IN THE HIGH COURT OF AUSTRALIA
VICTORIAN REGISTRY No. M221 of 2015

ON APPEAL FROM THE COURT OF APPEAL OF THE SUPREME COURT OF VICTORIA

BETWEEN:

CGU INSURANCE LIMITED (ACN 004 478 371)
Appellant

and

ROSS BLAKELEY, MICHAEL RYAN & QUENTIN OLDE AS JOINT AND SEVERAL LIQUIDATORS OF AKRON ROADS PTY LTD (IN LIQ) (ACN 004 769 895)
First Respondents

AKRON ROADS PTY LTD (IN LIQ) (ACN 004 769 895)
Second Respondent

TREVOR PAUL CREWE
Third Respondent

ROBERT MARK SILL
Fourth Respondent

JOHN MARTIN SILL
Fifth Respondent

CREWE SHARP PTY LTD (IN LIQ) (ACN 066 670 013)
Sixth Respondent

APPELLANT'S SUBMISSIONS

Part I: Publication

1. The appellant certifies that these submissions are suitable for publication on the internet.

Part II: Issues presented by the appeal

2. Whether courts have jurisdiction to declare the rights and obligations of parties under a contract of insurance in circumstances where:

   (a) the declaration is sought by a person who is not a party to the contract;

   (b) the parties themselves do not intend to pursue any claim relating to the rights or obligations under that contract; and

   (c) the only interest asserted by the person seeking the declaration is such priority as may be afforded by s562 of the *Corporations Act* 2001 (Cth) or s117 of the *Bankruptcy Act* 1966 (Cth).

3. Whether such a declaration, if made, would:

   (a) bind the parties to the contract as a matter of *res judicata*; or

   (b) finally determine the rights and obligations of the parties under the contract so that it would be an abuse of process for the parties to adopt a position contrary to the declaration in any subsequent proceedings.

4. Whether courts have jurisdiction to make a declaration about the meaning of a contract, at the suit of a stranger to the contract, on the ground that there may be "practical utility" in doing so.

Part III: *Judiciary Act* 1903 (Cth), s 78B

5. The appellant has considered whether its appeal involves "a matter arising under the Constitution or involving its interpretation." It does not. Accordingly, s78B notices are not required.

Part IV: Judgment of court below

6. The judgment of the Court of Appeal is not reported. Its medium neutral citation is *CGU Insurance Ltd v Blakeley* [2015] VSCA 153.

Part V: Relevant facts

7. The first respondents (***the Liquidators***) were appointed as joint and several liquidators of the second respondent (***Akron Roads***) in March 2010.

8. More than three years later, the Liquidators commenced proceedings in the Supreme Court of Victoria against the third respondent Trevor Crewe (***Mr Crewe***) and the sixth respondent, Crewe Sharp Pty Ltd (in liq) (***Crewe Sharp***), alleging that, as directors of Akron Roads, they breached s.588G(2) of the *Corporations Act* by failing to prevent Akron Roads from incurring debts when it was insolvent. Two other directors of Akron Roads, Robert and John Sill, are the fourth and fifth respondents.

9. In December 2013, Crewe Sharp claimed indemnity with respect to the claims made against it in the proceeding by the Liquidators under a professional indemnity policy of insurance (***insurance policy***) that it had with the appellant (***CGU***). Mr Crewe was a director of Crewe Sharp and he was also an insured under the insurance policy. CGU denied the claim on the basis that the insurance policy did not provide cover in respect of the claims made against Crewe Sharp in the proceeding.

10. Crewe Sharp entered into liquidation in June 2014. The liquidators of Crewe Sharp immediately told the Liquidators that it was unlikely that Crewe Sharp would defend the proceeding. Since that time, Crewe Sharp has not participated in the proceeding.

11. CGU subsequently provided to the liquidators of Crewe Sharp a copy of the letter in which it denied liability under the insurance policy.

12. Neither the liquidators of Crewe Sharp nor Mr Crewe have indicated any intention to challenge CGU's denial of liability. Nor have they filed cross-claims against CGU in the proceeding.

13. As at July 2011, Mr Crewe had net assets of about $1 million. There is no evidence of his current financial position. He is not a bankrupt. The ability of the fourth and fifth respondents to satisfy any judgment is unknown.

14. In August 2014 the Liquidators sought an order pursuant to rule 9.06(b) of the *Victorian Supreme Court (General Civil Procedure) Rules* 2005 that CGU be joined as a defendant and for leave to file and serve amended points of claim seeking a declaration that: "CGU is liable to indemnify Mr Crewe and Crewe Sharp under the insurance policy in respect of any judgment obtained by the Liquidators against them and in respect of any sums (including legal costs) which the court may order them to pay to the Liquidators".

15. The Liquidators contended, as to Crewe Sharp, that s562 of the *Corporations Act*, which is concerned with priorities in funds received by a company in liquidation, provided the basis for the court to join CGU and ultimately make the declaration sought. In the case of Mr Crewe, the reason advanced was that because the total judgment sum sought by the Liquidators significantly exceeded Mr Crewe's net assets, if the action succeeded, he would be unable to pay the judgment sum. In that event, he would be made bankrupt, which would enliven s117 of the *Bankruptcy Act*.

16. CGU opposed the application. On 13 February 2015, Judd J made the orders sought by the Liquidators, allowing for the joinder of CGU and for the declaration sought (*Blakeley v Crewe Sharp Pty Ltd* [2015] VSC 34).

17. At no time has either insured applied to join CGU, or indicated any intention to challenge its denial of liability. See [2014] VSC 34 at [11] per Judd J. That remains the case.

18. CGU made application for leave to appeal[1] against those orders. CGU argued that:

10

(a) the Court only has jurisdiction to grant declaratory relief if it is directed to the determination of a justiciable controversy;

(b) there is no such justiciable controversy in this case because, among other things, the parties to the insurance policy are not in dispute about their rights and obligations under it and the declaration, if made, would not determine their rights and obligations because it would not bind them as a matter of *res judicata* and nor would it produce a judgment in a money sum in favour of the Liquidators, Mr Crewe or Crewe Sharp;

(c) the reasoning of the majority in *Interchase Corporation Ltd (in liq) v FAI*
20 *General Insurance Company Ltd* (2000) 2 Qd R 301(***Interchase***) and of McLure P in *QBE Insurance (Australia) Ltd v Lois Nominees Pty Ltd* (2013) 17 ANZ Insurance Cases ¶61-949, [2012] WASCA 186 (***QBE Insurance***) to such effect is correct and should be followed, and the decisions of the South Australian Full Court in *JN Taylor Holdings Ltd (in liq)* v *Bond* (1993) 59 SASR 432 (***JN Taylor***) and the Full Federal Court in *Employers Reinsurance Corporation v Ashmere Cove Pty Ltd* (2008) 166 FCR 398 (***Ashmere Cove***) should not be followed.

