HIGH COURT OF AUSTRALIA

GLEESON CJ,
KIRBY, CALLINAN, HEYDON AND CRENNAN JJ

CGU INSURANCE LIMITED APPELLANT

AND

AMP FINANCIAL PLANNING PTY LTD RESPONDENT

CGU Insurance Limited v AMP Financial Planning Pty Ltd [2007] HCA 36
29 August 2007
M127/2006 & M128/2006

ORDER

In M127 of 2006

1. *Appeal allowed with costs.*

2. *Set aside the orders of the Full Court of the Federal Court made on 2 September 2005 and order 3 of the orders made on 8 June 2006 and, in lieu thereof, order that the appeal to that Court be dismissed with costs.*

3. *Application for special leave to cross-appeal refused.*

In M128 of 2006

Set aside orders 1, 2 and 4 of the Full Court of the Federal Court made on 8 June 2006 and remit the matter of the cross-appeal to the Full Court of the Federal Court to that Court for further consideration in the light of the decision of this Court in M127 of 2006.

On appeal from the Federal Court of Australia

Representation

A J Myers QC with P Zappia for the appellant (instructed by Deacons Lawyers)

N J O'Bryan SC with P D Crutchfield for the respondent (instructed by Minter Ellison)

CATCHWORDS

CGU Insurance Limited v AMP Financial Planning Pty Ltd

Insurance – Appellant agreed to provide insurance to the respondent in respect of claims for civil liability – Respondent notified the appellant of potential liability to investors arising out of misconduct of financial advisers who were representatives of the respondent for the purposes of the Corporations Law – Appellant represented to the respondent that it would not rely on clause prohibiting the respondent from admitting liability or settling claims or clause requiring formal claims against the respondent – Appellant told the respondent to act as a prudent uninsured – Respondent, for sound commercial reasons including preservation of its relations with the Australian Securities and Investments Commission, proposed a protocol for responding to the investors' claims designed to recompense investors without the need for legal proceedings – Appellant agreed in principle to the protocol – No legal proceedings were commenced – Respondent sought confirmation that the appellant would indemnify it for settlement amounts – Respondent paid settlement amounts to the investors at a time when the appellant had not accepted liability – Whether the appellant's liability to indemnify the respondent extended to payment of reasonable settlement amounts – Whether the settlement amounts were reasonable – Relevance of the requirement to act with utmost good faith in s 13 of the *Insurance Contracts Act* 1984 (Cth).

Insurance – Requirement to act with utmost good faith in s 13 of the *Insurance Contracts Act* 1984 (Cth) – Meaning of utmost good faith – Whether lack of utmost good faith means only dishonesty – Whether utmost good faith may require an insurer to act with due regard to the legitimate interests of the insured as well as to its own interests – Whether the appellant's delay in accepting or rejecting liability amounted to a lack of utmost good faith – Relevance of reciprocity – Whether the respondent could invoke the appellant's lack of utmost good faith if the respondent had failed to act with utmost good faith – Whether the respondent's lack of diligence and acting for its own interests amounted to a lack of utmost good faith.

Estoppel – Estoppel by convention – Appellant represented to the respondent that it would not rely on clause prohibiting the respondent from admitting liability or settling claims or clause requiring formal claims against the respondent – Appellant told the respondent to act as a prudent uninsured – Respondent, for sound commercial reasons including preservation of its relations with the Australian Securities and Investments Commission, proposed a protocol for responding to the investors' claims designed to recompense investors without the need for legal proceedings – Appellant agreed in principle to the protocol – No legal proceedings were commenced – Respondent sought confirmation that the appellant would indemnify it for settlement amounts – Respondent paid settlement amounts to the

investors at a time when the appellant had not accepted liability – Whether the appellant represented that the respondent would not subsequently be required to prove its liability to the investors – Whether the respondent relied on the representation – Whether detriment established.

Words and phrases – "prudent uninsured", "utmost good faith".

Insurance Contracts Act 1984 (Cth), ss 13, 14.
Corporations Law, s 819.

1 GLEESON CJ AND CRENNAN J. The facts of this complex litigation appear from the reasons of Callinan and Heydon JJ. We will repeat them only to the extent necessary to explain our own reasons.

2 It is convenient to leave to one side, for the present, the second appeal. The first appeal deals with the matter that occupied almost the whole of the time spent in argument in the Federal Court, and in this Court. It concerns the liability of the appellant ("CGU") to indemnify the respondent ("AMP"), pursuant to a contract of insurance, in respect of amounts paid by AMP ("the settlement amounts") to certain investors who placed funds for investment with two financial advisors, Mr Pal and Mr Howarth. Those two men were carrying on business through the medium of their company Macquarie Advisory Group Pty Ltd ("MAG"). The investments made by MAG failed. Messrs Pal and Howarth became bankrupt and MAG went into liquidation. The investors lost their money. It appeared that AMP may have been liable, under the Corporations Law ("the Law"), to those investors by reason of its relationship with Messrs Pal and Howarth. The circumstances in which AMP paid out the claims of some of those investors, and at the same time asserted a right to be indemnified by CGU, appear from the reasons of Callinan and Heydon JJ.

3 Our view, which accords substantially with that of Gyles J who was in dissent in the Full Court of the Federal Court, is that the Full Court should have dismissed the appeal from Heerey J. Heerey J held, on a number of grounds, that AMP had not established a right to indemnity from CGU in respect of the settlement amounts. Gyles J did not agree with all the reasons given for that conclusion, but held that the conclusion was right. In order to explain our reasons for agreeing with Gyles J that the appeal to the Full Court should have been dismissed, it is necessary to begin by referring to certain features of the case.

4 First, payment of the settlement amounts was not within the terms of the cover provided by the contract of insurance. (There were, in fact, two contracts, covering successive years, but it is convenient to refer to the insurance cover in the singular.) Under the insuring clause, CGU agreed to provide cover for "Claims for Civil Liability" arising from the conduct of AMP's "Insured Professional Business Practice" made while the policy was in force. "Civil Liability" was defined to mean liability for damages, costs and expenses which a civil court ordered the insured to pay on a claim. "Claim" was defined (so far as presently relevant) to mean any originating process in a legal proceeding or arbitration. None of the investors to whom settlement amounts were paid made a claim, as defined. In the events that occurred, there were no claims for civil liability within the meaning of the contract of insurance. That was not fatal to AMP's right to be indemnified in respect of the settlement amounts. Nevertheless, it is part of the context in which the conduct of CGU is to be evaluated, especially in considering arguments based on estoppel, or failure to

comply with the statutory requirement to act with the utmost good faith imposed by s 13 of the *Insurance Contracts Act* 1984 (Cth) ("the Act"). Criticism of CGU for delay in either accepting or denying liability to indemnify AMP needs to be tempered by the reminder that, at the time the settlement amounts were paid, it could not have been suggested that the event against which cover was provided had occurred.

5 For its own sound commercial reasons (including the need to protect its relations with the Australian Securities and Investments Commission ("ASIC"), its licence, and its goodwill) AMP adopted a procedure for dealing with investors which was designed to ensure, as far as possible, that claims for civil liability, within the meaning of the policy, were *not* made. There are difficulties with the idea that good faith requires an insurer to inform the insured, before the insured event has occurred, whether the insurer will accept liability if and when it occurs. For reasons that will appear, however, those difficulties do not need to be resolved. Delay in accepting or denying liability was not the possible breach of the requirement of good faith contemplated by the majority in the Full Court in formulating certain issues for further consideration by Heerey J. It is a criticism of CGU that seems to have generated more heat than light.

6 Secondly, at the time it paid the settlement amounts, AMP was concerned not to put CGU in a position where it might decide to exercise its contractual right to take over and defend any claim in the name of AMP. In an internal memorandum after a meeting of 5 October 2001 at which CGU was briefed on the nature of the claims against AMP, AMP's senior legal counsel said that AMP was "endeavouring to conclude the claims process ASAP" so as to reduce the risk of CGU assuming conduct of the claims. As Gyles J pointed out, Heerey J's findings amounted to a conclusion "that AMP was not prepared to let the contractual process take its normal course but was manoeuvring events to serve its commercial purpose of satisfying ASIC whilst preserving, as best it could, its rights against CGU." This led Gyles J to describe AMP's complaint that CGU was not acting with the utmost good faith as "somewhat bold". Heerey J referred to complaints of delay as "a trifle disingenuous".

7 Thirdly, most of the settlement amounts were paid during October and November 2001, and all settlement amounts were paid at a time when it was plain to AMP that CGU was not committing itself to accepting liability to indemnify AMP. A chronology of events which took no account of that fact would produce a distortion of the true picture. The pressure for urgent payment of the settlement amounts came following the meeting of 5 October 2001. At that meeting, CGU's solicitor told the AMP representatives that she was not satisfied that AMP was liable to the investors under the Law, that CGU did not have documentation to support many of the claims, that CGU would not be forced into making decisions on indemnity within 14 days of receiving liability reports, and that she intended to seek an opinion from Mr Archibald QC on

AMP's liability to investors. By the end of December 2001, that opinion had not been received. On 2 December 2001, AMP's senior counsel advised AMP that in his opinion AMP was likely to be found liable to investors. Since it was between 5 October 2001 and the end of 2001 that most of the settlement amounts were paid, it could not be suggested that they were paid in reliance on any acceptance by CGU of an obligation to indemnify AMP. On the contrary, they were made at a time when CGU was questioning whether AMP was under any liability to the investors.

8 On the other hand, it should be accepted that the conduct of CGU in relation to the protocol for claims settlement involved a representation by CGU that it would not, in any subsequent litigation concerning its liability to indemnify AMP, rely on cl 7.6 of the policy (prohibiting the insured from admitting liability or settling a claim) or upon the absence of any formal claim (as defined) by an investor to whom AMP was liable. CGU repeatedly told AMP that it should act as a prudent uninsured. As Gyles J said:

> "AMP was entitled to rely upon that assurance. It follows that CGU is estopped from denying liability to indemnify AMP for any payment pursuant to a settlement reached accordingly, notwithstanding any policy conditions to the contrary. Whether it did in fact act as a prudent uninsured in making the payments is another and, in my opinion, the main, issue. If it did so, it would have acted to its detriment. There would be a clear case of estoppel – whether by representation ... or convention ... To act as a prudent uninsured is, for relevant present purposes and leaving aside onus, similar to the position of an insured denied cover in breach of contract. A prudent uninsured might arrive at an objectively reasonable settlement in the light of its potential liability and pay accordingly."

9 Although the insured event never occurred, estoppel by convention produces the legal consequence that CGU's liability to indemnify AMP operated to cover AMP's reasonable payment of the settlement amounts in satisfaction of its liabilities to investors. How the requirements imposed by s 13 of the Act, in the circumstances of the present case, add anything to that is not clear. None of the judges in the Federal Court appeared to suggest that they did so, or to explain why.

10 There was nothing in the conduct of CGU and, in particular, nothing in the conduct of CGU between 5 October 2001 and the end of 2001, the period when most of the settlement amounts were paid, that conveyed a representation to AMP that (to use the language of AMP's written argument in the Full Court) AMP "would not be required to subsequently prove its liability to the investors with whom it had settled by calling those investors as witnesses in its case in any subsequent legal proceeding." Such a proposition is inconsistent with the findings of Heerey J. Furthermore, the conduct of AMP, as found by Heerey J,

does not support a conclusion that, in paying the settlement amounts, it relied on any such representation.

11 The orders made by the Full Court were for the remitter of the case to Heerey J for further consideration of the following questions:

> "• whether AMP was induced by CGU's conduct to assume that, if it settled [an investor's] demand on reasonable terms, it would not be required to establish by admissible evidence that it was legally liable to that investor in order to be reimbursed by CGU for the amount paid pursuant to such settlement;
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> • if so, whether AMP settled that demand in reliance upon that assumption;
>
> • whether, in the light of the answers to those questions, CGU is estopped from asserting that, or it would be a want of utmost good faith for CGU to assert that, AMP is required to establish by admissible evidence that it was legally liable to that investor;
>
> • whether AMP settled that demand on reasonable terms."

12 It is that order of remitter that AMP seeks to uphold in this appeal, and that was the focus of argument in this Court. It is, therefore, necessary to attend with some particularity to the questions raised for further consideration.

13 As to the first three questions, if they do not arise on the evidence, or if they have already been decided by primary findings of Heerey J which were not set aside in the Full Court, then nothing is achieved by the remitter. The conduct assumed by the questions to constitute reliance by AMP upon the relevant inducement is the payment of the settlement amounts. We have already pointed out when, and in what circumstances, that occurred. Furthermore, the possible breach of the requirement of utmost good faith to which the questions direct attention is the assertion by CGU, in this litigation, that AMP was required to establish by admissible evidence that it was liable to the individual recipients of the settlement amounts. It is not dilatory conduct of CGU in announcing its intention to accept or deny liability. There is a clear practical reason for that, related to the timing and circumstances of the payment of the settlement amounts. Heerey J made a finding as to the extent of the representations and reliance, when dealing with CGU's repeated statements to AMP that it should act as a prudent uninsured. He said:

> "The real significance of the term [prudent uninsured] to my mind is that CGU made it clear that [AMP] was to be no worse off in respect of [its] rights (if any) under the Policies by negotiating with the Investors and entering into the Settlements. One particular consequence of that is that

> CGU would not refuse indemnity on the basis that [AMP] had entered into the Settlements without CGU's prior written consent (Policies cl 7.6) or that Investors had not obtained an order of a civil court or an originating process (Policies cl 12.1 and cl 12.2). A prudent uninsured person, being ex hypothesi not bound by any policy of insurance, would not be subject to such restrictions. Neither would [AMP]."

14 Heerey J found that AMP had no belief that CGU accepted liability, and that AMP paid the settlement amounts because it considered that it was in its own interests to do so, especially having regard to the attitude of ASIC. To revert to a point made above, Heerey J also found that AMP "had a motive to settle as many claims as it could while the indemnity issue remained unresolved." From the point of view of its dealings with ASIC, the last thing AMP wanted was for CGU to take over and manage the claims process.

15 We accept the wider view of the requirement of utmost good faith adopted by the majority in the Full Court, in preference to the view that absence of good faith is limited to dishonesty. In particular, we accept that utmost good faith may require an insurer to act with due regard to the legitimate interests of an insured, as well as to its own interests[1]. The classic example of an insured's obligation of utmost good faith is a requirement of full disclosure to an insurer, that is to say, a requirement to pay regard to the legitimate interests of the insurer. Conversely, an insurer's statutory obligation to act with utmost good faith may require an insurer to act, consistently with commercial standards of decency and fairness, with due regard to the interests of the insured. Such an obligation may well affect the conduct of an insurer in making a timely response to a claim for indemnity.

16 However, the Act does not empower a court to make a finding of liability against an insurer as a punitive sanction for not acting in good faith. If there is found to be a breach of the requirements of s 13 of the Act, there remains the question how that is to form part of some principled process of reasoning leading to a conclusion that the insurer is liable to indemnify the insured under the contract of insurance into which the parties have entered. Let it be assumed, for example, that CGU's failure throughout substantially the whole of the year 2002 to admit or deny liability was a failure to act with the utmost good faith. What follows from that? Most of the settlement amounts were paid during 2001. Again, even if it be said that CGU should have made up its mind about liability before October 2001 (a difficult assertion to sustain having regard to what was said at the meeting of 5 October 2001), what follows? Between a premise that

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1 *Distillers Co Bio-Chemicals (Aust) Pty Ltd v Ajax Insurance Co Ltd* (1974) 130 CLR 1 at 31 per Stephen J.

CGU's delay constituted a failure to act with the utmost good faith, and a conclusion that CGU is liable to indemnify AMP in respect of the settlement amounts, there must be at least one other premise. What it might be has never been clearly articulated.

17 As the questions posed by the Full Court for reconsideration by Heerey J reveal, it is not any delay on the part of CGU that is said to be the relevant form of want of good faith; it is the possibility that it is unconscientious of CGU to assert in this litigation (as it has from before the commencement of the hearing before Heerey J) that AMP must show, by admissible evidence, that it was liable to the individual recipients of the settlement amounts.

18 The hypothesis of the first three questions posed for reconsideration by Heerey J is that AMP did *not* establish by admissible evidence that it was legally liable to the investors. It was accepted in argument in this Court that the remitter is not intended to give AMP an opportunity to reopen its case, and adduce further evidence. If AMP, at the trial, had established by admissible evidence that it was legally liable to the investors, then the first three questions formulated by the Full Court would not arise. It is necessary to note why the questions arise.

19 The main area of potential doubt about AMP's liability to the investors concerned the application, in the events that happened and in the circumstances of the business of Messrs Pal and Howarth, and MAG, of Pt 7.3, Div 4 and, in particular, s 819 of the Law. Gyles J said:

> "The backdrop to this issue is that the conduct of the persons that led to the potential liability of AMP had nothing to do with the business of AMP. The only relevant link was that one of the individuals concerned happened to be an AMP representative at the time. It is therefore obvious that there would be a live issue as to whether there would be any liability of AMP for the conduct in question if the claims were litigated. On the face of it, applying ordinary principles of vicarious liability or agency, it would be quite unlikely that AMP would be responsible. Hence the reference to the important but complex provisions of Div 4 Pt 7.3 (including s 819) of the *Corporations Law*."

20 Two particularly relevant provisions were s 819(1)(b)(ii), on which Mr Archibald QC relied in his opinion to CGU in early 2002, and s 819(4). Section 819(4), which was not considered by AMP's lawyers at the time the settlement amounts were paid, could have made MAG, rather than AMP, liable to the investors. Heerey J, on the limited information available to him, considered that s 819(4) may well have had this consequence. We say "on the limited information available", because that raises the point of the first three questions formulated by the Full Court. It was only because the information at trial was incomplete that the necessity to ask those questions is supposed to exist.

21 At the trial before Heerey J, AMP did not set out to establish that it was legally liable to the investors. It did not call the investors, or undertake to prove the facts that would have to be decided in order, for example, to reach a conclusion about the effect on AMP of s 819. Rather, it set out to demonstrate the *process* it followed in settling the claims. It tendered a large number of documents, including statements by investors, and legal recommendations. When those were tendered, CGU objected on the basis that the information in them was hearsay. Senior counsel for AMP said that they were not tendered as evidence of the facts stated in them, they were tendered "to prove AMP's state of mind at the time it settled". They were received into evidence on that limited basis.

22 Heerey J found that AMP did not enter into the settlements in reliance on any commitment or promise or representation by CGU. The evidence did not support a representation by CGU, at the time the settlement amounts were paid, that it would not put AMP to legal proof of its liability to the investors. On 5 October 2001, CGU told AMP that it did not accept that AMP was liable to the investors, and that it was taking its own legal advice on the matter. By the time it obtained, and communicated, the substance of that legal advice (which was that AMP was not liable to the investors) the settlement amounts had been paid.

23 Heerey J dealt with the issue of estoppel as it was argued before him. His findings of fact, and the evidence, did not leave open for further consideration the issues sought to be raised by the first three questions.

24 We turn now to the fourth question. Heerey J asked himself whether the settlements had been shown by AMP to be reasonable, that is, "based on a reasonable assessment of the risk faced by [AMP] if the Investors' claims were to proceed to trial and judgment". In this connection, he considered *Unity Insurance Brokers Pty Ltd v Rocco Pezzano Pty Ltd*[2], referring in particular to the reasons of Brennan CJ[3] and Hayne J[4]. He referred to the circumstances in which the investors whose claims were accepted were paid in full, the pressure from ASIC, and the haste to achieve settlements before CGU took over the claims. He also referred to the doubts about liability by reason of s 819(4) of the Law.

25 Heerey J made the following finding:

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2 (1998) 192 CLR 603.

3 (1998) 192 CLR 603 at 608-609 [6].

4 (1998) 192 CLR 603 at 653 [129].

> "[T]he whole process was so dominated by pressure from ASIC that I am quite unable to conclude that the Settlements would have been reached in the agreed amounts, or indeed at all, had that pressure not existed ... A settlement can fail the reasonableness test because of flaws in the process by which it was reached, quite apart from an assessment of settlement sum against predicted result of litigation. In the present case the reasoning that led [AMP] to make the Settlements in the way that it did was not to reach a compromise based on an assessment of the prospects of success of the claims, but to satisfy the demands of ASIC. [AMP] did not merely fail to give proper weight to the interests of CGU; it was explicitly told by ASIC to ignore those interests, and did so.
>
> Apart from the question of process, the Settlements were unreasonable because they failed to take into account the availability of the s 819(4) defence."

