HIGH COURT OF AUSTRALIA

FRENCH CJ,
KIEFEL, BELL, KEANE AND NETTLE JJ

CGU INSURANCE LIMITED APPELLANT

AND

ROSS BLAKELEY, MICHAEL RYAN & QUENTIN OLDE AS JOINT AND SEVERAL LIQUIDATORS OF AKRON ROADS PTY LTD (IN LIQUIDATION) & ORS RESPONDENTS

CGU Insurance Limited v Blakeley
[2016] HCA 2
11 February 2016
M221/2015

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of Victoria

Representation

D J O'Callaghan QC with R L Enbom for the appellant (instructed by Norton Rose Fulbright Australia)

P D Crutchfield QC with O Bigos for the first and second respondents (instructed by King & Wood Mallesons)

No appearance for the third to sixth respondents

CATCHWORDS

CGU Insurance Limited v Blakeley

Procedure – Joinder of third parties – Where liquidators of company brought action in Supreme Court of Victoria against company directors for order under s 588M(2) of *Corporations Act* 2001 (Cth) – Where liquidators sought to join third party insurer after directors' claim for professional indemnity rejected – Where directors not in position to challenge denial of liability under contract of insurance – Whether Supreme Court had jurisdiction to join third party insurer and grant declaratory relief in relation to private insurance contract between directors and third party insurer.

Jurisdiction – Federal jurisdiction – Meaning of matter – Meaning of justiciable controversy.

Words and phrases – "declaratory relief", "federal jurisdiction", "joinder", "justiciable controversy", "matter", "privity", "real interest".

Constitution, s 76(ii).
Bankruptcy Act 1966 (Cth), s 117.
Corporations Act 2001 (Cth), ss 562, 588G, 588M(2).
Judiciary Act 1903 (Cth), ss 39(2), 79.
Supreme Court Act 1986 (Vic), s 36.
Supreme Court (General Civil Procedure) Rules 2005 (Vic), r 9.06.

FRENCH CJ, KIEFEL, BELL AND KEANE JJ.

Introduction

1 The question on this appeal is whether federal jurisdiction invested in the Supreme Court of Victoria authorises that Court to entertain a claim for a declaration, by a plaintiff against a defendant's insurer, that the insurer is liable to indemnify the defendant.

2 On 9 April 2013, the liquidators of Akron Roads Pty Ltd (In Liq) ("Akron") commenced proceedings in the Supreme Court against three former directors of the company including Mr Trevor Crewe. Also named as a defendant was Crewe Sharp Pty Ltd (In Liq) ("Crewe Sharp"), a company of which Mr Crewe was a director and which provided consultancy services to Akron. The liquidators allege that Crewe Sharp was a director of Akron within the extended meaning of "director" in s 9 of the *Corporations Act* 2001 (Cth) ("the Act")[1].

3 The liquidators sought an order under s 588M(2) of the Act that the directors and Crewe Sharp pay to them, as a debt due to Akron, an amount equal to the amount of loss or damage suffered by creditors of Akron in relation to debts owed by Akron because of its insolvency. The cause of action created by s 588M is enlivened by a breach on the part of a company director of the duties imposed by s 588G of the Act to prevent the company incurring debts when it is insolvent or if it would become insolvent by incurring the debts and where there are reasonable grounds for suspecting that the company is or would become insolvent. The liquidators alleged that Mr Crewe and Crewe Sharp breached that duty by failing to prevent Akron from incurring debts when it was insolvent.

4 On 4 December 2013, Crewe Sharp made a claim on a professional indemnity policy with the appellant, CGU Insurance Ltd ("CGU"), for indemnity in relation to the claim brought against it by the liquidators. Mr Crewe, as a director of Crewe Sharp, was also insured under that policy.

5 CGU sent a letter to Crewe Sharp on 6 March 2014 denying that the insurance policy covered the liability asserted by the liquidators. CGU said that the claims against Crewe Sharp and Mr Crewe were expressly formulated as

---

1 Paragraph (b) of the definition provides that "director" includes a person who is not validly appointed as a director if they act in the position of a director or if the directors of the company or body are accustomed to act in accordance with the person's instructions or wishes.

arising from breaches of their duties as directors. It cited an exclusion in the policy for the liability of directors or officers of an incorporated body "arising from any act, error or omission of a director or officer of that incorporated body while acting in that capacity." It also relied upon an exclusion of claims "[a]rising from a liability to pay trading debts, trade debts, or the repayment of any loan."

6 On 20 June 2014, Crewe Sharp entered into a creditors' voluntary liquidation and its liquidators informed Akron's liquidators that it was unlikely that the company would defend the proceeding against it. As at 31 July 2011, Mr Crewe's net assets were about $1 million. Mr Crewe is not a bankrupt but the undisputed evidence is that his limited assets would be insufficient to cover the claim brought against him by the Akron liquidators in this proceeding.

7 On 20 August 2014, Akron's liquidators filed an interlocutory process in the proceedings in the Supreme Court seeking an order that CGU be joined as a defendant and for leave to file and serve amended points of claim seeking a declaration that CGU was liable to indemnify Mr Crewe and Crewe Sharp under the insurance policy in respect of any judgment and costs order obtained by the Akron liquidators against them.

8 On 2 October 2014, Mr Crewe's solicitors informed the Akron liquidators that he consented to the joinder of CGU and that he disagreed with CGU's decision to deny indemnity to Crewe Sharp. The liquidators of Crewe Sharp informed the Akron liquidators that Crewe Sharp was unfunded, was not in a position to investigate CGU's denial of indemnity, and took no position in relation to the joinder application. The other defendant directors did not participate in the application.

9 On 13 February 2015, Judd J made the orders sought by the Akron liquidators[2]. CGU made an application for leave to appeal against those orders. That application was heard by the Court of Appeal on 15 June 2015 and on 19 June 2015 that Court ordered that the application for leave to appeal be granted but that the appeal be dismissed[3]. On 11 September 2015, this Court granted CGU special leave to appeal against the judgment and order of the Court of Appeal on the grounds that the Supreme Court lacked jurisdiction to entertain the claim by the Akron liquidators for declaratory relief against CGU[4]. For the

---

2 *Akron Roads Pty Ltd (in liq) v Crewe Sharp* [2015] VSC 34.

3 *CGU Insurance Ltd v Blakeley* (2015) 18 ANZ Insurance Cases ¶62-073.

4 [2015] HCATrans 232 (Kiefel and Gordon JJ).

reasons that follow, the Supreme Court had federal jurisdiction which authorised it to entertain the claim and had the power to grant the relief sought.

The statutory framework

10 Sections 588G and 588M of the Act, which create the duties, and the remedies for their breach, underpinning the Akron liquidators' action against the former directors, have been sufficiently described.

11 The liquidators relied upon s 562 of the Act as a sufficient basis for the joinder of CGU[5]. That section provides:

> "(1) Where a company is, under a contract of insurance (not being a contract of reinsurance) entered into before the relevant date, insured against liability to third parties, then, if such a liability is incurred by the company (whether before or after the relevant date) and an amount in respect of that liability has been or is received by the company or the liquidator from the insurer, the amount must, after deducting any expenses of or incidental to getting in that amount, be paid by the liquidator to the third party in respect of whom the liability was incurred to the extent necessary to discharge that liability, or any part of that liability remaining undischarged, in priority to all payments in respect of the debts mentioned in section 556.
>
> (2) If the liability of the insurer to the company is less than the liability of the company to the third party, subsection (1) does not limit the rights of the third party in respect of the balance.
>
> (3) This section has effect notwithstanding any agreement to the contrary."

There is an analogous provision in s 117 of the *Bankruptcy Act* 1966 (Cth) which vests, in the trustee in bankruptcy, the right of a bankrupt to indemnity, under a contract of insurance, against liabilities to third parties. It imposes a similar obligation on the trustee to pay over to such third parties amounts recovered under the insurance contract in respect of the bankrupt's liability to them.

---

5 The origin of s 562 was explained in *Interchase Corporation Ltd (in liq) v FAI General Insurance Co Ltd* [2000] 2 Qd R 301 at 314 per McPherson JA as a legislative response to *In re Harrington Motor Co Ltd; Ex parte Chaplin* [1928] Ch 105 and *In re Southern Cross Coaches Ltd* (1932) 49 WN (NSW) 230.

12 The liquidators' application to join CGU was made under r 9.06 of the Supreme Court (General Civil Procedure) Rules 2005 (Vic) which relevantly provided:

> "At any stage of a proceeding the Court may order that—
>
> ...
>
> (b) any of the following persons be added as a party, namely—
>
> (i) a person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all questions in the proceeding are effectually and completely determined and adjudicated upon; or
>
> (ii) a person between whom and any party to the proceeding there may exist a question arising out of, or relating to, or connected with, any claim in the proceeding which it is just and convenient to determine as between that person and that party as well as between the parties to the proceeding".

The power conferred by that rule is to be exercised on the premise that the Court has jurisdiction with respect to the proceedings so far as they relate to the party to be joined. It is not itself a source of jurisdiction. If, as in this case, the Court is exercising federal jurisdiction, then the rule is applicable by operation of s 79 of the *Judiciary Act* 1903 (Cth)[6]. That section relevantly provides, in subs (1):

> "The laws of each State or Territory, including the laws relating to procedure, evidence, and the competency of witnesses, shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all Courts exercising federal jurisdiction in that State or Territory in all cases to which they are applicable."

It is not suggested that there was any other law of the Commonwealth that "otherwise provided" so as to prevent the joinder rule being picked up by s 79.

13 The Supreme Court of Victoria, like all superior courts, has inherent power to grant declaratory relief[7]. Section 36 of the *Supreme Court Act* 1986

---

6 *Gordon v Tolcher* (2006) 231 CLR 334 at 342 [11]; [2006] HCA 62.

7 *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 581 per Mason CJ, Dawson, Toohey and Gaudron JJ; [1992] HCA 10.

(Vic) in terms common to Australian superior courts[8] and based upon O 25 r 5 of the English Rules of the Supreme Court 1883 and s 50 of the *Chancery Procedure Act* 1852[9] provides:

> "A proceeding is not open to objection on the ground that a merely declaratory judgment is sought, and the Court may make binding declarations of right without granting consequential relief."

In the exercise of federal jurisdiction by the Supreme Court, s 36 would be picked up by s 79 of the *Judiciary Act* and be applicable to the grant of declaratory relief in federal jurisdiction.

The pleading

14 The question before this Court being framed as one of jurisdiction, it is necessary to refer to the liquidators' Second Further Amended Points of Claim, which set out the claims both against the directors and against CGU.

