



HIGH COURT OF AUSTRALIA

4 August 2010

CGU INSURANCE LIMITED v ONE.TEL LIMITED (IN LIQUIDATION) & ORS
[2010] HCA 26

In September 2004, Mr John Greaves was ordered to pay \$20 million in compensation to One.Tel Limited ("One.Tel"). Mr Greaves had been a director of One.Tel and was insured under a directors and officers liability policy, issued by CGU Insurance Limited ("CGU"). Today the High Court held that the termination of a deed of arrangement, pursuant to which Mr Greaves had assigned his rights under the policy to a trustee, did not prevent the trustee from commencing an action on the policy in respect of the \$20 million.

Mr Greaves (the third respondent) was, in 1995 and from 1997 to 2001, a director of One.Tel (the first respondent). He was insured under a directors and officers liability policy of insurance, issued by CGU (the appellant). In December 2001, after the collapse of One.Tel, the Australian Securities and Investments Commission ("ASIC") (the fourth respondent) sued Mr Greaves in the Supreme Court of New South Wales for breaches of the *Corporations Act 2001* (Cth). In September 2004, by consent of the parties, the Supreme Court ordered Mr Greaves to pay compensation to One.Tel in the sum of \$20 million and to pay \$350,000 to ASIC.

In November 2004, Mr Greaves entered into a deed of arrangement pursuant to Part X of the *Bankruptcy Act 1966* (Cth). Mr David Watson was the trustee of the deed. Under the deed, Mr Greaves was to assign to Mr Watson, as trustee, all the property described in Schedule A to the deed, including Mr Greaves's rights under the policy with CGU. The deed provided that the trustee should "get in and realise" that property "as soon as reasonably practicable". It also provided that the trustee should apply any amount received under the insurance policy in payment of any liability Mr Greaves might have to ASIC and One.Tel. Immediately after the trustee had completed or settled any claim under the policy (or had decided not to pursue a claim under the policy), the trustee was to issue a certificate. Once that certificate had been executed, Mr Greaves would be absolutely released and discharged from all liability in respect of the orders made by the Supreme Court in September 2004. Prior to the execution of that certificate, the deed prevented the trustee or any creditor from enforcing those orders. Finally, the deed stipulated that it was to terminate three years from the date of its execution unless the creditors resolved to extend its operation.

On October 2006, the trustee commenced proceedings against CGU in the Supreme Court of New South Wales, pursuing Mr Greaves's cause of action on the policy in respect of the \$20 million compensation order. In November 2007, the deed terminated – three years having passed since its execution. The primary issue for determination by the trial judge was whether the trustee's right to pursue an action under the policy survived the termination of the deed. His Honour held that, once the deed terminated, the trustee had no power to continue the proceedings. The Court of Appeal allowed the appeal. On 12 March 2010, CGU was granted special leave to appeal to the High Court.

CGU advanced two central contentions before the Court. The first was that, even if the assignment to the trustee of the chose in action (that is, the right to pursue proceedings under the policy) was a valid legal or equitable assignment, neither the *Bankruptcy Act* nor the deed itself gave the trustee

the power to continue the proceedings after termination. The second was that Mr Greaves had suffered no "loss" within the meaning of the policy, because even after the deed had terminated it continued to prevent anyone from enforcing the orders of September 2004 against him.

On the first issue, the Court noted CGU's concession that, once the deed had terminated, the trustee remained a trustee; but instead of holding the chose in action on the trusts under the deed, he held the property on trust for Mr Greaves. The Court accepted that concession as correct. It noted, however, that one obligation of a trustee which exists by virtue of the very office is the obligation to protect the trust property and vindicate the rights attaching to it. That obligation exists even if no provision of any statute or trust instrument creates it, and unless it is negated by any such provision. Here, no provision of the *Bankruptcy Act* or the deed negated it. Even after termination of the deed, the trustee remained a trustee and continued to have an obligation to comply with the duty to vindicate the rights associated with the trust property. The trustee was not disentitled from continuing the proceedings against CGU.

On the second issue, the Court rejected CGU's submission that the clause preventing the trustee and creditors from enforcing the September 2004 orders survived the termination of the deed. It further held that, even if the stay continued in force, Mr Greaves had still suffered a "loss" within the meaning of the policy.

The Court allowed the appeal in part, as its answers to some of the questions reserved for the consideration of the trial judge differed from those given by the Court of Appeal. The appeal was otherwise dismissed and CGU was ordered to pay One.Tel's costs.

- *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.*