Liquidators' Public Examinations — Access to Insurance Information

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1. INTRODUCTION

Liquidators, insurers, professional advisers to companies, and insolvency litigation lawyers are all affected in important areas of their practice by a series of recent decisions on a liquidator's access to insurance information during a public examination. The issue is simple but legally and commercially important. During a public examination of third parties (for example, professional advisers such as valuers, auditors, accountants and lawyers) against whom a company in liquidation might have a potential cause of action, is the liquidator entitled to information about professional indemnity insurance? Legally, such causes of action are potential assets for the company, and one purpose of public examinations might be to explore the existence, scope and even value of such actions. Commercially, one crucial consideration for the liquidator will be the likelihood of realising any judgment — in other words, the value of the cause of action — and that is where access to insurance information becomes critical.

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Everybody has always accepted that a liquidator's power to conduct public examinations is a broad-ranging one. Until recently, Australian law said little about whether a liquidator is entitled to enquire beyond the existence and extent of a right of action that the company might have against a third party. In other words, Australian law had not fully considered authorising a liquidator to make enquiries during a public examination about the value of a potential cause of action, including information about any professional indemnity insurance to which recourse might ultimately be made to satisfy any judgment against a company's professional advisers.

Four key cases in late 1993 and 1994 indicate that the law permits such enquiries. Collectively, they clearly authorise a liquidator during a public examination to make enquiries about the existence, scope *and* value of potential causes of action available to the company against third parties like external advisers, and in particular to examine such third parties about the existence and contents of any relevant insurance policies. Now that the door has been opened on access to such information, subsequent cases can be expected to outline how far the door is open — for example, what are the purposes for which such information might be sought, what kinds of insurance policies might be accessed, and what are the limits (if any) on access?

At a broader level, this topic is important from three perspectives. Jurisprudentially, it illuminates the dominance of purposive statutory interpretation over literal statutory interpretation, as one manifestation of the over-arching dominance of 'substance' over 'form' in modern Australian legal reasoning. This jurisprudential point is important because many legal practitioners schooled in a strictly 'black letter' approach to law underestimate the impact of modern changes in judicial reasoning upon important areas of commercial practice.[1] Legally, this topic concerns an important area of corporate insolvency law for which Australian precedent offered scant guidance until recently. Whether insurance information is within the scope of 'examinable affairs' during a public examination is an important topic in insolvency law and practice. Practically, this topic has important commercial implications for insurers, professional advisers to companies, and lawyers, particularly for pleadings, litigation tactics and arguments in correspondence or court about the scope of public examinations.

As academic and practising lawyers, we are interested in all three perspectives — jurisprudence, substantive law and practice — and their application to significant developments in Australian law. To assist readers, the main guidelines are summarised in Part 1 ('Introduction'), Part 2 ('The Results for Key Players') and Part 3 ('Key Legal Points'), with the relevant statutory provisions and the lines of reasoning and distinguishing

[1] See also Michael Kirby, 'In Defence of Mabo' (1994) 1 JCULR 51, 65 ff.; and B. Horrigan, 'Australian Legal Principles in Practice — Taking Reasoning and Research Seriously' (1993) 9 QUTLJ 159.

features of the four leading cases then being explained in ways which illuminate these main guidelines.

2. THE RESULTS FOR KEY PLAYERS

Liquidators

Liquidators can now better inform themselves before making a commercial judgment about proceeding with a claim against third parties such as a company's external advisers. In other words, liquidators can obtain information about professional indemnity insurance which reassures them about the potential fruits of litigation before spending an insolvent company's funds on litigation. Put bluntly, the liquidator's cost–benefit judgment about the worth of proceeding with litigation is enhanced.

However, problems may still exist for the liquidator where:

(a) the relevant policy is 'capped' and the capped limit is exhausted, or the policy is otherwise limited; or
(b) the liquidator's purpose means that access to insurance information is not justified or should be limited.[2]

Third Parties Such as Valuers, Auditors and Accountants Who May be Subject to Examination

In appropriate situations, these parties can be forced to reveal information about the nature and extent of relevant insurance policies held by them and to produce those policies.

Tactically, in light of the clear indication that access to insurance information and documents is now legally possible in appropriate circumstances, parties involved in such proceedings might consider the fall-back steps of:

(a) confidentiality arrangements surrounding the production of the documents;[3] and
(b) arguing about excising certain information from the documents produced, depending on the scope of the liquidator's purpose.

Insurers

Where liquidators are proceeding with claims for significant sums, they will be doing so with knowledge of the nature and extent of the insurer's obligation to indemnify. Practically, this does not expose insurers to greater

[2] See the reasoning in *Kelly v Murphy* (1993) 11 ACLC 1, 230, discussed in Part 7 of this article.

[3] This can present problems for liquidators, who also have other obligations (e.g. to creditors).

liability but increases the likelihood that liquidators will pursue claims which insurers must satisfy, or otherwise might affect settlement negotiations with insurers.

Insurers face the prospect of being joined in proceedings, for the purpose of obtaining a declaration of liability.

3. KEY LEGAL POINTS

- Section 596B of the*Corporations Law* confers power upon the court to summon a person for examination about a company's 'examinable affairs'.
- The definitions of 'examinable affairs', 'affairs' and 'property' in the *Corporations Law* collectively mean that any interest held by a company in real or personal property of any description, including a right of action against a third party, clearly falls within the definition of a company's 'examinable affairs'.
- The liquidator can conduct an examination not only to identify the existence of a right of action against a third party but also to identify its extent and value.
- In an insurance context, the liquidator is entitled upon examination to compel the third party to reveal the nature and extent of any relevant insurance cover and to produce any relevant policies. However, access to such information and other information is circumscribed.

4. FIRST PRINCIPLES

Often, a good starting point for discussion is to look at the matter from a commonsense point of view, or to return to first principles. If potential causes of action against third parties are suitable matters for investigation by liquidators during a public examination, logically the existence, extent and value of such company assets are all essential questions. Moreover, they are all inextricably linked in the liquidator's mind when deciding whether to pursue litigation in the interests of creditors. In that sense, drawing distinctions between the permissibility of enquiries about the existence of assets, on one hand, and impermissible enquiries about the value of assets, on the other, is a line-drawing exercise as a matter of form which Australian law increasingly disallows as a matter of substance.

Now, some will counter-argue that there is a difference between the legal enquiry about the existence of a potential asset which might be recovered, on one hand, and the commercial enquiry about the value of that asset, on the other. However, on a purposive and policy-based approach, that distinction is illusory.

