

CGU INSURANCE LIMITED v BLAKELEY & ORS (M221/2015)

Court appealed from: Court of Appeal of the Supreme Court of Victoria
[2015] VSCA 153

Date of judgment: 19 June 2015

Special leave granted: 11 September 2015

Akron Roads Pty Ltd (the second respondent) ('Akron') and its liquidators (the first respondents) brought proceedings in the Supreme Court of Victoria alleging that the directors of Akron breached s 588G(2) of the *Corporations Act* 2001(Cth) by failing to prevent it from incurring debts when it was insolvent. The relevant directors are Trevor Crewe (the third respondent) and Crewe Sharp Pty Ltd (in liquidation) (the sixth respondent) ('Crewe Sharp'). On 4 December 2013, Crewe Sharp made a claim for indemnity with respect to the proceeding under a professional indemnity policy of insurance that it had with CGU Insurance Limited ('CGU'). As Mr Crewe was a director of Crewe Sharp, he was also an insured under the policy. On 6 March 2014, CGU denied the claim on the basis that the policy did not provide cover in respect of the proceeding. Neither Crewe Sharp nor Mr Crewe indicated any intention to challenge CGU's denial of liability. The first and second respondents, however, sought an order pursuant to r 9.06(b) of the *Supreme Court (General Civil Procedure) Rules* 2005 ('the Rules') that CGU be joined as a defendant in the proceeding. They also sought leave to file and serve amended points of claim in which they sought a declaration that CGU was liable to indemnify Mr Crewe and Crewe Sharp under the policy in respect of any judgment obtained by the first and second respondents against them.

On 13 February 2015, Judd J granted the application and made orders joining CGU as the fifth defendant in the proceeding. CGU sought leave of the Court of Appeal to appeal on the grounds that the judge had erred in law in joining it as a defendant to the proceeding because courts have no jurisdiction at the suit of a stranger to grant declaratory relief as to the meaning and effect of a private contract between parties who will not pursue any claim relating to rights or duties under that contract.

The Court of Appeal (Ashley, Beach and McLeish JJA) noted that Australian case law implicitly supports the proposition that in exceptional circumstances a court will permit a plaintiff who is not a party to a contract to seek a declaration as to rights existing under that contract. The authorities also show that if there is practical utility in resolving a matter in which the plaintiff has a real interest, this may suffice to justify making a declaration in respect of that matter. The Court found that the making of a declaration in the circumstances sought in this case would be of practical utility and would not constitute the giving of an advisory opinion, because its practical effect would be to resolve the issue as between insured and insurer. It would be an abuse of process to permit either to litigate the question in subsequent proceedings. While, as a general proposition it may be accepted that only contracting parties have an interest in the contract to which they are parties, once an insured becomes insolvent, leaving behind an unpaid claimant in respect of whose claim an insurance policy responds, the

situation becomes different from that of an ordinary private contract. The Court accepted the submission of the first and second respondents that in those circumstances it is the claimant, and only the claimant, that has an interest in the insurance contract. The insured no longer has any practical commercial interest in the policy. That is the effect of s 562 of the *Corporations Act 2001* (Cth) and s 117 of the *Bankruptcy Act 1966* (Cth), which provide for payment of the insurance proceeds 'to the third party'.

The Court considered, consistently with the way courts are expected to exercise their jurisdiction in a modern world, that the possibility of separate proceedings between the current parties and later proceedings between a relevant liquidator or trustee in bankruptcy and CGU could not be countenanced. For these reasons, the judge's analysis was correct and his orders should not be disturbed. Whether there were ultimately grounds for a declaration being made against CGU was a matter for trial. It was not a matter appropriate for final determination on a joinder application.

The grounds of appeal include:

- The Court erred in dismissing the appeal because the court does not have jurisdiction at the suit of the first and second respondents to grant declaratory relief as to the meaning and effect of a contract to which they are not parties and when the parties to the contract, being the appellant and the third and sixth respondents, are not themselves in dispute.