IN THE SUPREME COURT OF NEW ZEALAND

SC 92/2009
[2010] NZSC 49

BETWEEN	LUDGATER HOLDINGS LIMITED Appellant
AND	GERLING AUSTRALIA INSURANCE COMPANY PTY LIMITED Respondent

Hearing: 23 March 2010

Court: Elias CJ, Blanchard, McGrath, Wilson and Anderson JJ

Counsel: I G Hunt for Appellant
C A McLachlan QC, M S Cole and R M Gapes for Respondent

Judgment: 11 May 2010

JUDGMENT OF THE COURT

The appeal is dismissed with costs to the respondent in the sum of $15,000 together with its reasonable disbursements to be fixed if necessary by the Registrar.

REASONS

(Given by Blanchard J)

[1] The issue on this appeal is whether a New Zealand statutory provision, which gives someone who has suffered injury or damage the right to make a direct claim against the insurer of the person who caused the injury or damage, can apply in circumstances where the insured and the insurer were Australian companies, the insurance policy was arranged between them in that country and the insured has gone into liquidation there.

[2] It arises in the following circumstances. The appellant, Ludgater Holdings Ltd, owns a building in Auckland. On 11 February 2006 the building was damaged in a fire which Ludgater alleges was caused by a defective capacitor in a fluorescent light. Ludgater claims that the capacitor was negligently manufactured or supplied. The manufacturer and potential defendant (no proceeding having yet been brought against it) was Atco Controls Pty Ltd, a company registered in Victoria, Australia. Atco went into liquidation in that State on 14 July 2006. Ludgater says the losses it suffered as a result of Atco's negligence were repair costs of $227,755 and loss of rental of $39,963.30.

[3] Atco was insured under a policy issued in Australia by the respondent, Gerling Australia Insurance Company Pty Ltd, which obliges Gerling to indemnify Atco for public and products liability arising anywhere in the world, except for the United States of America and Canada, but with a limit of the Australian equivalent of € 1,000,000 in the aggregate of claims for the relevant period of insurance. Gerling is incorporated in New South Wales. Its registration in New Zealand as an overseas company ceased on 16 May 2006.

[4] Relying on s 9 of the Law Reform Act 1936, Ludgater has brought a proceeding directly against Gerling in the High Court at Christchurch seeking judgment for the losses allegedly caused by Atco. That legislative provision is in the following terms:

> **9 Amount of liability to be charge on insurance money payable against that liability**
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> (1) If any person (hereinafter in this Part of this Act referred to as the insured) has, whether before or after the passing of this Act, entered into a contract of insurance by which he is indemnified against liability to pay any damages or compensation, the amount of his liability shall, on the happening of the event giving rise to the claim for damages or compensation, and notwithstanding that the amount of such liability may not then have been determined, be a charge on all insurance money that is or may become payable in respect of that liability.
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> (2) If, on the happening of the event giving rise to any claim for damages or compensation as aforesaid, the insured has died insolvent or is bankrupt or, in the case of a corporation, is being wound up, or if any subsequent bankruptcy or winding up of the insured is deemed to have commenced not later than the happening of that event, the provisions

of the last preceding subsection shall apply notwithstanding the insolvency, bankruptcy, or winding up of the insured.

(3) Every charge created by this section shall have priority over all other charges affecting the said insurance money, and where the same insurance money is subject to 2 or more charges by virtue of this Part of this Act those charges shall have priority between themselves in the order of the dates of the events out of which the liability arose, or, if such charges arise out of events happening on the same date, they shall rank equally between themselves.

(4) Every such charge as aforesaid shall be enforceable by way of an action against the insurer in the same way and in the same Court as if the action were an action to recover damages or compensation from the insured; and in respect of any such action and of the judgment given therein the parties shall, to the extent of the charge, have the same rights and liabilities, and the Court shall have the same powers, as if the action were against the insured:

Provided that, except where the provisions of subsection (2) of this section apply, no such action shall be commenced in any Court except with the leave of that Court.

(5) Such an action may be brought although judgment has been already recovered against the insured for damages or compensation in respect of the same matter.

(6) Any payment made by an insurer under the contract of insurance without actual notice of the existence of any such charge shall to the extent of that payment be a valid discharge to the insurer, notwithstanding anything in this Part of this Act contained.

(7) No insurer shall be liable under this Part of this Act for any sum beyond the limits fixed by the contract of insurance between himself and the insured.