26 In the Full Court, Emmett J, with whom Moore J agreed, criticised the reasoning of Heerey J. He said that it was irrelevant that AMP took no account of the interests of CGU because the reasonableness of a settlement must be assessed from the point of view of an uninsured recipient of the relevant demand. However, the gist of what Heerey J found was that AMP did not reach a compromise based primarily on an assessment of the objective prospects of success of the individual claims. Emmett J said that, in this respect, Heerey J failed to pay due regard to the evidence as to the legal advice AMP received from its solicitors and as to the claims process, citing a particular example. As to the effect of s 819(4) it appears to be common ground that it was not considered. Emmett J said:

> "His Honour's reasoning appears to have been that, simply because AMP did not turn its attention to s 819(4) at all, it was unreasonable to settle each of the 63 demands made by investors. His Honour did not examine, for example, the particular circumstances of the Bajada demand to see whether there was any basis for the application of s 819(4) to that demand.
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> CGU did not dispute that AMP may have a liability under s 819(2) or s 819(3). Before deciding that it was unreasonable not to have considered the possible application of s 819(4) to a demand against AMP by an investor, because of the involvement of MAG as an indemnifying principal, it would be necessary to examine the material relied on by AMP as to the relationship between Pal and Howarth, on the one hand, and MAG, on the other, and to speculate as to whether MAG and AMP would both be parties to a proceeding in a court. The primary judge did not undertake that task in relation to any investor demand."

27 As has been pointed out above, the hypothesis of questions 1 to 3, and the occasion for the need to ask them, was that AMP conducted the litigation on the footing that, contrary to what CGU had asserted since before the trial, AMP did not need to prove, by admissible evidence, facts which established its liability to the investors. The criticism of Heerey J for not examining the material relied on by AMP needs to be considered in that light. Heerey J considered the limited material available to him and formed a tentative view that s 819(4) could have applied. Since, at the time of the settlements, attention was not directed to s 819(4), it is difficult to see what more he could have done.

28 When, at the trial, senior counsel for AMP tendered the documents relating to the settlements, which were in 30 lever arch files, he told Heerey J that he did not need to read through them and that it was sufficient to observe the pattern of the procedures that were adopted by AMP to reach the level of satisfaction it required to deal with each of the investors' claims. There is no occasion to doubt that Heerey J did what he was asked to do. In his reasons, Heerey J said:

> "I should note an important evidentiary question. [AMP] claims that the Settlements it reached with the investors were, objectively considered, 'reasonable'. CGU says the true question is whether [AMP] became legally liable to the investors and that [AMP] cannot make out its case merely by showing that it reached settlements, whether reasonable or otherwise. Alternatively, CGU says that anyway the Settlements were not reasonable. But [AMP] has not called evidence from any of the Investors, or Pal or Howarth. There is evidence of investigations conducted by [AMP], its solicitors and ASIC, which includes reports of interviews with Investors. But there is no direct evidence from Investors and, in particular, no direct evidence of their dealings with Pal and Howarth."

29 The concluding sentence in that passage is of particular relevance to the issue about s 819(4). The objective reasonableness of the settlements, bearing in mind the circumstances of haste and external pressure under which they were reached, could not be divorced from the question whether AMP was, as the settlements assumed, liable to the investors with whom it settled in the full amount claimed. AMP had been admonished by ASIC not to attempt to rely on technicalities in its dealings with the investors, and this appears to have been a reason why AMP was anxious to avoid CGU's taking over management of the claims. It may well be that ASIC and CGU would have had different views on what constituted a technicality. At all events, it was well open to Heerey J to conclude that AMP had not shown that the settlements were reasonable.

30 Finally, we turn to the second appeal, M128 of 2006. This concerns the costs order made by Heerey J. The order was not to the satisfaction of CGU, which cross-appealed to the Full Court. The reasons for the order included

certain views reached by Heerey J on questions of construction of the contract of insurance. They were of relevance, or potential relevance, to indemnity sought by AMP other than in respect of the settlement amounts. Before the Full Court, and in this Court, CGU sought to use its cross-appeal on the costs issue as a vehicle for arguing those questions of construction. The Full Court did not deal with the cross-appeal for the understandable reason that, since it was allowing the appeal from Heerey J and setting aside his costs order, it was moot. CGU then appealed to this Court against the decision of the Full Court, again seeking to argue the questions of construction decided by Heerey J. On those questions, we do not have the benefit of any reasoning of the Full Court. The second appeal should be remitted to the Full Court for consideration of CGU's cross-appeal to that Court.

Orders

31 In M127 of 2006, the following orders should be made:

1. Appeal allowed with costs.

2. Set aside the orders of the Full Court of the Federal Court made on 2 September 2005 and order 3 of the orders made on 8 June 2006 and, in lieu thereof, order that the appeal to that Court be dismissed with costs.

3. Application for special leave to cross-appeal refused.

32 In M128 of 2006, set aside orders 1, 2 and 4 of the Full Court of the Federal Court made on 8 June 2006 and remit the matter of the cross-appeal to the Full Court of the Federal Court to that Court for further consideration in the light of the decision of this Court in M127 of 2006.

33 KIRBY J. This Court has before it two appeals from successive orders of the Full Court of the Federal Court of Australia. In each appeal, the appellant, CGU Insurance Limited ("CGU"), challenges decisions of the Full Court in favour of the respondent, AMP Financial Planning Pty Ltd ("AMP"). The main point in the appeals is the meaning and application of the obligation of utmost good faith, owed by an insurer to an insured under Australian law. However, there are many other issues that require consideration. That consideration demands close attention to the complex circumstances of the case and the arguments of the parties.

The complex issues in the litigation

34 *The decision in the appeal below*: The appeals in this Court arise out of a dispute between the parties as to the obligation of CGU to indemnify AMP under professional indemnity policies ("the Policies") issued by CGU in favour of AMP. Specifically, an important question is presented under the reformed law enacted by the *Insurance Contracts Act* 1984 (Cth) ("the Act"), s 13. That section implies into insurance contracts in Australia "a provision requiring each party to it to act towards the other party … with the utmost good faith".

35 The first appeal challenges the orders originally made by the Full Court[5] allowing AMP's appeal against the decision of the primary judge (Heerey J), substantially (but not on all issues) in favour of CGU[6]. The Full Court's decision dealt with issues relevant to the liability of CGU (as insurer) to AMP (as insured). It was concerned principally with whether, contrary to the findings of the primary judge, AMP had established entitlements to recover against CGU on the basis of the objective reasonableness of settlements arrived at between AMP and persons claiming against it ("the investors"). Those claims arose in circumstances alleged to engage the Policies and in accordance with a protocol agreed in principle between AMP and CGU as to the handling of such claims ("the Protocol").

36 In the appeal to the Full Court (as before the primary judge) AMP relied on the Policies, the Protocol, and also on arguments based both on the law of estoppel and on s 13 of the Act. The result of the first Full Court decision was an order, proposed by Emmett J[7] (with whom Moore J agreed[8]), allowing AMP's appeal. The order remitted to the primary judge for further consideration

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5 *AMP Financial Planning Pty Ltd v CGU Insurance Ltd* (2005) 146 FCR 447.

6 *AMP Financial Planning Pty Ltd v CGU Insurance Ltd* (2004) 139 FCR 223.

7 (2005) 146 FCR 447 at 489 [154].

8 (2005) 146 FCR 447 at 449 [1].

questions "in relation to each of the investor demands" upon AMP; issues of whether AMP had been induced in any way by CGU's conduct to settle those demands; and, if so or otherwise, whether CGU was estopped from, or would be in breach of its duty of utmost good faith by, asserting that AMP was required to establish by admissible evidence that it was legally liable to each investor[9].

37 In its first decision, the majority of the Full Court effectively concluded that the approach of the primary judge to the claim by AMP against CGU had miscarried by reason of a misunderstanding of, or failure to give effect to, AMP's estoppel arguments and also its arguments based on s 13 of the Act.

38 The third judge in the Full Court (Gyles J) agreed with some of the conclusions of the majority. He too was critical of the approach of the primary judge to AMP's claim[10]. However, for reasons somewhat different from those expressed by the primary judge, Gyles J rejected AMP's reliance on arguments of estoppel[11] and on s 13 of the Act[12]. By reference to the requirements of the Policies, which he held to be unaffected by these issues, Gyles J decided that the primary judge had come to the correct conclusion[13]. He would have dismissed the appeal. The orders favoured by the majority were made.

39 *The decision on the application to reopen*: CGU moved immediately for a stay of the entry of judgment, which was granted. CGU then applied to reopen the appeal to the Full Court in order to permit the Full Court to determine issues which CGU submitted would result in the appeal being dismissed. Those issues, which concerned the construction of the Policies, had been determined adversely to CGU by the primary judge[14] and were the subject of CGU's cross-appeal in the Full Court. The second Full Court unanimously dismissed CGU's application to reopen. All three judges concluded that the reopening of the contractual issues would be "academic"[15] or "futile"[16] in light of the orders made in the principal decision. In consequence, those orders were duly formalised. Special leave to

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9 (2005) 146 FCR 447 at 489 [154].

10 (2005) 146 FCR 447 at 491-492 [161]-[163], 492 [166].

11 (2005) 146 FCR 447 at 493 [172]-[173].

12 (2005) 146 FCR 447 at 491 [162].

13 (2005) 146 FCR 447 at 493-494 [173]-[177].

14 *AMP Financial Planning Pty Ltd v CGU Insurance Ltd* [2006] FCAFC 90.

15 [2006] FCAFC 90 at [2] per Moore J.

16 [2006] FCAFC 90 at [3].

appeal to this Court was granted to CGU in respect of the orders made in each of the Full Court decisions.

40 *The contention and cross-appeal*: In this Court, AMP, for its part, filed a notice of contention asserting that the Full Court had erred in failing to uphold the primary judge's decisions in favour of AMP on the specified issues relating to "the construction of the insurance policies"[17]. AMP sought special leave to cross-appeal. Its proposed cross-appeal was limited to a challenge to the order of remitter made by the first decision of the Full Court. AMP contended that, instead, the Full Court should have entered judgment in favour of AMP, as it contends this Court should now do. AMP also sought to substitute an order for costs against CGU and in favour of AMP by reason of the conduct of CGU, as insurer, about which AMP complains.

41 The foregoing description of the proceedings before this Court indicates the complexity of the litigation in the stage it has now reached. There are two appeals; an application for special leave to cross-appeal; and a notice of contention. Within the first appeal, issues are raised concerning:

- the liability of CGU as insurer under the contractual terms in the Policies;
- the reasonable settlement of investor claims pursuant to a suggested agreed Protocol;
- the law of estoppel; and
- whether the obligations of CGU are affected by the duty of good faith now contained in s 13 of the Act.

42 As if these "substantive" complexities were not enough, by their arguments before the Full Court, and in this Court, CGU and AMP each submitted that the other was restricted in the arguments it could advance in the appeals, by reason of considerations of procedural fairness. These submissions were made having regard to the pleadings; the respective conduct of the parties both at trial and on appeal; and the limited way in which certain evidence had been received concerning the individual investor claims against AMP, the payment of which by AMP has led to AMP's present claim for indemnity against CGU.

43 *Revocation of special leave?*: It must be questioned whether proceedings of this kind, proffering so many issues, most of which can only be resolved by

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17 These were issues 7, 8 and 9 in the reasons of the primary judge. See (2004) 139 FCR 223 at 250-252 [108]-[120].

reference to detailed facts, are truly suitable for determination in a second-level appeal and in a final national court. A tempting thought occasionally crossed my mind that the proper resolution of the proceedings might be the revocation of the grant of special leave for which I was myself, in part, to blame[18]. By its order of remitter, the Full Court majority had contemplated that the primary judge would reconsider all of his conclusions, giving adequate and correct attention to the issues of estoppel and good faith. In that sense, the proceedings were at an interlocutory stage.

44 Nevertheless, special leave having been granted, the issues having been fully explored, the amount ultimately at stake (not to say the costs) being substantial and some of the issues being important for the Australian insurance industry[19], this Court must resolve such of the issues as require determination. Unfortunately, to do this it is necessary, in the nature of those issues, to set out in some detail the factual background to the parties' disputes.

The facts

45 *Actions of securities representatives*: In August 1991, AMP was granted a licence as a securities dealer pursuant to s 784 of the former Corporations Law ("the Law")[20]. As such, AMP carried on business as an adviser to investors on finance, investment and insurance and as a licensed securities dealer and mortgage originator[21].

46 AMP and CGU entered into professional risks insurance contracts for two relevant years respectively from 28 February 1999 to 28 February 2000 ("the 1999 Policy") and from 28 February 2000 to 28 February 2001 ("the 2000 Policy"). The terms of the 1999 and 2000 policies were relevantly identical.

47 Some years previously, AMP had issued authorities to Mr Ashok Pal and Mr Anthony Howarth as "securities representatives" of AMP for the purposes of

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18 [2006] HCATrans 534 at 935; cf *Klein v Minister for Education* (2007) 81 ALJR 582; 232 ALR 306.

19 cf Sutherland, "An Uneasy Compromise: An Analysis of the Effect of Settlement Reached by an Insured with a Third Party Claimant vis-a-vis his or her Insurer", (1998) 9 *Insurance Law Journal* 257; Hopkins, "*AMPFP v CGU* – Utmost Good Faith under section 13, the Principle in *Rocco Pezzano* and the 'prudent uninsured'. What does it all mean and where to from here?", (2007) 18 *Insurance Law Journal* 25.

20 The Law has since been repealed.

21 (2005) 146 FCR 447 at 453 [12] per Emmett J.

Ch 7 of the Law. Messrs Pal and Howarth conducted a financial advisory business through a company which they controlled, Macquarie Advisory Group Pty Ltd ("MAG"). Each of them held a proper authority from AMP. At various times they also held proper authorities from Hillross Pty Ltd ("Hillross"), a related company of AMP[22]. Because the role of MAG (and whether it separately conducted a securities business) was later to become relevant, AMP made the point that the evidence did not establish that MAG itself conducted a securities business. AMP contended that the evidence was consistent with MAG having been no more than an administrative or service company of Messrs Pal and Howarth.

48 In May 1999, officers of Hillross discovered that Messrs Pal and Howarth had traded outside their proper authorities with Hillross. This discovery caused Hillross to notify the Australian Securities and Investments Commission ("ASIC") of possible breaches of the Law. At the same time, Hillross terminated the respective proper authorities of Messrs Pal and Howarth.

49 Following an investigation, ASIC obtained an order for the winding up of MAG and orders banning Messrs Pal and Howarth and MAG from the securities industry. These steps were followed by the compulsory examination of Messrs Pal and Howarth and officers of a company ("Hibiscus Spa") in which it was suspected that approximately $3.4 million of investor funds had been invested and lost. In December 1999, MAG was placed into liquidation.

50 *Notice to insurer of the claims*: On 16 December 1999, AMP informed CGU that it had become aware of a possible claim against it in relation to the activities of Mr Pal. It was this notice that gave rise to the claim under the 1999 Policy. Subsequently, on 5 September 2000, AMP gave further notification to CGU that it had become aware of matters that might give rise to additional claims. This notice was given under the 2000 Policy[23].

51 On 14 February 2001, officers of ASIC met officers of AMP. ASIC informed AMP that it was concerned about delay in compensating investors for losses arising from the conduct of Messrs Pal and Howarth, its securities representatives. A representative of ASIC told AMP that, if compensation was properly payable to investors, "there should be no discounting of valid claims and investors should not be required to follow a procedure that required court proceedings if such proceedings were unnecessary"[24]. It was made clear to AMP

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22 (2005) 146 FCR 447 at 455 [22].

23 (2005) 146 FCR 447 at 456 [24].

24 (2005) 146 FCR 447 at 456 [25].

that ASIC considered that the responsibility of AMP and Hillross was to handle all demands made by investors in an efficient, fair and timely manner and that such obligations should override any insurance concerns[25]. It was implicit that an inadequate response to the claims by the investors could put AMP's securities dealer's licence at risk.

52 Following the meeting between ASIC and AMP, AMP initiated discussions, through its solicitors, with CGU's then solicitors, designed to ensure that the demands by investors would be properly and quickly investigated and, where justified, paid "in the light of the comments made by [ASIC]"[26]. On 1 March 2001, AMP's solicitors (Minter Ellison) wrote to CGU's then solicitors (Ebsworth & Ebsworth) enclosing material in relation to AMP's "claim for indemnity for loss arising from the activities" of Messrs Pal and Howarth. In the letter, AMP's solicitors pointed to the importance for AMP's licence of a correct handling of the claims:

> "[T]he relationship between [AMP] and ASIC is critical to [AMP's] business. ASIC expects that securities licensees will conduct their business in a way which gives effect to their obligation to ensure that investors are adequately compensated for losses that arise from the wrong doings of securities representatives."

AMP made clear its obligation and intention to pay heed to ASIC's views when dealing with the investors' claims.

53 *Provision of a protocol*: The materials supplied to CGU included files maintained by AMP regarding Messrs Pal and Howarth as well as a summary of the investments that had given rise to demands for compensation by investors and details of their demands on AMP to date. As an example of how the legal liability of AMP to investors would arise, a draft liability report, prepared in relation to demands made by Bajada Retirement Fund ("Bajada") on AMP, was included. AMP's solicitors' letter went on:

> "When it is clear from the facts that advice was given or an investment made, at a time when Pal or Howarth, as the case may be, was authorised to act for more than one licensed securities dealer, notice will be issued to the other dealer seeking equal contribution. However, consistent with ASIC's requirements, contribution will not hold up resolution of the claim by [AMP] in any case.

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25 (2005) 146 FCR 447 at 456 [25].

26 (2005) 146 FCR 447 at 456 [26].

> The proposed procedure for the handling of claims … is presently being revised to reflect ASIC's comments … These proposed procedures will be supplied to you when they have been finalised."

54 On 26 March 2001, AMP's solicitors wrote again to CGU's solicitors enclosing a document described as "Proposed Procedure for the Management of Claims". This became known as "the Protocol". The further letter enclosed additional notification reports in relation to investor demands, as known to that time. It ended with an invitation:

> "We look forward to receiving, as soon as possible, confirmation that your client will indemnify [AMP] in respect of its liability arising out of the conduct of Pal and Howarth."

55 Clause 3 of the Protocol stated[27]:

> "[AMP] proposes that the following protocol be adopted for each complaint that is received by [AMP], whether direct or via Hillross:
>
> (a) receive claim and provide a notification report to CGU;
>
> (b) place Pal and Howarth on notice of claim as well as any other licensees that provided Pal or Howarth with a proper authority during the period of the investor's claim;
>
> (c) collate all relevant documentary evidence obtained from the investor;
>
> (d) prepare a report setting out [AMP's] legal liability and recommendations on the claim, considering factors such as investor risk profile, risk of investment and knowledge of that risk ('liability report') …
>
> (e) obtain instructions from CGU in relation to settling or defending the claim within 14 days of provision of the liability report;
>
> (f) if settling: prepare settlement deed, including full releases, confidentiality and any assignments of interests and associated causes of action …
>
> (g) if defending: prepare defence material for trial."

56 On 6 April, CGU's then solicitors responded in the following terms[28]:

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27 (2005) 146 FCR 447 at 457 [30].

28 (2005) 146 FCR 447 at 457 [31] (emphasis added).

> "We understand the requirements of [AMP's] internal and external complaints resolution procedures and have sought instructions from our client in respect of indemnity. Pending indemnity *your client should continue to act as a prudent uninsured.*"

57 *Agreement in principle to the protocol*: On 11 May 2001, CGU's solicitors again wrote to AMP's solicitors[29]:

> "[W]e are instructed by CGU … *to agree in principal* [sic] *to the protocol* for the handling of claims provided to us under cover of your letter dated 26 March 2001.
>
> In accordance with the protocol our client will consider your client's claim for indemnity on an investor by investor basis consequent upon receipt of your summary document. Upon receipt of your summary document we shall arrange to attend your office and inspect the relevant primary documents which it is submitted evidence the claim and comprise the basis of liability. *Thereafter we shall advise our client's instructions* in respect of the particular investor."

58 By 7 June 2001, AMP's solicitors were in a position to settle a concrete claim, namely that of Bajada. Accordingly, by letter of that day, they wrote to CGU's solicitors[30]:

> "You were provided with the liability report in respect of [Bajada's] claim on 26 March 2001. You have since indicated that CGU accepts liability in principle subject to examining the documents in support of each claim. We have since provided you with all the documents submitted by the claimants in support of their claim.
>
> [ASIC] has indicated to our client that settlement of claims ought not to be delayed due to the requirements of insurers. Accordingly, if we do not receive confirmation as requested above within 14 days of the date of this letter our client will settle this claim without the involvement of CGU. Our client will, however, expect CGU to reimburse it for the full amount of the settlement sum. Upon doing so our client will be willing to assign any assignments it takes from the claimants to CGU."

59 The assertions contained in the foregoing letter were repeated in respect of the demand by Bajada later in June 2001. On 9 July 2001 similar letters were

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29 (2005) 146 FCR 447 at 458 [31] (emphasis added).

30 (2005) 146 FCR 447 at 458 [32].

sent by AMP's solicitors in relation to specific demands upon AMP, made by other investors. On 12 July 2001, CGU's solicitors responded[31]:

> "[W]hilst *our client has no difficulties with the claim protocol as noted in our letter of 11 May* it has not yet determined to confer indemnity upon your client. Frankly it is interested to understand why it is that the directors (or their insurers) are not being required to meet the claims and why it appears that [AMP] has not pursued GIO Insurance for a decision on their liability. We would be grateful for your advice on precisely at what stage your client's negotiations with GIO Insurance have reached and if GIO Insurance has denied liability whether you believe such denial is sustainable."

