

**FIFTH CROSS-CLAIM
COMMERCIAL LIST CROSS-CLAIM RESPONSE**

COURT DETAILS

Court	Supreme Court of NSW
Division	Equity
List	Commercial
Registry	Supreme Court Sydney
Case number	2018/00076580

TITLE OF PROCEEDINGS

First plaintiff	Giabal Pty Ltd (ACN 009 863 807)
Second plaintiff	Geoffry Underwood
Third defendant	Wayne Leonard Chapman
Number of defendants	11

TITLE OF THIS CROSS-CLAIM

First cross-claimant	Robin Gray
First cross-defendant	Catlin Australia Pty Ltd
Second cross-defendant	Chubb Insurance Australia Limited

FILING DETAILS

Filed for	Catlin Australia Pty Ltd, First Cross-Defendant
Filed in relation to	Fifth Cross-Claim
Legal representative	Matt Andrews, Kennedys (Australasia) Partnership
Legal representative reference	AUSX111: 921843 MJA
Contact name and telephone	Llinos Kent, 02 8215 5999
Contact email	Llinos.Kent@kennedyslaw.com

A. Nature of the Dispute

1. The First Cross Defendant to the Fifth Cross-Claim (**Catlin**) agrees with the general description of the nature of the dispute raised by the Fifth Cross-Claim set out in Section A of the Fifth Cross Claim Commercial List Cross Claim Statement.

B. Issues likely to Arise

1. Catlin:
 - a. Generally agrees with the description of the Issues likely to arise set out in Section B of the Fifth Cross Claim Commercial List Cross Claim Statement;
 - b. repeats the description of the issues likely to arise set out in Part B of its Commercial List Response filed herein (**Catlin's List Response**);
 - c. says that the Issues Likely to Arise include whether one or more exclusion clauses contained in the Primary Policy apply.

C. First Cross-Defendant's Responses to Contentions

1. In answer to paragraph 1 of the Cross-Claimant's contentions, Catlin repeats the paragraphs 1-9 of Catlin's List Response.
2. Catlin admits paragraph 2 of the Cross-Claimant's contentions.
3. Catlin admits paragraph 3 of the Cross-Claimant's contentions.
4. In answer to paragraph 4 of the Cross-Claimant's Contentions, Catlin:
 - a. admits that on or about 6 February 2012, Chartis Australia Insurance Limited issued a policy of insurance, number 107092, in favour of GPL (**Primary Policy**);
 - b. says that the Primary Policy comprised:

- i) a schedule (***Primary Policy Schedule***);
 - ii) a policy wording headed “*Investment Management Insurance*” (***Primary Policy Wording***), and
 - iii) fifteen (15) endorsements (***Primary Policy Endorsements***);
- c. says that the Primary Policy had a Policy Period of 30 November 2011 to 30 November 2012, both at 4.00 pm at GPL’s main address.
5. In answer to paragraph 5 of the Cross-Claimant’s Contentions, Catlin:
- a. admits it was a term of the Primary Policy that the “*Limit of Liability*” under the Primary Policy was \$2,500,000;
 - b. admits that it was a further term of the Primary Policy that the “*Special Excess Limit*” was a limit of \$1,000,000 for each “*Non-Executive Director*”, subject to a total aggregate limit of \$2,500,000 for all “*Non-Executive Directors*”;
 - c. admits that it was a further term of the Primary Policy that Chartis would only be liable for “*Loss*” in excess of the “*Retention*” of \$250,000;
 - d. refers to the Primary Policy for its full terms and effect as if set out in full;
 - e. otherwise, does not admit the paragraph.

