IN THE SUPREME COURT OF NEW ZEALAND SC 92/2009

BETWEEN **LUDGATER HOLDINGS LIMITED**
Appellant

AND **GERLING AUSTRALIA INSURANCE COMPANY PROPRIETY LIMITED**
Respondent

Hearing:	23 March 2010
Court:	Elias C J Blanchard J McGrath J Wilson J Anderson J
Appearances:	I G Hunt for the Appellant C A McLachlan QC with M S Cole and R M Gates for the Respondent

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CIVIL APPEAL

MR HUNT:

If it pleases Your Honours, my name is Hunt, I appear for the appellant, Ludgater Holdings Limited.

ELIAS CJ:

Thank you, Mr Hunt.

MR McLACHLAN QC:

May it please Your Honours, my name is McLachlan, and I appear with my learned friends Mr Cole and Mr Gates for the respondent, Gerling Australia Insurance Company Propriety Limited.

ELIAS CJ:

Thank you Mr McLachlan, Mr Cole and Mr Gates. Yes, Mr Hunt?

MR HUNT:

Thank you, ma'am. Ma'am, I propose to start, if Your Honours please, with Ludgater's application for leave to adduce further evidence.

ELIAS CJ:

Well, I wonder, really, whether we shouldn't proceed to hear your argument first, to see whether we will find it useful to consider this material. Because if the argument on subject matter prevails, we won't reach it.

MR HUNT:

That's right. I agree with that. I'm happy to do that, if that's what Your Honours would prefer. I wasn't going to say a lot, anyway, about it. I think Your Honours have seen the material, and really, largely, it's a matter of submission so far it's relevant, anyway. I don't think it's going to be necessary to trouble ourselves greatly with that beyond that. Ma'am and Your Honours, the process I intend to take is really subject to Your Honours' need for me to do so, to review some of the factual material, just so we have that in context before we consider the issues in the case, and then to, so far as that as necessary, it may come to cover the fresh evidence that leave is sought to adduce. That also includes consideration of issues or matters in policy. And then to turn to deal with the problems that are before the Court, the issues that are before the Court, really, which are three. The question of in personam jurisdiction, which the Court of Appeal concluded the Court had, but which Gerling takes issue with, and will suggest and submit to Your Honours should not have been the conclusion reached. Secondly, the issue of subject matter jurisdiction, and thirdly, the issue of whether the Act has any extra-territorial application.

ELIAS CJ:

Yes. I really wonder whether it's putting it round the right way, because if you start with the in personam jurisdiction, you're straight into the question of the evidence, whereas it had seemed to me that it might be preferable to start with the section, and its application.

MR HUNT:

Section 9?

ELIAS CJ:

Yes. But I don't mean to divert you from the way in which you had intended to present your argument.

MR HUNT:

Perhaps what I could do, ma'am, is deal with not so much the evidence that relates to the in personam jurisdiction relevant to presence, Gerling's presence in New Zealand insofar as that leads into that area, but rather, the preference or the issues that led, or the considerations that led to the Court of Appeal's decision to prefer the view that section 9 creates a claim that is to be characterised as tortious.

ELIAS CJ:

Yes. In fact, it may be that it's best to deal directly with the in personam approach, because that will determine whether we need to hear you on the application.

MR HUNT:

Well, if Your Honours are against me on that –

ELIAS CJ:

Yes.

MR HUNT:

- then the subject matter jurisdiction won't be necessary to get into, either.

BLANCHARD J:

I'd prefer to go straight to subject matter, frankly, because I think there's a real problem in relation to section 9 subsection 3, which just hasn't been addressed.

MR HUNT:

Perhaps I should try and do so immediately. Let's firstly find within the bundles exactly where that section is.

BLANCHARD J:

Perhaps I should outline my concern, Mr Hunt. I don't see how section 9(3) can be given extra-territorial effect, because it would involve a New Zealand statute determining priorities in relation to a New South Wales insolvency, and that's an impossibility.

MR HUNT:

Or, in this case, a Victorian insolvency.

BLANCHARD J:

Well, it doesn't matter where. It's an Australian insolvency. And section 9(3) doesn't just say there's a charge. It says that it has priority over all other charges. Now, what's an Australian liquidator or an Australian general debenture holder going to make of that?

MR HUNT:

Well, you're right, Sir. It hasn't been addressed in any of the –

BLANCHARD J:

No, well, it's a fundamental point.

MR HUNT:

Yes.

BLANCHARD J:

The Australian Courts are bound by their own insolvency regimes. They're not bound by New Zealand insolvency regime.

MR HUNT:

Well, sir, I may have to come back to that. But perhaps my immediate response is to say that the question doesn't immediately concern the liquidator of Atco in Victoria.

BLANCHARD J:

It concerns Gerling, because Gerling must ensure that payment is made in accordance with the Australian insolvency regime.

MR HUNT:

It must – well, that depends if the Act, this charge affects the obligation that Gerling has to indemnify Atco.

BLANCHARD J:

Well, its obligation to indemnify Atco is an asset in the liquidation of Atco. It's an asset which will be covered by any general charge which Atco is given. We know nothing about that, but one can assume that there is likely to have been a charge to the banker. But even if there weren't, Gerling would be at real risk if it starts making a payment to someone other than the liquidator.

MR HUNT:

That was only addressed incidentally, I think, in the two High Courts judgments that Associate Judge Christiansen and Chisholm J, inasmuch as they accepted, or particularly Chisholm J did, that payment by Gerling in response to Ludgater's claim would be a full discharge of Gerling's obligations.

BLANCHARD J:

Not necessarily in New South Wales or Victoria.

MR HUNT:

For the moment, Sir, I'm struggling to see how an obligation that arises by virtue of the charge, and therefore by virtue of the incidents of liability relating to this particular event, and only this particular event, there should be any issue as to either priority or, for that matter, an asset that is held by, that might otherwise be held by the liquidator. Particularly, well, among other things, bearing in mind the fact that the policy permits Gerling to pay, not to Atco or Atco's liquidator, but direct to –

BLANCHARD J:

That's a New Zealand policy, not a New South Wales policy, unless there is a judgment under the New South Wales equivalent. And in Victoria, there is no equivalent. There may be something in the corporations law, but until it's invoked, the situation, it seems to me, in the Australian state is exactly the same as the situation that would have existed in New Zealand before section 9 was enacted.

MR HUNT:

The policy I'm talking about, Sir, is the policy between Atco and Gerling. It has that provision that enables Gerling to pay directly to, on behalf of –

BLANCHARD J:

But that's a New Zealand provision.

MR HUNT:

No, Sir, that is the terms of the Atco Gerling policy.

BLANCHARD J:

Oh, that kind of policy.

MR HUNT:

Yes. The policy permits the insurer, Gerling, to –

BLANCHARD J:

Yes, but that can't defeat an insolvency regime. You can't contract out of an insolvency regime.

MR HUNT:

No, I accept that. But Atco is in liquidation in Victoria. The charge that Ludgater seeks to exert, which it wishes to enforce in Australia, is one that is over, or in respect of, that liability and that liability only. It's not any kind of general charge, or any kind of attempt to create some obligation.

BLANCHARD J:

How does that help, if it comes, as it potentially does, in conflict with a general charge which is registered until Australian law, and this is only a New Zealand statutory provision?

MR HUNT:

Well, Sir, again, I may have to come back to it. But I'm struggling to see, in order to answer Your Honour's question, why a general charge that a bank or some other entity may have over Atco would include a charge over monies that are never, or not necessarily, I should say, payable to Atco, and insofar as they are, they're only payable in respect of a particular claim against Atco arising from –

BLANCHARD J:

They're still an asset of Atco, because they're discharging a liability of Atco's. Any balance sheet of Atco would have to take them into account.

MR HUNT:

In a balance sheet of Atco that outlined contingent –

BLANCHARD J:

Well, it would show a liability to the plaintiff – this is assuming this is all established – would show a liability to the plaintiff, Ludgater, but it would also show an asset being its right to indemnity. The fact that the indemnification

might be paid directly to the creditor doesn't mean that the right to the indemnity isn't an asset of Atco, and hence susceptible to a general charge. This is one of the vices that section 9 was designed to avoid, but it doesn't seem to me that you can buy a statute passed in one jurisdiction, effect a priority regime established under a statute in another jurisdiction. Your only method of dealing with the situation is to proceed under the New South Wales provision, which is equivalent, and then – I don't know how this affects Victoria, but forgetting about that difference for the moment – then New South Wales law would recognise the charge created by the equivalent provision to section 9(3).

MR HUNT:

I'm not sure how the recognition and the New South Wales legislation which is almost, but not quite, the same as section 9 would recognise any question of priority differently than the application of section 9 would.

BLANCHARD J:

It may not recognise it differently, but it recognises it as a matter of New South Wales law.

MR HUNT:

Yes, I would have to accept that.

BLANCHARD J:

I mean, imagine the situation if there were no comparable law in New South Wales.

MR HUNT:

Well, that's one of the rhetorical questions that the case raises. If there is no – and perhaps that's the other side of my argument. If there is no equivalent of section 9 – well, there is one in New South Wales. But if Gerling were registered in Victoria or Western Australia or Brisbane, where there are no equivalent provisions, then on the analysis Your Honour is proffering, then there's simply no basis for pursuing it at all.

BLANCHARD J:

Exactly.

MR HUNT:

That's the question –

ELIAS CJ:

It isn't really a question of fact. Is it not appointed to the structural problem with your case that subsection 3 envisages a claim against the fund and establishes priorities? It's not really consistent with an in personam regime.

MR HUNT:

Well, it does both those things, but I'm not sure that it follow from that that it's inconsistent with the in personam regime, depending on the view you take. If you take – this is, I suppose, the summary of the way it's been put before. Gerling would have it that this is a case involving a foreign insurer, a foreign insured, foreign proceeds of a policy, and section 9 can have no application. That's obviously a pretty seductive soundbyte. But Ludgater's proposition is that if you're an insurer and you elect to cover risks that will materialise in other countries, as in this case is so because the policy covers Atco for liability anywhere in the world save for North America, then you expect to take on board the probability that where your insured's products cause damage, that insured will become liability in those jurisdictions, and subject to whatever remedies the plaintiffs in those places have. That's part of the – I'm leaping ahead, but in the discussion that the Court of Appeal referred to, among other things, was the Law Commission in England's assessment in 1990 of some of the issues that lead to whether or not the choices should be regarded, or the characterisations should be regarded as contractual or tortious. And if it helps, perhaps, because it is a significant part of my submission, perhaps if I could take Your Honours to that. It's actually in what has been produced as more legible bundle, volume E. It's the lilac bundle, tab 3.

BLANCHARD J:

What does this look like?

MR HUNT:

It's this colour. Volume E. Paragraph 3.51 on page 59. Now, this passage was referred to in the Court of Appeal where it was considering which of the choices it should make, which choice it should make as to characterising the claim as contractual or tortious. And you may have seen it referred to in a number of other decision, such as the *Maher v Groupama Grand Est [2009] EWHC 38 (QB) [2009] 1 WLR 1752* case and others, and *Knight v AXA Assurance [2009] EWHC 1900 (QB)* as well. These are recent English cases which I'll come to. But in discussing the question of direct actions against insurers, you will see that there are different ways in which, the text says, "There are a number of ways in which the Courts of other jurisdictions have characterised this issue. It has been seen as a tortious question, governed by the applicable law in tort as a contractual question governed by the proper law of the insurance contract, and as a procedural question governed by the lex fori". I then go on to set out what a consultation paper had initially, tentatively concluded, but then went further after referring to the views that had been expressed to say, "We're not convinced that the tentative conclusion adopted in the consultation paper is necessarily the ideal one. The direct action is not in any real sense contractual since the claimant is not suing a party with whom he is in privity of contract. It is true that neither has a role being perpetrated by the insurer on the claimant, however, the action against the wrongdoers ensure it may be more akin to a claim in tort than contract, since what would normally be the claimant's primary remedy would be a tortious action against the wrongdoer. The claimant's action against the actual wrongdoer would be tortious. An action against the insurer may be better seen as an extension of this tortious action. Although the direct action cannot exist in the absence of the contract of insurance, neither would the direct action exist in the absence of any wrongdoing". And then it says this. "While to apply a law other than the law of the insurance contract would expose the insurer to a liability greater than he contemplated, nevertheless, depending on whether where the insured carries on his activities his expectations might

reasonably be expected to include not only the potential liability of the insured under the law of that jurisdiction to which cover extends, but also any potential direct liability". They then said that they didn't think there was any need to implement that view in legislation, and it could be left to the Courts to deal with as necessary. But the point I am making about that is that, just to back up here, the contract here covers Atco for its liability for the products it sells anywhere in the world, except for North America. There is, as Your Honours will have noted, no – just to clear it away – there is no proper law clause, there is no exclusive jurisdiction clause, there's no arbitration clause. So there are no issues in this case about those kinds of things which have troubled Courts which have characterised these kinds of claims as contractual in other cases, such as the *Through Transport Mutual Insurance Assn (Eurasia) Ltd v New India Assurance Assn Co Ltd [2004] EWCA Civ 1598 [2005] 1 Lloyd's Rep 67* case or others. But what the Law Commission is saying is that if you elect to provide insurance for an insured which contemplates the possibility that the insured will be liable in foreign jurisdictions, then you take on board not only the rules that will apply to the establishment of a liability in those jurisdictions, but whatever other statutory provisions there may be that assist a plaintiff to recover from the policy, or from the insurer, the amount of any liability. And that, among the materials that the Court of Appeal considered, was certainly one of the elements that they considered pivotal in deciding whether or not the characterisation of the claim should be tortious rather than contractual. And I don't know if I should carry on on this point, but it is probably relevant to do so. No doubt Mr McLachlan will tell you that that is not the preference that the Court should have accepted, and that the Court should have taken the view, as have other cases, mainly English cases, that the correct characterisation is contractual. But those cases, where you're talking about cases such as *Through Transport*, which I'll come to if you would like, and *Youell & Ors v Kara Mara Shipping Co Ltd & Ors (2000) 2 Lloyds Law Reports 102* those are both cases, perhaps it's easiest to deal with the point since it's come up now. The *Through Transport* and *Youell* cases are both cases that the Court of Appeal specifically referred to as being examples of the contractual characterisation. The decision in *Youell* is in volume B tab 13. Volume B is

the pink volume. I wouldn't want to try and take Your Honours all the way through this decision.

ELIAS CJ:

I don't think I've been to this decision.

MR HUNT:

You haven't?

ELIAS CJ:

No. But it's not on a section equivalent to our section 9, is it?

MR HUNT:

The case involved an application to serve outside –

ELIAS CJ:

Yes.

MR HUNT:

- an anti-suit injunction to prevent World Tanker from proceeding in Louisiana via a direct action statute. A direct action statute which, incidentally, although Aikens J in this case – to go back, Aikens J characterised the nature of the claim as contractual, but in Louisiana, the Courts there characterised the nature of the claim via their direct action statute as tortious.

ELIAS CJ:

Whose direct action statute was an issue in this case, the English one?

MR HUNT:

The Louisiana direct action.

ELIAS CJ:

Oh, the Louisiana one?

MR HUNT:

Yes. So this goes to show how fluid these cases are. This is a case involving a collision, somewhere off Portugal, of a ship with damage suffered, and then a claim being brought in Louisiana under a direct action statute. The decision doesn't set out exactly what the terms of the Louisiana statute are –

ELIAS CJ:

Well, is this because it's really they relied on the contract –

MR HUNT:

That's right.

ELIAS CJ:

Permitting them to access it, was it?

MR HUNT:

Well, what was being sought here was leave to serve outside England –

ELIAS CJ:

Yes.

MR HUNT:

- an anti-suit injunction preventing World Tanker from proceeding in Louisiana with its claim under the direct action statute that existed there.

ELIAS CJ:

Oh.

MR HUNT:

And the basis on which that was being sought, if we start – luckily for us all, these reports have a very full headnote, and quite a lot of what Your Honours need to pick up can be found from that. But if you see in the bold first paragraph the brief summary. The insurers – the action is brought in Louisiana, and that is an action under Louisiana's direct action statute.

Insurers, which is the Youell interests, apply in England to the Court there for an anti-suit injunction, and they rely, among other things, on the fact that the insurance contract has an exclusive jurisdiction clause, and there is also a proper law clause. So in terms of the English CPR rules, what had to be established there was, do you have a good, arguable case, justifying the issue of an anti-suit injunction, which you can then apply against the plaintiffs in the Louisiana case, and that's – well, firstly, should you get leave to serve outside England so as to effect some injunction against that claim, and that's exactly what Aitkens J did. The issues, other than taking Your Honours through the procedural history, which is set out in the first two columns on page 102 of that report, if you go to the top of that third column, you'll see what the issues were – whether an anti-suit injunction could be the subject of a claim by the insurers when the defendants sought to be enjoined had to be served outside the jurisdictions, whether the insurers could bring themselves within various provisions of the rules, if so, was this a proper case to permit service, and if so, whether permission should be refused on the ground that the application was by amendment, and so on. Now, if I can, before I move on, put this in a little context here. When Ludgater were issued proceedings, what it did, firstly, was file an originating application seeking leave under section 9(4) to proceed against Gerling, and then, subsequently, it filed an ex parte application for leave to serve that proceeding outside of New Zealand and in Australia under the-then rule 220. The equivalent in this case was of Gerling applying to set aside the order granting leave to serve outside the jurisdiction, in other words, preventing something taking place which would have effect outside of the jurisdiction. But I move on. His Honour describes the backdrop, perhaps, at paragraph 3 in that third column. "World Tanker had exerted the claim on the action end policies by virtue of the direct action statute in the direct action claim". This, of course, is the claim that's been brought in Louisiana.