The reference in this letter to GIO Insurance was to the insurer under a professional indemnity policy held by MAG with GIO Insurance.

60 *Ensuing protracted correspondence*: On 1 August 2001, AMP's solicitors again wrote to their counterparts expressing disappointment at the lack of response to their letters concerning investor demands[32]:

> "Due to our client's responsibilities under its dealers licence … to the claimants and the expectations of [ASIC], our client is obliged to go ahead with the settlements with these claimants.
>
> We enclose copies of the settlement deeds that our client proposes to use. [AMP] expects reimbursement from CGU in accordance with the terms of the above policy. Upon reimbursement, if CGU wishes, [AMP] is willing to assign any assignment it takes from the claimants to CGU."

61 This letter was followed by one of 8 August 2001 from CGU's solicitors to their counterparts[33]:

> "We confirm that *your client should continue to act as a prudent uninsured* in respect of the subject claim."

62 Some time during August 2001, the retainer of Ebsworth & Ebsworth was terminated. CGU appointed a new firm, Solomon & Associates, as its solicitors. The change of solicitors was not one that would quickly produce either a frank

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31 (2005) 146 FCR 447 at 458 [34] (emphasis added).

32 (2005) 146 FCR 447 at 458-459 [35].

33 (2005) 146 FCR 447 at 459 [35] (emphasis added).

and explicit denial or acceptance of indemnity. On 19 September 2001, AMP's solicitors wrote to the new solicitors for CGU[34]:

> "Your client … appeared to consider that [in the situation where the investor was not aware of the connection between Pal or Howarth and AMP] the principal would not be liable to the claimant. [AMP] suggested that if your client's view of liability was based on legal advice which differed from our advice, that fact has [sic] best be disclosed to us straight away.
>
> From [CGU's] response, we have taken it that Ebsworths [ie CGU's former solicitors] have not given advice which differs from our view concerning liability under section 819.
>
> As is evidenced from the liability reports already sent to you (and Ebsworths) our experience in dealing with investors is that the majority of them have the clear view that they were dealing with MAG, or in some cases Macquarie Bank. That is, that Pal and Howarth were acting as representatives of MAG. For the majority, the association with [AMP] has only come to light after the event. In our view, the effect of section 819 of the *Corporations Act* is to make [AMP] liable to such investors, even where investors do not know of [AMP], provided they reasonably believed that Pal or Howarth were acting for 'some person', such as MAG."

63 Despite this explicit invitation to the new solicitors for CGU to let AMP know, through its solicitors, of any contrary view concerning the operation of s 819 of the Law, there was no relevant response from Solomon & Associates.

64 On 5 October 2001 a meeting took place between the respective solicitors at which representatives of CGU were also present. AMP's solicitors made a presentation concerning the demands that had been made by investors in respect of the conduct of Messrs Pal and Howarth. On the same day, a letter was written providing a spreadsheet which summarised the amounts in respect of which demands had been received from investors. This document indicated that some had been rejected, some deferred and some paid by AMP. The letter concluded[35]:

> "Until CGU makes a decision on indemnity under the policy, *our client will continue to act in good faith as a prudent uninsured*, consistently with

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34 (2005) 146 FCR 447 at 459 [36].

35 (2005) 146 FCR 447 at 460 [39] (emphasis added).

> its obligations under the policy and its dealer's licence, to keep its exposure (financial, regulatory or to its reputation) to a minimum."

65 There were several further follow-up letters from AMP's solicitors to CGU's new solicitors, in each case indicating an expectation of reimbursement from CGU. There was no response either from CGU or its solicitors.

66 *Repeated offer of discussions*: In March 2002, Solomon & Associates ceased practice. CGU then retained Ms Nicole Wearne of Middletons, solicitors. On 5 April 2002, AMP's solicitors wrote to the new solicitors for CGU referring to the correspondence that had taken place over more than a year with the two previous solicitors, stating[36]:

> "At all times, our client has been willing to discuss this matter with CGU and its solicitors, and to provide any documents requested. We believe that we have complied, at all times, with requests for documents. If you believe that further documents need to be provided, please indicate which documents you require and we will attempt to find them."

67 Ms Wearne replied to this letter on 8 April 2002[37]:

> "We are instructed that our client continues to reserve its rights with respect to its liability to indemnify under the professional indemnity insurance policy issued to your client …
>
> [Y]our firm has acted for both [AMP] and [Hillross] throughout the claims administration process … There is a clear conflict of interest in your firm acting for both potential defendants …
>
> Our client insists that your firm immediately ceases to act for [AMP] and [Hillross] and that independent solicitors be appointed to administer any claims made against that entity.
>
> …
>
> As your firm is aware our client has obtained Senior Counsel's advice on the liability of [AMP] to clients of [MAG]. Counsel's advice is that your firm's interpretation of the Corporations Law is incorrect and accordingly in many cases no liability to a third party claimant exists.

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36 (2005) 146 FCR 447 at 460 [41].

37 (2005) 146 FCR 447 at 460-461 [42].

> We confirm your … verbal advice … that [AMP] has obtained releases and paid monies to investor clients of MAG. It is our view that to the extent the payments relate to any claim covered by the policy that the insured has breached the no admission or settlement condition set out in clause 7.6 of the policy.
>
> Our client believes that the procedure adopted by the insured to resolve disputes with clients of MAG may be in breach of condition 7.2 of the policy and in breach of the obligations imposed on the insured by Section 13 of the *Insurance Contracts Act 1984* as amended.
>
> …
>
> However our client is prepared to consider the insured's claim for indemnity arising from claims made by the clients of MAG on an individual basis.
>
> In the circumstances we have been instructed to review each client file to assess any liability on the part of the insured to the claimants for which it is entitled to be indemnified. In order for us to do this we seek that the insured provide us with a list setting out the name of every client of MAG where [AMP] considers that a claim for indemnity exists."

68 *Senior counsel's advice*: It is apparent that the foregoing letter represented a change of attitude on the part of CGU, as expressed by the new solicitors. It apparently coincided with the retainer of the new solicitors. Nevertheless, even at this time, there was no clear decision to repudiate the Protocol or to inform AMP that liability was denied by CGU. The reference to "Senior Counsel's advice" was a reference to an advice received by Solomon & Associates from Mr Alan Archibald QC on the issue of liability. That advice suggested that AMP had a defence to the claims being advanced by investors, based on the provisions of s 819(2) of the Law.

69 As will appear, the reliance on that sub-section was later abandoned. It was not pressed before this Court. The reference to Mr Archibald's advice provoked AMP's solicitors to respond to the preceding letter, recounting once again the communications between the parties since November 2000 and enclosing a consolidated schedule of all investors in relation to whose demands AMP sought indemnity under the Policies. CGU's solicitors declined to make Mr Archibald's advice available to AMP or its solicitors at that stage. They claimed legal professional privilege in respect of it. No specific reason was nominated as to why AMP had no liability to the investors. A demand was made for further information, sought as a "bear [sic] minimum"[38].

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38 (2005) 146 FCR 447 at 461 [43].

70 Meantime, in reliance on their understanding of it, AMP's solicitors continued to deal with investor claims in accordance with the Protocol. In the result, no investor instituted any legal proceedings or proceedings by way of arbitration against AMP. In all, AMP considered 63 investor claims under the Protocol. Through its solicitors it reached settlements with 47 of the investors. It paid those investors sums totalling $3.23 million. In respect of the balance of the investor claims, AMP either rejected or deferred a decision upon them. Before this Court, it was agreed that the balance of the claims should be treated as having been rejected by AMP. There was no indication of any legal proceedings being brought to enforce such claims.

71 *Insurer's obligation to decide*: Like Emmett J in the Full Court, I have taken pains to reproduce the course of correspondence between AMP and CGU, and their respective solicitors, for a reason. Only by considering the precise way in which CGU acted, over the long period from the first contact between the solicitors in March 2001 until December 2002, can the full impact of CGU's conduct be appreciated.

72 An insurer, acting in good faith, is perfectly entitled to deny indemnity. It can put the insured to proof where it rejects a claim, where it is suspicious about it or where it has *bona fide* reservations concerning its obligations to indemnify the insured. Then, at least, insurer and insured know where they each stand. Each can take appropriate advice. Each can prosecute and defend its legal entitlements. For nearly two years, CGU and its successive solicitors failed to act with clarity, candour and decisiveness. At one moment CGU was telling AMP through its solicitors to "act as a prudent uninsured". Yet immediately afterwards it was agreeing in principle to the Protocol. Repeatedly it either asserted, or acted on the basis, that it had no difficulties with the Protocol. But then, when relevant materials were sent, it reverted to the injunction to AMP to act as a "prudent uninsured". CGU ignored repeated invitations to nominate any further documentation it required. Yet it withheld its refusal of indemnity. It did not exercise its entitlement (or suggest that AMP exercise its entitlement) under the Policies to bring a test case, which would have permitted any doubts or hesitations it had concerning its liability to be ventilated, tested and authoritatively decided. It adverted to Mr Archibald's opinion. Yet then it declined to make that opinion available. Now it does not seek to sustain it. All too often, silence was the response to the letters from AMP's solicitors.

73 Certainly, there was no outright rejection of the claim for indemnity. On the contrary, whilst hinting at the existence of grounds to justify it to decline indemnity, by April 2002, the third solicitors to represent CGU were continuing to observe the Protocol. They acknowledged their instructions to "review each client file" being submitted to them in accordance with the Protocol by AMP's solicitors.

74 When the full detail of this extended prevarication and humbug is understood, it is apparent that CGU's conduct was quite contrary to the honourable and proper conduct of insurers in relation to insureds that should be observed in Australia in accordance with the Act. It therefore occasions little surprise that the majority in the Full Court concluded that further attention should be given to the legal foundations upon which AMP sought to rely in order to repel what at last happened, close to the end of the second full year of such conduct by CGU.

75 *Denial after litany of delay*: On 31 December 2002, AMP's solicitors wrote to Ms Wearne, who by now had moved from Middletons to Deacons, solicitors. The letter evinced a kind of desperation, certainly anxiety. After referring to the course of correspondence described above, the solicitors asked CGU to confirm in writing, no later than 14 January 2003, whether it admitted that the Policies responded to the demands made against AMP relating to Mr Pal's activities, detailed in an attached schedule. They insisted on knowing "whether CGU propose[d] to conduct negotiations and any legal proceedings in respect of any of the demands that remained unresolved"[39]. As Emmett J described it[40]:

> "There was no response to the letter because, unbeknownst to AMP and [its solicitors], CGU had written directly to AMP on 14 November 2002. The letter was addressed to AMP's brokers but, for some reason, it was not received by either AMP or [its solicitors].
>
> By the letter of 14 November 2002, CGU declined indemnity in respect of the demands made by clients of MAG and Pal. Enclosed with the letter were three schedules, A, B and C, describing the demands made against AMP, of which CGU had received notification. In relation to the demands listed in schedule A, CGU maintained that no legal liability existed on the part of AMP to the relevant investors."

76 The apparent lack of response would not have been surprising, given the litany of misleading delay. In the mysteriously mislaid letter of 14 November 2002 (a copy of which was subsequently provided by CGU's solicitors to AMP's solicitors on 7 January 2003) CGU went on[41]:

> "We are advised that [AMP's solicitors'] legal opinion on the operation of section 819 is flawed and not supported by case law. We are also advised

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39 (2005) 146 FCR 447 at 461 [44].

40 (2005) 146 FCR 447 at 461 [44]-[45].

41 (2005) 146 FCR 447 at 461 [45].

> that for [AMP] to be liable under section 819, what is required on the part of the claimant is actual belief that Pal's conduct in providing advice was performed in connection with [AMP's] business. Moreover, the investors' belief must be reasonably held.
>
> It is clear that none of the Schedule A investors held a belief that Pal acted on behalf of [AMP] at the time that the advice was provided or the investment made."

77 As Emmett J remarked, it is "highly significant" that no mention was made in this letter of s 819(4) of the Law, upon which a latter-day reliance has been placed by CGU. The demands referred to in Schedules B and C of the letter are not material. The amounts paid by AMP in accordance with the Protocol all related to investor claims falling within CGU's Schedule A.

78 At this stage, AMP's solicitors again pressed their demand for a copy of Mr Archibald's advice. Now, at last, it was provided. Emmett J noted that it made no mention at all of s 819(4) of the Law[42].

The cover and the pleadings

79 *Cover under the Policies*: It is important now to set out the relevant provisions of the Policies. Pertinent clauses of the Policies were examined both by the primary judge[43] and by Emmett J in the Full Court[44].

80 By cl 3.1, CGU agreed to provide cover for Claims (as defined) for Civil Liability (as defined) arising from the conduct of the Insured Professional Business Practice (as defined), provided prerequisites were satisfied in respect of the timing of the Claims. Special condition 4 stated:

> "[I]t is hereby declared and agreed that [AMP] shall be indemnified in accordance with the terms, conditions, exceptions and limitations of this Policy in respect of its liability as a principal and licensed securities dealer for acts or omission of its authorised representatives, but only on the basis that CGU … retain the rights of subrogation against the authorised representatives."

81 The Policies were particular to the business of AMP as a securities dealer under the Law. The relevant conditions were not template clauses, but were

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42 (2005) 146 FCR 447 at 462 [48].

43 (2004) 139 FCR 223 at 235 [41], 250 [108], 251 [111]-[113].

44 (2005) 146 FCR 447 at 454-455 [16]-[21].

specially inserted. By special condition 3, CGU agreed to insure AMP as a licensed securities dealer. CGU must thus be taken to be aware of the legislative setting within which AMP operated and the requirements to which AMP was subject (including those of ASIC) in respect of the activities of its authorised representatives in their dealings with investors.

82 Moreover, CGU must be taken to have been aware of the discipline to which AMP was subject from ASIC under the Law and the risks that non-compliance with ASIC's discipline would pose for the continuance of AMP's licence[45]. As CGU would have known, AMP's licence had a value to it (and its shareholders) far exceeding the individual or aggregate investor claims in issue in these proceedings. In writing insurance in this field of business, CGU must therefore be taken to accept the consequences for its insureds of the normal operation of the Law governing their business and the ordinary superintendence by ASIC to ensure that the letter and policy of the Law is carried out by a licensed securities dealer, such as AMP. Giving this context to the Policies, the later objections by CGU that AMP had acted on the settlement of claims out of fear of ASIC, and not as a prudent uninsured acting in good faith to CGU, are singularly unpersuasive.

83 By cl 3.2 of the Policies, it was stated that cover was to be provided in respect of any of the following types of Civil Liability Claims arising in the course of the Insured Professional Business Practice (relevantly):

> "(a) Breach of duty …
>
> (d) Dishonest, fraudulent, criminal or malicious acts or omissions by an Employee or Principal of [AMP] (but there is no cover to that Employee or Principal for these Claims).
>
> (f) Breaches of the *Trade Practices Act 1974* or similar Fair Trading legislation …".

84 Under cl 12.1 of the Policies, "Civil Liability" was defined as:

> "Liability for the damages, costs and expenses which a civil court orders [AMP] to pay on a Claim (as opposed to criminal liability or penalties)."

85 The term "Claim" was defined in cl 12.2 as:

> "Any originating process (in a legal proceeding or arbitration), cross claim or counter claim or third party or similar notice claiming compensation against and served on [AMP]."

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45 cf reasons of Callinan and Heydon JJ at [225].

86 By cl 7 of the Policies the following provisions were made concerning the dealings between insurer and insured:

> "7.1 [AMP] must tell [CGU] in writing about a Claim or loss as soon as possible and while this Policy is in force …
>
> 7.2 [AMP] must:
>
> (a) diligently do, and allow to be done, everything reasonably practicable to avoid or lessen [AMP's] liability or loss in relation to a Claim;
>
> (b) immediately give [CGU] all the help and information that [CGU] reasonably require to:
>
> (i) Investigate and defend the Claim or loss; and
>
> (ii) Work out [CGU's] liability under this Policy.
>
> …
>
> 7.5 [CGU] can:
>
> (a) take over and defend or settle any Claim in [AMP's] name; and
>
> (b) Claim in [AMP's] name, any right [AMP] may have for contribution or indemnity.
>
> 7.6 [AMP] must not:
>
> (a) admit liability for, or settle any Claim; or
>
> (b) incur any costs or expenses for a Claim
>
> without first obtaining [CGU's] consent in writing.
>
> If [CGU's] prior consent is not obtained, [AMP's] right to cover under this Policy may be affected."

87 *The pleadings*: In view of the highly technical arguments CGU pressed on this Court, concerning the suggested unfairness of the approach adopted by the majority in the Full Court (and the order of remitter that gave effect to their conclusions), it is necessary, as Emmett J concluded in the Full Court[46], to make reference to CGU's pleadings before the Full Court.

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46 (2005) 146 FCR 447 at 462-469 [51]-[65].

88 Emmett J's analysis of the pleadings extends over seven pages of his Honour's reasons. That analysis constitutes an admirable exercise in thoroughness and precision. It rebuts CGU's persistent complaint that AMP went outside the cases pleaded. I will not repeat the detail in Emmett J's reasons. I incorporate that detail by reference. Suffice it to say that it bears out what is, in any case, apparent on the face of AMP's statement of claim. AMP brought its claim against CGU under several heads, relevantly[47]:

> "• Breach of the Insurance Policies.
>
> • Estoppel against denial of indemnity under the Insurance Policies.
>
> …
>
> • Section 13 of the [Act]."

89 As Emmett J observed[48], AMP's claim against CGU for breach of the Policies could not ultimately succeed in contract. This was because, under cl 3.1 of each of the Policies, the obligation of CGU was to provide cover for "Claims", a defined word. Any such "Claim" involved a claim made by originating process, in a legal proceeding or arbitration, cross-claim, or counter-claim or third party or similar notice claiming compensation against AMP. In the event, and because of compliance with the Protocol, there were no such legal proceedings, and no arbitration, etc against AMP by any of the investors. Without a single express protest from CGU, each of the demands was settled by AMP before any such step was taken.

90 "Civil Liability" on the part of AMP, as contemplated by cl 3.1 of the Policies, defined in cl 12.1 as "[l]iability … which a civil court orders [AMP] to pay on a Claim", was therefore not established. As well, cl 7.6 of the Policies prohibited AMP from admitting liability for, or settling, any Claim without first obtaining CGU's consent in writing. No such written consent was provided to AMP by CGU before the settlements with the investors.

91 Upon these bases, a claim by AMP founded solely in contract, ie on the Policies, could not succeed. It was against the possibility that the foregoing provisions, or any of them, might be relied on by CGU to repel AMP's claim under the contracts of insurance that AMP pleaded estoppel and sought to show that, acting as a prudent uninsured, its settlements of demands by investors were

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47 (2005) 146 FCR 447 at 462 [49].

48 (2005) 146 FCR 447 at 463 [52].

reasonable in all of the circumstances and were made in good faith[49]. If the relevant estoppels were made out, CGU's liability to indemnify AMP would extend to cover AMP's reasonable settlement payments in satisfaction of its liabilities to investors[50]. In addition, AMP specifically pleaded reliance on the duty, which CGU owed pursuant to s 13 of the Act, to act towards AMP with the utmost good faith in respect of any matter arising under, or in relation to, the Policies.

92 *CGU's claim of unfairness*: Before this Court (and indeed before the Full Court) CGU made a lot of fuss suggesting that AMP had shifted the content of the estoppels upon which it relied and had altered the way in which it invoked s 13 of the Act. Whilst paying tribute to the ingenuity of these arguments, I am completely unconvinced that there is any substantive merit in them. Specifically, I would reject any contention that the approach and conclusions of the majority in the Full Court worked any procedural injustice on CGU. Given the ill-focussed, prevaricatory conduct of CGU and its successive solicitors, lasting almost two years, which I have described above, the belated insistence that CGU was a victim of procedural unfairness in the issues fought and decided in the proceedings rings hollow.

93 CGU's defence contested the estoppels relied on by AMP. The terms of the defence, however, removed any question that might otherwise have arisen from the language of cll 7.6, 12.1 or 12.2 of the Policies. Thus, by its defence, CGU accepted that it would not deny cover to AMP on the ground that no Claim (as defined) had been served on AMP by any investor; that no civil court had ordered AMP to pay monies in respect of any Claim; or that AMP had settled investor demands without CGU's prior consent in writing[51]. These concessions notwithstanding, CGU put in issue the question whether AMP had any liability to the investors with whom it had settled and, if so, whether such liability was of a kind to which its Policies responded.

94 CGU pleaded a number of specific defences to AMP's claim for indemnity. Thus, CGU's defence relied on its claimed entitlement to refuse indemnity in respect of payments already made by AMP on the basis that AMP was not itself liable to the investors by reason of the provisions of ss 817, 818 or 819 of the Law. Additionally, CGU pleaded that, even if AMP were *prima facie* liable pursuant to s 819(2) of the Law, each of Messrs Pal and Howarth was a representative of MAG, within s 819(1)(a) of the Law, and, in accordance with

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49 (2005) 146 FCR 447 at 467 [61].

50 cf reasons of Gleeson CJ and Crennan J at [9].

