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

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

BETWEEN:

10

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)
20 First Respondents

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

TREVOR PAUL CREWE
Third Respondent

ROBERT MARK SILL
Fourth Respondent

30

JOHN MARTIN SILL
Fifth Respondent

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

40

APPELLANT'S REPLY

Date of document: 20 November 2015
Filed on behalf of the Appellant by:
NORTON ROSE FULBRIGHT AUSTRALIA
Level 15, RACV Tower, 485 Bourke Street
Melbourne VIC 3001

Tel: +61 3 8686 6000
Fax: +61 3 8686 6505
Ref: Nicole Wearne

Part I: Publication

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

Part II: Argument

2. ***The first and second respondents' submission:*** Akron and its liquidators (collectively, **the Liquidators**) contend that s562 of the *Corporations Act* and s117 of the *Bankruptcy Act* "permeate every aspect" of their application to join CGU for declaratory relief and "provide an answer to every argument made by CGU" (First and Second Respondents' Submissions (**LS**) at [9]).[1]

3. As their submissions make clear (see LS at [9]-[17],[20]-[21]) the Liquidators' case for a declaration that CGU is liable to indemnify Crewe Sharp and Mr Crewe rests entirely on the construction of s562 and s117 contended for.

4. The Liquidators concede that neither s562 nor s117 "in terms" vest in a third party any rights that an insolvent or bankrupt insured may have against an insurer (LS at [11]). They submit instead that the Court has jurisdiction to make the declaration sought because "the effect of the application" of those provisions "confer[s] on the third party a legal right to the proceeds of the policy" and that "[o]nce the insured is in liquidation or in bankruptcy, the provisions operate to give the claimant a direct claim to the insurance proceeds" (LS11); that by reason of those provisions, CGU's "obligation to indemnify the insured...would be an obligation to pay Akron" (LS at 15); and that "in order to avoid circuity of action it is implicit that a third party is entitled to seek to enforce the right directly against the insurer..." (LS at 11). It follows, so it is submitted, that the Liquidators have "a sufficient interest [to seek a declaration], namely their right to payment of the policy proceeds under s562 and s117 upon obtaining judgment against Crewe Sharp and Mr Crewe" (LS at 13).

5. The construction of the provisions contended for by the Liquidators is untenable. In the absence of any other alleged basis for the existence of a justiciable controversy, it follows, from the Liquidators own submissions, that the Court has no jurisdiction to grant the declaration.

6. The Liquidators are unable to point to any words in either provision that provide a textual basis for their submissions that their "effect" is to confer a relevant right, or to convert the contractual obligation under a policy of insurance to indemnify the insured into an obligation to pay a third party or that "it is implicit" that they can enforce the policy directly against CGU. Absent any suggestion (not advanced) that context or legislative history[2] mean that the words of the sections must be

---

[1] The Liquidators' reliance on the reasoning of the Court of Appeal is limited: See LS at footnotes 5, 22, 27, 39, 41, 47.

[2] The legislative history is to the contrary. See *AssetInsure Pty Ltd v New Cap Reinsurance Corp Ltd (in liq)* (2006) 225 CLR 331, 358, [80]; s264(7) of the *Companies Act (Vic)* 1938 and s297(5) of the *Companies Act* 1936 (NSW); s84(1A) of the *Bankruptcy Act* (Cth) 1924 -1932.

construed other than their according to their plain meaning, that shortcoming is fatal.[3]

7. Further, on the only occasion when the Liquidators purport to quote any significant part of the legislation that is said to "permeate[] every aspect" of their application to join CGU, they misquote it and add words that it does not contain. That single quote reads: "The 'third party to whom the liability was incurred,' has a right to payment of 'an amount in respect of that liability [which] has been or is received by the company or the liquidator [or the trustee in bankruptcy] from the insurer.'" (LS at 11). Three points arise. First, the critical words "has a right to payment of" are not found in either s562 or s117. Secondly, neither s562 nor s117 use the words "third party to whom the liability was incurred." Thirdly, the Liquidators quote only from a small part of the words of the provisions. As a consequence, their submissions do not, as they must, construe "the words the legislature has enacted": *Taylor v Owners-Strata Plan No 11564* (2014) 253 CLR 531, 549, [39].

8. Section 562 prescribes what a liquidator is to do with a receipt of insurance proceeds. Section 117 makes a similar provision with respect to a bankrupt.[4] Section 562 says that if the various steps that it provides for occur – that is to say, if the company (here, Crewe Sharp) is insured against liabilities to third parties, and if such liability is incurred, and if an amount in respect of that liability is received by the company or the liquidator from the insurer – then the liquidator, after deducting their expenses of getting in that amount, must pay the amount remaining to the third party to the extent necessary to discharge the liability, in priority to all payments of debts mentioned in s556. No permissible approach to the construction of those words "effectively" confers upon the third party a right to the proceeds of the insurance policy or "impliedly" permits the third party directly to enforce that alleged right.

