



## HIGH COURT OF AUSTRALIA

Public Information Officer

7 April 2005

DANIEL WILKIE v GORDIAN RUNOFF LIMITED (formerly known as GIO INSURANCE LIMITED) AND MARKEL SYNDICATE 702 AT LLOYDS, LONDON (formerly known as RE BROWN SYNDICATE AT LLOYDS, LONDON)

Mr Wilkie, FAI Insurance's former chief operating officer, was entitled to indemnity under an insurance policy for his defence costs in criminal proceedings, the High Court of Australia held today.

Directors, officers and employees of FAI were insured for up to \$20 million against certain losses, including for wrongful acts committed or allegedly committed up to 31 May 1999. In 2003, the Australian Securities and Investments Commission instituted criminal proceedings against Mr Wilkie for alleged offences under the *Corporations Act*. ASIC alleged that in 1998 he permitted misleading information to be provided to FAI's auditors and acted dishonestly in the discharge of his duties with the intention of deceiving the auditors. Mr Wilkie has not admitted the offences and they have yet to be adjudicated. He claimed for the costs to be incurred in his defence against the ASIC charges. The policy contained terms called extensions and Extension 9, on which Mr Wilkie relied, was headed "Advance payment of defence costs". After GIO's solicitors reviewed the brief of evidence GIO denied indemnity for the claim pursuant to Exclusion 7 of the policy.

Exclusion 7 provides that the policy does not insure loss arising out of any claim based upon dishonest, fraudulent, criminal or malicious acts or omissions or any deliberate breach of any statute where such act, omission or breach has in fact occurred. "In fact" was defined as meaning that the conduct is admitted by the insured person or is subsequently established by a court. Under Extension 9, GIO paid all reasonable defence costs provided that GIO has not denied indemnity for the claim, but it reserved the right to recover payments if a court established that the insured person was not entitled to indemnity.

In the New South Wales Supreme Court Mr Wilkie sought a declaration that the insurers were not entitled to rely on Exclusion 7 to deny him indemnity under Extension 9. Justice Henric Nicholas held that insurers were not obliged to indemnify Mr Wilkie. The High Court granted special leave to appeal directly from Justice Nicholas's decision.

The Court held that GIO was responsible for the costs, charges or expenses incurred in defending, investigating or monitoring the ASIC proceedings and related appeals. It held that there is as yet no ground to which GIO can point as a legal basis for a denial of indemnity. Therefore, GIO was not free of an obligation to indemnify Mr Wilkie under Extension 9, on a basis located in Exclusion 7. The Court unanimously allowed the appeal.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*