15 The Akron liquidators alleged that the company incurred debts totalling $14,657,189.05 between 1 August 2009 and 1 February 2010, a period defined in the pleading as the "Relevant Period". Each of the defendants was said to have been a director of the company within the meaning of s 9 of the Act for the whole of the Relevant Period. Mr Crewe had been appointed as a director on 19 July 2001 and had continued to be a director since that date. Crewe Sharp, having acted in the position of a director, was thereby a de facto director within the meaning of s 9 of the Act. Alternatively, because the directors of the company were accustomed to act in accordance with its instructions or wishes, it was a "director" within the extended definition of that term in s 9 of the Act.

16 Akron was said to be insolvent during the Relevant Period and further, or alternatively, throughout lesser periods within the Relevant Period. There were reasonable grounds for suspecting that the company was insolvent or, alternatively, would so become insolvent at the time the debts were incurred. Each of the directors was said to have failed to prevent the company from incurring the debts and to have been aware that there were reasonable grounds for suspecting that the company was insolvent or would become insolvent by incurring the debts. A reasonable person in a like position would have been so aware. The directors were said, thereby, to have contravened s 588G(2) of the

---

8 See eg, s 21 of the *Federal Court of Australia Act* 1976 (Cth).

9 15 & 16 Vict, c 86.

Act. The creditors to whom the debts were owed had suffered loss and damage in relation to the debts because of the company's insolvency. Then it was said:

> "By reason of the matters set out in paragraphs 13 to 16 above, the Liquidators may recover under s 588M(2) of the Act from the First to Fourth Defendants, as a debt due to the Company, an amount equal to the loss and damage set out in paragraph 14 above."

The amount was $14,657,189.05.

17 The relief claimed against the directors was in the following terms:

> "An order under s 588M(2) of the *Corporations Act 2001* (Cth) that the Defendants pay to the First Plaintiffs, as a debt due to the Second Plaintiff, an amount equal to the amount of the loss or damage suffered by the Creditors (the details of which are set out in the particulars subjoined to paragraph 6 of the Points of Claim) in relation to the debts owed to them by the Second Plaintiff, because of the insolvency of the Second Plaintiff."

18 As to CGU, the liquidators alleged that it had issued an insurance policy, for the period 30 June 2009 to 30 June 2010, described as a Civil Liability Professional Indemnity policy in favour of Crewe Sharp and extending to its director, Mr Crewe. Express terms of the policy were pleaded, including that CGU would indemnify the insured "up to the Policy Limit for any Civil Liability to any third party which is incurred by the Insured in the conduct of the Professional Services" where the claims were made against the insured while the policy was in force, where CGU was given notice and where the claim arose from an act, error or omission on or after a date specified as the retroactive date. The limit of the cover provided under the policy was $5 million. The policy defined "Professional Services" as "the business of provision by the Insured of personnel, HR consultancy, management consultancy, business coaching, training and development consultancy, and debt recovery services". Exclusions relied upon by CGU in rejecting the claim for indemnity were pleaded and were said not to apply. CGU's denial of liability was pleaded.

19 CGU's liability under the policy and the operation of s 562 of the Act were pleaded:

> "25. By reason of the matters set out in paragraphs 18 to 24 above, CGU is liable to indemnify Crewe Sharp and Trevor Crewe under the Policy in respect of the amounts claimed by the Plaintiffs from Crewe Sharp and Trevor Crewe in this proceeding up to $5,000,000.

26. By reason of s 562 of the Act, any amount received by Crewe Sharp or its liquidator from CGU in respect of the Plaintiffs' claims must be paid to the Plaintiffs."

A plea in similar terms was set up in relation to a policy issued by CGU for the period from 30 June 2012 to 30 June 2013.

20 The declaration sought against CGU was as follows:

"A declaration that the Fifth Defendant is liable to indemnify the First and Fourth Defendants in respect of any judgment herein obtained by the Plaintiffs against the First and Fourth Defendants and in respect of any sums (including legal costs) which the Court may order the First and Fourth Defendants to pay to the Plaintiffs."

21 Mr Crewe and Crewe Sharp filed an amended defence asserting, inter alia, that they had reasonable grounds to expect, and did expect, that Akron was solvent during the Relevant Period and would remain solvent even if it incurred the debts or any of them.

22 CGU filed a defence. It relied upon the exclusion clauses and contended that the liquidators' claims against the directors did not constitute a "civil liability" or any liability incurred in the conduct of "professional services" within the meaning of the policy. It further alleged that Mr Crewe and Crewe Sharp had breached their duties of disclosure under s 21(1) of the *Insurance Contracts Act* 1984 (Cth) in failing to disclose that they provided company director and officer services. By reason of that non-disclosure any entitlement they had to indemnity was reduced to zero pursuant to s 28(3) of the *Insurance Contracts Act*. A similar plea was made in respect of the 2012/2013 policy.

23 In light of the pleadings, and as explained below, the jurisdiction invoked by the liquidators in the Supreme Court was federal jurisdiction.

The nature of the jurisdiction invoked by the Akron liquidators

24 "State jurisdiction is the authority which State Courts possess to adjudicate under the State Constitution and laws; federal jurisdiction is the authority to adjudicate derived from the Commonwealth Constitution and laws."[10] Jurisdiction with respect to a particular subject matter is authority to

---

10 *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087 at 1142 per Isaacs J; [1907] HCA 76, cited in *Lipohar v The Queen* (1999) 200 CLR 485 at 516–517 [78] per Gaudron, Gummow and Hayne JJ; [1999] HCA 65 and *Minister*

(Footnote continues on next page)

adjudicate upon a class of questions concerning that subject matter. The existence before a court of a question of the relevant subject matter class is necessary to the court's authority to adjudicate. It is not, however, sufficient to enliven the judicial power. As Griffith CJ said in *Ah Yick v Lehmert*[11], the term "federal jurisdiction" in s 71 of the Constitution means "authority to exercise the judicial power of the Commonwealth ... within limits prescribed."[12] Later in the same judgment the Chief Justice spoke of Parliament, under s 77(i), giving to a federal court created by it "jurisdiction to exercise any judicial power of the Commonwealth, which the Parliament may think fit to confer upon it"[13]. The identification of the subject matter of the proceeding is necessary to determine whether judicial power is invoked within its prescribed limits.

25 Other limits on "judicial power" are encompassed by such terms as "justiciability", "standing" and "incompatibility"[14]. "Jurisdiction" in the sense of authority to adjudicate and "judicial power" are different concepts[15]. There is also a distinction to be made, discussed below, between jurisdiction and specific powers to grant particular remedies. Observations about such distinctions may be made with an acceptance that there are other usages of the term "jurisdiction" which are not material for present purposes and which it is not necessary to explore[16].

26 It is a necessary condition of federal jurisdiction, in the sense of authority to exercise the judicial power of the Commonwealth, that the matter in which the jurisdiction of the court is invoked is "capable of judicial determination" or

---

for Immigration and Multicultural and Indigenous Affairs v B (2004) 219 CLR 365 at 394–395 [68] per Gummow, Hayne and Heydon JJ; see also at 377 [6] per Gleeson CJ and McHugh J; [2004] HCA 20.

11 (1905) 2 CLR 593; [1905] HCA 22.

12 (1905) 2 CLR 593 at 603.

13 (1905) 2 CLR 593 at 604.

14 Leeming, *Authority to Decide: The Law of Jurisdiction in Australia*, (2012) at 1.7.

15 Stellios, *The Federal Judicature: Chapter III of the Constitution*, (2010) at [7.2].

16 See generally Leeming, *Authority to Decide: The Law of Jurisdiction in Australia*, (2012) at 1.3–1.7.

"justiciable"[17]. That concept of justiciability does not embrace a purely advisory opinion. In holding invalid Commonwealth legislation purporting to confer an advisory jurisdiction this Court in *In re Judiciary and Navigation Acts* said that[18]:

> "there can be no matter within the meaning of [s 76] unless there is some immediate right, duty or liability to be established by the determination of the Court."

An entitlement to claim declaratory relief may be created by statute even though the subject matter of the relief is not an immediate right, duty or liability to be established. The declaration itself may assume that description where it concerns a real controversy susceptible of judicial determination. *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd*[19] may be cited as an example. Any member of the public was given standing by s 163A of the *Trade Practices Act* 1974 (Cth) to seek a declaration in relation to the operation or effect of any provision of that Act other than certain excluded provisions. Gleeson CJ and McHugh J said[20]:

> "The fact that no private right, or special interest, of the applicant is at stake in the present case does not deny to its disputed assertion that the respondent has violated s 52 of the Act and its claim for remedies of the kind provided by the Act the character of a justiciable controversy."

27 The subject matter and justiciability requirements were summarised by Burmester[21]:

> "'Matter', therefore, has two elements: the subject matter itself as defined by reference to the heads of jurisdiction set out in Chapter III, and the concrete or adequate adversarial nature of the dispute sufficient to give rise to a justiciable controversy."

---

17 *South Australia v Victoria* (1911) 12 CLR 667 at 708 per O'Connor J; [1911] HCA 17.

18 (1921) 29 CLR 257 at 265; [1921] HCA 20.

19 (2000) 200 CLR 591; [2000] HCA 11.

20 (2000) 200 CLR 591 at 603 [20].

21 Burmester, "Limitations on Federal Adjudication", in Opeskin and Wheeler (eds), *The Australian Federal Judicial System*, (2000) 227 at 232.

The constitutional requirements for the existence of a matter were not in issue in this appeal. What was in issue was the existence of a justiciable controversy between the Akron liquidators and CGU.

28 Section 39(2) of the *Judiciary Act* invests the Supreme Court with federal jurisdiction "in all matters in which the High Court has original jurisdiction or in which original jurisdiction can be conferred upon [the High Court]", save for certain immaterial exceptions. By virtue of s 76(ii) of the Constitution the matters in respect of which jurisdiction may be conferred upon the High Court include "any matter ... arising under any laws made by the Parliament". In addition to the general jurisdiction conferred by s 39(2) of the *Judiciary Act*, s 1337B of the Act invests the Supreme Courts of the States with jurisdiction "with respect to civil matters arising under the Corporations legislation."[22] The term "civil matter" is defined in s 9 of the Act as "a matter other than a criminal matter." The term "criminal matter" is not defined. The use of the constitutional term "matter" in the statutory investing of Supreme Courts with general and specific federal jurisdiction directs attention to the frequently quoted observation of Latham CJ in *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett*[23]:

> "a matter may properly be said to arise under a Federal law if the right or duty in question in the matter owes its existence to Federal law or depends upon Federal law for its enforcement, whether or not the determination of the controversy involves the interpretation (or validity) of the law."

29 It is a particular application of that general statement to say that a matter will arise under a federal law if it involves a claim at common law or equity or under a law of a State where the claim is "in respect of a right or property which is the creation of federal law"[24]. If the source of a defence to a claim at common law or equity or under a law of a State is a law of the Commonwealth, then on

---

22 The interaction between s 39(2) of the *Judiciary Act* and the conferral of jurisdiction in Div 1 of Pt 9.6A of the Act is further explained in *Gordon v Tolcher* (2006) 231 CLR 334 at 345 [29].

