

DEFENCE TO FIRST CROSS CLAIM

COURT DETAILS

Court	Supreme Court of New South Wales
Division	Equity
Registry	Sydney
Case number	2015/171592

TITLE OF PROCEEDINGS

Plaintiff	John Smith and Rosemary Smith
Defendant	Australian Executor Trustees Limited (ACN 007 869 794)

TITLE OF CROSS CLAIM

First Cross-Claimant	Australian Executor Trustees Limited
Second Cross-Claimant	IOOF Holdings Limited
First Cross-Defendant	AXIS Specialty Europe SE
Second Cross-Defendant	Willis Australia Limited

FILING DETAILS

Filed for	AXIS Specialty Europe SE
Legal representative	Patrick Boardman, Wotton + Kearney
Legal representative reference	PJB 6154 RJS
Contact name and telephone	Richard Shankland, (02) 8273 9863

PLEADINGS AND PARTICULARS

In answer to the Pleadings and Particulars contained in the First Cross-Claim Statement of Cross Claim filed on 20 June 2016 (**First Cross Claim**) the First cross defendant (**AXIS**) relies on the following facts and assertions:

Parties

- 1 AXIS admits paragraph 1 of the First Cross Claim.
- 2 AXIS admits paragraph 2 of the First Cross Claim.
- 3 AXIS admits paragraph 3 of the First Cross Claim.
- 4 AXIS admits paragraph 4 of the First Cross Claim.

Professional indemnity policies of insurance

- 5 AXIS admits paragraph 5 of the First Cross Claim.
- 6 AXIS admits paragraph 6 of the First Cross Claim.
- 7 As to paragraph 7 of the First Cross Claim, AXIS also relies on the terms of the 2011/2012 AXIS policy as if they were set out in full herein.
- 8 As to paragraph 8 of the First Cross Claim, AXIS:
- a. says that the 2014/2015 AXIS policy was issued by AXIS and Chubb Insurance Company of Australia Ltd (Chubb) in the following proportions:
 - i. AXIS – 90%; and
 - ii. Chubb – 10%;
 - b. says that its limit of liability under the 2014/2015 AXIS policy is limited to 90%; and
 - c. otherwise admits paragraph 8.
- 9 AXIS admits paragraph 9 of the First Cross Claim.
- 10 As to paragraph 10 of the First Cross Claim, AXIS also relies on the terms of the 2014/2015 AXIS policy as if they were set out in full herein.
- 11 AXIS admits paragraph 11 of the First Cross Claim.
- 12 AXIS admits paragraph 12 of the First Cross Claim.
- 13 AXIS admits paragraph 13 of the First Cross Claim.
- 14 AXIS admits paragraph 14 of the First Cross Claim.
- 15 AXIS admits paragraph 15 of the First Cross Claim.
- 16 AXIS admits paragraph 16 of the First Cross Claim.
- 17 AXIS admits paragraph 17 of the First Cross Claim.
- 18 AXIS admits paragraph 18 of the First Cross Claim.
- 19 AXIS admits paragraph 19 of the First Cross Claim.

20 AXIS admits paragraph 20 of the First Cross Claim.

Provident Capital Limited

21 AXIS admits paragraph 21 of the First Cross Claim.

22 AXIS admits paragraph 22 of the First Cross Claim.

23 AXIS admits paragraph 23 of the First Cross Claim.

23A In further answer to paragraphs 21 to 23 of the First Cross Claim, AXIS says that by reason of the fact that Provident is insolvent within the meaning given by section 95A of the Corporations Act 2001 (Cth) (**the Act**):

- a. The holders of debentures issued by Provident under the Trust Deed, which were unpaid as at 18 September 2012, have not received a full return on their investments in the administration of Provident.
- b. On or about 16 April 2015, the receivers of Provident estimated that the likely return of principal to debenture holders of Provident would be in the region of 12 cents of every dollar invested.

24 AXIS admits paragraph 24 of the First Cross Claim.

25 As to paragraph 25 of the First Cross Claim, AXIS:

- a. will rely on the whole of Amended Statement of Claim filed in the Smith proceeding on 17 July 2015 (**ASOC**) for its full terms and effect; and
- b. otherwise admits paragraph 25.

25A In further answer to paragraph 25 of the First Cross Claim, the following matters are pleaded in the ASOC:

- a. the plaintiffs (hereafter "**the Smiths**") are, and have been since 13 September 2010, holders of debentures issued by Provident evidenced by Debenture Certificate no. D001263151 dated 14 September 2010 in the sum of \$100,000 for a 2 year period;

Particulars

- i. Para. 2 of the ASOC.

