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## SITTING ON THE FENCE

**CGU INSURANCE LIMITED v. AMP FINANCIAL PLANNING PTY LTD**  
**HIGH COURT OF AUSTRALIA**  
**29 AUGUST 2007**

In perhaps the most important decision on insurance law this year, the High Court by a majority (Kirby J. dissenting) has held that CGU was not required to indemnify AMP Financial Planning in respect to a number of settlements it entered into with investor clients. In reaching its decision, the High Court dealt with the duty of utmost good faith and estoppel.

## BACKGROUND

The proceeding arose from the misconduct of two AMP representatives, Mr Ashok Pal and Mr Anthony Howarth, who conducted a financial advisory business called Macquarie Advisory Group Pty Ltd ("MAG"). At all relevant times, Pal and Howarth held authorities with AMP and Hillross (a company related to AMP).

In May 1999, Hillross discovered that Pal and Howarth had traded beyond their proper authorities and had invested about \$3.4 million of client funds in a speculative venture that was in financial trouble. Hillross terminated Pal's and Howarth's authorities and notified ASIC.

In consecutive insurance periods between February 1999 and February 2001, AMP held professional risks insurance with CGU. In December 1999 and again in September 2000, AMP notified CGU of Pal's and Howarth's misconduct.

In early February 2001, ASIC met with AMP and Hillross. ASIC was concerned

about the delays that investor clients were experiencing in receiving compensation. ASIC made it clear to AMP and Hillross that they expected an efficient and timely response to investor client claims. ASIC also warned that they would be carefully monitoring AMP's and Hillross's future handling of client claims.

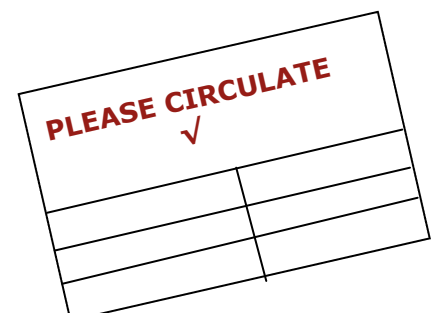
With ASIC's warning ringing in their ears, in March 2001, AMP's lawyers wrote to CGU's lawyers seeking indemnity in respect to the losses caused by Pal and Howarth. The letter relayed ASIC's concern about delays.

***"... During these exchanges, CGU expressly reserved its rights under the policy ..."***

Later in March 2001, AMP's lawyers wrote to CGU's lawyers and proposed a protocol for the management of claims.

CGU accepted the protocol, in principle, but did not commit to covering AMP in respect to the client claims.

Throughout 2001, there were various exchanges between lawyers for AMP and CGU in respect to the client claims. During these exchanges, CGU expressly reserved its rights under the policy and on no less than four occasions advised AMP to act as a prudent uninsured. CGU's position was acknowledged by AMP.



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Towards the end of 2001, there were two significant developments that feature prominently in the High Court decision. Firstly, AMP decided to settle the client claims without the intervention of CGU. In an internal memo of about October 2001, 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. In fact, most of the settlements occurred in October and November 2001.

***"... AMP were more concerned to avoid ASIC's wrath than to properly assess their liability to investor clients and subsequently CGU's liability to them ..."***

Secondly, in or about October 2001, CGU began expressing reservations about AMP's liability for the client claims. AMP and its clients relied on section 819 of the *Corporations Law* which required principals to indemnify clients in respect to the actions of their representatives. However, the liability of a principal was not certain where a representative was acting for two or more principals. In this case, the representatives were acting for AMP and MAG.

In late 2002, (almost three years after the first notification), CGU formally declined to indemnify AMP in respect to the investor client claims (settlements). CGU asserted that section 819 of the *Corporations Law* did not support a claim against AMP.

### FIRST INSTANCE

AMP commenced proceedings against CGU in the Federal Court. In 2004, Heerey J dismissed the AMP proceeding. Interestingly, AMP did not call evidence from either Howarth or Pal or any of the investor clients to establish its liability to those clients. Heerey J, found that AMP was more concerned to avoid ASIC's wrath than to properly assess their liability to investor clients and subsequently CGU's liability to them. He found that AMP did not enter into the settlements in reliance on any commitment or promise or representation

by CGU.

### FIRST APPEAL

In 2005, AMP successfully appealed to the Full Court of the Federal Court. Moore and Emmett JJ, upheld AMP's appeal (Gyles J dissenting) and remitted the proceeding back to Heerey J. to answer certain questions in respect to estoppel and utmost good faith.

### HIGH COURT

CGU appealed to the High Court. Gleeson CJ, Callinan, Heydon and Crennan JJ upheld the appeal, with Kirby J., dissenting,

### GLEESON CJ. AND CRENNAN J.

In a joint judgment, Gleeson CJ. and Crennan J. held that the Full Court should have dismissed the appeal from Heerey J. AMP was concerned to keep CGU out of the settlement process. In some respects, AMP's complaint about CGU's delay was disingenuous.

Most of the settlements occurred in late 2001 when it was plain to AMP that CGU was not committed to indemnifying AMP.

AMP settled claims at a time when CGU was questioning its liability to investors.

The Full Court should not have strayed from the findings of the trial judge. Heerey J, found that AMP did not believe CGU had accepted liability and that AMP paid the settlement amounts because it considered that it was in its own interests to do so.