51 (2005) 146 FCR 447 at 465 [56].

the terms of s 819(4) of the Law, AMP was not liable for the allegedly wrongful conduct of either of them[52].

95 *Approach of the Full Court*: In his reasons, Emmett J accurately explained the position reached on CGU's specific defences[53]:

> "CGU maintains that the issues thrown up by its defence required AMP to establish that it had a liability to each of the investors described in the SC Schedule, and that that liability was one to which the Insurance Policies responded. Those issues would also involve questions of the construction of s 819 of the Law and of cl 3.2 of the Insurance Policies. The issues would also entail evidence as to the circumstances in which investors made the investments that gave rise to their demands against AMP. That in turn would involve examination of the relationship between investors, on the one hand, and Pal, Howarth or MAG, on the other."

96 As Emmett J pointed out, whatever else it had done or not done, CGU had not at any time admitted that the Policies responded to any of the investor demands. By the time it reached the trial CGU had firmed up on the resistance suggested by Ms Wearne when she took over the matter. Its case had become that AMP itself had no liability to the investors and, if it did, that any such liability was not within the Policies[54].

97 In response to this state of the pleadings, AMP made no attempt before the primary judge to prove, *ad seriatim*, that it was liable in respect of the individual demands of investors described in the relevant schedule. Instead, as Emmett J put it, "AMP sought simply to establish that, acting as a prudent uninsured, its settlement of the demands by investors was reasonable in all of the circumstances. It also referred to s 13 of the [Act] in aid of its position."[55]

The decision of the primary judge

98 *Good faith and dishonesty*: In his reasons, Emmett J pointed out[56] that the primary judge had not followed the ordinary path of determining the issues between the parties in terms of their respective pleadings. Instead, he stated a

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52 (2005) 146 FCR 447 at 465-466 [57].

53 (2005) 146 FCR 447 at 467 [58].

54 (2005) 146 FCR 447 at 467 [59], [60].

55 (2005) 146 FCR 447 at 467 [61].

56 (2005) 146 FCR 447 at 469 [66].

number of questions for determination. By inference, these were the questions that he believed expressed the real issues, as they had emerged from the conduct of the trial by the parties.

99 The first two questions dealt with AMP's entitlements, and CGU's liability, under the Policies, in the events that had occurred. In view of what has already been said, it is possible to leave these issues aside and to proceed immediately to the third of his Honour's questions. This presented the issue whether AMP could avoid the result that followed from a literal application of the Policies on the basis of estoppel and/or a breach of the statutory obligation of utmost good faith. In summarising the answers of the primary judge on these issues, Emmett J encapsulated them, accurately, as follows[57]:

> "AMP could not rely on an estoppel because there was no relevant reliance by AMP. Up until receipt of the letter of 14 November 2002, AMP recognised that CGU had neither admitted nor denied liability to indemnify under the Insurance Policies. CGU made it clear that AMP was to be no worse off in respect of its rights (if any) under the Insurance Policies by negotiating with investors and entering into settlements. Further, AMP had not shown any detriment because CGU's defence makes it clear that it did not deny AMP's claim for indemnity on the basis of cll 12.1, 12.2 and 7.6. Accordingly, AMP is no worse off, vis a vis its policy rights (if any), by having entered into settlements with investors.
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> … An allegation of breach of the duty of utmost good faith requires proof of some want of honesty. There was no want of honesty on the part of CGU and, therefore, there was no failure to act toward AMP with the utmost good faith."

100 *Application of s 819 of the Law*: The primary judge's fourth issue concerned the liability of AMP to the investors in accordance with the Law. On this point the primary judge noted that the critical provision was s 819 of the Law and that CGU did not propound the view of that section's operation, adopted by Mr Archibald, that the conduct of Messrs Pal and Howarth was not in connection with a securities business or investment advice business carried on by AMP. Rather, CGU finally submitted that AMP could have relied on the exculpatory provisions in s 819(4).

101 The fifth issue concerned AMP's reliance on s 819(4) of the Law. On this, the primary judge concluded that the purpose behind s 819(4) was to "mitigate to some extent the Draconian rigour of s 819, which creates liability whether or not the wrongdoer was the agent of the 'indemnifying principal' and whether or not

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57 (2005) 146 FCR 447 at 469-470 [66].

the client had even heard of the indemnifying principal in relation to the impugned conduct". The primary judge concluded[58]:

> "At least where what might be termed the 'real' principal is before the court, it seems reasonable that it alone should bear the burden, and s 819(4) has that effect."

102 Although the answers to the foregoing questions were legally sufficient to require that the claim be decided in favour of CGU, the primary judge went on to address his remaining issues.

103 *Finding of unreasonable settlements*: As to the sixth, he concluded that the settlements reached by AMP with the investors were not reasonable, being of the view that[59]:

> "the whole process was so dominated by pressure from ASIC that I am quite unable to conclude that the Settlements would have been reached in the agreed amounts, or indeed at all, had that pressure not existed. …
>
> Apart from the question of process, the Settlements were unreasonable because they failed to take into account the availability of the s 819(4) defence … [This] seems not to have been considered at all."

104 The primary judge then decided three further issues (his numbers 7, 8 and 9) in favour of AMP[60]. On issue 7, he concluded that the demands by investors against AMP could "be properly characterised as being for breach of duty" and thus within cl 3.2 of the Policies. On issue 8, he concluded that, given the purpose of the Policies to provide indemnity for the kind of liability that AMP might incur by conducting the kind of business it had, a commercial construction of the Policies required rejection of the argument that the ambit of the "Insured Professional Business Practice" of AMP was limited to its own activities and did not extend to those of authorised agents for which it might be liable under the Law.

105 *Residual primary findings*: As to his ninth issue, the primary judge answered in the negative the question of whether the demands of investors were excluded from AMP's indemnity by cl 6.3(e) of the Policy. The last two issues in the primary judge's list concerned the disposition of costs and declaratory relief. In light of the primary conclusions reached by him, the primary judge entered

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58 (2004) 139 FCR 223 at 248 [99].

59 (2004) 139 FCR 223 at 250 [106]-[107].

60 (2004) 139 FCR 223 at 250-252 [108]-[120].

judgment in favour of CGU. However, because AMP had succeeded on three issues (issues 7, 8 and 9) and CGU was otherwise successful, his Honour ordered that AMP pay ninety percent of CGU's costs[61].

The decision of the Full Court

106 *A critical difference*: It is essential to appreciate the critical difference between the majority in the Full Court and both the primary judge and Gyles J, in dissent in the Full Court. Essentially, the majority in the Full Court concluded that the primary judge had erred in his treatment of the issues of estoppel and of AMP's reliance on s 13 of the Act. Because a proper consideration of those two issues was essential to a just and lawful determination of AMP's claim for indemnity by CGU, the mistaken treatment of those issues had caused the trial to miscarry. In effect, the approach of the primary judge had deprived AMP of the only basis upon which, in law, it might establish its entitlements against CGU. It was for that reason that the majority ordered that the proceedings be remitted to the primary judge for further consideration.

107 The majority necessarily recognised that, in the end, the further consideration might fail to establish AMP's entitlements, in the ways in which AMP advanced them. However, it is basic to the trial system observed in this country that a party should have a decision of the trial court upon every legal claim propounded by it, freed from material errors of legal approach or significant factual misunderstandings.

108 There was no error in the approach of the majority in the Full Court with respect to the remitter. The majority withheld the entry of judgment in favour of AMP (relief which AMP had sought at trial, on appeal and which it now seeks in this Court by its proposed cross-appeal). The order of remitter contemplated that CGU might still succeed at first instance. It simply insisted that such success should be based on a proper trial of the issues of estoppel and good faith propounded by AMP which, the majority concluded, had not so far occurred.

109 Following such an interlocutory order, of a kind regularly made by intermediate courts which have responsibility in that regard (and more time to consider the factual complexities of a case than this Court ordinarily has), the remitter would normally be allowed to take its course before any intervention by this Court. If, in the outcome, the primary judge were to confirm his original conclusion, at least AMP would then arguably have had a full and accurate consideration of its arguments. If the primary judge reversed his conclusion, the Full Court's correction would be vindicated. CGU would be entitled to challenge

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61 *AMP Financial Planning Pty Ltd v CGU Insurance Ltd (No 2)* [2004] FCA 1397. See (2005) 146 FCR 447 at 471 [67].

that outcome, including any still relevant interlocutory rulings made on the way, up to this Court.

110 *Emerging issues on appeal*: CGU secured special leave to bring these appeals, not only because of its complaints concerning the principles that had led the Full Court majority to remit for correction of error the original determinations on the estoppel and good faith questions, but because of what CGU said were fundamental reasons undermining the correctness of remitter in this case. Those fundamental reasons were said to include the procedural unfairness inflicted on CGU by the majority's consideration of the estoppel and good faith issues in the Full Court. However, given that both such issues were unequivocally signalled in AMP's statement of claim and pursued at the trial, I have already indicated that, on appropriate analysis, there was no substance in CGU's argument in this regard.

111 More fundamental, and arguable, was the question of whether AMP was bound to fail in any case, making remitter on the issues of estoppel and good faith futile. One such propounded "fundamental issue" was whether the settlements agreed between AMP and the investors were objectively shown to be unreasonable, taking into account the proper operation of s 819(4) of the Law[62]. Connected with this issue, and in a sense even more fundamental, is the question of whether AMP could prove the objective reasonableness of the settlements with the investors simply by tendering (and having admitted) the written files of the claims on AMP by such investors, without actually calling the investors and other persons to establish, by oral testimony, the circumstances in which those claims arose, the investors' respective relationships with Messrs Pal and Howarth, MAG and AMP and the reasonableness of the individual sums which AMP had paid out, given the potential sources of doubt over the fact and extent of AMP's liability to the investors.

112 *Defective treatment of estoppel*: For the majority in the Full Court, Emmett J accepted the rule established by this Court in *Unity Insurance Brokers Pty Ltd v Rocco Pezzano Pty Ltd*[63]. By that rule, where one party to a contract is in breach and the breach forces the innocent contracting party into litigation with a third party, the innocent party may properly conclude that its best interest is to settle the third party's claim. The contract breaker will then be liable in law for the settlement where (1) it is in breach of its legal obligations and (2) the settlement is reasonable when judged objectively, by reference to all of the circumstances prevailing at the time the settlement was reached[64].

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62 (2005) 146 FCR 447 at 492 [167], 493 [169] per Gyles J.

63 (1998) 192 CLR 603 at 615-616 [33] per McHugh J.

64 cf reasons of Gleeson CJ and Crennan J at [9].

113 In the present case, at the time of the successive settlements with the investors (and most certainly during the early settlements) CGU was not in the position of a "contract breaker"[65]. This was because of the way in which the Policies defined a "Claim" and because no such Claim (as defined) had ever been made. Nevertheless, AMP argued that the lack of Claims (as defined) did not defeat its case against CGU, pleaded in terms of estoppel and, alternatively or additionally, the obligations imposed on CGU by s 13 of the Act. As the majority in the Full Court recognised[66] (with support on this point from Gyles J[67]), the estoppel argument was crucial if AMP was to get to first base, in the face of the terms of the Policies. This made it critical that the primary judge should examine closely and accurately both the estoppel claim and the reinforcement for that claim that AMP sought to derive from s 13 of the Act.

114 Essentially, the primary judge considered that AMP had effected the settlements with the individual investors because it regarded such settlements as desirable in its own interests (including its interest to keep on the right side of ASIC). The primary judge did not consider that AMP had acted in reliance on any commitment or promise or representation made to it by or for CGU that CGU would indemnify or reimburse AMP in respect of payments made pursuant to the settlements with the investors[68].

115 In response to the primary judge's conclusion in this regard, AMP countered that its detriment was to be found in the fact that it had proceeded (as CGU knew) along the path of individual settlements with the investors, on the footing of its own legal advice that this was a course proper for it to take as a "prudent uninsured". Because CGU had not promptly decided and announced its refusal of indemnity, AMP had put itself in a seriously disadvantageous position. When the refusal of indemnity at last came, AMP could effectively no longer require any of the investors to come forward to prove a case against AMP, so as to meet the obligation created by the belated denial of indemnity and insistence on individual proof of the investor claims.

116 By sitting on its hands the way it did, CGU had thus lulled AMP into a belief that its agreement in principle to the Protocol would ultimately lead to the provision of indemnity for the payments to investors made by AMP. CGU knew

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65 (2005) 146 FCR 447 at 472 [70]; see also at 491-492 [163] per Gyles J.

66 (2005) 146 FCR 447 at 449 [1] per Moore J, 472 [71]-[72], 474 [82], 489 [154] per Emmett J.

67 (2005) 146 FCR 447 at 491 [161].

68 (2004) 139 FCR 223 at 240 [61].

of the pressure that ASIC was imposing on AMP. That pressure to act efficiently, fairly and in a timely way was inherent in AMP's business for which CGU had provided insurance. CGU was supplied by AMP with all of the relevant written material. It repeatedly omitted to respond to enquiries as to whether it needed more information. It failed to initiate, or suggest, a settlement test case. And only most belatedly did it raise its suggested defence, based on s 819 of the Law.

117 It is true, as the primary judge pointed out, that CGU by its defence indicated that it would not rely on the absence of a "Claim" or of an order of a civil court to repel AMP's proceedings against it. However, according to AMP, these concessions were "quite illusory if, in order to obtain reimbursement from CGU under the Insurance Policies, it [was] incumbent upon AMP to conduct, as against CGU, the case that each investor, but for the settlement, would have had to conduct against AMP"[69].

118 *Primary judge's critical error*: It is in dealing with these arguments (which CGU contested and unconvincingly suggested were outside the original case of estoppel) that Emmett J identified the critical error of approach on the part of the primary judge concerning AMP's pleaded reliance on estoppel. Emmett J said[70]:

> "AMP says, in effect, that it was induced to assume that it would not be required to establish by admissible evidence that it was legally liable to the investors. If it were required to establish by admissible evidence that it was legally liable to each of the investors with whom it settled, it has adversely affected its capacity to obtain indemnity from CGU. If AMP's assumption was induced by CGU, it would be unconscionable for CGU to depart from that assumption by insisting upon AMP establishing by admissible evidence that it was legally liable to each investor.
>
> His Honour did not make a finding in relation to the assumption and detriment for which AMP contends. That is to say, his Honour made no finding as to whether, in reliance upon the assumption referred to above, AMP entered into any settlement with an investor and made no finding as to whether, from a practical point of view, AMP put it beyond its power to establish by admissible evidence that it was legally liable to that investor."

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69 (2005) 146 FCR 447 at 473 [78].

70 (2005) 146 FCR 447 at 474 [81]-[82].

119 Emmett J noted CGU's complaint that the estoppel relied on was outside the pleadings[71]. However, he concluded (rightly in my view) that the contention advanced by AMP was within the pleadings[72]. Obviously, he considered that, because the estoppel claim was crucial to the foothold of AMP's recovery against CGU, it was essential that the claim be addressed accurately and determined, one way or the other, on the available evidence.

120 *Support for the Full Court's analysis*: There are many considerations sustaining Emmett J's approach. As a matter of law, the way in which AMP advanced its claim grounded on estoppel finds ample support both in the general law and equitable bases of estoppel[73]. Arguably, for CGU to depart from assumptions it induced in the course of its dealing with AMP (including its agreement in principle to the Protocol) would amount to unconscientious conduct[74]. So much was also recognised by Gyles J[75]. His Honour concluded, rightly in my view, that[76]:

> "[t]o act as a prudent uninsured is, for relevant present purposes … similar to the position of an insured denied cover in breach of contract. A prudent uninsured might arrive at an objectively reasonable settlement in the light of its potential liability and pay accordingly."

121 Gleeson CJ and Crennan J reject AMP's claim grounded on estoppel, for the reason that, according to their Honours, the requisite representation and

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71 (2005) 146 FCR 447 at 474 [83].

72 (2005) 146 FCR 447 at 474 [84].

73 *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 at 428-429; *The Commonwealth v Verwayen* (1990) 170 CLR 394 at 441-442; cf *New Zealand Pelt Export Co Ltd v Trade Indemnity NZ Ltd* (2004) 13 ANZ Insurance Cases ¶61-626 at 77,679-77,681 [96]-[99].

74 *Thompson v Palmer* (1933) 49 CLR 507 at 547; *Tobin v Broadbent* (1947) 75 CLR 378 at 407.

75 (2005) 146 FCR 447 at 491 [161] citing (amongst other cases) *Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Australia) Ltd* (1986) 160 CLR 226 at 244.

76 (2005) 146 FCR 447 at 491 [161].

reliance were lacking[77]. In my view, each of the suggestions is fully answered by Emmett J in the passages that I have cited[78].

122 For present purposes, it is not essential for this Court in these appeals to decide the liability of CGU finally on the basis of the estoppels propounded by AMP. The whole point of the order of remitter, favoured by the majority in the Full Court, was to allow that question to be fully considered and decided by the primary judge by the application of the law to the facts properly examined and found. The correct time for any conclusive determination by this Court of CGU's liability, based on AMP's arguments of estoppel, would be after the determination of that issue by the primary judge, following the remitter, and following any further appeal to a Full Court.

123 For the present, it is sufficient to say that the Full Court's conclusions that the primary judge erred in his approach to the evidence; that the claim now advanced by AMP was within the pleadings; and that it was a legally viable claim, have not been shown to be erroneous. It remains to decide whether, as CGU asserts, remitter was nonetheless futile. The Full Court's analysis, and its conclusion, on the arguability of the issue of estoppel should not be disturbed. Subject to what follows, this alone supports the order of remitter which is designed to ensure the proper determination of an essential ingredient in AMP's claim against CGU.

124 *Good faith and the s 13 claim*: The same conclusion, in my view, follows from an analysis of the treatment by the majority in the Full Court of the primary judge's consideration of AMP's reliance on s 13 of the Act. That section states:

> "A contract of insurance is a contract based on the utmost good faith and there is implied in such a contract a provision requiring each party to it to act towards the other party, in respect of any matter arising under or in relation to it, with the utmost good faith."

125 The expression "utmost good faith" is not defined in the Act. At common law, contracts of insurance were contracts *uberrimae fidei*. Ordinarily, the obligations of good faith arose in cases involving suggested breaches of that obligation by the insured. However, at common law, as under s 13 of the Act, the principle applied equally to both parties to the insurance contract[79].

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77 At [10].

78 Above, these reasons at [117]-[118].

79 *Distillers Co Bio-Chemicals (Aust) Pty Ltd v Ajax Insurance Co Ltd* (1974) 130 CLR 1 at 31; *Deaves v CML Fire and General Insurance Co Ltd* (1979) 143 CLR

(Footnote continues on next page)

126 Before the passage of the Act, there was no reported case in which the common law duty clearly operated to the benefit of the insured[80]. In part, this was because of decisional authority suggesting that the only remedy which an insured had for breach of the good faith obligation in an insurance contract at common law was avoidance of the contract. That was a remedy that would rarely, if ever, be to the benefit of the insured, given that it would effectively deny insurance cover[81].

127 The language of s 13, including the statement of the general principle as a legal obligation separate from the implication of a provision into the contract, supports AMP's submission that s 13 of the Act had the effect of introducing a larger and reciprocal obligation between the insurer and the insured in the place of what had, for all practical purposes, previously been a one-way street. Such a view of s 13 would fit comfortably with other protections for consumers, introduced into the Act, based on the report of the Australian Law Reform Commission[82].

128 In his reasons, the primary judge was unconvinced by AMP's reliance on s 13 of the Act. He dismissed the contention of a want of the utmost good faith on the part of CGU. He held that it was essential, if that complaint were to be established, for AMP to prove a want of honesty on the part of CGU, an element that the primary judge held was unproved[83]. Indeed, AMP had not, as such, made such an allegation at trial. It was this view concerning the requirements of s 13 that the majority in the Full Court held to have been erroneous[84]. They concluded that it amounted to a legal error. I agree with the opinion of the majority in this respect. The legal error, once disclosed, also justified the remitter of this issue to the primary judge for redetermination, so long as to do so was not futile.

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24 at 76 per Murphy J; *Banque Keyser Ullmann SA v Skandia (UK) Insurance Co Ltd* [1991] 2 AC 249.

80 *Kelly v New Zealand Insurance Co Ltd* (1993) 7 ANZ Insurance Cases ¶61-197 at 78,258 is an instance where the attempt failed.

81 Kelly and Ball, *Principles of Insurance Law in Australia and New Zealand*, (1991) at 156-159 [4.23]-[4.31].

82 Australian Law Reform Commission, *Insurance Contracts*, Report No 20, (1982) at 202 [328]. Note also the summary of recommendations at xxxvii [64] indicating the frequency of complaints about delay on the part of insurers.

83 (2004) 139 FCR 223 at 242 [76].

84 (2005) 146 FCR 447 at 475-476 [86]-[92].