- b. Provident at all material times carried on the business of borrowing money from the public by issuing debentures under Chapter 2L of the Corporations Act;

Particulars

- i. Para. 3(d) of the ASOC.
- c. Provident was placed into receivership on 29 June 2012 by order of the Federal Court;

Particulars

- i. Para. 3(f) of the ASOC.
- d. Provident entered into voluntary administration on 18 September 2012;

Particulars

- i. Para. 3(g) of the ASOC.
- e. Provident entered into liquidation pursuant to a creditors' voluntary winding up on 24 October 2012;

Particulars

- i. Para. 3(h) of the ASOC.
- f. the members of the group to whom the Smith proceeding relates are all those persons and entities:
 - i. who were a holder of debentures issued by Provident as at 29 June 2012; and
 - ii. who have suffered loss and damage by reason of the conduct of AETL as pleaded in the ASOC; and
 - iii. have signed a relevant funding agreement with Litman Holdings Pty Limited by 5pm on 16 June 2015.

Particulars

- 1. Para. 4 of the ASOC.

- g. at all material times, the Trust Deed provided that following the occurrence of an “*event of default*”, AETL was entitled to take action to enforce the Charge either itself or by the appointment of a receiver or apply to wind up Provident;

Particulars

- i. Paras. 8(m)(ii) and (iii) of the ASOC.
- h. in December 2011, the Australian Securities and Investment Commission (**ASIC**) raised concerns about Provident’s financial affairs and its disclosures in documents that it had issued to the public for the purposes of raising funds;

Particulars

- i. Para. 34 of the ASOC.
- i. on 8 June 2012, AETL commenced proceedings seeking orders under s283HB(1) of the Act to make the Charge immediately enforceable and to appoint receivers to Provident;

Particulars

- i. Para. 35 of the ASOC.
- j. on 29 June 2012, the Federal Court ordered that a receiver be appointed to Provident;

Particulars

- i. Para. 36 of the ASOC.
- k. on 3 July 2012, Messrs Marcus Ayres, Anthony Simms and Philip Carter of PPB (NSW) were appointed as joint and several receivers of Provident, and on 10 July 2012 as joint and several receivers and managers of Provident (**Receivers and Managers**);

Particulars

- i. Para. 37 of the ASOC.
- l. since their appointment, the Receivers and Managers have set about realising the assets of Provident, and have given an estimate that the likely return to debenture holders will be about 12 cents of every dollar invested;

Particulars

- i. Para. 38 of the ASOC.
- m. the Group Members and each of them have suffered loss and damage;

Particulars

- i. Para. 39 of the ASOC.

Claims for indemnity and damages against AXIS

2011/2012 AXIS policy

26 As to paragraph 26 of the First Cross Claim, AXIS:

- a. says that on 27 June 2012 AETL (through Willis) notified AXIS of circumstances that might give rise to a claim against AETL (**the Notification**);
- b. says that the Notification consisted of:
 - i. an email from Pegah Vaghaye of Willis to Olympia Samolis of AXIS (**27 June Email**) which forwarded an email from Michael Stanelos, the Commercial Manager and Assistant Company Secretary of IOOF Holdings Pty Limited, to Pegah Vaghaye of Willis (**the Stanelos Email**); and
 - ii. the documents that were attached to the Stanelos Email;
- c. will rely on the whole of 27 June Email for its full terms and effect;
- d. otherwise admits paragraph 26.

27 As to paragraph 27 of the First Cross Claim, AXIS:

- a. admits that on 4 August 2014 Kelly Butler of Willis sent an email to Robyn Fraser of AXIS (**4 August 2014 Email**);
- b. Says that the 4 August 2014 Email consisted of:
 - i. an email from Kelly Butler of Willis to Robyn Fraser of AXIS which forwarded an email dated 4 August 2014 from Michael Stanelos of IOOF Holdings Pty Limited to Kelly Butler of Willis (**the 4 August 2014 Stanelos Email**); and

ii. the documents that were attached to the 4 August 2014 Stanelos Email which included:

1. a letter dated 28 July 2014 from Meridian Lawyers addressed to the "Debenture Holder, Provident Capital Debenture Scheme, Operated by Provident Capital Limited (Receivers & Managers Appointed) (in liquidation)"; and
2. attached documents referred to in the letter from Meridian.