19. CGU's application was first heard by the Court of Appeal on 24 April 2015 (Mandie and Beach JJA). Having heard CGU's submissions, the Court announced
30 that it had decided to refer the application for leave and the appeal (if any) to a bench of three judges on a date to be fixed. The application was heard by the Court of Appeal (Ashley, Beach and McLeish JJA) on 15 June 2015. Judgment was delivered four days later. Leave to appeal was granted and the appeal was dismissed.

20. The Court of Appeal correctly identified the appellant's critical contention, viz that "the Court has 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 and duties under that contract."[2] The Court then quoted

---

[1] In Victoria any civil appeal (as defined) now requires leave to appeal to be obtained from the Court of Appeal. See s14A of the *Supreme Court Act* 1986 (Vic)(as amended).

[2] *CGU Insurance Ltd v Blakeley* [2015] VSCA 153 at [21].

the oft cited passage of the plurality in *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 581-582[3] (***Ainsworth***), upon which CGU had relied, about the need for a person seeking declaratory relief to have a real interest in the relief sought. The Court of Appeal did not, however, apply the *Ainsworth* principles because it was of opinion that "observations about limits on the power of courts exercising federal jurisdiction to grant declarations do not necessarily assist." [4] The Court of Appeal also thought it unnecessary to address the reasoning of McLure P in *QBE Insurance* to the effect that no justiciable controversy exists in these circumstances because the learned President, in doubting the correctness of the Full Court's approach in *Ashmere Cove Pty Ltd*, had relied on Gaudron J's observations in *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591 (***Truth About Motorways***) "which was a case in federal jurisdiction".[5]

21. The Court of Appeal then observed that even in the context of federal jurisdiction, "authority is against the view" contended for by CGU, citing the reasoning of the primary judge in *Ashmere Cove v Beekink (No 2)* (2007) 244 ALR 534, 549-550, [58].[6] The Court of Appeal summarised and agreed with that reasoning in these terms: "...even if it was true to say (following the decision of the Queensland Court of Appeal in *Interchase*) that an insurer joined as a co-defendant at the suit of a claimant against the insured would not be bound, by a declaration as to liability, as between itself and the insured, there was still utility in a declaration against an insurer...because, by analogy with the wider concept of estoppel enunciated in [*Anshun*] it would be an abuse of process to permit...the insurer to litigate the question of liability in subsequent proceedings. As such, the declarations sought would effectively determine the proceedings." [7]

22. On the issue of how an outsider to a contract may seek declaratory relief in relation to the meaning and effect of the insurance policy, the Court of Appeal agreed that "only contracting parties have an interest in the contract to which they are parties."[8] The Court of Appeal was of opinion, however, that "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

---

[3] "[The power to grant declaratory relief] is a discretionary power which '(i)t is neither possible nor desirable to fetter ... by laying down rules as to the manner of its exercise.' However, it is confined by the considerations which mark out the boundaries of judicial power. Hence, declaratory relief must be directed to the determination of legal controversies and not to answering abstract or hypothetical questions. The person seeking relief must have 'a real interest' and relief will not be granted if the question 'is purely hypothetical', if relief is 'claimed in relation to circumstances that (have) not occurred and might never happen' or if 'the Court's declaration will produce no foreseeable consequences for the parties'".

[4] *CGU Insurance Ltd v Blakeley* [2015] VSCA 153 at [23].

[5] *CGU Insurance Ltd v Blakeley* [2015] VSCA 153 at [27].

[6] *CGU Insurance Ltd v Blakeley* [2015] VSCA 153 at [24], footnote 26.

[7] *CGU Insurance Ltd v Blakeley* [2015] VSCA 153 at [24] (footnotes omitted).

[8] *CGU Insurance Ltd v Blakeley* [2015] VSCA 153 at [34].

contract."[9] The Court of Appeal did not cite authority for that proposition but quoted and accepted the following submission made by counsel on behalf of the Liquidators: "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 in relation to both company liquidation and personal bankruptcy: s 562 of the *Corporations Act 2001* (Cth) and s 117 of the *Bankruptcy Act 1966* (Cth). Those sections provide for payment of the insurance proceeds 'to the third party'. Insurance proceeds in the hands of a liquidator or trustee in bankruptcy of the insured are payable to the claimant, and are not divisible among the creditors of the insured."[10]

23. In the course of its reasons, the Court of Appeal also made observations about the manner in which courts in Victoria must "exercise" jurisdiction. The Court said that "every court exercising jurisdiction in Victoria in any civil proceeding must exercise its jurisdiction so that all matters in dispute between the parties are completely and finally determined and all multiplicity of proceedings concerning any of those matters is avoided. Further, the *Civil Procedure Act 2010* mandates the just, efficient, timely and cost-effective resolution of civil proceedings."[11]

24. The Court of Appeal next turned to a different topic, and said that "[w]hether there are ultimately grounds for a declaration being made against CGU is a matter for trial" and that "[i]t is not a matter appropriate for final determination on a joinder application".[12] The Court also said that it regarded CGU's case that the Court had no jurisdiction to make the declaration as a matter "pertaining to practice and procedure" and that "the judge managing this proceeding was in a better position than this Court to assess the prospects that the circumstances of this case may ultimately justify the making of a declaration against CGU should the policy be shown to be applicable and in force during the relevant period when Akron Roads was alleged to have been insolvent."[13]

25. The ratio of the Court of Appeal's decision is to be found principally at paragraphs [37] and [26] of the reasons. The Court of Appeal held that "*[f]or present purposes all that matters* is that [the Liquidators] have a sound basis for seeking declaratory relief, *on the basis that there may be practical utility* in having an issue in which they have a real interest resolved in this manner".[14] Citing the decision of the primary judge in *Ashmere Cove v Beekink (No 2)* (2007) 244 ALR 534, who agreed with Davies JA (dissenting) in *Interchase*, the Court of Appeal said that such "practical utility" existed because "[i]t would be an abuse of process to

---

[9] *CGU Insurance Ltd v Blakeley* [2015] VSCA 153 at [34].
[10] *CGU Insurance Ltd v Blakeley* [2015] VSCA 153 at [34].
[11] *CGU Insurance Ltd v Blakeley* [2015] VSCA 153 at [36], (footnote and internal citations omitted).
[12] *CGU Insurance Ltd v Blakeley* [2015] VSCA 153 at [38].
[13] *CGU Insurance Ltd v Blakeley* [2015] VSCA 153 at [39].
[14] *CGU Insurance Ltd v Blakeley* [2015] VSCA 153 at [37] (emphasis added).

permit...[the insurer] to re-litigate the issue in subsequent proceedings".[15] The Court of Appeal was thus of opinion that it was "unnecessary" to resolve the conflict of authority between the majority in *Interchase* and *JN Taylor* on the *res judicata* issue.[16]

26. The other considerations of practical utility referred to elsewhere in the Court of Appeal's reasons were: (i) that the insureds may change their minds and pursue CGU for indemnity;[17] (ii) that the trustee in bankruptcy (were Mr Crewe to be bankrupt) or the liquidator of Crewe Sharp "may ultimately take a step against CGU" ;[18] and (iii) that there is "a real prospect" that if the Liquidators succeed against the insureds that the liquidator of Crewe Sharp or any trustee in bankruptcy of Mr Crewe may be put in funds to pursue CGU for indemnity.[19]

27. On 11 September 2015 the Registry of the Supreme Court of Victoria notified the parties that the trial of the proceeding has been fixed for trial on 4 April 2016 on an estimate of 4-8 days.