Particulars

Primary Policy cll 4.71, 5.4 and 5.5

Primary Policy Schedule, items 5 and 8

6. In answer to paragraph 6 of the Cross-Claimant’s Contentions, Catlin:
- a. admits that:
 - i) clause 1.1 of the Primary Policy is in terms that generally accord with the description set out in sub-paragraph 6(a);

- ii) clause 1.2 of the Primary Policy is in terms that generally accord with the description set out in sub-paragraph 6(b);
 - iii) clause 1.3 of the Primary Policy is terms that generally accord with the description set out in sub-paragraph 6(c), save that clause 1.3 of the Primary Policy provides cover in respect of "*Investment Manager Management Liability*" and not "*Investment Management Liability*" as alleged;
- b. says that the cover afforded by:
- i) clause 1.1 of the Primary Policy is:
 - (1) in respect of an Insured Person, limited to "*Loss*" (as defined in the Primary Policy) arising out of a "*Claim*" first made during the "*Policy Period*" for a "*Wrongful Professional Act*" and notified to the Insurer as soon as practicable during the Policy Period;
 - (2) in respect of an Insured Entity, limited to the reimbursement of the Insured Entity for any "*Loss*" that the Insured Entity pays on its own behalf or on behalf of an Insured Person, such "*Loss*" arising out of a "*Claim*" first made during the "*Policy Period*" for a or "*Wrongful Professional Act*" and notified to the Insurer as soon as practicable during the Policy Period;
 - ii) clause 1.2 of the Primary Policy is:
 - (1) in respect of an Insured Person, limited to "*Loss*" (as defined in the Primary Policy) arising out of a "*Claim*" first made during the "*Policy Period*" for a "*Wrongful Professional Act*" or a "*Wrongful Managerial Act*" and notified to the Insurer as soon as practicable during the Policy Period
 - (2) is, in respect of a Fund, limited to the reimbursement of the Fund for any "*Loss*" that the Fund pays on its own behalf or on behalf of an Insured Person, such "*Loss*" arising out of a "*Claim*" first made during the "*Policy Period*" for a "*Wrongful*

Managerial Act” or “*Wrongful Professional Act*” and notified to the Insurer as soon as practicable during the Policy Period;

- iii) clause 1.3 of the Primary Policy is:
- (1) in respect of an Insured Person, limited to “*Loss*” (as defined in the Primary Policy) arising out of a “*Claim*” first made during the “*Policy Period*” for a “*Wrongful Managerial Act*” and notified to the Insurer as soon as practicable during the Policy Period
 - (2) is, in respect of an Insured Entity, limited to the reimbursement of the Insured Entity for any “*Loss*” that the Insured Entity pays on its own behalf or on behalf of an Insured Person, such “*Loss*” arising out of a “*Claim*” first made during the “*Policy Period*” for a “*Wrongful Managerial Act*” and notified to the Insurer as soon as practicable during the Policy Period;
- c. says that for the purposes of the Primary Policy a “*Wrongful Managerial Act*” is a matter claimed against an “*Insured Person*” solely because of his or her capacity as a Director or Officer, or any actual or alleged act, error or omission by a Director or Officer in his or her capacity as such;
- d. says that for the purposes of the Primary Policy a “*Wrongful Professional Act*” is any actual or alleged act, error or omission in the performance of “*Investment Advisory Services*” by an “*Insured*” or any other person or entity for whom an Insured Entity is legally liable for;
- e. says that for the purposes of the Primary Policy an “*Investment Advisory Services*” is the investment advisory services, investment management services and trustee services declared in the Submission and performed by or on behalf of an Insured Entity in agreement with a third party for compensation or in conjunction with services for compensation;
- f. says further that the cover afforded by the Primary Policy is subject to the terms, conditions and exclusions of the Primary Policy as a whole;