In this way, the topic of a liquidator's right of access to information and documents concerning indemnity insurance of third party profes-

sional advisers during a public examination serves as an important illustration of the legal and practical relevance of arguments about 'form' and 'substance' in the ongoing evolution of Australian law.[4] In short, the pervasive distinction between 'form' and 'substance' in many areas of modern Australian law reveals something which is academically significant in terms of legal reasoning and practically significant in terms of client-based advice.

5. THE STATUTORY FRAMEWORK

Section 596B(1)(b)(ii) gives the court a discretion, upon the liquidator's application,[5] to summon a person to attend before the court for examination about a corporation's 'examinable affairs' if the court is satisfied that the person 'may be able to give information about examinable affairs of the corporation'.

Section 9 defines 'examinable affairs' to mean:

> (a) The promotion, formation, management, administration or winding up of the Corporation; or
> (b) Any other affairs of the Corporation (including anything that is included in the Corporations' affairs because of section 53 ...

So far as is relevant, s. 53 provides that the affairs of a body corporate include:

> (a) The promotion, formation, membership, control, business, trading, transactions and dealings (whether alone or jointly with any other person or persons and including transactions and dealings as agent, bailee or

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[4] The legal and practical relevance of 'form' and 'substance' in Australian law and legal reasoning is further examined in B. Horrigan, 'Australian Legal Principles in Practice — Taking Reasoning and Research Seriously' 1994 QUTLJ 159.

[5] Note that it is not only a liquidator that can apply for a summons under s. 596B(1)(b)(ii). Section 596B(1)(a) provides that the court may summon a person for examination about a corporation's examinable affairs if an 'eligible applicant' applies for the summons. Section 9 defines 'eligible applicant' to mean:
(a) the Commission; or
(b) a liquidator or provisional liquidator of the corporation; or
(c) an administrator of the corporation; or
(d) an administrator of a deed of company arrangement executed by the corporation; or
(e) a person authorised in writing by the commission to make:
(i) applications under the Division of Part 5.9 in which the expression occurs; or
(ii) such an application in relation to the corporation.

On the position where a creditor is funding the examination that is being undertaken by the liquidator, see *Re Laurie Cottier Productions Pty Ltd (in liq.)* (1993) 11 ACLC 178; and *Douglas-Brown v Furzer*, unreported, Full Western Australian Supreme Court, 1 February 1994.

On the power of the Australian Securities Commission to authorise applications for examination, see *Whelan v ASC* (1994) 119 ALR 323 (discussing the authorisation of a receiver); and *Hong Kong Bank of Australia Ltd v ASC* (1992) 108 ALR 70 (discussing the authorisation of trustees of a unit trust).

> trustee), *property* (whether held alone or jointly with any other person or persons and including property held as agent, bailee or trustee), liabilities (including liabilities owed jointly with any other person or persons and liabilities as trustee), profits and other income, receipts, losses, outgoings and expenditure of the body ... (*emphasis* added)

Section 9 defines 'property' to mean:

> Any legal or equitable estate or interest (whether present or future and whether vested or contingent) in real or personal property of any description *and includes a thing in action*; ... (*emphasis* added)

Thus, s. 9 and s. 53 together make it clear that the company's 'property' is a part of its 'examinable affairs'. By virtue of s. 9, a cause of action is 'property' of the company, thereby also forming part of its 'examinable affairs'.

Section 596D(2) provides that the summons may require the examinee 'to produce at the examination specified books that ... are in the person's possession ... and ... relate to the corporation or any of its examinable affairs.'

Section 597(9) provides that, '[t]he court may direct a person to produce, at an examination of that or any other person, books that are in the first-mentioned person's possession and are relevant to matters to which the examination relates or will relate.'

Both s. 596D(2) and s. 597(9) make it clear that an examinee can be compelled to produce specified 'books' at the examination. By s. 9, 'books' includes 'a document', and an insurance policy is clearly 'a document'.

Accordingly, on a literal interpretation of the relevant provisions, courts have power to order the examination of a person against whom the company might have a cause of action, and to require that person to produce any relevant insurance policies. So, there are two important questions:

1. the 'legal' question about whether the examination provisions should be interpreted widely or narrowly; and
2. the 'applied' question about whether, as a matter of discretion, information from third parties about their professional indemnity insurance should be made available and, if so, to what extent.

Clearly, the universal Australian answer to the first question is to adopt a wide approach.[6] In *Re Duke Group Ltd (in liq.)*,[7] Dawson J summarised the answer succinctly: 'The power conferred by section 596B is wide....'

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[6] *Re Excel Finance Corp. Ltd (Receiver & Manager appointed)* (1993) 113 ALR 543; *Re Spedley Securities Ltd (in liq.) v Bank of New Zealand* (1990) 3 ACSR 366; *Lombard Nash International Pty Ltd v Berentsen* (1990) 3 ACSR 343; *Hongkong Bank of Australia Ltd v Murphy* (1992) 28 NSWLR 512; *Re BPTC Ltd (in liq.)* (1992) 7 ACSR 539; *Hamilton v Oades* (1989) 166 CLR 486; *Re Allan Fitzgerald Pty Ltd (in liq.)* [1990] 1 Qd R 401.

[7] (1994) 68 ALJR 196, 198.

The answer to the second question is that the examination can be used for that purpose, but some of the boundaries of that use — for example, all insurance policies? — await settlement. It is one thing to say that the door is now open. It is another thing to say how far it is open.

6. THE PERMISSIBLE SCOPE AND PURPOSE OF LIQUIDATOR'S PUBLIC EXAMINATIONS

First, it is important to recognise that it is a discretionary power, as indicated in *Grosvenor Hill (Queensland) Pty Ltd v Barber*[8] by Beaumont, Spender and Cooper JJ:

> We stress that it is important to bear clearly in mind the difference between the ambit of the power and the circumstances in which the power will be exercised. The Court retains a discretion in appropriate cases to refuse to exercise the power or to make its exercise subject to stringent conditions.

Indeed, the courts have given liquidators frequent warnings that they will not tolerate the use of the examination procedure for what amounts to an abuse of process.[9] Keeping in mind that 'what is oppressive or unfair must be determined in the light of the current provisions of the legislation and the policy or intent of those provisions',[10] it is worth noting that the following uses of the power are examples of where the court will not allow the examination to proceed:

1. helping the liquidator to overcome difficulties encountered by the liquidator purely as a litigant — for example, overcoming a refusal to answer interrogatories or a refusal of leave to administer interrogatories; and
2. examining potential witnesses for existing or prospective proceedings simply for the purpose of gathering information to destroy their credibility — in other words, simply having a dress rehearsal for cross-examination in the ultimate action.[11]

Second, it is helpful to look at some of the considerations that are taken into account by the courts when they exercise their discretion. These are outlined immediately below.

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[8] (1994) 12 ACSR 646, 656.