Part VI: Argument

Summary

28. The Court of Appeal's conclusion that "all that matters" in cases such as this is "that there may be practical utility" in making the declaration sought and that such utility included that "it would be an abuse of process to permit...the insurer to litigate the question of liability in subsequent proceedings" should not, with respect, be accepted. For the reasons detailed below, the Court of Appeal should have considered and followed the reasoning of the majority in *Interchase* and of McLure P in *QBE Insurance* and held that there is no relevant justiciable controversy and that there is thus no jurisdiction to grant the declaratory relief sought by the Liquidators in this case. The Court of Appeal should therefore have refused the Liquidators' application to join CGU as defendant to the proceeding.

29. For the reasons detailed below, the Court of Appeal was wrong: (i) to dismiss as irrelevant and not consider federal cases or state cases relying on them on the ground that federal cases are "different", because the question of jurisdiction[20] in

---

[15] *CGU Insurance Ltd v Blakeley* [2015] VSCA 153 at [26].
[16] *CGU Insurance Ltd v Blakeley* [2015] VSCA 153 at [25], [26].
[17] *CGU Insurance Ltd v Blakeley* [2015] VSCA 153 at [37].
[18] *CGU Insurance Ltd v Blakeley* [2015] VSCA 153 at [37].
[19] *CGU Insurance Ltd v Blakeley* [2015] VSCA 153 at [35].

[20] "Jurisdiction" is used here in its most common sense, namely the right of the court to enter upon the inquiry as to whether or not a cause of action exists in the plaintiff and, if a cause of action does exist, to grant or, if the relief is discretionary, to withhold the relief applied for. Lack of jurisdiction is the absence of any right in the court to enter upon such an inquiry at all. See *Rediffusion (Hong Kong) Ltd v Attorney-General (Hong Kong)* [1970] AC 1136 at 1151; *Harris v Caladine* (1991) 172 CLR 84, 136 per Toohey J.

both federal and state cases is relevantly identical; (ii) to conclude that the *Anshun* doctrine would inevitably preclude an insurer from seeking to re-litigate the issue; (iii) not to find that the declaration even if made would not bind the parties; and (iv) to find that s562 of the *Corporations Act* and s117 of the *Bankruptcy Act* operate as an exception to the privity rule and provide the basis upon which an outsider may seek declaratory relief about the meaning and effect of a contract.

30. Further, and for reasons set out in detail below, if the Court of Appeal's reasons in relation to the question of the "exercise" of jurisdiction and discretionary considerations are to be read as supporting a proposition that such considerations, case management principles and matters of practice and procedure and the like are relevant to, or controlling of, the anterior question of whether jurisdiction exits, those reasons are also wrong.

The nature of declaratory relief

31. Declaratory relief must be directed to the determination of a real, legal, actual or justiciable controversy.[21]

32. It is "central" to the purpose of a judicial determination that it "includes a conclusive or final decision based on a concrete and established or agreed situation which aims to quell a controversy."[22] "[J]udicial power involves, as a general rule, a decision settling for the future, as between defined persons or classes of persons, a question as to the existence of a right or obligation, so that an exercise of the power creates a new charter by reference to which that question is in future to be decided as between those persons or classes of persons... [T]he process ...entitles and obliges the persons between whom it intervenes, to observance of the rights and obligations that the application of law to facts has shown to exist".[23] As Chesterman JA (with whom Fraser and White JJA agreed) said in *Taylor v O'Beirne* [2010] QCA 188 at [28], citing *Gouriet v Union of Post Office Workers* [1978] AC 435 at 501, *Ainsworth* at 581-2 and *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 355-6: "...declaratory relief, being a judgment of a court of law, can only be given by way of the judicial determination of a legal controversy, settling the dispute once and for all in such a manner as to give rise to a *res judicata*, or issue estoppel."[24]

33. Declaratory relief cannot be claimed as a way of obtaining legal advice from a court or answering an abstract, academic or hypothetical question divorced from a

---

[21] *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 581-2; *Kuczborski v Queensland* (2014) 314 ALR 528 at [6], [175], [183], [278] (and the cases cited therein); *Taylor v O'Beirne* [2010] QCA 188 at [24]-[28] (and the cases cited therein).

[22] *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 355, [45].

[23] Per Kitto J in *R v Trade Practices Tribunal; Ex Parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 374, quoted in *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334, 355, [45].

[24] [2010] Qd R 188 at [28].

real controversy. Nor can it be claimed if it is in respect of circumstances that have not occurred and might never happen or if the declaration will produce no foreseeable consequences for the parties.[25]

34. The requisite controversy will exist where a person is seeking to have the court establish by its determination any "immediate right, duty or liability which the plaintiff claims or to which he alleges he is subject".[26] See s36 of the *Supreme Court Act* 1986 (Vic), which vests the power to make declarations "of right".

35. These fundamental requirements "ensure that the work of the courts remains focused upon the determination of rights, duties, liabilities and obligations as the most concrete and specific expression of the law in its practical operation".[27] Recognising that a plaintiff has a sufficient interest to seek the exercise of judicial power where the exercise will affect the person's legal situation maintains the ordinary characteristics of judicial power.[28]

Jurisdiction

Federal cases are not different

36. The Court of Appeal was wrong to disregard cases relied upon by CGU on the basis that they were "federal cases" or, in the case of McLure P's reasons in *QBE Insurance*, a state case that relied on a federal case, namely, *Truth About Motorways*. The notion that the requirement of jurisdiction in a federal court is in a material way different to a state court is wrong because whether the issue is one of the existence of a "matter" for Federal Constitutional purposes or the invocation of the power under s36 of the *Supreme Court Act*[29] and its equivalents, the "central task" that confronts state and federal courts alike is the identification of a justiciable controversy. See, by way of example only, *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, 585, [138]-[139]. The Court of Appeal should thus have considered (and, it is submitted, followed) the reasoning of the plurality in *Ainsworth* about the considerations that confine the power to grant declaratory relief and the reasoning of McLure P in *QBE Insurance.*[30]

---

[25] *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334, 346, [47]; *Kuczborski v Queensland* (2014) 314 ALR 528 at 533, [6] (citing *Ainsworth*), [183].

[26] *Kuczborski v Queensland* (2014) 314 ALR 528 at 554, [99], 588, [278], 589, [283].