129 *The relevance of dishonesty*: It is true that, before these proceedings, there were *dicta* in Australian judicial opinions suggesting that some want of honesty had to be proved in order to establish a breach of the requirement of the utmost good faith expressed in s 13 of the Act. Ormiston JA (with whom Phillips and Kenny JJA agreed) said as much in *CIC Insurance Ltd v Barwon Region Water Authority*[85]. Ormiston JA adopted that test by reference to what he took to be the holding of the Full Court of the Supreme Court of Western Australia in *Kelly v New Zealand Insurance Co Ltd*[86]. Owen J had there observed that "the essential element of honesty" was the focus of the section.

130 No one doubts that the absence of honesty on the part of an insurer (or insured) will, if proved, attract the provisions of s 13 of the Act. However, this does not mean that a want of honesty is a universal feature of a want of the utmost good faith in this context. Moreover, that is not what Owen J said in *Kelly*. The reference to the "essential element of honesty" was, in fact, derived by his Honour from a New Zealand decision in *Vermeulen v SIMU Mutual Insurance Association*[87]. However, in his reasons in *Kelly*, Owen J (with whom Kennedy and Steytler JJ agreed) did not confine the operation of the section so narrowly. Owen J said[88]:

> "At common law contracts of insurance are described as contracts uberrimae fidei or contracts of good faith. The precise definition of the term 'good faith' depends on the legal context in which it is used. In the context of insurance, Sutton in *Insurance Law in Australia* says that the phrase 'it … basically encompasses notions of fairness, reasonableness and community standards of decency and fair dealing'."

After referring to *Vermeulen*, Owen J went on to state[89]:

> "By virtue of s 12 of the Act the duty in s 13 is an over-riding duty which must not be limited or restricted in any way."

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85 [1999] 1 VR 683 at 699-700 [42]-[45].

86 (1996) 130 FLR 97 at 111.

87 (1987) 4 ANZ Insurance Cases ¶60-812.

88 *Kelly* (1996) 130 FLR 97 at 111.

89 *Kelly* (1996) 130 FLR 97 at 111.

131 To show that he did not restrict the criterion to dishonesty, Owen J concluded in *Kelly*[90]:

> "For all of these reasons there was no *dishonest, capricious or unreasonable* conduct by the respondent."

In my view, the criteria of dishonesty, caprice and unreasonableness more accurately express the ambit of what constitutes a breach of s 13 of the Act[91].

132 The foregoing line of authority was noted in the Full Court by Moore J, who wrote separately on this aspect of the appeal[92]. As an instance of the wider application that, in Moore J's view (and my own), s 13 of the Act entails, his Honour cited the opinions of Bollen J in *Moss v Sun Alliance Australia Ltd*[93] and of Ambrose J in *Gutteridge v Commonwealth*[94]. Both of these were cases in which the insurer had (as CGU did here) prevaricated and delayed the insured in the handling of the insurance claim.

133 In *Moss*, Bollen J addressed the insurer's failure to make a prompt decision about whether it would not, or could not, provide indemnity[95]:

> "[Counsel] says that prompt admission of liability to meet a sound claim for indemnity and prompt payment is required of an insurer by virtue of its obligation to act with the utmost good faith towards its insured. I agree. The defendant here, says [counsel], did not so behave. It is, therefore, in breach of its contract, of its obligation to act with the utmost good faith, of a term in its contract with the plaintiffs. It delayed for an unreasonably long time in admitting liability and in withholding, even until now, payment. …
>
> [T]he assessor could and should, in my opinion, quite quickly have found that the plaintiffs had a true and sound claim for indemnity."

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90 (1996) 130 FLR 97 at 112 (emphasis added).

91 cf reasons of Gleeson CJ and Crennan J at [15] and reasons of Callinan and Heydon JJ at [257].

92 (2005) 146 FCR 447 at 449-452 [1]-[11].

93 (1990) 55 SASR 145 at 154-156.

94 Unreported, Supreme Court of Queensland, 25 June 1993.

95 (1990) 55 SASR 145.

134 *Good faith and timely decisions*: The same can be said of CGU. It should have arrived much more quickly at a conclusion either that AMP's claim was sound or that it was unsound, then stated clearly its position on indemnity. Instead, it delayed, it ignored letters and, arguably, it allowed AMP to continue on a course of action under the Protocol which a prompt decision on its part might have forestalled. However AMP might have hoped that CGU would not take over litigation of one, a sample, or all of the investor claims (out of concern for any reaction of ASIC) – a matter that has loomed large in the reasons of the primary judge and of Gyles J in the Full Court and now in the reasons of the majority in this Court[96] – if CGU had elected to do so, that was its right. Yet it sat on its hands. Moreover, reliance on this consideration is itself disingenuous because it ascribes to ASIC a proclivity to retaliatory conduct that would be unlawful and therefore most unlikely to occur.

135 In *Gutteridge*, Ambrose J followed the approach of Bollen J in *Moss*. Accurately, in my view, his Honour identified the principle for which *Moss* stands. It is one which the Full Court in the present case correctly endorsed[97]:

> "[F]ailure to make a timely decision to accept or reject an insured's claim for indemnity under a policy can amount to a failure to act towards the insured with the utmost good faith as required by s 13 of the Act, even if the failure results not from an attempt to achieve an ulterior purpose, but results merely from a failure to proceed reasonably promptly when all relevant material is, or ought to be, at hand sufficient to enable a decision on the claim to be made and communicated to the insured."

136 In this Court, Gleeson CJ and Crennan J[98] state that CGU's delay in accepting or denying liability was *not* the possible breach of the requirement of good faith that was contemplated by the majority in the Full Court. With respect, that is not my reading of the Full Court decision[99]. The majority in the Full Court decided that, by imposing on AMP's s 13 claim a requirement to establish dishonesty on the part of CGU, the primary judge's treatment of s 13 miscarried. The majority derived their own opinion, from the objective evidence, that it was open to the primary judge "to make a judgment as to whether the conduct of CGU over many months exhibited a failure to act with the utmost good faith in

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96 See eg reasons of Gleeson CJ and Crennan J at [6].

97 Unreported, Supreme Court of Queensland, 25 June 1993, cited (2005) 146 FCR 447 at 452 [10].

98 At [5].

99 See (2005) 146 FCR 447 at 449 [1] per Moore J, 481 [114]-[115] per Emmett J.

relation to AMP's claim to be entitled to indemnity under the Insurance Policies"[100]. The Full Court majority were correct to so conclude.

137 *A broader view of s 13*: The relevance of this broader view of the s 13 obligation is obvious. As Emmett J pointed out, it is potentially two-fold. First, it could affect whether CGU was bound to assert, before settlement was made with any particular investor, that it would not accept liability for any such settlement. Secondly, it could entitle AMP to claim that CGU had failed to act with the utmost good faith in relation to the Policies when it belatedly claimed that AMP was required, by admissible evidence, to establish that it was legally liable to each investor when it settled that investor's demand on it[101]. There was not a whisper of such a requirement in any of the earlier correspondence between the solicitors of CGU and AMP.

138 It is essential to repeat that, at this stage, all that the Full Court has done is to require that the primary judge reconsider the good faith arguments of AMP, freed from his mistaken belief that, to rely on the section, AMP had to establish dishonesty on the part of CGU. In the end, the outcome of AMP's claim might be the same. However, having regard to the large amounts at stake and the centrality in the case of AMP's reliance on estoppel and want of good faith on the part of CGU, it was not at all unreasonable that the majority in the Full Court should conclude that the proper course, and the only one conducive to the lawful disposition of AMP's claim, was to remit the entire proceedings to the primary judge for reconsideration on these issues.

139 Subject to what follows, CGU has thus failed in this Court to establish any error in the reasoning or conclusion of the Full Court as to the mistrial of the two issues. In particular, the broad view which the Full Court majority took concerning the operation of s 13 of the Act[102] is one that this Court should endorse. It sets the correct, desirable and lawful standard for the efficient, reasonably prompt, candid and business-like processing of claims for insurance indemnity in this country. The dilatory, prevaricating, confused, uncertain, inattentive and misleading way in which, over two years, CGU, with its four successive firms of solicitors, delayed and postponed its decision to deny indemnity amounts to a very sorry story. Potentially it is one of considerable disadvantage and prejudice to AMP. Whether it would ultimately entitle the Federal Court to provide relief to AMP requires further analysis of the evidence

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100 (2005) 146 FCR 447 at 476 [92] per Emmett J. See also at 452 [11] per Moore J.

101 (2005) 146 FCR 447 at 474-475 [85].

102 By contrast, Gyles J considered the reliance on s 13 to be "misplaced": (2005) 146 FCR 447 at 491 [162].

and argument, as the Full Court recognised. Nevertheless, in the circumstances, the order of remitter made by the Full Court was fully justified.

140 *Justification for remitter*: The actual order, entered in the record, was one simply for the remitter of the matter to the primary judge, his earlier orders having been set aside by the Full Court. However, in the reasons of Emmett J, the purposes and scope of the remitter were made plain. As the relevant passage is set out in other reasons[103], I will not repeat it.

But was remitter futile?

141 *Reasonableness of the settlements*: Because the primary judge was of the view that there was no breach of the Policies, no way that AMP could render CGU liable on the principles of estoppel and no relevant breach of the duty of the utmost good faith on the part of CGU, he did not strictly have to decide whether the individual settlements between AMP and the investors were reasonable in each case[104].

142 Nevertheless, the primary judge did proceed to address that question. For two given reasons he concluded that the settlements were not reasonable. If those conclusions were to stand, an order of remitter might be futile, as CGU submitted it would be. This requires consideration of the two bases upon which the primary judge held that the settlements were not reasonable. The first concerned the process by which the settlements were achieved. The second concerned the suggested failure of AMP to consider the possible application of s 819(4) of the Law to the investor claims.

143 As to the process, the primary judge held that the reasonableness of the settlements had to be proved according to an objective standard and that AMP bore the onus of establishing that such standard had been reached. He also considered that the settlements had to be reasonable from the point of view of CGU "in the sense that they must be based on a reasonable assessment of the risk faced by AMP if the investors demands were to proceed to trial and judgment and CGU were liable to provide indemnity"[105].

144 In the Full Court, Emmett J accepted the need for determination according to an objective standard. He appears also to have accepted that the onus rested

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103 See (2005) 146 FCR 447 at 489 [154]. Noted in reasons of Gleeson CJ and Crennan J at [11]; reasons of Callinan and Heydon JJ at [253].

104 (2005) 146 FCR 447 at 481 [116].

105 (2005) 146 FCR 447 at 481 [117].

on AMP to establish reasonableness, it being the claimant for relief. I too accept these propositions. However, Emmett J did not consider that the application of an objective standard required consideration of whether the settlements were reasonable from the point of view of CGU. He explained this conclusion on the footing that objective reasonableness had to be "assessed from the point of view of an uninsured recipient of the relevant demand"[106].

145 *Reciprocity of the s 13 obligation*: With respect to Emmett J, I am not convinced that this was a correct conclusion of this issue. If the insured insists on the benefit of the insurer's duty to it of "the utmost good faith", the reciprocal character of the obligation evinced in s 13 of the Act implies, in the case of breach by the insurer or of failure on its part to accord the utmost good faith, that the insured will still, for its part, act in accordance with that principle, so far as it intends later to hold the insurer obliged to it in respect of the consequent losses.

146 Nevertheless, I agree with AMP's submission on this issue that, assuming Emmett J were wrong in this respect, CGU's interests and its views were, in fact, taken into account and given more than ample opportunity for presentation, discussion and consideration. This was done through the mechanism of the Protocol to which CGU agreed in principle. It was done through the large numbers of letters, with copious materials, supplied to CGU's solicitors by AMP's solicitors, also pursuant to the Protocol. At any stage, CGU could have instructed AMP to defend a particular claim, several claims or all claims as a test. Or CGU could have suggested the invocation of the senior counsel clause in the Policies[107]. Having entered this particular insurance market, CGU must be taken to have known AMP's obligation to act efficiently, honestly and fairly in relation to claimant investors[108]. CGU was, in fact, informed of the intervention of ASIC.

147 *The suggested role of ASIC*: The primary judge appears to have been affected, adversely, by AMP's understandable desire to satisfy ASIC. Applying what he took to be an objective standard, he indicated that settlement in order to placate ASIC, rather than to compensate an investor for the value of the investor's demand recoverable from AMP, would render the settlement objectively unreasonable. However, ultimately, the primary judge did not so conclude. He simply indicated that, because the whole process relating to the settlement of the investor demands was so dominated by pressure from ASIC, he was "quite *unable to conclude* that the Settlements would have been reached in

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106 (2005) 146 FCR 447 at 481 [118].

107 Clause 7.8. See [2007] HCATrans 047 at 3955; cf reasons of Callinan and Heydon JJ at [258].

108 See eg the Law, s 826(1)(j).

the agreed amounts, or indeed at all, had that pressure not existed"[109]. In reaching this conclusion, the primary judge was greatly influenced by the fact that AMP was explicitly told by ASIC to ignore CGU's interests. He expressed the opinion that this was what AMP had eventually done[110].

148 In the Full Court, Emmett J analysed closely *the process* by which AMP had proceeded to settle the individual investor demands[111]. I will not repeat what is said there, except to say that I find no error in Emmett J's reasoning, save insofar as his Honour had earlier concluded that it was unnecessary for AMP, in effecting individual settlements, to consider the reasonableness of the settlement as between itself and CGU. For the reasons already stated, that error was immaterial to the outcome of Emmett J's analysis.

149 *Decision on settlement evidence*: As Emmett J pointed out[112], some 12 volumes of material evidencing the investigations that were carried out by AMP in relation to the individual investor demands were tendered at the trial. All of that material was in evidence before the primary judge. As the primary judge's reasons show, his Honour did not refer to any of the material in these volumes in his reasons.

150 Before the Full Federal Court and this Court, CGU referred to the fact that the material tendered by AMP in relation to each particular settlement was proffered for a limited purpose, not as proof of the truth of the underlying facts referred to in the material, but as evidence of the circumstances in which AMP had decided to settle the individual claims[113]. Further, CGU stated that senior counsel for AMP had informed the primary judge at trial that he did not need to read through the numerous folders. CGU claimed that he had said that it would be sufficient for the primary judge to satisfy himself that a formal procedure was adopted and to observe the pattern of the procedure in each case.

151 This account, on the part of CGU, of what transpired at the trial is somewhat misleading. The transcript reveals that the investor materials were tendered and accepted in evidence as material relevant, in each case, to the decision made by AMP on whether or not to settle the investor claim referred to.

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109 (2004) 139 FCR 223 at 250 [106] (emphasis added); cf reasons of Gleeson CJ and Crennan J at [14].

110 (2004) 139 FCR 223 at 250 [106].

111 (2005) 146 FCR 447 at 482-486 [122]-[138].

112 (2005) 146 FCR 447 at 482 [122].

113 [2006] FCAFC 90 at [5].

In each case, the nature of the relevant documents was practically identical. It included claimant interview records (where the claimant was not legally represented), documents evidencing the investment and the basis for, and quantum of, the investor's claim as well as final liability reports.

152 Perhaps understandably, the primary judge expressed a certain reluctance to read and consider the individual investor documents. It was this reluctance that elicited the suggestion at trial that, once AMP's process was understood, it could suffice, within the Protocol, to demonstrate the reasonableness of the ensuing settlements, unless CGU could, in any particular case, demonstrate that the material before the AMP decision-maker was inadequate for the purpose of ensuring a reasonable outcome. Immediately following the statement by senior counsel for AMP that it was not necessary for the primary judge to read everything in the volumes, counsel went on:

> "[B]ut it is important that the material is there … so that the other side can test any part of it that they wish to test with the people who actually [performed] the work".

153 Once again, the pattern evident from the outset of the dealings between AMP and CGU can be observed. AMP supplied relevant documentation. CGU sat on its hands. It relied on its own lack of action, lack of response and inordinate delay.

154 In the outcome, the investor documents were relevant to the issues pleaded by AMP. They were available to the primary judge to prove what had, in fact, happened pursuant to the Protocol as agreed in principle between AMP and CGU. They were also available to establish that AMP had a reasonable basis upon which to settle each of the claims before AMP agreed to settle it. At an earlier phase, before the Full Court, CGU appears to have acknowledged this fact. In its written submissions to the Full Court, CGU itself said:

> "Whether the settlements were reasonable must be judged by reference to:
>
> (a) the reasoning that supported the advice given to the client to settle;
>
> (b) the material the client had available to it at the time the settlement was reached[114].
>
> That material was in evidence. The learned trial judge had available to him the same factual material that was available to [AMP] and its solicitors when the decision was made to reach the settlements with the investors. It cannot be contended that the learned trial judge erred in

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114 See *Unity Insurance* (1998) 192 CLR 603 at 653 [130] per Hayne J.

> assessing that material … Accordingly, there is no basis for [the Full] Court to interfere with the conclusions of the learned trial judge on this issue." (emphasis added)

155 *The Full Court's conclusion was correct*: Although the primary judge obviously felt that AMP had been unduly influenced by the pressure from ASIC, Emmett J, for the majority in the Full Court, dealt with that conclusion, in my view convincingly[115]:

> "It may be that AMP was influenced by pressure from [ASIC] to deal with investors' demands promptly and expeditiously. It may be also that AMP was anxious to reach a settlement of such demands quickly and before investors commenced proceedings that would constitute a Claim (as defined) under the Insurance Policies. However, it by no means follows that, because investors' demands were dealt with expeditiously under pressure from [ASIC], any of the settlements of the demands was unreasonable, judged objectively. That requires, at least, an examination of the reasoning that led to the advice upon which the settlements were based."

156 CGU, through its successive solicitors, had long possessed the materials on the basis of which AMP's settlements with the individual investors were being negotiated and agreed. At no stage until near the breakdown of the Protocol arrangement did CGU, or its solicitors, notify AMP of its position on indemnity, despite the fact that they knew full well that AMP was proceeding to settle the claims.

157 The first investor claim was not settled until the end of August 2001. This was more than six months after AMP's meeting with ASIC in February 2001. At no stage during that meeting, or later, did ASIC require AMP to settle all claims irrespective of their legal and factual merits. Such a requirement would have been beyond ASIC's powers, improper and of no legal force. AMP's witnesses rejected the suggestion that AMP had simply acted in accordance with ASIC's wishes. The suggestion that AMP was no more than a puppet for ASIC's demands is contradicted by the fact that, in the ultimate outcome, AMP paid less than half of the total investor claims made against it[116]. CGU's criticisms of the role that ASIC played in AMP's decisions would have been more convincing if they had been made earlier, with particularity and by reference to the precise material supplied to CGU and later, in the 12 volumes, provided both to CGU and to the primary judge.

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115 (2005) 146 FCR 447 at 485 [133].

116 cf reasons of Gleeson CJ and Crennan J at [7].

158 *Illustration by a concrete case*: Emmett J did not approach the issue of the reasonableness of the settlements on the basis only of general considerations of the foregoing kind. He took as an example one of the first investor demands settled by AMP (the demand of Bajada)[117]. By detailed reference to the folder of material relating to that claim (supplied to CGU's solicitors in March 2001) Emmett J analysed the foundations of liability claimed to render AMP liable to that investor. He pointed out that no suggestion was made by CGU, in the course of the hearing, that there was some flaw in the reasoning contained in the liability report (except to the extent of the suggested failure to advert to a possible defence under s 819(4) of the Law, shortly to be addressed).

159 Emmett J concluded, in language which I regard as compelling and properly addressed to the dealings between an insurer and insured in contemporary Australia, conducted in accordance with the Act[118]:

> "The primary judge gave no consideration to the reasoning contained in … the liability report for Bajada. Nor did his Honour give any consideration to similar reports in relation to all of the other demands by investors that have been settled. It follows that his Honour's conclusion, that the settlements of the demands by AMP were not reasonable, should not stand. Whether they were reasonable or not requires an examination of the material indicated."

160 It follows that the first suggested basis of futility was not made out. The majority in the Full Court were correct to so decide.

161 *Relevance of s 819(4) of the Law*: As already noted, the primary judge considered that, in addition to what he saw as the defects in the *process* adopted by AMP for settlements with individual investors, the *outcomes* were unreasonable because they failed to take into account "the possible effect and availability to AMP of a defence under s 819(4) of the Law"[119].

162 Section 819 appeared in a Division of the Law (Div 4 of Ch 7) designed to expand the liability of a principal for the conduct of a "securities representative". That expression was defined in s 94 of the Law to cover a person "employed by", or who "acts for or by arrangement with", another person in connection with a securities business or investment advice business carried on by the other person. Messrs Pal and Howarth arguably answered to that description.

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117 (2005) 146 FCR 447 at 485-486 [134]-[138].

118 (2005) 146 FCR 447 at 486 [138].

119 (2005) 146 FCR 447 at 486 [139].