[9] *Re Hugh J. Roberts Pty Ltd (in liq.)* [1970] 2 NSWR 582, 585 per Street J; *Hamilton v Oades* (1989) 166 CLR 486, 497–585 per Mason CJ.

[10] *Douglas-Brown v Furzer*, unreported, Full Western Australian Supreme Court, 1 February 1994, per Malcolm CJ at 11.

[11] *Re Rothwells (No. 2)* (1989) 7 ACLC 576, 588 per Nicholson J.

The Purpose of Section 596B

Basically, s. 596B was enacted to overcome the liquidator's disadvantaged position, as indicated by the Full Federal Court in *Grosvenor Hill*:

> The liquidator comes to the company as an officer of the court under a duty and responsibility to get in and maximise the assets of the company for distribution for the benefit of creditors. In the discharge of his or her duty and function, the liquidator comes to the company with limited or no knowledge of the company's assets, business and affairs. The liquidator is therefore in a position of disadvantage to make informed decisions of both a legal and commercial nature necessary to carry out the winding up.[12]

The court added:

> The legislature has recognised this position of disadvantage and addressed the problem by the enacting of section 596B of the [Corporations] Law and its predecessors. The effect of the legislation is to place the liquidator in a privileged position to obtain information relevant to and necessary for the proper discharge of his or her statutory function.[13]

Competing Public Interests

Grosvenor Hill also demonstrates that the courts are conscious of competing public interests:

> [T]he exercise of the power can involve tension between two important public interests. The first is the public interest in a liquidator obtaining necessary information to properly discharge the function of liquidator in the winding up of a company for the benefit of the creditors. The second is the right of the individual to privacy in regard of his or her affairs, documents and papers.[14]

The Purpose of the Examination

Essentially, the courts assess whether the liquidator is conducting the examination for the legitimate purpose of gathering information about the affairs of the company to assist in the winding up, or whether the liquidator is attempting to gain some collateral advantage through the use of the examination process — remembering that the liquidator has a statutory advantage which is not available to ordinary litigants. Obviously, there is considerable room for argument along the spectrum between these two extremes. In addition, as indicated in Part 7 of this

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[12] (1994) 12 ACSR 646, 651.
[13] *Ibid.*
[14] *Ibid.*

article, the liquidator's purpose can sometimes be a substantive ground for restricting the liquidator's access to insurance information — a consideration for which *Kelly v Murphy*[15] stands as a prime example.

In *Re Spedley Securities Ltd (in liq.); Spedley Securities Ltd (in liq.) v Bank of New Zealand*,[16] Cohen J set the parameters as follows:

> The question to be considered is whether, in exercising that power, the liquidator might be going beyond an investigation of matters to enable him to carry out the liquidation more effectively and instead seeking to obtain an unfair advantage in the other litigation so as to amount to injustice. It is accordingly relevant to consider the purpose of the examination and to take into account the liquidator's statement of that purpose.[17]

Where Proceedings are Contemplated or Already on Foot against the Examinee

The bottom line is that Australian courts approach the scope and purpose of such examinations as a matter of substance rather than form. In this context, the distinction between substance and form means that, although the examination runs a greater risk of being an abuse of process where proceedings against the examinee already exist or are contemplated by the liquidator, its risk is not a sufficient reason alone to prevent the examination proceeding in these circumstances. In short, it is not oppressive simply because proceedings are contemplated.

In *Re Hugh J. Roberts Pty Ltd (in liq.)*,[18] the liquidator sought to examine two sole directors of a company. The directors challenged the order to grant the examination on the basis that the examination was only undertaken for the purpose of obtaining admissions to be used against them in evidence in misfeasance proceedings. Street J said:

> A liquidator needs information concerning his company just as much in connection with current or contemplated litigation as in connexion with other aspects of its affairs.... In my judgment, it is immaterial in basic substance whether the private examination is sought to be used by the liquidator to gather information in connection with proceedings he believes he might be able to bring, proceedings he contemplates bringing, proceedings he has decided to bring, and proceedings he has already brought. There is no presently relevant distinction in substance between gathering information referable to commencing proceedings and gathering information referable to continuing proceedings. There may be more risk of or opportunity for the examination being vexatious or oppressive after proceedings have been commenced.... Also an abuse of process may be more readily exposed once proceedings are

[15] (1993) 11 ACLC 1230.
[16] (1991) 9 ACLC 124.
[17] *Id.* 131.
[18] [1970] 2 NSWR 582.

> already on foot. But this is surely not to the point, as vexation or oppression will not be tolerated no matter when the examination is held.[19]

As Macrossan CJ and Pincus JA pithily commented in *Re M D & B (No. 8) Pty Ltd (in liq.)*:

> The circumstance that some answers given may possibly assist a creditor in an action against directors, as well as being useful to the liquidators in the performance of their tasks, cannot make it wrong to proceed with an examination. Objections to the propriety of particular questions would of course be dealt with in the course of the examination....[20]

In England, the courts are reluctant to allow the examination of a person against whom the liquidator has definitely decided to bring or has already brought proceedings. In *Re Spiraflite Ltd*,[21] Megarry J said:

> What may be properly given to a liquidator [as a] liquidator will not be given to a liquidator-litigant [as a] litigant.... Once proceedings have been commenced, the liquidator must normally have decided that there are sufficient grounds for risking the funds under his control on the hazards of litigation. At that stage, the effect of making an order under the section would normally be to improve the liquidator's position [as a] litigant.

Contrast this position with the Australian position. As Nicholson J said in *Re Rothwells Ltd (No. 2)*:[22]

> Australian authorities have recognised that they do not follow those present English authorities ... which hold that if the evidence shows the liquidator has already commenced litigation or had definitely decided to commence it, the pre-disposition of the court will be to refuse an immediate order for examination unless the liquidator can show special grounds to the contrary.... On the Australian authorities the relevance of the commencement of litigation or a decision to embark upon it is that it requires the court to approach the assessment of the liquidator's purpose with greater caution.

As Mullighan J from the South Australian Supreme Court said in *Gerah Imports Pty Ltd v The Duke Group Ltd (in liq.)*:[23]

> The liquidator is involved in a very complex winding-up of the defendant and there is no reason to reject his assurance that he also requires the documents for the wider purpose of the winding-up which I have mentioned and not to advance his case in the Nelson Wheeler action....

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[19] *Re Hugh J. Roberts Pty Ltd (in liq.)* [1970] 2 NSWR 582, 585 per Street J, quoted approvingly by Connolly J on behalf of the Queensland Full Court in *Re Allan Fitzgerald Pty Ltd (in liq.) (No. 2)* [1990] 1 Qd R 401, 405.

[20] Unreported, Queensland Court of Appeal, 14 October 1994, at 2.

