

IT'S UNANIMOUS: HIGH COURT SAYS LIQUIDATORS CAN JOIN INSURERS

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Legal Briefings - By **Alan Mitchell** and **Lisa Filippin**

EXECUTIVE SUMMARY

On 11 February 2016 the High Court delivered a unanimous judgment¹ which clears the path for liquidators and others to join insurers of defendants to proceedings, enabling the determination at the same trial as to whether an insurer has an obligation to indemnify defendants in respect of any liability that may be found against those defendants.

The liquidators of Akron Roads Pty Ltd (in liquidation) (**Akron**) commenced an insolvent trading claim in the Supreme Court of Victoria against the company's directors, and sought to join CGU Insurance Limited (**CGU**), an insurer of some of the defendants, for the purpose of seeking a declaration that the insurer was obliged to indemnify those defendants in respect of any liability that may arise out of the insolvent trading claim. The High Court concluded that the Supreme Court had jurisdiction and power to allow the joinder of the insurer and provide declaratory relief, and can do so where the claimant has an interest in the performance of the insurance contract and there is utility in the court making the declaration.

The decision is an important one for stakeholders in a liquidated company, including creditors, directors and officers and their insurers, as it creates the opportunity for a direct route for recourse to a funding pool, which may ultimately benefit unsecured creditors.

AKRON AND A CLAIM FOR INSURANCE

On 9 April 2013, the liquidators of Akron (**Liquidators**) commenced proceedings in the Supreme Court of Victoria against three former directors, including Trevor Crewe, and one alleged de-facto shadow director, Crewe Sharp Pty Ltd (**Crewe Sharp**), claiming compensation for loss pursuant to section 588M(2) of the *Corporations Act 2001* (Cth) (**Act**) for insolvent trading.

Crewe Sharp and Mr Crewe, who was also a director of Crewe Sharp, made a claim for indemnity with respect to the proceeding under a professional indemnity policy issued by CGU under which they were insured. CGU denied the claim, advising that the policy did not provide cover in respect of claims made in the proceeding.

During the course of liquidator examinations about Akron's affairs, the Liquidators became aware of the professional indemnity policy held by the directors.

APPLICATION TO JOIN CGU AND THE DECISIONS OF THE COURTS

On 20 August 2014, the Liquidators applied to the Supreme Court for:

- an order to join CGU as a defendant, and
- leave to file and serve a claim seeking a declaration that CGU was liable to indemnify the relevant directors under the policy of insurance up to the policy limit of \$5 million in respect of any judgment obtained against them in the proceeding.

CGU ultimately opposed the application.

On 13 February 2015 Judd J of the Supreme Court allowed the Liquidators' application to join CGU to the proceeding for the purposes of determining whether the insurers were obliged to indemnify the defendants.² The Court of Appeal granted CGU leave for appeal, but ultimately dismissed it.

The High Court of Australia allowed CGU special leave to appeal.

DECISION OF THE HIGH COURT

The High Court unanimously dismissed the appeal on 11 February 2016.

French CJ, Kiefel, Bell and Keane JJ delivered a joint judgment, holding that the claim for declaratory relief was within the federal jurisdiction conferred on the Supreme Court of Victoria.

The primary claim (by the Liquidators against the directors for insolvent trading) was based on Federal legislation and therefore involved the Victorian Supreme Court (VSC) exercising Federal jurisdiction. The issue then was whether there was a justiciable controversy between the Liquidators and CGU, and whether the VSC could grant a declaration as to the operation of the insurance contract, when the Liquidators were strangers to that insurance contract. The court accepted that whilst s562 of the Act and s117 of the Bankruptcy Act (by which the Liquidators had an ultimate right to any proceeds from the insurance in respect of the claim) do not confer a direct right of action by a claimant against an insurer of a defendant, those provisions, combined with the insurer's denial of cover, gave the Liquidators a sufficient interest to establish a justiciable controversy between them and CGU to found jurisdiction in the VSC to make the declaration sought.

Nettle J wrote a separate judgment also dismissing CGU's appeal. His Honour stated that the core of the justiciable controversy was the dispute between the Liquidators and the directors and there was an additional controversy between the directors and CGU as to CGU's liability to indemnify the directors. His Honour concluded that the Liquidators have a real interest in establishing that CGU is liable to indemnify the directors, which is 'sufficient to comprise a justiciable controversy for the purpose of identifying a matter that attracts jurisdiction'.

THE SIGNIFICANCE OF THE DECISION

The case is an important one for stakeholders of a company in liquidation. Depending on the circumstances of the case, it clears the way for liquidators to join insurers to proceedings to secure payment of its claim. This is particularly helpful where those defendants may be insolvent or bankrupt as it:

- opens up the possibility of a greater source of funds available to liquidators to pay the company's creditors where a court finds a defendant liable, and makes a declaration that the insurers are liable to indemnify those defendants who are insured, and
- enables a liquidator to pursue the insurer directly by seeking declaratory relief in proceedings against the insured, as opposed to seeking payment of any claim by the insurer through a trustee in bankruptcy appointed to a bankrupted defendant, or a liquidator of a liquidated corporate defendant.

The case highlights the need for liquidators to be aware of any policies of insurance issued by insurers on behalf of directors and officers, and of any insurance claims made by potential defendants (and the insurer's decision on those claims). Liquidators ought to consider the mechanisms available to them to identify this information, such as the use of public examinations about the affairs of a company pursuant to sections 596A and 596B of the Act, and the obligations on officers to assist liquidators pursuant to section 530A of the Act.

Whether or not a liquidator ought to join an insurer to a proceeding is dependent on a number of variables, including but not limited to the strength of the case against the defendants and the insurer, the claim amount, the terms of the insurance policy, the insurance policy limit, and the evidentiary requirements to found a claim.

ENDNOTES

1. *CGU Insurance Limited v Blakely & Ors* [2016] HCA 2.
2. *Akron Roads Pty Ltd (in liq) v Crewe Sharp & Ors* [2015] VSC 34.

MORE INFORMATION

For information regarding possible implications for your business, contact [Alan Mitchell](#).

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



ALAN MITCHELL

PARTNER,

MELBOURNE

+613 9288 1401

Alan.Mitchell@hsf.com

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