ELIAS CJ:

I'm sorry, because I probably should have read this case, but it's a contractual case brought in England and it's not about the Louisiana statute at all. It just

doesn't seem to me to be comparable to a claim such as under section 9, which is about charges on insurance monies.

MR HUNT:

I entirely agree. The point here is that this case was relied on by Gerling as support for the proposition that the characterisation of the nature of the claim that is being made is contractual rather than tortious. This case, however, tells us that the answer – well, firstly, as is mentioned in a number of the cases, and I'll come back to it, there's a very relevant passage in the judgment of the Court of Appeal in England in the *MacMillan Inc v Bishopsgate Investment Trust plc (no 3) [1006] 1 WLR 386* case which is to the effect that you have to decide these questions having regard to what the issues are. You can't just choose a blanket characterisation, and say that fits everything. Here, the question that the insurers were seeking to have the Court engage with was you are proceeding in Louisiana under a statute, but it is also pursuant to a contract which you rely on to require the indemnity to be met, if liability is established. You can't take one without the other, and if the contractual elements or the contractual provisions require you to bring your claim in England according to English law, then you cannot ignore those obligations by simply choosing some other jurisdiction where there is a direct action statute as though there is no limitation. There is nothing very controversial about that, even in context of section 9, because we know that the third parties claim against the insurer can be no better than the insured's claim against the insurer would be. So that if, for example, and there's a case in the bundle, we've all done this case, a decision of Thomas J, for reference it's volume a tab 26, I'm digressing a little, but if there's a basis on which the insurer could avoid indemnity because there had been a non-disclosure, for example, or some other breach of the policy, then the third party's claim against the insurer can be no better than that. So certainly, when you come to consider characterisation, the contract is important, but the question is, what is the issue that you're considering? And in this case, the issue was whether the insurers were entitled, relying on a policy, to prohibit a claim being brought in Louisiana without regard to the bargain that the insurer and the original insured had struck. So that's why I say it doesn't provide significant support

for the argument that the characterisation of section 9 is contractual. We know, of course, and it's just a statement of the obvious –

ELIAS CJ:

But why do you need to characterise section 9? Why don't you simply construe it to see whether the application fits within the terms?

MR HUNT:

That's a very much more expedient way of doing that, but the argument has come about, I think, because the view seems to be that you must characterise for choice of law purposes the nature of the claim, because that helps you decide whether it's the New Zealand legislation or some other legislation that applies. And here, I think what you'll be told is well, this contract was one that was written in Australia between two Australian companies, and the right that arises is really one that is on the back of that contract, so it's contractual, so it should be dealt with in Sydney.

ELIAS CJ:

But the relevant right, surely, is the statute, the mechanism, the statutory mechanism for obtaining a charge over funds.

MR HUNT:

That's exactly what I'm trying to persuade Your Honours is the case. And the characterisation of that right so far it's necessary is tortious, is relevant because this is a claim that's being brought in New Zealand in respect of what Ludgater says is a tort, which has its place in New Zealand damage sustained and so on, in New Zealand.

ANDERSON J:

But it's thought that it was neither contractual nor tortious. It's a statutory right to a charge, and to achieve it, you have to prove a tortious liability by the insured and a contractual liability by the insurer.

MR HUNT:

I agree. I don't disagree with that either. As I say, the reason for the search seems to be because it is thought necessary to apply, and it is in this sense, because there is a contention that you should be regarding this as all within Australia's jurisdiction. This has to be a choice made between which provisions or which law should apply. Obviously, you need to have both. You need to have the contract, otherwise you've got nothing. And you need to have the statute, otherwise you've got nothing either.

ANDERSON J:

Does the legislation intend to have extra-territorial effect on the priority of charges on a foreign jurisdiction?

MR HUNT:

Well, there's two parts to that, and Blanchard J has raised one of the issues about that. I'll need to come back to that, but the broader questions that was aboard before the Courts below was is there a basis on which it can be said the Act has to have extra-territorial jurisdiction if it needs to. And it only needs to if you take the view that, or if you don't accept that New Zealand Courts have jurisdiction by virtue of the fact that Gerling has agreed to indemnify and insured in respect of liability that occurs in New Zealand.

ELIAS CJ:

Oh, all right. But that would be pursuant to the policy, which hasn't really featured very much in the cases below.

MR HUNT:

Well, the reason for that was that the policy was not available. It wasn't produced to either Associate Judge Christiansen or Chisholm J. It was asked for. It was requested formally, but it wasn't produced. It was produced to the Court of Appeal, and that was the first opportunity that anybody had a chance to look at it. I do want to ask Your Honours to look at it, if only briefly, although I'm summarised some of the salient points in my synopsis, but could we do that, perhaps, now, just so Your Honours are au fait with what we're

discussing. You'll find the policy document in the blue bundle, volume 3 of the case.

ELIAS CJ:

Sorry, what is your underlying application that this protest to jurisdiction has been made in respect of? Where do we find that?

MR HUNT:

Ah, that, ma'am, is in the case, volume 1, tab 3. The underlying application is an originating application dated the 2nd of July 2007. Second leave to issue proceedings.

ELIAS CJ:

Does section 9(4) require leave?

MR HUNT:

Yes, it does, ma'am. Well, it's an interesting point. You may or may not have your finger on the provisions of section 9 from the other bundle, but section 9 requires the leave of the Court –

ELIAS CJ:

Oh, yes, it does. I'm sorry, I'd forgotten.

MR HUNT:

What you say reminds me of another point that I wouldn't want Your Honours to overlook. It may be a small point, but not insignificant, perhaps. If Atco had been in liquidation already when the damage occurred, or it had been put into liquidation at some stage later, but the relation back date would have gone back prior to the date of damage, leave wouldn't have been required at all.

ELIAS CJ:

Sorry, say that again?

MR HUNT:

Let me take Your Honour to the section. We had it a moment ago. It'd D 5, ma'am. Now, if you look at subsection 4 on page 118, the first paragraph is the provision under which the application is being made, but you'll see the proviso. "Provided that, except where the provisions of subsection 2 of this section apply, no action shall be commenced in any Court, except with the leave of the Court". Now, subsection 2 concerns what the position is if, at the happening of the event, the insured is insolvent, or bankrupt, or dead, or wound up, or if it turns out that it's wound up later, but the active insolvency means that it was already effectively insolvent before the event, you don't need leave at all. So you then enforce the charge without leave, although you would still, in this case, need to seek leave to serve the proceeding outside of the jurisdiction. But you don't need the other leave, that proviso is there as it's described in decisions such as *FAI (New Zealand) General Insurance Co & Blundell & Brown Limited [1994] 1 NZLR 11 (CA)* to prevent an insurer being vexed by a claim when there's a good, solvent defendant available to be sued. That's the reason for the proviso. Of course, that puts to one side the fact that typically, and in this case, it's not in dispute an insurer in a situation such as this which take over the defence of the claim. So in practical terms, the insurer will be running the defence. But I was going to take Your Honours to the policy, which is in the third volume, at tab 8. Now, in light of the observation that context is everything in the law, it might help if I just highlight, if you have your highlighter pens with you, those things that I say are important about this policy, starting at page 267. The insured, of course, includes the other defendant in this case, Atco controls Pty Ltd, it's the second company. The class of insurance includes product liability, and here we're talking about a capacitor, that's what it is. The period, as you see, is between 2005 and 2006, and that covers the date of the event. The limit is the Australian equivalent of £100,000 in terms of products liability. And the territorial limits there are worldwide, excluding the United States –

McGRATH J:

£100,000 or a million pounds?

MR HUNT:

I'm sorry. I wouldn't get very far with £100,000.

ANDERSON J:

Is it pounds or Euros?

MR HUNT:

It's actually Euros. You're right. I'm sorry. It is Euros.

ELIAS CJ:

Which is a lot of money.

MR HUNT:

Which may be more, or may be less.

ELIAS CJ:

Well, it's a lot of money.

MR HUNT:

But it's an aggregate, and I suppose just to footnote that, that's not irrelevant, I suppose, because you know here that there are three similar claims in New Zealand arising from the same central issue. So you never know. The aggregate might not be enough. But the fact that it's Euros, and thank Your Honour for pointing that out – no-one's picked that up before – really shows just what an international kind of a policy this is. You can see over the next page that in the special condition, the first special condition, there's a reference to the international programme, and this policy is within an international insurance agreement between two companies, or perhaps one, a German company and an Austrian company, who have issued a master proxy. So you get the picture, this is an international company with Australian-based arms, which is offering indemnity to –

WILSON J:

Mr Hunt, isn't this plainly a contract entered into in Australia by two Australian companies. There's no indication that it is not governed by Australian law.

MR HUNT:

Well, as far as the contract is concerned, that would be right. If there was any issue between the parties, then that would, no doubt, be resolved according to Australian law. Although I will make this observation, Sir. Page 283, paragraph 8 of page 13 of the policy is a provision regarding disputes. And it says that in the event of any dispute between the company and the insured arising out the application of this policy for exports to the US or Canada, no indemnity attaches, unless the dispute is resolved in accordance with Australian law in Australian Courts. It would seem a curious thing to have to specify that those kind of disputes were to be resolved in accordance with Australian law if the policy, in all respects, was to be dealt with under Australian law otherwise.

WILSON J:

Isn't that readily explicable by the exclusion for territorial limits in the policy itself? That's why you need that special provision.

MR HUNT:

Yes. But I'm not really trying to debate the point with you, Sir, because there isn't any issue about the policy here. There's no issue about whether or not Australian law should apply to the way the policy works. There's no exclusive jurisdiction clause, there's no interpretation.

WILSON J:

There's a very real issue, as I see it, as to the basis on which section 9 can be said to apply to a contract entered into in Australia by two Australian companies, and you'll certainly have to help me on that issue.

MR HUNT:

Well, Sir, it comes back somewhat to the point that I made in referring to the Law Commission report in England. This is a company that has agreed to indemnify Atco for liability that it incurs anywhere in the world. And the insurer clause, which is on page 272, says what it will do. "The company will pay to, or on behalf of the insured, all sums the insured shall become legally liable to pay by way of compensation in respect of, among other things, property damage first happening during the period of insurance within the territorial limits". That was page 272.

ANDERSON J:

What's the nature of the risk got to do with the place for payment?

MR HUNT:

Well, the nature of the risk doesn't have anything to do – well, what I refer to by the nature of the risk, Sir, refers to the place where the risk will come to be established in terms of a liability, and that could be anywhere in the world except where it's excluded.

ANDERSON J:

And how do you link that to an obligation to pay in any particular place?

MR HUNT:

Well, there are two parts to my answer to that. The evidence in this case that an insurer such as Gerling will, in the event of a claim being brought outside the jurisdiction, run the case, take it over, act as the defendant.

ELIAS CJ:

Where do you get that from?

MR HUNT:

That is the evidence of Mr Nobbs –

ELIAS CJ:

But what is relied on in the policy?

MR HUNT:

There's nothing in the policy.

ELIAS CJ:

Oh, I see. Thank you.

ANDERSON J:

A practice?

ELIAS CJ:

Yes.

MR HUNT:

Insurers have the right, whether it's in the contract or not, to subjugate themselves into the defence of any claim, and that is typically what they do. And no doubt that's why Mr Nobbs talked about it. You don't typically find insurers saying we indemnify you, you go ahead and defend yourself, and if it turns out there's a liability, let us know how much it is and we'll pay the cheque. That's not the way it works. So it doesn't have to be in the policy for that to be a reality. I don't know that I can take anything from it, but I note, while we're on that page, page 273, I should say, the reference in capitals to accident compensation legislation. I'm not sure whether that's supposed to mean that there was any particular regard to New Zealand's laws, but the language covers both Australian legislation, because there is workers' or workmen's compensation legislation and accident compensation. Of course, here's the terminology that we use in this country. Those are the main points, since we're looking at the policy, that I wanted to draw Your Honours' attention to. But as I say, the central point is this. If you insure a party such as Atco and it exports goods and the goods fail, and Atco is responsible for their failure, it doesn't matter whether you've exported them to Canada – it does matter to Canada, obviously – or New Zealand or South Africa, or

England, or Europe, or wherever it might be. If those goods lead to a claim against Atco, just as Ludgater alleges here, then that's where the claim will be brought, and you'll expect the insurer to go there, as the insured would if it weren't insolvent.

McGRATH J:

When you say that's where the claim will be brought, that's where the claim by the party that lost will bring its claim –

MR HUNT:

Correct.

McGRATH J:

- in tort against the Atcos of this world, that's all you're saying in that?

MR HUNT:

That's right, that's all I'm saying. And you'll expect the insurer to go there.

ELIAS CJ:

But you don't expect him to bring his fund here, necessarily, do you?

MR HUNT:

You don't necessarily – well, you don't anticipate that he's going to bring his chequebook immediately. You hope he will.

ELIAS CJ:

So what's the problem with establishing the occasion for the charge in New Zealand?

MR HUNT:

The problem?

ELIAS CJ:

Yes. Before you have recourse to section 9. Getting your judgment.

MR HUNT:

I'm not quite sure I follow, ma'am. If the defendant is not – well, that's a good way, it's helpful to answer the question in this way. If the defendant is not insolvent, section 9 doesn't become necessary to resort to. You issue your proceedings without any difficulty here, by making, finding your statement of claim, secondly to serve Atco in Melbourne, which is where it's based, and you're entitled to do that, because the course of action, or the tortious course of action arises in New Zealand. That's what rule 219 permits you –

McGRATH J:

So are you saying – could you not have done that even though Atco was insolvent?

MR HUNT:

That's possibly right. In other words, one could have sued Atco in liquidation –

McGRATH J:

In New Zealand?

MR HUNT:

In New Zealand. And served Atco outside, that's in Melbourne, and brought it before the Court in that way. I imagine –

McGRATH J:

Got your judgment in New Zealand?

MR HUNT:

Yes.

McGRATH J:

How does that tell you anything about how you enforce that judgment against the charge that you say you have?

MR HUNT:

Well, if I could do that, Sir, the way I would enforce the charge would be – well, I don't need to be enforcing a charge in that way.

ELIAS CJ:

Well, you may in Australia.

MR HUNT:

Well, I'd be enforcing a judgment –

ELIAS CJ:

You may need to access the – yes.

MR HUNT:

- but not a charge. I get the judgment against Atco in New Zealand. I then register it in Australia.

McGRATH J:

Yes.

MR HUNT:

I enforce it in Australia.

McGRATH J:

Yes. I mean, all I'm saying is that you're taking us through the policy. There's no issue, I would have thought, subject to what Mr McLachlan says, that you could have sued Atco in liquidation in New Zealand. You accept that. I don't see why the provisions of the policy you've taken us through tell us anything about the section 9 issue. The mere fact that your client would have come over and possibly resisted the claim, given its concern as to what would happen under section 9, doesn't seem to me to tell us anything about how section 9 is intended to operate in the section, and where suit is to be.

MR HUNT:

Well, oddly enough, Sir, before I answer your question, and it's in my synopsis, at one stage, Gerling's position was more or less as you've just said it might be, or should be. I've set it out in paragraph 6.13 of my synopsis. This is the position that was taken before both the High Court Judges earlier on. Mr Cole, in paragraph 6.13 –

McGRATH J:

Sorry, I'll just remind myself of that.

BLANCHARD J:

When I did that, I put a big tick beside it. That's what should have happened.

ANDERSON J:

You're still well within time to do that, aren't you? You still could?

MR HUNT:

Yes, well, 2006, well within time to do that. But that's not what Gerling wants to have done.

BLANCHARD J:

Well, does that matter?

MR HUNT:

No, I know that. In that sense, it doesn't. But obviously, one doesn't one to become embroiled, if possible, in a dispute.

ANDERSON J:

Would you register a judgment in New South Wales and then seek a charge on the basis of the New South Wales statute?

MR HUNT:

It's a little bit more complicated than that, Sir, because Atco is registered in Victoria, where there is no section 9 equivalent at all, nothing like the section –

ANDERSON J:

Where is Gerling?

MR HUNT:

Sydney. New South Wales.

ANDERSON J:

So you'll be seeking to enforce a charge against Gerling, so you could register your Atco judgment in New South Wales, and then sue Gerling for a charge under the New South Wales statute.

MR HUNT:

Well, that's no different, really, than what we're seeking to do here.

ANDERSON J:

I know. So obviously there are fiscal considerations.

MR HUNT:

Well, Gerling, helpfully, acknowledges that there's no bar to Ludgater suing Atco in Sydney, and I think Gerling in Sydney as well. So the whole thing can be wrapped up in Sydney.

ANDERSON J:

I don't say this pejoratively, but there are obviously tactical reasons for Gerling's stance.