23 (1945) 70 CLR 141 at 154; [1945] HCA 50, quoted with approval in *LNC Industries Ltd v BMW (Australia) Ltd* (1983) 151 CLR 575 at 581; [1983] HCA 31 and *Re McJannet; Ex parte Australian Workers' Union of Employees (Q) [No 2]* (1997) 189 CLR 654 at 656–657; [1997] HCA 40.

24 *LNC Industries Ltd v BMW (Australia) Ltd* (1983) 151 CLR 575 at 581.

that account also the matter may be said to arise under federal law[25]. The existence of such a claim in a proceeding will meet the subject matter condition necessary to enliven the federal jurisdiction invested in a court of a State pursuant to s 77(iii) of the Constitution, read with s 76(ii). However, before federal jurisdiction can be enlivened, the claims in the proceeding must not only satisfy the subject matter requirements, but involve a justiciable controversy or otherwise fall within an established category of judicial power[26].

30 The justiciability requirement encompassed in the concept of "matter" appears in the description of that term by the majority in *Fencott v Muller*[27] as "a justiciable controversy, identifiable independently of the proceedings which are brought for its determination and encompassing all claims made within the scope of the controversy"[28]. It has an evaluative element as also appears from the majority judgment in *Fencott*[29]:

> "What is and what is not part of the one controversy depends on what the parties have done, the relationships between or among them and the laws which attach rights or liabilities to their conduct and relationships. The scope of a controversy which constitutes a matter is not ascertained merely by reference to the proceedings which a party may institute, but may be illuminated by the conduct of those proceedings and especially by the pleadings in which the issues in controversy are defined and the claims for relief are set out."

---

25 *LNC Industries Ltd v BMW (Australia) Ltd* (1983) 151 CLR 575 at 581, citing *Felton v Mulligan* (1971) 124 CLR 367 at 408; [1971] HCA 39.

26 Eg the long-standing power of courts to give directions to trustees, administrators and executors and to determine questions arising in the course of company winding up processes or the traditional powers of courts to make orders relating to the maintenance and guardianship of infants, as outlined in *R v Davison* (1954) 90 CLR 353 at 368–369 per Dixon CJ and McTiernan J; [1954] HCA 46.

27 (1983) 152 CLR 570; [1983] HCA 12.

28 (1983) 152 CLR 570 at 603 per Mason, Murphy, Brennan and Deane JJ.

29 (1983) 152 CLR 570 at 608 per Mason, Murphy, Brennan and Deane JJ.

The evaluative element is illustrated by, but not confined to, the delineation of the so called "accrued jurisdiction" to entertain non-federal claims in federal jurisdiction, by their Honours' observation that it is[30]:

> "a matter of impression and of practical judgment whether a non-federal claim and a federal claim joined in a proceeding are within the scope of one controversy and thus within the ambit of a matter."

31 The existence of jurisdiction is anterior to the existence of the power to grant particular relief. As Gleeson CJ and McHugh J said in *Minister for Immigration and Multicultural and Indigenous Affairs v B*[31]:

> "In a legal context the primary meaning of jurisdiction is 'authority to decide'. It is to be distinguished from the powers that a court may use in the exercise of its jurisdiction." (footnotes omitted)

The distinction has been made frequently in this Court[32].

---

30 (1983) 152 CLR 570 at 608 per Mason, Murphy, Brennan and Deane JJ. As Gummow and Hayne JJ observed in *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 585 [140]; [1999] HCA 27, the references to "impression" and "practical judgment" cannot be understood as stating a test to be applied. Considerations of impression and practical judgment are relevant because the question of jurisdiction usually arises before evidence is adduced and often before the pleadings are complete. Necessarily, then, the question will have to be decided on limited information.

31 (2004) 219 CLR 365 at 377 [6]. See also to similar effect at 395 [69] per Gummow, Hayne and Heydon JJ, citing *Harris v Caladine* (1991) 172 CLR 84 at 137 per Toohey J; [1991] HCA 9.

32 *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 616 per Mason CJ, 619 per Wilson and Dawson JJ, 627–628 per Toohey J; [1987] HCA 23; *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1 at 29 [27]–[28], 32 [35] per Brennan CJ, McHugh, Gummow, Kirby and Hayne JJ; [1998] HCA 30; *Lipohar v The Queen* (1999) 200 CLR 485 at 516–517 [78] per Gaudron, Gummow and Hayne JJ; *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2001) 204 CLR 559 at 590 [64]–[65] per Gleeson CJ, Gaudron and Gummow JJ; [2001] HCA 1; *Keramianakis v Regional Publishers Pty Ltd* (2009) 237 CLR 268 at 280 [36] per French CJ; [2009] HCA 18; *Osland v Secretary, Department of Justice [No 2]* (2010) 241 CLR 320 at 332 [19] per French CJ, Gummow and Bell JJ; [2010] HCA 24; *Lacey v*

(Footnote continues on next page)

32 The Akron liquidators' proceeding against the directors involved a matter arising under a law made by the Commonwealth Parliament, namely ss 588G and 588M of the Act. If Mr Crewe and Crewe Sharp had instituted third party proceedings against CGU claiming indemnity under the insurance policy, an indemnity which depended for its existence upon the existence of a liability to pay damages pursuant to s 588M of the Act, then their claim would have involved a matter arising under federal law. And if CGU chose to invoke s 21 of the *Insurance Contracts Act*, as it did in its pleadings before the Supreme Court, the matter would, on that account, also have been a matter arising under federal law. The third party proceedings would properly have been characterised as part of the matter defined by the Akron liquidators' claim against the directors. The matter, defined by reference to the Akron liquidators' claims against the directors and a third party claim by the directors against CGU, would have met the subject matter requirement for the existence of federal jurisdiction and involved claims enlivening the judicial power of the Commonwealth.

33 The question for this appeal is whether the Akron liquidators' claim for declaratory relief against CGU involved a matter arising under a law of the Commonwealth in which the Supreme Court had federal jurisdiction, invested by statute, to exercise the judicial power of the Commonwealth in the sense described above. Alternatively, the question may be asked whether the claim was part of the matter in which the liquidators claimed against the directors.

34 The Akron liquidators' claim for declaratory relief against CGU answered the subject matter requirement for the exercise of federal jurisdiction by the Supreme Court. It depended upon the existence of a liability under s 588M of the Act said to enliven the indemnity obligation under the CGU insurance policy. The question whether the judicial power of the Commonwealth invested in the Supreme Court was enlivened by the claim for declaratory relief against CGU depends upon whether that claim involved a justiciable controversy.

35 The reasoning of the primary judge and the Court of Appeal focused on the availability of the declaratory relief sought. The written submissions filed by counsel followed a similar path. The reasoning appears to have proceeded on the basis that non-federal rather than federal jurisdiction was engaged. Nevertheless, much of what was said may be treated as a surrogate for argument on the question whether the Akron liquidators' claim against CGU involved a controversy cognisable in the exercise of federal jurisdiction. There was

---

Attorney-General (Qld) (2011) 242 CLR 573 at 593–594 [48] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ; [2011] HCA 10.

reference in the Supreme Court and in argument before this Court to differences of view expressed in intermediate courts of appeal concerning the availability of the relief.

The decisions of intermediate courts of appeal

36 Intermediate courts of appeal have not always drawn a clear distinction between jurisdiction and power in this class of case. That is not least because argument before those courts has focused on matters such as utility going to discretion to grant the declaratory relief, which overlaps with issues of standing and justiciability relevant to the availability of the remedy.

37 In *JN Taylor Holdings Ltd (In liq) v Bond*[33], King CJ, with whom Prior and Perry JJ agreed[34], considered whether the Supreme Court of South Australia had "jurisdiction" to grant a declaration sought by the liquidators of the appellant companies against the directors' insurer. The Chief Justice said that the Court's power to grant declaratory relief was limited only by its own discretion and the boundaries of judicial power[35]. In so saying, he acknowledged a distinction between the jurisdiction to entertain the action at all and a settled practice of the Court to exercise its discretion by withholding the relief in certain factual situations[36]. The reference to "jurisdiction" may be understood as a reference to the limits of the Court's jurisdiction. It was not suggested that a "settled practice" going to discretion defined the limits of jurisdiction or of the Court's power. Nevertheless, the discretionary considerations to which the Chief Justice referred would be relevant to the existence of a "matter" in federal jurisdiction[37].

---

33 (1993) 59 SASR 432.

34 (1993) 59 SASR 432 at 443.

35 (1993) 59 SASR 432 at 436.

36 (1993) 59 SASR 432 at 436, citing *Rediffusion (Hong Kong) Ltd v Attorney-General of Hong Kong* [1970] AC 1136 at 1155.

37 (1993) 59 SASR 432 at 436.

38 King CJ required that the plaintiff have a real interest in the determination of the question raised by the declaration — a purely theoretical question would weigh against the grant of relief[38]. On the other hand, a plaintiff could have a real interest in the question even though its impact on the plaintiff might be no more than a possibility[39]. The liquidators' interest in obtaining a declaration of the insurer's liability concurrently with that of the directors was "undeniable"[40]. In that case the Full Court was concerned with proceedings under the Companies Code of South Australia. It was not thereby concerned with the exercise of federal jurisdiction.

39 A different result was reached by the Court of Appeal of Queensland in *Interchase Corporation Ltd (in liq) v FAI General Insurance Co Ltd*[41]. The insurer of valuers who were sued for professional negligence had denied liability and that denial was not contested by the valuers. The plaintiff sought joinder of the insurer to claim a declaration that the insurer was liable to indemnify the valuers in respect of their asserted liability. Joinder was ordered by a Judge in Chambers but an appeal was allowed by McPherson JA and Byrne J over the dissent of Davies JA.

40 Byrne J based his reasons upon the terms of the joinder rule, which authorised the joinder of persons whose "presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter"[42]. His Honour held that the joinder served no useful purpose. The declaration sought could not directly affect any property, legal right or obligation of the plaintiff. Nor could it effectively determine the insurer's rights or duties. A judicial determination of the issues pertaining to the plaintiff's claim for declaratory relief could not shut out the insurer from litigating about them again in proceedings under s 562 of the Act or s 117 of the *Bankruptcy Act*. More fundamentally, he held that as between

---

38 (1993) 59 SASR 432 at 436–437.

39 (1993) 59 SASR 432 at 437, citing *Hordern-Richmond Ltd v Duncan* [1947] KB 545.

40 (1993) 59 SASR 432 at 438.

41 [2000] 2 Qd R 301.