- g. denies that clause 1.1 of the Primary Policy is capable of applying in circumstances where no allegation is made that the matters alleged against the eighth defendant constitute a "*Wrongful Professional Act*" within the meaning of the Primary Policy;
 - h. refers to the Primary Policy for its full terms and effect as if it were set out in full;
 - i. otherwise, does not admit the paragraph.
- 7. In answer to paragraph 7 of the Cross-Claimant's Contentions Catlin:
 - a. says that GPL was the Policyholder of the Primary Policy and accordingly, satisfied the definition of an "*Insured Entity*" for the purposes of the Primary Policy;
 - b. says that for the purposes of the Primary Policy, a person who was a "*Director or Officer*" of an "*Insured Entity*" satisfies the definition of an "*Insured Person*" for the purposes of the Primary Policy;
 - c. says that the words "*Director or Officer*" are defined in cl 4.20 of the Primary Policy;
 - d. says that to the extent that the Cross Claimant was an executive or non-executive director or officer, responsible officer or compliance committee member of an "*Insured Entity*", or became a director or officer of such an entity during the "*Period of Insurance*" (i.e. 30 November 2011 to 30 November 2012), he will satisfy the definition of a "*Director or Officer*" for the purposes of the Primary Policy;
 - e. otherwise does not admit the paragraph.
- 8. In answer to paragraph 8 of the Cross-Claimant's contentions, Catlin:
 - a. says that, on the proper construction of the Primary Policy, there is a single "*Claim*";
 - b. says that for the purposes of the Primary Policy a "*Wrongful Managerial Act*" is a matter claimed against an "*Insured Person*" solely because of his

or her capacity as a Director or Officer, or any actual or alleged act, error or omission by a Director or Officer in his or her capacity as such;

- c. does not admit that any matters alleged against the Cross Claimant in the "*Claim*" (or, in the alternative "*Claims*") against him were for "*Wrongful Management Acts*" within the meaning of the Primary Policy;
- d. otherwise, does not admit the paragraph.

Catlin Policy

9. In answer to paragraph 9 of the Cross-Claimant's contentions, Catlin:
 - a. admits that on about 1 February 2012, Catlin (as agent for the members of S.J. Catlin & Others, Syndicate 2003 at Lloyds) issued a Financial and Professional Risks Excess Insurance, policy number 923424 (***Catlin Policy***);
 - b. says that the First Excess Policy was constituted by:
 - i) a policy wording (***Catlin Policy Wording***); and
 - ii) a policy schedule (***Catlin Policy Schedule***);
 - c. says that the period of insurance in respect of the Catlin Policy was 30 November 2011 to 30 November 2012, both at 4.00 pm at the "*Insured Address*";
 - d. refers to the Catlin Policy for its full terms and effect as if set out in full;
 - e. otherwise, does not admit the paragraph.
10. In answer to paragraph 10 of the Cross-Claimant's contentions, Catlin:
 - a. says that it was a term of the Catlin Policy that, subject to the terms and conditions of the Catlin Policy as a whole, Catlin will indemnify an "*Insured*" up to the Limit of Indemnity for all damages or compensation including costs fees and expenses;

- b. says that the "*Limit of Liability*" for the purposes of the Catlin Policy is AUD\$10,000,000 each and every claim and in the aggregate;
 - c. refers to the Catlin Policy for its terms and effect as if set out in full;
 - d. otherwise does not admit the paragraph.
11. In answer to paragraph 11 of the Cross-Claimant's contentions, Catlin:
- a. admits that the Catlin Policy contains a term generally in accordance with the description set out in the paragraph;
 - b. says that the purposes of the Catlin Policy, the "*Insured*" was the insured named in the Catlin Policy Schedule (namely GPL) and any party indemnified in by the "*Underlying Policies*";
 - c. says that the "*Limit of Liability*" for the purposes of the Catlin Policy is AUD\$10,000,000 each and every claim and in the aggregate;
 - d. says that it was a further term of the Catlin Policy that liability under the Catlin Policy will not attach unless and until the Underlying Insurers have paid or have admitted liability for or have been held liable to pay the Underlying Limit of Indemnity and the insured has a liability to pay a sum which exceeds the Underlying Limit of Liability;
 - e. says that the Primary Policy is the only "*Underlying Policy*" for the purposes of the Catlin Policy;
 - f. says that it was a further term of the Catlin Policy that any decision of an underlying insurer to accept a claim ex-gratia or without prejudice without the prior written acceptance of Catlin is not binding on Catlin and does not operate to erode any underlying aggregate limit of indemnity for the purposes of the Catlin Policy;
 - g. says that it was a further term of the Catlin Policy that it is subject to the same provisions (except as to premium, settlements, the limits of liability and as otherwise provided in the First Excess Policy Wording) as the Primary Policy prior to the happening of a loss;

- h. refers to the Primary Policy Wording, the Primary Policy Schedule, the Catlin Policy Wording, and the Catlin Policy Schedule for their full terms and effect as if set out in full;
- i. otherwise does not admit the paragraph.

