HIH CLAIMS SUPPORT LIMITED v INSURANCE AUSTRALIA LIMITED (M24/2011)

Court appealed from:	Court of Appeal of the Supreme Court of Victoria [2010] VSCA 255
Date of judgment:	29 September 2010
Date special leave granted:	11 March 2011

In March 1998, a large video screen at the Australian Grand Prix collapsed because of inadequate structural support. The New South Wales Supreme Court found that the scaffolder ("Steele") was liable in the amount of $1,461,045. Steele held a general liability insurance policy with a company in the HIH group. HIH accepted the claim but collapsed before making any substantive payment. The Australian Grand Prix held an insurance policy with SGIC which also responded to the claim against Steele (SGIC was later replaced by the respondent). Following the collapse of HIH, the Commonwealth Government set up the HIH Claims Support Scheme, of which the applicant was trustee and administrator. Steele sought assistance from the scheme. The applicant paid the sum of $1,314,941 in part satisfaction of the judgment against Steele and then sought contribution, in the Supreme Court of Victoria, from the respondent on the basis that it had coordinate liability. Hollingworth J found, inter alia, that the applicant and respondent did not have equal and coordinate liability because the applicant had no obligation to Steele at the date of the insuring clause event as it was not in existence at the time. Further, the applicant's obligation to indemnify was primary in nature as it arose under a contract of indemnity, whereas the respondent's obligation to Steele under a contract of insurance was a secondary obligation. Accordingly, the applicant had no entitlement to contribution from the respondent.

The Court of Appeal (Warren CJ, Mandie JA and Beach AJA) dismissed the applicant's appeal. The Court found that the liability of the applicant and respondent were different. The respondent's liability was to indemnify Steele in respect of his liability for the loss that occurred as a result of the screen being damaged. Whilst that was the same loss covered by the HIH policy, the liability the applicant created by the acceptance of the offer document was subject to a condition enabling the applicant to prove in the winding up of HIH. An underlying assumption of the doctrine of contribution was that the creditor had equal or substantially equal recourse to each party who was liable. That was not the situation in this case. If Steele had been paid under the respondent's policy, there would have been no occasion for him to have made a claim on the scheme and thus no contract would have come into existence between Steele and the applicant and the applicant would never have had any liability to Steele. So if, instead of the applicant paying Steele's claim, the respondent had done so, there would have been no entitlement in the respondent to claim contribution from the applicant. Finally, the Court noted that for liability to be coordinate, the liability had to be of the same nature and the same extent. There were no common interests, common burden or common risk in this case.

The grounds of appeal include:

- The Court of Appeal ought to have found that the indemnities and liabilities of [the appellant] and [the respondent] were equal and coordinate and ordered contribution.