[27] *Kuczborski v Queensland* (2014) 314 ALR 528 at 571, [184].

[28] *Kuczborski v Queensland* (2014) 314 ALR 528, 571, [184], citing *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591.

[29] Section 36 of the *Supreme Court Act* (1986) Vic permits the court to make "binding declarations of right". Here the Liquidators have no such rights with respect to the insurance policy said to give rise to the obligation to indemnify described in the form of declaratory relief.

[30] The Court of Appeal said (at [27]) that Murphy JA in *QBE Insurance* "appeared to be of the same opinion as Newnes JA", who supported the reasoning in *Ashmere Cove*. That statement is incorrect. Unlike Newnes JA, Murphy JA decided the application for leave on summary judgment

The Liquidators have no relevant interest in the declaration sought

37. As a practical matter, the size of the Liquidators' claim against the directors ($14.6M), together with the insureds' financial situation and the unknown financial situation of the other directors, puts the Liquidators at risk of not recovering the full judgment sum. That much may be accepted for present purposes. The Liquidators' interest in joining CGU and seeking the declaration, obviously enough, is to try to minimise that risk by potentially accessing insurance proceeds under the priority provisions in s562 of the *Corporations Act* and s117 of the *Bankruptcy Act*.

38. Contrary to the observations of the Full Court in *Ashmere Cove*,[31] such a contingent, financial interest, cannot found a claim for declaratory relief. The declaration sought by the Liquidators contemplates relief that relates only to CGU's alleged liability to Mr Crewe and Crewe Sharp. That cannot directly affect any property, legal right or obligation of the Liquidators.

39. As Byrne J (with whom McPherson JA agreed) explained in *Interchase* at p.317:

> "What utility could attend such adjudication? [The plaintiff] is not a party to the policy. The policy was procured for the protection of the insured, not for claimants against them like [the plaintiff]. Although [the insureds] may sue on the policy, [the plaintiff] has no entitlement under the general law or statute to enforce it. Of course, like every prospective judgment creditor, [the plaintiff] has a commercial interest in the capacity of judgment debtors to satisfy a money judgment. But the declaration sought – relief that relates exclusively to [the insurer's] liability to [the insureds] – could not directly affect any property, legal right or obligation of [the plaintiff]".

No abuse of process

40. The Court of Appeal relied on what it called "the *Ashmere Cove* proceedings" and the "compelling" analysis in "*Ashmere Cove*" in holding that "the making of a declaration...would be of practical utility...because its practical effect would be to resolve the issue as between insured and insurer... [and] it would be an abuse of process to permit either to litigate the question in subsequent proceedings" (at [26]).

41. That statement, which is the critical part of the *ratio decidendi* of the Court of Appeal's decision is, with great respect, wrong.

---

principles. See *QBE Insurance (Australia) Ltd v Lois Nominees Pty Ltd* (2013) 17 ANZ Insurance Cases ¶61-949, [2012] WASCA 186 at [228]. He did not rule on the question relevant here, and the Court of Appeal was mistaken to suggest otherwise. McLure P dissented in the result, but not on the issue relevant here. Newnes JA joined with Murphy JA in dismissing the application for leave, but only Newnes JA adopted the approach of the Full Court in *Ashmere Cove*, and then only by way of *obiter dictum*. The Court was thus evenly divided on the critical question that arises here.

[31] *Employers Reinsurance Corporation v Ashmere Cove Pty Ltd* (2008) 166 FCR 398 at 409-410, [49]-[54].

42. First, an important premise of the statement - namely, that there exists to be resolved an "issue as between insured and insurer" - is incorrect. There is no such issue, because as the Court of Appeal itself recognised earlier in its reasons, "[n]either Crewe Sharp nor Mr Crewe have indicated any intention to challenge CGU's denial of liability".[32] Secondly, as the Full Court in *Ashmere Cove* said (in a passage not referred to by the Court of Appeal) "any attempt by the Insurers to relitigate their liability under the Policy in subsequent proceedings *would give rise to an issue concerning* the application of the *Anshun* principle." The Full Court continued, noting that "[t]he outcome cannot be predicted with certainty, since it may be influenced by the course the trial takes".[33] The Full Court also said that "*the likelihood*" is that an insurer would face "formidable obstacles"[34] and "[i]f the Insurers have a full opportunity to agitate any defence they wish to raise...it is difficult to see why the *Anshun* principle would not preclude them from relying on any such defence in subsequent proceedings involving the same parties."[35]

43. The Full Court in *Ashmere Cove* therefore did not decide that the *Anshun* doctrine "would" bar subsequent litigation because it made clear that the outcome cannot be predicted with certainty.

44. The question of whether CGU in this case would or would not be prevented from re-litigating issues in a subsequent proceeding can thus only be determined, if the issue arises, when the course that any trial takes is known.[36] And then the question can only be answered by adopting a "a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case", many or some of which cannot yet be known. As Lord Bingham (with whom Lord Goff, Lord Cooke and Lord Hutton agreed) said in *Johnson v Gore Wood & Co* [2002] 2 AC 1 at 31D:[37]

> "It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing

---

[32] *CGU Insurance Ltd v Blakeley* [2015] VSCA 153 at [10].

[33] *Employers Reinsurance Corporation v Ashmere Cove Pty Ltd* (2008) 166 FCR 398 at 412, [68] (emphasis added).

[34] *Employers Reinsurance Corporation v Ashmere Cove Pty Ltd* (2008) 166 FCR 398 at 412, [68].

[35] *Employers Reinsurance Corporation v Ashmere Cove Pty Ltd* (2008) 166 FCR 398 at 412, [71].

[36] See also *Nicholas v Bantick* (1993) 3 Tas R 47 at 62 per Green CJ ("[The issue of abuse of process]...will have to be determined at the trial in the light of all the evidence as it eventually emerges at the trial"). In this case, CGU has also pleaded non-disclosure and misrepresentation defences. See paragraphs 31-31I of the Defence of the Fifth Defendant to the Second Further Amended Points of Claim dated 11 June 2015.

[37] As to *res judicata* and abuse of process being juridically different see *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2014] AC 160 at 185G per Lord Sumption JSC; and *Tomlinson v Ramsey Food Processing Pty Limited* (2015) 323 ALR 1, [2015] HCA 28 at [25], [26] and [35].

the process of the court by seeking to raise before it the issue which could have been raised before."