MR HUNT:

I would think so. As well as, as Mr McLachlan will tell you, matters of important principle regarding where it might be required to defend proceedings that arise when it covers international risk.

ANDERSON J:

Mightn't be too worried about New Zealand, but it might be worried about some other jurisdiction.

MR HUNT:

Yes, well, of course, one of the corollaries of Gerling's stance, of course, and His Honour Blanchard J has referred to it, is if you happen to have an insurer in a jurisdiction where nothing of the sort exists, no direct action statute, then what if the defendant is insolvent, what can you do?

ANDERSON J:

Tough luck for living in that country.

MR HUNT:

Well, tough luck for dealing with a defendant who turns out to have insurance that you can't effectively resource.

ANDERSON J:

It's just an incident of geography.

MR HUNT:

An incident of geography, well, that's why, without – well, Sir, you've touched on a point that I made to the Court of Appeal, and they said well, look, that's not this case. We don't have to worry ourselves about the implications of our reasoning for those situations. In my submission, you do. And the reason I say that is this. This reasoning in the Court of Appeal must equally apply if you are a New Zealand-based defendant insured by Gerling in Sydney, well, leaving aside the fact that there's an equivalent in Sydney. There isn't one in New South Wales, there isn't one in Western Australia, and if the policy has been written in South Africa, say, or some other place without a direct action possibility, then the New Zealand insured, thinking it has – and those dealing with it – thinking it has indemnity insurance really don't have anything at all. That's the consequence of Gerling's argument.

ANDERSON J:

Well, that might be relevant if it's not a question of construction that decides this question of discretion by the Court.

BLANCHARD J:

Why doesn't the New Zealand insured have an ability to claim indemnity?

MR HUNT:

I'm not saying that the New Zealand insured doesn't have an ability to claim indemnity. If company A is registered, let's say Atco is registered in Hamilton, for argument's sake, and it had a policy issued by Gerling of the sort that, as now know, Gerling actually does issue to New Zealand insured. That company goes into liquidation. Ludgater, or some equivalent, seeks to recover from Atco. It discovers that it's in liquidation. It seeks leave to attach the insurance monies in the same way that Ludgater are seeking to do so here. Gerling isn't in the jurisdiction where there is any equivalent of section 9. That means that the plaintiff has no effective means of recovering what Gerling has agreed to pay, because it has no basis for enforcing it other than, as Ludgater are seeking to do here, obtaining a judgment in New Zealand, taking it to that place, and enforcing it, without resort to any direct action statute in that place, but simply by relying on the fact that it's obtained, a judgment which it's entitled to register and then enforce in that way.

BLANCHARD J:

Well, it might well be able to enforce the judgment, but there wouldn't be any question, then, of interfering with a foreign insolvency regime.

MR HUNT:

Well, that's precisely what Ludgater is trying to avoid doing. What Ludgater is seeking is an order in New Zealand that it can register in Sydney –

BLANCHARD J:

Yes, but in the example you're giving, it's a New Zealand insolvency regime.

MR HUNT:

Yes.

BLANCHARD J:

So there's no problem in New South Wales. There's no insolvency in New South Wales.

MR HUNT:

No, that's true.

BLANCHARD J:

It's a totally different situation.

MR HUNT:

But the question, I don't think, revolves around whether there's a different insolvency regime in New South Wales compared to New Zealand, but whether or not the insurer is in a place where it can be required to disgorge the indemnity it's agreed to provide.

BLANCHARD J:

Why wouldn't it be obliged to disgorge?

MR HUNT:

Well, I think the easiest way of looking at that question, Sir, is to look at the situation, assuming, for the moment, that there is no section 9 equivalent in New South Wales, which there is, but there isn't in many other parts of Australia. So you don't have anything that creates a charge over what the insurer is obliged contractually to pay to indemnity its insured. You don't have any ability to access the monies in that way. So what other way can you effectively do that?

BLANCHARD J:

Do you have a New Zealand judgment against Gerling under section 9 which you'd enforce in New South Wales, but it doesn't involve any interference with the New South Wales insolvency regime.

MR HUNT:

Well, the first part of what you've just said, Sir, is exactly what Ludgater is seeking to do, get a judgment in New Zealand –

ELIAS CJ:

But you're seeking to get a judgment under section 9.

MR HUNT:

Yes.

ELIAS CJ:

We're talking about a judgment as to liability to provide the occasion for the claim.

MR HUNT:

Yes, but bearing in mind that if leave is granted, then the action against the insurer has exactly the same stamp as the action against the insured.

ELIAS CJ:

Yes.

MR HUNT:

And here, the issues are as to – they're not as to the contract, they're not as to jurisdiction, the law, whether it should be arbitrated in any particular place. The issues here are going to be liability issues. Was there a duty? Was it breached? Was there causation? What was the damage? Those are the issues in that case.

ANDERSON J:

Isn't insolvency a matter of state or federal law in Australia?

BLANCHARD J:

Both.

MR HUNT:

I believe both. There are regimes that are within the Commonwealth legislation, and there are intrastate insolvency provisions as well.

ANDERSON J:

So invoking the New South Wales equivalent of section 9 might raise problems with the insolvency administration in Victoria?

MR HUNT:

Well, as I say, Gerling acknowledges that the claim can be brought, and it says should be brought, in New South Wales. But for that acknowledgement, there could have potentially have been cross-border issues between Victoria and New South Wales. I mean, after all, I suppose on Gerling's argument, the process might be this. You get your judgment against Atco in New Zealand, assuming you can proceed against Atco, notwithstanding that it's in liquidation in New Zealand, then you take your judgment, because it's against Atco, to Victoria. That's the only – you can't take it to New South Wales, there's no point. You can't enforce it in New South Wales. And that's where, so Gerling would say, you'd have to go. That's where you can enforce the judgment, so you go to Victoria. Then somehow you have to get from Victoria to Sydney, and you do that either by re-registering the judgment in the Commonwealth reciprocal enforcement of judgment legislation there is in Australia, or you try and bring yourself within the New South Wales equivalent of section 9. But that's at least two stages further than Ludgater thinks it should have to go. It's two steps more, I should say, than it should have to take, if the Court is to accept that the charge that's created, which Gerling accepted by insuring a risk that would emerge in New Zealand, it might become subject to, can be pursued in proceedings in New Zealand, and then registered in Sydney, and enforced there. But that's the point about the difference between the subject matter jurisdiction and the in personam jurisdiction. There is a basis for saying that Gerling is subject to the in personam jurisdiction of the Court. Where the Courts overseas have been troubled about the subject matter jurisdiction is where Courts have sought to grant orders that have then been taken into another jurisdiction and enforced there as though they were

domestic orders. The Courts don't like that, as you see in cases that I'm sure we'll come to, *MacKinnon v Donaldson Lufkin and Jenrette [1986] Ch 482* and *Societe Eram Shipping Co Ltd v Compagnie Internationale de Navigation [2003] UKHL 30 [2004] 1 AC 260* being two in particular, and also in the case of manoeuvre injunctions. But that's why the Courts have said, well, if you can bring your defendant sufficiently within the jurisdiction of this Court, and get the order against them, then provided you don't seek to take that order away with you and enforce it overseas essentially as if you were working within the rules of that jurisdiction, but instead you register that, so that the enforcement process is undertaken via the foreign rules, there isn't a problem. That's the analogy. We've been talking about the in personam jurisdiction and perhaps it's better for me to carry on a little further with that, just to try and – I know Mr McLachlan is going to suggest reasons why you should take a different view that that adopted by the Court of Appeal, and there may be things I want to say in reply, but I should say a little more about that, I think. We'd cover the *Youell* case, and the other case which was referred to by the Court of Appeal and is mentioned again as supporting Gerling's submission is the two *Through Transport* cases, which are both in volume C, volume C being the green bundle. They're tabs 1 and 2. Now, again, Your Honours, we're assisted by the very helpful and full Lloyds headnote. You can see the gist of the issue as it was before the Court of Appeal, firstly, in the bold section there. There was a loss of goods in transit, there was a payment by the owner's insurers, and they had the cause of action assigned to them. They brought a claim against the carriers, who became insolvent, and proceedings were brought against the carriers PNI Club in Finland. The question was whether the insurers were bound by the arbitration clause in the contract between the carriers and the Club, and whether there should be an anti-suit injunction. Now, unlike the *Youell* case, we don't have a lot to tell us about the terms of the Finnish statute. But there is, on page 16 of the bundle, page 82 of the judgment, at paragraph 58, a description of the nature of the Finnish provision. It's 67 of the Finnish legislation, and you'll see the reference to the title, being the insured person's entitlement to compensation under general liability insurance. The definition of the right is a right to claim compensation in accordance with the insurance contract direct from the insurer, and they

then said about this, that the claim was not, therefore, in any sense independent of the contract of insurance, but under or in accordance with it, and they accepted that the Judge below was correct to hold that the issue was one of obligation. The point I make about that, firstly, is that the language of the section is quite different from section 9 that we're dealing with here. But just to elaborate on the case. This, again, was an anti-suit injunction proceeding. You may or may not have picked up that there is now, in England, or at least in Europe, a regulation prohibiting the granting of anti-suit injunctions. It's regulation 44, and the decision in the case of West Tankers, which is at the same volume tab 12, explains the base or the background to that. It's actually quite an interesting case, West Tankers. I won't go to it just now, but I just mark it for Your Honours' attention. It's a case in the European Court of Justice, and it's a case referred by the House of Lords for a determination on whether an anti-suit injunction could be imposed, and the Court concluded that it couldn't. But what's interesting about this, and it's something that you see within the flavouring of the decisions in *Youell* and *Through Transport* and others is the discussion about the economic interests that are at stake if Courts are prohibited from requiring litigation or arbitration to be carried on in the places where the contracts say they should, in this case, London. And there's overt recognition of the advantage that anti-suit injunctions will have for those kinds of interests, which just reflects the sorts of choices that we're talking about here are not just legal choices, but also choices that are motivated by other considerations. But anyway, back to *Through Transport*. The operative part of the decision really appears, or the significant part of the discussion starts at paragraph 66. And that is what deals with the anti-suit injunction –

ELIAS CJ:

Of this judgment? This judgment goes to 39.

McGRATH J:

It's Through Transport number 1.

MR HUNT:

Yes, the two Through Transport decisions.

ELIAS CJ:

Oh, I see. Thank you.

MR HUNT:

So it's at page 84 at paragraph 66. This is where the consideration of whether there should be an anti-suit injunction begins. And essentially, to try and summarise, the Court found that here's a case where the insurance contains an arbitration provision. It means that the insured and the insurer have agreed that if there is a dispute, it will be resolved in London. That's where it has to be brought. There's a choice of law clause as well. That was another reason why it should be dealt with in London. So there was, therefore, a good argument, obviously, that that's where the claim should be brought. But what's interesting about this decision is that the Court of Appeal did not say that because there were those provisions in the contract, it was not possible for the direct action statute to be relied on in Finland. They discharged the anti-suit injunction which had been granted in the Court below, and said no, you cannot do that. There is a provision in the Finnish statute that says you can pursue the claim in that way, and that is not to be prevented by virtue of the provisions of the contract. What's interesting is the second decision which is tab 2.

ELIAS CJ:

Which part of judgment – you started to tell us there was some important sections, and then you summarised them.

MR HUNT:

I am sorry, I am jumping ahead.

ELIAS CJ:

Where's the provision that says you can box on under the direct enforcement statute?

MR HUNT:

Ah. That, ma'am, is perhaps easiest to go to the headnote –

ELIAS CJ:

I'd rather not go to the headnote, I'd rather go to the paragraph.

MR HUNT:

All right. Then you'll find it, ma'am, at paragraphs 83 – well, as I said, the whole discussion about the anti-suit injunction begins a bit earlier at paragraph 66, but at 83, you'll see the reference to the decisions in *Gasser v Grovitt*, which were proceedings involving arbitration clauses. And then we turn to paragraph 93, and if you look at 93, of course you have to take into account what's just been said immediately previously. At 92, the Court said that he agreed with the Judge below's conclusion that had been reached about whether injunctions should or shouldn't be issued. But they didn't accept submissions that the Court shouldn't grant an anti-suit injunction where a party to an arbitration begins proceedings in the Court of a contracting state in breach of an arbitration clause in the contract. And then they said, this is not, however, this case.

ELIAS CJ:

I think really it's paragraph 94 that seems to –

MR HUNT:

Yes, 93 and 94, that's right. But the corollary of that, ma'am, is interesting, and that is what I was about to take you to in terms of the second decision.

ELIAS CJ:

Well, before you do, can I just read 94. I'd just like to understand where it's going. It seems, really, quite neutral on the matters that we have to decide here in this case.

MR HUNT:

And the point that I was trying to make, though, about this ma'am, is here's a contract which does have an arbitration clause, does have an ECJ in it, does have these things that limit, or, at least, direct the way in which the issue between insurer and insured have to be dealt with. And all of those matters were upheld, and the Court decided that the case should be characterised as contractual, since there was a statute which the Court equally acknowledged. It was quite open to the other party to bring proceedings under in Finland, and it refused to prevent that step being taken. So it recognised that the statute, notwithstanding whatever was in the contract –

ELIAS CJ:

Well, as a matter of discretion, it did not grant the injunction because it couldn't be said that proceedings in Finland, if those were taken, would be oppressive. Isn't that really what they decided?

MR HUNT:

Correct. That's what it says in paragraph 96, yes.

ELIAS CJ:

It just doesn't seem to me to have anything to do with – it's turning it right round the other way, isn't it? It's deciding whether an injunction should have been granted to protect the arrangements the parties had entered into in the contract, and the Court decides, well, we're not going to do that in the exercise of our discretion. How does that help in this case?

MR HUNT:

Well, because I'm trying to put myself, essentially, in Ludgater's – I'm trying to put Ludgater in the position of the party that was seeking to engage the Finnish statute.

ELIAS CJ:

But there's nothing – this case does not deal with the position under the Finnish statute. It simply says that as a matter of English law, we're not going

to – in the exercise of discretion, we're not going to grant an injunction. It's nothing to do with invoking the Finnish statute.

MR HUNT:

Well, I don't disagree with that, ma'am. The point is that this case is being used to support the argument that the correct characterisation of Ludgater's claim is contractual, because – well, that's the point, that's the submission that's being made to you. You should regard the claim that Ludgater is pursuing as to be properly characterised as contractual, not tortious.

ELIAS CJ:

Well, I still don't understand why section 9 requires you to characterise it one way or the other.

MR HUNT:

As I understand Gerling's argument, because choice of law principles require a choice to be made. And my answer to that is it depends what the issue is –

ELIAS CJ:

And if there's a choice.

MR HUNT:

Of course. It depends whether there's a choice, it depends whether a choice has to be made, and it most particularly depends on what the issue is. Here was a case where there were issues to do with the enforceability of the contract when it had those provisions. We don't have any of those issues here. So what's to prohibit Ludgater from relying on this provision to sue in Finland in relation to a risk insured elsewhere?

ELIAS CJ:

We don't know, of course, what the Finnish Court, when seized of the matter, might say. It might say under your contract, go away.

MR HUNT:

Well, that's very interesting, and that's what I was –

ELIAS CJ:

It's probably irrelevant, so you don't need to go on to that.

MR HUNT:

Well, I won't spend any time on it, ma'am, but the fact of the matter is, this case did go back to the High Court, and where – because the Court of Appeal said, well, there can't be an anti-suit injunction, so there were parallel proceedings. The ones in England under the arbitration provision and the ones in Finland. And what was said about that was that, well, eventually, somebody's going to decide who wins the arm wrestle about this, because we're not stopping the Finnish Court from dealing with it, and obviously, we can't stop the parties litigating it through arbitration in London as they say they're entitled to do. It's in paragraph 37, page 388, the last part of the decision. In 36, "The main argument put forward by Mr Smith is that the Court should not exercise its discretion in order to assist the Club to avoid enforcement a judgment of the merits obtained in Finland. The Club is being quite candid about its reasons for seeking to pursue arbitration proceedings in this country. It wishes to obtain an award declaring that it is not liable to New India, and if successful, will seek leave to enforce that award as a judgment under the Arbitration Act, then enter judgment in the same terms under section 66, and rely on it to impose enforcement of any judgment that New India obtains in Finland under the, obviously, the proceedings that are being pursued there. One thing that is already clear in this case is that both parties are adamant in their pursuit of their rights as they see them. New India is determined to press ahead in Finland, and if it is successful, will, no doubt, seek to enforce its judgment in this country. Similarly, the Club intends to do all it can to ensure that the claim is determined in arbitration as the Court of Appeal has held is its right". So you get a Mexican standoff situation, eventually, where there are going to be proceedings in different ways in different countries. But that's the corollary of that case. But as I say, the reason why *Youell* and *Through Transport* were being referred to and

relied on was because it's suggested that there should be an overall categorisation or characterisation of the client, and it should be contractual, and that's contrary to my submission. Now, the *Maher* case –

ELIAS CJ:

Before you go to that, is that a convenient time to take the adjournment? Thank you, we'll take the morning adjournment.

