



HIGH COURT OF AUSTRALIA

Public Information Officer

7 April 2005

JOHN DAVID RICH v CGU INSURANCE LIMITED
MARK ALAN SILBERMANN v CGU INSURANCE LIMITED

The High Court of Australia today rescinded the special leave granted to Mr Rich and Mr Silbermann to appeal against a ruling that they were not entitled to insurance indemnity for their legal costs.

Mr Rich and Mr Silbermann are former directors of One.Tel Ltd, which went into liquidation in 2001. Following an investigation into One.Tel's collapse, the Australian Securities and Investments Commission instituted proceedings in the New South Wales Supreme Court relating to possible serious breaches of their duties as directors. Mr Rich and Mr Silbermann are also defending a claim by American Express in relation to credit card use. They have incurred substantial legal costs. CGU has refused to indemnify them for these costs under a Directors and Officers Liability Insurance Policy issued in 2000. CGU claimed an exclusion clause covering dishonesty and fraud by directors applied in relation to the alleged wrongful acts and that the insurance contract had been validly avoided under the *Insurance Contracts Act* because of both fraudulent non-disclosure and fraudulent misrepresentation.

In the Supreme Court, Mr Rich and Mr Silbermann, along with former chairman John Greaves, sought orders that CGU advance the defence costs already incurred and to be incurred. Justice Peter McClellan found against them, answering three questions in favour of CGU. The Court of Appeal dismissed the appeals. Mr Rich and Mr Silbermann were then granted special leave to appeal to the High Court on the ground that the Court of Appeal had erred in upholding the affirmative answer to the first of the three questions. (Mr Greaves did not seek special leave.) Question 1 asked whether CGU could plead the exclusion clause as a defence to the claim for indemnity costs in the absence of a judgment, order or other final adjudication adverse to Mr Rich and Mr Silbermann.

The High Court unanimously ordered that special leave be rescinded, with costs borne by Mr Rich and Mr Silbermann. The Court held that it was being asked to consider hypothetical issues, because Mr Rich and Mr Silbermann chose not to appeal against the answers to questions 2 and 3 which were favourable to CGU. If the High Court were to hold in answer to question 1 that CGU could not rely on the exclusion clause before a final judgment establishing fraud or dishonesty, this would still not produce the result sought by Mr Rich and Mr Silbermann, namely funds being advanced to them before the determination of defences raised by CGU. This is because, under question 2, CGU could always seek judgment in its favour in the Supreme Court and thereby refuse liability under the exclusion clause.

This indicates that the strategy proposed by Mr Rich and Mr Silbermann was misconceived. They proposed that if the High Court answered question 1 in their favour they could seek summary judgment in the principal proceedings against CGU and a consequent order for defence costs to be advanced, postponing issues of dishonesty and fraud until final adjudication of a cross-claim by CGU based on the answer to question 2. The Court rejected this for two reasons. Issues raised in proceedings are not to be determined summarily except in the clearest of cases, and any order for advance payment, if made independently of an order determining CGU's cross-claim, would offend the principles respecting avoidance of circularity of action in litigation. Accordingly, special leave to appeal was rescinded.

- *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.*