

# HIGH COURT OF AUSTRALIA

FRENCH CJ,  
HEYDON, CRENNAN, KIEFEL AND BELL JJ

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CGU INSURANCE LIMITED

APPELLANT

AND

ONE.TEL LIMITED (IN LIQUIDATION) & ORS

RESPONDENTS

*CGU Insurance Limited v One.Tel Limited (In Liquidation)*  
[2010] HCA 26  
4 August 2010  
S78/2010

## ORDER

1. *Appeal allowed in relation to order 2 of the Court of Appeal of the Supreme Court of New South Wales made on 18 December 2009.*
2. *The answers to the questions reserved for separate determination be recorded as:*

*Question 1: Can the plaintiff named in the amended summons maintain these proceedings to seek recovery from the first defendant of the alleged property identified in paragraph v of Schedule A to the deed ('the Property')?*

*Answer: Yes.*

*Question 2: Upon the termination of the Deed, did any alleged interests or rights of Greaves in respect of the alleged Property cease to be held by the plaintiff as trustee or otherwise identifying the same?*

*Answer: No.*

*Question 3A: In what capacity does the plaintiff hold any alleged interests or rights of Greaves in respect of the alleged Property?*

*Answer: Not necessary to answer.*



*Question 3B: In what capacity would the plaintiff hold any proceeds of the realisation of any interests or rights of Greaves in respect of the alleged Property?*

*Answer: Not necessary to answer.*

*Question 4: Which of the parties (including Greaves), if any, hold any alleged interests or rights of Greaves in respect of the alleged Property, and in what capacity?*

*Answer: Not necessary to answer.*

*Question 5A: Upon termination of the Deed, was Greaves released and discharged from all liability at law and/or in equity in respect of the orders made on 6 September 2004?*

*Answer: No.*

*Question 5B: Upon termination of the Deed, did Greaves obtain the accrued benefit of a covenant not to enforce in respect of the compensation and costs order made on 6 September 2004 in the ASIC proceedings?*

*Answer: No.*

*Question 6: Does CGU have accrued or binding rights under the Deed such that the plaintiff and/or Greaves have no further rights to seek recovery of the alleged Property?*

*Answer: No.*

*Question 7: Are any or all of the plaintiff and the second to fourth defendants precluded from bringing any claim, including the present proceedings, against CGU in respect of the alleged Property in relation to the orders made on 6 September 2004 by reason of any or all of the following matters:*

- (a) There being no relevant 'Loss' (at the time of entry into the Deed or upon termination of the Deed) within the meaning of the Policy;*
- (b) Greaves having no existing Loss within the meaning of the Policy for which he may be legally indemnified arising out of any Claim by reason of any Wrongful Act for the purpose of Insuring Agreement A of the Policy in relation to the compensation and costs*



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*order made on 6 September 2004 in the ASIC proceedings;*

*(c) There being no subject matter for indemnity as provided in the opening words of the Policy?*

*Answer: No.*

*Question 8: Is the covenant in the deed to assign to the plaintiff effective in the events that have occurred?*

*Answer: Yes.*

*Question 9: Is any transfer and assignment to the plaintiff of the Property void and of no effect within cl 1(e) of the Deed after termination of the Deed by reason of cl 1(e) of the Deed and/or s 213 of the Bankruptcy Act 1966 (Cth)?*

*Answer: No.*

3. *Appeal otherwise dismissed.*

4. *The appellant is to pay the first respondent's costs of the appeal.*

On appeal from the Supreme Court of New South Wales

### **Representation**

D F Jackson QC with A W Street SC, E G Romaniuk and W A D Edwards for the appellant (instructed by Colin Biggers & Paisley Solicitors)

B A J Coles QC with P Kulevski for the first respondent (instructed by Clayton Utz Lawyers)

Submitting appearances for the second and fourth respondents

No appearance for the third respondent

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.



## **CATCHWORDS**

### **CGU Insurance Limited v One.Tel Limited (In Liquidation)**

Bankruptcy – Deed of Arrangement – Directors and officers liability policy of insurance – Equitable assignment of rights under policy of insurance to trustee under Deed of Arrangement – Trustee commenced proceedings in pursuit of rights under policy of insurance – Deed of Arrangement terminated – Effect of termination – Whether trustee had power to continue proceedings – Whether "loss" suffered under policy of insurance – Whether certain clauses of Deed of Arrangement survived termination.

Trusts – Bare trust – Duties and powers of trustee.

Words and phrases – "loss", "bare trust".

*Bankruptcy Act 1966 (Cth), Pt X.*

*Conveyancing Act 1919 (NSW), s 12.*



1 FRENCH CJ, HEYDON, CRENNAN, KIEFEL AND BELL JJ. These proceedings were heard on agreed facts. It is desirable to outline the material parts of those facts at the outset.

### The agreed facts

2 The proceedings have their origins in the conduct of the third respondent, John Huyshe Greaves ("Mr Greaves"). From 28 February 1995 to 31 December 1995, and from 25 July 1997 to 31 March 2001, Mr Greaves served as a director of the first respondent, One.Tel Limited (In Liquidation) ("One.Tel"). He was insured under a directors and officers liability policy of insurance ("the Policy"). The insurer was the appellant, CGU Insurance Limited ("CGU").