It is accepted that if both Atco and Gerling were New Zealand registered companies s 9 would apply to the circumstances of this case, subject to proof of Atco's liability and to the policy limit. The question is whether it can do so where they are not and, in particular, where Atco is in liquidation in Australia.

[5] In July 2007 Ludgater sought leave to commence proceedings against Gerling under s 9. Gerling protested jurisdiction. In August 2007 Ludgater made an ex parte application for leave to serve Gerling out of the jurisdiction. That application was granted, but in October of that year Gerling applied to the High Court for an order dismissing Ludgater's proceeding on the ground that the High Court lacked jurisdiction to determine the s 9 claim.

The Associate Judge's judgment

[6] Associate Judge Christiansen dismissed that application on 14 December 2007.[1] He referred to r 219(a) of the High Court Rules[2] which provided that proceedings could be issued and served outside New Zealand without leave where a claim arose "where any act or omission for or in respect of which damages are claimed was done or occurred in New Zealand". The Associate Judge said that it was arguable that the capacitor was the cause of the damage to Ludgater's property even though the negligence relied upon, in manufacture, occurred in Australia. That the damage occurred in New Zealand was itself sufficient to bring the case within r 219(a). The cause of action arose in New Zealand. It could not be acceptable that an Australian insurer could provide indemnity to a company doing business in New Zealand but not be responsible to persons in New Zealand adversely affected by the insurer's product. There was also sufficient evidence to prove that at relevant times Gerling had a presence in New Zealand; that it was conducting its business in New Zealand until 16 May 2006. If Atco was held to be liable, any judgment would be payable in New Zealand. Section 9 put the insurer in the same place as an insured and, if payment was required, then an insurer had to pay the judgment in New Zealand. The Associate Judge said there was no prejudice to Gerling. If Atco was liable to Ludgater, then Gerling was obliged to indemnify Atco in respect of that liability. "It likely will make no difference whether the claim is made in New Zealand or Australia, or whether New Zealand or Australian law applies."[3]

The High Court judgment

[7] Gerling sought review of that decision by a High Court Judge. Chisholm J gave judgment on 2 May 2008.[4] The Judge agreed with Associate Judge Christiansen that r 219(a) applied because the capacitor was installed in the building

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1 *Ludgater Holdings v Gerling Australia* HC Christchurch CIV-2007-409-1525, 14 December 2007.

2 See now High Court Rules 2008, r 6.27.

3 At [45].

4 *Ludgater Holdings Ltd v Gerling Australia Insurance Co Pty Ltd* [2008] 3 NZLR 685 (HC).

in New Zealand where the fire occurred. He also found Gerling had a presence in New Zealand at the relevant time and had thereby subjected itself to the jurisdiction of New Zealand courts. It had elected to provide insurance cover in relation to an event occurring in New Zealand. On a literal reading of s 9(1), as specified prerequisites had been satisfied, Ludgater should be entitled to enforce the charge created by the section pursuant to subs (4). Also, it could reasonably be inferred that Gerling would conduct the proceedings on behalf of Atco in the New Zealand Court and Atco's liquidation would not prevent Ludgater taking steps to enforce its charge in the same way as it could have enforced a judgment against Atco. It would be entitled to register and enforce the judgment against Gerling in Australia.

[8] However, in case he was wrong about that, the Judge considered whether in any event s 9 had extra-territorial effect. He concluded that it did. If the section were to operate properly the plaintiff must be able to seek leave once it was triggered regardless of the identity or location of the insurer. Otherwise the wide application of the section would be severely negated in a way that the Judge said could not have been intended by Parliament. The focus should be on the status of the payment, not the identity of the payer. The only possible qualification to an extra-territorial application of the section was that the insurer would have to be located in a country, such as Australia, where it would be possible to enforce the charge. The Judge considered that he was bound by the decision of the Court of Appeal in *FAI (NZ) General Insurance Co Ltd v Blundell and Brown Ltd*[5] from which he drew the proposition that the section was designed to protect a plaintiff by giving direct access to insurance moneys and to prevent an insurer from obtaining a "windfall" where it was impracticable to sue the insured. It put the insurer into the same position as the insured (not vice versa) for the purposes of the claim by the injured party. It was supposed to provide an effective mechanism for obtaining a charge over the relevant insurance moneys. Therefore, if it had been necessary to consider whether s 9 had extra-territorial effect, the Judge would have found that it did. Any other interpretation would deprive the section of its intended effect and would open it up to anomalies that could not possibly have been intended. The extra-territorial effect

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5 *FAI (NZ) General Insurance Co Ltd v Blundell and Brown Ltd* [1994] 1 NZLR 11 (CA).

would not encroach upon Australian sovereignty. The application for review was therefore dismissed.

