

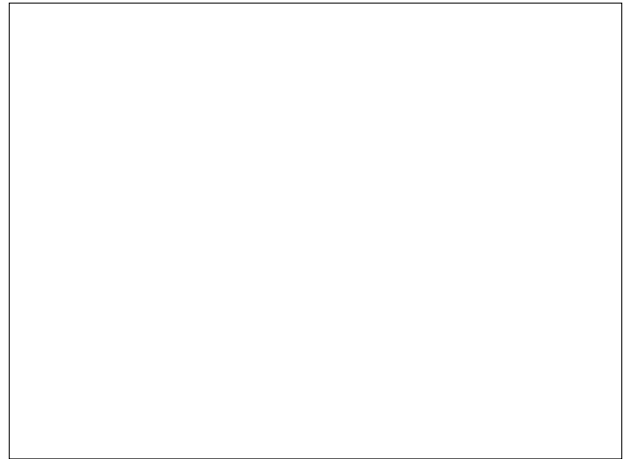
Breaches of directors' duties

CGU Insurance Limited v One.Tel Limited (in Liquidation) & Ors [2010] HCA 26

These proceedings originated from the conduct of the third respondent, John Greaves (Mr Greaves) during his tenure as a non-executive director of the first respondent, One.Tel Limited (in Liquidation) (One.Tel). The circumstances surrounding the failure of One.Tel are well known. In December 2001, the Australian Securities and Investments Commission (ASIC) commenced an action against Mr Greaves, the former chairman and non-executive director of One.Tel, and the executive directors, following the collapse of the telco in May 2001 with a deficiency of assets in the order of \$240 million. ASIC alleged various breaches of directors' duties and sought a range of orders for contraventions of the civil penalty provisions of the *Corporations Act 2001* (Cth).

In September 2004 Mr Greaves reached an agreement with ASIC to settle the civil penalty proceedings against him. Under the agreement Mr Greaves admitted to contraventions of the Corporations Law between January 2001 and 30 March 2001 in relation to discharge of his duties as a non-executive director and chairman of One.Tel, accepted a disqualification from managing a corporation for a period of 4 years and agreed to pay compensation of \$20 million to One.Tel and ASIC's costs of \$350,000. Orders to this effect were made on 6 September 2004.

Mr Greaves was insured under a Directors' and Officers Liability Policy (the policy) with CGU Insurance Limited (CGU). Two months after settling the civil penalty proceedings, Mr Greaves entered into a Deed of Arrangement (the deed) pursuant to Part X of the *Bankruptcy Act 1966* (Cth) (the Act), prior to the substantial amendments made to that Part on 1 December 2004 by the *Bankruptcy Legislation Amendment Act 2004* (Cth). The trustee appointed by the deed was David Patrick Wilson (the trustee). Pursuant to clause 2 of the deed, Mr Greaves' rights under the policy were assigned to the trustee.



One Tel directors (L to R) Jodee Rich, Brad Keeling, Rodney Adler and John Greaves at the company's AGM in 2000.
Photo: Mark Williams / Newspix.

Relevantly, clause 9 of the deed provided that immediately after the trustee:

- I. completes or settles any claim for the realisation of assets being rights under the [Policy] including the pursuit to judgment or settlement of any claim under [the Policy]; or
- II. makes a decision not to pursue a claim under the [Policy], the Trustee will issue a certificate to the effect that he has completed the realisation of assets being rights under the [Policy] or to the effect that the Trustee does not intend to pursue a claim against CGU ... under [the Policy].

Clause 10 of the deed provided that:

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

Clause 11 of the deed provided that:

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

On 18 October 2006, the trustee commenced proceedings in the Commercial List of the Equity

Division of the NSW Supreme Court to pursue Mr Greaves' cause of action on the policy in respect of the \$20 million dollar compensation order (the proceedings). CGU was the first defendant, ASIC the second, One.Tel the third and Mr Greaves the fourth. CGU had previously purported to avoid the policy and in its defence to the trustee's claim raised many allegations against Mr Greaves of fraudulent non-disclosure and fraudulent misrepresentation.

On 30 November 2007 the deed terminated in accordance with its terms. From 8 August 2008 the summons in the proceedings was amended so that the name of the plaintiff was changed from 'David Patrick Watson, as trustee of the Deed of Arrangement in respect of John Huyshe Greaves' to 'David Patrick Watson'. The parties postulated several questions for determination prior to the resolution of the other issues in the case, including whether, following the termination of the deed, the trustee could continue to maintain the proceedings.

At first instance the primary judgment held that, once the deed terminated, the trustee had no power to continue the proceedings and that Mr Greaves had suffered no 'loss' because, even after the deed was terminated, clause 11 continued to operate so as to prevent the trustee and creditors from enforcing against Mr Greaves the compensation and costs orders made in September 2004. The Court of Appeal allowed an appeal and remitted the matter to the Supreme Court for further hearing. CGU then appealed to the High Court.

In a joint judgment the High Court (French CJ, Heydon, Crennan, Kiefel and Bell JJ) held that the deed created a trusteeship with express duties and that the termination of the deed caused the trustee to have duties and powers outside the deed. In particular, the trustee had a duty to vindicate the rights connected with the trust property, which was the chose in action being enforced in the proceedings. The High Court held at [36] of the joint judgment that:

One obligation of a trustee which exists by virtue of the very office is the obligation to get the trust property in, protect it, and vindicate the rights attaching to it. That obligation exists even if no provision of any statute or

trust instrument creates it. It exists unless it is negated by a provision of any statute or trust instrument. Here no provision of the Act nor the Deed negates it. Mr Greaves' equitable assignment of his right to sue CGU under the Policy gave the Trustee the duty to vindicate that right. After the Deed terminated, the Trustee continued to comply with the duty to vindicate that right by prosecuting the Trustee proceedings against CGU in order to crystallise its advantages by reducing them to a judgment in damages. Even assuming in favour of CGU that, after termination of the Deed, the Trustee no longer held the chose in action on the trusts of the Deed, the Trustee did remain a trustee, and did have an obligation to continue the process of complying with the duty to vindicate the rights associated with the trust property.

Accordingly, the trustee was not disentitled from continuing the proceedings.

As to whether Mr Greaves had suffered any 'loss', the High Court agreed with the Court of Appeal that even if clause 11 survived termination of the deed it did not discharge or release Mr Greaves from the judgment debts as that could only occur on the execution of a clause 10 certificate. However, the High Court held that clause 11 could not survive the termination of the deed as such a construction produced an 'absurdity' as it would leave One.Tel stripped of its beneficial interest created by the deed and simultaneously unable to exploit its original right to enforce the \$20 million compensation order, which it had given up in return for gaining the beneficial interest. Further, once the deed was terminated the duty under clause 9 ceased. As a result, that left no room for clause 11 to operate. The High Court held that '[o]nce it became impossible for any cl 9 certificate to be executed, the basis on which cl 11 could operate collapsed'.

The proceedings have now been referred back to the Supreme Court for the resolution of the remaining issues between the parties.

By Ralph Notley