[21] [1979] 1 WLR 1096, 1100.

[22] (1989) 7 ACLC 576, 588.

[23] (1993) 10 ACSR 391, 395–6.

> The liquidator is entitled to seek appropriate orders pursuant to section 541 even if he has caused civil proceedings to be instituted against the person he seeks to examine: *Re Hugh J Roberts Pty Ltd (In liq)* (1969) 91 WN (NSW) 537 per Street J at 541, *Hongkong Bank of Australia v Murphy* (1992) 8 ACSR 736 per Gleeson CJ at 743 and *Re Equiticorp Finance Ltd; ex parte Brock* (1992) 7 ACSR 13; 10 ACLC 382. It follows that he may apply for an order where civil proceedings have been instituted against someone else. As Street J pointed out in *Re Hugh J Roberts Pty Ltd (In liq)*, supra, at 541–2, vexation or oppression will not be tolerated and a liquidator must not abuse the process (under section 541).

Gerah concerned an examination under s. 541 of the Companies Code in the context of existing proceedings for breach of contract and negligence against third parties.

Where the Liquidator Gains an Advantage Which Would be Denied to the Ordinary Litigant

In *Re John Arnold's Surf Shop Pty Ltd (in liq.)*,[24] again proceedings had already been commenced against the proposed examinee. Cox J rejected the notion that the examination should be refused because it in effect gave the liquidator an advantage that would be denied to the ordinary litigant, thus making it clear that the section gives to the liquidator rights not possessed by an ordinary litigant.

Indeed, in *Re Spedley Securities Ltd (in liq.); Spedley Securities Ltd (in liq.) v Bank of New Zealand*,[25] Cohen J said:

> The mere fact that the liquidator is given an advantage not enjoyed by other litigants is not a basis for finding injustice or an abuse of process. It is an advantage which the statute gives to a liquidator because of the particular circumstances in which he stands.

Where the Liquidator Gains Access to Information Which Would Otherwise Have been Denied

Re Laurie Cottier Productions Pty Ltd (in liq.)[26] shows that a liquidator can gain access to information that would have been denied under traditional processes of discovery and interrogation. Waddell CJ allowed the liquidator to examine one of four directors of the company about the circumstances of a transfer of assets of the company which the liquidator was seeking to set aside:

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[24] (1980) 23 SASR 222.

[25] (1991) 9 ACLC 124. See also *Re Excell Finance Corp. Ltd (Receiver & Manager appointed)* (1993) 113 ALR 543, 564.

[26] (1992) 9 ASCR 513.

> [T]he liquidator needs information as to the availability and likelihood of being able to realise the assets transferred if these are recovered. This is not information which you could gain reliably by discovery or interrogatories.

Drawing Everything Together

Mason CJ in the majority in *Hamilton v Oades* commented in general terms about the liquidator's purpose, the relevance of pending litigation, the scope of the provision, and what is really necessary to prevent abuses of power:

> In light of the purpose of the section, great weight must be given to the views of the liquidator when the Court considers whether to order an examination: *In Re Rolls Razor Ltd (No. 2); In Re John Arnold's Surf Shop Pty Ltd....* The very purpose of the section is to create a system of discovery, which may cause defences to be disclosed, for the purpose of bringing charges. The section gives to the liquidator rights not possessed by an ordinary litigant: *John Arnold.* In these circumstances, it must be accepted that the section applies equally to proceedings which the liquidator 'might be able to bring, proceedings he contemplates bringing, proceedings he has decided to bring, and proceedings he has already brought': *Re Hugh J Roberts Pty Ltd....* To adopt the language of Kitto J in *Mortimer v Brown,* to hold otherwise 'would render the provision relatively valueless in the very cases which call most loudly for investigation'.... The court retains its power to give directions and to restrain questions in cases where the examination is being conducted for an improper purpose or constitutes an abuse of process.... Thus, if a liquidator were to conduct an examination directed to compel the examinee to disclose defences or to give pre-trial discovery, or to establish guilt, this examination may be restrained as an abuse of process: *Hugh J Roberts....*'[27]

The interpretation of the High Court's decision by the Queensland Full Court in *Re Allan Fitzgerald Pty Ltd (in liq.) (No. 2)*[28] reinforces the point:

> *Hamilton v Oades* ... is not direct authority for present purposes, for it deals with a problem which has been before the courts on many occasions, namely, whether in an examination under section 541 the common law privilege against self-incrimination is available.... As I have said, the decision is not direct authority, but in comparison with a situation in which civil litigation only is pending, it is a very powerful indication that the mere pendency of proceedings, to which the examinee or, as here, a third party whose officer he is, is pending, will not, in itself, make it oppressive for the examination to proceed. Moreover, it is valuable for present purposes for its discussion of the discretion, which is reposed in the judge conducting the examination by section 541(5), to give such directions as to the matters to be enquired into, as he thinks fit.

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[27] (1989) 166 CLR 486, 497–8.
[28] [1990] 1 Qd R 401, 406–7.

Similarly, Macrossan CJ and Pincus JA referred in *Re M D & B (No. 8) Pty Ltd* to the 'liberal attitude' of modern courts towards public examinations:

> Suggestions, to be found in some of the cases, that it can never be right for a liquidator to use an examination to obtain information or documents which are needed for pending litigation, at least where attempts to obtain them in the litigation have failed or are stalled, may not accord with current notions to the proper attitude towards such examinations. ... [T]he balance of opinion has swung in favour of discouraging undue inhibition of the often difficult process of finding out such matters as what has happened to the company's money. In our respectful opinion, courts should be slow to respond to submissions of the kind which succeeded below, advocating the placing of obstacles in the path of liquidators seeking, in good faith, information about matters of legitimate interest to them.[29]

Recent Australian commentaries clearly endorse the wide view of the purpose and scope of examination:

> The court will exercise its discretion in favour of the liquidator even if the examination order will confer an advantage not ordinarily enjoyed by an ordinary litigant.... It is no objection that the examination leads to questions of a fishing nature or enables the liquidator to obtain disclosure of materials that are available for us as evidence in current proceedings. The liquidator is also entitled to probe the surrounding circumstances in the hope that a further line of inquiry may be opened up to reveal the truth about a transaction.... The court can even allow a public examination to proceed where criminal proceedings have already been brought against the proposed examinee.[30]

Summary

In short, everything above shows that the courts take a liberal approach to the interpretation of sections like s. 596B. Although the courts are conscious of preventing the process from being used as a vehicle for abusive or oppressive proceedings or for advantages in litigation beyond the statutory advantage conferred upon a liquidator, they characteristically exercise their discretion in ways which give liquidators much leeway.