42 [2000] 2 Qd R 301 at 316, citing Rules of the Supreme Court (Q), O 3 r 11(2) (since repealed).

insurer and insured there was no controversy and there could be no res judicata[43]. Nor could a defence by the insurer to an indemnity claim in later proceedings constitute an abuse of process. The declaratory relief sought would have the character of an advisory opinion[44]. McPherson JA agreed with Byrne J and added that the presence of the insurer was not "necessary" in the sense required by the joinder rule[45].

41 Davies JA, in dissent, identified the question before the Court as a question of "power under the Rules of Court to order the joinder sought" and whether the primary judge had erred in exercising his discretion to permit the joinder[46]. A grant of declaratory relief would have utility as it would be an abuse of process for the insurer or the insured to litigate the question determined by the declaration in later proceedings[47]. The declaration sought could therefore "effectively determine the question of [the insurer's] liability to the valuers as between those parties."[48] The question was not hypothetical[49]:

> "the insolvency of the valuers, their failure to seek an indemnity from [the insurer] and the ineffectuality of any judgment by [the plaintiff] against the valuers unless [the insurer] is liable to indemnify them — together combine, in my view, to give [the plaintiff] a real interest in the relief which it seeks."

42 The difference between his Honour's approach and that of the majority reflected not so much a difference in principle as a different evaluation of the interest of the plaintiff in bringing the claim against the insurer and the utility of the declaratory relief sought. For the purposes of determining whether there is a "matter" attracting federal jurisdiction in such claims, the approach adopted by Davies JA is to be preferred. It reflected a recognition of the reality of the

---

43 [2000] 2 Qd R 301 at 318–319.

44 [2000] 2 Qd R 301 at 320.

45 [2000] 2 Qd R 301 at 312.

46 [2000] 2 Qd R 301 at 307.

47 [2000] 2 Qd R 301 at 310–311.

48 [2000] 2 Qd R 301 at 311.

49 [2000] 2 Qd R 301 at 311.

plaintiff's interest which was not to be confined by a requirement that the plaintiff demonstrate a claim for vindication of an existing legal right against the insurer.

43 In *Employers Reinsurance Corporation v Ashmere Cove Pty Ltd*[50] a Full Court of the Federal Court rejected an argument that declaratory relief sought by plaintiffs against a defendant's insurers was beyond the judicial power of the Commonwealth.

44 Their Honours referred to the distinction between a "matter" and the legal proceeding in which the matter is determined, reiterating that the two are not synonymous[51]. They observed that the "justiciable controversy" before the Federal Court, and thereby the matter before that Court, was not defined by the contractual relationship between the insurers and the insured. In that case the insured maintained but did not pursue its entitlement to indemnity. The plaintiff investors had a real interest in establishing that the insurers were liable to indemnify the insured with respect to the liability the subject of the claim against it. That analysis is equally applicable to the scope of the relevant statutory jurisdiction conferred on the Supreme Court by s 1337B of the Act and by s 39(2) of the *Judiciary Act* in so far as each grant refers to "matters".

45 The preceding analysis would bring the claim against CGU in this case within the scope of a "justiciable controversy" capable of constituting a "matter" for the purposes of federal jurisdiction where the subject matter falls within the grant of jurisdiction.

46 There was no dispute in the Full Court in *Ashmere Cove* that the Federal Court had power to grant declaratory relief against the insurers. The remaining debate in that case went to discretion by reference to practical utility. In that connection the Court held that the principle enunciated by this Court in *Port of Melbourne Authority v Anshun Pty Ltd*[52] would probably preclude the insurers, in subsequent proceedings involving the same parties, from agitating any defence they could have invoked against the plaintiffs' claim[53]. In that way the proposed

---

50 (2008) 166 FCR 398.

51 (2008) 166 FCR 398 at 408 [43]–[44], citing *Crouch v Commissioner for Railways (Q)* (1985) 159 CLR 22 at 37; [1985] HCA 69 and *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 585 [138]–[139].

52 (1981) 147 CLR 589; [1981] HCA 45.

53 (2008) 166 FCR 398 at 413–414 [71].

proceedings could effectively finally determine the question of the insurers' liability. This Court refused an application for special leave to appeal against the decision of the Full Court[54].

47 A similar approach, focused on the availability of the remedy rather than jurisdiction, was taken in *QBE Insurance (Australia) Ltd v Lois Nominees Pty Ltd*[55]. In that case, the plaintiff claimed equitable compensation against a solicitor who became a bankrupt and, being refused joinder of a claim for declaratory relief against the solicitor's insurer, commenced separate proceedings seeking such relief which were consolidated with the primary action. An appeal by the insurer against dismissal of a motion for summary judgment against the plaintiff was dismissed by a majority in the Court of Appeal of Western Australia.

48 The appeal was dismissed on the basis that the availability of declaratory relief was arguable[56] albeit the question remained whether the insured should be joined in the proceedings against the insurer. The focus of the majority reasoning was on the utility of the proceedings by reference to the limits imposed on relitigation by abuse of process considerations. McLure P, in dissent, held that the real controversy in the case was between the insured and his insurer and the plaintiff was not a proper contradictor. On that basis there was no utility in the claim[57]. Her Honour expressed doubt about the correctness of the decision of the Full Court of the Federal Court in *Ashmere Cove*[58].

49 Only in one of the preceding decisions has the court held the relief not to be available, that being the decision of the Court of Appeal of Queensland. That decision involved an application of a joinder rule and no direct consideration of jurisdiction. The application of the majority judgment in that case and the dissent of McLure P in the Court of Appeal of Western Australia to federal jurisdiction is at best indirect and, in any event, not to be preferred in evaluating the concreteness of the controversy between the liquidators and CGU in this case.

---

54 [2008] HCATrans 296 (Gummow, Hayne and Kiefel JJ).

55 (2013) 17 ANZ Insurance Cases ¶61-949.

56 (2013) 17 ANZ Insurance Cases ¶61-949 at 73,113–73,114 [116]–[121] per Newnes JA, 73,131 [228] per Murphy JA.

57 (2013) 17 ANZ Insurance Cases ¶61-949 at 73,103 [51].

58 (2013) 17 ANZ Insurance Cases ¶61-949 at 73,100 [34].

The primary judge's decision

50 The Akron liquidators contended before Judd J that they had a sufficient interest in the determination of CGU's liability to support their claim for a declaration and thus for joinder. They relied upon s 562 of the Act. They also contended that if they were successful in their claim against Mr Crewe he would become a bankrupt, in which case his trustee in bankruptcy would have similar rights by operation of s 117 of the *Bankruptcy Act*.

51 CGU opposed joinder on the basis that, there being no claim against it by its insured, there was no justiciable controversy. It made the obvious point that s 562 does not confer on a liquidator a right of action against an insurer to enforce insurance policies. The liquidator's interest would be hypothetical and contingent upon an insured successfully enforcing a right. The possible bankruptcy of Mr Crewe was also hypothetical and contingent. Further it was said that the Court had no jurisdiction under s 36 of the *Supreme Court Act* 1986 (Vic) to grant the declaratory relief sought and, if it did have jurisdiction, should decline to do so in the exercise of discretion. Section 36, however, goes to power rather than to jurisdiction in the sense relevant for present purposes. The submissions from CGU, to the extent that they were reflected in his Honour's reasons, focused on the power to award declaratory relief.

52 The key finding by his Honour appeared at [48] of his reasons for judgment, in which he said:

> "The claim by the plaintiffs, that CGU is bound to indemnify the insured, arises out of, or relates to, or is connected with their claim against the insured as defendants. The plaintiffs have a sufficient interest in the proceeds of insurance to provide them with standing to apply for declaratory relief. Furthermore, by reason of s 562 of the Act, and the duty of liquidators to creditors of Akron Roads, there is a justiciable dispute consequent upon CGU's denial of liability under the policy."

He referred to factors rendering it "just and convenient that the dispute between the plaintiffs and CGU be resolved at the same time, and in the same proceeding, as the dispute between the plaintiffs and the insured."[59] That approach was said to be consistent with the overarching purpose under the *Civil Procedure Act* 2010 (Vic). There was no express reference to jurisdiction or federal jurisdiction.

---

59 [2015] VSC 34 at [48].

The decision of the Court of Appeal of the Supreme Court of Victoria

53 CGU sought leave to appeal to the Court of Appeal on the single proposed ground that Judd J had erred in law in joining it as a defendant to the proceeding:

> "because courts have no jurisdiction at the suit of a stranger to grant declaratory relief as to the meaning and effect of a private contract between parties who will not pursue any claim relating to rights or duties under that contact."

In support of the application for leave, the proposed appeal was said to involve "principles of law about which intermediate courts of appeal in Australia have expressed divergent views".

54 The Court of Appeal referred to the limits of declaratory relief discussed by this Court in *Ainsworth v Criminal Justice Commission*[60]. While that discussion was not framed by reference to jurisdiction, the Court of Appeal regarded as significant this Court's identification of the need for a "real interest" on the part of the person seeking declaratory relief coupled with foreseeable consequences for the parties if a declaration were to be made[61]. In a passage which suggested that their Honours' attention had not been directed to the nature of the jurisdiction which had been invoked in the proceedings before them, they said[62]:

> "The position is of course different in the context of federal jurisdiction, where there must be a 'matter' sufficient to attract the exercise of judicial power. For that reason, observations about limits on the power of courts exercising federal jurisdiction to grant declarations do not necessarily assist CGU's jurisdictional argument." (footnote omitted)

55 The Court acknowledged that "even in that context"[63] (ie a court exercising federal jurisdiction) authority was against the view that the Court lacked jurisdiction. It referred to *Ashmere Cove*[64]. It held on the basis of the

---

60 (1992) 175 CLR 564.

61 (2015) 18 ANZ Insurance Cases ¶62-073 at 76,691 [22].

62 (2015) 18 ANZ Insurance Cases ¶62-073 at 76,691 [23].

63 (2015) 18 ANZ Insurance Cases ¶62-073 at 76,691 [24].

64 (2008) 166 FCR 398.

reasoning in that case that it would be an abuse of process to permit either the insured or CGU to relitigate the question determined by the declaratory proceedings. It was not necessary to decide whether those proceedings would give rise to a res judicata between the insured and CGU[65].

56 Their Honours noted that the dissent of McLure P in *QBE Insurance* and her Honour's doubt about the correctness of *Ashmere Cove* expressed in that dissent depended in part upon an observation by Gaudron J in *Truth About Motorways*[66]:

> "There may be cases where, absent standing, there is no justiciable controversy. That may be because the court is not able to make a final and binding adjudication. *To take a simple example, a court could not make a final and binding adjudication with respect to private rights other than at the suit of a person who claimed that his or her right was infringed*. Or there may be no justiciable controversy because there is no relief that the court can give to enforce the right, duty or obligation in question." (emphasis added by McLure P; footnote omitted)

In noting this influence on McLure P's reasoning, the Court of Appeal observed that *Truth About Motorways* "was a case in federal jurisdiction."[67] That observation tends to reinforce the conclusion that the Court of Appeal and counsel before it did not appreciate that the case with which it was concerned was one of federal jurisdiction.