The Court of Appeal judgment

[9] With leave of Chisholm J, Gerling appealed to the Court of Appeal which gave judgment on 11 September 2009.[6] In summarising the relevant facts, the Court noted that Gerling had ceased to carry on any business in New Zealand as from 4 April 2003 although it had not been deregistered until 16 May 2006.[7] The Court dealt first with whether the High Court had in personam jurisdiction in the case. That was said to depend upon whether claims brought under direct recourse provisions like s 9 should be characterised as in tort or in contract. Leading texts took different views. The editors of *Dicey* were clear in their preference for a contractual classification,[8] whereas Nygh said there were strong reasons for adopting a tortious analysis.[9] In resolving this issue the Court of Appeal considered that the best course was to follow the view expressed in *FAI*. That case concerned whether the s 9 claim was time-barred under the Limitation Act 1950. The claim against the insured was in equity so there was no limitation period on that claim. But if the claim against the insurer were an independent claim based on the statute, then the six-year limitation period applied. (All parties in *FAI* were based in New Zealand so no extra-territorial effect was being considered.) The Court of Appeal had concluded that the claim was not time-barred because, as Richardson J had said,[10] the proceeding against the insurer had the same character as the proceeding against the insured and was not to be treated as an independent action to recover a sum recoverable by virtue of an enactment. Hardie Boys J had said that because the section gave the claim against the insurer the same character and identity as a claim

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6 *Gerling Australia Insurance Company Pty Limited v Ludgater Holdings Limited* [2009] NZCA 397 per Ellen France, Potter and Keane JJ.

7 Ludgater continues to dispute this factual issue but as it is not of significance in the determination of the appeal, it will not be further referred to.

8 Lord Collins of Mapesbury (ed) *Dicey, Morris and Collins on The Conflict of Laws* (Third Cumulative Supplement to the Fourteenth Edition, Sweet & Maxwell, London, 2009) at [35–043].

9 PE Nygh and M Davies *Conflict of Laws in Australia* (7th ed, Lexis Nexis Butterworths, Chatswood, NSW, 2002) at [22.24].

10 *FAI* at 17.

against the insured, the time limit for bringing the former must be the same, and must have the same starting point, as the time limit for bringing the latter.[11]

[10] The Court of Appeal acknowledged that, in considering legal issues which had an impact in more than one legal jurisdiction, the issue was not really one of "interest balancing" but rather involved a "structural problem".[12] However, the Court of Appeal said, given there is no settled position in terms of the overseas authorities on the characterisation of claims, the best course was to apply *FAI*. It noted also that the Law Commission for England and Wales had said that if the claimant's action against the actual wrongdoer would be tortious, an action against the insurer might be better seen as an extension of the tortious action.[13] The Court therefore took the view that Ludgater's s 9 claim should be characterised as being in tort. A defendant in a tort claim could be served abroad under r 219(a). Gerling had been lawfully served abroad under that rule. The High Court had in personam jurisdiction.

[11] In coming to that conclusion, the Court indicated that it did not consider the test of presence in New Zealand was helpful. Gerling was incorporated and had its principal place of business in Australia, where it was served. It was therefore to be treated as a foreign defendant. The Court distinguished the decisions of the House of Lords in *Clark v Oceanic Contractors Inc*[14] and *Agassi v Robinson.*[15] Both dealt with the assessment of United Kingdom tax liability so the context was very different and involved interpreting the specific terms of the taxing legislation. In both cases the critical factor was whether the defendants had come into the jurisdiction and done acts which put them within the scope of legislation which provided for foreigners who entered the United Kingdom and did acts there. The situation in those cases was different from that in the present case where the statute was silent as to its territorial application.

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11 *FAI* at 19.
12 At [47], citing *Tolofson v Jensen* [1994] 3 SCR 1022 at 1047.
13 Law Commission for England and Wales *Private International Law: Choice of Law in Tort and Delict* (Law Com No 193, 1990) at [3.51].
14 *Clark v Oceanic Contractors Inc* [1983] 2 AC 130 (HL).
15 *Agassi v Robinson* [2006] UKHL 23, [2006] 1 WLR 1380.

