

High Court confirms third party claimants can join insurers to proceedings

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What happened?

- + In a judgment handed down yesterday,¹ the High Court considered the vexed issue of whether a third party claimant may join an insurer to Court proceedings against an insured for the purpose of challenging an insurer's decision to decline cover.
- + After reviewing conflicting authorities from intermediate Courts, the High Court held that, by virtue of provisions in the **Corporations Act 2001 (Cth)**² and **Bankruptcy Act 1966 (Cth)**,³ a third party claimant has a sufficient interest in an insurer's liability to indemnify an insolvent or potentially insolvent insured to enable that claimant to join the insurer to the Court proceedings. The third party claimant can thereby challenge the indemnity decision by seeking declaratory relief against the insurer.

What does it mean?

- + The decision clarifies a claimant's right in an insolvency context to join an insurer to proceedings against an insured for the purpose of challenging a declination.
- + Insurers can expect to be a party to proceedings against an insolvent insured where cover has been declined in contentious circumstances.
- + Insurers can expect an increase in requests for insurance details in circumstances where the capacity of an insured defendant to satisfy a judgment is in doubt.
- + The limits of the decision in terms of its application to potentially insolvent insured defendants will pose some challenges.

BACKGROUND

By its liquidators, Akron Roads Pty Ltd (in liquidation) (**Akron**) commenced proceedings in the Victorian Supreme Court against its former directors, Trevor Crewe (**Crewe**) and Crewe Sharp Pty Ltd (**CS**), amongst others, in respect of loss resulting from alleged insolvent trading by Akron.

CS held professional indemnity insurance with CGU Insurance Limited (**CGU**), which also provided cover to Crewe. The insurance provided cover to CS and Crewe in respect of civil liability they incurred in the conduct of their professional services as management consultants. Crewe and CS sought indemnity from CGU in respect of Akron's claims. CGU declined to indemnify on the basis of directors and officers and trading debts exclusions in the policy.

¹ *CGU Insurance v Blakeley* [2016] HCA 2

² Section 562

³ Section 117

During the course of the proceedings, CS entered into liquidation. Crewe remained solvent but the evidence indicated he would not be able to satisfy judgment against him in the event Akron's claim was successful.

Akron applied to the Court to join CGU to the proceeding as a defendant. As against CGU, Akron intended to seek a declaration that CGU was liable to indemnify CS and Crewe under the policy in respect of any judgment obtained by Akron against them in the proceeding.

CGU opposed the joinder application.

CS, which by that stage was in liquidation, did not take a position in relation to the application. Crewe consented to the joinder of CGU to the proceeding on the basis that he disagreed with CGU's decision, but did not pursue a claim against CGU himself.

THE ISSUE

The central issue considered in the case was whether there was a "*justiciable controversy*" between Akron and CGU such that the Court had power to provide declaratory relief in respect of it, and Akron could join CGU to the proceedings.

Before the Supreme Court, Akron argued that it had a sufficient interest in the determination of CGU's liability to CS and Crewe to support the claim for a declaration and the joinder of CGU as a party to the proceedings, despite the fact that neither CS nor Crewe intended to pursue a determination of that question. Akron submitted that its interest derived from section 562 of the *Corporations Act 2001* which gives any third party to whom an insolvent company is liable a priority to any insurance funds paid in respect of that liability. An equivalent provision in respect of insured natural persons is contained in section 117 of the *Bankruptcy Act 1966*, which Akron contended would apply if Crewe entered into bankruptcy.

However, those sections do not give a third party claimant a direct cause of action against the insurer.

CGU opposed the application and submitted that there was no justiciable controversy because there was no claim against it by CS or Crewe. CGU submitted that if Akron's application was allowed, the Court would effectively be asked to determine the meaning and effect of a private contract between parties who were not pursuing any claim under that contract. CGU also submitted that Akron's interest pursuant to the *Corporations Act* and *Bankruptcy Act* was hypothetical and contingent upon Crewe and CS successfully establishing an entitlement to indemnity under the Policy (and, in Crewe's case, him entering bankruptcy).

In the first instance,⁴ the Court granted Akron's application and ordered that CGU be joined to the proceedings. In determining the matter, the Court held that, by virtue of section 562 of the *Corporations Act*, Akron had a sufficient interest in the proceeds of the insurance such that there was a justiciable controversy and joined CGU to the proceeding, allowing Akron to seek declaratory relief against it.

The Court of Appeal upheld the trial Judge's decision.⁵

A common theme across the trial Judge's and the Court of Appeal's decision was the advantages of avoiding a multiplicity of proceedings and case management considerations by joining CGU to the proceedings.

⁴ *Akron Roads Pty Ltd (in liq) v Crewe Sharp & Ors* [2015] VSC 34

⁵ *CGU Insurance Ltd v Blakeley & Ors* [2015] VSCA 153

HIGH COURT DECISION

CGU successfully applied for leave to appeal to the High Court and the appeal was heard on 9 December 2015. The High Court unanimously dismissed the appeal and found that the Supreme Court had power to determine Akron's claim against CGU, such that the joinder was properly allowed.

In dismissing the appeal, the Court:

1. characterised Akron's claim against CGU as arising from the legal consequences created by the *Corporations Act* if CGU was liable to indemnify CS and (though expressed as "more contingently") the equivalent provision of the *Bankruptcy Act*, rather than any incursion upon the privity of the insurance contract;
2. held that the interest created by the *Corporations Act* and the *Bankruptcy Act*, and CGU's denial of liability under the policy, were sufficient to give rise to a justiciable controversy between Akron and CGU; and
3. found that the declaration sought by Akron, if granted, would be binding as between Akron and CGU, and it was unlikely that either CS and Crewe or CGU would be permitted to re-litigate any issues in subsequent proceedings which had or should properly have been agitated in Akron's proceedings against CGU.

IMPLICATIONS

The joinder of insurers to proceedings by claimants is not a new issue, with most Courts having prioritised practical considerations to allow the joinder of insurers, despite there being conflicting authority at an appellate level as to the claimant's ability to seek relief directly against the insurer. This practical approach has now been confirmed by the High Court. Accordingly, there is no impediment to compelling an insurer of an insolvent, or potentially insolvent, defendant to participate in the proceedings in the defence of an indemnity decision.

The potential costs consequences of this decision are significant as, in the usual course, the insurer will not be able to obtain a determination of its liability to indemnify the insured until the trial of the claimant's claim against the insured. Moreover, it thrusts the insurer into a far more central role in litigation where an indemnity decision is regarded as contentious.

The High Court's decision is also likely to give rise to an increase in the frequency and scope of requests for a defendant's insurance details. Typically, an insured's insolvency was the trigger for insurance issues to be ventilated and policy documents to be disclosed. However, the Court's acceptance of the relevant provisions of the *Bankruptcy Act* as giving Akron a sufficient interest in Crewe's insurance position to enable it to seek a declaration against CGU, despite Crewe not being bankrupt, arguably extends the circumstances in which a third party may assert a legitimate interest in a defendant's insurance arrangements and, therefore, a right to disclosure of the insurance position.

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