



HIGH COURT OF AUSTRALIA

Public Information Officer

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ASSETINSURE PTY LIMITED (formerly Gerling Global Reinsurance Company of Australia Pty Limited) v NEW CAP REINSURANCE CORPORATION LIMITED (in liquidation), JOHN RAYMOND GIBBONS as liquidator to the first respondent, FARADAY UNDERWRITING LIMITED, AND NC RE CAPITAL LIMITED (in liquidation)

A provision in the *Insurance Act* to the effect that, in a winding-up of an insurance company, Australian assets should be used in the first place to discharge Australian liabilities was interpreted by the High Court to refer to liabilities of all kinds, not only liabilities under contracts of insurance. The Court also held that under a provision of the *Corporations Act* insurance included reinsurance.

New Cap, which operated as a reinsurer, went into voluntary administration in April 1999 and its creditors resolved that the company be wound up. AssetInsure, an Australian insurer, and Faraday Underwriting, part of a syndicate of British insurers providing cover in various parts of the world to AK Steel Corporation, were both reinsured with New Cap, which had in turn taken out re-reinsurance (or retrocession). Both AssetInsure and Faraday were among New Cap's creditors.

Proceedings were brought in the NSW Supreme Court to resolve issues related to New Cap's winding-up and the manner in which proceeds should be distributed among creditors. Two issues remained to be resolved in the High Court. One concerned section 116 of the *Insurance Act*, that in a winding-up of an insurance company, assets in Australia shall only be used to discharge liabilities in Australia, unless there are no Australian liabilities. The other concerned whether section 562A of the *Corporations Act* applied to the proceeds of contracts of re-reinsurance.

AssetInsure argued that "liabilities in Australia" in section 116 of the *Insurance Act* were limited to liabilities under insurance contracts and that the location of such liabilities was determined exclusively by section 31(4). However, Justice William Windeyer held that "liabilities in Australia" were not confined to liabilities arising only under insurance contracts and held that section 31(4) was not an exclusive basis for determining their location. This was upheld by a majority of the NSW Court of Appeal and by a 3-2 majority of the High Court. The majority held that "liabilities in Australia" included all liabilities arising in the course of business in Australia, such as rent, taxes, loan repayments, costs of goods, and wages. Section 31(4) provided that in certain circumstances specific liabilities undertaken under insurance contracts were "liabilities in Australia", but the Court held this was not an exhaustive statement of "liabilities in Australia".

Justice Windeyer's decision on the *Corporations Act* issue was unanimously upheld by the High Court after being overturned by the Court of Appeal. The issue was whether the priority afforded by section 562A applied only to the proceeds of contracts of reinsurance or whether it also applied to the proceeds of contracts of re-reinsurance, such as that taken out by New Cap against liabilities it might incur under reinsurance contracts issued to AssetInsure and Faraday. AssetInsure argued both it and Faraday were entitled to pay-outs New Cap had received from its re-reinsurers. Justice Windeyer held that the priority afforded by section 562A applied to both reinsurance and re-reinsurance contracts.

The High Court unanimously allowed the appeal on the *Corporations Act* issue and, by majority, dismissed the part of the appeal relating to the *Insurance Act* issue, therefore restoring declarations and directions made by Justice Windeyer in relation to both issues.

- *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.*