45. The Court of Appeal was, with respect, also wrong to say that *Interchase* did not decide "the question whether the making of a declaration would be determinative by virtue of abuse of process considerations".[38] The majority (Byrne J, McPherson JA agreeing) addressed the question at some length and expressed their view that such considerations were unlikely to be determinative, stating that "...several considerations combine to show that there is *no appreciable prospect* that a defence denying liability to indemnify would be treated as such an abuse".[39]

46. Byrne J characterised those considerations as follows:

(i) "[i]n later proceedings, [the insurer] would not be resisting an obligation to indemnify for an ulterior or collateral purpose; and in deciding whether a pleading that raises fairly arguable grounds of claim or defence constitutes an abuse of process, the propriety of the litigant's motives is commonly a significant factor";

(ii) "the plaintiff(s) in the later case will have elected not to bring third-party proceedings in this litigation and instead will have waited to see the outcome of [the plaintiff's] action against [the insurer]...";

(iii) "[n]ext, what would then be challenged as an abuse of process is not the prosecution of a claim but the defence of one"; and

(iv) "the subsequent proceedings would probably afford [the insurer] procedural advantages that are not available to it in defending [the plaintiff's] action and the issues so far raised to justify the refusal to indemnify suggest that those advantages – in particular, a capacity to interrogate – could affect the result in a second contest".[40]

47. The power to stay a subsequent proceeding must be exercised with caution and only in the most exceptional or extreme case. And the onus on the party alleging abuse is a heavy one. See *O'Shane v Harbour Radio P/L* (2013) 85 NSWLR 698 at [111]. See also *QBE Insurance* at [41], citing *Howden v Truth & Sportsman Ltd* (1937) 58 CLR 416, 418 ("The jurisdiction to strike out proceedings or a defence as an abuse of process must be exercised with great circumspection").They are further reasons why the Court of Appeal was, with respect, wrong to elevate what can only have been a prospect of a subsequent proceeding being an abuse into something that "one could not countenance"[41], and thus a sufficient reason for it to dismiss the appeal.

---

[38] *CGU Insurance Ltd v Blakeley* [2015] VSCA 153 at [26].
[39] *Interchase Corporation Ltd (in liq) v FAI General Insurance Company Ltd* (2000) 2 Qd R 301 at 320 (emphasis added).
[40] *Interchase Corporation Ltd (in liq) v FAI General Insurance Company Ltd* (2000) 2 Qd R 301 at 320.
[41] *CGU Insurance Ltd v Blakeley* [2015] VSCA 153 at [38].

48. The Court of Appeal also noted some additional considerations of practical utility, viz: (i) the insureds may change their minds and pursue CGU; (ii) the trustee in bankruptcy (were Mr Crewe to be bankrupt) or the liquidator of Crewe Sharp "may ultimately take a step against CGU" ; and (iii) there is "a real prospect" that if the Liquidators succeed against the insureds that the liquidator of Crewe Sharp or any trustee in bankruptcy of Mr Crewe may be put in funds to pursue CGU for indemnity. The relevant fact is that "no insured has applied to join CGU as a party in the proceeding, or indicated any intention to challenge its denial of liability"[42] and the additional circumstances referred to by the Court of Appeal are, with respect, matters of conjecture.

49. The Court of Appeal also said that "as the trial judge observed" CGU "accepted" that "at least in relation to Mr Crewe" it would be an abuse of process to permit either to litigate the question in subsequent proceedings."[43] That is incorrect. CGU made no such concession.

Res judicata: declaration will not bind parties to the insurance policy

50. The Court of Appeal found it unnecessary to resolve the conflict of authority between the intermediate courts of appeal about whether the declaration sought by the Liquidators about CGU's obligations to Mr Crewe and Crewe Sharp would "finally determine" those rights, because it said that it found the reasoning in "the *Ashmere Cove* proceedings" to be "compelling" on the abuse of process point: [26]. But the Court of Appeal should have held, consistently with the reasoning of the majority in *Interchase*, that the declaration sought would not finally determine the rights of the parties to the insurance policy and would not serve any purpose and that, therefore, declaratory relief could not be given.

51. Whether Mr Crewe or Crewe Sharp are entitled to indemnity under the insurance policy will not be settled "once and for all" by the making of the declaration. As Byrne J (McPherson JA agreeing) explained in *Interchase* at p.317- 8:

> "A judicial determination of the issues pertaining to [the plaintiff's] claim for declaratory relief cannot shut out [the insurer] from litigating about them again as, for example, should [the plaintiff's] damages claims succeed, in proceedings instigated by the liquidator or by [the insured's] trustee claiming indemnity. The order for joinder does proceed on a contrary assumption: viz that a question as to the rights and duties of insurer and insured is concluded by a judgment on such issues between [the plaintiff] and one or other of the insured. This, however, is not the law.
>
> As a result of the joinder, [the insurer], [and the insureds] are co-defendants. But they are not adversaries. The insurer asserts, and both insured appear content to accept, that [the insurer] was entitled to decline indemnity. Among them, there is no controversy. No procedural manoeuvre by [the plaintiff] can alter that state of affairs...So even if [the insurer] remains [joined], the

[42] *CGU Insurance Ltd v Blakeley* [2015] VSCA 153 at [11].
[43] *CGU Insurance Ltd v Blakeley* [2015] VSCA 153 at [26].

litigation is destined to conclude without making adversaries of the defendants among themselves. In short, the rights of the co-defendants *inter se* will not be determined in [the plaintiff's] action".[44]

52. In this case, CGU and the insureds are not "adversaries". They have no extant, or even remotely likely, dispute in relation to CGU's denial of indemnity. As Judd J found as a fact at first instance: "[n]o insured has applied to join CGU, or indicated any intention to challenge its denial of liability".[45] This case is, relevantly, therefore factually indistinguishable from *Interchase*[46] (and *QBE Insurance*, for that matter[47]).

10

Case management principles

53. The Full Court in *Ashmere Cove* and the Full Court in *JN Taylor* (a decision not relied upon by the Court of Appeal[48]) decided that considerations of "practical utility"[49], "efficiency" or case management principles[50] meant that joinder of the insurer in each case should be allowed. In so holding each court regarded the relevant issue as being one that fell ultimately to be determined by reference to considerations of discretion, not law.

54. The Full Court in *Ashmere Cove*, for example, held that "[i]n substance, the effect
20 of the joinder orders made by the primary Judge is no different to the situation involved in the everyday case of an insured joining its insurer as a third party (by

---

[44] See too *Interchase Corporation Ltd (in liq) v FAI General Insurance Company Ltd* (2000) 2 Qd R 301 at 309. 313-315 and 319. In *QBE Insurance* both parties accepted that if the court made the declaration sought that the doctrines of *res judicata*, issue estoppel and *Anshun* would not apply in any subsequent proceedings by the trustee in bankruptcy of the insured against the insurer for indemnity: *QBE Insurance (Australia) Ltd v Lois Nominees Pty Ltd* (2013) 17 ANZ Insurance Cases ¶61-949, [2012] WASCA 186 at [22].

[45] *Blakeley v Crewe Sharp Pty Ltd* [2015] VSC 34 at [11].

[46] In *Interchase*, Byrne J (McPherson JA agreeing) was of the view that that evidence showed that "[t]he insurer asserts, and both insured appear to accept, that [the insurer] was entitled to decline indemnity." *Interchase Corporation Ltd (in liq) v FAI General Insurance Company Ltd* (2000) 2 Qd R 301 at 320 at 317, lines 32-33.

