IN THE HIGH COURT OF AUSTRALIA
SYDNEY OFFICE OF THE REGISTRY

No. S417 of 2011

BETWEEN:

CERTAIN LLOYD'S UNDERWRITERS SUBSCRIBING TO CONTRACT NO IH00AAQS
Appellant

and

JOHN CROSS
Respondent

No. S418 of 2011

BETWEEN:

CERTAIN LLOYD'S UNDERWRITERS SUBSCRIBING TO CONTRACT NO IH00AAQS
Appellant

and

MARK GEORGE THELANDER
Respondent

No. S419 of 2011

BETWEEN:

CERTAIN LLOYD'S UNDERWRITERS SUBSCRIBING TO CONTRACT NO IH00AAQS
Appellant

and

JILL MARIA THELANDER
Respondent

RESPONDENTS' SUBMISSIONS

Part I:

I certify that this submission is in a form suitable for publication on the internet.

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Part II:

1. The Respondents agree with the Appellant's statement of the relevant statutory position in paragraphs 1, 2 and 3 of Part II of its submissions.

2. The principal issue is whether the meaning of "personal injury damages" referred to in s 198D of the *Legal Profession Act* 1987 (NSW) and then in s 338 of the *Legal Profession Act* 2004 includes damages caused by an intentional act done with intent to cause harm when,

   a. those sections state that "personal injury damages" "has the same meaning as in the *Civil Liability Act* 2002 (NSW)" and "has the same meaning as in Part 2 of the *Civil Liability Act* 2002" respectively, and,

   b. the *Civil Liability Act* specifically excludes from its operation civil liability in respect of an intentional act done with intent to cause injury.

3. The Respondents agree with the related issue stated by the Appellants, as to which *Legal Profession Act* applies (1987 or 2004).

Part III:

4. I certify that the Respondents have considered whether any notice should be given in compliance with section 78B of the *Judiciary Act* 1903 and do not believe that any such notice should be given.

Part IV:

5. The Appellant's statement of facts is not contested.

Part V:

6. The Appellant's statement of applicable statutes and regulations is accepted.

Part VI:

7. It is agreed that the question of whether the provisions of the *Legal Profession Act* 1987 or the *Legal Profession Act* 2004 does not affect the

determination of the principal issue in the appeal. Nevertheless, the Respondents submit that it is the 2004 Act that applies, for the reasons stated by Basten JA in the court below.

8. The range of "matters" in relation to which legal services may be provided is obviously extremely wide. Even in relation to a claim for damages there could be a number of "matters" for which legal services would be provided at different times. Simple examples are the addition of a party or the commencement of fresh proceedings. Clause 18 of the savings and transitional provisions in Schedule 9 of
10 the 2004 Act (set out in paragraph 16 of the judgment of Basten JA) logically divides the operation of the two acts according to whether the client instructions were given before or after the commencement of operation of the 2004 Act.

9. In this case the question of what costs order should be sought did not arise until the judgment on liability was given in November 2009. It seems entirely logical that the retainer of the Respondents' solicitors in relation to their further legal services, and the costs liability of the Appellant would then be governed by the 2004 Act because they were in relation to a new "matter".

20 10. The principal issue in the appeal is the interpretation of "personal injury damages" in ss 198C and 198D of the 1987 *Legal Profession Act* or ss 337 and 338 of the 2004 *Legal Profession Act* (as the case may be).

11. It is submitted that it is appropriate to consider the relevant provisions of the *Legal Profession Acts* and the *Civil Liability Act* as one piece of legislation. In *State of NSW v Williamson* [2011] NSWCA 183, Campbell JA gave a detailed account of the relevant legislative history and in paragraph 79 he observed that the costs restriction provisions of the *Legal Profession Act* 1987, were contained Division 5B inserted by Schedule 2 of the *Civil Liability Act* 2002. He noted that,
30 "*Division 5B was part of a single legislative scheme enacted by the Civil Liability Act 2002.*"

12. In *Commissioner for Railways (NSW) v Agalianos* (1955) 92 CLR 390 at 397, Dixon CJ said, "the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed". That statement has been cited and followed in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 353 at [69] by McHugh, Gummow, Kirby and Hayne JJ, and recently by Kiefel J in *Westport Insurance Corporation v Gordian Runoff Ltd* (2011) 85 ALJR 1188 at [151]. In *Singh v The Commonwealth* (2004) 222 CLR 322 Gleeson CJ expressed a similar view at 335 at [19] and [20]. The views of Heydon and Crennan JJ in *Byrnes v Kendle* (2011) 85 ALJR 798 at [97] focusing on the objective intention of the legislature, are consistent with those earlier statements.

13. There is no logical reason why "the context, the general purpose and policy of a provision" cannot be discerned with assistance from the scope of application of a provision of a statute.

14. It is accepted that the scope of application of a concept is not the same as the meaning of a concept (Appellant's submissions Part VI, paragraphs 7 and 11 and the references there to the judgments of Campbell and Macfarlan JJA in *State of NSW v Williamson*). However, it does not follow that the scope of application of a concept may not assist in establishing the meaning of the concept. So it cannot be said that "personal injury damages" has a meaning in Part 2 of the *Civil Liability Act* that includes personal injury damages caused by an intentional act done with intent to cause injury.

15. If the scope of application was not to be taken into account in the subject definition, one would expect that sections 198C and 337 of the respective *Legal Profession Acts* to reproduce the relevant definition as it is in the *Civil Liability Act* when both the *Civil Liability Act* and the costs limitation provisions of the Legal Profession Act were introduced as a single package of reforms in the *Civil Liability Act* and were clearly intended to work in harmony. Surely, scope of application is an element of the relevant context of the concept (the defined expression). These

points are consistent with the reasoning of Hodgson JA in his reconsideration of the issue in *State of NSW v Williamson* at paragraph 4.