9. It is not "circuitous" to require payment of an amount by an insurer to a liquidator or trustee, and then a payment by them to the third party.[5] See s117 ("the right of the bankrupt to indemnity under the policy vests in the trustee who must pay the proceeds to the third party"[6]) and s562 (if…an amount is received by the company or the liquidator from the insurer, the amount must…be paid by the liquidator to the third party…")

10. Another telling indicator that the alleged "right" to any insurance proceeds and the entitlement to enforce that right directly against CGU is not conferred by s562 (or

---

[3] "This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the [statutory] text. So must the task of statutory construction end." *Thiess v Collector of Customs* (2014) 250 CLR 664 at 671, [22], citing *FCT v Consolidated Media Holdings Ltd* (2012) 250 CLR 503 at 519, [39].

[4] See *Tapp v LawCover Insurance Pty Ltd* [2013] FCA 35 at [13] per Rares J.

[5] Cf. *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574 at 609.

[6] It is unclear in any event how the Liquidators say that the insurance proceeds would end up in the hands of a trustee. If the Liquidators are correct that CGU would, upon a declaration being made, be obliged to pay the insurance proceeds to Mr Crewe (see Liquidators' Submissions at [16]) then he would receive such proceeds *before* any bankruptcy.

s117), is that the Liquidators do not seek to enforce any such right.[7] The only relevant relief sought by the Liquidators is the declaration (which, it is submitted, is inutile in any event) that "[CGU] is liable to indemnify [Mr. Crewe] and [Crewe Sharp] in respect of any judgment herein obtained by [the Liquidators] against [Mr Crewe] and [Crewe Sharp] to pay to the Liquidators."[8] That proposed declaration is about the right of someone else to receive any insurance proceeds. And that is impermissible because a person must seek declaratory relief about their own immediate rights and obligations. See *Kuczborski v Queensland* (2014) 254 CLR 51 at 87, [99], 108, [182], 109, [184], 130, [278].

11. ***Interchase/QBE/Ashmere Cove*:** As to the conflicting decisions of the intermediate courts of appeal, the Liquidators confine themselves to the bald assertion that "[t]here is no reason to doubt the correctness of the Full Federal Court's holding in *Ashmere Cove*" (LS at 21). But there *is* reason to doubt the holding, because, as CGU has submitted, it is at odds with the detailed reasoning to the contrary in the judgments of the majority in *Interchase* and the judgment of McClure P in *QBE*, about which the Liquidators say virtually nothing.

12. Rather than dealing with the substance of that reasoning to the contrary, the Liquidators instead seek to distinguish it, on a number of narrow grounds. Each is misconceived. As to *Interchase*, they submit first that it "concerned" joinder under an earlier, narrower joinder rule (LS at 26). That much is true, but the rule had nothing to do with the substance of reasoning of Byrne J and McPherson JA that CGU relies on here. Secondly, they submit that the insureds in *Interchase* were not yet in liquidation or bankruptcy (LS at 27). That is not a point of distinction. The insureds in *Interchase* "[did] not have assets sufficient to justify Interchase's proceeding to trial..."[9] They are thus in precisely the same position as Crewe Sharp and Mr Crewe, both of whom, as the Liquidators are at pains to point out, will not be able to satisfy a judgment (LS at 5). Thirdly, the Liquidators contend that *Interchase* is different because the insured "appeared content to accept" that the insurer was entitled to decline indemnity (LS at 28). But that is precisely the state of affairs that exists in this case. As the Court of Appeal noted, "[n]either Crewe Sharp nor Mr Crewe have indicated any intention to challenge CGU's denial of liability."[10] Fourthly, the Liquidators seek to distinguish *Interchase* because the claimant in that case accepted that s562 and s117 did not accord it standing and that "[n]o such concession is made" by the Liquidators here (LS at 29). The majority reasoning did not, however, turn on that concession, so it was irrelevant.

---

[7] In *Interchase*, the plaintiff originally also sought an order for "payment" by the insurer. The plaintiff later accepted that it had no right to such an order, whether it was understood as payment to the insureds or to Interchase. See *Interchase Corporation Ltd (in liq) v FAI General Insurance Company Ltd* (2000) 2 Qd R 301 at 316, footnote 1, per Byrne J.

[8] See para A of the prayer for relief of the Liquidators' Second Further Amended Points of Claim.

[9] *Interchase Corporation Ltd (in liq) v FAI General Insurance Company Ltd* (2000) 2 Qd R 301 at 316. They were thus in exactly the same position as Mr Crewe (who is not bankrupt).

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

13. The Liquidators also seek to distinguish McLure P's judgment in *QBE* on the ground that it "was based on" a concession made by the parties that *res judicata*, issue estoppel and *Anshun* would not apply in any later proceedings (LS at 30). But that is not what McLure P said.[11] The critical part of her Honour's reasons is at [33]-[36], where (at [34] in particular) she says that the decision of the Full Court in *Ashmere Cove* is wrong because there was in that case, as in *QBE*, "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." It followed that there was no justiciable controversy and no jurisdiction to grant declaratory relief.[12] That reasoning does not depend at all on any concession made by counsel. It follows that *QBE* is relevantly on all fours with this case.