On these principles, a liquidator seeking information from third parties with a view to assessing the feasibility of potential proceedings against them is not by that reason alone gaining an unfair advantage as a potential litigant *if* the matters are otherwise properly the subject of an examination. In other words, if it is a legitimate subject for examination, the

[29] Unreported, Queensland Court of Appeal, 14 October 1994, at 3–4. For guidelines on the scope and purpose of public examinations generally, see F Zumbo, 'The Liquidator's Power of Examination under the Corporations Law: The State of Play' (1994) 12 CSLJ 504.

[30] *The Laws of Australia*, Vol. 4, 'Business Organisations', [171].

ancillary benefits in prospective litigation are irrelevant. Any advantage is an advantage conferred upon the liquidator by statute, and that advantage alone is not sufficient to justify refusal of an examination on the ground of abuse of process. Something more must be present to indicate an abuse of process.

7. APPLICATION OF WIDE VIEW TO A LIQUIDATOR SEEKING INFORMATION REGARDING THE EXAMINEE'S INSURANCE COVER

As indicated above, the first question is whether the court's approach to examination is wide or narrow. The second question is what that means for a liquidator seeking information about insurance. Here, *Grosvenor Hill* aptly sets the scene:

> The question is whether the court is limited by this section to ordering an examination the purpose of which is to go no wider than to determine whether or not there are reasonable grounds, including evidence, to litigate a case to a successful judgment, or whether the court has power to order an examination, the purpose of which is to ascertain the likelihood of any judgment being satisfied; that is, whether it is a permitted purpose to inquire as to the worth of a potential defendant so as to be able to make a practical assessment as to the likelihood of a return to the company of the fruits of any favourable judgment and the necessary legal costs expended in obtaining it. Is the court empowered under this section to order an examination or the production of documents to test the likelihood of the creditors in the winding up receiving a tangible benefit from the satisfaction of any judgment obtained and to enable the liquidator to determine whether it is prudent to commence or maintain litigation with knowledge as to the real likelihood of obtaining any tangible benefit beyond the mere judgment, including a judgment for costs, at the conclusion of the litigation?[31]

This is a long way of asking whether the liquidator's scope of enquiry is limited to the existence of a possible cause of action, or extends to the value of that cause of action. Here, 'value' means access to insurance information and documents which reveal the likelihood of satisfying any judgment from the insurer's fund. At this point, consider the four Australian cases directly addressing this issue in late 1993 and 1994.

The first is *Re Interchase Corp. Ltd.*[32] Summonses for examination were issued to a firm of valuers, Grosvenor Hill (Queensland) Pty Ltd, and to two of their former employees, Mr Richardson and Mr Waghorn, who were involved in the preparation of certain valuations for the company concerning the Myer Centre in Brisbane. The purpose of the examination

[31] (1994) 12 ACSR 646, 652.
[32] (1994) 12 ACLC 97; and (1994) 12 ACSR 405.

was to determine whether the company had a good cause of action in negligence and/or breach of contract against the valuers for those valuations, and to determine the extent to which Grosvenor Hill and Richardson and Waghorn had professional indemnity insurance. In deciding that the examinations should be allowed to proceed and that each of the examinees should produce any relevant insurance policies, Drummond J said:

> The question whether a company in liquidation has a good claim in fact and law against a third party, such as a valuer who has prepared a valuation on which the company may have relied to its detriment, is a matter that clearly, in my view, forms part of the affairs of the company. For the liquidator to be able to examine an expert on a section 596B summons for the purpose of gathering information and evidence to see if the company has a good cause of action in damages against the expert is of little practical value if a liquidator cannot also examine the expert as to his ability to satisfy a judgment that the company may be able to recover against him. The dicta *Re Laurie Cottier Productions* and in *Re Indopal* to which I have referred in my view support the proposition that the ascertainment of the value that a claim the company may have against another is part of the affairs of the company. I would therefore hold that documents throwing light on the extent to which each of Grosvenor Hill, Mr Richardson, and Mr Waghorn have professional indemnity insurance against any liability they may be under to Interchase in respect of the negligent performance of the valuations here in question is part of the 'examinable affairs' of Interchase, in that such documents relate to an issue in the winding up of Interchase.[33]

The valuers appealed against Drummond J's decision on the ground that the court had no power to order the production of insurance policies. They argued that the policies were not relevant under s. 597(9) because they were not 'relevant to matters to which the examination relates or will relate'. This argument included the policy argument that adopting a construction which would permit production of policies of professional indemnity insurance would open the floodgates for detailed examination of private financial details of various people against whom the company might have a claim. In other words, the argument was that the law should draw the line at that point.

On the appeal, *Grosvenor Hill (Qld) Pty Ltd v Barber*,[34] Beaumont, Spender and Cooper JJ dismissed these arguments, concluding:

> In our view, the ambit of the power is sufficiently wide to enable information to be sought from a defendant or potential defendant as to ability of that person to satisfy any reasonable judgment which may be obtained in litigation instituted by the liquidator. *In that context, it is within power to order production of relevant documents, including insurance policies, to ascertain whether or not the*

[33] (1994) 12 ACLC 97, 105.
[34] (1994) 12 ACSR 646.

> *person has an enforceable right to indemnity from an insurer or other person.* The obtaining of such information by the liquidator in the course of the winding up is to facilitate the realisation of the chose in action to the best advantage of the company and its creditors.[35] (*emphasis* added)

On the question of how the court exercises its discretion, the judges said:

> [I]n the final analysis, it must be left to the court in any particular instance, guided by the evident statutory purpose of the section, to determine whether or not the information is relevant to the liquidator for the purpose of performing his statutory duty and whether and in what manner any proposed examinee needs to be safeguarded beyond the ordinary safeguards of court control of the examination process from any oppressive exercise of the power....
>
> [I]n the present case, it has been foreshadowed that, if a cause of action exists, a substantial claim for damages will be made. In other words, it is not suggested that the request for the production of the insurance documents is frivolous or an abuse of the court's process. It is accepted, properly we think, that the reason for the request is so that the liquidators may be better informed on the question whether it should institute proceedings against Grosvenor. If the order was, in truth, made within power, the conduct of the liquidators in seeking practical information as to the actual worth of any claim that Interchase might have would not, in our view, be an abuse of process and would not be oppressive.[36]

In other words: the potential action is a chose in action; that chose in action is the company's 'property'; it is an 'examinable affair' of the company; and the liquidator's enquiries about it should not be limited to enquiries about the existence of that asset but rather extend also to enquiries about the value of that asset, which means enquiries about 'whether or not the person has an enforceable right to indemnity from an insurer or other person ... to facilitate the realisation of the chose in action to the best advantage of the company and its creditors'.