3 On 12 December 2001 the fourth respondent in this appeal, the Australian Securities and Investments Commission ("ASIC"), sued Mr Greaves in the Supreme Court of New South Wales ("the ASIC proceedings"). On 21 May 2002 CGU purported to avoid the Policy.

4 On 6 September 2004, by consent, the Supreme Court made orders and declarations against Mr Greaves in the ASIC proceedings. That relief included an order that Mr Greaves pay compensation to One.Tel in the sum of \$20 million ("the \$20 million compensation order"). It also included an order that he pay \$350,000 to ASIC.

5 On 30 November 2004 Mr Greaves entered into a Deed of Arrangement ("the Deed") pursuant to Pt X of the *Bankruptcy Act* 1966 (Cth) ("the Act")<sup>1</sup>. The other party was David Patrick Watson, who died on 18 July 2009. His executrix, the second respondent, is Christine Watson. It is convenient to refer to Mr and Mrs Watson as "the Trustee".

6 Clause 2 of the Deed provided:

"[Mr Greaves] covenants to convey, transfer or assign or cause to be conveyed, transferred or assigned to the Trustee all the property more particularly described in Schedule A hereto on trust to be dealt with by the Trustee in accordance with this Deed of Arrangement."

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1 The relevant provisions are in Pt X as it stood before the commencement on 1 December 2004 of the *Bankruptcy Legislation Amendment Act* 2004 (Cth), which made very substantial amendments to Pt X.

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*Heydon J*  
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*Bell J*

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Paragraph (v) of Sched A included Mr Greaves's rights under the Policy. Clause 3 provided:

"The Trustee accepts appointment as Trustee of this Deed and the conveyance and assignment of the said property upon the trusts hereinafter set out."

7 Clause 4 provided:

"The Trustee shall get in and realise the assets set out in the said paragraph 2 hereto as soon as reasonably practicable provided that he shall have the power to postpone the sale of any part thereof as he in his discretion considers expedient."

8 Clause 5 provided that the Trustee should apply any amount received by him under the Policy in payment of any liability that Mr Greaves might have to ASIC and One.Tel.

9 Clause 6 provided:

"Subject to clauses 5 and 18, the Trustee shall apply any moneys received by him pursuant to this Deed in making payments in the order described by Section 108 to 114 inclusive of the Act as modified by Section 237(2) thereof."

10 Clause 7 provided:

"Immediately after [Mr Greaves] has in all respects complied with his obligations under this Deed and the Act the Trustee shall certify that [Mr Greaves] has complied with the Deed. Notice that such certificate has been executed shall be given by the Trustee to [Mr Greaves] and the Creditors."

A certificate pursuant to cl 7 was executed on 2 March 2006.

11 Clause 8 provided that on execution of the certificate, Mr Greaves was released from all debts and claims against him except for any liability under certain orders, one of which was the \$20 million compensation order.

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12 Clause 9 provided that immediately after the Trustee:

"I. completes or settles any claim for the realisation of assets being rights under the [Policy] including the pursuit to judgment or settlement of any claim under [the Policy]; or

II. makes a decision not to pursue a claim under the [Policy],

the Trustee will issue a certificate to the effect that he has completed the realisation of assets being rights under the [Policy] or to the effect that the Trustee does not intend to pursue a claim against CGU ... under [the Policy]."

13 Clause 10 provided:

"[Mr Greaves] shall upon execution of the said certificate by the Trustee be absolutely released and discharged from all liability in respect of the compensation and costs order made on 6 September 2004 in the ASIC Proceedings."

14 Clause 11 provided:

"Prior to the execution of the certificate referred to in clause 9, neither the Trustee nor any creditor will take any steps to enforce against [Mr Greaves] the compensation order and the costs order made on 6 September 2004 in the ASIC Proceedings other than to seek recovery pursuant to the arrangement constituted by this Deed."

15 On 16 October 2006 the Trustee gave notice to CGU of the assignment of Mr Greaves's rights under the Policy.

16 On 18 October 2006 the Trustee commenced proceedings in the Commercial List of the Equity Division of the Supreme Court of New South Wales ("the Trustee proceedings"). The Trustee proceedings pursued Mr Greaves's cause of action on the Policy in respect of the \$20 million compensation order<sup>2</sup>. CGU was the first defendant, ASIC the second, One.Tel the third and Mr Greaves the fourth. In its Amended Defence to the Trustee's

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2 The claim which the Trustee made in the Trustee proceedings against CGU did not extend to a claim in relation to the order of the Supreme Court of New South Wales made on 6 September 2004 that Mr Greaves pay \$350,000 to ASIC.

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Amended Summons, which extended over 36 closely typed pages, CGU raised many allegations against Mr Greaves of fraudulent non-disclosure and fraudulent misrepresentation in support of its claim that its purported avoidance of the Policy was valid.