COURT ADJOURNS: 11.25 AM

COURT RESUMES: 11.43 AM

MR HUNT:

Thank you, ma'am. I wanted to try and conclude my submissions on this characterisation in personam issue by referring, firstly to further High Court and Court of Appeal decisions in England, then the Nygh & Davies *Conflict of Laws Australia* 7th Ed text which was considered by the Court of Appeal, and also the Australian Law Commission report, because that interleaves with what Mr Nygh had to say on this subject. We are still, probably – Your Honour is quizzical as to why we need to be doing this, but, as I say, this seems to be the approach that is being a) urged on the Court and b) being taken elsewhere. The first of the two English cases is the first instance decision of Blair J in *Maher,* which is in your volume C tab 9. The relevant section is from paragraph 13 on, but in particular, and what I will take Your Honours to, paragraph 17 and following, there the question – it says, "If this claim had been brought against the tortfeasor or his estate, there is therefore no doubt that damage would have been assessed by reference to English law. It doesn't make a difference that the claim is a direct one against the tortfeasor's insuring". I should have said, by way of introduction, a bit more about the facts. This is a case in England, where proceedings were brought against the insurer, the French-domiciled insurer of a driver in relation to an accident that took place in France, and there are provisions in the English and European jurisdiction which enable proceedings to be brought in the domicile of the injured persons, and that's how it happened to be that that could be

done. The Judge then continued, "The defendant submits that the starting point is that this claim is properly characterised as a contractual claim, not a claim in tort", and there you'll see the reference to the *Through Transport* decision we've already discussed, and the upholding by the Court of Appeal in the first instance decision of the characterisation of the claim as one of a contractual nature. But then reference to a decision of the Court of Appeal earlier, also in the bundle but I'll not take you to it presently, in *MacMillan* and the significant observation of Auld J. I agree with the Judge when he said, "In order to ascertain the applicable law under English conflict of law, it is not sufficient to characterise the nature of the claim. It is necessary to identify the question and issue. Any claim, whether it be a claim that can be characterised as restitutionary or otherwise, may involve a number of issues which may have to be decided according to different systems of law. Thus it is necessary for the Court to look at each dispute and decide the appropriate law to apply to the resolution of that dispute". He then continued, "Whether a particular issue is properly to be characterised as one in tort or one in contract depends, therefore, on what the issue is". In paragraph 19, which I won't read out, the issue that the Court was concerned with was how to assess damages, and that was a question of the application of the law of tort. Reference was made in paragraph 22, some of the text in Dicey & Morris *On the Conflict of Laws* (10th Ed, 1980), and in a minute I'll mention what Mr McLachlan will hand up, helpfully having provided it to me, a recent update to Dicey, covering both of these cases. And you will see there, also, the reference to the Law Commission report that we've touched on earlier. But the real point, I think, is that your discussion or your consideration of the characterisation depends on what the issue is, and as I say, in this case, there are many issues that have been aboard in the other cases to do with arbitration, proper law, English jurisdiction, and so on. None of those trouble the Court here. Similar observations accepted in the next decision, which is the Court of Appeal decision –

BLANCHARD J:

I'm sorry, what are we to draw from *Maher*?

MR HUNT:

Well, *Maher* says that you decide what the right characterisation is according to what the issue is, and therefore, from my perspective, the assistance is provides me is this. There aren't any issues to do with the policy of insurance. I leave aside Your Honour's points about priority and charges and those things in terms of this question of characterisation for in personam jurisdiction purposes. There aren't any issues that trouble you, because there aren't any problems or issues in the contract as to the indemnity. It's a simple, unqualified indemnity that Gerling offers to Atco in respect of its liability to claims brought anywhere in the world, including New Zealand. So, therefore, so far as it is necessary to characterise the nature of the issues that arise, they relate to that liability, they relate to Atco's liability, and therefore tort is the right law to characterise the issues as falling within. The Court of Appeal decision is the next tab, and I really, for completeness, refer Your Honours to what was said there by Moore-Bick J, the Judge who was, in first instance in *Through Transport*, as it happens, in paragraphs 8, 9 and 10, reflecting where English law, according to him, stands in relation to this process. Now, the authors of Nygh, which was referred to by the Court of Appeal, if I can move to that now, and that text is in your bundle D at tab 23, paragraph 22.24, pages 258-259. It's a short passage that concerns the rights of recourse against third-party insurers. "Some civil law jurisdictions give a plaintiff a direct right of recourse against the liability insurer against the person who wrongfully caused him or her loss. Should the availability of such a right be given by the law that would govern the tort claim against the person causing the harm, or by the law governing the contract of liability insurance between that person and his or her insurer. There are strong reasons for preferring the former solution, treating the direct action statute not as an independent course of action against the insurer, but rather as giving the plaintiff the right to pursue the insurer on the course of action that he or she would have had against the insurer", in other words, tortious. The author goes on to note that "a direct action statute was characterised in Youell as conferring on the plaintiff the statutory right to make a claim on the liability insurance contract between the insured and defendant insurer to enforce an indemnity for a liability owed by the insured to the plaintiff, thus Aikens J had the plaintiff's

right of direct action was subject to an arbitration clause in the insurance contract. This seems highly undesirable. There seems to be little reason to treat the right of recourse against an insurer any differently from the cases of a curious liability where the law governing the tort claim against the actual wrongdoer also governs the right to make his or her employer vicariously liable for that wrong". Before I go on, I note the footnotes to that passage on the first page. The reference in footnote 149 to, among other states in the US, a couple of examples of direct action statute locations. Footnote 151, I think Your Honour McGrath J asked me how the Louisiana Courts saw their own statute, and the note there records the Courts in Louisiana themselves characterised it as a tortious statute, and the same point is made over the page at footnote 153, where the author notes that the conclusion reached by Aikens differed from that formed or reached by the Courts in Louisiana themselves. I'll carry on, second paragraph. "A somewhat similar issue has arisen in relation to legislation that imposes a charge on a policy of insurance in favour of the person injured by the insured, which, in certain circumstances, enforceable by way of cause of action against the insurer. It has been held that this course of action, when given by the law, is enforceable if the risk insured was within the jurisdiction, even if the policy was issued under the law of another Australian jurisdiction". And that is reference to Cambridge Credit Corporation in Lissington, which was a case where none of the insurers were actually resident in Australia, but it was held that the claim could be brought in New South Wales on the basis that that's where the proceeds of the policy would be payable. There's then reference to the Australian Law Commission report, and I'll mention that in a moment, and also some other jurisdiction which we don't have in New Zealand –

ELIAS CJ:

When using this language, in the submissions, the language of direct recourse statutes has been used, but the point that's made here is that it's only a somewhat similar issue in the case we have here, the ability to invoke a provision like section 9. It's not really a direct recourse statute.

MR HUNT:

I think the term has been actually used reasonably loosely, the directness relates to the ability to go directly to the insurer. But the distinction that seems to be made here, and I'm not sure it's a distinction with a difference, to be honest, is that provision that allows you to sue the insurer, and that provision which provides for a charge, and I don't have –

ELIAS CJ:

But it must be a significant difference.

MR HUNT:

Well, it would be significant, certainly, in terms of Blanchard's J point regarding priority, although having said that, if, for argument's sake, and I don't have an example to compare it with for you, if the statute simply says, well, you can pursue the insurer directly, you are going to have to deal one way or the other with those kinds of priority issues, even if the language of the statute doesn't say that the right is preserved or protected by way of a charge. The only provisions that I can refer you to, really, are those that are referred to – as a comparison – are those within the *Through Transport* decision, and as we saw a little while ago, those provisions are operated via the contract of insurance, rather than by stating that there was a charge. So I think that point Your Honour makes is right. Now, for completeness, ma'am, there's a red bundle, and this is the addendum bundle. These are some paragraphs from the 1990 Australian Law Reform Commission report number 58 on the choice of law, and I put it there because it's referred to by Nygh, and he footnotes it in reference to the observations that are made here, and because it also contains discussion about the point that we've just been referring to. At page 32 at paragraph 6.7, the authors note "In terms of right of recourse to insurers, that in certain situations, legislation permits a claimant for damages arising from personal injury to bring action directly against an insurer, whether the Court allows this claim in cases involving interstate elements depends on choice of law rules, and the Court may have to decide whether the right of recourse is a tortious claim", partly an answer, I suppose, to the question Your Honour's been asking, why do we need to do this. "In some cases, direct

action against the insurer has been considered tortious", and that's a reference to an Australian decision, *Ryder v Hartford Insurance Company [1980] SydLawRw 9(1)* relied on by Nygh. It appears that in the USA and in France, direct recourse provisions are also characterised as tortious. The South Australia Supreme Court, however, has decided the right of recourse is sui generis in the nature of quasi-contract and for the proper law of the contract to decide, which, I suppose, is what Wilson's J question of me earlier relates to. I don't believe that any legislative changes particularly emerged from that report on this point. We do, of course, have the Commonwealth legislation that is applicable and provides a provision of some similarity, but not the same as section 9 in terms of the rights to pursue an insurer. But you will see at paragraph 6.78 on page 36, albeit that addressed to proposals concerning tort intended to apply the choice of law questions, and overseas countries the statement that the ability of the rules to cover overseas situations is enhanced by the displacement rule in the preservation of law that a Court can decline to recognise or enforce a law of a place outside Australia on the grounds that to do so would be contrary to public policy. That is the catch-all answer for the defendant, who considers that being forced to answer a claim in a foreign jurisdiction, perhaps via a direct action statute, should not be permitted to be enforced, because, for example, that claim has been advanced inconsistently with the obligations that the policy requires to be adhered to, in order for the liability to be established. In other words, if you're the Finnish plaintiff and you sue under the direct action statute and you get a judgment in Finland and you then seek to enforce it in London, you may be met by a public policy argument to say, "This is not appropriate, you have ignored the limitations or the requirements of the policy in obtaining the judgment you have, we're not going to permit you to enforce that because that would be contrary to public policy to enable you to," and that was the point or the –

ELIAS CJ:

That's probably where the litigation about London being the place of arbitration was heading, in the end, the Courts probably have to decide whether it was contrary to public policy to give effect to the –

MR HUNT:

Perhaps not Lon – well, as I said, in the *West Tankers* case there was consideration of whether that's a good thing because it preserves London's ability to compete with Geneva or New York or any other place where arbitration, for example, is promoted. But, as the European Court said, "Well, those considerations that can't influence the way we approached this, we would have to be deciding more on the basis, looking at the contract, that it would be wrong to permit somebody to avoid their limitations of the contract via a direct action statute and then bring the judgment here and enforce it as if their restrictions did not apply."

ELIAS CJ:

I'm now, I'm afraid, getting a little lost as to the architecture of the argument.

MR HUNT:

I'm sorry about that.

ELIAS CJ:

Why are we at choice of law questions in terms of the application of section 9 and the objection to jurisdiction?

MR HUNT:

Well, the reason why we're discussing it is because the way the Court of Appeal elected to approach the question was –

ELIAS CJ:

No, I just mean in terms of your argument –

MR HUNT:

I'm seek –

ELIAS CJ:

– what are you arguing for here?

MR HUNT:

What I'm trying to do at the moment is endorse the Court of Appeal's assessment, so far as it needed to be made in that way, that it had in personam jurisdiction over Gerling. Now, I haven't said, "Well, that whole discussion was unnecessary" because all we have to do is look at the statute and say how that's to be applied. I have, I suppose, taken the course that the argument was presented in –

ELIAS CJ:

But if you didn't have the statute –

MR HUNT:

Yes. The statute?

ELIAS CJ:

If you didn't have section 9 –

MR HUNT:

Yes.

ELIAS CJ:

– would you still be pushing the in personam jurisdiction in the absence of section 9?

MR HUNT:

Well, In the absence of section 9 I wouldn't have a right to pursue Gerling anyway.

ELIAS CJ:

No.

MR HUNT:

I don't have that ability.

ELIAS CJ:

Yes, yes.

MR HUNT:

I can only pursue Gerling via this provision, otherwise I must pursue Atco –

ELIAS CJ:

Yes.

MR HUNT:

– whether insolvent, or perhaps not, as the case may be. But I don't have any other mechanism for directly pursuing Gerling than via a provision of this sort.

ELIAS CJ:

Yes, so why aren't we starting with section 9?

MR HUNT:

Well, as I said, really because the way in which the argument had been framed, rightly or wrongly, in terms of how section 9 should be approached was by asking two questions. Was there in personam jurisdiction and then was there subject matter jurisdiction? Your Honour might say, "Well, -

ELIAS CJ:

But it's not either/or really. Well, it's not determinative of the choice of law issues. If you have a right under section 9 to sue the insurer, you'd still have to come to choice of law question which, on the English authority you took us to – was it Justice Beatson or the other one? I always muddle up with him.

MR HUNT:

Beatmore?

ELIAS CJ:

The two Bs, the High Court decision you took us to.

MR HUNT:

Blair, Justice Blair.

ELIAS CJ:

Yes, Blair, Justice Blair. You still have to decide which law is to be applied, and one would have thought that it was the, in the case of tortious liability, which is the underlying basis of the indemnity here, that it must be where the tort occurred.

MR HUNT:

Well, that's exactly what I'm trying to – that's the conclusion that the Court of Appeal reached –

ELIAS CJ:

But my point is you're not really at that point yet. The gateway, as you've said, is section 9.

MR HUNT:

Yes, well, we maybe, maybe the way it's been approached, at least in the Court of Appeal, because this –

ELIAS CJ:

But the choice of law doesn't seem to be to be determinative at all, of the application of section 9.

MR HUNT:

Well, hmm. The choice that seems to be being advanced, you have to make, and I'm talking here about Gerling's position, is Australian law or New Zealand law, and because the argument is that you should characterise the claim as one of a contractual nature therefore it's the Australian law that should apply, therefore the legislation in New South Wales is where Gerling's route – sorry, Ludgater's route, is. That's –

ANDERSON J:

Why don't you just enquiry whether section 9 is intended to have extra-territorial reach?

MR HUNT:

Well, that's –

ANDERSON J:

It's as simple as that, isn't it? I mean, it may not be a simple answer, but it's a simple proposition.

MR HUNT:

Well, that's – when the matter was before Justice Chisholm, that is what I sought to do, and he didn't, finally had to particularly rely on that, but if he'd had to he would have, relied on at least his conclusion that it did have that application. That's not to say that that's the only route home for Ludgater, because if the Court takes the view that Gerling is sufficiently present as a corporation – and the argument in the Courts below was, "It's here, it's in New Zealand" as well as the fact that the policy it offers covers liability here, it's here, it's capable of being regarded as somebody or a company that should be subject to New Zealand law, including section 9. That doesn't require you to consider whether that section has extra-territorial application, but either of those alternatives will get Ludgater home, and that's what happened in front of Justice Chisholm.

ANDERSON J:

I would have thought that the question of choice of law arises once you assume that Gerling can be sued here, because of its presence, and then the liability in relation to the insured is determined according to New Zealand law, and the liability under the contract of insurance is decided according to Australian law, because it's an Australian contract.

MR HUNT:

And there was no impediment to the Court if it had seized a jurisdiction to deal with the claim against Gerling and/or Atco, assuming for the moment that they say they could both be defendants. There is nothing to impede the New Zealand Court dealing with Australian law here –

ANDERSON J:

I know, but it still has to stem from the question of whether section 9 reaches outside the borders.

MR HUNT:

Well –

ANDERSON J:

Can it bear on an Australian contract of insurance?

MR HUNT:

The way I would like to put it to you, Your Honour, is that if Gerling is here, it's present in the jurisdiction, and its obligation is via a contract in Australia. That's no impediment to the application of section 9, because it has, by virtue of its presence, the indemnity it offers, it has subjected itself to the possible application, if the circumstances permit, of section 9's application. That was the point I made earlier: if you choose to cover people worldwide, you take on board the risk that your insurers will be found liable in the domestic law and, if there's a direct action statute, there too.

ANDERSON J:

That's still not a choice of law issue, that's a question of jurisdiction.

MR HUNT:

That's quite right. If I can establish that the Court has jurisdiction in those ways, we don't have to be worried about choice of law.

ANDERSON J:

And if you can't?

MR HUNT:

And if I can't, I have to establish that –

ANDERSON J:

Section 9 reaches beyond the borders.

MR HUNT:

Correct, correct. And that's the way the argument was advanced in the second of the High Court cases. Here are the two alternatives, either Gerling is subject to it because it's here, or the Act applies extra-territorially.

ANDERSON J:

And neither of those is a choice of law issue, so I'm wondering why we've spent two hours on it.

MR HUNT:

Well, I suppose I should have gone back to the submissions I've put to Justice Chisholm, shouldn't I. Maybe I should. That's the way it's been addressed, that's the way the Court has dealt with it, I have to show the Court of Appeal was wrong. Maybe I've taken too long to get to the – at least another way through. But it still doesn't necessarily answer Justice Blanchard's concerns about the way the section would work. But I would say the answer to his concerns is, you don't have to concern yourself with Australian insolvency law if Gerling is here and is properly before the Court. That's not an issue that has to be troubling the Court. All it has to determine is, is there a charge to be established arising from Atco's liability. The extra-territorial jurisdiction is a different point and a different –

BLANCHARD J:

A charge on what?

MR HUNT:

A charge on the amount payable by Gerling to indemnify Atco against its liability.