Immediately prior to the Full Federal Court handing down its decision in *Grosvenor Hill*, the Full South Australian Supreme Court considered the same issue in *Gerah Imports Pty Ltd v The Duke Group Ltd (in liq.)*.[37]

In that case, the liquidator commenced proceedings against the Western Australian partners of an accounting firm, Nelson Wheeler, alleging that they were negligent in preparing a report supplied to the corporation. The liquidator had also commenced proceedings against a number of other defendants who were alleged to be partners in a national partnership of Nelson Wheeler. The liquidator applied to examine persons involved in the Western Australian partnership or the national partnership, seeking information and documents about whether the Western

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[35] *Id.* 656.
[36] *Id.* 656–7.
[37] (1993) 12 ACSR 513.

Australian partners were part of the national partnership and about the level of insurance covering the Western Australian and national partners.

Olsson J (with whom King CJ and Millhouse J agreed) said that the judge at first instance had not erred in the exercise of his discretion in ordering the examination and the production of the relevant documents, concluding:

> The commercial reality of pursuing long and expensive legal proceedings for a very large sum of money against individuals of finite resources is clearly a matter as to which he needs to make a judgment, based upon the likelihood, or otherwise, of potential ultimate recovery from a relevant insurer.[38]

In other words, the liquidator is entitled to discover whether potential defendants are persons of straw or persons of substance when it comes to satisfying any judgment. The 'commercial reality' supplies both the context within which the statutory power of examination must be interpreted and a non-rule-based justification in its own right which favours access to insurance information for liquidators.

Before Dawson J in the High Court, the accountants then sought a stay of the order for their examination. In *Re Duke Group Ltd (in liq.)*,[39] Dawson J refused the stay, concluding:

> Clearly the rights of action, if any, of the corporation against the applicants are examinable affairs within the meaning of the legislation. The Full Court concluded that an examination of those rights under the relevant provisions was not confined to their existence but extended to their extent and value. Plainly the latter are matters of considerable moment to the liquidator of a corporation in pursuing the assets of the corporation in an economical and efficient manner.

However, these two cases are not the end of the story. They must be contrasted with the decision of the New South Wales Court of Appeal in *Kelly v Murphy*.[40] This case illustrates that the court will take heed of the liquidator's purpose in conducting the examination. This point is significant because it shows that liquidators are not entitled to all information in all insurance policies in all circumstances. At the same time, *Kelly v Murphy* is consistent with the other two cases. It does not say that, contrary to those cases, liquidators are not entitled to information about insurance. Rather, it says that liquidators are limited in their access to such information if the purpose of their enquiry does not justify access to it. This point is important, because three cases which superficially have conflicting results all support the same underlying principle.

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[38] *Id.* 520.

[39] (1994) 68 ALJR 196, 198. At the time of writing, a further matter has been reserved before the Supreme Court of Victoria concerning substantially the same issues.

[40] (1993) 11 ACLC 1, 230.

Again, understanding the basic facts in all of these cases enhances our understanding of their lessons. Mr Short had been a director of BPTC Ltd and at the same time a partner of Freehill Hollingdale & Page. BPTC was the corporate trustee for a number of unit trusts. The new trustees commenced proceedings against BPTC and Mr Short for alleged breaches of duties to the unitholders. The other partners of Freehill Hollingdale & Page were also joined as defendants. Under the relevant partnership legislation, the firm would be liable for actions of partners done in the ordinary course of business. Accordingly, the new trustees sought to examine Mr Short on the nature of the relationship between him, BPTC, and Freehill Hollingdale & Page and, in particular, to determine whether Mr Short was acting in the ordinary course of Freehill Hollingdale & Page's business when acting as a director of BPTC. A production order was made under s. 597(9), requiring Freehill Hollingdale & Page to produce at Mr Short's examination a copy of their professional indemnity policy for the relevant period. However, this order was qualified in that the identity of the insurer, the amount of the insurance cover, and other details which may have revealed the amount of the insurance cover were ordered to be deleted. Obviously, this information is exactly the kind of information which a liquidator might want where the liquidator's purpose includes making enquiries about the value of the potential cause of action. Freehill Hollingdale & Page appealed against the production order, and the new trustees cross-appealed against the restriction placed on access to Freehill Hollingdale & Page's insurance details.

Sheller JA (with whom Meagher and Handley JJA agreed) decided that both the appeal and the cross-appeal should be dismissed. The production order was allowed to stand on this basis:

> [It] was ... neither vexatious nor oppressive and falls within the ambit of the order for examination made and contemplated by section 597. The claims against Mr Short and the partners of Freehill Hollingdale & Page result from and are closely connected with BPTC's alleged breaches of trust. There are therefore matters which relate to the affairs of BPTC as trustee of the trusts. The documents described in schedule A [one of which was Freehill Hollingdale & Page's professional indemnity insurance policy] are, for reasons I have indicated, relevant to these matters.... No ground is shown for saying that His Honour's discretion miscarried in not refusing to make the order.[41]

As regards the deleted insurance details, Sheller JA also concluded that:

> ... there is no error of principle demonstrated which should lead us to interfere with His Honour's decision to exclude this material from the documents to be produced.[42]

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[41] *Id.* 237.
[42] *Ibid.*

In *Re Duke Group Ltd (in liq.)*,[43] Dawson J explained *Kelly v Murphy* on this basis:

> The trustees only sought information for a limited purpose, which did not extend to discovering the capacity of the partners of the firm of solicitors in question to satisfy any judgment.

In other words, the court was not saying that the insurance details were not relevant to the examinable affairs of the corporation, but rather were saying that they were not relevant to the enquiry being undertaken by the trustees. This point should not be underestimated. It is the key to the consistent theme underlying all three cases. Its rationale is simple. If a liquidator wants to examine a third party's insurance policy for information which might reveal the nature of the business arrangements and the nature of the business interactions between the various parties, information going to the value of the insurance cover might be irrelevant to that narrow enquiry. However, that is not a blanket prohibition on liquidators having access to insurance information and documents.

Nevertheless, such qualifications point the way towards refinement of the broad principle underlying these three cases. Given the commercial importance of this topic in a litigious environment where actions against professional advisers continue before the courts, somebody is likely to ask another court soon to set some boundaries — namely, to what extent does the purpose of the liquidator's enquiry limit the access to information?; when can certain information be deleted from the documents produced?; and what kinds of insurance policies are relevant?