17 On 30 November 2007, by reason of cl 17(c) of the Deed and s 235(d) of the Act, the Deed terminated because three years had passed since it was executed. Although cl 17(c) permitted an extension of this period for the purpose of the Trustee finalising any claim under the Policy if the creditors so resolved, no meeting of creditors had been called to consider such a resolution.

18 With effect from 8 August 2008, the summons in the Trustee proceedings was amended. The name of the plaintiff was changed from "David Patrick Watson, as trustee of the Deed of Arrangement in respect of John Huyshe Greaves" to "David Patrick Watson". Underlying the change was the controversy which has now reached this Court. The issues in the controversy were propounded in nine questions for separate determination prior to the resolution of other issues.

#### The primary judge

19 The primary judge (McDougall J) held that, once the Deed terminated, the Trustee had no power to continue the Trustee proceedings. He also held that Mr Greaves had suffered no "Loss", because even after the Deed was terminated, cl 11 continued to operate so as to prevent the Trustee and creditors from enforcing against Mr Greaves the orders made in the ASIC proceedings<sup>3</sup>.

20 The primary judge therefore gave judgment for CGU<sup>4</sup>.

#### The Court of Appeal

21 The Court of Appeal of the Supreme Court of New South Wales (Hodgson and Campbell JJA and Sackville AJA) allowed the appeal, and remitted the matter to the Equity Division of the Supreme Court for further hearing<sup>5</sup>.

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3 Clause 11 is quoted at [14] above.

4 *Watson v CGU Insurance Ltd* [2008] NSWSC 1409.

5 *One.Tel Ltd (In Liq) v Watson* [2009] NSWCA 282; *One.Tel Ltd (In Liq) v Watson (No 2)* [2009] NSWCA 396.

The appeal to this Court

22 CGU appealed to this Court. In substance the appeal fails for several reasons. Before turning to those reasons, it is necessary to note CGU's central contentions.

CGU's central contentions

23 CGU advanced two central contentions.

24 The first was that the Trustee had no power to continue the Trustee proceedings once the Deed was terminated. CGU submitted that neither the Act nor the Deed gave that power. It submitted that, even if the assignment of the Policy by Mr Greaves to the Trustee was an absolute assignment at law pursuant to s 12 of the *Conveyancing Act* 1919 (NSW) (which CGU said was not the case), that assignment did not give the Trustee that power. And it submitted that even if the assignment was a valid equitable assignment, it did not give the Trustee that power.

25 The second central contention of CGU was that Mr Greaves had suffered no "Loss" to which the Policy responded.

26 The effect of these arguments, if sound, would have been to give CGU an adventitious windfall benefit. Subject to the merits of CGU's defences in the Trustee proceedings, it would be better off to the extent of \$20 million as a result of the execution of the Deed, to which it was not a party, than it would have been if the Deed had not been executed.

Was there an assignment of the benefit of the Policy?

27 In considering CGU's first central argument, the legal assignment question may be put to one side at the outset. The primary judge's "tentative view" was that the Deed was a legal assignment to the Trustee of Mr Greaves's rights under the Policy pursuant to s 12 of the *Conveyancing Act*. But he said that even if that were not so, cl 2 was a valid equitable assignment of those rights because of the consideration flowing from cll 8, 10 and 11, and from the Trustee's other

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promises<sup>6</sup>. The Court of Appeal found that there was a legal assignment<sup>7</sup>. CGU challenged that conclusion.

28 It is not necessary to decide the merits of this challenge. Even if the challenge were sound, and there was no legal assignment, there was a valid equitable assignment for the reasons given by the primary judge. CGU expressly conceded, and below it will be assumed, that there was a valid equitable assignment, so that Mr Greaves, as assignor, became a trustee of a chose in action – his rights under the Policy – for the Trustee, and the Trustee held equitable title to Mr Greaves's rights under the Policy in trust for the beneficiaries identified in the Deed. For reasons now to be explained, that gave the Trustee the right to continue the Trustee proceedings even after the Deed terminated. No argument is available that the Trustee proceedings are not properly constituted by reason of the non-joinder of Mr Greaves, as assignor: he was joined (as fourth defendant).

Did the Act or the Deed disentitle the Trustee from continuing the Trustee proceedings after the Deed came to an end?

29 CGU argued that although the Trustee was entitled to commence the Trustee proceedings, it lost any entitlement to continue them once the Deed terminated. The Deed was to be construed subject to Pt X of the Act (cl 1(e)). The powers which the Deed conferred on the Trustee ceased once cl 17(c) came into effect by reason of s 235(d) of the Act. And the duties which the Deed created – to apply the monies to One.Tel and ASIC under cl 5 and to issue a certificate under cl 9 – also ceased. While the Deed was still on foot, the Trustee held the assigned chose in action (Mr Greaves's right to sue CGU) on trust in the manner specified in cll 2 and 3 of the Deed, and validly commenced the Trustee proceedings. But once the Deed ceased to be on foot, the Trustee lost any capacity to continue those proceedings, for the standing of the Trustee to do so depended on the Deed. This conclusion was said, in detailed arguments, to be supported by s 224(b) (which preserved the validity of acts done under a deed of arrangement before it was terminated), by par (c) of the definition of "trustee" in s 5, and by ss 187, 188, 194, 195, 204, 206, 213, 214, 218, 219(1), 223, 224A, 226(4), 229, 231(2), 233, 234, 234A, 234B, 236, 237(2) and 237AA. Very great stress was placed on a provision to which the Court of Appeal was not referred,

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6 *Watson v CGU Insurance Ltd* [2008] NSWSC 1409 at [57]-[58].