[47] In *QBE Insurance*, neither the insured nor his trustee in bankruptcy sought to cross-claim against the insurer (which had denied liability). See *QBE Insurance (Australia) Ltd v Lois Nominees Pty Ltd* (2013) 17 ANZ Insurance Cases ¶61-949, [2012] WASCA 186 at [12] per McLure P.

[48] The Court of Appeal referred to *JN Taylor* at footnotes 10 and 30, but did not rely on any part of the reasoning of that decision (per King CJ, Prior and Perry JJ agreeing). King CJ expressed the view that "there is no jurisdictional limit" to grant declaratory relief, and that "[t]he court's power to grant relief is only limited by its own discretion" *JN Taylor Holdings Ltd (in liq)* v *Bond* (1993) 59 SASR 432 at 436 (internal quotation omitted). He also said that "there are circumstances which are so contra-indicative to the exercise of the discretion in favour of the grant of declaratory relief that the existence of those circumstances would lead almost inevitably to the exercise of the discretion against the making of the declaration." *Ibid.* It is submitted that those statements are incorrect because, as the High Court said in *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 582 of the *power* to grant declaratory relief, "it is confined by the considerations which mark out the boundaries of judicial power."

[49] *Employers Reinsurance Corporation v Ashmere Cove Pty Ltd* (2008) 166 FCR 398 at 414, [73].

[50] See eg *JN Taylor Holdings Ltd (in liq)* v *Bond* (1993) 59 SASR 432 at 438, 440 and 443.

whatever procedural means may be appropriate in the particular court). This enables issues of liability and assessment of damages or compensation, both as between claimant and insured and as between insured and insurer, to be heard and determined in the one proceeding. There are obvious benefits in terms of efficiency and economy. There is no reason in modern times why form should trump substance, where the interests of justice suggest that all related issues should be resolved in a single proceeding."[51]

55. In *QBE Insurance* McLure P quoted from those critical passages and said: "With the greatest respect, it is difficult to see how that is correct. There was no 'lis' (in the sense of proceedings) between the insured and the insurers nor was there anything to indicate that the indemnity issues would be actively litigated between the co-defendants so as to bind them."[52] In our respectful submission, her Honour's view, which is consistent with the reasoning of the majority in *Interchase*, is correct and is to be preferred.

56. The reasoning of the Full Court in *Ashmere Cove* about "practical utility" is also wrong because the considerations identified by the Full Court as matters of "substance" pay insufficient regard to the fundamental principles governing the circumstances in which jurisdiction to grant declaratory relief may be invoked. Discretionary considerations about the arguable efficiency of a single proceeding should not be permitted to trump a lack of jurisdiction.[53] Even if only viewed as going to discretion, the benefits of "efficiency" relied on by the Full Court in *Ashmere Cove* are far from obvious. As McPherson JA said in *Interchase*: "[E]xperience suggests that, far from serving the demands of convenience, the old Chancery practice of insisting on the joinder of all parties having any conceivable present, future or contingent interest in the outcome of litigation is not one that should be encouraged." But, most importantly for present purposes, no amount of invocation of considerations of supposed efficiencies can make up for a want of jurisdiction because "[t]he question here is...not one of convenience, but of law..."[54]

---

[51] *Employers Reinsurance Corporation v Ashmere Cove Pty Ltd* (2008) 166 FCR 398 at 414, [74].

[52] *QBE Insurance (Australia) Ltd v Lois Nominees Pty Ltd* (2013) 17 ANZ Insurance Cases ¶61-949, [2012] WASCA 186 at [34].

[53] The Full Court in *Ashmere Cove* dealt separately with (and rejected) the insurer's contention that the claim for declaratory relief in that case fell outside the judicial power of the Commonwealth. See *Employers Reinsurance Corporation v Ashmere Cove Pty Ltd* (2008) 166 FCR 398 at 407-412, [41]-[62].

[54] *Interchase Corporation Ltd (in liq) v FAI General Insurance Company Ltd* (2000) 2 Qd R 301 *at* 315 lines 45-46; see too Byrne J at 320-321 ("...the declaration would be in the nature of an advisory opinion, without beneficial effects. It cannot produce useful, "foreseeable consequences for the parties" *and would be refused at trial. The joinder was therefore erroneous*" (citations omitted and emphasis added).

Section 562 of the Corporations Act and Section 117 of the Bankruptcy Act

57. Sections 562 of the *Corporations Act* and 117 of the *Bankruptcy Act* do not confer on a third party a direct right of action against an insurer.[55] That is consistent with the position at common law that a person with no rights in respect of a contract, and who has no claim for relief under it, may not obtain a declaration in respect of it.[56]

58. As this Court explained in *AssetInsure Pty Ltd v New Cap Reinsurance Corp Ltd (in liq)*[57], as long ago as the 1930s Australian legislatures "took a different path" from the English law and "[r]ather than proceed by vesting the insolvent company's rights against the insurer in the third party to whom liability was incurred[58], provision was made in the companies legislation for preferential treatment of such a liability".[59]

59. It is instructive to examine some of the schemes devised by legislatures in different jurisdictions dealing with how, when and on what terms third parties may acquire rights against insurers because they exemplify the type of "irresistible clearness" of language that the Commonwealth Parliament would have adopted had it intended to vest rights in third parties and to permit outsiders to contracts to seek relief that the doctrine of privity otherwise precludes.[60]

60. In NSW, the ACT and New Zealand, for example, legislation allows third parties who have suffered loss due to the fault of a wrongdoer to recover directly from the wrongdoer's insurer by giving to the third party a right to enforce a statutory charge enforceable by way of an action against the insurer. See s6 of the *Law Reform (Miscellaneous Provisions) Act* 1946 (NSW); ss206 and 207 of the *Civil Law (Wrongs) Act* 2002 (ACT); and s9 of the New Zealand *Law Reform Act* 1936.

---

[55] Those provisions create a preferential treatment for the third party creditor over all other creditors. See *Tapp v LawCover Insurance Pty Ltd* [2013] FCA 35 at [13]-[14] per Rares J.

[56] See Meagher, Gummow and Lehane, *Equity, Doctrines and Remedies* (5th ed) at [19-210] and the cases there cited. In *CE Heath Casualty & General Insurance Ltd v Pyramid Building Society (in liq)* [1997] 2 VR 256 per Ormiston JA at 270, expressed "the gravest doubts" about whether it is appropriate to permit an outsider to seek from the court declaratory relief as to the meaning and effect of a contract between two parties who had not themselves raised any issue as to its meaning and effect, but regarded himself as constrained to follow *JN Taylor*. See too *Carpenter v Ebblewhite* [1939] 1 KB 347 at 357-8 per Greer LJ.

[57] *AssetInsure Pty Ltd v New Cap Reinsurance Corp Ltd (in liq)* (2006) 225 CLR 331.