57 Their Honours also referred to the Court of Appeal's earlier decision in *CE Heath Casualty & General Insurance Ltd v Pyramid Building Society (In liq)*[68] in which joinder of an insurer was refused on discretionary grounds. In that case Ormiston JA (Tadgell JA agreeing) observed that absent authority he would have had the "gravest doubt whether it was ordinarily appropriate to permit an outsider to seek from the court declaratory relief as to the meaning and effect of a contract between two parties who had not themselves raised any issue as to its meaning and effect and at least one of whom objected to the court's interfering in

---

65 (2015) 18 ANZ Insurance Cases ¶62,073 at 76,691 [26].

66 (2000) 200 CLR 591 at 611–612 [46], cited in (2013) 17 ANZ Insurance Cases ¶61-949 at 73,100 [36].

67 (2015) 18 ANZ Insurance Cases ¶62,073 at 76,691–76,692 [27].

68 [1997] 2 VR 256.

its private affairs."[69] As the Court of Appeal in the present case observed, what was said in *CE Heath* was not directed to jurisdiction[70]. It may be added that the reference to interference in the "private affairs" of insurer and insured involved a reductionist approach to the significance for creditors of the insurer's liability, a fortiori in the light of s 562 of the Act and s 117 of the *Bankruptcy Act*.

58 The Court of Appeal concluded that[71]:

> "For present purposes, all that matters is that the first and second respondents have a sound basis for seeking declaratory relief, on the basis that there may be practical utility in having an issue in which they have a real interest resolved in this manner."

The grounds of appeal

59 The grounds of appeal in this Court were:

> "2. The Court erred in dismissing the appeal because the Court does not have jurisdiction at the suit of the first and second respondents to grant declaratory relief as to the meaning and effect of a contract to which they are not parties and when the parties to the contract, being the appellant and the third and sixth respondents, are not themselves in dispute.
>
> 3. The Court ought to have held that the learned primary judge erred in law in joining the appellant as a defendant to the proceeding because courts have no jurisdiction at the suit of a stranger to grant declaratory relief as to the meaning and effect of a private contract between parties who will not pursue any claim relating to rights or duties under that contract."

The grounds thus expressed focused solely on jurisdiction albeit, having regard to the written submissions filed in this Court, they did not draw a clear distinction between jurisdiction, power and discretion. The conceptual distinctions are important even though, in the context of federal jurisdiction, factors relevant to

---

69 [1997] 2 VR 256 at 270.

70 (2015) 18 ANZ Insurance Cases ¶62-073 at 76,693 [30]–[31].

71 (2015) 18 ANZ Insurance Cases ¶62-073 at 76,694 [37].

the power to grant the remedy and discretionary refusal may go to the existence of a "matter".

Contentions and conclusions

60 CGU, in its written submissions, argued that the Court of Appeal erred in:

(i) dismissing cases in federal jurisdiction as irrelevant;

(ii) holding that the insurer would be precluded by the *Anshun* doctrine from seeking to relitigate issues decided adversely to it in the declaratory proceedings;

(iii) failing to find that the declaration, if made, would not bind the parties; and

(iv) finding that s 562 of the Act and s 117 of the *Bankruptcy Act* "operate as an exception to the privity rule and provide the basis upon which an outsider may seek declaratory relief about the meaning and effect of a contract."

61 The parties to the appeal in their written submissions did not put argument on whether the Supreme Court was being asked to exercise federal jurisdiction in the claim for declaratory relief. This Court sent the parties a letter prior to the hearing of the appeal asking that they consider:

> "Whether the joinder of the appellant in the proceedings in the Supreme Court of Victoria invoked the jurisdiction of that Court in a matter arising under a law of the Commonwealth pursuant to s39(2) of the *Judiciary Act* 1903 and/or s1337B of the *Corporations Act* 2001."

62 The CGU argument, to the extent that it engaged with the question of federal jurisdiction, reduced to the proposition that there was no justiciable controversy between the liquidators and CGU, and therefore no "matter". The Akron liquidators on the other hand contended that the claim did involve the invocation of federal jurisdiction.

63 For the reasons already given, the claims which the Akron liquidators seek to bring against CGU involve a question arising under a law of the Commonwealth. It is a necessary condition of the liability of CGU to indemnify Mr Crewe and Crewe Sharp that they be liable to the liquidators pursuant to s 588M of the Act. That is, of course, not a sufficient condition of CGU's liability under the policy. That liability will also depend upon the scope of the cover provided by the policy, properly construed, and, if they become relevant,

the merits of the specific defences which have been raised to the Akron liquidators' claims.

64 The question raised by the Akron liquidators' claim is one within the subject matter area of federal jurisdiction. The next inquiry is whether it reflects a justiciable controversy between the Akron liquidators and CGU. It is in that area that the parties essentially joined issue on this appeal.

65 In light of the foregoing reasons, that question can be answered quite shortly. Crewe Sharp had made a claim against CGU under the policy and CGU had declined that claim. Neither Crewe Sharp nor its liquidators nor Mr Crewe accepted the denial of liability. Mr Crewe, who was also an insured person under the policy, disagreed with the decision and consented to the joinder of CGU. The liquidators of Crewe Sharp were not in a position to investigate CGU's denial of liability and took no position on the joinder.

66 If the Akron liquidators made good their claim against Crewe Sharp and Mr Crewe, and established the liability of CGU to indemnify its insured, the proceeds of the policy so far as they related to Crewe Sharp would have been payable by the liquidators of Crewe Sharp to the Akron liquidators subject to the deductions mentioned in s 562 of the Act. If Mr Crewe himself became a bankrupt then s 117 of the *Bankruptcy Act* could apply to similar effect with respect to his trustee in bankruptcy.

67 As the Akron liquidators have submitted, their claim does not depend upon any incursion upon principles of contract law or privity of contract. They are not claiming as a party to the insurance contract nor as persons otherwise entitled to the benefit of that contract. Their claim is based upon the legal consequence created by s 562 of the Act in the event that CGU is liable to indemnify Crewe Sharp and, more contingently, s 117 of the *Bankruptcy Act* in the event that CGU is liable to indemnify Mr Crewe and he becomes a bankrupt. That legal consequence would be the bringing into existence, in favour of the Akron liquidators, of a right to the proceeds of the insurance policy payable to Crewe Sharp in respect of its liability to Akron. The interest upon which the claim for declaratory relief is based and CGU's denial of liability under the policy are sufficient to constitute a justiciable controversy between the Akron liquidators and CGU involving a question arising under a law of the Commonwealth. Because of these statutory provisions, it is the Akron liquidators who stand to benefit (to the exclusion of Crewe Sharp and Mr Crewe) from the making of the declaration sought. It would be distinctly to ignore this reality if the liquidators' interest in this regard could be defeated by reason of inaction on the part of Crewe Sharp and Mr Crewe against CGU given that the

statutory provisions themselves deprive Crewe Sharp and Mr Crewe of all incentive to pursue a claim under the policy.

68 The declaration sought by the Akron liquidators would be binding as between them and CGU. In the circumstance in which the insured are also parties, albeit not conceding CGU's position nor claiming relief against it, it is unlikely that they or CGU would be permitted to relitigate, in subsequent proceedings, issues which had been determined or which could properly, and should, have been agitated in the proceedings against CGU.

69 The application of preclusive doctrines against relitigation, which would support the utility of declaratory relief, is in the circumstances of this case theoretical. Given the position of the parties there would seem to be little or no prospect of any relitigation being embarked upon which would require consideration of those doctrines. For all practical purposes the declaratory claim brought by the Akron liquidators will be the only occasion on which CGU's denial of liability is contested.

70 This is a case in which the Supreme Court has federal jurisdiction to entertain the claim by the Akron liquidators against CGU and power to grant the declaratory relief sought. The appeal should be dismissed. The appellant is to pay the respondents' costs of the appeal.

71 NETTLE J. The first respondents ("the liquidators") are the liquidators of the second respondent, Akron Roads Pty Ltd (in liq) ("Akron Roads"). In 2013, the liquidators and Akron Roads instituted a proceeding in the Supreme Court of Victoria against, inter alia, the third and sixth respondents ("the directors") as directors of Akron Roads for damages for breach of s 588G(2) of the *Corporations Act* 2001 (Cth) ("the proceeding"). During the early interlocutory stages of the proceeding, the primary judge (Judd J) granted the liquidators leave to join the directors' professional indemnity insurer ("CGU") as an additional defendant to the proceeding and to amend the liquidators' points of claim to include a claim for a declaration that CGU is liable to pay the directors the amount which the directors are ordered to pay to the liquidators. CGU applied for leave to appeal to the Court of Appeal (Ashley, Beach and McLeish JJA) on the ground that Judd J did not have jurisdiction to make the declaration that was sought. Leave was granted but the appeal was dismissed. By grant of special leave, CGU now appeals to this Court. For the reasons which follow, this appeal should be dismissed.

The facts

72 The liquidators were appointed as liquidators of Akron Roads in March 2010. A little over three years later, they instituted the proceeding in the Commercial and Equity Division of the Supreme Court of Victoria against the third, fourth and fifth respondents, who were formerly directors of Akron Roads, and the sixth respondent, Crewe Sharp Pty Ltd ("Crewe Sharp"), a company controlled by the third respondent ("Mr Crewe"). The liquidators alleged that either Crewe Sharp acted in the position of a director, or, alternatively, Akron Roads' directors were accustomed to acting in accordance with Crewe Sharp's wishes, and therefore that Crewe Sharp was a "director" as defined in s 9 of the *Corporations Act*. The liquidators alleged that, as directors of Akron Roads, the third to sixth respondents breached s 588G(2) of the *Corporations Act* by failing to prevent Akron Roads from incurring debts while insolvent. Pursuant to s 588M(2) of the *Corporations Act*, the liquidators applied for an order that the third to sixth respondents pay, as a debt due to Akron Roads, an amount equal to the loss or damage suffered by Akron Roads' creditors as a result of Akron Roads' insolvent trading.

73 In December 2013, Crewe Sharp claimed indemnity from CGU for any amount for which Crewe Sharp might be held liable to the liquidators. Mr Crewe was also an insured under the policy. CGU denied the claim on the basis, it was said, that the policy did not provide cover in respect of the claims made against Crewe Sharp. CGU has since also alleged non-disclosure as a basis for denying liability.

74 Crewe Sharp was put into liquidation in June 2014 and the liquidators of Crewe Sharp immediately told the liquidators that it was unlikely that

Crewe Sharp would be defending the proceeding. Since then, Crewe Sharp has not participated in the proceeding.