7 *One.Tel Ltd (In Liq) v Watson* [2009] NSWCA 282 at [96]-[110].

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and which was only raised in this Court in oral argument: s 276, rendering criminal the conduct of a person who acted as a trustee under a deed of arrangement that had been terminated.

30 One.Tel argued at some length that the trust in favour of itself created by the Deed survived the termination of the Deed because nothing in the Act or the Deed had any contrary effect.

31 It is not necessary to deal with these arguments. Indeed, in view of the fact that the form of Pt X now is very different from the form to which the parties' arguments were addressed, it is undesirable to do so.

32 The primary judge considered that the termination of the Deed did not divest the Trustee of any property held as "Trustee" pursuant to the Deed, but that it did affect the identification of those entitled to the beneficial interest. He thought that after termination of the Deed, the Trustee ceased to hold the chose in action under the trusts of the Deed, but held it as "bare trustee" for Mr Greaves beneficially. This approach was in substance defended and adopted by counsel for CGU in the Court of Appeal, although it was criticised by counsel for One.Tel. The primary judge's approach was also adhered to by CGU in this Court in substance.

33 In the pleadings CGU alleged that the termination of the Deed meant that the Trustee had ceased to be a trustee of any kind. It did not contend that before this Court. CGU instead contended that once the Deed had ended, while the Trustee had ceased to hold the equitable title to the chose in action created by the Policy on the trusts in the Deed, it had commenced to hold it as trustee in favour of Mr Greaves.

34 This is a concession by CGU that the termination of the Deed did not cause the Trustee to cease holding the equitable interest in the chose in action on trust. The concession was correct. Even if CGU's submission that the Trustee was prevented from acting as trustee of the Deed after it was terminated is assumed to be correct, nothing in the Deed or the Act either caused the Deed to unwind on termination, or returned the parties to the status quo just before the execution of the Deed. The title on which the Trustee had held the benefit of the equitable interest in the chose in action did not vanish into thin air or return to Mr Greaves or go anywhere else: it remained with the Trustee. Nor was it open to the Trustee to enjoy the property beneficially: the Trustee continued to hold it on trust. Thus the Trustee continued to have the duties of a trustee, but, on CGU's assumptions, on trusts other than those created by the Deed, because on

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those assumptions the beneficial interests under those trusts and the powers to continue the Trustee proceedings had come to an end.

35 Even if the termination of the Deed is assumed to have deprived the Trustee of any power in the Deed or the Act to continue the Trustee proceedings, it does not follow that there was not some other power to do so.

36 The primary judge described the trust on which the Trustee held the rights under the Policy which Mr Greaves assigned to it as a "bare trust" after the termination of the Deed. Let that be assumed. The trustee of a bare trust has no interests in the trust assets other than those which exist by reason of the office of trustee and the holding of legal title. Further, the trustee of a bare trust has no active duties to perform other than those which exist by virtue of the office of the trustee, with the result that the property awaits transfer to the beneficiaries or awaits some other disposition at their direction. One obligation of a trustee which exists by virtue of the very office is the obligation to get the trust property in, protect it, and vindicate the rights attaching to it. That obligation exists even if no provision of any statute or trust instrument creates it. It exists unless it is negated by a provision of any statute or trust instrument. Here no provision of the Act or the Deed negates it. Mr Greaves's equitable assignment of his right to sue CGU under the Policy gave the Trustee the duty to vindicate that right. After the Deed terminated, the Trustee continued to comply with the duty to vindicate that right by prosecuting the Trustee proceedings against CGU in order to crystallise its advantages by reducing them to a judgment in damages. Even assuming in favour of CGU that, after termination of the Deed, the Trustee no longer held the chose in action on the trusts of the Deed, the Trustee did remain a trustee, and did have an obligation to continue the process of complying with the duty to vindicate the rights associated with the trust property.

37 It does not follow from CGU's contention that the Trustee had no entitlement to continue the proceedings which could be derived from the Deed once it had terminated that the Trustee did not have an entitlement to continue the proceedings after the Deed terminated which derives from a source other than the Deed. The latter entitlement derives from the duty and power of trusteeship. The Deed created a trusteeship with express duties. The termination of the Deed caused the Trustee to have duties and powers outside the Deed. Here the duty of the Trustee to vindicate the rights connected with the trust property related to a chose in action being enforced in the Trustee proceedings. The hoped-for fruits of those proceedings lay in an order for damages. Discontinuance by the Trustee with a view to letting some other person enforce the chose in action by starting a new action may have run the risk that the new action might be statute-barred, and would certainly have involved a waste of costs. In these circumstances the only

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way of protecting the chose in action, vindicating the rights attached to it and getting in its fruits was for the Trustee to continue the proceedings.