BLANCHARD J:

And if Gerling doesn't answer for that in New Zealand, what happens then?

MR HUNT:

Well, if Gerling's properly here and Gerling is made liable, because it's established that Atco was negligent, then the judgment against Gerling is what will be taken to New South Wales and enforced there.

BLANCHARD J:

How do you enforce it in New South Wales?

MR HUNT:

You register in New South Wales and then you enforce it against Gerling. Just in the same way as any judgment.

BLANCHARD J:

So you make Gerling make a payment which may be contrary to the New South Wales insolvency regime?

MR HUNT:

Well, I don't know that – it doesn't follow – well, we started talking about that earlier. It doesn't follow that because Atco was insolvent in Victoria, which is where it's located, enforcement of a judgment obtaining against Gerling in New South Wales infringes Victorian insolvency laws or, for that matter, New South Wales insolvency –

BLANCHARD J:

Would Atco not be regarded as insolvent in New South Wales?

MR HUNT:

That, Sir, I can't answer. It's not a, it's a Victorian company, its base is in Melbourne, so I don't know –

BLANCHARD J:

Well, it's a co-operative company scheme. I think if you're in liquidation in one state you're in liquidation in all of them, aren't you?

MR HUNT:

I can't, I don't know the answer, to the extent –

BLANCHARD J:

It would be rather a surprising result if you weren't.

MR HUNT:

Well, I just don't –

BLANCHARD J:

I mean, I don't know that you nowadays in Australia have separate pools of assets, for example.

MR HUNT:

Well, I'm sorry, Sir, I can't assist you in relation to the way in which an Atco insolvency in Melbourne would be effective or how it would affect the position in New South Wales or Queensland or Western Australia, for that matter.

BLANCHARD J:

Well, it seems to me it may come down to a question of whether a New Zealand Court could properly make an order under section 9, where effectively it would have to have extra-territorial effect.

MR HUNT:

Well, I think, in answer to Justice Anderson's point, I've indicated that there are two routes. One is via Gerling's presence in New Zealand, which doesn't

therefore require any choice to be made, there's as jurisdictional basis for approaching section 9 and making the order. That order would then be taken, as I say, to New South Wales and enforced. Now, the second route –

BLANCHARD J:

It's not like getting a judgment in an ordinary case, though, against a party that happens to have a presence in New Zealand. The judgment is directly related to the liability the Gerling has to Atco. I mean, that's where the impact of the Australian insolvency regime comes in.

MR HUNT:

Well, the judgment or the kind of, the way the charge is – well, that is dealt with by the first part of section 94, I would have said, Sir. "The charge shall be enforceable by way of action against the insured in the same way and in the same Court as if the action were an action to recover damages or compensation and, in respect of any such action in the judgment, the parties shall, to the extent of the charge, have the same rights and liabilities," and so on, as if the action were against the insured. So what you end up with is a judgment for a sum of money, reflecting Atco's culpability and its liability to Ludgater. You don't get any embellishment on the judgment that you obtain beyond that.

ELIAS CJ:

I'm just looking at the terms of section 9 and wondering why the leave of the Court is not required where subsection (2) applies. What thoughts do you have about that? Because if that proviso – no, if that exception for subsection (2) wasn't there, one would have thought that a Court granting leave would immediately want to know why should you not proceed against the company in liquidation in terms of your underlying course of action, and then seek to enforce that against the insurer in Australia?

MR HUNT:

Well, there'd be one, I suggest, one reason why that distinction arises. If you – I mean, this is supposed to be remedial legislation, as Justice Robertson

said, I believe, in the *FAI (NZ) General Insurance Co Ltd v Blundell and Brown Limited* [1994] 1 NZLR 11 (CA) case, it's supposed to make it easier for claimants to get access to insurance monies, not more difficult. If the company is insolvent then you would need to pursue it via the sort of insolvency provisions by getting the leave of the Court to proceed against the insured and then you would, absent the charge, you would be making a claim, you'd get leave, you'd get the judgment and then you'd pursue it, presumably, against the pot of assets, such as there may be, that the company has. The purpose of, the way it's drafted, is to ensure that you don't, as a plaintiff, need to go through that set of hoops, you're entitled to leapfrog the otherwise obligatory leave-seeking requirement for the insolvent company, and you can go direct to the insurer.

ELIAS CJ:

But doesn't that really point up why section 9 envisages a domestic claim? Because otherwise you're going to be bifurcating different aspects of your dispute, your stages 1 and 2, in different jurisdictions.

MR HUNT:

Where the insurer is outside –

ELIAS CJ:

Yes.

MR HUNT:

New Zealand. Well, that brings us back to some of those two initial points that were just raised. If the insurer is actually not to be regarded outside of New Zealand because it's present in New Zealand, then why should that be so. I mean, after all –

ELIAS CJ:

Well, doesn't it depend how you're looking at this? Are you looking at it as a provision which is about domestic application, or is it really a provision about

how you obtain a charge on the assets of the insurer, in circumstances where the insured is insolvent?

MR HUNT:

Well, I would submit, Ma'am, it's the latter.

ELIAS CJ:

Well, if it's the latter, why is it more convenient or why does the remedial aspect push you to enforcement in New Zealand?

MR HUNT:

Well, I'm arguing that it doesn't – well, you mean via the head action, the action against the insurer, as if it were the insured?

ELIAS CJ:

Yes, why is there better protection in construing section 9 as if it has extra-territorial effect?

MR HUNT:

Well, I would say the answer to that is this. The Act is obviously directed at the insurance that bites on liability as it's established in New Zealand. There'd be no point saying that this section has any application elsewhere, to a tort in Australia, say, or a tort in South Africa or some other place. We're only concerned with New Zealand plaintiffs who seek to recover what an insurer – I would say, wherever that insurer is.

ELIAS CJ:

But you're not impeded from doing that, you're not impeded from proceeding in New Zealand to establish liability. What is being questioned is whether you're entitled to obtain priority in a foreign insolvency regime?

MR HUNT:

Well, I don't see, if you accept that the insurer has brought itself within the jurisdiction and accepts the applicability of this kind of legislation to its claims,

that it can – well, it's not, it may be, for the insurer to make that point, it might be, as Justice Blanchard says, for other creditors and receivers to make that point. But if the insurer has elected to be here –

ELIAS CJ:

Do they have to come to New Zealand too?

MR HUNT:

Who?

ELIAS CJ:

The other creditors and –

MR HUNT:

No, I mean when you seek to enforce the judgment you obtained in New Zealand against the company in Australia.

BLANCHARD J:

But the judgment is related to the liability, the underlying liability of the insured.

MR HUNT:

Yes.

BLANCHARD J:

And that necessarily involves looking at how the insured would be required to make payment from its liquidation. I don't think you can just treat the fact that there happens to be a separate obligation of the insurer to pay direct as completely unrelated.

MR HUNT:

But, Sir, if the company, if Atco were not in liquidation and therefore section 9 didn't apply, it would be necessary to get the judgment in New Zealand and enforce it in Australia as well. So either way, you are going to get an order

that relates to the liability established in New Zealand, which has to be enforced in Australia via the processes of enforcement that are available there, including the registration. So, to rephrase I suppose, if Atco had not gone into liquidation it would still have been subject, it would have been a defendant in proceedings brought in New Zealand and a judgment entered against it in New Zealand which could not simply be enforced in Australia, it would have to be registered and enforced there. I submit that the position vis-à-vis its insurer would be no different.

WILSON J:

But isn't there a fundamental difference between the determination of the possible liability of a third party to the insured and, if such liability is established, the liability of the insurer to satisfy that liability? There're quite different, aren't they?

MR HUNT:

They are – well, they are both, to start with the choices of action, but they are different inasmuch as the claim against the insured is a tortious claim and the other, the claim against the insurer which, I would say, is, on the back of that, is a claim via the policy, and a choice of action, true.

ELIAS CJ:

The heading seems to me to be against you, it's all about charges.

MR HUNT:

Yes. But I come back to my point, Ma'am – I suppose I may be repeating myself – if you have an insurer which has come to New Zealand, in the sense that it is present here, what is inappropriate about that, as a defendant company, being made liable in New Zealand and then the order obtained being taken and enforced against it elsewhere?

ELIAS CJ:

Because you're imposing a priority on a foreign regime, with its own, presumably, priorities.

MR HUNT:

Well, the – I think it's easy to get confused as to what "the charge" and "priority" means. The charge only exists if the liability is established and, in this case, Gerling has a fund of up to a million Euro, which will respond to any liability. It's not, other than via the established –

BLANCHARD J:

The charge is not on Gerling, the charge is on Atco.

MR HUNT:

The charge is on the monies, I would have said, Sir.

BLANCHARD J:

They're Atco's money which is being charged. It's Atco's right to claim from Gerling which is being charged.

MR HUNT:

Yes, I agree, yes.

BLANCHARD J:

So you have an immediate competition, potentially, between that charge, not recognised by Australian law, and any other charge which exists over the assets of Atco and is recognised by Australian law.

MR HUNT:

But the charge – there cannot be any competing charge relating to this liability.

BLANCHARD J:

Why?

MR HUNT:

Because this liability is specific to this set of facts and this claim.

BLANCHARD J:

I don't understand that.

MR HUNT:

Well, Atco, say, has a set of assets, one of them is the ability to be indemnified against any liability it has. Unless there's a liability established it has no reason to call on that indemnity and can't do so, and won't do so. So –

BLANCHARD J:

But there is, at the same time, a liability to Ludgater, once judgment is established, and an ability on the part of Atco to claim indemnity. There's a liability and an asset, the charge is on the asset.

MR HUNT:

Yes.

BLANCHARD J:

It's just another asset of Atco's, so far as the liquidator is concerned.

MR HUNT:

Ah, yes it is, but it's specific –

BLANCHARD J:

And, at common law, as I understand it, there is no priority. The insurance monies would simply be paid to the liquidator, who would distribute in accordance with the insolvency regime.

MR HUNT:

Well, that –

BLANCHARD J:

That's been fixed, –

MR HUNT:

Fixed by the judgment, yes

BLANCHARD J:

– domestically, for New Zealand.

MR HUNT:

Yes.

BLANCHARD J:

It happens, it's been fixed in New South Wales as well, but under a different statute, with which we're not concerned.

MR HUNT:

Well, the – I think I'm repeating myself, Sir, and maybe it's –

BLANCHARD J:

I mean, I think you've got a real problem if you did get a judgment and tried to register it in New South Wales, because I don't think the New South Wales Courts would take any notice of it.

MR HUNT:

Well –

BLANCHARD J:

We wouldn't, if it was the other way round.

MR HUNT:

Well, I'm not sure why that would be, Sir, with respect.

BLANCHARD J:

Because of the charge element. Because it's defeating the expectations in the domestic insolvency in Australia.

MR HUNT:

Well, those expectations, Sir –

BLANCHARD J:

There are very strong policy grounds underlying insolvency regimes, and they're not easily defeated.

MR HUNT:

Well, I have no reason not to accept that proposition, Sir, but that, in part, you've crystallised the question but also the reason why some choices have to be made here. If the liability that one is concerned about, priority in relation to, is only in relation to this particular plaintiff, this particular claim, what's the public policy concern that a New Zealand Court, if the reverse situation arose, in –

BLANCHARD J:

Calamity.

MR HUNT:

Well –

BLANCHARD J:

We wouldn't like the Australians interfering in our insolvency regime, and they'll take the same attitude towards us.

MR HUNT:

Well, with respect, Sir, I think that becomes a slightly circular situation. If the reverse were the situation and the question was being asked here – should we enforce an order, essentially attained under the New South Wales equivalent? – what would be the good reasons why we would refuse to recognise that judgment? They –

BLANCHARD J:

Well, it would be, assuming there had been no resort to the New Zealand section 9, that the reliance was simply upon the New South Wales equivalent. I would think that a New Zealand Court would say they're not in a position to impose a charge on a New Zealand asset, that the New Zealand insolvency regime will govern the distribution of Atco's assets amongst Atco's creditors. And so the assets would get paid to the liquidator and distributed in accordance with the New Zealand insolvency regime or, if it happened that there was a receivership, that the payments would go to the receivers.

MR HUNT:

Well, receivership is another way of insolvency being established, it doesn't have to be liquidation that arises here. But I suppose, Sir, all I can say is I part company with Your Honour's approach to how the enforcement of a charge in New Zealand, if established in Australia under the section 9 equivalent in New South Wales, would raise questions of comity for a New Zealand Court asked to do so. The considerations that would relate to that would be, this is an obligation the insurer has agreed to meet, it's been established that it is a liability that it should meet, the insurer can either pay the p –

BLANCHARD J:

In New Zealand law in that circumstances the insurance company has agreed to pay Atco, not anyone else.

MR HUNT:

I was trying to use your own example and address myself to how the Court would deal with the reverse scenario to what we're dealing with.

BLANCHARD J:

Yes, well, that's what I'm addressing.

MR HUNT:

Yes.

BLANCHARD J:

A New Zealand Court would simply say that there's a contract of indemnity, Atco's entitled to the money, it's to be paid to Atco.

MR HUNT:

Well, it may or may not – it might not say that, and I would suggest it –

BLANCHARD J:

Why wouldn't it say that?

MR HUNT:

Well, for one thing, the policy doesn't require the money to be paid to Atco, it can be paid on Atco's behalf to the plaintiff.

BLANCHARD J:

Atco's in no position, when insolvent, to give such a direction.

MR HUNT:

I don't believe, Sir, that the contract requires Atco to say that it wants that done or not, and it would be un –

BLANCHARD J:

Well, who directs then?

MR HUNT:

Well, if the situation, Sir, and I don't think it's contested, certainly in the evidence before Your Honours it isn't, that the insurer takes over the defence of the claim, so it runs the defence, if the liability's established it's going to make the payment to the plaintiff, it's not going to make it to Atco and say, "Well, now, we defended it –

BLANCHARD J:

I don't follow that. Why is it going to make the payment to the plaintiff?

MR HUNT:

Because the –

BLANCHARD J:

If Atco is insolvent –

MR HUNT:

Yes. Well, I wasn't necessarily dealing with Atco's insolvency or not. The fact of the matter is whether it's insolvent or substantial, inoperative, the reality is that the insurer will take over the defence of the claim, defend the claim.

BLANCHARD J:

But the insurer's not in a position to ignore the insolvency regime and simply distribute an asset of Atco's as it thinks appropriate.

MR HUNT:

Well, that's subject to whether an order is obtained which can be enforced, and that would bring one back to Your Honour's concern about whether a Court would enforce an order in that way, concerned that it would infringe insolvency and priority provisions. I don't see that those impediments should do or should arise for a company that is, set its all out as indemnifying risks that arise in New Zealand. I suppose, to try and move on, Sir, that the –

WILSON J:

Before you do so, is the payment directly to the third party permissive only or mandatory, on the part of the insurer? It's permissive, isn't it?

MR HUNT:

Well, the policy simply says it can do either.

WILSON J:

It can do, yes.

MR HUNT:

Yes, it can do, yes. And I'm saying that, as a matter of practice, if it had put itself in the position of the defendant, as it would, then it would pay the money to the plaintiff. There'd be no reason for it not to.

WILSON J:

One reason might be the prospect of the liquidator coming knocking on the door later on.

MR HUNT:

Save for that.

WILSON J:

Yes, a very good reason, I would have thought.

MR HUNT:

Obviously, save for that. But I would be saying something that I don't have any evidential basis for, but I am not familiar with situations where receivers have, in the context of a charge, said, "Well, you can't pay the money to the plaintiff, you've got to pay it to me." But that, to be fair, doesn't –

BLANCHARD J:

They do it all the time in other contexts.

MR HUNT:

Do they? Well, I'll take –

BLANCHARD J:

After all, they're administering an assignment of all the assets, under a classical debenture. It's not quite the same structurally under a general security agreement, but in Australia they don't have those yet.

MR HUNT:

Yes, well, one has to come back – I can't say that those aren't considerations that the Court has to have regard to, but I did say at the outset that there were choices to be made here and, if the claim is to fail because of priority issues in Australia, then that seems to be unfair on Ludgater. And the other, I suppose, point about it is, well, where does that leave –

BLANCHARD J:

It's not unfair on Ludgater, Ludgater's got its remedies. It can proceed to get its judgment against Adco and then take that judgment to Australia and invoke the Australian legislation.

MR HUNT:

Well, as I think has been pointed out, maybe that was the option, so far as –

BLANCHARD J:

I don't know why it wasn't availed of. Three years down the track, and here we are arguing a procedural point.

MR HUNT:

True, I can't disagree with that. But obviously, as I said, I think, in answer to another question, there are potentially further steps in that process than are required, if the Court accepts our jurisdiction, to approach the case in the way Ludgater says it should. That means that we just proceed back to trial, get a judgment, and away we go. The –

ELIAS CJ:

Where do you want to head with your submissions?

MR HUNT:

I've finished what I had to say about enforcement, I think we've covered that as in personam jurisdiction, I think. I wanted to talk about the subject matter issue, because that was where Ludgater's case failed before. The conclusion was here –

ELIAS CJ:

Do you think you'll be able to conclude by lunchtime, Mr Hunt?

MR HUNT:

I'm going to try to.