163 As the primary judge pointed out in his reasons[120], the critical provision, so far as AMP's liability for the conduct of Messrs Pal and Howarth is concerned, was s 819. That section created liability "whether or not [the] conduct is or would be within the scope of the representative's employment by, or authority from, any person"[121]. Section 819, at the relevant time, provided:

> "(2) If:
>
> (a) subparagraph (1)(a)(i) applies; or
>
> (b) subparagraph (1)(a)(ii) applies and the representative engages in that conduct;
>
> then, for the purposes of a proceeding in a court:
>
> (c) as between the indemnifying principal and the client or a person claiming through the client, the indemnifying principal is liable; or
>
> (d) as between any of the indemnifying principals and the client or a person claiming through the client, each of the indemnifying principals is liable;
>
> as the case may be, in respect of that conduct in the same manner, and to the same extent, as if he, she or it had engaged in it.
>
> (3) Without limiting the generality of subsection (2), the indemnifying principal, or each of the indemnifying principals, as the case may be, is liable to pay damages to the client in respect of any loss or damage that the client suffers as a result of doing, or omitting to do, as the case may be, the act referred to in paragraph (1)(b).
>
> …
>
> (4) If:
>
> (a) there are 2 or more indemnifying principals;
>
> (b) 2 or more of them are parties (in this subsection called the '**indemnifying parties**') to a proceeding in a court;
>
> (c) it is proved for the purposes of the proceeding:

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120 (2004) 139 FCR 223 at 245 [91].

121 The Law, s 819(1).

(i) that the representative engaged in that conduct as a representative of some person; and

(ii) who that person is; and

(d) that person is among the indemnifying parties;

subsections (2) and (3) do not apply, for the purposes of the proceeding, in relation to the indemnifying parties other than that person."

164 *A new argument based on s 819(4)*: In the Federal Court and before this Court, CGU did not seek to uphold Mr Archibald's opinion that s 819(2) applied in the circumstances to exclude AMP's liability for the activities of Messrs Pal and Howarth on behalf of MAG. However, CGU did rely on s 819(4). In something of an understatement, Emmett J remarked that "[t]he precise way in which s 819 operates is not entirely straight forward"[122]. His Honour observed that, so far as the section had been the subject of judicial consideration, there was judicial disagreement as to its effect[123].

165 In the Full Court, CGU did not dispute that AMP might be liable for the conduct of Messrs Pal and Howarth under s 819(2) or (3). However, it invoked s 819(4) and complained that AMP had not turned its attention to that sub-section at all. As Emmett J tartly observed on this argument, no mention had been made by CGU of the sub-section in any of the correspondence between the solicitors over the extensive period described. Nor did the primary judge consider, for example, the particular circumstances revealed in the Bajada demand to see if there was any basis for the application of s 819(4) to that demand in the concrete circumstances of that investor claim[124]. In these circumstances, Emmett J's conclusion is entirely convincing[125]:

> "Before deciding that it was unreasonable not to have considered the possible application of s 819(4) to a demand against AMP by an investor, because of the involvement of MAG as an indemnifying principal, it would be necessary to examine the material relied on by AMP as to the relationship between Pal and Howarth, on the one hand, and MAG, on the

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122 (2005) 146 FCR 447 at 487 [143].

123 Referring to *Newman v Financial Wisdom Ltd* (2004) 183 FLR 164; *Financial Wisdom Ltd v Newman* (2005) 12 VR 79.

124 (2005) 146 FCR 447 at 487 [144].

125 (2005) 146 FCR 447 at 487 [145].

other, and to speculate as to whether MAG and AMP would both be parties to a proceeding in a court. The primary judge did not undertake that task in relation to any investor demand."

166 CGU appears to have thought that it was sufficient to keep all of its cards hidden, close to its chest. For the better part of two years, it acted on a basis that reasonably appeared to conform to its agreement in principle to the Protocol. It ignored countless opportunities and invitations to seek further information on the ample materials supplied to it. It plainly knew that AMP was proceeding to settle the investor demands in accordance with the Protocol. It neither sought to invoke, nor to suggest, a test case or series of test cases. Nor did it invoke the senior counsel clause in the Policies. It hinted darkly at Mr Archibald's opinion. But then it refused for a long time to make that opinion available to AMP. When it was belatedly produced, it became clear that it relied on an operation of s 819(2) which CGU did not press in the Federal Court or before this Court. In the end, CGU produced s 819(4), like a *deus ex machina*, before the primary judge in the hope that, in some unspecified way, it would cast doubt on the reasonableness of AMP's settlements.

167 The primary judge was persuaded to adopt, tentatively "because of the incomplete evidence", that view of the effect of s 819(4)[126]. Gyles J was unable to say that the primary judge's view, in this respect, was "clearly wrong"[127]. However, Emmett J (with Moore J agreeing) subjected the belated argument based on s 819(4) to close attention and was unpersuaded. So am I. Without undertaking particular analysis of the individual claims, it was impossible to reach a justifiable conclusion on the application of s 819(4) as a matter of broad generality. It follows that it was impossible for CGU, without plunging into the uncongenial task that was inherent in its responsibilities as insurer, poised to deny indemnity, to assert that the facts of individual claims attracted the arguable application of s 819(4) of the Law.

168 *Other suggested grounds of futility*: I have already indicated that I would reject the complaints by CGU that the estoppels expressed by Emmett J and the available reliance on s 13 of the Act were outside AMP's pleadings and contrary to the way in which AMP had opened and presented its case at trial.

169 There remain, therefore, only the issues raised by the appeal from the second, unanimous Full Court decision (concerning the application to reopen the appeal). It is sufficient for me to say that, upon any approach to the appeal

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126 (2005) 146 FCR 447 at 493 [170].

127 (2005) 146 FCR 447 at 493 [170].

itself[128], no error is demonstrated in the way the Full Court disposed of the application for the reasons that it gave. It is unnecessary, in the approach that I have adopted, to consider the issues raised by AMP's notice of contention in this Court. It is enough for me to note that the primary judge's determination of issues 7, 8 and 9 (as explained in his Honour's reasons)[129] on the construction of the clauses of the Policies is not disturbed by any conclusion that I have reached in the appeals. His conclusions on the construction issues therefore stand. So far as relevant, they would control the disposition of the remitter.

AMP's application to cross-appeal

170 *An inappropriate cross-appeal*: The foregoing leaves only AMP's application for special leave to cross-appeal to this Court. The cross-appeal was proposed to permit AMP to challenge that part of the orders of the Full Court by which it remitted the proceedings to the primary judge for further consideration.

171 The application was advanced for AMP on the heroic expectation that this Court might be persuaded to go even beyond the extensive consideration of the matters of fact and law presented by the appeals, so as to undertake, for itself and effectively for the first time, the sifting of the evidence (including, presumably, the 12 volumes of evidence unaddressed by the primary judge) so as, in this Court, to reach finality in the litigation between the parties.

172 When subjected to necessary questioning about this proposition, and whether it would involve a proper use of the time and function of this Court, the valour of AMP's counsel melted. It was acknowledged, correctly, that the prospect of tempting this Court into such an undertaking was remote. This was a correct assessment. The prospect is most unalluring.

173 If the whole point of the Full Court's order of remitter to the primary judge was to ensure that the detailed evidence before the primary judge, which had not earlier been examined by him by reference to the applicable claims and principles, should now be examined for the first time, it would be quite wrong for this Court to undertake that task for itself. Apart from every other reason for not doing so, it would effectively deprive the party disappointed by the outcome, of any opportunity to challenge that outcome (essentially a first instance decision) on appeal. In a case of this kind, such a procedural injustice should not be agreed to.

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128 cf reasons of Gleeson CJ and Crennan J at [30].

129 (2004) 139 FCR 223 at 250-252 [108]-[120].

174 *Leave to cross-appeal refused*: The application by AMP for special leave to cross-appeal should be refused.

Conclusions and orders

175 *Mutuality of the good faith duty*: Is there any general principle for which this complex and difficult case stands? In my view there is.

176 The principle is that the parties to insurance contracts in Australia, unlike most other contracts known to the law, owe each other, in equal reciprocity, an affirmative duty of the utmost good faith. This is so now by s 13 of the Act. In the context of that section, emphasis must be placed on the word "utmost"[130]. The exhibition of good faith alone is not sufficient. It must be good faith in its *utmost* quality.

177 The resulting duty is one that pervades the dealings of the parties to an insurance contract with each other. In consequence of the Act, and of the reform that it introduced in s 13, the duty of good faith as between insurer and insured now takes on a true quality of mutuality. It governs the conduct of insurers whereas, previously, as a practical matter, the duty of good faith was confined to a duty cast upon insureds because the remedies for proof of the absence of good faith were usually of no real use to the insured[131].

178 The duty is more important than a term implied in the insurance contract, giving rise to remedies for a breach, although, by the express provision of s 13, it is certainly that. The duty imposes obligations of a stringent kind in respect of the conduct of insurer and insured with each other, wherever that conduct has legal consequences.

179 *Prompt indemnity decisions*: Specifically, in my view, this case stands for the principle that an insurer cannot act as CGU did here[132]. An insurer cannot agree with its insured in principle to a protocol for handling relevant claims against the insured, tell the insured to act as a "prudent uninsured" and then allow the processing of such claims (which necessarily had, as it knew, to be dealt with efficiently and fairly) to proceed to successive settlements over nearly two years without indicating one way or the other whether it admitted or denied indemnity. It cannot repeatedly receive large amounts of material from the insured and fail to give relevant and timely responses to that material. It cannot ignore numerous

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130 cf (2005) 146 FCR 447 at 475-476 [91]-[92].

131 See above these reasons at [125].

132 cf reasons of Callinan and Heydon JJ at [258]-[259].

invitations to seek further information if it needed it or to ask for further materials. It cannot leave a frank disclosure of any concerns until nearly 18 months after notification of the claims and, even then, decline a candid identification of those concerns.

180 One way or the other, the duty of the utmost good faith obliges an insurer to make up its mind and either to accept indemnity or to refuse it to the insured, long before that was done in this case. Then, at least, if indemnity is denied, both parties will know that they are left to their remedies at law. To condone and endorse, as lawful, the conduct of the insurer in this case, as the majority do, sends quite the wrong signal to Australian insurers concerning their obligations under the Act in their dealings with insureds. It is not a signal that I would endorse. It is not one that this Court should send.

181 *Need to correct the error at trial*: Arguably, here, the insurer's default in observing the duty of the utmost good faith added the ingredient that might assist the insured to overcome the difficulties presented for it by the contractual terms of the Policies, read in isolation from the circumstances. At the very least, the insured, AMP, was entitled to have the primary judge consider this issue with legal accuracy. In particular, it was entitled to have him decide the point, measured against the detailed evidence that was before him at the trial, and all of it, freed from his incorrect belief that the s 13 duty applied only to forbid dishonesty by CGU, the insurer. That was an erroneously narrow reading of s 13 which the Full Court majority rightly corrected. We should endorse the approach of the majority and its order for the reconsideration of all of the evidence in that light. Such reconsideration is not futile. It should be undertaken. Especially so because a majority in this Court, in these appeals, hold that the primary judge erred in conceiving the s 13 duty of utmost good faith as a rule against dishonesty only[133]. There may indeed sometimes be difficulties in deciding exactly what s 13 of the Act affirmatively obliges the insurer to do. But it is not nothing. Yet nothing is what the majority in these appeals ultimately demand[134]. I disagree.

182 *Orders*: To give effect to the foregoing conclusions, I favour the following orders:

(1) In appeal M127 of 2006, appeal dismissed with costs;

(2) In the appeal M128 of 2006, appeal dismissed with costs; and

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133 Reasons of Gleeson CJ and Crennan J at [15] and my own reasons at [129]-[135].

134 Reasons of Gleeson CJ and Crennan J at [16] and reasons of Callinan and Heydon JJ at [258]-[262].

(3) In appeal M127 of 2006, the application by AMP Financial Planning Pty Limited for special leave to cross-appeal refused with costs.

183 CALLINAN AND HEYDON JJ. The Court has before it two appeals, the nature of which is described in the judgment of the Chief Justice and Crennan J. They raise issues concerning the construction of insurance policies, the *Insurance Contracts Act* 1984 (Cth) and the Corporations Law[135], and of estoppel.

Introduction

184 The respondent, AMP Financial Planning Pty Ltd ("AMP"), carries on business as a licensed securities dealer under a licence granted on 27 August 1991 pursuant to s 784 of the Corporations Law ("the Law"). Under s 826(1)(j) of the Law, a licence may be revoked by the regulator, the Australian Securities and Investments Commission ("ASIC"), if, relevantly, ASIC has reason to believe that a holder "has not performed [its duties] efficiently, honestly and fairly … as the case requires".

185 On 19 February 1999, AMP and the appellant, CGU Insurance Limited ("CGU"), entered into a professional risks insurance contract ("the 1999 policy"). The period of cover under the 1999 policy was from 28 February 1999 to 28 February 2000. On 22 February 2000, AMP and CGU entered into a further professional risks insurance contract ("the 2000 policy"), for the period from 28 February 2000 to 28 February 2001. The terms of the 1999 policy and the 2000 policy (together "the policies") are relevantly identical. The claims with which the Court is concerned were made during the currency of one or other of the policies. The policies were "claims made" policies.

AMP's securities representatives

186 AMP provided financial planning advice to retail clients by a group of people who were authorized under the Law to give advice and make recommendations on its behalf. Mr Ashok Pal ("Pal") and Mr Anthony Howarth ("Howarth"), who conducted the financial advisory business Macquarie Advisory Group Pty Ltd ("MAG"), were representatives of AMP for the purposes of Ch 7 of the Law, holding, as they did, appropriate authorities from AMP. At various times they also held authorities from Hillross Pty Ltd ("Hillross"), a company related to AMP.

187 The authorities in question were given by AMP for the periods from 1 August 1996 to 2 December 1997 (Pal) and 10 November 1994 to 19 June 1995 (Howarth).

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135 As set out in s 82 of the *Corporations Act* 1989 (Cth), since repealed by the *Corporations (Repeals, Consequentials and Transitionals) Act* 2001 (Cth).

188 Pal also held authorities from Hillross for the period from 30 November 1997 to 27 May 1999 as did Howarth from 3 December 1997 to 27 May 1999.

Discovery of misconduct by Pal and Howarth

189 On about 12 May 1999 Hillross discovered that Pal and Howarth had traded beyond their proper authorities, and in a manner contrary to their representatives agreements with Hillross.

190 Of particular concern then was an investment in Hibiscus Spas Pty Ltd ("Hibiscus"). It appeared that about $3.4 million of clients' funds had been invested and lost there. Pal himself was a director of and investor in Hibiscus. Clients had paid money for "shares" in it which were never issued, and for "debentures" which were never registered, at times when Hibiscus was in deep financial trouble. Even the most speculative of investors would not have been attracted to it had they been aware of these matters.

191 Hillross terminated Pal's and Howarth's authorities, and notified their clients that the relationship between Hillross and AMP, and Pal and Howarth had ended.

192 Hillross notified ASIC of possible breaches of the Law on the part of Pal and Howarth, as required under the conditions of its securities dealers licence. ASIC conducted examinations of Pal, Howarth and associated persons and obtained an order for the winding up of MAG. It banned Pal and Howarth from participation in the securities industry and from the management of companies.

193 As investigations progressed it became apparent that some investments had been recommended and made during the period that Pal and Howarth held authorities from AMP. On 16 December 1999 AMP notified CGU that it had become aware of matters which might give rise to a claim under the 1999 policy. On 5 September 2000 further notification was given to CGU under the 2000 policy.

The insurance policies

194 Relevant clauses of the policies should be set out in some detail.

195 By cl 3.1, CGU agreed to provide cover for Claims (as defined) for Civil Liability (as defined) arising from the conduct of the Insured Professional Business Practice (as defined), so long as the conditions in relation to the timing of the Claims were satisfied.

196 Special Condition 4 of the policies was in these terms:

"[I]t is hereby declared and agreed that [AMP] shall be indemnified in accordance with the terms, conditions, exceptions and limitations of this Policy in respect of its liability as a principal and licensed securities dealer for acts or omission of its authorised representatives, but only on the basis that CGU ... retain the rights of subrogation against the authorised representatives."

197 By cl 3.2 of the policies, it was agreed that cover would be provided in respect of any of the following types of Civil Liability Claims arising in the conduct of the Insured Professional Business Practice:

"(a) Breach of duty (including a duty of confidentiality).

(b) …

(c) …

(d) Dishonest, fraudulent, criminal or malicious acts or omissions by an Employee or Principal of the Insured (but there is no cover to that Employee or Principal for these Claims).

(e) …

(f) Breaches of the Trade Practices Act 1974 or similar Fair Trading legislation enacted throughout Australia (but not for criminal liability)."

198 Costs of investigations were also covered:

"3.3 Claim Investigation Costs

We [the appellant] also pay (up to an amount equal to the Policy Limit) Claim Investigation Costs.

We only pay these, however, if either:

(a) We incur them; or

(b) the Insured incurs them after first obtaining Our agreement in writing and the costs and expenses are in Our view reasonable."

199 There were obligations of prompt notice and co-operation:

"7.1 We must be told about Claims

The Insured must tell Us in writing about a Claim or loss as soon as possible and while this Policy is in force. If this is not done the Insured's right to cover under this Policy may be affected.

7.2 Claims co-operation

Each Insured must:

(a) diligently do, and allow to be done, everything reasonably practicable to avoid or lessen the Insured's liability or loss in relation to a Claim;

(b) immediately give Us all the help and information that We reasonably require to:

(i) Investigate and defend the Claim or loss; and

(ii) Work out Our liability under this Policy."

200 The appellant reserved a right to protect itself:

"7.3 We can protect our position

When We receive a notification of a Claim, or of a fact or circumstance which may give rise to a Claim which would be covered under this Policy, then We can take whatever action We consider appropriate to protect Our position. This does not, however:

(a) indicate that any Insured is entitled to be covered under this Policy; or

(b) jeopardise Our rights under the Policy or at law."

201 Full disclosure was essential:

"7.4 Disclosure of information to us in respect of the cover and the Claim

The solicitors instructed by Us for any Claim can disclose to Us any information they receive in that capacity, wherever they obtain it from."

202 The appellant was entitled to manage claims:

"7.5 We can manage the Claim on the Insured's behalf

We can:

(a) Take over and defend or settle any Claim in the Insured's name; and

(b) Claim in the Insured's name, any right the Insured may have for contribution or indemnity."

203 A clause of particular significance here was one providing that the respondent had no right to admit liability or settle claims, or to defend them contrary to the appellant's wishes:

"7.6 An Insured must not admit liability for or settle any Claim

An Insured must not:

(a) admit liability for, or settle any Claim; or

(b) incur any costs or expenses for a Claim

without first obtaining Our consent in writing.

If Our prior consent is not obtained, the Insured's right to cover under this Policy may be affected.

7.7 Insured's right to contest

If an Insured elects not to consent to a settlement that We recommend and wants to contest or continue the legal proceedings, then We only cover the Insured (subject to the Policy Limit) for:

(a) the amount We could have settled the matter for, less

(b) the relevant Excess listed in the Schedule, plus

(c) the Claim Investigation Costs calculated to the date the Insured elected not to consent to the settlement."

204 There was a "senior counsel clause" to which, regrettably, little or no attention was paid by the parties:

"7.8 Senior Counsel

(a) Unless a Senior Counsel, that We and the Insured both agree to instruct, advises that the Claim proceedings should be contested, then neither We nor the Insured can require the other to contest any legal proceedings about a Claim if the other does not agree to do so.

(b) In formulating his or her advice, Senior Counsel must be instructed to consider:

(i) The economics of the matter; and

(ii) The damages and costs likely to be recovered; and

(iii) The likely costs of defence; and

(iv) The Insured's prospects of successfully defending the claim.

(c) The cost of Senior Counsel's opinion is to be taken as part of the Claim Investigation Costs.

(d) If Senior Counsel advises that the matter should be settled and if the terms of settlement are within limits which are reasonable (in Senior Counsel's opinion and in the light of the matters he/she is required to consider), then:

(i) the Insured cannot (subject to Section 7.7, Insured's right to contest) object to the settlement; and

(ii) the Insured must immediately pay the relevant Excess or Excesses listed in the Schedule."

205 The indemnity extended to legal and associated costs:

"12.1 Civil Liability

Liability for the damages, costs and expenses which a civil court orders the Insured to pay on a Claim … It includes the legal costs of the person making the Claim, for which the Insured become liable.

12.2 Claim

Any originating process (in a legal proceeding or arbitration), cross claim or counter claim or third party or similar notice claiming compensation against and served on an Insured.

12.3 Claim Investigation Costs

The legal costs and expenses of investigating, defending or settling any Claim (or anything which might result in a Claim), which would be covered by this Policy at the time the legal costs and expenses arise. Refer Section 3.3, Claim Investigation Costs.

12.4 Covered Claim

Claims which We have agreed to cover, under this Policy. See Section 7.12(b), the Excess."