38 As One.Tel submitted, the only interest of CGU is in denying or qualifying the right asserted against it in an action by the Trustee as equitable owner of the chose in action created by the Policy. All that matters is that the Trustee is equitable owner of the chose in action. Provided the suit is otherwise properly constituted, in general it is of no concern to defendants whether the plaintiff suing on a chose in action is suing as assignee or not; or is suing under an equitable assignment, not a legal assignment; or is holding the right sued on in trust for a beneficiary. A person who is a trustee as a result of an equitable assignment of the benefit of a contractual right on trust can maintain the same actions on the right as that person could maintain if the contractual right were held by that person free of trust. Whether the Trustee is holding the chose in action for beneficiaries, and which beneficiaries, then, are not matters that are material to CGU. CGU has no right to seek the due administration of the trust or complain about any maladministration of it: that is a matter for the beneficiary or beneficiaries. If Mr Greaves is the beneficiary, as the primary judge found and as CGU contends, and if he has reason to suppose that the Trustee is about to do or continue to do an act prohibited by the terms of the trust or any statute, he is at liberty to apply for an injunction to restrain it. And if he has reason to suppose that the Trustee is failing to perform trust duties, he may institute proceedings to compel performance.

39 The Trustee is not disentitled from continuing the Trustee proceedings.

Was there a "Loss"?

40 The starting point of CGU's second central argument is that cl 11 survived the termination of the Deed. CGU put this even though for the purpose of its first central argument it contended that the Deed ceased to have any operation once it was terminated by effluxion of time. It contended that once the Deed was terminated, no certificate could be issued under cl 9, for the Trustee no longer had any powers under the Deed. It followed that the prohibition on enforcement of the \$20 million compensation order remained permanently in operation. Clause 11 was an accrued and continuing protection for Mr Greaves despite the termination of the Deed.

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41        *Position if cl 11 continued in force.* The submission to this point corresponds with the reasoning of the primary judge<sup>8</sup>. Even if the submission to this point is assumed to be correct, it fails at the next stage. The Policy defined "Loss" as meaning "the amount payable in respect of a Claim made against the Directors and Officers for a Wrongful Act and shall include damages, judgements, settlements, interest, costs and Defence Costs." CGU argued that since cl 11 prevented the Trustee and the creditors taking any steps to enforce the \$20 million compensation order, there was no "amount payable" in respect of a claim against Mr Greaves. It supported that argument by submitting that the Policy was one of indemnity. It relied on the primary judge's statement: "If and for so long as the orders are not enforceable against Mr Greaves, there is nothing in respect of which he has any entitlement to be indemnified."<sup>9</sup>

42        The Court of Appeal rejected that argument by saying that cl 11 "does not discharge or release [Mr Greaves] from the judgment debts." It said: "That occurs only on the execution of the certificate by the Trustee in accordance with cl 10 of the Deed"<sup>10</sup>.

43        The Court of Appeal's reasoning is correct. Its conclusion may also be supported for the following additional reasons.

44        First, "Loss" is defined to include "judgments" and "settlements". The judgment of 6 September 2004, which was consented to as part of a settlement, remains on foot.

45        Secondly, the \$20 million compensation order is an order which was made in respect of a claim made against Mr Greaves in the ASIC proceedings. It created a judgment debt. That debt remains an "amount payable" even though, on the assumption in favour of CGU that cl 11 survives the termination of the Deed, the Trustee and the creditors are debarred from taking any steps to enforce

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8     A submission advanced to this Court, but apparently not below, was that s 233(2) of the Act caused cl 11 to remain binding on creditors, but the submission did not explain why this assisted CGU, for the stay on enforcement of creditors' remedies created by s 233(2) only continued for "so long as the deed remains in force", and CGU's entire case depended on the Deed having ceased to be in force.

9     *Watson v CGU Insurance Ltd* [2008] NSWSC 1409 at [52].

10    *One.Tel Ltd (In Liq) v Watson* [2009] NSWCA 282 at [94].

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the \$20 million compensation order against Mr Greaves. An "amount payable in respect of a Claim made against" Mr Greaves includes an amount which Mr Greaves is legally liable to pay. The \$20 million compensation order created in him a legal liability to pay \$20 million. If by some happy chance Mr Greaves became sufficiently wealthy to pay the \$20 million, and chose to do so, it could not validly be contended that the Policy did not respond. Mr Greaves would have paid an amount which he was liable to pay under a judgment debt. That demonstrates that the status of the \$20 million as an "amount payable", which rests on Mr Greaves's legal liability to pay it, is not affected by any bars which may prevent particular people from enforcing the judgment debt, because the creation of those bars does not affect his legal liability. There is a distinction between Mr Greaves's duty to pay, and the capacity of others to enforce that duty.