12. Catlin admits paragraph 12 of the Cross-Claimant's contentions.

13. Catlin admits paragraph 13 of the Cross-Claimant's Contentions.

Chubb Policy

14. Catlin does not admit paragraph 14 of the Cross-Claimant's contentions.

15. Catlin does not admit paragraph 15 of the Cross-Claimant's contentions.

16. Catlin does not admit paragraph 16 of the Cross-Claimant's contentions.

17. Catlin does not admit paragraph 17 of the Cross-Claimant's contentions.

18. Catlin does not admit paragraph 18 of the Cross-Claimant's contentions.

19. In answer to paragraph 19 of the Cross-Claimant's contentions, Catlin:

The Conflict of Interest Exclusion

- a. says that it was an express term of the Primary Policy Wording that (**Conflict of Interest Exclusion**):

“The Insurer shall not be liable to make any payment under any Cover or Extension in connection with any Claim made against an Insured arising out of, based upon attributable to or in any way connected with any actual or alleged conflicts of interest (including but not limited to the failure of an Insured Person to disclose any actual or alleged conflicts of interest)”

Particulars

Endorsement 15 to the Primary Policy

- b. repeats paragraph 8(a) above and says that on the proper construction of the Primary Policy, there is a single “*Claim*”;
- c. says that if the Cross Claimant incurs a “*Loss*” (as defined in the Primary Policy, which is denied), the Primary Policy does not respond as:
 - i) any payment that Chartis would have been obliged to make in respect of that “*Loss*” is a payment in connection with a single “*Claim*”;
 - ii) the “*Claim*” (or, in the alternative, “*Claims*” as alleged in paragraph 109 of the Plaintiffs’ Contentions) arise/s out of, is/are based upon, is/are attributable to, or is/are connected with an actual or alleged conflict of interest;

Particulars

See the whole of the FACLS, and in particular (without limitation) paragraphs [55A]-[55J], [69], [73]-[74B], [79.5], [79.6], [79.7], [80.1], [80.8], [80.10], [80.11], [82]-[83B], [86A]-[90A], [102]-[104]. Further particulars may be provided following the service of the plaintiffs’ and GPL Directors’ evidence.

- iii) says that in the premises:
 - (1) the Conflict of Interest exclusion is engaged, and Chartis is not liable to make any payment under the Primary Policy; and
 - (2) the First Excess Policy does not respond.

The Lenders Liability Exclusion

- d. says that it was an express term of the Primary Policy that (***Lenders Liability Exclusion***):

“The Insurer shall not be liable to make any payment under any Cover or Extension in connection with any Claim arising out of, based upon or attributable to an actual or alleged:

- (i) *loan, lease or extension of credit to the extent that such a Claim arises out of a Wrongful Professional Act in the administration of such loan, lease or extension of credit; or*
- (ii) *collection, foreclosure or repossession in connection with any actual or alleged loan, lease or extension of credit"*

Particulars

Endorsement 4 to the Primary Policy

- e. repeats paragraph 8(a) above and says that on the proper construction of the Primary Policy, there is a single "*Claim*";
- f. says that if the Cross Claimant incurs a "*Loss*" (as defined in the Primary Policy, which is denied), the Primary Policy does not respond as:
 - i) any payment that Chartis would have been obliged to make in respect of that "*Loss*" is a payment in connection with a single "*Claim*";
 - ii) the "*Claim*" (or, in the alternative, "*Claims*" as alleged in paragraph 109 of the Plaintiffs' Contentions) arise/s out of, is/are based upon, or is/are attributable to an actual or alleged loan or extension of credit;

Particulars

See the whole of the FACLS and in particular (without limitation) paragraph [74]. Further particulars may be provided following the service of the plaintiffs' and GPL Directors' evidence.