75 The liquidators of Crewe Sharp and Mr Crewe did not file any cross-claims against CGU or, apart from asserting their claims in correspondence, indicate any intention of otherwise challenging CGU's denial of liability under the policy. It is not suggested, however, that the directors accept CGU's denial of liability.

76 As at July 2011, Mr Crewe had net assets of about $1 million and, apart from the fact that he has not been declared bankrupt, there is no reason to think that he would have sufficient funds to meet the liquidators' claim of approximately $14.6 million. The ability of the fourth and fifth respondents to satisfy any judgment in favour of the liquidators is unknown.

77 In August 2014, the liquidators applied to Judd J for an order pursuant to r 9.06(b) of the Supreme Court (General Civil Procedure) Rules 2005 (Vic) that CGU be joined as a defendant to the proceeding and for leave to file and serve amended points of claim seeking a declaration 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] and in respect of any sums (including legal costs) which the court may order [them] to pay to the [liquidators]".

78 The liquidators based their application in relation to Crewe Sharp on the priority which s 562 of the *Corporations Act* would afford them in respect of any amount payable by CGU to Crewe Sharp under the insurance policy. In relation to Mr Crewe, the liquidators based their application on the fact that, if the claim succeeds and results in Mr Crewe being declared bankrupt, the liquidators will have priority under s 117 of the *Bankruptcy Act* 1966 (Cth) in respect of any amount payable by CGU to Mr Crewe under the policy.

79 CGU opposed the application principally on the ground that the Court had no jurisdiction to grant the declaratory relief sought, or should decline to do so in the exercise of its discretion.

The judgments below

80 Judd J allowed the application. Despite CGU's submission that there was "a clear conflict of relevant authorities ... concerning the question of jurisdiction to grant declaratory relief in [such] a case"[72], his Honour said that he found no reason to refuse the application. As he observed, there was a contest between the liquidators and CGU concerning CGU's liability to indemnify the directors. It

---

72 *Akron Roads Pty Ltd (in liq) v Crewe Sharp* [2015] VSC 34 at [18].

was unlikely that the joinder of CGU would prejudice the efficient and cost-effective management of the trial or disproportionately extend the length of the trial. The claim by the liquidators that CGU is bound to indemnify the directors arose out of or related to or was connected with the liquidators' claims against the directors. The liquidators had a sufficient interest in the proceeds of insurance to accord them standing to apply for the declaratory relief which they seek[73]. By reason of s 562 of the *Corporations Act*, there was a justiciable dispute consequent upon CGU's denial of liability under the policy. Accordingly, it was just and convenient that the dispute between the liquidators and CGU be resolved at the same time and in the same proceeding as the dispute between the liquidators and the directors.

81 The Court of Appeal affirmed Judd J's reasoning[74]. Their Honours also rejected a further argument, which CGU advanced for the first time in the Court of Appeal, that the reasoning of the plurality in *Ainsworth v Criminal Justice Commission*[75] dictated that the Court has no jurisdiction to grant declaratory relief at the suit of a stranger to a private contract concerning the meaning and effect of the contract. In so holding, the Court of Appeal eschewed doubts expressed by McLure P in *QBE Insurance (Australia) Ltd v Lois Nominees Pty Ltd*[76] about the validity of the reasoning of the Full Court of the Federal Court of Australia in *Employers Reinsurance Corporation v Ashmere Cove Pty Ltd*[77]. Their Honours considered that McLure P's misgivings proceeded from a misinterpretation of some of the observations of Gaudron J in *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd*[78].

82 The Court of Appeal also distinguished an earlier decision of the Victorian Court of Appeal in *C E Heath Casualty & General Insurance Ltd v Pyramid Building Society (In liq)*[79], on the basis that that case was decided on

---

73 Cf *Kuczborski v Queensland* (2014) 254 CLR 51 at 109-110 [187] per Crennan, Kiefel, Gageler and Keane JJ; [2014] HCA 46.

74 *CGU Insurance Ltd v Blakeley* (2015) 18 ANZ Insurance Cases ¶62-073.

75 (1992) 175 CLR 564 at 581-582 per Mason CJ, Dawson, Toohey and Gaudron JJ; [1992] HCA 10.

76 (2013) 17 ANZ Insurance Cases ¶61-949 at 73,100-73,101 [33]-[37].

77 (2008) 166 FCR 398.

78 (2000) 200 CLR 591 at 611-612 [46]; [2000] HCA 11.

79 [1997] 2 VR 256.

discretionary grounds rather than as a matter of jurisdiction and, in any event, because it did not address the issue on which *Ashmere Cove* was decided.

Jurisdiction

83 In *Ainsworth*, the plurality stated that the power to grant declaratory relief is "confined by the considerations which mark out the boundaries of judicial power"[80]. Consequently, a party seeking declaratory relief must demonstrate a "real interest"[81] in the subject matter of the declaration and it must be apparent that the declaration will be productive of foreseeable consequences for the parties. Relief will not be granted if the question is "purely hypothetical" in the sense that it is "claimed in relation to circumstances that [have] not occurred and might never happen"[82].

84 As the law has developed since *Ainsworth*, it is now apparent that there are also three further considerations relating to the jurisdiction to entertain a claim for declaratory relief in courts exercising federal jurisdiction. First, whether a claim for a declaration of liability constitutes a "matter" sufficient to attract federal jurisdiction is to be determined according to the "tripartite inquiry" adumbrated by Gaudron and Gummow JJ in *Re McBain; Ex parte Australian Catholic Bishops Conference*[83] as follows:

> "[F]irst, the identification of the subject matter for determination ... secondly, the identification of the right, duty or liability to be established ... thirdly, the identification of the controversy between the parties ... for the quelling of which the judicial power of the Commonwealth is invoked".

85 Secondly, it is not a requirement of a "matter" that the right, duty or liability exist as between opposing parties. As Gaudron and Gummow JJ stated in *Re McBain*[84]:

---

80 (1992) 175 CLR 564 at 582 per Mason CJ, Dawson, Toohey and Gaudron JJ.

81 (1992) 175 CLR 564 at 582.

82 (1992) 175 CLR 564 at 582, quoting *University of New South Wales v Moorhouse* (1975) 133 CLR 1 at 10 per Gibbs J; [1975] HCA 26.

83 (2002) 209 CLR 372 at 405-406 [62]; [2002] HCA 16.

84 (2002) 209 CLR 372 at 407 [67], quoting *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265; [1921] HCA 20.

> "[T]here is no general proposition respecting Ch III [of the Constitution] that the 'immediate right, duty or liability to be established by the determination of the Court' ... must be a right, duty or liability in which the opposing parties have correlative interests."

86 Thirdly, where a claim that depends on non-federal law (here, the common law liability of CGU under the insurance policy) and a federal claim (here, the liquidators' claims against the directors under s 588M(2) of the *Corporations Act*) arise out of "common transactions and facts" or "a common substratum of facts", or where "the determination of one is essential to the determination of the other"[85], the non-federal claim will be part of the federal matter and thus fall within "accrued" federal jurisdiction.

Federal jurisdiction

87 Before this Court, CGU contended that the Court of Appeal were wrong in holding that this case did not raise a question of federal jurisdiction and holding that the *Ainsworth* criteria were therefore inapplicable. The liquidators accepted that contention but nonetheless submitted that the Supreme Court had federal jurisdiction to entertain the claim for a declaration against CGU.

88 Up to a point, CGU's contention may be accepted. Evidently, the Court of Appeal overlooked the significance of the fact that the issue between the liquidators and the directors is whether the directors are liable for breach of their duties under the *Corporations Act*. The issue between the liquidators and the directors is thus a matter "arising under"[86] a law of the Commonwealth with the result that the Supreme Court's authority to decide the issue stems from the federal jurisdiction conferred on the Supreme Court by s 39(2) of the *Judiciary Act* 1903 (Cth)[87]. It follows that the Supreme Court's jurisdiction to decide the claim for declaratory relief against CGU depends on whether that claim comes within the concept of a "matter" within the meaning of s 39(2) of the *Judiciary Act* and thus within the meaning of Ch III of the Constitution. It does not follow, however, that the Supreme Court does not have federal jurisdiction to entertain the claim for a declaration.

---

85 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 585 [140] per Gummow and Hayne JJ; [1999] HCA 27, quoting *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457 at 512 per Mason J; [1981] HCA 7.

86 Constitution, s 76(ii).

87 *Felton v Mulligan* (1971) 124 CLR 367 at 408 per Walsh J; [1971] HCA 39. See also *Agtrack (NT) Pty Ltd v Hatfield* (2005) 223 CLR 251 at 262 [29] per Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ; [2005] HCA 38; *Edwards v Santos Ltd* (2011) 242 CLR 421 at 438 [45] per Heydon J; [2011] HCA 8.

89 Before this Court, CGU further contended that the Court of Appeal were in error in treating what were described as case management considerations as pertinent to jurisdiction. Counsel for CGU submitted that, although the liquidators may have a contingent financial interest in whether CGU is obligated to indemnify the directors in respect of the liquidators' claims, a declaration as to CGU's liability to indemnify the directors would not directly affect any property, legal right or obligation of the liquidators. For that reason, counsel submitted, there was no relevant justiciable controversy between the liquidators and the directors and accordingly no jurisdiction to grant the declaratory relief that is sought.

90 That contention should be rejected. As the Full Court concluded in *Ashmere Cove*[88], in a case of this kind the core of the justiciable controversy is the dispute between the liquidators and the directors. There is also a controversy between the directors and the insurer as to whether the insurer is liable to indemnify the directors against the liquidators' claims, which forms part of the single controversy arising out of the liquidators' claims against the directors. The success of the liquidators' claims against the directors is an essential prerequisite to the determination of any claim by the directors against the insurer. The liquidators' claim that the insurer is bound to indemnify the directors arises out of the same substratum of facts as the liquidators' claims against the directors. And the liquidators have a real interest in establishing that the insurer is liable to indemnify the directors. That is sufficient to comprise a justiciable controversy for the purposes of identifying a matter that attracts jurisdiction.

91 The Court of Appeal were correct, too, to reject the doubts that McLure P expressed in *QBE Insurance*[89] as to the rectitude of the approach in *Ashmere Cove*. With respect, her Honour attributed an unduly narrow meaning to the conception of "matter". As this Court held in *Truth About Motorways*[90], it is not an essential feature of a matter that the parties to a claim share correlative rights, in the sense of reciprocal rights and obligations.

92 CGU's submission that the lack of contractual privity between CGU and the liquidators deprived CGU and the liquidators of the character of adversaries (with the result that there was no justiciable controversy between them) requires separate consideration. To a large extent, it centred on an observation of Ormiston JA in *C E Heath*[91] that it is not ordinarily appropriate to permit an

---

88 (2008) 166 FCR 398 at 410 [51].

89 (2013) 17 ANZ Insurance Cases ¶61-949 at 73,100 [34].

90 (2000) 200 CLR 591 at 637 [122] per Gummow J, 660 [183] per Hayne J.