46 Thirdly, at least during the lifetime of the Deed, cl 11 did not prevent an assignee of Mr Greaves, namely the Trustee, from enforcing the Policy. The assigned rights of Mr Greaves against CGU arose because of a judgment debt that came into existence against him. Clause 11 did not set aside the judgment. It did not extinguish the judgment debt. It did not release Mr Greaves from the duty to pay that debt.

47 Fourthly, CGU's submission produces an absurd result, because it creates a conflict between cl 9 and cl 11. The point of the Deed was to enable the Trustee to enforce Mr Greaves's rights under the Policy in favour of One.Tel. Clause 9 assumes that the successful completion or settlement of the claim against CGU will produce a payment from CGU which can be used by the Trustee in effect to fund compliance by Mr Greaves with his duty to satisfy the \$20 million compensation order by paying the money to One.Tel. Yet on CGU's construction of cl 11 and assuming it continued in force, Mr Greaves has suffered no "Loss" because of the ban on the Trustee and creditors enforcing the \$20 million compensation order, and hence nothing can be recovered from CGU to fund payment of it. If CGU's argument about "Loss" were correct, it could have struck out, demurred to or obtained summary dismissal of the Trustee proceedings soon after their inception on 18 October 2006. It would not have been necessary for CGU to have waited until the Deed came to an end on 30 November 2007.

48 *Clause 11 did not continue in force.* In any case the conclusion urged by CGU must fail. That is because the assumption that cl 11 survived the termination of the Deed is not correct.

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49 The termination of the Deed on 30 November 2007 did not invalidate any steps taken by the Trustee to realise assets and employ them in making payments required by the Deed (for example, under cl 6). The termination of the Deed did prevent the Trustee from taking steps required by the Deed which were uncompleted before the time of its termination. That meant that no further steps could be taken under cl 9 (issue of a certificate in relation to the realisation of assets, for example, rights under the Policy), which meant that the absolute release of Mr Greaves from liability in relation to the \$20 million compensation order referred to in cl 10 could not take place. As the Court of Appeal said, the "opening words of cl 11 (*Prior to the execution of the certificate referred to in clause 9*) imply that the stay provided by cl 11 continues only while it is still possible that the Trustee can execute a certificate under cl 9."<sup>11</sup> However, the Court of Appeal preferred to accept CGU's contention that the cl 11 stay continued beyond the date of termination of the Deed, and inferred that cl 9 authorised the issue of a certificate after the date of termination of the Deed.

50 The Court of Appeal was certainly correct to see cll 9-11 as marching in tandem: either cl 9 ceased to have potential operation when the Deed terminated (in which case cll 10 and 11 did as well), or cl 11 continued to have potential operation when the Deed terminated (in which case cll 9 and 10 did as well). However, there is no reason why some clauses in the Deed should remain operative after its termination while others do not. The preferable conclusion is that once the Deed terminated, while acts carried out under it remained effective, the whole of its future potential operation ceased. That outcome is not unfair to Mr Greaves. Before 30 November 2007 he had no entitlement to recover on the Policy because he had assigned it to the Trustee, holding for One.Tel in particular as beneficiary, and he had the cl 11 protection. After 30 November 2007, while he lost his cl 11 protection, he became beneficiary under a resulting trust of the Policy on the assumptions underlying other parts of CGU's submissions<sup>12</sup>: in that respect he had in substance returned to the pre-Deed position.

51 Clause 11 was a covenant by the Trustee and creditors not to take any step against Mr Greaves until whatever recovery from CGU on the Policy that could be achieved had been achieved. If no recovery against CGU had been achieved, or if what was recovered was less than what Mr Greaves owed to ASIC and One.Tel, and the cl 9 certificate was issued, it would then have been open to

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11 *One.Tel Ltd (In Liq) v Watson* [2009] NSWCA 282 at [89].

12 See above at [33].

ASIC and One.Tel to pursue their rights against Mr Greaves to the extent to which their claims had fallen short of full satisfaction after the relevant amounts had been paid under cl 5. Once the Deed terminated, the cl 5 duty ceased. So did the cl 9 duty. That left no room for cl 11 to continue: it did not operate perpetually, but only in an interim period "[p]rior to the execution of the certificate referred to in clause 9". Once it became impossible for any cl 9 certificate to be executed, the basis on which cl 11 could operate collapsed. As CGU submitted for the purpose of other arguments, the Deed established only a short-term regime to hold the position while the Trustee made attempts to bring in assets for the benefit of creditors. It was only to last three years, unless extended by a meeting of the creditors. It did not have the function of giving permanent protection to Mr Greaves.

52 It is true that by taking one step in performing the Deed – assigning the Policy to the Trustee – Mr Greaves had provided "all the consideration required from him"<sup>13</sup>. But that step was part of a series of interconnected steps. Clause 8 released him from all but a limited number of liabilities (one of which was liability under the \$20 million compensation order). Clause 9 contemplated a decision to commence proceedings in respect of the Policy, or settle or not pursue a claim under the Policy. The decision was made to commence the Trustee proceedings, but they had not been completed when the Deed came to an end. The future steps of prosecuting them and issuing a cl 9 certificate could not be carried out under the Deed because it had ended.