- iii) the "*Claim*" arises out of a "*Wrongful Professional Act*" (as defined in the Primary Policy Wording) in the administration of that loan, or out of the extension of that credit;

Particulars

See the whole of the FASOC, and in particular (without limitation) paragraphs [74], [74B], [79.5]. [79.6, [80]-[80.11], [82],

83], [83A], [86A]-[90]. Further particulars may be provided following the service of the plaintiffs' and GPL Directors' evidence.

iv) in the premises:

- (1) the Lenders Liability Exclusion is engaged, and Chartis is not liable to make any payment under the Primary Policy; and
- (2) The First Excess Policy does not respond;

The Insolvency Exclusion

g. says that it was an express term of the Primary Policy that (Insolvency Exclusion):

"The Insurer shall not be liable to make any payment under either the "Fund Professional Civil Liability and Management Liability Cover or the "Investment Manage Management Liability" Cover for Loss in connection with any Claim arising out of, based upon or attributable to the actual or alleged insolvency of the Insured Entity or any Fund or any actual or alleged inability of the Insured Entity or any Fund to pay any or all of its debts as and when they fall due"

Particulars

Endorsement 11 to the Primary Policy

- h. repeats paragraph 8(a) above and says that on the proper construction of the Primary Policy, there is a single "*Claim*";
- i. says that the Cross Claimant incurs a "*Loss*" (as defined in the Primary Policy, which is denied), the Primary Policy does not respond as:
 - i) any such "*Loss*" is in connection with a single "*Claim*";
 - ii) the "*Claim*" (or, in the alternative, "*Claims*" as alleged in paragraph 109 of the Plaintiffs' Contentions) arise/s out of, is/are based upon, or

is/are attributable to the actual or alleged insolvency of GPL and/or Gunns, and/or the actual or alleged inability of GPL and/or Gunns, to pay any or all of its debts as and when they fell due;

Particulars

See the whole of the FASOC, and in particular (without limitation) paragraphs [55A]-[69], [75], [79]-[80A], [82]-[83B], [86A]-[94A], [102]-[104]. Further particulars may be provided following the service of the plaintiffs' and GPL Directors' evidence.

- j. in the premises:
- i) the Insolvency Exclusion is engaged and Chartis is not liable to make any payment under the Primary Policy; and
 - ii) the First Excess Policy does not Respond.

Wayne Tank

- k. further says that, in the alternative:
- i) if on the proper construction of the Primary Policy, a "*Claim*" is to be identified by reference to alleged "*Wrongful Professional Acts*" or "*Wrongful Managerial Acts*", or causes of action, and there is more than one "*Claim*" (which is denied) then:
 - (1) the proceedings include a "*Claim*" that arises out of, is based upon, or is attributable an actual or alleged conflict of interest;
 - (2) for the reasons outlined in sub-paragraphs 19(a)-(c) above, the Conflict of Interest Exclusion is triggered by that "*Claim*";
 - (3) in the premises the Primary Policy, and as a consequence the First Excess Policy, does not respond to that "*Claim*";

- ii) if on the proper construction of the Primary Policy, a “*Claim*” is to be identified by reference to alleged “*Wrongful Professional Acts*” or “*Wrongful Managerial Acts*”, or causes of action, and (there is more than one “*Claim*” (which is denied) then:
 - (1) the proceedings include a “*Claim*” that arises out of, is based upon, or is attributable to an actual or alleged loan or extension of credit and the “*Claim*” arises out of a Wrongful Professional Act in the administration of the loan or the extension of credit;
 - (2) for the reasons outlined in sub-paragraphs 19(d)-(f) above, the Lenders Liability Exclusion is triggered by that “*Claim*”;
 - (3) in the premises, the Primary Policy, and as a consequence the First Excess Policy, does not respond to that “*Claim*”;
- iii) if on the proper construction of the Primary Policy, a “*Claim*” is to be identified by reference to alleged “*Wrongful Professional Acts*” or “*Wrongful Managerial Acts*”, or causes of action, and there is more than one “*Claim*” (which is denied) then:
 - (1) the proceedings include a “*Claim*” that arises out of, is based upon, or is attributable to the actual or alleged insolvency of an “*Insured Entity*” or the alleged inability of an “*Insured Entity*” to pay any or all of its debts as and when they fall due;
 - (2) for the reasons outlined in sub-paragraphs 19(g)-(j) above, the Insolvency Exclusion is triggered by that “*Claim*”;
 - (3) in the premises, the Primary Policy, and as a consequence the First Excess Policy, does not respond to that “*Claim*”;
- iv) in the premises where the proceedings advance “*Claims*” which are excluded from cover under the Primary Policy, to the extent that any other “*Claims*” made in the proceedings on the basis of the matters alleged in the FACLS would otherwise fall within the cover afforded by the Primary Policy (which is denied), the Primary Policy does not