ASIC's discussions with the respondent and Hillross

206 In early February 2001 ASIC arranged a meeting with the respondent and Hillross. It took place on 14 February 2001. Representatives of the respondent, Hillross, Minter Ellison (the respondent's solicitors) and officers of ASIC attended. The appellant was not represented. The officers said that ASIC was concerned about delay in compensating clients: problems had been discovered as early as May 1999. They said that it was the responsibility of the respondent and Hillross to respond to all claims by clients in an "efficient, fair and timely manner"[136], and that their obligation to do so transcended any concerns that they might have about insurance. The officers continued, that if the view of the respondent or Hillross was that compensation was properly payable, they should not discount valid claims, and clients should not be compelled to sue to recover the money to which they were entitled. They said further, that the procedure for dealing with complaints needed to be improved: clients should be informed of the time intended to be taken to resolve claims, they should be told of the evidence needed to support their claims, and the names of the persons on behalf of the respondent who would deal with them. There should also be, the officers of ASIC stressed, clear milestones during the evaluation of the claims, accurate tracking, reporting of complaints, and accountability. Clients of the respondent had told ASIC of their concerns about delays and of their frustration at the details required by the respondent. The ASIC officers rather ominously said that ASIC would look very carefully at the conduct of Hillross and the respondent in dealing with claims before it decided upon further action if any: ASIC might

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136 See s 826(1)(j) of the Law.

insist that the respondent and Hillross give enforceable undertakings to ASIC under the Law.

Exchanges between the parties

207 Following this meeting with the officers of ASIC, the respondent and Hillross prepared a plan for the investigation of demands by investors. On 1 March 2001, Minter Ellison wrote to the appellant's solicitors, Ebsworth & Ebsworth, enclosing a folder of material in relation to the respondent's "claim for indemnity for loss arising from the activities" of Pal and Howarth. The covering letter stated that the dispatch of the material had been delayed to enable a report on the outcome of the meeting with ASIC officers on 14 February 2001 to be provided. Relevantly, the letter said:

> "[T]he relationship between [AMP] and ASIC is critical to [AMP]'s business. ASIC expects that securities licensees will conduct their business in a way which gives effect to their obligation to ensure that investors are adequately compensated for losses that arise from the wrong doings of securities representatives.
>
> ...
>
> ASIC considers that investors should:
>
> - be compensated promptly and be inconvenienced as little as possible in the information gathering process in relation to their claim;
>
> - not be required to 'plead' their case or engage a lawyer to pursue their claim or have their claim declined or discounted because of a technical 'defence';
>
> ...
>
> In order to protect its licence and business reputation, [AMP] will give effect to ASIC's views when dealing with investor claims."

208 The folder of material included a history of Pal's and Howarth's dealings, together with a copy of the contents of files maintained by the respondent relating to them. The folder also contained a summary of the investments that had been lost, and of the demands received so far. It included a report on the respondent's actual or contingent liabilities to several of the investors. The letter of 1 March 2001 went on to say:

> "The proposed procedure for the handling of claims ... is presently being revised to reflect ASIC's comments made at the 14 February 2001

meeting. These proposed procedures will be supplied to you when they have been finalised."

The protocol

209 On 26 March 2001, Minter Ellison wrote again to Ebsworth & Ebsworth, enclosing a document entitled "Proposed Procedure for the Management of Claims" ("the Protocol"). The letter also enclosed notification reports in respect of the demands by investors of which Minter Ellison was aware at that time and added:

> "We wish to emphasise that [AMP]'s internal and external complaints resolution procedures require claims to be resolved in 45 days, otherwise the claimant must be referred to FICS [Financial Industry Complaints Service].
>
> We look forward to receiving, as soon as possible, confirmation that your client will indemnify [AMP] in respect of its liability arising out of the conduct of Pal and Howarth."

210 The enclosed Protocol was of importance in the proceedings and should be set out in full:

> "**Proposed Procedure for the Management of Claims**
>
> 1. In order to comply with its internal and external complaints resolution procedures, and after discussions with ASIC, Hillross has written to all past clients of MAG of whom it is aware inviting them to contact Hillross if they wish to make a complaint. … Hillross has set up a project team who will maintain a database of complainants and will visit them to collect relevant information.
>
> 2. [AMP] does not propose to write its own letter to investors at this stage (unless information presently in our possession indicates the claim lies against [AMP] only …). To do so would probably cause confusion. It is only once relevant information has been collected from complainants that it is possible to assess whether the liability for the claim properly lies against Hillross or [AMP] or both.
>
> 3. [AMP] proposes that the following protocol be adopted for each complaint that is received by [AMP] …
>
> (a) receive claim and provide a notification report to CGU;

(b) place Pal and Howarth on notice of claim as well as any other licensees that provided Pal or Howarth with a proper authority during the period of the investor's claim;

(c) collate all relevant documentary evidence obtained from the investor;

(d) prepare a report setting out [AMP]'s legal liability and recommendations on the claim, considering factors such as investor risk profile, risk of investment and knowledge of that risk ('liability report') …

(e) obtain instructions from CGU in relation to settling or defending the claim within 14 days of provision of the liability report;

(f) if settling: prepare settlement deed, including full releases, confidentiality and any assignments of interests and associated causes of action …

(g) if defending: prepare defence material for trial.

4. The process described above … [has] been approved by ASIC and by HIH (prior to the appointment of the provisional liquidators) in relation to claims made against Hillross.

5. If it is apparent from the information collected by Hillross that the claim falls solely under [AMP]'s licence, all further conduct of that claim will be handled by [AMP].

6. Where a claim is identified as a joint claim, Ebsworth & Ebsworth and HIH will be notified.

(a) In the event that an investor's claim creates a situation where liability as between [AMP] and Hillross is an issue, Minter Ellison will refer that investor's claim to Ebsworth & Ebsworth and HIH for the further conduct of the matter. We envisage that such a situation may arise where Pal provided advice during the period of [AMP]'s proper authority but the investment relevant to that advice was not made until Pal held a proper authority from Hillross.

(b) CGU and HIH will need to come to an arrangement in relation to the legal costs of a claim where the claimant has losses that occurred during both [AMP]'s proper authority and Hillross' proper authority. For example, where a claim

> seeks compensation for two investments, one of which clearly falls within [AMP]'s proper authority, and the other within Hillross' proper authority. These types of claims do not pose a conflict for Minter Ellison as it is clear which principal is liable for which investment and the resulting loss. However, the costs of dealing with such a claim will apply to both [AMP] and Hillross. It may be that Minter Ellison's costs that apply to the investigation and analysis of the claim may be apportioned between [AMP] and Hillross in a manner proportionate to the claim. For example, where an investor had a $100,000 claim, $80,000 of which related to an investment made during the proper authority of Hillross and $20,000 of which related to an investment made during the proper authority of [AMP], Minter Ellison's costs would be split 80% to Hillross (HIH) and 20% to [AMP] (CGU).
>
> 7. As previously described, ASIC has indicated its view that settlement should involve a return of capital, plus interest and costs. An assignment of the investor's interest in the investment, together with any associated causes of action, should be obtained to enable [AMP], or CGU, to bring third party claims which may not otherwise not [sic] available to it.
>
> 8. [AMP] has previously provided (on 1 March 2001) details of 17 claims that have already been made … For completeness, attached are notification reports for each of these claimants. Notification reports for additional claims received since 1 March 2001 will be sent under separate cover."

211 On the same day Minter Ellison sent a "liability report" in respect of one investor, the Bajada Retirement Fund, to Ebsworth & Ebsworth. The trustee of that fund had made one of the first claims upon the respondent. The covering letter requested the appellant's authority to make an offer of settlement of $22,664.36 within 14 days. The letter continued:

> "If we have not heard from you within that period [AMP] shall, acting as a prudent uninsured (as you have previously advised it to do), make the settlement offer to the Bajada Retirement Fund."

212 On 6 April Ebsworth & Ebsworth wrote to Minter Ellison a letter which included the following:

> "We understand the requirements of [AMP]'s internal and external complaints resolution procedures and have sought instructions from our

> client in respect of indemnity. Pending indemnity your client should continue to act as a prudent uninsured."

213 On 11 May 2001, Ebsworth & Ebsworth wrote again to Minter Ellison, relevantly saying:

> "[W]e are instructed by CGU ... to agree in principal [sic] to the protocol for the handling of claims provided to us under cover of your letter dated 26 March 2001.
>
> In accordance with the protocol our client will consider your client's claim for indemnity on an investor by investor basis consequent upon receipt of your summary document. Upon receipt of your summary document we shall arrange to attend your office and inspect the relevant primary documents which it is submitted evidence the claim and comprise the basis of liability. Thereafter we shall advise our client's instructions in respect of the particular investor."

214 On 7 June 2001, Minter Ellison wrote to Ebsworth & Ebsworth, enclosing a copy of the proposed deed of settlement in respect of the demand made by the Bajada Retirement Fund. The letter of 7 June 2001 said:

> "You were provided with the liability report in respect of the Bajada Retirement Fund's claim on 26 March 2001. You have since indicated that CGU accepts liability in principle subject to examining the documents in support of each claim. We have since provided you with all the documents submitted by the claimants in support of their claim.
>
> [ASIC] has indicated to our client that settlement of claims ought not to be delayed due to the requirements of insurers. Accordingly, if we do not receive confirmation as requested above within 14 days of the date of this letter our client will settle this claim without the involvement of CGU. Our client will, however, expect CGU to reimburse it for the full amount of the settlement sum. Upon doing so our client will be willing to assign any assignments it takes from the claimants to CGU."

215 Minter Ellison wrote again on 25 June 2001, making similar assertions in respect of the same claim upon their client.

216 On 9 July 2001, similar letters were sent by Minter Ellison in relation to demands by other investors.

217 Ebsworth & Ebsworth responded on 12 July 2001:

> "[W]hilst *our client has no difficulties with the claim protocol as noted in our letter of 11 May* it has not yet determined to confer indemnity upon

> your client. Frankly it is interested to understand why it is that the directors (or their insurers) are not being required to meet the claims and why it appears that [AMP] has not pursued GIO Insurance for a decision on their liability. We would be grateful for your advice on precisely at what stage your client's negotiations with GIO Insurance have reached and if GIO Insurance has denied liability whether you believe such denial is sustainable." (emphasis added)

218 MAG was apparently also an insured under an insurance policy effected with another insurer, GIO Insurance.

219 On 1 August 2001, Minter Ellison wrote another letter to Ebsworth & Ebsworth. After referring to the earlier correspondence, Minter Ellison expressed disappointment that there had not been a satisfactory response to their earlier letters, and continued:

> "We have provided full details of the … claims, but CGU has not provided confirmation of indemnity or instructions to [AMP] to complete settlements. We note the comment you made at our meeting on 26 July 2001, that in these circumstances [AMP] should continue to act as a prudent uninsured.
>
> Due to our client's responsibilities under its dealers licence (which we have previously pointed out to you) to the claimants and the expectations of ASIC, our client is obliged to go ahead with settlements with these claimants.
>
> We enclose copies of the settlement deeds that our client proposes to use. [AMP] expects reimbursement from CGU in accordance with the terms of the above policy. Upon reimbursement, if CGU wishes, [AMP] is willing to assign any assignments it takes from the claimants to CGU."

220 On 8 August 2001, Ebsworth & Ebsworth wrote to Minter Ellison, acknowledging receipt of the last letter, adding:

> "We confirm that your client should continue to act as a prudent uninsured in respect of the subject claim."

221 In August 2001, the retainer of Ebsworth & Ebsworth was terminated because of a conflict of interest. Solomon & Associates replaced them as solicitors for the appellant.

222 On 19 September 2001, Minter Ellison wrote to that firm:

> "At our previous meeting with your clients, and their former solicitors … on 26 July 2001, one issue that was raised was the liability of the licensed

> securities dealer principal, [AMP], where the claimant investor was not aware of the connection between the adviser, Pal or Howarth, and the principal [AMP]. Your client ... appeared to consider that in this situation the principal would not be liable to the claimant. [AMP] suggested that if your client's view of liability was based on legal advice which differed from our advice, that fact has [sic] best be disclosed to us straight away.
>
> From [CGU's] response, we have taken it that Ebsworths have not given advice which differs from our view concerning liability under section 819.
>
> As is evidenced from the liability reports already sent to you (and Ebsworths) our experience in dealing with investors is that the majority of them have the clear view that they were dealing with MAG, or in some cases Macquarie Bank. That is, that Pal and Howarth were acting as representatives of MAG. For the majority, the association with [AMP] has only come to light after the event. In our view, the effect of section 819 of the *Corporations Act* is to make [AMP] liable to such investors, even where investors do not know of [AMP], provided they reasonably believed that Pal or Howarth were acting for 'some person', such as MAG."

223 Minter Ellison's opinion as to the operation of s 819 of the Law was attached to the letter. Solomon & Associates were invited to inform Minter Ellison whether they disagreed with it. A response was made by Solomon & Associates on 2 October 2001 in these terms:

> "The time frame for resolution of this matter as stipulated by you is unrealistic.
>
> …
>
> We anticipate being in a position to respond to your letter within 28 days of our meeting with you."

224 An important meeting took place on 5 October between Minter Ellison, Solomon & Associates and representatives of the appellant. On the day of the meeting, Minter Ellison wrote to Solomon & Associates as follows:

> "We disagree that the time specified, 14 days, for CGU to respond to these claims is unrealistic. We have provided full details of these claims. We have been providing background information about the Pal and Howarth claims, including various liability reports which state how the relevant provisions of the *Corporations Act* apply, for many months. The time period specified is in accordance with the procedure agreed with ASIC for the handling of claims and submitted to CGU in March this year. Ebsworths' letter dated 11 May 2001 stated that CGU agreed in principal

> [sic] to the protocol for handling claims. At no stage prior to your letters of 1 October 2001, has CGU indicated that this time period is too short. We have already settled claims that have been processed in accordance with this protocol.
>
> The application of the relevant *Corporations Act* provisions and our views on liability are clearly set out in the liability reports. We have also previously requested (most recently in our letter … dated 19 September 2001 to which … we have received no response) that if you or CGU disagree with the conclusions reached in the liability reports to let us know immediately.
>
> …
>
> Fundamentally, our client's responsibilities under its dealer's licence, in particular its obligation to act efficiently, honestly and fairly, require it to go ahead with settlements. The agreement with ASIC requires claims to be settled with a minimum of delay. … To delay settlements at all in circumstances where [AMP] has formed a clear view of liability, and particularly for the period of 28 days from 5 October 2001 as you suggest is untenable and inconsistent with the agreement reached with your client in May this year and not disputed until your letters of 1 October 2001. … Our client is not prepared to put its licence and its business or its commercial reputation at risk because its insurer has not yet made a decision on indemnity on the Policy.
>
> In our view, CGU has had the information necessary to make that decision for some considerable time. …
>
> Until CGU makes a decision on indemnity under the Policy, our client will continue to act in good faith as a prudent uninsured, consistently with its obligations under the Policy and its dealers licence, to keep its exposure (financial, regulatory or to its reputation) to a minimum."

225 At the meeting, Minter Ellison made a presentation on the claims. Ms Solomon said that the appellant would take the advice of Mr Archibald QC on the issue of the respondent's liability. She also said that more information was required to enable the questions of liability to be considered by the appellant.

226 After the meeting, the respondent's senior legal counsel wrote an internal memorandum revealing that the respondent was trying to resolve claims as soon as possible in order to avoid the appellant's assumption of control of them. The respondent's solicitors then wrote to Solomon & Associates on 24 October 2001 requesting, among other things, that the respondent be permitted to have "an input into the brief" that had been discussed at the meeting of 5 October. Their letter concluded:

> "In the meantime, as we pointed out in our letter to you dated 5 October 2001 and at our meeting, until CGU informs us that it will provide indemnity under the Policy, [AMP] is obliged to continue to act as a prudent uninsured. Accordingly, and bearing in mind its obligation to act efficiently, honestly and fairly, [AMP] is obliged to go ahead with settlements."

227 Thereafter, Minter Ellison continued to write to Solomon & Associates in relation to the demands of the investors, enclosing from time to time copies of proposed deeds of settlement.

228 In March 2002, Solomon & Associates ceased practice. The appellant was then obliged to retain a third firm of solicitors, Middletons. On 5 April 2002, Minter Ellison wrote to that firm, saying:

> "We note that your client has yet to confirm with our client whether indemnity under its policy will be granted. While we understand that you have only recently received instructions in this matter, we note that we met with CGU's solicitors first in late 2000, then again with CGU's solicitors and CGU approximately 1 year ago, and again with CGU's (second) solicitors and CGU late last year.
>
> At all times, our client has been willing to discuss this matter with CGU and its solicitors, and to provide any documents requested. We believe that we have complied, at all times, with requests for documents. If you believe that further documents need to be provided, please indicate which documents you require and we will attempt to find them."

Middletons replied on 8 April 2002, stating:

> "We are instructed that our client continues to reserve its rights with respect to its liability to indemnify under the professional indemnity insurance policy issued to your client ...
>
> [Y]our firm has acted for both [AMP] and [Hillross] throughout the claims administration process ... There is a clear conflict of interest in your firm acting for both potential defendants to any claim by the third party clients.
>
> Our client insists that your firm immediately ceases to act for [AMP] and [Hillross] and that independent solicitors be appointed to administer any claims made against that entity.
>
> ...

> As your firm is aware our client has obtained Senior Counsel's advice on the liability of [AMP] to clients of [MAG]. Counsel's advice is that your firm's interpretation of the Corporations Law is incorrect and accordingly in many cases no liability to a third party claimant exists.
>
> We confirm your ... verbal advice ... that [AMP] has obtained releases and paid monies to investor clients of MAG. It is our view that to the extent the payments relate to any claim covered by the policy that the insured has breached the no admission or settlement condition set out in clause 7.6 of the policy.
>
> Our client believes that the procedure adopted by the insured to resolve disputes with clients of MAG may be in breach of condition 7.2 of the policy and in breach of the obligations imposed on the insured by Section 13 of the *Insurance Contracts Act 1984* as amended.
>
> ...
>
> However our client is prepared to consider the insured's claim for indemnity arising from claims made by the clients of MAG on an individual basis.
>
> In the circumstances we have been instructed to review each client file to assess any liability on the part of the insured to the claimants for which it is entitled to be indemnified. In order for us to do this we seek that the insured provide us with a list setting out the name of every client of MAG where [AMP] considers that a claim for indemnity exists. We have on file numerous lists of clients some of which duplicate names on earlier notices and some of which are stand alone lists.
>
> ...
>
> As stated our client believes that your office should not continue to act for [AMP] ... On a without prejudice and reserved rights basis our client is prepared to take over conduct of all outstanding claims with our office acting for the insured."

229 Minter Ellison replied to Middletons on 23 May 2002, referring to the communications between the parties since November 2000, and enclosing a consolidated schedule of all investors in relation to whose demands the respondent sought indemnity under the policies.

230 Middletons replied on 20 June 2002. Their letter stated that the appellant held the view that, in many cases, the respondent was not liable, in particular, to those investors who were clients of MAG. Reference was also made to the advice that had by then been obtained from Mr Archibald QC, but which the

appellant declined to show to the respondent. The letter ended with a detailed request for further information, required, it was said, as a "bear [sic] minimum".

231 The appellant yet again changed its solicitors, this time to Deacons. On 31 December 2002, Minter Ellison wrote to the new solicitors. After referring to the earlier correspondence, Minter Ellison asked that the appellant say in writing, no later than 14 January 2003:

> "(a) whether CGU admits that the Policy applies to the claims made against [AMP] relating to Pal's activities detailed in the enclosed table ('Claims');
>
> (b) if CGU admits the Policy applies to the Claims, whether CGU proposes to conduct negotiations and any legal proceedings in respect of any Claims which remain unresolved."

232 There was no response to that letter because, unbeknown to the respondent and its solicitors, the appellant had already written to the respondent denying liability:

> "In relation to the claims as listed in Schedule A, CGU maintains that no legal liability exists on the part of [AMP] to the claimant investors.
>
> We note that your solicitors, Minter Ellison, have advised [AMP] that the Court is likely to find that a legal liability exists to each of the Schedule A claimants under section 819 of the *Corporations Act*. They have advised that the liability exists on the basis that the claimants however believe that Pal was acting on behalf of 'some principal'.
>
> We are advised that Minter Ellison's legal opinion on the operation of section 819 is flawed and not supported by case law. We are also advised that for [AMP] to be liable under section 819, what is required on the part of the claimant is actual belief that Pal's conduct in providing advice was performed in connection with [AMP]'s business. Moreover, the investors' belief must be reasonably held.
>
> It is clear that none of the Schedule A investors held a belief that Pal acted on behalf of [AMP] at the time that the advice was provided or the investment made.
>
> Consequently, in the circumstances of the subject claim, indemnity is not available to [AMP]."[137]

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137 Claims set out in two further schedules are not presently relevant.

233 Minter Ellison responded to Deacons on 22 January 2003. In relation to the demands set out in Schedule A (the presently relevant ones), they requested that a copy of the opinion of Mr Archibald QC be provided, and insisted that the appellant review its rejection of liability.

234 On 28 March 2003, the appellant wrote to the respondent again. After it referred to some additional documents that had been forwarded by Minter Ellison to its solicitors, it maintained its denial of liability, this time however providing to the respondent the opinion of counsel that it had obtained:

> "We regret to advise that the additional documents do not contain any information that alters the basis of [AMP's] claim. We maintain our original decision to deny indemnity on the basis that [AMP] is not legally liable for the acts of Mr Pal in recommending unauthorised investments. ...
>
> We enclose a copy of the most recent advice received from Mr Archibald SC and Mr Settle of Counsel. You will see that their advice confirms our view that no legal liability exists on the part of [AMP] to the claimant investors."