Indeed, immediately prior to publication of this article, the boundary was tested in the fourth major case, *Re GPI Leisure Corp. Ltd (in liq.)*.[44] The liquidator sought production under s. 596 of any relevant policies of insurance indemnifying partners of a law firm, and also sought other documents including correspondence, file notes, internal memoranda, and agreements connected in some way with such policies. Declining to order production of the latter category of documents, McLelland CJ reinforced the distinction between the scope of the court's power to compel submission to examination and the way in which that power should be exercised in different circumstances, adding:

> It is one thing to permit the liquidator to use the process of the Court to compel persons alleged to be liable to GPIL to answer questions about the existence of insurance policies which may be available to indemnify such persons in respect of any such liability, and to compel the production of such policies and ancillary documents such as renewal certificates (see *Gerah Imports v The Duke Group* 12 ACSR 513 at 520; *Grosvenor Hill v Barber* 12 ACSR 646 at 655–7, and 68 ALJR 196; but cf *Kelly v Murphy* 12 ACSR 365 at 372–3). It is quite

[43] (1994) 68 ALJ 196, 198.
[44] Unreported, New South Wales Supreme Court, McLelland CJ, 2 September 1994.

another to permit the liquidator to use such process to compel answers to questions and to compel the production of documents, in order to conduct an investigation into other matters such as, for example, (a) the merits of any dispute between the insured and the insurer as to whether a policy has been avoided for non-disclosure, or whether conditions of indemnity in the policy have been fulfilled (I should stress that these are hypothetical examples); or (b) confidential disclosures by the insured to the insurer made in order to protect the insured's right to indemnity under a policy (which may not be protected by legal professional privilege — cf *Bulk Materials v Coal and Allied Operations* 13 NSWLR 668).

8. DISTILLING THE LEGAL LESSONS

The net result of these decisions is that the courts take a realistic view of the practical and commercial requirements of the liquidator, recognising that it is reasonable and necessary for a liquidator to require the production of relevant insurance policies from a third party against whom the company in liquidation may have a good claim.

Here, the legal result converges with commercial convenience. As a matter of substance, a liquidator's wide powers of enquiry during public examinations logically should embrace both the existence of an asset (including a potential cause of action) and its value. As a matter of substance and in accordance with commercial reality, the existence, extent and value of a cause of action are inextricably linked in assessing the viability of litigating that cause of action. In other words, only the sticklers for form — that is, those who still mistakenly cling to a belief in the predominance of a 'strict letter of the law' approach to law — would argue that the liquidator should be entitled to ask questions with a view to establishing the existence of a potential cause of action but should stop short of asking questions about the value of that item. In terms of commercial reality, both dimensions are clearly important for a decision which the liquidator will make in the interests of creditors. Given the law's ready acceptance of the statutory advantages conferred upon a liquidator in comparison with ordinary litigants, such arguments of form are now legally untenable.

At the same time, this does not mean that all arguments against disclosure of insurance information should be rejected as matters of form. We have gone to some pains to expose the real justification for limiting access to such information, in the expectation that this might remain a testing point for some time yet. As *Kelly v Murphy* and *Re GPI Leisure Corp. Ltd (in liq.)* illustrate, there may be justifiable circumstances for restricting the availability of such information as a matter of substance in appropriate circumstances. However, this simply emphasises the importance of reaching the right result for the right reason. For a legal profession increasingly facing public criticism for litigious practices which are not cost-effective, and where the remnants of a 'stickler for form' attitude

still unnecessarily pervade correspondence between opposing litigants, arguments before courts, and the layperson's view of law, it would be unproductive now for anybody to revisit issues such as the scope of a liquidator's power of examination and the liquidator's general entitlement to insurance information and documents.[45] Rather, worthwhile time and energy might be better directed towards the secondary questions which we have highlighted, and which remain unanswered. These secondary questions are summarised in this basic question: is the liquidator entitled to all information in all insurance policies and elsewhere in all circumstances?

9. ANCILLARY ISSUES

We have indicated the subsidiary questions about access to insurance information and documents, which await settlement in future cases. Three ancillary issues are also worth mentioning because of their practical importance.

First, modern insurance practice creates some practical problems in deciding where to draw the line on disclosure (for example, checking claims made during a relevant claims period, proposal forms, etc.). For example, what is the position where the relevant insurance policy is 'capped'? The policy might provide that somebody is covered for all claims up to a ceiling of $80 million. Is the liquidator then entitled to require production of documents that reveal what other claims have been made against the policy and the amount of those claims, so that he can work out how much of the indemnity is available to meet his potential claim? Sometimes, it is a line-drawing exercise where variations of the 'floodgates' policy argument will be relevant.[46]

Consider the same issue from the perspective of the competing public interests at stake. *Grosvenor Hill* acknowledges the competition between the public interest in a liquidator obtaining necessary information for the proper discharge of the liquidator's function for the benefit of creditors, on one hand, and the public interest in the right of an individual to privacy concerning that individual's affairs, documents and papers, on the other. Here the ancillary question is whether the court will advance the first public interest at the expense of the second in these circumstances. Requiring a party to reveal information about who has made claims

[45] Indeed, that fundamental point was conceded in *Re GPI Leisure Corp. Ltd (in liq.)*.

[46] Other complications include differences between 'claims made' policies and 'event or occurrence' policies. Additional public interests must be balanced, particularly when setting fair limits on what is disclosed. For example, many 'claims made' policies have extensions which enable a potential claim to trigger the policy's protection and which crystallises when the claim is made. Information about claims which have not yet crystallised in this way is obviously sensitive, and there might need to be limits on its disclosure in the interest of fairness.

against them and the extent to which their insurers have satisfied those claims might be limited in some way by future courts. Again, any such limitations will be grounded in substance rather than form, on the basis that such enquiries might go beyond what is legally permissible.

Second, consider the potential impact of these three cases upon insurance practice. Some underwriters have expressed fears publicly that litigants armed with insurance information will simply commence proceedings and claim damages for the upper limit of the insurance cover. Insurers trying to settle claims because of their nuisance value might then be forced to settle for amounts which might have been lower without knowledge of the benchmark provided by the insurance cover. Insurers are left waiting to see whether this fear proves realistic.

Third, consider the final ancillary issue for the practice of litigation. This concerns matters of pleading. In his judgment in *Gerah Imports Pty Ltd v The Duke Group (in liq.),*[47] Olsson J referred to the possibility of a liquidator joining the third party's insurer in the proceedings against the third party for the purpose of obtaining a declaration of liability. He accepted that this may be possible based on the line of reasoning in *J.N. Taylor Holdings Ltd (in liq.) v Alan Bond.*[48] Tactically, this can be an important consideration, not least in pleadings.[49]

However, note that joining the insurer and obtaining a declaration of liability are not straightforward matters. For example, somebody commencing proceedings against an insured party and seeking to join their insurer will not necessarily know if the insured party has done anything which entitles the insurer to disclaim liability under the policy. In other words, joining insurers in proceedings does not overcome all hurdles.