[12] The Court of Appeal recognised that its finding that there was in personam jurisdiction was not determinative. It turned to the question of whether the High Court had subject-matter jurisdiction, noting that Hoffmann J had said in *Mackinnon v Donaldson, Lufkin and Jenrette Securities Corporation* that it did not follow from the fact that a person was within the jurisdiction and so able to be served that there was no territorial limit to the issues upon which the court might properly apply its own rules or the things which it could order such a person to do.[16] Here, where the law of the insurance policy was Australian, it was still necessary to ask whether the New Zealand court had subject-matter jurisdiction. It was not simply a matter of bringing Gerling before the New Zealand court. The effect of s 9 was to create a charge over the proceeds of the Australian insurance policy. The Court of Appeal said that it needed to consider whether the chose in action constituted by the charge on the proceeds of the policy was situated in New South Wales (where Gerling had its head office) or in New Zealand. If it was situated in New South Wales then a New Zealand court should not trespass on the jurisdiction of a foreign State. The Court referred to the decision of the House of Lords in *Société Eram Shipping Co Ltd v Cie Internationale de Navigation*[17] in which a judgment had been registered in the High Court in England. One of the judgment debtors had a bank account in Hong Kong which was in credit. The judgment creditor could have obtained a garnishee order in Hong Kong against the bank but instead it had applied to the High Court in England for such an order. The House of Lords found that an order could not be made relating to a chose in action situated abroad. Lord Hoffmann had said that the execution of a judgment was an exercise of sovereign authority:[18]

> It is a seizure by the state of an asset of the judgment debtor to satisfy the creditor's claim. And it is a general principle of international law that one sovereign state should not trespass upon the authority of another, by attempting to seize assets situated within the jurisdiction of a foreign state or compelling its citizens to do acts within its boundaries.

[13] The Court of Appeal said that choses in action generally are situated in the country where they are properly recoverable or can be enforced, that is, where the debtor resided and could be sued.[19] In this case, the chose in action was not located

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16 *Mackinnon v Donaldson, Lufkin and Jenrette Securities Corp* [1986] Ch 482 (ChD) at 493.
17 *Société Eram Shipping Co Ltd v Cie Internationale de Navigation* [2004] 1 AC 260 (HL).
18 At [54].
19 *Kwok Chi Leung Karl v Commissioner of Estate Duty* [1988] 1 WLR 1035 (PC) at 1040.

in New Zealand. Gerling did not have a residence here and the debt was not payable here. The New Zealand court should not trespass on Australia's authority by making orders in relation to it.[20] Ludgater had said that the position was affected by the fact that under the policy Gerling might satisfy its liability by making a payment on behalf of its insured. However, the Court of Appeal said, that did not change the place of payment of the proceeds, which would remain in New South Wales. Nor was it relevant to the question of whether proceeds of the policy were payable that a New Zealand judgment on Atco's liability to Ludgater was payable in New Zealand. The Court held that the absence of subject-matter jurisdiction meant that Gerling's appeal had to be allowed and the proceeding in the High Court dismissed.

Discussion

[14] The origins and development of s 9 are described in Chapter 5 of the Law Commission's report on *Some Insurance Law Problems*.[21] The section and a predecessor[22] responded to the obvious unfairness in the denial by the common law of priority for an injured plaintiff's claim to insurance proceeds received by or payable to an insolvent insured defendant. In the earliest of the cases to which the Law Commission referred, *Re Harrington Motor Co Ltd, ex parte Chaplin,*[23] a pedestrian injured by a negligently driven taxi had been awarded damages but the taxi company was insolvent. Its insurer had paid the amount to the liquidator. The injured man was held to have no right to require that the insurance proceeds be paid over to him. They were available to the taxi company's general creditors, including him. The members of the Court recognised the unfairness of this result. Atkin LJ was even moved to remark that:[24]

> ... it would appear as though a person who is insured against risks and who has general creditors whom he is unable to satisfy, has only to go out in the street and to find the most expensive motor car or the most wealthy man he can to run down, and he will at once be provided with assets which will enable him to pay his general creditors quite a substantial dividend!

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20 At [66]–[70].
21 Law Commission *Some Insurance Law Problems* (NZLC R46, 1998).
22 Motor-vehicles Insurance (Third-party Risks) Act 1928, s 10.
23 *Re Harrington Motor Co Ltd, ex parte Chaplin* [1928] Ch 105 (CA).
24 At 124.