- c. will rely on the whole of 4 August 2014 Email for its full terms and effect;
- d. says that the contents of the 4 August 2014 Email concerned subject matter that was the subject of the Notification;
- e. otherwise denies para. 27.

28 As to paragraph 28 of the First Cross Claim, AXIS:

- a. admits that on 28 August 2014 Kelly Butler of Willis sent an email to Robyn Fraser of AXIS (**28 August 2014 Email**);
- b. Says that the 28 August 2014 Email consisted of:
 - i. an email from Kelly Butler of Willis to Roby Fraser of AXIS which forwarded an email dated 28 August 2014 from Michael Stanelos, the Commercial Manager and Assistant Company Secretary of IOOF Holdings Pty Limited, to Kelly Butler of Willis (**the 28 August 2014 Stanelos Email**); and
 - ii. the document that was attached to the 28 August 2014 Stanelos Email being a letter dated 18 August 2014 from Slater + Gordon addressed to the "Dear Debenture Holder" and bearing the subject line "Provident Capital Limited (Receivers & Managers Appointed) (In Liquidation)";
- c. will rely on the whole of 28 August 2014 Email for its full terms and effect;
- d. says that the contents of the 28 August 2014 Email concerned subject matter that was the subject of the Notification;
- e. otherwise denies para. 28.

- 29 As to paragraph 29 of the First Cross Claim, AXIS:
- a. admits that AXIS sent a letter to Willis dated 3 September 2015 (**3 September 2015 Letter**);
 - b. will rely on the whole of the 3 September 2015 Letter for its full terms and effect;
 - c. otherwise admits para. 29.
- 30 AXIS denies paragraph 30 of the First Cross Claim, and says that:
- a. On its proper construction, exclusion clause 3.16 of the 2011/2012 AXIS policy does apply with respect to the Smith proceeding; and
 - b. it is not liable to indemnify AETL under the 2011/2012 AXIS policy with respect to the Smith proceeding.
- 30A In further answer to paragraph 30 of the First Cross Claim, AXIS repeats paras. 23A and 25A of this Defence and says as follows:
- a. Pursuant to clause 2.1 of the Trust Deed, Provident could at any time issue debentures to any person who applied for them under the Trust Deed.
 - b. Prior to 18 September 2012 pursuant to the Trust Deed Provident had issued debentures to over approximately 3,000 Debenture holders, including the Smiths and the group members described in paragraph 4 of the ASOC.
 - c. At the time they were issued and at all times thereafter, all of the debentures that Provident issued pursuant to the Trust Deed were unlisted.

Particulars

- i. AETL has made this admission in para. 41 of the First Cross Claim.
- ii. The debentures were not listed or quoted on a market or exchange.
- iii. The debentures were not listed or quoted on a securities market or exchange.
- iv. The debentures were not listed or quoted on the Australian Securities Exchange (**ASX**).
- v. The debentures were not traded on a secondary market or exchange.

- vi. The debentures could not be traded on a secondary market or exchange.
 - vii. The debentures were not and could not be traded on the ASX.
- d. Further or in the alternative to sub-para. 30A(c), at the time they were issued and at all times thereafter the debentures that were issued by Provident pursuant to each debenture prospectus that was issued by Provident on and after 19 November 2004, were unlisted.

Particulars

- i. Debenture Prospectus 7 dated 19 November 2004 at page 7;
 - ii. Debenture Prospectus 8 dated 25 November 2005 at page 8;
 - iii. Debenture Prospectus 9 issued in 2006 (precise date not known);
 - iv. Debenture Prospectus 10 dated 18 December 2007;
 - v. Supplementary Prospectus for Prospectus 10 dated 29 February 2008.
 - vi. Debenture Prospectus 11 dated 23 December 2008 pages 8, 21;
 - vii. Debenture Prospectus 12 dated December 2009 pages 6, 21;
 - viii. Provident Capital Prospectus 2011 dated 22 December 2010 pages 4, 20;
 - ix. Provident Capital Prospectus 14 dated 16 December 2011 page 4, 20;
 - x. AXIS also repeats the particulars to para. 30A(c).
- e. Further or in the alternative to sub-para. 30A(c) and (d), at the time they were issued and at all times thereafter the debentures that are referred to in para. 2 the ASOC were unlisted.