53 CGU's submissions allege that, in place of the trust created by the Deed, under which the Trustee held the Policy for One.Tel and ASIC, there sprang up a resulting trust in favour of Mr Greaves. Assuming that to be correct, to construe cl 11 as continuing in these circumstances would be unjust: it would leave One.Tel stripped of its beneficial interest under the trust created by the Deed, while simultaneously remaining unable to exploit its original right to enforce the \$20 million compensation order, which it had given up in return for gaining its beneficial interest. And if, contrary to what is said above about CGU's argument in relation to "Loss"<sup>14</sup>, cl 11 operated not merely to prevent One.Tel enforcing the \$20 million compensation order but also to wipe out Mr Greaves's legal liability to pay that sum, there would be injustice to One.Tel in losing its capacity to compel the Trustee to proceed with the Trustee proceedings against CGU.

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13 *One.Tel Ltd (In Liq) v Watson* [2009] NSWCA 282 at [4].

14 At [41]-[47].

*French* CJ  
*Heydon* J  
*Crennan* J  
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*Bell* J

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54 The construction of the Deed propounded by CGU – that cl 11 survives the termination of the Deed – is a construction which produces absurdity because of the harsh consequences for One.Tel. Further, CGU's primary position was that the Deed came to an end on 30 November 2007: it would be an unexplained anomaly if cl 11 survived, but nothing else.

55 CGU's argument that cl 11 continued in force must be rejected.

How should the questions be answered?

56 In substance the appeal fails. But the reasoning stated above differs in some respects from that of the Court of Appeal. It is therefore necessary to examine whether any of the answers given by the Court of Appeal to the questions for separate determination should be changed. The questions are set out below<sup>15</sup>.

57 The Court of Appeal's answers to questions 1 and 2 are correct for the reasons given above<sup>16</sup>. Question 5A was answered in the same way by the primary judge and the Court of Appeal, CGU did not suggest that it should be changed, and it is correct. The Court of Appeal's answer to question 5B is correct because cl 11 did not survive the termination of the Deed for reasons given above<sup>17</sup>. The Court of Appeal's answer to question 6 is correct for reasons given above in relation to CGU's "Loss" argument<sup>18</sup>. So is the Court of Appeal's answer to question 7. Question 8 was answered in the affirmative by both the primary judge and the Court of Appeal. It was common ground in this Court that the covenant referred to in question 8 was effective at least as an equitable assignment. Hence the Court of Appeal's answer is correct. Question 9 was answered in the negative by both the primary judge and the Court of Appeal. An affirmative answer would be inconsistent with CGU's concession that the trust property remains vested in the Trustee notwithstanding the termination of the Deed<sup>19</sup>. Hence the Court of Appeal's answer is correct.

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15 At [61].

16 At [29]-[39].

17 At [48]-[55].

18 At [40]-[47].

19 Above at [33]-[34].

58 That leaves questions 3A, 3B and 4. The Court of Appeal's answers were that the Trustee held the trust property for ASIC and One.Tel. The primary judge's answers, in substance, were that the Trustee held it for Mr Greaves. Questions 3A, 3B and 4 should not be answered for the following reasons.

59 Part C of the Trustee's Amended Commercial List Statement contained the Trustee's "Contentions" as plaintiff. Paragraph 32 alleged:

"In the premises, following the termination of the Deed, the plaintiff is entitled to continue the present proceedings and:

- (a) holds the Rights and any proceeds of the realization of the Rights on express or alternatively constructive trust for ASIC and OneTel; or
- (b) holds the Rights and any proceeds of the realization of the Rights on resulting trust for [Mr] Greaves; or
- (c) holds the Rights absolutely but will hold any proceeds of the realisation of the rights on trust for:
  - (i) ASIC and OneTel; or alternatively;
  - (ii) [Mr] Greaves."

CGU answered that allegation of the Trustee thus:

"The First Defendant denies paragraph 32 and says:

12.1 The Plaintiff as trustee or otherwise:

12.1.1 Cannot maintain and/or prosecute these proceedings; and

12.1.2 Cannot receive the proceeds of judgment and/or realisation of property the subject of these proceedings;

12.2 The First Defendant repeats the matters set out in paragraphs 1(ii), 1(iii), 1(iv) and 2, above."

The matters so referred to were relevantly allegations that the Trustee had ceased to be a trustee, had no standing to prosecute the Trustee proceedings, and had no right to recover the \$20 million because of cl 11; and that Mr Greaves had the benefit of a "release and discharge from all liability" under the \$20 million

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compensation order and had suffered no loss. The second defendant (ASIC) did not admit that the Trustee could hold the proceeds of the Trustee proceedings for Mr Greaves, but admitted that the Trustee could hold them for ASIC and One.Tel. The third defendant (One.Tel) admitted par 32 of the Trustee's contentions. No Commercial List Response from the fourth defendant (Mr Greaves) appears in the appeal papers before this Court. Mr Greaves took no part in formulating the questions for separate and prior determination and he took no active part in the hearings in the courts below or in this Court. ASIC took no active part in the hearings before the Court of Appeal or this Court. And the Trustee took no active part in the hearing before this Court.