[15] Lawrence LJ summarised the position in a passage which may have influenced the legislative solution which emerged in this country in s 9:[25]

> The case, when stripped of all its fringes, amounts simply to this, that the appellant claims the benefit of a contract of insurance made between his debtor and an insurance company, to which contract he was neither party nor privy. It is not suggested that the benefit of the contract was assigned to the appellant or that the assured constituted himself a trustee of the benefit of the contract for the appellant. In the absence of any such assignment or trust I fail to see how the appellant can establish any claim to the money paid under the contract. It is suggested that the insolvency of the debtor operates in some way to give to the appellant a charge or lien on the money so paid, but in my judgment it is clear that such insolvency has no such operation and confers no right to that money which had not been acquired by the appellant before the insolvency. It is well settled that money paid under a policy such as this to a solvent assured is not, in his hands, charged in favour of or appropriated to the person in respect of whose claim it has been paid.

[16] The general effect of s 9 is helpfully summarised in the judgment of McHugh and Gummow JJ in the High Court of Australia in *Bailey v New South Wales Medical Defence Union Ltd*.[26] That case was brought under s 6 of the Law Reform (Miscellaneous Provisions) Act 1946 (NSW), which is the New South Wales equivalent of s 9. It was drawn from the New Zealand precedent and is for presently relevant purposes nearly identical to s 9. McHugh and Gummow JJ said:[27]

> ... what s 6 achieves is the creation of a new right with an associated remedy to enforce it. The section does so by sweeping up distinctions in the general law between legal and equitable assignments of whole or part of presently existing or future choses in action and between cases where value is required or inessential. By its own force, the statute, in circumstances where it applies, creates, on the happening of the event giving rise to the claim for damages or compensation, a charge on all insurance moneys which are then payable in respect of the liability against which the insured is indemnified and on all such insurance moneys that may become payable in respect of that liability. (footnotes omitted)

[17] Under subs (1) of s 9, the insured's liability to a third party claimant to pay damages or compensation is charged on the insurance money which "is or may become" payable by the insurer to the insured in respect of that liability. The charge obviously is for the benefit of the third-party claimant, in this case Ludgater. It is

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25 At 124–5.

26 *Bailey v New South Wales Medical Defence Union Ltd* (1995) 184 CLR 399.

27 At 446.

created on the happening of the event giving rise to the claim for damages.[28] So, if s 9 applies in the present case, any liability of Atco to Ludgater would be charged on the amount payable by Gerling by way of indemnity to Atco as from the date of the fire. Under subs (2), the provisions of subs (1) are to apply notwithstanding the insolvency of an insured, so Atco's subsequent liquidation would make no difference. Under subs (3), not only is there to be a charge for the benefit of the third party claimant, but it is to have "priority over all other charges" affecting the insurance money. Those other charges would include any general charge given at any time by an insured company (under a general security agreement or, in terms of pre-PPSA law still applicable in Australia, under a general floating charge). By virtue of subs (3), the charge created under subs (1) has priority over any such general charge and also over any specific charge created by the company over the chose in action, that is, the insured's right to recover under its policy with the insurer. It is a charge created by the New Zealand legislation over an asset of the (now insolvent) insured. If there happen to be two or more charges created under Part 3 of the Act,[29] it is provided under subs (3) that they rank between themselves in the order of the dates of the events out of which the liability arose, that is, priority in accordance with the date of creation of each charge. If those events happened on the same date the statutory charges rank equally between themselves. Accordingly, if there were, say, three instances of defective capacitor-related fires occurring on three different days, subs (3) would have effect to give the claimants, in date order of the fires, first to third priority in respect of the insurance moneys, but all of those claims would have priority over any general charge which Atco may have had in favour of a financier, whether created before or after the fires.

[18] Subsection (4) of s 9 then makes the charge in favour of the claimant enforceable by way of an action against the insurer in the same way and in the same court as if it were an action to recover damages or compensation from the insured.

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[28] *Pattinson v General Accident, Fire, & Life Assurance Corp Ltd* [1941] NZLR 1029 (SC) at 1039 per Myers CJ; and *Bailey* at 443 and 449.

[29] Part 3 consists of s 9 and also s 9A, which enables a claim to be made against a nominated defendant where an insured is deceased and there is no administrator of the estate in New Zealand. Section 9A does not, however, provide for the creation of any charge. So the reference to Part 3 comprehends no more than charges under s 9 itself.