Particulars

- xi. AXIS repeats the particulars to para. 30A(c) and (d).
- f. Further or in the alternative to paras. 30A(c), (d) and (e), at the time they were issued and at all times thereafter the debentures that are referred to in para. 4(a) of the ASOC were unlisted.

Particulars

- i. AXIS repeats the particulars to para. 30A(c) and (d).

- g. At the time they were issued and at all times thereafter, all of the debentures that Provident issued pursuant to the Trust Deed were unrated.
- i. AETL has made this admission in para. 41 of the First Cross Claim.
 - ii. The debentures had not received a credit rating from a credit rating agency or an organisation that provides a credit rating (**CRA**).
 - iii. The debentures had not received a credit rating from a CRA which at the relevant times held an exemption for their credit rating services under ASIC Class Order [CO 03/1093] *Credit rating Agencies* as amended by ASIC Class Order [CO 05/415].
 - iv. The debentures had not received a credit rating from a CRA a credit rating agency operating in Australia which held an Australian Financial Services (**AFS**) license.
- h. Further or in the alternative to sub-para. 30A(g), at the time they were issued and at all times thereafter the debentures that were issued by Provident pursuant to every debenture prospectus that was issued by Provident on and after 19 November 2004, were unrated.

Particulars

- i. AXIS repeats the particulars to para. 30A(d) and (g).
- i. Further or in the alternative to sub-para. 30A(g) and (h), at the time they were issued and at all times thereafter the debentures that are referred to in para. 2 the ASOC were unrated.
 - i. AXIS repeats the particulars to sub-para. 30A(d), (g).
- j. Further or in the alternative to paras. 30A(g), (h) and (i), at the time they were issued and at all times thereafter the debentures that are referred to in para. 4(a) of the ASOC were unrated.
 - ii. AXIS repeats the particulars to sub-para. 30A(d) and (g).

31 AXIS admits paragraph 31 of the First Cross Claim.

32 As to paragraph 32 of the First Cross Claim, AXIS:

- a. AXIS denies that the withdrawal of indemnity that is referred to was wrongful;

- b. Otherwise denies paragraph 32.

2014/2015 Axis Policy

33 AXIS denies paragraph 33 of the First Cross Claim.

33A. In further answer to paragraph 33 of the First Cross Claim, AXIS:

- a. says that on its proper construction, exclusion clause 3.11 of the 2014/2015 AXIS policy applies with respect to the Smith proceedings; and
- b. says that AXIS is not liable to indemnify AETL under the 2014/2015 AXIS policy with respect to the Smith proceedings;
- c. says that further, AXIS is not liable to indemnify AETL under the 2014/2015 AXIS policy with respect to the Smith proceeding for the reasons set out in paragraph 34(e) of this Defence.

34 As to paragraph 34 of the First Cross Claim, AXIS:

- a. Admits that on 30 November 2015, Andrew Dawson of Willis sent an email to Heather Ballantyne and Tony Haynes of AXIS (**the 30 November 2015 Email**);
- b. Says that attached to 30 November 2015 Email was a letter dated 30 November 2015 from AETL (Stanelos) to Willis (Dawson) concerning the Smith proceeding (**30 November 2015 Letter**);
- c. Says that that the 30 November 2015 Letter said in part:

*"I refer to the Financial Institution's Professional Indemnity policy of insurance in force for the period of insurance from 30 November 2014 to 30 November 2015 insuring IOOF Holdings Ltd (IOOF) and its subsidiaries (**the policy**).*

Australian Executor Trustees Ltd (AET) a subsidiary of IOOF and is therefore an Insured pursuant to the policy.

...

This notification is without prejudice to any notifications made by AET under earlier policies of insurance with respect to the facts and matters recorded in this notification.

2 Background

In the period from about 7 December 2004 to 18 September 2012, AET was the trustee appointed under a Debenture Trust Deed between AET and Provident Capital Limited (Provident).

The Debenture Trust Deed was governed by Chapter 2L of the Corporations Act 2001 (Cth) (Act).

Provident issued debentures to members of the public.

On 18 September 2012, Provident entered voluntary administration.

The holders of debentures issued by Provident, which were unpaid as at the date of administration, have not received a full return on their investments in the administration of Provident.”