ELIAS CJ:

Yes.

MR HUNT:

I'm going to have to try to.

ELIAS CJ:

All right.

MR HUNT:

But it does mean that I will probably have to, if I get to it at all, be very brief as regards the extra-territorial jurisdiction point that Justice Anderson asked me about.

ELIAS CJ:

Well, you may need to go on, but I am anxious that we should –

MR HUNT:

Yes, move on.

ELIAS CJ:

– give the respondent an opportunity.

MR HUNT:

Yes, I did say I'd try and finish by lunchtime.

ELIAS CJ:

Yes.

MR HUNT:

Well, I'm really addressing what I have said already in my written synopsis about that. The position appears to be that subject matter jurisdiction should be regarded as situated, in this case, in Sydney, because that's where Gerling is and that's where the money is, and that that is therefore sufficient to conclude that there is discord or the High Court has no subject matter jurisdiction and it cannot deal with the matter. The first part of the answer to that concern is probably the one that's been discussed already. If it's not necessary to get into that issue because Gerling is here, it's present, it is properly before the Court otherwise, then the location of the proceeds in Sydney may not be all that important at all. But the answer to that problem that I've addressed in my submissions really goes back to the reason why that rule exists, and that probably takes me to the first case where a discussion about it is to be found, and that is tab A, volume 2, a decision of the Court of Appeal in *New York Life Insurance Co v Public Trustee* (1924) 93 LJ –

ELIAS CJ:

Is it 2 or B?

MR HUNT:

I'm sorry, volume A, tab 2. And by way of preface to this area of my submissions, I've cited from the authors of *Cheshire and Fifoot* – and you have the text with the footnotes where these cases come from.

BLANCHARD J:

Sorry, where are you in your submissions?

MR HUNT:

This, Sir, is paragraph 8, subject matter jurisdiction, and 8.2. Firstly, at least in that passage in my submissions, why is it that the residence of the debtor was regarded as the place at which the debt was situate, and it is a general

but not universal rule so what are the exceptions, in what circumstances is it a rule not to be followed? The historical basis for the rule is explained in the *New York* case, in the judgment of Lord Justice Atkin, and I would take you to page 22 of the bundle or page 119 of the decision itself. And the passage that I am referring the Court to is His Honour's explanation about how one locates the situation of a debt, which appears in the second paragraph and following, in the right-hand column. And you can see from that that the derivation of the rule come from ecclesiastical practice and administration, because the jurisdiction of such authorities was territorially limited, and the reference to the test that was to be applied in respect of simple contract debts, that is to say, where was the debtor residing? And then His Honour said, "Now, one knows that" – midway down the page, just below the middle – "a debtor has to seek out his creditor and pay him, but it seems plain that the reason why the residence of the debtor was adopted as that which determined where the debt was situate, was because it was in that place where the debtor was that the creditor could, in fact, enforce payment of the debt", which, he said, was a very material consideration. "The result is that, in the case of an ordinary individual, by that rule for a long time the situation of a simple contract debt, under ordinary circumstances, has been held to be where the debtor resides, that being the place where, under ordinary circumstances, the debt is enforceable, because it is only by bringing a suit against the debtor that the amount can be recovered." His Honour then went on to talk about complications, where it was possible to bring suits against the debtor in a territory where he is not residing, by reason of the processes within the Court, and those are the sort of processes that we have here and they had in England that enable proceedings to be taken and served abroad on residents or debtors that are outside of the country. And the Judge didn't choose to deal with the issue because it wasn't one before him, but he did go on to say this, "Now when you are dealing with" – and I'm on page 120 of the judgment, second paragraph – "Now when you are dealing with a corporation you are dealing with a legal notion and you have to examine the question of where the debt can be said to be situate. It appears to me plain that a corporation, according to our law, is deemed to reside for the purposes of suit," it carries on, "… business in its own name, and in the case of corporations you have

many activities in many countries such as the big insurance companies," for example, the plaintiffs in this case. "It appears to me that the true view is that the corporation resides for the purposes of suit in as many places as it carries on business, and it is to be noticed that in the ordinary cases where an obligation is entered into by the corporation without any particular limits of the place where it is payable, inasmuch as that obligation is an ordinary personal obligation which follows the person, you have in each jurisdiction a right to sue the corporation in there, the corporation is resident there and the obligation is enforceable there. Under ordinary circumstances the debts would be situate in each place where the corporation can be found." His Honour then goes on to say that that give rise to some difficulty in a matter of that sort, inasmuch as the right in question is a shows in action and a shows in action involves the right of suit, and there was only a right of suit in this country to recover the sum of money against the insurance company. "It appears to be impossible to say that that right is not a right which is situate here." And then at the top of the following page, "I think that it is a right which in normal circumstances can properly to be said to exist here, and from that point of view it appears to be, may well be here, and I think it is the fact that simple contract obligations can be situate in more than one place." Now, obviously he's talking about civil contract obligations. I'm not sure that we're dealing with anything other than that in this kind of case, because the obligation would be quite straightforward, is to pay some of the money if a liability is established. And that was a case where the contracts expressed the way in which payment was to be made as being in sterling in London. So, that was in part the reason for orientating the situation there.

But the point of my submission is, you see there the reason for the rule, the general rule, that you locate the situs of the debt where the debtor resides. But you also see that it is not a rule to apply in all cases and, in particular, not necessarily to apply where a corporation is concerned and it carries on business in a variety of different locations. And the obligation can be enforced wherever the corporation is, and that brings us back here to the question of Gerling's presence in New Zealand, and it's for that reason that evidence

about Gerling's presence in New Zealand, including what Ludgater seeks to rely on in relation to the breadth of that business, is relevant to that question.

The second aspect of what His Honour is saying here is that the rule is related to residence because of enforceability. Now, in 1924 I'm not sure what the rules regarding the reciprocal enforcement of judgments may have been, but certainly they're much different now and they certainly exist between Australia and New Zealand, as one would expect, given our close ties. So insofar as a Court won't make an order which is knows can't be enforced, and that would under the old approach, or at least the historical approach, be a good reason for regarding the situation of the debtors, where the debtor actually is, that in and of itself, in my submission, doesn't provide a rationale for acquiring to take the view that the rule applies and the site of the debt should be said to be Australia. If, as I have argued, Ludgater can obtain a judgment in New Zealand, which it can enforce in Australia, subject no doubt to the concerns that Justice Blanchard has raised, then the rationale for requiring the proceedings to be brought in Australia as such falls away, because there isn't any impediment to enforcement. And so locating the situs of the obligation in that way for those reasons is unnecessary. Now, in the Court of Appeal decision the approach, I think, was conclusory: this is the general rule, the proceeds are payable in New South Wales, that's where the debt is sited, therefore New Zealand Courts won't have subject matter jurisdiction, therefore the application must be dismissed or the case must fail. But if Your Honours take the view that that general rule needn't apply in this case, that rationale falls away. There are cases of exceptions, some of them are mentioned in the *Cheshire* text, where that has been so. An example of one such exception is a decision of the English Court of Appeal in *Power Curber International Ltd v National Bank of Kuwait Sak* (1983) 3 All ER 607, which is volume D – sorry, volume A, I should say, and tab 11, the same bundle as Your Honours have just been looking at, page 97. I'll take Your Honours to the text, but in the head note it was held that the proper law – this is a case involving an exporting company in the United States contracting to sell machinery to buyers in Kuwait, there was a letter of credit issued to a bank in North Carolina in favour of the plaintiff and the question arose as to where the

situs of the debt created by that letter of credit was, was it in Kuwait or was it in North Carolina? The head note records that the proper law of the letter of credit was that with which it closest and most real connection, which was the law of North Carolina, because that was where the defendant bank was required by the letter of credit to perform its obligation to pay. So, too, was the situs of the debit, because a debt under a letter of credit was situated in the place where it is payable against documents, unlike a ordinary debt, which could be situated where the debtor was resident.

Now, you'll see in the judgment references to why the choices were being made in this way, the existence, or London being the place where the Courts were that were being asked to enforce letters of credit, letters of credit being important components of international trade and transactions and, as Lord Justice Denning said at page 603, line, G, "London is an important centre of international trade, merchants from all the world come here to settle their disputes, banks from all the world have branches here and receive and make payments. So far as we can be of service to international trade we will accept the task and fulfil it to the best of our ability." But the case generally, and the reason I'm referring Your Honours to it, is it's an exception to the notion that the situs of the debt must be where the debtor resides. Here's a case where the situs of the debt was said to be where the debt was payable and, in my submission, the debt is not obligatorily payable in New Zealand to Ludgater, but it can be paid, because the policy permits it to be paid, so what is the reason for ignoring that latitude, that the insurer has when considering where the site of the debt should be?

There is another decision in the same bundle, tab 10, it's *Alloway v Phillips (Inspector of Taxes)* (1983) All ER 138, again, a Court of Appeal decision. I put it in there really for completeness and because it's referred to in the *Cheshire* text. It is one of the cases referred to by *Cheshire and Fifoot* as being, if you like, an example of something other than the usual rule, and it's there really only to make that point, that the usual rule is not a universal rule, it will defer, when it needs to, to other considerations, and here the two consideration that I am relying on are Gerling's presence in New Zealand and,

secondly, the fact that the enforceability of the judgment can be had in Australia with a New Zealand judgment and, thirdly, I should add, the power that there is in the insurance contract to pay the debt directly on behalf of Atco. That would be, I suppose, in a nutshell, my challenge to the conclusion that Gerling's residence in New South Wales is, in and of itself, determinative of situs. My submission is that the Court needn't take that approach, for those reasons.

The same elements of presence that I have referred to in that regard, in that subject matter jurisdiction context, are, in my submission, relevant to the extra-territorial reach of the legislation, which is what I'll finish with reference to. And, again, I am reliant on my submissions at paragraph 9, and I'm reliant too, and I adopt, the reasoning that was accepted by Justice Chisholm in the High Court. The three cases that relate to this proposition that the Act can be interpreted to have extra-territorial, a case that I'm relying on, decision of the House of Lords in *Clark (Inspector of Taxes) v Oceanic Contractors* [1983] 2 AC 130, which is in bundle A, tax 12, and subsequent to that same, the Court's decision in *Agassi v Robinson (Inspector of Taxes)* [2006] 1 WLR 1380, which is volume C, tab 4, and I note also that the question of territorial application is addressed in the *Société Eram Shipping Co Ltd v Compagnie Internationale de Navigation* [2004] 1 AC 260 decision, that is in bundle B, tab 18, and the particular reference in that bundle or that decision to that issue, which I won't go through now, but touched on, is –

BLANCHARD J:

That case seemed to me to be directly against you.

MR HUNT:

Société Eram? Well, that's certainly the way it was relied on, to be against me in the Court below. But the distinction between this case and that case was that what was being sought was an order which could be taken and enforced directly in another jurisdiction, not via some sort of recognition or judgments process as, I am submitting, Ludgater would need to do. That was the

problem, a garnishee or the third party debt order was being sought in England to be taken away and enforced in Hong Kong, and that's quite a different proposition than what, I am submitting, would be the process that would be taken here.

BLANCHARD J:

But it says here, "That where a final order was made by the third party, in making payment in compliance with the order was discharged from his liability in respect of the debt to the extent of his payment, that it was not open to the Court to make an order where it appeared that such discharge would not be available under the law which governed the debt."

MR HUNT:

Yes, I imagine Your Honour's suggesting that if payment was made by Gerling in Australia there might still be a claim by the receiver or the liquidator?

BLANCHARD J:

Yes.

MR HUNT:

Yes. Well, firstly, the reason why the order wasn't being made was because, in part at least, because the Court couldn't be sure that that would not be the case, that there would not be a discharge of the debt in Hong Kong, that was its concern. I've submitted, Sir, that that concern will not and should not arise in relation to payment by Gerling of any amount that a judgment against Atco/Gerling should have happened to be established for. But I don't want to dwell on that decision any more than that, because I just wanted to finish off, if I may, and leave it to Mr McLachlan in relation to, by finishing off with respect to the foreign extra-territorial jurisdiction point.

The answer said to be available to this contention is, well, the House of Lords decisions are taxing cases. In my submission, that's not an answer. Taxing cases are notoriously the sort of cases where Courts are jealous about the extent of extra-territorial application, even more than anything else, and so too

are other countries, more jealous of their own jurisdiction in relation to tax. What was significant about the *Clark* and *Agassi* cases was – well, in the first of those cases the question was determined around the issue of presence, not residence. It wasn't important that the relevant company was not resident in England, what was important was that it was present and had come into the jurisdiction for a time, so that it should be subject to the revenue laws of England. In *Agassi* that situation was even more acute. The Act was interpreted so as to have extra-territorial application, because if it weren't then the obligation to pay tax in terms of the statute it was concerned with would merely become voluntary, and you'll see in the decision of the four Law Lords who concluded, that the Act should have extra-territorial application, that they were quite satisfied that the limitation that was being contended for on behalf of Mr Agassi could not be upheld, for that reason. I've cited in my synopsis what was said by Lord Mance, namely, that the legislation could not sensibly have meant or provided that the taxpayer could avoid his – and there's a typo there – "Of liability by the simple means of arranging for payment to be made to him or his company by a person not present in the United Kingdom." And also you'll see in *Agassi* there was no real concern expressed at the fact that the Act said nothing specific about where it did or didn't have extra-territorial application. They simply looked at the Act, what's it supposed to achieve, what's the vice it's directed to, who is it intended to affect and, as I say, they were clear that any other interpretation would just mean that the tax would be voluntary, that couldn't be what was intended, so it followed that the intention of the legislature must have been to enable the Act to work extra-territorially so it could take effect. Justice Chisholm accepted that that was an appropriate analysis and he also accepted that, although in this case payment would be made in Australia, that for the same sorts of reasons would be no different than that which arose in the *Agassi* case. That was his rationale for accepting that the Act should apply in that way.

So, the question for the Court really comes back to the big one. Is it fair to say that when section 9 was, section 9 to be interpreted, so as to apply to insurers who are in New Zealand, who are present in New Zealand, who come to New Zealand, in the sense that they insure risks that emerge or

crystallise in New Zealand, should those insurers be subject to the application of section 9, and, in my submission, they should. That would be an appropriate point to stop.

ELIAS CJ:

All right, thank you. We'll take the lunch adjournment now, thank you.

COURT ADJOURNS: 1.02 PM

COURT RESUMES: 2.16 PM

ELIAS CJ:

Yes Mr McLachlan?

MR MCLACHLAN QC:

May it please the Court. The question before this Court today is whether or not a plaintiff suing in a New Zealand court under section 9 of the Law Reform Act 1936 may obtain a charge over the foreign proceeds of a foreign contract of insurance between a foreign insurer and a foreign insured for alleged liability arising from the foreign manufacture of goods abroad which are said, which is said to have caused loss here. And we submit, Your Honours, that in the company of a unanimous Court of Appeal the answer to that question is no and that accordingly Gerling is not subject to New Zealand jurisdiction in respect of this claim. We so submit on an application of five basic principles of New Zealand law. Those are the principles set out in paragraph 1 of my written submissions and I propose, with your leave, to take them today in the order in which they're developed in the body of the submissions that means of course going first to section 9 itself and then to the way in which it falls to the interpreter according to private international rules and taken right up front the point which I know has troubled a number of Your Honours this morning, the point which I originally made in paragraph 3(b) of my written submissions, in relation to the effect of the charge of this kind in relation to priority.

Now of course this point, the point about the effect of the charge and the related question of subject matter jurisdiction is fundamental to this appeal because if you're with me as to the nature of the remedy under section 9, and its effect in terms of subject matter jurisdiction, then just as in the Court of Appeal we submit that that is sufficient to dispose of the appeal in Gerling's favour and the rest, if I may be permitted to say so, would then become academic. Let me just –

ELIAS CJ:

You may say it since Sir Kenneth Keith is not on the bench otherwise I wouldn't advise it.

BLANCHARD J:

Just remember everything you say is being taken down and may be used by academics against you.

MR MCLACHLAN QC:

With those cautions duly borne in mind, Your Honours, the five principles which are set out in pages 1 and 2 can be conveniently summarised and labelled as follows. The first principle which I developed in part 1 of the submissions I call the charge principle and that is simply the proposition that section 9 operates by imposing a statutory charge over proceeds of an insurance policy and therefore operates as an involuntary assignment by operation of law on that shows inaction and all the other consequences within section 9 flow from that basic point.

The second principle I call the conflict principle and it's dealt with in part 2 of my submissions and that is simply the proposition that both the powers of the High Court and the scope of New Zealand legislation are absent, of course express legislative provision to the contrary, to be construed by reference to the general rules of private international law applicable in New Zealand.

The third principle developed in part 3 of my submissions is the subject matter jurisdiction principle and it flows in this case directly from principle 1, the

nature of the charge. And that is the proposition that the Court has no jurisdiction to adjudicate a claim founded upon the involuntary operation of a statutory charge over movable property abroad which is the case here.

The fourth principle I call the foreign contract –

ELIAS CJ:

Is that really a separate point or is it part of point 1?

MR MCLACHLAN QC:

It is the application, Your Honour, of point 1 in an international context.

ELIAS CJ:

All right. Thank you.