14. ***Abuse of process:*** On the question of whether any subsequent proceeding would constitute an abuse of process, the Liquidators again ignore CGU's submissions.[13] Instead of addressing CGU's submissions, they merely repeat observations of the primary judge in *Ashmere Cove* that "the practical effect of making a declaration would be to resolve the issue between insured and insurer" and that "it would be an abuse of process to permit either to litigate the question in subsequent proceedings", as if that were the end of the matter. They also repeat what the Court of Appeal said below about allowing separate proceedings being contrary to "the way courts are expected to exercise their jurisdiction in the modern world" (LS at 31), again ignoring CGU's submission on the point.[14]

15. The Liquidators cite a number of other cases, including a decision of the U.S. Supreme Court, in an endeavour to meet CGU's contention that whether it would be an abuse of process for it to re-litigate issues cannot be determined until after trial (LS at 32). But none of the cases cited actually concerns that question.[15]

16. Further, the course that any trial with CGU as a party would take would be subject to many variables. It is unlikely that Crewe Sharp will participate in any trial[16] and if Mr Crewe's current financial position is as dire as the Liquidators suggest (LS at fn 1), it is possible that he will not participate either. CGU has also pleaded non-disclosure defences.[17] Such considerations make the task of determining in advance

---

[11] *QBE Insurance (Australia) Ltd v Lois Nominees Pty Ltd* (2013) 17 ANZ Insurance Cases ¶61-949, [2012] WASCA 186 at [22]-[26].

[12] *QBE Insurance (Australia) Ltd v Lois Nominees Pty Ltd* (2013) 17 ANZ Insurance Cases ¶61-949, [2012] WASCA 186 at [36].

[13] See Appellant's Submissions at [40]-[49].

[14] See Appellant's Submissions for example at [30] and [71].

[15] See also Restatement, *Judgments* 2d, §29(3) and Reporter's Note on Comment e at p301 (1982), cited, along with *Parklane Hosiery Co v Shore* 439 US 322, 329-331 (1979), by way of comparison, by Byrne J in *Interchase Corporation Ltd (in liq) v FAI General Insurance Company Ltd* (2000) 2 Qd R 301 at 320, footnote 21.

[16] See email dated 20 June 2014 from Pitcher Partners, the liquidators of Crewe Sharp, to Mr Blakeley.

[17] See CGU's Defence to Second Further Amended Points of Claim at paragraphs 31-31I.

whether and to what extent CGU would or would not be precluded from re-litigating questions in any subsequent litigation impossible.

17. ***Res judicata***: The Liquidators ignore CGU's submission that the Court of Appeal was wrong not to address and resolve the conflict of authority between the intermediate courts of appeal about whether the declaration would "finally determine" rights as between the insurer and the insured. Other than an assertion (LS at 31) that the declaration *will* finally determine the rights of the parties to the insurance policy, they say nothing about the issue. In particular they do not address any part of the reasoning in *Interchase* at p.317- 8 relied upon by CGU[18] for the proposition that 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, including because CGU and the insureds are not "adversaries".

18. ***The position in the UK:*** The Liquidators cite Lord Woolf and J Woolf, *The Declaratory Judgment*, (4th ed, Sweet & Maxwell, London 2011) for the proposition that the word "right" (contained in s36 of the *Supreme Court Act* 1986 (Vic)) is a "protean" word. They also cite two first instance English decisions for a proposition that a declaration may be granted if a party's interest is "affected" (LS 19). In *Gouriet v Union of Post Office Workers* [1978] AC 435 at 501 Lord Diplock said at 501 that "the jurisdiction...is not to declare the law generally or to give advisory opinions; it is confined to declaring contested legal rights, subsisting or future, of the parties represented in the litigation before it and not those of anyone else."[19] See also *Meadows Indemnity Co Ltd v The Insurance Corp of Ireland plc* [1989] 2 Lloyd's Rep 298. Whether and to what extent the position in England has "moved on" since those decisions is debated.[20] In any event, the relevance to this appeal of the English materials cited by the Liquidators is not readily apparent.

Dated: 20 November 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

Counsel for the Appellant

[18] See Appellant's Submissions for example at [50] and [51].
[19] See also *Gouriet v Union of Post Office Workers* [1978] AC 435 at 483, 515 and 522.
[20] Compare *The Declaratory Judgment* at 3-26ff with Meagher, Gummow and Lehane's *Equity Doctrines and Remedies* (5th ed. 2015) at [19-205] ("The suggestion that the law has moved on is concerning..."). The new English rule also "does not expressly state that a declaration has to be of 'rights'". See *The Declaratory Judgment* at 3-23. The position in this country is, of course, otherwise: see by way of example only s36 of the *Supreme Court Act* (Vic) 1986.