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Thus the position is that the only party in this Court (or the Court of Appeal) to advance the proposition that Mr Greaves is the beneficiary, namely CGU, was a party who could not profit from establishing that proposition. That is because, for reasons given above<sup>20</sup>, the identity of the beneficiary for whom the Trustee was holding the trust property after the Deed terminated is not a concern of CGU and CGU cannot rely on any particular answer to questions 3A, 3B and 4 as a means of supporting the primary judge's judgment in its favour. The only parties potentially interested in the proposition that Mr Greaves is the beneficiary are Mr Greaves on the one hand and One.Tel or ASIC on the other. The proposition is not at present a live issue as between Mr Greaves and One.Tel or ASIC. Those three parties are defendants in the Trustee proceedings, but there are no cross-claims between them. One.Tel has an interest in the Trustee proceedings succeeding. There is nothing to suggest that Mr Greaves opposes the Trustee proceedings succeeding. Indeed he has an interest in them succeeding, because to the extent that there is any shortfall in recovery against CGU, Mr Greaves will remain exposed to enforcement of the \$20 million compensation order in view of the conclusion reached above that the protection afforded to Mr Greaves by cl 11 no longer exists<sup>21</sup>. And it is unlikely that Mr Greaves will make a claim to the beneficial enjoyment of any damages produced by the Trustee proceedings: that claim would be rendered nugatory by the capacity of One.Tel to enforce against him the \$20 million compensation order. Thus the issues underlying questions 3A, 3B and 4 are moot. The application to the primary judge was not an application for judicial advice to a trustee; it was a separate trial of issues in controversy. To answer the questions would be to give a merely advisory opinion, not quell a controversy between

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<sup>20</sup> At [38].

<sup>21</sup> See [48]-[55].

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parties entitled to participate in the controversy. Hence those three questions need not be answered. In the event that they become live issues if the Trustee proceedings succeed, they can be agitated in separate proceedings. That event is unlikely for the reasons just given.

### Orders

61 In substance One.Tel has enjoyed complete success in resisting the appeal. Accordingly, the Court's orders should be<sup>22</sup>:

1. Appeal allowed in relation to order 2 of the Court of Appeal made on 18 December 2009.
2. The answers to the questions reserved for separate determination be recorded as:

Question 1: Can the plaintiff named in the amended summons maintain these proceedings to seek recovery from the first defendant of the alleged property identified in paragraph v of Schedule A to the deed ('the Property')?

Answer: Yes.

Question 2: Upon the termination of the Deed, did any alleged interests or rights of Greaves in respect of the alleged Property cease to be held by the plaintiff as trustee or otherwise identifying the same?

Answer: No.

Question 3A: In what capacity does the plaintiff hold any alleged interests or rights of Greaves in respect of the alleged Property?

Answer: Not necessary to answer.

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22 Save for the numbering, which follows that of the Court of Appeal, the questions are set out as they appear in the primary judge's order that there be a prior determination of them.

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Question 3B: In what capacity would the plaintiff hold any proceeds of the realisation of any interests or rights of Greaves in respect of the alleged Property?

Answer: Not necessary to answer.

Question 4: Which of the parties (including Greaves), if any, hold any alleged interests or rights of Greaves in respect of the alleged Property, and in what capacity?

Answer: Not necessary to answer.

Question 5A: Upon termination of the Deed, was Greaves released and discharged from all liability at law and/or in equity in respect of the orders made on 6 September 2004?

Answer: No.

Question 5B: Upon termination of the Deed, did Greaves obtain the accrued benefit of a covenant not to enforce in respect of the compensation and costs order made on 6 September 2004 in the ASIC proceedings?

Answer: No.

Question 6: Does CGU have accrued or binding rights under the Deed such that the plaintiff and/or Greaves have no further rights to seek recovery of the alleged Property?

Answer: No.

Question 7: Are any or all of the plaintiff and the second to fourth defendants precluded from bringing any claim, including the present proceedings, against CGU in respect of the alleged Property in relation to the orders made on 6 September 2004 by reason of any or all of the following matters:

- (a) There being no relevant 'Loss' (at the time of entry into the Deed or upon termination of the Deed) within the meaning of the Policy;

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- (b) Greaves having no existing Loss within the meaning of the Policy for which he may be legally indemnified arising out of any Claim by reason of any Wrongful Act for the purpose of Insuring Agreement A of the Policy in relation to the compensation and costs order made on 6 September 2004 in the ASIC proceedings;
- (c) There being no subject matter for indemnity as provided in the opening words of the Policy?

Answer: No.

Question 8: Is the covenant in the deed to assign to the plaintiff effective in the events that have occurred?

Answer: Yes.

Question 9: Is any transfer and assignment to the plaintiff of the Property void and of no effect within cl 1(e) of the Deed after termination of the Deed by reason of cl 1(e) of the Deed and/or s 213 of the *Bankruptcy Act*?

Answer: No.

- 3. Appeal otherwise dismissed.
- 4. The appellant is to pay the first respondent's costs of the appeal.