***"... However, in this instance, AMP did not have 'clean hands' ..."***

On the duty of utmost good faith, they held that the duty "*... 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*".

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### CALLINAN AND HEYDON JJ.

Callinan and Heydon JJ. adopted a different approach. Their joint decision dealt with questions of estoppel and the duty of utmost good faith, being the issues remitted back to the trial judge by the Full Court.

In respect to estoppel, Callinan and Heydon JJ. held that AMP's submissions to the Full Court were not open on appeal, as they had not been litigated at trial.

Further, Callinan and Heydon JJ. supported the trial judges' finding that AMP had suffered no relevant detriment and that it did not alter its position on the basis of any assumption or belief induced by CGU's conduct. Its decision to make the settlements as and when it did were made for its own reasons and interests.

They expressly made no finding on the issue of utmost good faith, although in their opinion, CGU's conduct did leave something to be desired.

They believed the duty of utmost good faith invoked reciprocal obligations on insureds and insurers, not unlike the equitable doctrine of "*clean hands*". In other words, a Plaintiff seeking relief must itself not be guilty of tainted conduct.

However, in this instance, AMP did not have "*clean hands*" because of its determination to settle the investor claims quickly without properly considering the possibility of exoneration under section 819(4) of the *Corporations Law*. Importantly, AMP had failed to invoke the "*Senior Counsel clause*" in the CGU policy. This clause required CGU and its insured to refer the future conduct of a claim to Senior Counsel for his or her binding determination. They were perplexed as to why the clause was not invoked and no reference was made to it in the course of this lengthy proceeding.

In a parting blow they said:

*"If it were otherwise the Respondent (AMP) might perhaps have been able to make out a case that, as a practical matter, in the market place, 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 temporising, was not acting in good faith, in consequence of which settlements had to be, and were, not inappropriately made ..."*

### DISSENT—KIRBY J.

Kirby J. agreed with the Full Court majority. In reaching that conclusion, His Honour stated that it was only by considering the precise way that CGU acted, over the long period from the first contact between the solicitors in March 2001 to December 2002, that the full impact of CGU's conduct could be appreciated.

***"... He considered that CGU must be taken to accept the consequences for its insureds of the normal operation of the law governing their business ..."***

His Honour noted that for nearly two years, CGU and its successive solicitors failed to act with clarity, candour and decisiveness. At one point, CGU was telling AMP to "*act as a prudent uninsured*", yet immediately afterwards it was agreeing in principle to the protocol.

Kirby J. considered that, by agreeing to insure AMP as a licensed securities dealer, CGU must have been aware of the legislative setting within which AMP operated and the requirements to which AMP (particularly regarding ASIC's requirements) was bound to operate. He considered that CGU must be taken to accept the consequences for its insureds of the normal operation of the law governing their business, in particular the powers of ASIC to ensure that AMP complied with the letter of the law.

In relation to the estoppel issues, he agreed with Emmett J's conclusion in the Full Court judgment. He agreed with AMP's submissions that because CGU had not promptly decided and announced its refusal of indemnity, AMP had put itself in a seriously disadvantageous position.

By sitting on its hands the way it did, CGU had 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.

***"... Insureds need to be careful when settling claims ..."***

On the duty of utmost good faith, His Honour considered that emphasis must be placed on the word *"utmost"* and noted that good faith alone was not sufficient. The duty imposed obligations of a stringent kind in respect to the conduct of insurer and insured with each other, wherever that conduct has legal consequences.

His Honour concluded *"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. 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 the insureds."*

## **CONCLUSION**

Insureds need to be careful when settling claims without an admission of indemnity from their insurer. In this instance, AMP had developed an elaborate protocol for the management of claims. CGU had agreed in principle with the protocol. The AMP settlements were supported by the opinion of AMP's Senior Counsel. However, this was not quite enough.

The majority held that the protocol did not absolve AMP from leading admissible evidence to prove their liability to investors. AMP's decision not to call such evidence was fatal to their chances of success.

While CGU did not commit to indemnifying AMP, their agreement to the protocol, according to

Gleeson CJ and Crennan J, prevented them from relying on the condition in their policy that prohibited insureds from admitting liability or from relying on the limited definition of claim (legal proceeding). Callinan and Heydon JJ were of the opinion that CGU's reliance on the strict definition of claim may have infringed section 14 of the *Insurance Contracts Act* which provides that a party must not rely on a provision in an insurance policy except in the utmost good faith.

In respect to the duty of utmost good faith Callinan and Heydon JJ emphasised the reciprocal nature of the duty between insureds and insurers. Gleeson CJ and Crennan J were more concerned with the consequences of the breach of the duty. They were critical of AMP for failing to articulate how the alleged breach of the duty by CGU could result in CGU being liable to indemnify AMP.

While CGU succeeded in their appeal, the message from the High Court does not provide them with much comfort. Two of the majority judges were critical of CGU's conduct of the claim but refused to make a conclusive finding on the issue of utmost good faith. The dissenting judge was forthright in his criticism of CGU's conduct. The message, from what is a relatively conservative High Court, is that insurers need to be responsive to their insured's needs. Similarly, insureds in their haste to settle claims should not overlook fundamental issues such as liability.



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