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DATE 4/9/02
 TIME 10:47
 SIGNED NM

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Our ref: PNW2334189
 Your ref: DJA/BRIS2923-7545873

4 September 2002

Mr David Abernethy
 Corrs Chambers Westgarth
 DX 135
 BRISBANE

By facsimile: 07 3228 9444

Dear David

BRISBANE GRAMMAR SCHOOL

- 1 I refer to your facsimile dated 2 September 2002.
- 2 You suggest that the CIGNA Renewal Notices enclosed with your facsimile establish that CIGNA was the primary and excess insurer for the 1986/87 year in that the Renewal Notices in question "... were inviting renewal for the 1987/88 year...".
- 3 I have re-analysed all of the documents you have previously provided to me with regard to the insurance cover for the various policy years. It is apparent that for the 1984/85 year INA was the primary layer insurer pursuant to a primary layer of \$1million, and the excess layer insurer for a limit of \$16.5million in excess of \$1million (see INA Renewal Certificates dated 8 October 1984).
- 4 For the 1985/86 renewal Reed Stenhouse recommended that BGS consider increasing the limit of indemnity to \$20million. It appears that the House Committee of BGS approved this recommendation on 23 October 1985 (see the handwritten notation on the Reed Stenhouse letter to BGS dated 17 October 1985). ACE acknowledges that CIGNA was the primary insurer from 1 September 1985 to 1 September 1986 for a primary limit of liability of \$1million. It is apparent that CIGNA was also the excess insurer for the 1985/86 year. ACE instructs me that initially the excess cover was renewed on the expiring terms, with the limit of liability of \$16.5million in excess of \$1million. It is apparent from the Reed Stenhouse Confirmation of Cover dated 30 December 1985 that the increase in excess cover to \$19million in excess of \$1million was processed effective from 2 January 1986. Accordingly from 2 January 1986 to 1 September 1986 BGS had cover of \$20million pursuant to primary and excess policies issued by CIGNA.
- 5 I am instructed by ACE that the Renewal Notices enclosed with your facsimile dated 2 September 2002 on the face of the documents invited renewal for the period specified therein, namely from 1 September 1986 to 1 September 1987, not for the 1987/88 year



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as suggested in your facsimile. You will note, for instance, that the Renewal Notice for the excess policy quoted a premium of \$7,000, which is the same amount referred to as the premium in the CIGNA Excess Certificate for the 1986/87 year dated 15 May 1987 which you faxed to me on 15 August 2002.

- 6 The CIGNA Renewal Notice for the primary layer which was enclosed with your facsimile dated 2 September 2002 refers to the same policy number which INA and/or CIGNA had allocated to the primary cover for the 1982/83, 1983/84, 1984/85 and 1985/86 policy periods. CIGNA clearly offered renewal of the primary policy for the 1986/87 policy year, subject to the payment of a premium of \$4,030. ACE instructs me that its records indicate that this policy lapsed on 1 September 1986, which indicates that BGS did not accept the offer of renewal of the primary policy.
- 7 It is apparent from the broker's Insurance Renewal Report for the 1986/87 year that it was proposed that the insurance cover remain at \$20million. That report indicated that the primary layer of \$1million was underwritten by RSA, that the first excess layer of \$14million in excess of \$1million was underwritten by CIGNA, and that the second excess layer of \$5million in excess of \$15million was underwritten by Carlingford (a predecessor to HIH). That RSA was the primary layer insurer for the 1986/87 policy is confirmed by the Alexander Stenhouse Cover Record, and by the CIGNA Excess Certificate issued on 15 May 1987. The fact that RSA issued cover with a sum insured of \$1million for the 1986/87 policy period is also confirmed by the RSA Certificate of Insurance dated 26 September 1986.
- 8 The Alexander Stenhouse Cover Record indicates that for the 1986/87 policy year RSA charged a premium of \$2,500. This is consistent with the premium noted in the RSA Certificate of Insurance issued on 26 September 1986. Although I understand that RSA says that the information contained in the RSA Certificate of Insurance suggests that its cover was an excess of loss cover, all of the evidence points to the fact that RSA was the primary layer insurer for the 1986/87 year and that any reference to "XOL Liability" in its Certificate of Insurance was a processing error by RSA. The CIGNA excess layer records for that period show RSA to be the underlying insurer pursuant to a primary layer of \$1million.
- 9 That CIGNA was an excess layer insurer for the 1986/87 year on a layer of \$14million in excess of \$1million is clearly established by the records you have provided to me and by ACE's own internal records. That BGS required \$20million cover for the 1986/87 also cannot be questioned, and is consistent with the cover it had for the 1985/86 year. If RSA continues to assert that it was an excess insurer for the 1986/87 year it could only be on a layer in excess of \$15million. I am instructed that it is extremely unlikely than at the relevant time an insurer would issue excess layer cover of \$1million in excess of \$15million when the insured required \$20million worth of cover. In any event, for RSA to have been an excess layer insurer above the CIGNA layer there would have had to have been a fourth insurer on the program to cover the layer of \$4million in excess of \$16million. There is no suggestion that a fourth insurer existed. I would also be surprised if an analysis of premiums charged by local insurers at that time would have indicated that an insurer would charge a premium of \$2,500 for an excess layer of \$1million in excess of \$15million. The logical conclusion is that CIGNA quoted a renewal premium of \$4,030 for the primary layer for the 1986/87 year, that RSA was prepared to underwrite the primary layer for \$2,500 and, being the cheaper quote, won the business.

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- 10 ACE leaves it to BGS to resolve the issues relating to the 1986/87 policy year with RSA. For its part, ACE instructs me that its records establish that it was not on risk for the primary layer in the 1986/87 year, and that the CIGNA Renewal Notice enclosed with your facsimile dated 2 September 2002 does not provide evidence of the nature asserted by you in your facsimile.

Yours sincerely



Phillip Wotton

Partner

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Email Phillip.wotton@wottonkearney.com.au

cc **Ken Horsley**
Minter Ellison

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