MR MCLACHLAN QC:

Principle 4 I call the foreign contracts principle and that is the submission that as a matter of interpretation of section 9, as a matter of its interpretation, section 9 does not apply to foreign contracts of insurance because it is the existence of that contract of insurance which provides the only link enabling the third party claimant to get relief not for the underlying liability generally for which it can always get relief against the defendant, against whom it has a claim under the general law, but relief directly against the proceeds of the policy by suing the insurer which is the only situation with which we're concerned today.

The fifth and final principle is the personal jurisdiction principle and that is the submission that it follows that whereas here the defendant is served abroad, the Court equally has no personal jurisdiction in application of two of those earlier principles because firstly the claim is brought under a foreign contract and not a New Zealand one and secondly – and therefore rule 219 does not provide a basis for jurisdiction and secondly in any event the Court has no discretion under rule 220 where the relief, as here, exceeds the extent of its subject matter jurisdiction.

So I propose to take each of those principles in turn and to refer, you may be relieved to hear, to only a handful of the leading cases compendiously collected in the bundle of authorities on my most recent count at most 15 and many of those are ones that have already been referred to you this morning by my learned friend and the reason why I take you just to the leading authorities is simply to seek to make good those fundamental principles.

So if I may then turn to the first principle, the charge principle, which is dealt with in detail starting at paragraph 3 of my written submissions. It is, I submit, fundamental to this case to obtain a close working understanding of the way in which section 9 of the Law Reform Act operates and we have the section in bundle D of the authorities at tab 5, page 118.

The first point about the way in which that section operates is that the entire section is predicated upon the existence of a contract of insurance. We know that from section 9(1) which opens by providing that the section operates where a person has entered into a contract of insurance and we know that also from subsection (7) which confirms, if confirmation were needed, that the insurer shall be liable, no insurer shall be liable beyond the limits fixed by that contract.

The second point, which is the central point adverted to by His Honour Justice Blanchard this morning, is well what then happens which gives rise to this special remedy created by section 9 and that is, of course, the decision of Parliament to create a charge on all insurance monies, under section 9(1), which has the consequences set out in section 9(3) –

BLANCHARD J:

And it happens only through a charge.

MR MCLACHLAN QC:

That is, I accept that Your Honour and if one then reads on to subsection (4) the suit then is brought is brought in the enforcement of such a charge.

BLANCHARD J:

Mmm.

MR MCLACHLAN QC:

So everything flows from the charge, in my submission, and that, in fact, was the brilliance if I may say so of the New Zealand legislature in 1936 but in the consequence of this case it also carries with it the seeds of an essential limitation. So the section 9(1) creates the charge, everything flows from that. One thing that flows from that is a very special rule about priorities in section 9(3) which is firstly that the charge has a priority over all other charges, affecting the insurance monies which of course could include any general charges which apply to assets of the insured, but it also provides a priority as between claims on the insurance money providing that those apply in the order of the dates of the events out of which the liability arose. So a special rule as to the priority or charges in relation to this shows inaction.

The operation of section 9 or rather its equivalent in New South Wales was subjected to a characteristically, if I may so, insightful analysis by McHugh and Gummow JJ in the High Court of Australia in their concurring judgment with which the majority agreed on this point and you have that analysis in volume B of the bundle of authorities at tab 9 and the relevant passage begins at page 122 in the bundle which is page 445 in the Commonwealth Law Reports.

Now I should say at once that this case was not an international case and I therefore rely upon it for the acute analysis of the juridical character of the charge thus created. So Their Honours say, "That which is created by section 6(1), the equivalent of our section 9(1), is given the name charge. This invokes an institution of the general law and suggests the creation by force of the statute of a security for the payment of a debt or the performance of some other obligation." And then they go on, six, seven lines down on page 446, "Accordingly assignment by way of charge presently existing shows an action is effectively only inequity –"

ELIAS CJ:

Just pausing, because I haven't looked at this New South Wales provision. One of the cases says that it's different from ours but at first sight it looks very, very similar.

MR MCLACHLAN QC:

I haven't, I confess Your Honour, parsed it word for word but in my submission in this material respect it's identical. And there is in fact in the detailed comparison in the judgment because Their Honours make the point that section 6 was in fact derived from the New Zealand legislation.

ELIAS CJ:

Yes. Right.

MR MCLACHLAN QC:

Then in the second paragraph, the first full paragraph on 446, they go on, "Section 6 is to be read against the background of these distinctions in property law. However, what section 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 a presently existing or future shows as an action and between cases where value is required or an essential. 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 a charge on all insurance monies which are then payable in respect of the liability against which the insured is indemnified and on all such insurance monies that may become payable in respect of that liability." Now with respect in a sense all that McHugh and Gummow JJ are doing there are expressing in very elegant language what we could, ourselves take from a close reading of the statutory section. But it is apparent from that judgment and, indeed, in my submission, from reading the statutory section, that what has been created here is an ability to execute against a species of property, and you achieve that by creating a charge over the show's inaction represented by the proceeds of the policy. Since, of course, the insurer owes

no legal liability to the third-party claimant as a matter of the common law, he is capable of being made a defendant to a claim under section 9 only by virtue of the existence of the contract of insurance, the statutory charge imposed by operation of law by section 9, when coupled when the establishment of a legal liability owed to the insured to the third-party claimant. And it's that charge which is what is enforceable to the extent of the charge by section 9(4). And so at this point, if I may just depart from my written submissions on page 5, just to directly address the points which were being raised in argument with my learned friend this morning by Blanchard J and the Chief Justice and Anderson J. Let's just think for a moment about the practical consequences of the operation of such a charge in the context in which it's primarily envisaged to apply which is where the insured becomes insolvent. Firstly, you could have multiple claims on that same shows inaction. Of course you could, for the reason that Blanchard J, with respect, rightly pointed out this morning, that that is simply another asset of the insured. By definition, if the insured is insolvent, it's unable to pay all of its debts, and there may well be, therefore, other people who also claim charges of other kinds derived from their own contractual arrangements with the insured and who claim various priorities of their own. But even if we stick with the insurance context for a moment, it is perfectly foreseeable that there may be more than one claim, specifically, on the proceeds of the insurance policy. My learned friend pointed out this morning that there is an annual aggregate of a million Euros under this instance contract. We know from the evidence, and the reference is Keywick, Keywick's affidavit, bundle 2 tab 8 at 138, that there are at least two other claims pending in New Zealand against Gerling in relation to Atco matters. What we don't know is how many other claims there may be pending in other parts of the world in relation to the same matter. There's no evidence about that at all. And my point, really, is a point of principle, here. It's not specific to these facts. The Court, therefore, needs a mechanism to determine who gets priority as between those rival claimants to those insurance monies who are claiming because they claim that Atco owed them a liability which is covered by insurance. And there is simply no way, in my submission, that any Court other than the Court where it shows an action is situate can properly distinguish and prioritise between those claims. Imagine, for example, if those

claims exceed the limit of the policy. The Court needs a mechanism to determine who gets what. Section 9(3) grants such a mechanism because it simply creates a priority by time, but that's only applicable, or would only be applicable, on my friend's hypothesis in respect of those claimants who happen to sue in New Zealand.

ANDERSON J:

Or New South Wales, which has a similar provision.

MR McLACHLAN QC:

Indeed, and in the New South Wales Court, Anderson J, would be capable of achieving a priority between more rival claims if my submission about the necessity to centralise those claims in the situs of the debt finds favour with this Court. That's precisely why you need a centralising provision of this kind on the situs of the chosen action.

BLANCHARD J:

How would you sort things out as between the corporations law applying in Victoria and New South Wales, but particularly in Victoria, and the New South Wales statute? It may not be a question you're able to answer.

MR McLACHLAN QC:

Well, I certainly wouldn't claim expertise in Australian insolvency law, and I'm quite confident of one thing, which is that Your Honour's expertise in that field vastly exceeds my own. But I did want to make a point about the corporations law of Australia. My proposition –if I may, just before I get to that, can I just make a couple of other points about the priority rules in section 9 or in section 6 of the New South Wales Act and the way in which they require the centralisation of claims at the situs of the debt. The first is the point made by Her Honour the Chief Justice this morning about the operation of section 9(2). It may be said more generally, may it not, that the section contemplates a local insolvency in the relevant country to operate effectively. Because what has to happen here is the adjustment of relative priorities between charges claimed over the same asset, and in my submission, therefore, what is really

going on here by an attempt by Ludgater, or, more correctly, Ludgater's insurers, NZI, for whom my learned friend acts as is clear from the correspondence exhibited in the Court record, to obtain a priority over this shows of action which may well be contested by others, and seek to improve their position by proceeding in New Zealand vis-a-vis other claimants who otherwise would not do so. But the further point about the Corporations Act which I wish to make was, of course, Atco has not been sued in New Zealand. It's not a party to the current action, despite the comment made by my learned friend to the contrary this morning. And the reason is that in order to sue Atco, one would need the leave of the Australian Court, a point made – and let's just look at it straight away, because this correspondence, although it now goes back three years, in my submission made exactly the right point to the plaintiffs about how they should proceed, and we have it in volume 3 of the record at tab 4 pages 248-49. There we have, in December 2006, Messrs Young Hunter, the solicitors acting for Ludgater, writing to Atco in Victoria and saying "We act for NZI Insurance and its insured, Ludgater", and they're writing about the file, which is the subject matter of the claim, and they're claiming damage. Now, the response comes back from the liquidators on the 23rd of January, and it's just over the page. The liquidators make the perfectly sensible point that the company is in liquidation, and therefore proper notification of the claim in the liquidation needs to take place, and they also point out that pursuant to section 47(1)(b) of the Corporations Act 2001, an Act of the Commonwealth of Australia, which also has sister or daughter Acts in each of the states, and is therefore applicable Australia-wide, a person cannot begin or proceed with any recovery against the company as it's in the process of being wound, presumably they mean wound up, except with the leave of the Court. And then they say, "Our solicitors will be willing to accept service of any documents in the event you wish to make such an application", and they also say, further up in paragraph 3, "We can't admit your claim, but we may need to notify the company's insurer, Gerling Australia Insurance Company" – and they gives its address in Sydney – "of your client's alleged claim". Now, of course the reason why we commonly have those kind of notification requirements in insolvency regimes is precisely for the same reason that there is a need, when a company becomes insolvent, to exercise

some degree of control over the way in which claims are pursued. The liquidator may have to decide whether to defend the claim, how much to spend on it, and that may be true, also, even where there is insurance, if the insurance may not cover the full extent of the liability. And it is not the case that section 6 of the New South Wales statute provides the only remedy to ensure some degree of priority for Ludgater's claim in these proceedings, because section 5(62) of the Corporations Act, which we have exhibited in the same bundle, 3 tab 12 page 323, provides that a liability in respect of which there's insurance, if the amount is received in respect of that liability by the liquidator from the insurer, that amount must, after deducting any expenses incidental to getting it in, 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. So there you have another priority rule. It's a different priority rule. It works in a different way to section 9 or section 6, but it's also directed at the same mischief. Blanchard J made the point this morning which, with respect, I adopt, that the reason why we need to be astute to confine the operation of propriety charges of this kind to the jurisdiction where the property is found flows directly from that fundamental notion of comity which underpins the whole operation of a private international law system, and I can make that point good or can give some additional authority for it, high authority for it, by referring the Court to the seminal judgment of the Supreme Court of Canada in the case of *Tolofson v Jensen* which is in bundle B of the authorities at tab 7. La Forest J, giving the judgment for the majority in that case – now, that was not a case concerned with third-party rights against insurers, you may be relieved to know. It was a running-down case, essentially. But the question before the Court was whether or not an Ontario statute of general words applied or did not apply where the accident had taken place in Quebec. And the Court, in judgment of La Forest, goes right back to first principles in terms of why we have rules of private international law. The passage which I would be grateful if Your Honours could go to is on page 73 in the bundle, page 302 in the Dominion Law report, under the heading "Critique and Reformulation". What he says at letter G is, "The truth is that a system of law built upon what a particular Court considers to be the expectations of the parties, or what it thinks is fair, without engaging in further probing about what it means by this

does not bear the hallmarks of a rational system of law, indeed, in the present context, it wholly obscures the nature of the problem. In dealing with legal issues having an impact in more than one legal jurisdiction, we are not really engaged in that kind of interest-balancing. We're engaged in a structural problem". And then he says, well, although this is just interprovincial, we need to start by thinking about the international context, which, of course, is the context with which Your Honours are faced today. And picking up the report again at letter A on page 303, he says, "On the international plane, the relevant underlying reality is the territorial limits of law under the international legal order. The underlying posit of public international law is that generally each state has jurisdiction to make and apply law within its territorial limit. Absent a breach of some overriding norm, other states, as a matter of comity, will ordinarily respect such actions and are hesitant to interfere with what another state chooses to do within those limits". In my submission, Your Honours, that general principle does, and ought to, guide your decision on this case today. Let's return, though, for a moment, to the statutory section, which is in bundle D at tab 5.

BLANCHARD J:

Are we finished with *Tolofson*?

MR McLACHLAN QC:

We're finished with *Tolofson* unless Your Honours decide to hear me further on the case. My point here is simply to spend a moment on what section 9 does not say, because section 9, in my submission, contains nothing of itself in express words about its territorial application. And if we try to divine that simply by, as it were, burrowing into the language of section 9 unaided by an application of general principles, we will find ourselves chasing ephemera. It doesn't tell us what is the relevant connection with New Zealand to bring the Act into operation. My learned friend seems to proceed on the basis that the relevant connection is the underlying liability of the insured, which he asserts is governed by New Zealand law. But, of course, the Act is predicated on the existence of a contract of insurance, and the operation of a statutory charge over the insurance monies, and therefore the question simply put at large

without the assistance of more general authority is that Your Honours need to decide which of those connections are the relevant ones to determine the spatial or territorial operation of the statutory section. And that's why, and it's really only for that purpose, responding to a question which Anderson J posed to my learned friend this morning, it's really for that purpose that, in my submission, we do gain assistance from the general rules of private international law. We're doing it, in other words, in order to construe, properly, the statutory section. And the principle on which I rely, and I can turn now to my second principle, which is the conflicts principle, dealt with in part 2 of my written submissions on page 6 –

McGRATH J:

Just before you leave the first principle, can I just go back to the Victorian corporations law you've referred to. I'm right in saying that a judgment obtained in New Zealand for liability against the tortfeasor could come within that section if the judgment were registered in the state of Victoria, is that a correct reading of the provision?

MR McLACHLAN QC:

It is, Your Honour. Of course, I'm not in a position to, and don't speak to the Victorian provisions in relation to foreign judgments, but in principle, this Act appears to be concerned with the establishment of liabilities incurred by the insured, which would include, potentially, tortious liability which would be the subject of an action against Atco. There's no reason to give that a limited scope, because a company can come under a liability of that kind anywhere in the world, and it would still be a liability of the company.

BLANCHARD J:

So under that, I haven't turned it up again, you'd register the judgment and then the liquidator would turn round to the insurer and say please indemnify, and when and if the insurer indemnified, subject to any defences on the insurance policy that it had, such as the limit of liability, then when the expenses of that exercise deducted, the proceeds were then paid over to satisfy the judgment?

MR McLACHLAN QC:

To the third-party claimant, yes. And of course we're talking here in context of judgments, but it's not necessary for the purpose of the due administration of a liquidation to secure an unsecured debt by way of judgment or to perfect it by way of judgment, one could merely –

McGRATH J:

The charge is applied by law, isn't it?

MR McLACHLAN QC:

The liability exists, Your Honour, by virtue of operation of the general law. Of course, section 5(62)(1) does not operate by way of imposing a charge in the way that our section 9 or section 6 does.

BLANCHARD J:

And nor would the registered judgment in that scenario, either.

MR McLACHLAN QC:

It would nearly perfect an unsecured debt.

BLANCHARD J:

So if there was a limited amount of insurance money, and a number of claimants, they would simply be paid out pro-rata.

MR McLACHLAN QC:

Section 5(62)(1) does not tell us the way in which those debts are to be paid –

BLANCHARD J:

Well, the ordinary –

MR McLACHLAN QC:

But the assumption which Your Honour is making, I simply don't know the position, but the ordinary rule is that they would be paid out pro-rata.

BLANCHARD J:

Well, that fund is segregated for such claimants, who, to that extent, have a priority, and they would share that priority in accordance with a normal pari passu rule.

MR McLACHLAN QC:

That would be my assumption. I'm not in a position to speak to Australian law. But the point, of course, here, is that that is a very different manner of distribution contemplated by section 9(3) or section 6(3) of the New South Wales act, which gives you priority in time, rather than pari passu distribution. Did Your Honours have any – of course, we'll come back to section 9 repeatedly and inevitable in subsequent portions of my oral submissions. But if not, may I proceed to my proposition 2?

ELIAS CJ:

Yes.

MR McLACHLAN QC:

So my second proposition is really a general proposition as to approach, which is that in the absence of express legislative provision as to territorial scope, and my submission here is that there is none, the Court is obliged to determine both the question of legislative jurisdiction, i.e. the scope of section 9 itself, and the exercise of its own jurisdiction over both persons and subject matter abroad by applying general rules of private international law. That is the purpose of those rules. Now, let's just build that up for a moment –

ELIAS CJ:

Why do you go on to the second?