Thus, leaving aside the extra-territoriality question, Ludgater could sue Gerling claiming the damages which it could have claimed from Atco. In that litigation Ludgater and Gerling would have, to the extent of the charge, the same rights and liabilities as if Ludgater were suing Atco, and the Court likewise would have the same powers as if Atco had been the defendant.[30]

[19] Subsection (5) permits use of s 9 even after the claimant has already obtained a judgment for damages or compensation against the insured in respect of the same matter. So Ludgater could sue Atco in New Zealand and then, if successful, could take steps to register the judgment in Australia.

[20] Under subs (6) a payment of a claim by an insurer without actual notice of a charge under the section is a valid discharge to the insurer to the extent of the payment. Finally, subs (7) limits the liability of the insurer under s 9 to the amount which is payable under the contract of insurance. So, again leaving aside the extra-territoriality issue, Gerling would not be liable on a claim or claims proved in respect of Atco's policy during the period of insurance for more in aggregate than the Australian equivalent of € 1,000,000, with priority as between those claims being determined in accordance with subs (3).

[21] The fact that the section is plainly intended to operate primarily when an insured is insolvent and alters the priority of claims against an asset of such an insured should make it apparent that where the insured has its place of business in a foreign jurisdiction and no place of business in New Zealand any extra-territorial reach of the section is doubtful: there may be a problem for the claimant in establishing that Parliament has intended that there is to be jurisdiction for a New Zealand court to adjudicate the direct claim against the insurer. Subject-matter jurisdiction may be lacking even if, as the Court of Appeal believed, a New Zealand

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[30] The effect of the proviso to subs (4) is to require the claimant under the section to obtain the leave of the court before commencing the proceeding unless the insured was already insolvent before the event giving rise to the claim occurred. In this case, Atco's liquidation occurred after the date of the fire, so Ludgater sought and obtained leave to commence its proceeding against Gerling, as well as seeking leave to serve Gerling in Australia.

court has personal jurisdiction under the section in respect of an overseas-based insurer.[31]

[22] We therefore go straight to a consideration of whether the High Court had subject-matter jurisdiction in this case. This Court has very recently affirmed in *Poynter v Commerce Commission*[32] that an enactment is to be treated as not having extra-territorial effect unless a contrary intention appears and subject to any relevant rules of private international law.

[23] Section 9 is a stand-alone provision in an Act which makes a number of unrelated reforms of common law rules. The Act provides no context assisting the interpretation of the section, which itself is silent about any extra-territorial application or restriction. It is necessary to consider the consistency of the application of the section with the laws of Australian jurisdictions, the possibility of interference with the domestic jurisdiction of an Australian court, and the practical consequences for Atco and Gerling of the making of an order under s 9.

[24] Dixon J summarised these considerations of policy and practice when speaking of what he called the "well settled ruled of construction" in *The Wanganui-Rangitikei Electric Power Board v The Australian Mutual Provident Society*:[33]

> The rule is that an enactment describing acts, matters or things in general words, so that, if restrained by no consideration lying outside its expressed meaning, its intended application would be universal, is to be read as confined to what, according to the rules of international law administered or recognized in our Courts, it is within the province of our law to affect or control. The rule is one of construction only, and it may have little or no place where some other restriction is supplied by context or subject matter. But, in the absence of any countervailing consideration, the principle is, I think, that general words should not be understood as extending to cases which, according to the rules of private international law administered in our Courts, are governed by foreign law. As the present statute deals with the discharge *pro tanto* of obligations, it ought to be understood as confined to those obligations which arise under the law of New South Wales.
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31 Personal jurisdiction concerns who can be brought before the court; subject-matter jurisdiction concerns the extent to which the court can claim to regulate the conduct of those persons: *Mackinnon v Donaldson, Lufkin and Jenrette Securities Corp* at 493 per Hoffmann J.

32 *Poynter v Commerce Commission* [2010] NZSC 38.

33 *The Wanganui-Rangitikei Electric Power Board v The Australian Mutual Provident Society* (1934) 50 CLR 581 at 601.

> The circumstances of the present case illustrate the soundness of the presumption by which, unless a contrary intention appears, statutory provisions are understood as having no application to matters governed by foreign law. For, even if the New South Wales enactment were construed as extending to obligations having some other proper law, in no forum out of New South Wales would it be recognized as affecting them.