[58] See the *Third Parties (Rights against Insurers)* Act 1930 (UK).

[59] *AssetInsure Pty Ltd v New Cap Reinsurance Corp Ltd (in liq)* (2006) 225 CLR 331, 358, [80]. The legislative history is set out in detail at 357-361, [75]-[86].

[60] See *Potter v Minahan* (1908) 7 CLR 277 at 304 per O'Connor J, quoting from *Maxwell on Statutes* (4th ed), p. 121: "It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law without expressing its intention with irresistible clearness..." See also *Bropho v State of Western Australia* (1990) 171 CLR 1, 18; *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, 259, [15].

61. In the UK, the *Third Parties (Rights against Insurers) Act* 2010 (UK) (the ***2010 Act***) will replace the *Third Parties (Rights against Insurers) Act* 1930 (UK) (the ***1930 Act***).[61] Under the 1930 Act, the third party cannot sue the insurer until liability is established. Under sub-section 1(3) of the 2010 Act the third party will be able to bring proceedings against the insurer and in those same proceedings establish the insured's liability to the third party.

62. In South Africa, when an insured is insolvent, section 156 of the *Insolvency Act* 1936 expressly provides a third party with an entitlement to bring an action to recover from an insurer the amount of the insured's liability towards the third party (but not exceeding the maximum amount for which the insurer has bound itself to indemnify the insured).

63. In Canada, once a third party has obtained a judgment against the insured and the insured fails to satisfy that judgment, the third party may, subject to the specific terms of the largely similar provincial legislation, proceed against the insurer.[62]

64. It would be passing strange if s562 of the *Corporations Act* and s117 of the *Bankruptcy Act*, which are priority provisions, were to be construed as vesting the same or a similar right in third parties that legislatures in other jurisdictions have expressly provided for. But that is precisely the effect of the case for which the Liquidators contend.

65. Further, s601AG of the *Corporations Act* (which provides a person with a right of recovery against an insurer of a deregistered company), s48 of the *Insurance Contracts Act* 1984 (Cth) (which confers a statutory right of recovery upon a non-party referred to or specified in a general contract of insurance) and s51 of the *Insurance Contracts Act* (which provides a person with a right of recovery against an insurer where the insured or third party beneficiary has died or cannot be found) each demonstrates that when Parliament does provide third parties with rights of action, it does so, unsurprisingly, using the clearest of language.

The relevant interest is contingent/hypothetical

66. A further reason why no power exists to grant the declaratory relief sought by the Liquidators is that the relief is claimed in respect of circumstances that have not occurred and might never happen: *Kuczborski v Queensland* (2014) 314 ALR 528 at [6] (citing *Ainsworth*), [183]; *Interchase* per McPherson JA at 314.

---

[61] The 2010 Act has received Royal Assent but it has not yet come into force.

[62] See e.g., in British Columbia s25 of the *Insurance Act*; in Alberta s534 of the *Insurance Act*; in Manitoba s127 of the *Insurance Act*; in New Brunswick s104 of the *Insurance Act*; in Newfoundland and Labrador s13 of the *Insurance Contracts Act*, in Nova Scotia s28 of the *Insurance Act*, in Saskatchewan, s122 of the *Saskatchewan Insurance Act* and in Ontario s132 of the *Insurance Act*.

67. Specifically, the Liquidators need to succeed in their claims against Mr Crewe or Crewe Sharp; Mr Crewe must become a bankrupt, because it is only if he becomes bankrupt that the Liquidators will be entitled to recover from his trustee any insurance proceeds paid; and the trustee in bankruptcy or the liquidator of Crewe Sharp would then need to decide to pursue CGU for indemnity and obtain an order that CGU pay the insurance proceeds to the trustee and/or the liquidator of Crewe Sharp.

Not a matter for trial

68. The Court of Appeal was, with respect, also wrong to regard CGU's contention that the Court lacks jurisdiction to make the declaration as raising questions more appropriate for determination at trial.[63]

69. CGU did not contend that the discretion of the judge at first instance had miscarried.[64] Nor did CGU's case have anything to do with "[w]hether the court that ultimately hears the trial of this proceeding grants relief against CGU"[65] or "[w]hether there are ultimately grounds for a declaration being made against CGU".[66] CGU's contention was (and is) that "the Court has 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 and duties under that contract." That submission, recorded in the Court of Appeal's reasons at [21], did not rely upon any question about whether declaratory relief should be granted. It raised considerations relating only to the anterior question whether the Court has the power to make the declaration. And the Court of Appeal ought to have decided that question without reference to any question or speculation concerning the eventual propriety of making a declaration: See *Bray v F Hoffman – La Roche Ltd* (2003) 130 FCR 317 at 370, [239] per Finkelstein J ("[I]f a query about jurisdiction is raised...the court must satisfy itself that it has jurisdiction before it proceeds any further with the matter") and *Re Tooth & Co Ltd* [1978] 31

---

[63] *CGU Insurance Ltd v Blakeley* [2015] VSCA 153 at [37], [38].

[64] The Court of Appeal said at [33] that to the extent that CGU submitted that the judge's discretion miscarried, "that submission must be rejected." CGU made no such submission.

[65] *CGU Insurance Ltd v Blakeley* [2015] VSCA 153 at [37].

[66] *CGU Insurance Ltd v Blakeley* [2015] VSCA 153 at [38]. At footnote 21, the Court of Appeal said: "CGU did not contest the jurisdiction of the Court to order joinder. It is plain that joinder could be ordered in respect of a claim notwithstanding that there may be doubt as to the Court's ultimate jurisdiction to grant the relief sought. The joinder would enable the Court to exercise the implied jurisdiction every court enjoys to determine whether it actually has jurisdiction: see Mark Leeming, *Authority to Decide – The Law of Jurisdiction in Australia* (Federation Press, 2012) 33ff" (***Leeming***). Each of those three statements is, with respect, wrong. CGU did contest the jurisdiction of the Court to order joinder. Want of jurisdiction was the precise basis upon which CGU opposed the orders sought by the Liquidators. The second sentence is, with great respect, also incorrect. It is the Court's first obligation to resolve any such doubt: *Hazeldell Ltd v Commonwealth* (1924) 34 CLR 442 at 446 per Isaacs ACJ; *Bray v F Hoffman – La Roche Ltd* (2003) 130 FCR 317 at 370, [239]. As to the third sentence, joinder is not necessary to determine whether a court "actually" has jurisdiction, because courts have jurisdiction to determine whether they have jurisdiction. See Leeming, section 2.5 headed "Jurisdiction to determine a court's own jurisdiction" at pp33ff.