respond to those “*Claims*” in accordance with the principles in *Wayne Tank & Pump Co Ltd v The Employers’ Liability Assurance Corporation Ltd [1974] QB 57*.

Further matters

- l. says that it continues to reserve its position in respect of the application of other provisions of the Primary Policy, and reserves the right to rely on them (or any other term of the Primary Policy or First Excess Policy) in the event that facts or matters emerge during the conduct of these proceedings which are relevant to the application of them
 - m. otherwise denies the paragraph.
20. In answer to paragraph 20 of the Cross-Claimant’s contentions, Catlin:
- a. repeats paragraph 19 above;
 - b. otherwise denies the paragraph.
21. In answer to paragraph 21 of the Cross-Claimant’s contentions, Catlin:
- a. repeats paragraphs 6, 19 and 20 above;
 - b. says that:
 - i) that any decision of Chartis to “*confirm indemnity under the Primary IMI Policy*” was made without the prior written acceptance of Catlin;
 - ii) by reason of the matters referred to in paragraph 6(d)-(f) above, any such decision of Chartis is:
 - (1) not binding on Catlin, and
 - (2) does not operate to erode the underlying aggregate limit of liability;
 - iii) in the premises where the underlying aggregate limit of liability has not been eroded, no cover is available under the First Excess Policy;

c. otherwise, denies the paragraph.

22. Catlin does not admit paragraph 22 of the Cross-Claimant's contentions.

Declination of Indemnity

23. Catlin admits paragraph 23 of the Cross-Claimant's contention.

24. In answer to paragraph 24 of the Cross-Claimant's contentions, Catlin:

- a. repeats paragraphs 6 and 21(b) above;
- b. otherwise does not admit the paragraph.

25. In answer to paragraph 25 of the Cross-Claimant's contentions, Catlin:

- a. admits that in correspondence dated 14 February 2019, it declined indemnity under the First Excess Policy in respect of these proceedings;
- b. says that in that correspondence Catlin stated that three exclusion clauses operated;
- c. says that in that correspondence it reserved its position in respect of the application of other clauses;
- d. says that Catlin continues to reserve its position in respect of the application of those other provisions of the Primary Policy, and reserves the right to rely on them (or any other term of the Primary Policy or First Excess Policy) in the event that facts or matters emerge during the conduct of these proceedings which are relevant to the application of them;
- e. otherwise does not admit the paragraph.

26. Catlin does not admit paragraph 26 of the Cross-Claimant's contentions.

27. In answer to paragraph 27 of the Cross-Claimant's contentions, Catlin:

- a. admits that on 4 December 2019, Ball J revoked the leave given to proceed against GPL pursuant to s 500 of the *Corporations Act*;

b. otherwise does not admit the paragraph.

28. Catlin admits paragraph 28 of the Cross-Claimant's contentions.

29. Catlin admits paragraph 29 of the Cross-Claimant's contentions.

D. Questions appropriate for referral to a referee

1. None.

E. Whether the party is willing to proceed to mediation at an appropriate time

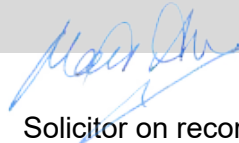
1. The Fifth Cross-Defendant has not been involved in a mediation in the proceedings. The Fifth Cross-Defendant is willing to proceed to mediation at an appropriate time.

SIGNATURE

Signature of legal representative

Capacity

Date of signature



Solicitor on record

30 July 2021