The High Court of Australia declined to construe a New South Wales statute so that it would reduce an interest rate set in a loan contract whose proper law was that of New Zealand merely because payment was to be made to the creditor in New South Wales.

[25] In the absence of a statutory indication to the contrary, a court will not as a matter of principle exercise its power, statutory or otherwise, in relation to property situated in another country in a manner which would compel someone to do or refrain from doing something in relation to that property if its order may create a risk of conflict with an actual or likely determination of a court in that other country. In particular, it will not, and should not, make an order which cannot be given the effect in relation to the subject property which Parliament has stipulated shall be a necessary consequence of the order.[34] Thus in *Société Eram* the House of Lords refused an English garnishee order on a third-party debt sited in Hong Kong where such an English order would not be recognised and any payment in obedience to it would not discharge the third party's obligation to the judgment debtor as a matter of Hong Kong law.[35]

[26] Accordingly, if a New Zealand plaintiff wishes to have the benefit of an order that something shall be done with property whose situs is in another jurisdiction it will ordinarily have to apply directly to a court in that jurisdiction. If a New Zealand court did make an order which required someone to do or refrain from doing something with property whose situs was in a foreign jurisdiction, the foreign court where the New Zealand judgment was sought to be registered would appear to have

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34 *Société Eram Shipping Co Ltd v Cie Internationale de Navigation* at [26] per Lord Bingham.

35 The discharge of a debt by the law of a country other than that in which it arises generally does not relieve the debtor in any other country: *Ellis v M'Henry* (1871) LR 6 CP 228 at 234 per Bovill CJ, cited by Lord Bingham in *Société Eram Shipping Co Ltd v Cie Internationale de Navigation* at [16].

every right to decline to accept and enforce it. A New Zealand court is likely to react in a similar way if the situation were in reverse. In fact, under the Reciprocal Enforcement of Judgments Act 1934, a foreign judgment in rem relating to movable property may be registered only if that property was situated in the country of the court which gave the original judgment at the time of the proceeding in that country.[36] Mr McLachlan QC pointed out also in his submissions that Article 5.8 of the Agreement on Trans-Tasman Court Proceedings and Regulatory Enforcement 2008,[37] whose ratification is the subject of a Bill now before Parliament,[38] confirms this position. If legislation in terms of the treaty is enacted in New Zealand and Australia it will make provision for the setting aside of certain judgments in a registering court on the basis that at the time of the proceeding before the court in the other country which issued the judgment the property to which it relates was not situated within that court's territory. Consistently with the 1934 Act, included in such judgments susceptible to setting aside for that reason will be judgments in an action in rem in which the subject-matter is movable property.

[27] We pass then to the application of these principles in the present case. The situs of a debt is ordinarily where the debtor is resident[39] but a corporation which has more than one office may be found to be resident wherever it has places of business. It has been said in relation to an international insurance company that it is necessary to choose which of its places of business (residences) is, in relation to a debt owing by it, to be treated as its residence for this purpose. That depends upon the insurance contract in question. In what place does it oblige the insurer to make payment?[40] The situs of a debt has been said to be where it is required to be paid by an express or implied provision of the contract or, if there is none, where it would be paid in the ordinary course of business.[41]

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36 Section 6(3)(b). The position appears to be the same in Australia: Foreign Judgments Act 1991 (Cth), s 7(3)(b).

37 Agreement on Trans-Tasman Court Proceedings and Regulatory Enforcement (24 July 2008).

38 Trans-Tasman Proceedings Bill 2009 (105-1). See also Trans-Tasman Proceedings Act 2010 (Cth), s 19(2)(c).

39 *Kwok Chi Leung Karl v Commissioner of Estate Duty*.

40 *New York Life Insurance Co v Public Trustee* [1924] 2 Ch 101 (CA).

41 *F & K Jabbour v Custodian of Israeli Absentee Property* [1954] 1 WLR 139 (QBD) at 146; *Cambridge Credit Corp Ltd v Lissenden* (1987) 8 NSWLR 411 (NSWSC).