FLR 314 at 330 per Brennan J ("Antecedent to any question of the propriety of making a declaration is the question of the power to make it)."[67]

70. The Court of Appeal also wrongly regarded the question of whether the Court has authority to make the declaration as "pertaining to practice and procedure". [68] It observed that "...every court exercising jurisdiction in Victoria in any civil proceeding must exercise its jurisdiction so that all matters in dispute between the parties are completely and finally determined 'and all multiplicity of proceedings concerning any of those matters is avoided' (citing *Supreme Court Act* 1986, s29)" and that "[f]urther, the *Civil Procedure Act* 2010 mandates the just, efficient, timely and cost-effective resolution of civil proceedings".[69] If these observations are to be read as standing for the proposition that the need to avoid multiplicity of proceedings and to ensure the just, efficient, timely and cost-effective resolution of civil proceedings are grounds for the existence of jurisdiction where it otherwise would not exist, the observations cannot, with great respect, be correct.

71. Further, the Court of Appeal's observations about the "exercise" of jurisdiction suggest that the Court failed to distinguish the anterior jurisdictional question, whether it had "authority to decide", from the question of what powers may be used or invoked if jurisdiction is established. It is, with respect, wrong to confuse those two quite distinct issues. See, for example, *Minister for Immigration and Multicultural and Indigenous Affairs v B* (2003) 219 CLR 365 at 377, [6] per Toohey J ("In a legal context the primary meaning of jurisdiction is "authority to decide". It is to be distinguished from the powers that a court may use in the exercise of its jurisdiction").[70]

The Liquidators have declined to fund cross claim by the insureds against CGU

72. As McLure P pointed out in *QBE Insurance* "there are alternative routes by which the [insurer's] denial of liability could be litigated."[71] One alternative is for the Liquidators to place the insureds in funds to bring a cross-claim against CGU.[72] For reasons only the Liquidators can explain, they have chosen not to do so. This consideration is important because it goes to what McLure P in *QBE Insurance*

---

[67] The decisions in *Interchase*, *JN Taylor* and *Ashmere Cove* are appeals from orders joining an insurer for the purpose of a plaintiff seeking declaratory relief. In each case, the court did not defer that question to trial. See also Leeming, pp 35-36, 41-42.
[68] *CGU Insurance Ltd v Blakeley* [2015] VSCA 153 at [39].
[69] *CGU Insurance Ltd v Blakeley* [2015] VSCA 153 at [36].
[70] Internal citations omitted. See also *Minister for Immigration and Multicultural and Indigenous Affairs v B* (2003) 219 CLR 365 at 377, [69] per Gummow, Hayne and Heydon JJ)
[71] *QBE Insurance (Australia) Ltd v Lois Nominees Pty Ltd* (2013) 17 ANZ Insurance Cases ¶61-949, [2012] WASCA of Appeal 186, [16].
[72] *QBE Insurance (Australia) Ltd v Lois Nominees Pty Ltd* (2013) 17 ANZ Insurance Cases ¶61-949, [2012] WASCA of Appeal 186, [16].

correctly described as "coherence." [73] As McLure P points out: "An insured defendant who elects not to issue third party proceedings against his insurer is not, in the event he is found liable to the plaintiff, prevented by the doctrines of *Anshun* estoppel or abuse of process or otherwise from commencing indemnity proceedings against his insurer. Moreover, the judgment creditor, notwithstanding his commercial interest in the outcome of the indemnity proceedings, has no sufficient standing to be made a party to the indemnity proceedings...It is also relevant in the exercise of the discretion to refuse a declaration that there are alternative conventional routes to a claim against the appellants." [74]

10

Part VII: Applicable legislation and regulations

73. The relevant legislative provisions are attached as Annexure A.

Part VIII: Precise form of orders sought by the appellant

74. The Appellant seeks the following orders:

20

1. The appeal be allowed.
2. Set aside orders 2 and 3 of the Court of Appeal of the Supreme Court of Victoria made on 19 June 2015 and in their place order that:
   (a) the appeal be allowed;
   (b) the issue of the costs of the appeal (including the costs of the application for leave to appeal) be remitted to the trial judge for determination.
3. Set aside orders 2 and 3 made by the Honourable Justice Judd J on 13 February 2015 and remit the issue of the costs of the joinder application to the trial judge for determination.
4. The first respondents pay the appellant's costs of the appeal and of the application for special leave to appeal.

30

40

[73] *QBE Insurance (Australia) Ltd v Lois Nominees Pty Ltd* (2013) 17 ANZ Insurance Cases ¶61-949, [2012] WASCA of Appeal 186, [49].
[74] *QBE Insurance (Australia) Ltd v Lois Nominees Pty Ltd* (2013) 17 ANZ Insurance Cases ¶61-949, [2012] WASCA of Appeal 186, [49].

Part IX: Estimate of oral argument

75. The appellant estimates that 2 hours will be required for the presentation of its oral argument.

Dated: 16 October 2015

DJ O'CALLAGHAN

Aickin Chambers
Tel (03) 9225 8271
Email: greenbaypackers@vicbar.com.au

RENEE L ENBOM

Owen Dixon Chambers West
Tel (03) 9225 8793
Email: renbom@vicbar.com.au

HELEN A TIPLADY

Ninian Stephen Chambers
Tel (03) 9225 6240
Email: helen.tiplady@vicbar.com.au

ANNEXURE A

Section 562 of the *Corporations Act* 2001 (Cth):

Application of proceeds of contracts of insurance

(1) Where a company is, under a contract of insurance (not being a contract of reinsurance) entered into before the relevant date, insured against liability to third parties, then, if such a liability is incurred by the company (whether before or after the relevant date) and an amount in respect of that liability has been or is received by the company or the liquidator from the insurer, the amount must, after deducting any expenses of or incidental to getting in that amount, be paid by the liquidator to the third party in respect of whom the liability was incurred to the extent necessary to discharge that liability, or any part of that liability remaining undischarged, in priority to all payments in respect of the debts mentioned in section 556.

(2) If the liability of the insurer to the company is less than the liability of the company to the third party, subsection (1) does not limit the rights of the third party in respect of the balance.

(3) This section has effect notwithstanding any agreement to the contrary.

Section 117 of the *Bankruptcy Act* 1966 (Cth):

Policies of insurance against liabilities to third parties

(1) Where:

(a) a bankrupt is or was insured under a contract of insurance against liabilities to third parties; and

(b) a liability against which he or she is or was so insured has been incurred (whether before or after he or she became a bankrupt);

the right of the bankrupt to indemnity under the policy vests in the trustee and any amount received by the trustee from the insurer under the policy in respect of the liability shall, if the liability has not already been satisfied, be paid in full forthwith to the third party to whom it has been incurred.

(2) Subsection (1) does not limit the rights of the third party in respect of any balance due to him or her after the payment referred to in that subsection has been made.

(3) This section applies notwithstanding any agreement to the contrary, whether entered into before or after the commencement of this Act.

Section 36 of the *Supreme Court Act* 1986 (Vic):

Declaratory judgments

A proceeding is not open to objection on the ground that a merely declaratory judgment is sought, and the Court may make binding declarations of right without granting consequential relief.