10. LEGAL REASONING IMPLICATIONS

As indicated in the introduction to this article, jurisprudentially these four recent decisions are another manifestation of Australian legal reasoning's modern preoccupation with 'purposive' rather than 'literal' statutory interpretation. Writing extra-judicially, Mason CJ has set the framework for the modern approach by Australian judges:

> It is unrealistic to interpret any instrument, whether it be a constitution, a statute, or a contract, by reference to words alone, without any regard to fundamental values.... The emphasis is on substance instead of form, whether it be the substance of a constitutional provision or the substance of a transaction

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[47] (1993) 12 ACSR 513.

[48] (1993) 59 SASR 432.

[49] On the tactical side, also note Drummond J's acceptance in *Re Interchase Corp. (in liq.)* (1994) 12 ACSR 405, 413 that the existence of proceedings against third parties is not an inevitable impediment to obtaining orders for their examination — for example, existing proceedings need not be discontinued.

> between parties. Likewise, the emphasis is on purposive interpretation, ... literal interpretation being a hallmark of formalism.[50]

Increasingly, as these recent decisions illustrate, unduly literal approaches to statutory provisions, including arguments which analyse the statutory provisions in a vacuum and removed from their commercial context, are unlikely to find favour with Australian courts following the High Court's lead on legal reasoning. In this way, a heightened awareness of developments in Australian judicial reasoning critically enhances our understanding of the proper legal result in a traditional 'black letter law' topic such as liquidators' public examinations.

Nowadays, it is legally permissible for judges to engage in purposive statutory interpretation by reference to underlying policy objectives and other non-rule-based considerations such as commercial reality. They increasingly do so without any of the ritual incantations of traditional judicial rhetoric that judges simply make 'legal' judgments rather than 'value' judgments. Consider, for example, the unspoken assumption of the undoubted correctness of a purposive approach to statutory interpretation which permeates Dawson J's dismissal of special leave to appeal to the High Court in *Re Duke Group Ltd (in liq.)*,[51] including rationales grounded in purposive statutory interpretation, underlying statutory policy objectives, and commercial reality:

> The section of the Corporations Law which is critical is section 596B. That confers power upon the court to summon a person for examination about a corporation's examinable affairs. When regard is had to the definitions of 'examinable affairs', 'affairs' and 'property' contained in sections 9 and 53, 'examinable affairs' include any legal or equitable estate or interest (whether present or future and whether vested or contingent) in real or personal property of any description and include a thing in action.
>
> Clearly the rights of action, if any, of the corporation against the applicants are examinable affairs within the meaning of the legislation. The Full Court concluded that an examination of those rights under the relevant provisions *was not confined to their existence but extended to their extent and value.* Plainly the later are matters of considerable moment to the liquidator of a corporation in pursuing the assets of the corporation in an economical and efficient manner. And as was pointed out in *Hamilton v Oades*, a liquidator performs a public function in which one of his duties is to protect the interests of the creditors.
>
> It is not contended before me by the applicants that the examination ordered by the Master is oppressive. What is said is that it extends beyond the affairs of the corporation to the affairs of other persons and is merely for the purpose of ascertaining their potential liability and their capacity to satisfy any judgment against them. However, as I have said, these are matters of

[50] Mason CJ, 'Future Directions in Australian Law' (1987) 13 *Monash Law Review* 149, 158–9.

[51] (1994) 68 ALJR 196, 198.

> importance to a liquidator, going in a practical way as they do to the value of the property of the corporation.
>
> The applicants are unable to point to any authority in their favour. (*emphasis* added)

Here, reference to precedent is almost an afterthought. In addition, Dawson J proceeds to explain the substantive rationale for limiting or even refusing disclosure of information about indemnity insurance:

> The decision of the Court of Appeal of New South Wales in *Kelly v Murphy* is to be explained upon the basis that the trustees only sought information for a limited purpose, which did not extend to discovering the capacity of the partners of the firm of solicitors in question to satisfy any judgment.

As explained in Part 7 of this article, in *Kelly v Murphy* access to relevant insurance policies was sought for information which might explain the role of one of the law firm's partners as a director and adviser for a business. As a matter of substance, seeking information for that narrow purpose says nothing one way or the other about seeking information about insurance for the wider purpose of assessing the 'existence ... extent and value' of a corporation's potential cause of action against third party professional advisers such as valuers, auditors or lawyers.

Having considered the statutory provisions and the guidelines in recent cases, let us return to the wider perspective of a purposive approach to statutory interpretation. The statute creates wide powers of enquiry for a public examination. Previous cases admit that this gives liquidators an advantage in litigation. Everybody acknowledges that liquidators might initiate a public examination of third parties against whom a company in liquidation might have a potential cause of action. On both a literal and a purposive reading of the relevant 'public examination' provisions in the *Corporations Law*, enquiries about such causes of action should count as 'examinable affairs' of the company, to at least some degree. The rationale is that such causes of action might prove to be valuable assets in the liquidation. In terms of commercial reality, liquidators are properly interested in the likely fruits of litigation against such third parties, including the prospects of realising any judgment against them which, in a world of modern indemnity insurance, often means the prospects of recovering against an insurance policy of the right kind and for the right amount. Everybody accepts that such examinations should not be granted willy-nilly, and that sometimes it may be inappropriate to order disclosure of information about indemnity insurance at all or without restriction. However, taking all of these things together in light of a purposive approach to the 'public examination' provisions, in principle they clearly produce a result in favour of disclosure of such information as a matter of substance, unless there are reasons for refusing or limiting access to such information and those reasons are based on 'substance' rather than 'form'.

11. CONCLUSION

In conclusion, we return to the three important dimensions — jurisprudential, legal and practical — outlined in the introduction to this article. Jurisprudentially, the way in which Australian judges handle this topic reveals something significant about purposive statutory interpretation in modern legal reasoning. In particular, it reveals the importance of understanding the pervasive distinction between 'substance' and 'form' at increasingly deeper levels of analysis, not least to understand why some arguments are rejected by Australian courts nowadays on the basis of this distinction. Legal practitioners also encounter such distinctions in arguments before courts or in correspondence, so this jurisprudential dimension is also relevant in everyday commercial practice.

Legally, Australian law now clearly indicates that liquidators are entitled during public examinations to information and documents concerning professional indemnity insurance. As we have indicated, that general answer still leaves open some subsidiary questions which are legally and practically important.

Finally, this topic has important implications in practice for professional advisers who may be required to disclose information about their insurance arrangements during liquidators' public examinations, insurers who might ultimately be responsible for satisfying judgments against professional advisers, liquidators who want more information before they decide whether to proceed with litigation, and insolvency practitioners who will better understand all of these lessons through a balanced focus upon jurisprudence, substantive law and practice.