235 The opinion enclosed with the letter makes no mention of s 819(4) of the Law[138]. That omission is not without significance for reasons which will appear.

236 Almost all of the claims by investors that were accepted or otherwise dealt with by the respondent were resolved within a period of about two months, in October and November 2001, that is, at about the time that the appellant was, among other things, making it clear that it was seeking counsel's opinion as to AMP's liability to the investors.

237 These proceedings were commenced in the Federal Court on 13 June 2003. No investor whose claim has been recognized and settled had, by then, been obliged to sue to recover; nor has any such investor subsequently been obliged to sue. It follows that the definitions of "Civil Liability" in cl 12.1 and "Claim" in cl 12.2 of the policies had not been satisfied, and hence that the duty to indemnify created by cl 3.1 had not been triggered. Further, no claims or proceedings had been brought or made against Pal or Howarth by the respondent, and no attempt had been made to conduct a test case, to seek a judicial construction of s 819 of the Law, or to invoke the "senior counsel clause", cl 7.8, in the policies. These too are relevant and important matters.

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138 *AMP Financial Planning Pty Ltd v CGU Insurance Ltd* (2005) 146 FCR 447 at 462 [48].

The litigation

238 The respondent's claim was for damages to be measured by the sum of the investors' claims paid, interest and the costs of investigation. The respondent also sought a declaration of entitlement to an indemnity in respect of rejected and deferred claims. The respondent alleged that it was so entitled if settlements made with investors were reasonable. Subsequently, it sought by an amendment to its pleading to set up a cause of action in estoppel. The appellant denied that the settlements were reasonable and it denied any estoppel. It contended, alternatively, that it was not liable, even if the settlements were reasonable, and that, in any event, the claims by the investors were not risks insured by it on the proper construction of the policies.

239 At the trial which took place before Heerey J the respondent tendered voluminous folders of material relating to the investigations which had been made by the respondent, its solicitors and ASIC. It led no evidence from any of the investors of their dealings with Pal and Howarth. The respondent's senior counsel, in tendering the folders, made it clear that the purpose of the tender was a confined one, to prove the respondent's "state of mind at the time it settled".

The first appeal to this Court

240 The questions for decision by this Court are largely defined by the questions which the majority of the Full Court of the Federal Court remitted for determination by the trial judge. Of these it is convenient to refer first to the question of estoppel.

241 During the hearing of this appeal, there was much debate as to the precise scope of the estoppel relied on by the respondent in its pleadings, the appellant correctly submitting that it will generally be inimical to the due adminstration of justice, if, on an appeal, a party were to be permitted to raise a point not taken on trial as to which relevant evidence had not been adduced there, although it could have been[139]. It will therefore unfortunately be necessary to examine the pleadings, and some statements made in addresses and at other times by counsel at the trial, seeking to define their respective cases.

242 By its further amended statement of claim the respondent made these allegations:

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139 *Whisprun Pty Ltd v Dixon* (2003) 77 ALJR 1598 at 1608, [51]-[52]; 200 ALR 447 at 461. See also *Water Board v Moustakas* (1988) 180 CLR 491 at 497-498.

"13. On or about 11 May 2001, the [appellant] represented to the [respondent] that:

(a) the [appellant] agreed in principle to the protocol;

(b) in accordance with the protocol, the [appellant] would, within 14 days of provision of the liability report in respect of each investor claim, consider the [respondent's] claim for indemnity and communicate with the [respondent] in relation to settling or defending such claims ('**protocol representation**').

…

14. In accordance with the protocol and in reliance on the protocol representation, the [respondent]:

(a) received the investor claims set out in Schedule 1 and Schedule 2 and notified each investor claim to the [appellant];

(b) obtained legal advice in relation to issues of liability and quantum regarding each investor claim;

(c) forwarded liability reports to the [appellant] in relation to each investor claim; and

(d) provided further information in relation to the investor claims when requested to do so by the [appellant].

…

15. In accordance with the protocol and in reliance on the protocol representation, on various dates the [respondent] requested the [appellant] to provide it with instructions pursuant to the protocol in relation to each investor claim ('**requests for instructions**').

…

16. Contrary to the protocol representation, the [appellant] did not respond to the request for instructions or otherwise communicate to the [respondent] its instructions whether to settle or to defend any of the claims.

17. On each occasion on which the [respondent] sent the [appellant] a request for instructions, the [respondent] informed the [appellant] that, if the [appellant] did not communicate its instructions in

accordance with the protocol, the [respondent] would be obliged to settle the claim and it thereafter did so in relation to the investor claims in schedule 1 in the amounts and on the dates therein specified.

…

21. Further or in the alternative, as a result of the making of the protocol representation alleged in paragraph 13 and as a result of the actions of the [respondent] and the [appellant] alleged in paragraphs 16 and 17 above, the [respondent] was induced by the [appellant] to believe that:

(a) the [appellant] was aware of and accepted the [respondent's] obligations and intention to deal with the investor claims prudently and in an efficient, honest and fair manner;

(b) the [appellant] would provide its instructions either to settle or to defend the investor claims within 14 days of the provision by the [respondent] to the [appellant] of each liability report in accordance with the protocol;

(c) if the [appellant] failed to respond to the [respondent's] requests for instructions, the [respondent] might reasonably proceed to settle the investor claims notified to the [appellant] under the protocol as it was legally and commercially compelled to do; and

(d) by so settling, *the [respondent] would not adversely affect its rights to obtain indemnity under the insurance contracts*.

22. Acting upon the beliefs alleged in paragraph 21 above, in reliance on the protocol representation, and in reliance on the absence of any objection, or suggestion by the [appellant] that the beliefs alleged in paragraph 21 were unreasonable, unjustified or wrong, the [respondent] settled the investor claims in Schedule 1 as alleged in paragraph 17 above ('**the settlements**').

22A. The settlements were reasonable.

23. In the premises of the preceding paragraphs, and in particular of paragraphs 16, 17, 21, 22 and 22A above, it would be unconscionable now and therefore the [appellant] is unable to deny indemnity to the [respondent] under the contracts of insurance in respect of the investor claims.

24. Further or alternatively, in the premises of the preceding paragraphs, and in particular of paragraphs 16, 17, 21, 22 and 22A above, the [appellant] is estopped from denying indemnity to the [respondent] under the contracts of insurance in respect of investor claims." (emphasis added)

243 On day four of the six day trial, the respondent provided the primary judge with its amended list of disputed issues of fact and law:

"Is CGU prevented by any principle of law (estoppel …) from relying upon its argument … that [AMP] is not now entitled to claim damages for breach of contract (in respect of settled investor claims) and an order that CGU indemnify it under the policies (in respect of unresolved or unknown claims) … because it settled with some investors after the claims management protocol had been agreed but before CGU had expressly repudiated the contracts of insurance, particularly having regard to the fact that [AMP] was told by CGU to act as a 'prudent uninsured' in relation to claims which to the knowledge of CGU, [AMP] proposed to settle?"

244 The primary judge, without objection by the respondent, formulated the respondent's case on estoppel as follows[140]:

"1. By agreeing to the Protocol as the means by which the Investors' claims would be managed and, where appropriate, settled, and by instructing [AMP] to act as a 'prudent uninsured' until a decision on indemnity was made, and by standing by while [AMP] settled Investor claims full details of which had been given to CGU, CGU is now estopped from relying on the fact that [AMP] settled claims prior to CGU denying cover under the policy *in toto*.

2. As a result of CGU agreeing in principle to the Protocol and being informed on numerous occasions to act as a prudent uninsured, [AMP] was induced by CGU to believe that:

(a) CGU was aware of and accepted [AMP]'s obligation and intention to deal with the Investor claims prudently and in an efficient, honest and fair manner, as required, in particular, in order to protect [AMP]'s licence under the Law (see s 826(1)(j));

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140 *AMP Financial Planning Pty Ltd v CGU Insurance Ltd* (2004) 139 FCR 223 at 239-240 [59].

(b) CGU would provide its instructions either to settle or to defend the Investor claims within 14 days of the provision by [AMP] to CGU of each liability report in accordance with the Protocol;

(c) if CGU failed to respond to [AMP]'s requests for instructions, [AMP] might reasonably proceed to settle the Investor claims notified to CGU under the Protocol as it was legally and commercially compelled to do; and

(d) by so settling, [AMP] would not adversely affect its rights to obtain indemnity under the insurance contracts in the manner which CGU now submits occurred.

3. There is a conventional estoppel by conduct made out here because:

(a) CGU made a representation or fostered an assumption;

(b) [AMP] relied to its detriment on the representation or assumption by proceeding to deal with and settle claims with the Investors on the basis of the agreed Protocol; and

(c) for CGU to act contrary to the representation or assumption would be unconscionable in all the circumstances …"

245 His Honour was not however prepared to find such an estoppel because, first, in his view, reliance was lacking[141]:

"Up until the receipt of the letter of 14 November 2002 [AMP] recognised, as was the fact, that CGU had neither admitted nor denied liability to indemnify under the Policies. The most senior responsible person at [AMP] who gave evidence (although not, it would seem, the ultimate decision maker) was Mr Stephen Tudjman. He is a legal practitioner. He said in cross-examination:

'Q ... Until receipt of that letter of 14 November [2002], whenever that occurred at the earliest, there was no denial of liability?

A That's my recollection.

Q So you were acting on the basis that the policy was on foot. Leave aside the question of whether it ceased to be on foot after that date, but you were acting on the basis that the policy was on foot?

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141 (2004) 139 FCR 223 at 240 [60]-[61].

A Yes.'

> [AMP] had no belief that CGU had accepted liability. On the contrary, it was apparent to it that CGU had not yet made up its mind. CGU was, to use Ms Sutherland's metaphor, sitting on the fence. It was equally possible that CGU might, at some future time, deny liability. [AMP] entered into the Settlements and paid the Investors not in reliance of [sic] any commitment or promise or representation by CGU but because [AMP] considered the Settlements were desirable in its own interests, especially having regard to the attitude of ASIC."

246 During his opening senior counsel for the respondent had identified the actual estoppel said to have arisen, and in so doing clarified its precise and narrow operation:

> "[F]ormally we pleaded the protocol gave rise to an estoppel, but the estoppel would only be relevant in the circumstances that your Honour postulated earlier if CGU was now suggesting that *the arrangements that were made were a breach of the policy* for some reason, but that's all disappeared, your Honour." (emphasis added)

247 The reference to "the arrangements that were made" is a reference to the Protocol which was adopted by the respondent for the settlement of investors' claims, that is to say, claims made otherwise than by way of an originating process or the like. But for those "arrangements", the making of settlements would itself not have fallen within cll 3.1 and 12.1 of the policies, and would have been an actual breach of cl 7.6 of the policies.

248 The trial judge also held that the respondent had failed to establish a relevant detriment, and further, that no representation to induce an assumption or belief on the part of the respondent had been made by the appellant.

249 As will appear, those holdings on the evidence providing the basis for them on the issues as argued by the parties, not only are clearly correct, but are also not either within, or indeed relevant to, the questions which the majority in the Full Court said should be remitted to the trial judge.

250 We interpolate that his Honour rejected the appellant's argument that the investors' claims necessarily fell outside the policies. He found for it however on the other substantial issue, that it was not sufficient for the respondent to show simply, as it sought to do by the tender of the folders of the investigations, that the settlements made were reasonable. He accordingly dismissed the respondent's action and ordered that the appellant recover 90% of its costs on an

ordinary party and party basis, despite that the appellant had made a Calderbank offer superior to the result for the respondent at trial[142].

251 The appellant cross-appealed against the costs order. In the appeal by the respondent to the Full Court of the Federal Court, constituted by Moore, Emmett and Gyles JJ, the parties disputed the nature and ambit of the issues that had been litigated and determined by the trial judge, the respondent contending that his Honour had failed properly to consider its case in estoppel. The appellant then argued that no claim of the kind now advanced in the Full Court had been pleaded or pursued at trial.

252 The Full Court (Moore and Emmett JJ, Gyles J dissenting) ordered that the respondent's appeal be allowed, set aside the orders made by the primary judge, and remitted the proceeding to him[143]. Before the orders were entered, the appellant moved, by notice of motion dated 15 September 2005 (amended by order made on 26 September 2005), to have the appeal and cross-appeal re-opened on the basis, inter alia, that the Full Court had failed to decide other issues argued, including the construction of the policies. That application was heard and dismissed by the Full Court. The Full Court[144] also ordered that the appellant pay the respondent's costs of the appeal and dismissed the cross-appeal.

253 In his reasons for judgment Emmett J accepted the respondent's submission that the trial judge had misapprehended the respondent's case on estoppel, notwithstanding that the appellant was able to argue correctly that no ground of appeal directed to the particular estoppel found by his Honour had been the subject of the notice of appeal, and that evidence relevant to it could have been led by the appellant at trial if it had been properly and clearly raised there. Emmett J (Moore J agreeing) nonetheless remitted the questions as follows to the trial judge[145]:

> "The appeal should be upheld and the orders made by the primary judge should be set aside. The matter should be remitted to the primary judge for further consideration, in the light of these reasons, of the following questions in relation to each of the investor demands referred to in the SC Schedule:

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142 *AMP Financial Planning Pty Ltd v CGU Insurance Ltd [No 2]* [2004] FCA 1397.

143 *AMP Financial Planning Pty Ltd v CGU Insurance Ltd* (2005) 146 FCR 447.

144 *AMP Financial Planning Pty Ltd v CGU Insurance Ltd* [2006] FCAFC 90.

145 (2005) 146 FCR 447 at 489 [154].

- whether AMP was induced by CGU's conduct to assume that, if it settled that demand on reasonable terms, it would not be required to establish by admissible evidence that it was legally liable to that investor in order to be reimbursed by CGU for the amount paid pursuant to such settlement;

- if so, whether AMP settled that demand in reliance upon that assumption;

- whether, in the light of the answers to those questions, CGU is estopped from asserting that, or it would be a want of utmost good faith for CGU to assert that, AMP is required to establish by admissible evidence that it was legally liable to that investor;

- whether AMP settled that demand on reasonable terms."

254 The first reference to a claim of an estoppel as found by Emmett J had appeared in par 1 of the outline of submissions filed by the respondent in support of its appeal to the Full Federal Court. In its outline of submissions in response, the appellant specifically contended that this was a marked departure from the estoppel pleaded by the respondent, and from the grounds of appeal. This is a submission with which the Full Federal Court dealt very briefly[146], and without analysis of the pleadings. It can be dealt with equally briefly here: the appellant's argument in that regard is right. The respondent's claim of an estoppel at trial hinged on the Protocol. That follows from the respondent's opening at the trial and par 21(d) of the respondent's further amended statement of claim, the former of which we have earlier relevantly, and the latter of which we fully quoted. In those circumstances the respondent's appeal to the Full Court should have been dismissed: the questions remitted by the Full Court had not been litigated at trial, and were not open on appeal, but, of greater consequence still, for the reasons given by the trial judge, could not be answered favourably to the respondent in this Court.

255 The trial judge was also correct to find that the respondent had suffered no relevant detriment: it did not alter its position on the basis of any assumption or belief induced by the conduct of the appellant. Whatever may be said, and there is something as we will show, of the appellant's opportunism and lack of diligence, the relevant decision to make the settlements as and when it did were made for its own reasons and in its own personal interests. The question of estoppel stated by Emmett J for remittal neither arose nor could, even if it had, be answered in favour of the respondent.

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146 (2005) 146 FCR 447 at 474 [83]-[84].

Utmost good faith

256 Part II of the *Insurance Contracts Act* 1984 (Cth) ("the Insurance Act") imposes upon both parties to a contract of insurance a duty of utmost good faith. Section 12 of the Insurance Act provides that the provisions of Pt II may not be read down and s 13 that parties may not rely on the terms of a contract of insurance except in the utmost good faith. Section 13 is as follows:

> "A contract of insurance is a contract based on the utmost good faith and there is implied in such a contract a provision requiring each party to it to act towards the other party, in respect of any matter arising under or in relation to it, with the utmost good faith."

257 At the outset we should say that we agree with the Chief Justice and Crennan J that a lack of utmost good faith is not to be equated with dishonesty only. The analogy may not be taken too far, but the sort of conduct that might constitute an absence of utmost good faith may have elements in common with an absence of clean hands according to equitable doctrine which requires that a plaintiff seeking relief not himself be guilty of tainted relevant conduct. We have referred to the doctrine of clean hands because, as with another equitable doctrine, that he who seeks equity must do equity, it invokes notions of reciprocity which are of relevance here. That is not to say that conduct falling short of actual impropriety might not constitute an absence of utmost good faith of the kind which the Insurance Act demands. Something less than that might well do so. Utmost good faith will usually require something more than passivity: it will usually require affirmative or positive action on the part of a person owing a duty of it. It is not necessary, however for the purposes of this case, to attempt any comprehensive definition of the duty, or to canvass the ranges of conduct which might fall within, or outside s 13 of the Insurance Act.

258 We have already foreshadowed that in our opinion the conduct of the appellant did leave something to be desired. It does seem to us that there was certainly a degree of opportunism on the part of the appellant in dealing with the claims against the respondent by the investors. As Kirby J has pointed out[147], this insurance was effected in a market in which ASIC had an important and powerful presence. It follows that it ought to have been within the contemplation of the appellant that the respondent might come under pressure from ASIC to settle claims. It may be another question, however, whether it would have been within the contemplation of the appellant that ASIC would act in the way in which it did, that is to say, on the respondent's case possibly high-handedly. We would make no judgment about this as ASIC is not a party, but it is right to point out

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147 Judgment of Kirby J at [155].

that there was nothing in the Law or elsewhere disentitling a licence holder such as the respondent from defending claims and actions which it believes to be defendable. But there were other factors in play. The respondent seems to have been just as keen to stay out of court as ASIC was to keep the investors out of court. The respondent was anxious to protect its name and goodwill, and to that end to keep the appellant at a distance from the management of the claims.

259 That the appellant may have wished to see some further documents, in order to explore in somewhat more detail some of the investors' claims, that it thought that there might be a good defence under s 819(4) of the Law, that it wished to obtain its own senior counsel's opinion, and that it changed its solicitors several times, cannot fully justify, or for that matter explain, the long delay that occurred before it denied liability. If that were all there were to the case, we might have been inclined to hold that the appellant did fail in its duty of utmost good faith. Temporizing by an insurer can be just as damaging to an insured as outright rejection of a claim. To preserve their businesses, business people often need to act expeditiously. It is often in everyone's interests if possible to keep out of court. If the respondent had not been impelled by the other reasons to which we have referred, it still might have been in the interests of the respondent and also ultimately those of the appellant, to receive and deal with the claims quickly and out of court. In those circumstances, and in the absence of other reasons and events, it might also have been open for a court to apply s 14 of the Insurance Act to hold that reliance on the strict definition of a claim, as an originating or like process would have infringed the appellant insurer's duty of utmost good faith. But there were other reasons and some of these we have discussed in detail.

260 There is however yet another of them. It is that the respondent seems to have chosen either to ignore, or deliberately not to invoke, cl 7.8, the "senior counsel clause" of the policies. It was open at all times for the respondent to bring that clause into play. It would certainly have been, in our view, an act of much less than utmost good faith for the appellant to refuse, had it been asked to do so, to co-operate in the choice of, and obtaining of advice from, senior counsel. That advice could well have been to the effect that legal proceedings by investors ought not to be contested. Senior counsel advising pursuant to cl 7.8 was bound to have regard to the economics of the claims generally, and the respondent's prospects of defending them. Why this clause was not invoked has been left entirely unexplained. Indeed it seems to be that no reference was made to it by anyone until the parties' attention was drawn to it during the course of the appeal to this Court. Certainly no party suggested otherwise.

261 Having regard to the failure to invoke cl 7.8 of the policies, the respondent's determination to settle the investors' claims quickly for its own reasons, and its failure to consider the possibility of exoneration under s 819(4) of the Law, even if there had been an absence of good faith on the part of the

appellant as to which we make no conclusive finding, there was not such a degree of reciprocal good faith on the part of the respondent as would entitle it to relief against the appellant. If it were otherwise the respondent might perhaps have been able to make out a case that, as a practical matter, in the marketplace, both competitive and regulated as it was, in which it was operating, and having regard to the daily exigencies of business, an insurer acting opportunistically, and temporizing, was not acting in good faith, in consequence of which settlements had to be, and were, not inappropriately made, even though in some instances strictly legally they need not have been made at all, or not for the amounts for which they were in fact made.

262 The respondent's case on Pt II of the Insurance Act fails.

263 The last question remitted by the majority in the Full Court related to the reasonableness of the claims. That question cannot arise in view of the conclusions that we have reached about the other questions. In any event the respondent made its choice about this aspect of the case at the trial, that is, to tender documents only to show the respondent's "state of mind". There is no basis for re-opening that matter.

The other appeal

264 The other appeal is concerned, as the Chief Justice and Crennan J point out, with a matter of costs. We agree with the opinion of the Chief Justice and Crennan J about it.

Conclusion

265 We would agree with the orders proposed by the Chief Justice and Crennan J.