16. In *Gordian Runoff* at [151] Kiefel J said, "Context here is used in its widest sense, to include the mischief to which the provision is directed."The mischief being dealt with by this legislation related to personal injury claims other than intentional torts (and some other specific claims for compensation). The clearly stated policy of the *Civil Liability Act* (in section 3B in its present form) is to exclude claims for personal injury damages caused by an intentional act done with intent to cause injury from the restrictions imposed by, inter alia, Part 2 *Civil Liability Act* (since December 2002). It is consistent with the enactment of that policy that the costs limitation provisions of the *Legal Profession Act* would limit costs in respect of damages recovered in accordance with the restrictions in Part 2 *Civil Liability Act*. Consistency is a guide to meaning (see *Agalianos*, above).

17. The reference by Dixon CJ in *Agalianos* to "fairness" of a provision as a guide to its meaning leads to the contrast between the application of the costs limitation provisions of the *Civil Liability Act* to actions for negligence compared to those for intentional torts.

18. Each of the Respondents in these appeals was violently assaulted by security guards and each was bitten by a Rottweiler dog under the control of those guards. Damages were limited by the Appellant's policy of insurance which excluded aggravated and exemplary damages. The District Court trial occupied approximately twenty two days. The Cross and the two Thelander hearings were concurrent, with evidence in each being evidence in the others. The damages recovered by each were less than the threshold for the cost cap, $100,000.

19. Using those facts as an example, there is no apparent fairness or logical justification in limiting the costs of such proceedings when the restraints imposed by Part 2 of the *Civil Liability Act* on actions for negligence do not apply to the intentional torts involved. Nor is there the "consistency" referred to by Dixon CJ in the passage cited.

20. The fact that the exclusion of specific compensation claims from the relevant *Legal Profession Act* costs provisions overlaps but does not coincide with the exclusions in s 3B *Civil Liabilitiy Act* is a curiosity that may not assist the argument of either party. So much is indicated in the reasons of the court below (Basten JA at paragraphs 57 – 59, with whom Hodgson JA agreed at paragraph 1, and Sackville JA at paragraphs 76 – 78). However, it is submitted that the observations made by Campbell JA in *State of NSW v Williamson* at paragraphs 91 and 92, as to the "different roles" that the subject exception provisions had to play does not detract from the point that the exclusions from the *Civil Liability Act* in s 3B would become exclusions from the meaning of personal injury damages as having "the same meaning as in Part 2 of the *Civil Liability Act* 2002".

21. His Honour's identification of circumstances (at paragraph 92) when exceptions specified in s 198C(2) of the 1987 Act would not be also covered by the s 3B *Civil Liability Act* exceptions would suggest a reason for the duplication of the references to statutory exceptions in the two Acts. That is, while the exceptions of "awards of damages" in the cases specified in s 3B(1) would (on the Respondents' argument) be excluded from the relevant definition in the *Legal Profession Act* 1987 or 2004, so also would any "compromise or settlement of a claim" (paragraph 92) and a case of where "a claim yielded nothing to the claimant", subject to there being a complying legal practitioner and client costs agreement, (also paragraph 92 of his Honour's reasons. In short, the exceptions in s 198C(2) picked up circumstances not covered by the exceptions of "awards of damages" in relation to the same statutory claims referred to in s 3B(1) *Civil Liability Act.* As his Honour pointed out in paragraph 84, "the exceptions from the operation of Division 5B 1987 *LP Act*, contained in s 198C(2) ... were cast in language appropriated to the cap on costs operating by reference to "*the amount recovered on a* ***claim*** *for personal injury damages".* That, of course, is a broader scope of recovery of money than is an award of damages.

22. The logic of excluding intentional torts from the cost capping provisions can be powerfully illustrated by the facts in *State of New South Wales v Ibbett* (2006)

229 CLR 638. Mrs Ibbett had a pistol pointed at her in a threatening manner by a police officer. She succeeded in an action for assault. Under the subject cost capping provisions if she claimed no damages for personal injury there would be no cost cap. However, if she claimed damages for "impairment of her mental condition" or other recognised personal injuries, she would have claimed "personal injury damages" and her costs would be capped by the *Legal Profession Act*, unless intentional torts done with intent to cause injury are excluded from the meaning of that expression in Part 2 *Civil Liability Act.* If she had been pistol whipped the illustration would be magnified.

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23. There is a clear rational basis for the NSW Parliament to have excluded intentional torts with intent to cause injury from the cost capping provisions of the *Legal Profession Act* 1987 (NSW) and its successor of 2004, and from the *Civil Liability Act.* It lies in the policy differences between personal injury damages claims based on negligence and those based on intentional torts. Those differences provided obvious logical reasons for the exclusion. They are common to the views of all three judges in the Court of Appeal. They are identified by Sackville JA at [74] – [75]. Basten JA deals with them at [39] – [52]. Hodgson JA, after agreeing with the relevant parts of the reasons of Basten JA, at [1] was
20 explicit in *State of New South Wales v Williamson* [2011] NSWCA 183 at [4]. In *Williamson*, Campbell JA recognised the policy reason for exclusion of intentional torts from the cost capping provisions, at [29] but then did not go beyond a literal approach to construction (as his Honour explained in [29].

Part VII:

24. There is no notice of contention or cross-appeal.

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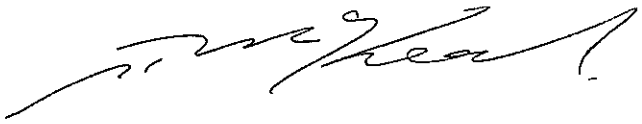
Dated: 9 February, 2012



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