HIGH COURT JUDGMENTS

ANDREW YUILE

Insurance

Joinder of third party insurer – "matter" and federal jurisdiction

In *CGU Insurance Limited v Blakely* [2016] HCA 2 (11 February 2016) the High Court upheld a decision to join a third party insurer to determine the insurer's liability to indemnify a defendant. Liquidators of Akron Roads Pty Ltd commenced proceedings under the *Corporations Act 2001* (Cth) against directors of Akron seeking recovery of money paid in breach of directors' duties. The directors claimed on a professional indemnity insurance policy with CGU. CGU denied that the policy applied. The liquidators of Akron sought to join CGU to the proceedings against the directors, seeking a declaration that CGU was liable to indemnify the directors in respect of any judgment obtained. CGU argued that the Court had no jurisdiction to join it as there was no "matter" or controversy between the liquidators and CGU – the declaration sought was contingent and hypothetical. Further, the claim offended privity of contract principles as the liquidators were not parties to the insurance contract. (CGU also disputed they were liable under the policy.) The Court held that there was a sufficient dispute between the liquidators and CGU for there to be a "matter", for a declaration to be sought and for CGU to be joined: (i) CGU had denied liability under the policy, which denial was not accepted by the directors or liquidators; (ii) if the Court was to find for the liquidators in their claim against the directors and to find that the insurance policy applied, CGU would be liable to pay money to the directors; and (iii) the liquidators would have a priority claim on any payout under the *Corporations Act* (or the *Bankruptcy Act 1966* (Cth)). The Court also held that the whole of the proceedings were in federal jurisdiction, as the claim depended on liabilities arising under federal laws. French CJ, Kiefel, Bell and Keane JJ jointly; Nettle J concurring. Appeal from Court of Appeal (Vic) dismissed.

Migration

Offshore detention – executive and legislative power – Act of State

In *Plaintiff M68/2015 v Minister for Immigration and Border Protection* [2016] HCA 1 (3 February 2016) the High Court held that the Commonwealth's involvement in the detention of the plaintiff in Nauru was valid. The plaintiff claimed that laws authorising the Commonwealth give effect to arrangements for offshore detention on Nauru, including to detain her, were invalid because they transgressed the limits on executive detention set down in *Lim v Minister for Immigration* (1992) 176 CLR 1 and were not supported by a head of power. Further, any Nauruan law relied on by the Commonwealth was invalid under the constitution of Nauru. The Commonwealth argued that the *Lim* limit did not apply as the detention was in fact being imposed by Nauru under its laws (and the Court could not inquire into the validity of those laws); the executive's action was authorised by s198AHA of the *Migration Act 1958* (Cth); and the *Lim* limits, if they did apply, were not transgressed in this case. French CJ, Kiefel and Nettle JJ held (Keane J concurring) that the detention was imposed by Nauru, under its laws, and not by the Commonwealth. *Lim* does not apply to the Commonwealth's participation in such action offshore. Further, s198AHA was valid and authorised the Commonwealth's action. Bell and Gageler JJ, writing separately, held that the Commonwealth was detaining the plaintiff, that the Commonwealth's action was authorised by s198AHA (which was valid), and that the *Lim* principles applied to the situation, but were not breached in this case. Gordon J dissented, finding that the Commonwealth was detaining the plaintiff, that the *Lim* principles applied, and that the Commonwealth's actions went beyond the *Lim* limits. The Court unanimously held that it could not examine the constitutional validity of the Nauruan laws. Answers to Special Case given. ■

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