

INSURANCE LAW UPDATE

HIH Scheme not entitled to claim contribution from private insurer in equity

The issue was recently considered by the High Court in *HIH Claims Support Ltd v Insurance Australia Ltd* [2011] HCA 31.

The Court has held that by taking over the rights of an insured the HIH Scheme assumes the position of a creditor of the HIH group rather than a true insurer of the insured. In circumstances of double insurance, the Scheme does not assume the same burden or insure the same risk and cannot be required to contribute upon a claim made by the private insurer. As a result of this 'mutuality difficulty' the Scheme cannot claim an equitable contribution from a private insurer.

Background

A support scaffold, erected by a scaffolding sub-contractor ("**the sub-contractor**") for the 1998 Australian Grand Prix collapsed causing damage to a large "jumbotron" screen. The sub-contractor was insured under its own general liability policy ("**the HIH policy**") issued by a company in the HIH group ("**HIH**"). Additionally, the sub-contractor was also insured under an insurance policy ("**the SGIC policy**"), issued by SGIC General Insurance Limited all rights and liabilities of which vested in Insurance Australia Limited ("**IAL**"), taken out by the Australian Grand Prix Corporation. The sub-contractor chose to make a claim under the HIH policy in relation to the event and any liability established in proceedings commenced against it. The sub-contractor was found liable for the damage.

HIH paid part of the legal costs incurred in the defence of the proceedings against the sub-contractor before it collapsed and was placed into provisional liquidation in March 2001. In response to the collapse the Commonwealth Government set up a Scheme to relieve policyholders 'suffering financial hardship as a result of the HIH [Group] collapse'.

The Scheme

The Scheme created HIH Claim Support Limited ("**HCSL**") to pay out 90% of the value of a claim made by an insured in exchange for the assignment of any of the insured's rights to receive or demand a benefit from claims made, and any rights the insured may have or may obtain against a party in respect of a claim made under an HIH policy.

The assignment was made using an Offer to Assign which provided that HCSL only accepted the applicant's offer after the payment of a benefit under the Scheme. In effect, HCSL sought to replace an insured as an unsecured creditor in the liquidation.

At trial – Supreme Court of Victoria

HCSL brought proceedings against IAL seeking a contribution of half of all benefits it had paid to the sub-contractor. At trial, the claim was dismissed on the ground that the respective liabilities were not co-ordinate. It was considered inappropriate to construe HCSL's obligation to indemnify as being the equivalent of HIH's. The assignment of the insured's rights under the HIH policy did not constitute an assignment by HIH of its legal obligations under the policy.

On appeal

HCSL submitted that it effectively stood in the shoes of HIH, replicating the circumstances of double insurance. The Court of Appeal dismissed the appeal on the following grounds:

- The liabilities for which the sub-contractor was indemnified were different
- Notions of fairness and natural justice did not require the intervention of equity
- The sub-contractor would not have equal or substantially equal recourse to both HCSL and IAL as it would have had if a genuine mutuality had existed

On appeal to the High Court

HCSL sought an equitable contribution from IAL on the basis that coordinate liability between the HIH

policy and SGIC policy was undisputed and that HCSL discharged a burden that was in substance the same burden as the one shared between the original two insurers. IAL responded with the argument that the liabilities were not coordinate as it never shared a common burden with HCSL.

The impact of the application of the Scheme in the circumstances was also in dispute. HCSL submitted that it would be inequitable for IAL to 'escape liability' on the basis that HCSL assumed responsibility for the insolvent insurer by way of assignment of the rights of an insured. IAL focused on its inability to bring a claim for contribution against HCSL as no contract between a indemnified, and subsequently ineligible, insured and HCSL could have come into existence.

Decision

The High Court unanimously found in favour of IAL. The two judgments delivered, the joint judgment of Gummow ACJ, Hayne, Crennan and Kiefel JJ and Heydon J's judgment, essentially found that the obligations of HCSL and IAL being *'not of the same nature and to the same extent is reason enough to find that those obligations are not-co-ordinate liabilities.'*

Reasoning

Both judgments found that HCSL did not 'step into the shoes' of HIH, as contended by HCSL, but that the effect of the assignment of rights from an insured meant that HCSL, in fact, stepped into the shoes of the insured. It was also problematic that HCSL did not become exposed to all claims under the policy and, as a result, could not properly be considered an insurer of the sub-contractor.

The operation of the scheme gave rise to what Heydon J described as a 'mutuality difficulty'. The difficulty arose on application of the principles of equitable contribution cited by the High Court.

The joint judgment of Gummow ACJ, Hayne, Crennan and Kiefel JJ started by citing Kitto J's statement of the basic principle in *Albion Insurance Co Ltd v Government Insurance Office (NSW)* [1969] HCA 55:

'persons who are under co-ordinate liabilities to make good the one loss ... must share the burden pro rata persons who are under co-ordinate liabilities to make good the one loss.'

Their honors also cited the joint judgment in *Friend v Booker* restating the principle as:

'...[t]he equity to seek contribution arises because the exercise of the rights of the obligee or creditor ought not to

disadvantage some of those bearing a common burden; the equity does not arise merely because all the obligors derive a benefit from a payment by one or more of them...'

The mutuality difficulty played out in a number of areas. First, there was no common interest or common burden between HCSL and IAL. If IAL had indemnified the sub-contractor it would not have been open to claim assistance under the Scheme as, even though IAL could have subrogated to the relevant rights of the sub-contractor, the sub-contractor would cease to have rights against the Scheme. In other words, the sub-contractor would no longer have been in financial need and, as a result, would not be eligible to claim under the Scheme.

Second, as HCSL undertook no enforceable obligation under the Scheme until a payment was made IAL would not have been able to bring a claim for contribution.

Third, the risk covered by HCSL, being events that had already occurred, and that covered by IAL were not the same risk.

The 'community of interest' between the IAL and HCSL, as it was described by HCSL, was not *'a sufficient condition for the operation of an equity to contribute where the obligations in question were as qualitatively different as they were in the circumstances.'*

Heydon J didn't consider HCSL to be an insurer of the sub-contractor and regarded the mutuality difficulty as manifested in IAL's inability to meaningfully subrogate to the rights of the insured to claim for contribution against HCSL in the event that it had indemnified the sub-contractor. His Honour found that *'as [IAL] could have no right of subrogation, it could have no right of contribution.'*

Implications

It is understood that the decision will impact on a number of actions and claims by the HIH Scheme against private insurers.

If you have any questions about the contents of this article please contact Steven Weybury to discuss on (03) 9620 7266 or at srw@norriscoates.com.au

NORRIS COATES LAWYERS

Level 10
99 William Street
Melbourne Vic 3000
DX 212 Melbourne
Telephone: (03) 9620 7266