91 [1997] 2 VR 256 at 270.

outsider to seek declaratory relief regarding the meaning and effect of a contract about which the parties have not themselves raised any issue. Up to a point, that is correct. Ormiston JA's reservation about the impermissibility of allowing an outsider to seek a declaration about the meaning and effect of a contract to which the outsider is not party was based on the decision of the Court of Appeal of England and Wales in *Meadows Indemnity Co Ltd v The Insurance Corporation of Ireland Plc*[92]. In *Meadows*, it was held that the court below lacked jurisdiction to grant a declaration at the suit of a reinsurer that the insurer whose liability was the subject of the reinsurance was not liable to the insured. The decision was largely based on the speeches of Lord Wilberforce and Lord Diplock in *Gouriet v Union of Post Office Workers*[93].

93 In *Gouriet*, Lord Wilberforce said that declaratory relief cannot be granted unless[94]:

> "the plaintiff, in proper proceedings, in which there is a dispute between the plaintiff and the defendant concerning their legal respective rights or liabilities either asserts a legal right which is denied or threatened, or claims immunity from some claim of the defendant against him or claims that the defendant is infringing or threatens to infringe some public right so as to inflict special damage on the plaintiff."

94 Lord Diplock stated that[95]:

> "The only kinds of rights with which courts of justice are concerned are legal rights; and a court of civil jurisdiction is concerned with legal rights only when the aid of the court is invoked by one party claiming a right against another party, to protect or enforce the right or to provide a remedy against that other party for infringement of it, or is invoked by either party to settle a dispute between them as to the existence or nature of the right claimed. So for the court to have jurisdiction to declare any legal right it must be one which is claimed by one of the parties as enforceable against an adverse party to the litigation, either as a subsisting right or as one which may come into existence in the future conditionally on the happening of an event."

---

92 [1989] 2 Lloyd's Rep 298.

93 [1978] AC 435.

94 [1978] AC 435 at 483.

95 [1978] AC 435 at 501.

95 In *Meadows*, the Court of Appeal concluded that the reinsurer had no standing to claim the declarations sought because the reinsurer was not in a contractual relationship with the insured and because, although there was a connection between the contract of insurance and the contract of reinsurance, the reinsurer's "rights [were] in no way involved in the existing dispute between [the insurer] and [the insured]"[96]. The essence of the decision is encapsulated in May LJ's statement that[97]:

> "I accept the general submission that was made to us that a person not a party to a contract has no locus, save perhaps in exceptional circumstances, to obtain a declaration in respect of the rights of other parties to that particular contract. It would be contrary to the whole principle of privity to allow such a person to obtain such a declaration. He has no 'rights' in respect of that contract and has no claim for relief under it."

96 Australian authority largely accords with *Meadows*. As was recognised in *Meadows*, however, there are exceptions. Generally speaking it may be correct to say that an outsider has no standing to seek a declaration about the meaning and effect of a contract to which the outsider is not party[98]. But that depends on what is meant by an "outsider" and upon the circumstances in which the parties to the contract have chosen, or been influenced, not to raise an issue. A plaintiff to whom s 562 of the *Corporations Act* or s 117 of the *Bankruptcy Act* gives a right to be paid in priority out of the proceeds of a policy of insurance against an insolvent defendant's liability to the plaintiff is not an "outsider" in any rational sense of the word.

The conflict of authority

97 In *Interchase Corporation Ltd (in liq) v FAI General Insurance Co Ltd*[99], Byrne J reasoned that, although an insured defendant may sue on a policy of insurance, the plaintiff has no entitlement under general law or statute to enforce the defendant's claim against the insurer. Accordingly, since the declaration sought by the plaintiff related exclusively to the insurer's liability to the insured, it could not directly affect any property, legal right or obligation of the plaintiff.

---

96 [1989] 2 Lloyd's Rep 298 at 309.

97 [1989] 2 Lloyd's Rep 298 at 309.

98 See, eg, *Wilson v Darling Island Stevedoring and Lighterage Co Ltd* (1956) 95 CLR 43 at 67 per Fullagar J; [1956] HCA 8; *Coulls v Bagot's Executor and Trustee Co Ltd* (1967) 119 CLR 460 at 478 per Barwick CJ; [1967] HCA 3.

99 [2000] 2 Qd R 301 at 317-318.

On that basis, his Honour held that the subject of the declaration would be theoretical[100].

98 By contrast, in *Ashmere Cove Pty Ltd v Beekink (No 2)*[101], French J held at first instance, and the Full Court affirmed on appeal[102], that, although s 562 of the *Corporations Act* does not confer a legal right on a plaintiff liquidator as against a defendant's insurer, it confers a right of priority in respect of the proceeds of any successful claim by the defendant against the insurer. That gives the plaintiff liquidator a "very real interest"[103] in having the insurer's obligations to the defendant determined by way of declaration in the course of the proceeding in which the defendant's liability to the liquidator is determined.

99 There are a number of reasons why the approach in *Ashmere Cove* is to be preferred. To begin with, Byrne J's reasoning in *Interchase* assumes that it was a condition of the power to grant declaratory relief that the declaration be determinative of an issue which directly affected property, a legal right or an obligation of the claimant. As has been seen, that is not the case. Depending upon the circumstances, it is sufficient that a claimant will derive some benefit or advantage from the declaration over and above any benefit or advantage that might be derived by an ordinary citizen[104].

100 Second, although it is true that declaratory relief will not ordinarily be granted in relation to circumstances that have not yet occurred and might never happen[105], the liquidators' claim for a declaration is in relation to events which,

---

100 [2000] 2 Qd R 301 at 320-321.

101 (2007) 244 ALR 534 at 550 [59].

102 *Ashmere Cove* (2008) 166 FCR 398.

103 *Ashmere Cove Pty Ltd v Beekink (No 2)* (2007) 244 ALR 534 at 550 [59]. See also *Ainsworth* (1992) 175 CLR 564 at 582; *Kuczborski* (2014) 254 CLR 51 at 61 [6] per French CJ.

104 *Robinson v Western Australian Museum* (1977) 138 CLR 283 at 327-328 per Mason J; [1977] HCA 46; *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27 at 35-36 per Gibbs CJ, 71 per Brennan J; [1981] HCA 50; *Wentworth v Woollahra Municipal Council* (1982) 149 CLR 672 at 681 per Gibbs CJ, Mason, Murphy and Brennan JJ; [1982] HCA 41; *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 at 264-267 [42]-[48] per Gaudron, Gummow and Kirby JJ; [1998] HCA 49.

105 *Moorhouse* (1975) 133 CLR 1 at 10 per Gibbs J.

ex hypothesi, have occurred, namely, the directors' past breaches of s 588G of the *Corporations Act*.

101 Third, although it may not be known until the conclusion of the trial whether the circumstances which afford the liquidators a right of priority in relation to the proceeds of the insurance policy have occurred, that is not to say that those events have not yet occurred. The purpose of allowing CGU to be joined as a defendant to the proceeding is so that the claim for a declaration may be determined at the same time as and on the basis of the same evidence as the liquidators' claims against the directors.

102 Fourth, the issue in this case is not theoretical but, even if it were, the court does not lack jurisdiction to make a declaration concerning a theoretical issue, in the sense of an issue that does not presently exist but which is likely to arise in future, where the issue is productive of a real and pressing dispute, is of real practical importance or is one in which the claimant has a real commercial interest. Thus, for example, it is now well established that, where a claimant intends to take action which would subject him or her to a "theoretical" possibility of being subjected to legal process, the risk of being so subjected to that process is sufficient to ground standing to claim a declaration that the basis of the process (in that case, the offence) is invalid[106] and, co-ordinately, that in such cases there is a matter upon which the court has jurisdiction to adjudicate[107]. Similarly, where a claimant has a real commercial interest in establishing the claimant's legal status or entitlement in relation to proposed commercial conduct and there is a real controversy with some contradictor as to the existence or extent of the claimant's legal status or entitlement, the claimant may have standing to obtain, and the court co-ordinately will have jurisdiction to grant, a declaration as to the existence or extent of the status or entitlement[108].

---

106 *Croome v Tasmania* (1997) 191 CLR 119; [1997] HCA 5; *Kuczborski* (2014) 254 CLR 51 at 61 [6] per French CJ, 86-88 [96]-[100] per Hayne J, 106-108 [175]-[181] per Crennan, Kiefel, Gageler and Keane JJ, 132-133 [281]-[283] per Bell J.

107 *The Commonwealth v Sterling Nicholas Duty Free Pty Ltd* (1972) 126 CLR 297 at 305 per Barwick CJ; [1972] HCA 19; *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 355-357 [47]-[48]; [1999] HCA 9; *Edwards* (2011) 242 CLR 421 at 435 [37] per Heydon J; *Kuczborski* (2014) 254 CLR 51 at 59 [3] per French CJ. See also French, "Declarations: Homer Simpson's Remedy – Is There Anything They Cannot Do?", in Dharmananda and Papamatheos (eds), *Perspectives on Declaratory Relief*, (2009) 25 at 38.

108 *Aussie Airlines Pty Ltd v Australian Airlines Ltd* (1996) 68 FCR 406 at 415 per Lockhart J; *Edwards* (2011) 242 CLR 421 at 436 [38] per Heydon J.

The declaration would be binding

103 A further aspect of CGU's argument before this Court was to the effect that French J's and the Full Court's judgments in *Ashmere Cove* proceeded upon a misconception that, if a declaration of the kind sought were granted, the insurer would be estopped by operation of issue estoppel or the principle in *Port of Melbourne Authority v Anshun Pty Ltd*[109] in any subsequent proceeding between the insured and the insurer from disputing the insurer's liability to indemnify the insured. In CGU's submission, the insurer would not be so estopped and therefore the declaration would not finally resolve the issue. It followed, CGU contended, that there is no jurisdiction to grant the declaration sought and further or alternatively that Judd J should have declined to join CGU in the exercise of his discretion because the declaration sought would be devoid of practical utility.

104 That argument should be rejected. As the Court of Appeal observed, whether or not the declaration would, as a matter of res judicata, bind CGU from contesting its liability to the directors in any subsequent proceeding between the directors and CGU, it would be an abuse of process for CGU to deny liability in such proceedings. That is sufficient utility in itself to attract jurisdiction and to warrant the exercise of discretion in favour of granting a declaration. But in addition to that, and subject only to one procedural consideration to be mentioned later in these reasons, the declaration would, by operation of issue estoppel, preclude CGU from contesting its liability to the directors in any subsequent proceeding between CGU and the directors.

