmed the vitality of the contra proferentem rule in a case relating to the construction of an indemnity clause[16].

49 Self-evidently policies of insurance are contracts of indemnity and indeed the rule has always had a special role to play in insurance cases[17].

50 In their judgment Gleeson CJ, McHugh, Gummow and Kirby JJ have said that counsel for the appellant prudently eschewed any recourse to the contra proferentem rule for the interpretation of this policy which had been agreed between parties all of whom were in the business of insurance[18].

51 With respect, I am not so sure that this is so even though the appellant himself and the organization of which he was a director or officer were involved in the business of insurance. Although no doubt the genesis of the rule lies in a concern for the disadvantages and rights of the less than highly literate, it has over time become a rule of general application in insurance cases without regard to the standard of literacy, or the commercial, or the legal sophistication of the insured. That a high level of literacy and sophistication of either kind would in any event provide no armour against the obscurities of this policy appears clearly enough from the differences in reasoning and conclusions between this Court and the court below, and the most careful and elaborate analysis in which Gleeson CJ, McHugh, Gummow and Kirby JJ have been obliged to engage to make sense of it.

52 There is a further reason to support their Honours' conclusions. It is that the adoption of the construction for which the respondents contend would mean that in a real and practical sense they would become the final arbiters of the extent of their obligations because their insureds will frequently lack the means to defend themselves adequately against the charges levelled against them unless they are put in funds to do so. It would not have been a difficult matter for the respondents to have insisted upon a policy that put beyond doubt their right to

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15 (2004) 78 ALJR 907; 206 ALR 387.

16 (2004) 78 ALJR 907 at 913 [23]; 206 ALR 387 at 396.

17 *Provincial Insurance Co Ltd v Morgan* [1933] AC 240 at 251-253. As Lord St Leonards said in *Anderson v Fitzgerald* (1853) 4 HL Cas 484 at 510 [10 ER 551 at 561]: "A policy ought to be so framed, that he who runs can read."

18 See reasons for judgment of Gleeson CJ, McHugh, Gummow and Kirby JJ at [16]-[17].

postpone payment of defence costs until the outcome is known had they so wished.

53 Subject to these matters I agree with the reasons and conclusions of Gleeson CJ, McHugh, Gummow and Kirby JJ.