[28] The insurance policy in this case was issued to Atco by Gerling in New South Wales.[42] Gerling's obligation to pay Atco's claim is an obligation to pay in Australia[43] for that is naturally where Gerling could expect to be able to make payment and therefore where Atco could expect to receive it. Both had their principal places of business there and the insurance arrangements were transacted there. The policy says nothing to the contrary. Atco was given no express right to demand that payment be made anywhere other than in Australia, and none is implicit. It could not require payment in New Zealand on the basis that the insurance claim related to an event occurring in this country. If Gerling did elect to comply with a request for payment here, that would be a voluntary act on the part of Gerling. Mr Hunt, for Ludgater, endeavoured to make something of the fact that the policy contemplated the making of a payment by Gerling "on behalf of" Atco. But neither that, nor the fact that as a practical matter Gerling might choose to conduct the defence of a proceeding brought against Atco in another country, could affect Gerling's right to insist on making payment in Australia. For all of these reasons, the situs of any obligation on the part of Gerling under Atco's insurance policy must be Australia.

[29] That being the case, a New Zealand court should not make an order with regard to the payment of the Australian debt (a movable). It certainly should not direct the making of the payment in a manner which would not be consistent with the applicable Australian law. Where the insured party is in insolvency in Australia, that necessarily precludes any order which requires a payment that would not be compliant with the Australian regime which governs the recovery and distribution of the assets of a company in liquidation. Any judgment and order under s 9 will purport to determine not only Atco's liability to Ludgater but also Gerling's liability to Atco. It will also purport to impose a New Zealand statutory charge on Atco's Australian asset. Such an order will require Gerling to pay Ludgater rather than Atco's liquidator because of the statutory charge.

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42 It does not say that it is governed by Australian law but that may seem to be implicit in Gerling's express right of cancellation under the Insurance Contracts Act 1984 (Cth).

43 For present purposes it matters not whether in New South Wales or Victoria.

[30] If Gerling were, pursuant to the order, to make such a direct payment, whether in Australia or New Zealand, it seems unlikely that its obligation to Atco will thereby be discharged under Australian law, a factor which was considered of the greatest moment in *Société Eram*. If a proceeding were to be brought against Gerling by Atco's liquidator, an Australian court would surely have to order Gerling to pay again, at least in the absence of any order under s 6 of the New South Wales statute, the equivalent of s 9. Importantly, a New Zealand order under s 9 will not translate upon registration in Australia into an order under the New South Wales statute. Absent such a New South Wales order, which would require a fresh application in that State, the Australian liquidator's duty appears to be to resolve any claim made by Ludgater against Atco and, if liability is established, to claim against Gerling under the policy and apply the proceeds in accordance with s 562 of the Corporations Act 2001 (Cth).

[31] That section does give injured claimants a priority in an Australian liquidation, but not in the same manner as s 9. It reads:

> **562 Application of proceeds of contracts of insurance**
>
> (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.

[32] It is to be observed that this section does not provide for priority between injured claimants to be determined by the time of the events giving rise to the claims. Any shortfall is presumably shared pro rata. If the aggregate of the sums payable on the separate claims arising in the various countries where Atco has done business exceeds the limit of the insurance policy, any payment made to Ludgater under s 9

pursuant to an order of a New Zealand court might well prove to be more than its entitlement under s 562.

[33] These views on the position under Australian law are necessarily tentative. Aside from the tendering to us of the Australian statutory provisions to which reference has been made, this Court has not been furnished with any other material or any evidence which establishes how the priority of claims against an insolvent insured should be worked out under Australian law. In particular, it has not been explained how s 562 and the New South Wales equivalent of s 9 are to be applied if they lead to different results. But it is unnecessary for us to have this further information, for the material we have adequately illustrates why s 9 should not be given an extra-territorial reach. It is to be borne in mind also that, if an interpretation with that reach were given in this case, it would have to be given also where the situs of the debt was in a country where no statutory provision for special priority applied and the law was in the state which attracted the criticism in *Harrington Motor Co*. The fundamental point is that because s 9 creates a charge over the insurance proceeds it cannot apply extra-territorially. As Mr McLachlan put it during argument, s 9 must be interpreted in accordance with the rules of private international law which have the consequence of disapplying it if the transaction is, according to the relevant choice of law, governed by foreign law. In this case the law governing the obligations of Gerling under Atco's policy is Australian law, including its insolvency rules.

[34] We have therefore concluded that the High Court did not have subject-matter jurisdiction in respect of Ludgater's s 9 application. That makes it unnecessary to decide the more difficult question of whether it also lacked personal jurisdiction in the proceeding.

Result

[35] The appeal is dismissed with costs of $15,000 to the respondent which is also entitled to its reasonable expenses to be fixed if necessary by the Registrar.

Solicitors:
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