- d. will rely on the whole of the 30 November 2015 Email and the 30 November 2015 Letter for their full terms and effect;
- e. says that the contents of the 30 November 2015 Letter concerned subject matter that was the subject of the Notification and in the circumstances did not constitute the giving by AETL of written notice to AXIS of a “Claim” (as defined) under clause 5.1 of the 2014/2015 AXIS policy;
- f. says that the Smith proceeding arose from facts and circumstances that were notified to AXIS in the Notification;
- g. otherwise denies para. 34.

35 AXIS denies paragraph 35 of the First Cross Claim.

36 AXIS admits paragraph 36 of the First Cross Claim and repeats paragraphs 33A and 34 of this Defence.

37 As to paragraph 37 of the First Cross Claim, AXIS:

- a. repeats paragraphs 33A and 34 of this Defence;
- b. denies that the 2014/2015 AXIS policy applies with respect to the Creighton proceeding as alleged or at all; and
- c. otherwise denies paragraph 37.

38 As to paragraph 38 of the First Cross Claim, AXIS:

- a. repeats paragraphs 33A and 34 of this Defence;
- b. denies that the declinature of indemnity that is referred to was wrongful; and
- c. otherwise denies paragraph 38.

Alternative basis of claim under Section 54

39 As to paragraph 39 of the First Cross Claim, AXIS:

- a. AXIS repeats paras. 23A, 25A and 30A of this Defence; and
- b. Otherwise denies paragraph 39.
- c. Says that:
 - i. On its proper construction, exclusion clause 3.16 of the 2011/2012 AXIS policy does apply with respect to the Smith proceeding; and
 - ii. AXIS is not liable to indemnify AETL under the 2011/2012 AXIS policy with respect to the Smith proceeding.

40 As to paragraph 40 of the First Cross Claim, AXIS:

- a. admits that the effect of exclusion 3.16 of the 2011/2012 AXIS policy is that AXIS and Chubb will not indemnify AETL under the 2014/2015 AXIS policy for any "Claim" (as defined) directly or indirectly arising from the insolvency or external administration of any issuer of unlisted and / or unrated debentures or promissory notes;
- b. repeats paragraph 39(c) of the Defence;
- c. otherwise does not admit paragraph 40.

41 AXIS does not admit paragraph 41 of the First Cross Claim but says that:

- a. it agrees that the debentures were not listed or rated;
- b. Provident did not omit to obtain a listed or rating of the debentures (as the term "omit" would be understood).

42 AXIS denies paragraph 42 of the First Cross Claim and says that there was no such omission.

43 AXIS denies paragraph 43 of the First Cross Claim and says that:

- a. there was no such omission; and
- b. if (which is denied) there was such an omission as pleaded in paragraph 41, then such omission could reasonably be regarded as being capable of causing or contributing to the loss.


44 AXIS denies paragraph 44 of the First Cross Claim.

Claims against Willis

45 AXIS does not plead to paragraphs 45 to 56 (inclusive) of the First Cross Claim as no allegations are made against it in those paragraphs.

SIGNATURE OF LEGAL REPRESENTATIVE

I certify under clause 4 of Schedule 2 to the *Legal Profession Uniform Law Application Act 2014* that there are reasonable grounds for believing on the basis of provable facts and a reasonably arguable view of the law that the defence to the claim for damages in these proceedings has reasonable prospects of success.

Signature 
Capacity SOLICITOR ON THE RECORD
Date of signature 18 July 2016

AFFIDAVIT VERIFYING

Name Georgina Haddad
Address Level 21, 45 Clarence Street, Sydney NSW 2000
Occupation Senior Claims Officer
Date 15 JULY 2016

I say on oath:

- 1 I am employed as a Senior Claims Officer of the First Cross-Defendant and I am authorised to make this affidavit on its behalf.
- 2 As to any allegations of fact in this Defence to the First Cross Claim (**Defence**), I believe that the allegations are true.
- 3 As to any allegations of fact that the Defence denies, I believe that the allegations are untrue.
- 4 As to any allegations of fact that the Defence does not admit, after reasonable inquiry I do not know whether or not the allegations are true.

SWORN AT SYDNEY

Signature of deponent



Name of witness

JANE O'NEILL

Address of witness

426, 85 CASTLEREAUX ST, SYDNEY

Capacity of witness

SOLICITOR

And as a witness, I certify the following matters concerning the person who made this affidavit (the **deponent**):

- 1 I saw the face of the deponent.
- 2 I have known the deponent for at least 12 months.

 Identification document relied on (may be original or certified copy)

Signature of witness



Note: The deponent and witness must sign each page of the affidavit. See UCPR 35.7B.