**HIH Claims Support Limited v Insurance Australia Limited [2011] HCA 31**

The Australian High Court has confirmed dual insurance entitlements do not necessarily apply where one insurer’s obligations arise under an insurance policy and another insurer’s obligations arise under a contract that is not an insurance policy.

### Introduction

In *HIH Claims Support Limited v Insurance Australia Limited*, the High Court of Australia considered dual insurance issues to determine whether a claim for equitable compensation could be made by HIH Claims Support Limited (HIHCSL), and whether the liabilities of HIH and Insurance Australia Limited (IAL) were “co-ordinate”.

### Facts

In 1998, Australian Grand Prix Corporation (AGPC) subcontracted Ronald Steele (Steele) to erect a scaffold. The scaffold collapsed and caused damage to a video screen operated by Screenco Pty Limited (Screenco). Steele effectively had two insurers at the time of the incident: a company within the HIH group (HIH), and SGIC General Insurance Limited (SGIC), who insured the contractors and sub-contractors of AGPC.

Screenco instituted proceedings in the Supreme Court of New South Wales against Steele. Steele made a claim on his policy with HIH. HIH confirmed cover but collapsed in 2001, before the trial had taken place. The Court awarded damages of $1,461,045 to Screenco.

The collapse of HIH resulted in the HIH Claims Support Scheme (the Scheme) being established, whereby the Commonwealth Government appointed HIHCSL as the trustee, administrator and manager of the Scheme. The Scheme enabled HIH policyholders to access funds if they made a valid claim.

Even though HIH had agreed to indemnify Steele, it was unable to pay Steele’s claim. As such, Steele was required to make a claim under the Scheme, whereby he assigned his rights as a policyholder to HIHCSL and became an unsecured creditor of HIH.

As Steele made a valid claim under the Scheme, in accordance with the Scheme HIHCSL paid 90% of Steele’s legal costs, 90% of the amount awarded to Screenco and 90% of the costs incurred by other parties.

Before its collapse, HIH and Steele commenced proceedings against SGIC in the Supreme Court of Victoria, and during the proceedings, IAL assumed the responsibilities of SGIC. After the collapse of HIH, HIHCSL commenced further proceedings against IAL in the Supreme Court of Victoria. Both proceedings were based on HIH and HIHCSL claiming equitable contribution (dual insurance) from IAL.

IAL submitted that, by HIHCSL making the aforementioned payments, its (IAL’s) obligations regarding indemnity had been discharged. The second proceedings filed against IAL were appealed to the High Court of Australia.

### Decisions

In the Supreme Court of Victoria, HIHCSL’s claim was dismissed by Hollingworth J. Special leave was granted to HIHCSL, allowing HIHCSL to appeal to the High Court of Australia, which found in favour of IAL and dismissed HIHCSL’s claim with costs.

### Grounds for decision

Hollingworth J dismissed the claim on the basis the liabilities of HIHCSL and IAL “did not co-exist at the relevant date”.

Hollingworth J found the liability to indemnify Steele was an obligation primarily held by HIHCSL. The SGIC insurance policy existed at the time the incident in 1998, whereas the contract between HIHCSL and Steele only commenced once the Scheme had been established in 2001.

Hollingworth J made reference to *Spence Rail Maintenance Pty Ltd v Hamersley Iron Pty Ltd* and *Caledonia North Sea Ltd v British Telecommunications plc,* and stated “an obligation to indemnify under a contract of indemnity was ordinarily not co-ordinate with an obligation to indemnify under a contract of insurance.”

The Victorian Court of Appeal also found HIHCSL and IAL did not hold liabilities that were of a “common interest”, “common burden” or “common risk”.

The High Court considered the basic principles of equitable contribution and made reference to *Albion,* where Kitto J stated, “persons who are under co-ordinate liabilities to make good the one loss…must share the burden pro rata.”

The High Court also considered whether a common obligation “of the same nature and to the same extent” would arise if one insurer’s obligations arose under statute and the other insurer’s obligations arose under contract.

*Caledonia North Sea Ltd v British Telecommunications plc* established that obligations regarding indemnity under a contract and under an insurance policy do not constitute obligations “of the same nature and to the same extent”, the obligations under a contract being primary and the obligations under the insurance policy being secondary. Overall, on review of the relevant authorities the High Court found “that
equity will not intervene in the absence of a common legal burden or co-ordinate liabilities.\textsuperscript{1,3}

The High Court therefore dismissed the claim on the grounds that the liabilities of HIHCSL and IAL did not co-ordinate as their liabilities were not “of the same nature and to the same extent”,\textsuperscript{14} and held that equity should not intervene and require IAL to contribute to the amounts paid by HIHCSL when indemnifying Steele under the Scheme.

**Impact**

The decision affirms the previously stated principles regarding a dual insurance equitable contribution. In order to seek equitable contribution, the liabilities of both parties must first be co-ordinate, in existence at the time of the incident, and come from the same source.

The key issue which arose and makes this case novel\textsuperscript{15} is that one party was an insurer and the other party was a trustee of a trust funded by the Commonwealth Government. Heydon J pointed to the fact that there are not many comparable cases, and that the law should not be developed to benefit parties in the same position as HIHCSL, as “it would be a revolution having the tendency to produce idiosyncratic and uncertain results.”\textsuperscript{16}

When dealing with a case where a person is indemnified by an insurer and that insurer is seeking a dual insurance equitable compensation from another insurer, it must therefore be established that the liabilities of both parties are co-ordinate and “of the same nature and to the same extent”. If one insurer owes its indemnity obligations under a contract (or statute) and the other insurer owes its indemnity obligations under a policy, the contractual obligations will be primary and the policy obligations will be secondary, making it difficult for the party who has contractual obligations to seek equitable compensation.

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\textsuperscript{1} [2011] HCA 31.  
\textsuperscript{2} HIH Claims Support Ltd v Insurance Australia Ltd (2009) 15 ANZ Insurance Cases 61-824 at 77841 [127]-[128] and 77,842 [138].  
\textsuperscript{3} Speno Rail Maintenance Pty Ltd v Hamersley Iron Pty Ltd (2000) 23 WAR 291.  
\textsuperscript{4} Caledonia North Sea Ltd v British Telecommunications plc [2002] 1 Lloyd’s Rep 55.  
\textsuperscript{5} HIH Claims Support Limited v Insurance Australia Limited [2011] HCA 31 at [25].  
\textsuperscript{6} Ibid at [30].  
\textsuperscript{7} Gummow ACJ, Hayne, Crennan and Kiefel JJ.  
\textsuperscript{8} Albion (1969) 121 CLR 342.  
\textsuperscript{9} Ibid at 350.  
\textsuperscript{10} BP Petroleum Development Ltd v Esso Petroleum Co Ltd 1987 SLT 345.  
\textsuperscript{11} Caledonia North Sea Ltd v British Telecommunications plc [2002] 1 Lloyd’s Rep 553.  
\textsuperscript{12} Ibid at 559 [13]-[14].  
\textsuperscript{13} HIH Claims Support Limited v Insurance Australia Limited [2011] HCA 31 at [46].  
\textsuperscript{14} Ibid at [25].  
\textsuperscript{15} Ibid at [64] per Heydon J.  
\textsuperscript{16} Ibid at [70].

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