105 If the directors had chosen to prosecute their own claim for indemnity against CGU by way of third party proceeding, the outcome of the third party claim would have been binding as between all parties to the proceeding[110]. Since the directors chose not to adopt that course, it is desirable and appropriate for the liquidators to adopt an alternative method of obtaining a determination of the issues that is binding on the directors and CGU. Arguably, that would not have been possible before r 9.06(b)(ii) of the General Rules of Procedure in Civil Proceedings 1986 (Vic) came into force[111]. The former provision was similar to O 15 r 6(2)(b) of the English Rules of the Supreme Court 1965 (UK) ("RSC") and, according to the meaning which was attributed to RSC O 15 r 6(2)(b) in *In re Vandervell's Trusts*[112], CGU could not have been joined because its joinder

---

109 (1981) 147 CLR 589; [1981] HCA 45.

110 *Sandtara Pty Ltd v Abigroup Ltd* (1997) 42 NSWLR 5 at 8-9 per Gleeson CJ, Meagher and Handley JJA.

111 Cf *Asher v London Film Productions Ltd* [1944] KB 133 at 137-138 per Lord Greene MR.

112 [1971] AC 912.

would not have been "necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter"[113]. But r 9.06(b)(ii) was introduced for the specific purpose of overcoming the limitations identified in *Vandervell's* case by allowing a party to be joined in order to determine any question arising out of, relating to or in connection with any claim in the proceeding which it is just and convenient to determine as between the joined party and a party to the proceeding as well as between the parties to the proceeding. And here it is just and convenient that CGU's liability to indemnify Crewe Sharp and Mr Crewe be determined in this proceeding as between all parties.

106 CGU also invoked Byrne J's reasoning in *Interchase* to the effect that, although the joinder of an insured might make the insurer and the insured co-defendants, it would not make them adversaries. As Byrne J put it[114]:

> "The insurer asserts, and both insured appear content to accept, that [the insurer] was entitled to decline indemnity. Among them, there is no controversy. No procedural manoeuvre by [the plaintiff] can alter that state of affairs. ... So, even if [the insurer] remains [joined], the litigation is destined to conclude without making adversaries of the defendants among themselves. In short, the rights of the co-defendants inter se will not be determined in [the plaintiff's] action."

107 That reasoning should also be rejected. It overlooks that while the directors are joined as defendants to the proceeding, in effect they stand in relation to the liquidators' claim for a declaration against CGU as co-plaintiffs with the liquidators. Their position is akin to that of a recalcitrant joint promisee that refuses to join with another joint promisee as plaintiffs in a proceeding against the promisor to enforce the promise. In such a case, the recalcitrant joint promisee may be joined as a defendant to the proceeding to ensure that he or she is bound by the determination. The same may occur where an equitable assignor of a legal chose in action refuses to join with the equitable assignee as a plaintiff in a proceeding against the obligor to enforce the chose in action. The assignor may be joined as a defendant in order to ensure that the assignor is bound vis-a-vis the obligor.

108 As Lord Atkinson explained in *Rodriguez v Speyer Brothers*[115], in such cases, although the joined party is joined as a defendant, the joined party is not a defendant in any true sense of the term, or at least not in the sense of one who has

---

113 General Rules of Procedure in Civil Proceedings 1985 (Vic), O 16 r 11.

114 [2000] 2 Qd R 301 at 317-318.

115 [1919] AC 59 at 103-104.

to defend against a hostile claim. The plaintiff does not make a claim against the joined party. The purpose of the joinder is to make the joined party, in effect, a plaintiff against the joined party's will. The relief which the joined party gets is the relief to which a willing plaintiff would be entitled. The judgment is entered for the joined party as much as for the actual plaintiff. It does not matter that, but for the joinder, the controversy between the joined party and the existing defendant would have remained uncrystallised. The purpose of the exercise is, in effect, to ensure that the controversy is crystallised and dealt with at the same time as the other issues pertaining to the plaintiff's ability to recover from the original defendant[116].

109 Of course, there are differences between joint promisees, the parties to an equitable assignment and the liquidators in a case like this. In the case of joint promisees, each joint promisee has rights directly against the promisor and, in the case of an equitable assignment of a legal chose in action, the assignee's claim against the obligor derives from the assignor's legal rights against the obligor. The liquidators do not have that kind of claim. But, for present purposes, such differences are immaterial. The liquidators have a legal, albeit contingent, right to priority in relation to any amount found to be owed by CGU to the directors under the policy. And, in order to exercise their right of priority, it is necessary for them to obtain a determination which is binding as between CGU and the directors that CGU is liable to indemnify the directors.

110 Accordingly, in the same way that it is appropriate and effective for a promisee to join a recalcitrant joint promisee as a defendant and thereby establish the joint promisees' claim against the promisor, and it is appropriate and effective for an equitable assignee to join the assignor to establish the assignee's claim against the obligor, it is appropriate and effective for the liquidators to join CGU in the one proceeding with the directors so that the directors' liability to the liquidators is determined at the same time as the issue of CGU's liability to the directors[117].

111 A similar result might have been achieved by the liquidators suing CGU for a declaration of CGU's liability to indemnify the directors and then joining the directors as additional defendants in order to ensure that CGU was bound by the determination of the directors' liability to the liquidators. The order in which they were joined, however, is irrelevant.

112 As foreshadowed, there is one procedural aspect of the matter that should be attended to. Only parties to an issue can raise, or have raised against them, the

---

116 Cf *Shrimp v Landmark Operations Ltd* (2007) 163 FCR 510 at 527-528 [79]-[82].

117 *Barclays Bank v Tom* [1923] 1 KB 221 at 223-224 per Scrutton LJ.

doctrine of issue estoppel in relation to that issue[118]. In order to determine the parties to an issue, as opposed to the parties to a proceeding, it is sometimes necessary to look beyond the title to an action to identify against which person the relief is sought[119]. As this matter stands, the liquidators' points of claim express their claim for a declaration of CGU's liability to the directors as a claim made only as against CGU. To ensure that the directors are bound by any such declaration, and equally to ensure that the directors are entitled to assert the benefit of the declaration as against CGU[120], the claim should be amended to put beyond doubt that it is a claim made against both CGU and the directors.

113 Subject to that, it should be concluded that the liquidators' claim for a declaration of CGU's liability to the directors gives rise to a justiciable controversy. Because determination of that justiciable controversy depends on resolution of the directors' liability to Akron Roads under the *Corporations Act*, the justiciable controversy is within the same matter as the liquidators' claims against the directors. The claim for the declaration therefore comes within the Supreme Court's federal jurisdiction. Judd J and the Court of Appeal were right to hold that there is jurisdiction to grant the declaration that is sought.

Discretionary considerations

114 It remains to deal with three submissions regarding discretionary considerations on which CGU relied. The first pertained to Byrne J's characterisation of the process of a plaintiff joining a potentially insolvent defendant's insurer as a "manoeuvre"[121].

115 That aspect of Byrne J's reasoning was directed to different circumstances from those in this case. Accordingly, whether or not it is correct, it is distinguishable. Here, the liquidators' joinder of CGU as a defendant and claim for a declaration of CGU's liability to indemnify the directors should not be conceived of as a "manoeuvre" in any pejorative sense of that term. The joinder is designed to overcome the kinds of manoeuvres which are sometimes employed by parties in CGU's position – to delay and deter the final adjudication of liability – by ensuring that all issues are dealt with at once in the one proceeding in a manner that binds all parties to the proceeding[122]. As the Court of Appeal

---

118 Spencer Bower and Handley, *Res Judicata*, 4th ed (2009) at 128 [9.08].

119 See *Taylor v Ansett Transport Industries Ltd* (1987) 18 FCR 342 at 357 per Fisher J, quoting *Cross on Evidence*, 3rd Aust ed (1986) at 124.

120 *Sandtara* (1997) 42 NSWLR 5 at 8-9.

121 *Interchase* [2000] 2 Qd R 301 at 318.

122 Cf *Asher v Environment Secretary* [1974] Ch 208 at 222 per Lord Denning MR.

said, it would disaccord with contemporary imperatives of cost-effective and efficient judicial management of commercial litigation for the Supreme Court not to do as much as it can to ensure that issues which are common to parties are determined once and for all in the one proceeding. That is the purpose of Pt 4.2 of the *Civil Procedure Act* 2010 (Vic).

116 Granted, declaratory relief will not be granted if a question is "purely hypothetical" or if relief is claimed in relation to circumstances which have not occurred and might never happen[123]. But, in this case, as has been explained, the issue is not hypothetical. The object of joining CGU as a defendant is to enable the question of CGU's liability to indemnify the directors to be determined at the same time as the directors' liability to the liquidators. When and if the Supreme Court makes a declaration that CGU is liable to indemnify the directors against their liabilities to the liquidators, it will be because the Court has determined that the directors are liable to the liquidators.

117 The second submission concerned the difference between the circumstances that attend the claim that CGU is liable to indemnify Crewe Sharp and the circumstances that attend the claim that CGU is liable to indemnify Mr Crewe. Crewe Sharp is in liquidation whereas Mr Crewe has not been declared bankrupt and may not be.

118 It may be accepted that there is that difference. But whether Mr Crewe is declared bankrupt is likely to depend on whether the liquidators succeed in their claim against him. If they do, the evidence suggests that he will not have sufficient assets to meet their claim and that he will be declared bankrupt. In those circumstances, the fact that it is not yet clear whether final orders will be required is not a sufficient discretionary consideration to forgo the chance of having the liability of CGU to indemnify Mr Crewe in respect of his liability to the liquidators determined. The trial judge will be able to see more clearly at trial whether the claim under s 117 of the *Bankruptcy Act* is something which is likely to occur. And it may be assumed that the trial judge will not grant any relief against CGU in respect of its liability to Mr Crewe until and unless the necessary facts are established. It might also be open to the trial judge (if the trial judge thought it appropriate to do so) to defer making a declaration against CGU in respect of Mr Crewe until after the liquidators had obtained a sequestration order against Mr Crewe.

119 Finally, CGU stressed that it was unlikely that the directors would take an active part in the proceeding and it submitted that, because CGU has pleaded non-disclosure defences, it is impossible to assess the extent to which CGU would be estopped in any subsequent proceeding. But the short answer to those

---

123 *Ainsworth* (1992) 175 CLR 564 at 582; *Bass* (1999) 198 CLR 334 at 357 [49].

concerns is that it is up to the directors, and perhaps also up to CGU in the exercise of its rights under the policy, whether the directors participate in the proceeding. Hence, regardless of whether the directors choose to participate, there is no reason why the issues as between the liquidators and the directors and as between the directors and CGU cannot be determined once and for all in this proceeding, or why the outcome should not be regarded as binding on CGU. As a party to the proceeding that is potentially affected by the outcome of the liquidators' claims against the directors, CGU will have every right itself to defend the liquidators' claims against the directors[124] as well as defending the liquidators' claim against CGU.

Conclusion

120 In the result, the appeal should be dismissed.

---

124 *Barclays Bank v Tom* [1923] 1 KB 221 at 224-225.