MR McLACHLAN QC:

That's what I'm just about to do, if I may, Your Honour.

ELIAS CJ:

All right, thank you.

MR McLACHLAN QC:

Because it is, in my submission, a vital and important point. So it's been very common, with respect, in argument before Courts in New Zealand to refer to this general presumption against extraterritoriality, and if I may be forgiven for appearing a little flippant, normally to refer to it, only to dismiss it for one reason or another. But, of course, the fact that it exists in undoubted, and the fact that when it exists, it can cut down the operation of a New Zealand statute of general words is equally undoubted, and there are many illustrations of that, but the only one I wish to take you to is the judgment of the Court of Appeal in the *Governor of Pitcairn v Sutton [1995] 1 NZLR 426 (CA)* case, which is in bundle B of the authorities at page 8. Now, this, of course, was a case dealing with that limitation on jurisdiction which arises by virtue of public international principle in relation to sovereign immunity. But the passage, in my submission, is still applicable here and you'll note from the report in the New Zealand law reports that a full Court of the Court of Appeal sat, presided – a very powerful Court, if I may say so – over by the-then President, Cooke J as he then was, and they gave a unanimous judgment. The relevant passage is at page 97 of the bundle, page 438 in the New Zealand law reports. It's headed the application of the Employment Contracts Act. What Their Honours observe in that case is that, at line 31, it's common for statutes of general application to be expressed in the broadest terms. But then they say, "The legislature recognises that presumption, such as the presumption against extra-territorial application, and the presumption of sovereign immunity, will apply to qualify the reach of the statute". And they say, "This must be necessarily so" – at line 38 – "otherwise, of course, almost any general statute would displace well-settled doctrines accepted by New Zealand and its international relations. While the Employment Contract Act is broadly phrased, it is not expressed to apply extraterritorially or to override sovereign immunity. The absence in its general language of any specific restriction on its application to a foreign sovereign cannot be elevated into a expression of intent to override an important presumption grounded in public

policy and the common law". Well, all very well, you might say, in relation to a public international law of principle like sovereign immunity, but the starting point, in my submission, is the same, because in section 9 as well, we have a statute of general application, purports to apply to all persons, all contracts of insurance, all proceeds of them, charges to apply on those proceeds and the like. And the question, then, is, is there, then, a limitation on the legislative jurisdiction of Parliament, which the Court should apply as a presumption and which will apply unless, and to the extent, Parliament has expressly said otherwise, which of course it can do, but hasn't done here. And in my submission, in the context of a civil claim of this kind, a claim for civil relief, it's the rules of private international law which determine when a New Zealand statute relating to a civil action is applicable to an international legal relationship. And don't take that from me, with respect, take it from Dickson J in the High Court of Australia in the case still frequently cited, because it was a seminal case, the *Wanganui-Rangitikei Electric Power Board v Australian Mutual Provident Society (1934) 50 CLR 581* case. I've actually set out the relevant passage in my submissions, so I can take it from there. But the short point about that case is that a New South Wales statute, New South Wales being the relevant forum, was held not applicable. The New South Wales statute of general application was held not applicable because the relevant dispute was contractual and the contract was governed by New Zealand law. The way in which Dickson J puts the point is set out in my written submissions at the bottom of page 6. He says, "The case is one for applying what I believe to be the well-settled rule of construction. The rule is that an enactment describing acts, matters of 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 recognised in our Courts, it is within the province of our law to effect or control". He says, "The rule is one of construction only, and it may have little or no place where some other restriction is supplied by the context of the 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". So the point that he's making there is that the rules of private international law don't just operate so as to designate a foreign law in relevant cases. Of course, they also have the consequence of disapplying New Zealand law to that same case if the relevant transaction is, according to the relevant choice of law rule, governed by foreign law. That's the point of them. And what he says is, of course Parliament can, if it chooses to do so expressly, dislodge or disrupt that ordinary process, but where it hasn't done so expressly, that's the way we must proceed. And I'll come back to *Irish Shipping Limited Commercial Union Assurance Co plc [1991] 2 QB 206 (CA)* when I get to a later point in my submissions, but the point is that Lord Justice Staughton much more recently expressly accepts that exactly the same approach should be applied to third party rights against insurers legislation.

The further and final point that I make under principle 2 is that in addition to as it were enabling us to properly construe legislative jurisdiction, the rules of private international law, respecting the territorial character of sovereign authority exerted by Courts, also delimit the extent of the Courts' powers in relation to persons and subject matter abroad save where Parliament has expressly provided otherwise and that's the whole point really of the *Société Eram Shipping Co Ltd v Compagnie Internationale de Navigation* [2003] UKHL 30, [2004], 1 AC 260 which I shall come to in a minute since it deals centrally with the effect of the proprietary consequence of the charge when it's applied to subject matter abroad. And in my submission when properly analysed that case is on all fours with our own. So that's principle 2, the conflicts principle.

Principle 3 then simply seeks to work out the consequences of principle 1 and 2 when applied to subject matter jurisdiction, to subject matter which is situate abroad and the submission is that the Court, the High Court lacks subject matter jurisdiction in these proceedings simply because section 9 operates by way of a charge over the proceeds of the policy. Those proceeds are situate in Australia and the Court may not trespass on the jurisdiction of a foreign state by exerting jurisdiction over them and of course that was the ratio of the judgment of the Court of Appeal which I come here today to defend. So the

principle is best found in the judgement of Lord Bingham in the *Société Eram* case itself which is in bundle B in the very last tab which is tab 18. This is a case as has already been noted in argument today which is concerned with the operation of garnishee orders but in my submission on analysis the garnishee order situation is really identical in substance to the situation with which we're faced here because in the garnishee – in the first place the Court, the Court's powers in relation to the awarding of garnishee orders, at least in the United Kingdom, are statutory as to the judgment records. But secondly, if you think in substance about what is happening in a garnishee order situation here is an underlying liability owed by the – by a defendant on a judgment to a plaintiff and the comparison here would be the third party claimant Ludgater and the underlying person alleged to have caused the loss, namely Atco. But what the garnishee order enables you to do is to obtain execution over an asset and that asset is a shows in action which arises solely because another party here the bank but in our case the insurer another party owes a debt to the person against whom enforcement is sought and in my submission that is in substance the same situation with which we're faced in this case. The problem in *Société Eram* which *Société Eram* addressed directly is well what if that shows an action is not situated in England but is situated abroad and Lord Bingham, all the laws of appeal deal with this point in concurring ways but I need take you for this purpose only to the judgment of Lord Bingham in the passage where he deals with extraterritorial jurisdiction which is in page 274 of the appeal cases or 343 in the bundle. The first thing that he says is, what we have to do is to distinguish between personal jurisdiction and subject matter jurisdiction and he expressly approves the dicta of Hoffman J, or the ratio in fact of the judgment of Hoffman J as he then was, in *Kennon v Donaldson* and just pausing there, in my submission that's the first answer to the submission made by my learned friend where he says, oh well, so long as you're satisfied that Gerling is subject to the personal jurisdiction of the Court, nothing else matters, that point was precisely considered by the House of – the Judicial Committee of the House of Lords and their answer was, yes it does matter. The fact that the bank is subject to our personal jurisdiction is not the end of the case if the assets are situate abroad. And he then goes on over the page to distinguish the position in relation to garnishee

orders from the quite common position of the grant of a worldwide Morava injunction against a defendant but here – and in so doing he approves the explanation of Nicholls LJ, as he then was, in *Babanaft International Co SA v Bassatne* [1990] which is one of the first decisions of the Court of Appeal in England which developed the worldwide Morava and what Nicholls J, letter C on page 275, was very concerned to distinguish what he was doing from a proprietary order and he said –

ELIAS CJ:

Did you mean Bingham?

MR MCLACHLAN QC:

No. With respect Your Honour, at page 275 in the appeal cases Lord Bingham is citing with approval –

ELIAS CJ:

Sorry, thank you.

MR MCLACHLAN QC:

– the dictum of Nicholls LJ in *Babanafte*.

ELIAS CJ:

Yes.

MR MCLACHLAN QC:

And the point made by Nicholls LJ with which Lord Bingham approved is that well this kind of order, an order made directly against a personal defendant, doesn't attach those assets. It does not create or purport to create a charge on those assets.

BLANCHARD J:

It simply freezes them.

MR MCLACHLAN QC:

That's right and it imposes, Justice Blanchard, a purely personal obligation on the defendant, the underlying defendant, on our hypothesis Atco, which by its terms, and this is now clear in the standard form order in New Zealand as well, has no application to third parties abroad precisely because of the kind of concern about extraterritorial jurisdiction with which the Judges were so concerned. And so he concludes at the – in the third line of paragraph 24 on the same page, a garnishee order, he says you can return to very basic principles, "A garnishee or third party debt order is a proprietary remedy which operates by way of attachment against the property of the judgment debtor. The property of the judgment debtor so attached is the shows in action represented by the debt of the third party or garnishee to the judgment debtor." And as a result of that he says over on the next page in paragraph 26 that we, it is contrary in principle, I can pick it up. I better read it a little earlier up actually. He says on line 4, "In practical terms it doesn't matter very much whether the House rules that the Court has no jurisdiction to make an order or the Court has a discretion which should always be exercised against the making of an order in such a case but the former seems to me to be the preferable analysis, i.e. it has no jurisdiction, since I would not accept that the Court has power to make an order which if made would lack what has been legislatively stipulated to be a necessary consequence of such an order."

BLANCHARD J:

What do you mean by legislatively stipulated?

MR MCLACHLAN QC:

The, the legislature when creating the remedy of a garnishee order specifically stipulated that it was to operate as a charge.

BLANCHARD J:

Oh, I see, yes.

MR MCLACHLAN QC:

And in my submission, that's on all fours with the position under section 9 of our legislation. And he says, lower down, "If, contrary to my opinion, the English Court had jurisdiction, objections to exercise them would be very strong on the grounds of principle, comity and convenience. It's contrary in principle to compel a bank to pay out money owed by a customer if its liability to its customer is not reduced to the same extent". And the discussion in which Your Honour Blanchard J engaged this morning, again, in my submission, precisely demonstrates the same kind of problems could arise here. "If there is a debt due under this contract of insurance, it's a debt owned by Atco which the liquidators of Atco are entitled to have and to deal with, subject only to the operation of the law binding upon them or some other intervention of the legislature at the place where the siters of those assets is to be found". So the question, then, is, well, is this asset then situate in Australia, and the view taken by the Court of Appeal was that it wasn't really necessary to start delving into some of the apparent conflicts between the authorities on whether one was concerned with the residence of the debtor or the place where the debt was payable, because whatever view you take of that question of law, you get to the same answer in this case, because there is simply no basis for siting this debt in New Zealand. It is a debt payable by an Australian insurer to an Australian insured. The principal place of residence of the Australian insurer is in Sydney, and that's also the place where, in the ordinary course of business, it should be paid. And so I could take Your Honours to the authorities on this point. Perhaps I should just spend a moment, but in my submission it really doesn't matter too much which view on that question you take. If I can just take you to *Dicey* first, a passage for which I am not personally responsible, and that is in volume E at tab 7 page 92. It's mauve. Paragraph 22-026 at the top of page 92. As part of the treatise, *Dicey* is stating the rules to be applied to determine the situs of particular kinds of property, and here he's dealing with ordinary debts. "The general rule is that, subject to the exceptions set out below, a debt is situate in the country where the debtor resides". And then lower down starting with "Nevertheless", the editors make the point that "the possibility that the English Court may take jurisdiction against a non-resident defendant" – which, of

course, is our situation which we're considering at the moment – "does not make a debt situate in England if the debtor is not resident here, and the same is no doubt true with regard to a foreign Court, so the result is that enforceability and situs do not fully coincide. A debt will not normally be situated in a country if it's not enforceable there, but the fact that it is enforceable does not necessarily mean that it's situate there". So I mention that point because in some submissions made to you this morning, my learned friend suggesting oh, well, if you decide that you've got in personam jurisdiction against Gerling, that makes the debt situate in New Zealand to that extent, or if you decide that Gerling has some presence here, that may make the debt situate here. And in my submission, that's not the case. My learned friend referred you this morning to the decision in the New York Life case in bundle A 2.23, and if we can just look very briefly at that, because there is a passage in the judgment of Lord Aitken following that to my learned friend took you, which shows that the ratio is not at all as broadly cast as my learned friend would have it. It's page 121. Lord Justice Aitken, as he then was, is making the point, well, what about an insurance company that's got offices everywhere, does that make the debt situate everywhere? And after the passage to which my learned friend took you this morning, he comes down on page 121 to say, towards the bottom of the page, "It may well be quite possible", he said, "in those circumstances the same debt was charged in every country, and I can well understand", he says, "that the insurance companies may find themselves in a considerable difficulty when they have to solve the problem to whom they are to make payment" – exactly the problem with which we are here concerned – "and therefore I think, in such a case as this, it may be necessary to adopt some further principle than the simple principles which I have applied". And the principle he applies is, "in construing the contract to see where the primary obligation to pay is", and he says, "in this case, it's quite clear the primary obligation to pay is to pay in London, because it's in pounds sterling, and the contracts actually say that they're to pay a sterling sum in London". So whether or not, in my submission, you adopt – and the same, just while we've got bundle A with us, I should mention the Cambridge Credit judgment in the New South Wales Court. It's of particular interest because it is actually concerned with section 6, the New

South Wales equivalent of our own section, and the report is in tab 16 of volume A at page 161. And the problem with which the Judge was concerned with in that case was, well, what if there are a whole host of insurers, none of them are in Australia, how then do we approach the matter? And the answer that he gives is that in that event, situs is supplied by where, in the course of ordinary business, the debt should be paid. And we have that at the bottom of page 74 column 721 in the Australian New Zealand insurance cases reports. And again, by way of conclusion, just before the heading the claim statute barred on page 74, 723. So the point here is that Sydney is both the place where the debtor resides, which is the ordinary rule, and if there were any doubt about it, it's also the place where the debt would be expected to be paid in the ordinary course of business. And so whichever rule you apply, you get to the same result. So I doubt I think, without the need to take you back to what Dr F A Mann said about the distinction between personal and subject matter jurisdiction, which is set out on page 9, I dealt with the submissions made there about why it is that our situation is on all fours with the situation applied in *Societe Eram* in relation to a garnishee order. And I need to add only that my learned friend's reliance upon that other well-known treatise of private international order Cheshire is, in my submission, misconceived. He says oh, well, of course you can depart from the general rule, and cites the example of specialties such as negotiable instruments and the like. The plain fact of the matter, Your Honours, is that when Cheshire comes to consider any voluntary assignments by operation of law, it is clear that a strict situs rule is applied, and the authority that is cited is *Societe Eram*. So this is not something which can be, as it were, watered down, where what you're concerned with is a statutory imposition of a charge which results in the involuntary assignment by operating in law of the shows in action to a person other than a person who would otherwise be entitled to its benefit. And the fact that the insurance contract permits the insurer, at its election, to pay on behalf of the insured does not change the place of payment under the contract from Australia to New Zealand. And finally on this point, and I'm now on page 11 paragraph 11 of my written submissions, lest it be thought that the approach I'm taking is, in some way, old-fashioned, particularly in view of the ever-increasing closer relations, economic and legal, between Australia and

New Zealand, let me just make the point that it is clear that both under the current legislation for enforcement of judgments and the legislation, or the treaty obligations which the two states have assumed to enhance that legislation, the position will still be the same. It will not be possible to enforce a judgment which has an in rem effect over movable property situate in the other state. Let me just make that good. There are better, clearer copies of the relevant provisions in this new bundle E, the mauve bundle. The current legislation applicable between the two countries is still the reciprocal Enforcement of Judgments Act 1934, which has been extended to New South Wales. Section 6 deals with cases where judgments made must be set aside, and one of the key reasons why a judgment is to be set aside is if the Courts of the country, the original Court of known jurisdiction. Subsection 3 of section 6 on page 54 in the bundle tells us how we establish jurisdiction for this purpose. It sets out a rather narrow set of criteria, and in B it requires that where the action is in rem and the subject matter is movable property, the property in question must, at the time of the proceedings, be situate in the country of that Court. And exactly the same reservation continues to apply, or will continue to apply, under the new regime, which, subject to Parliament's deliberations, we eagerly anticipate –

BLANCHARD J:

It's going to get its first reading this week, isn't it?

MR McLACHLAN QC:

I can't confirm the precise Parliamentary timetable, but certainly a Bill has been prepared and is in the House, Blanchard J.

BLANCHARD J:

It looked pretty likely from the provisional order paper.

MR McLACHLAN QC:

Well, I'm grateful for that, and it only serves to confirm my point that I'm presently on, which is set out in article 8(b) of the treaty itself, which is, of course, the international obligation pursuant to which both states will act.

Article 8(b) on page 68 says that registration may be set aside on the basis of the property in question was not, at the time of the proceedings before the Court, situate within the territory of the party, and category B is judgments in an action in rem where the subject matter is movable property. In my submission, the expression "judgment in an action in rem" means no more – it's not a defined term – it means no more than that the subject matter of the action is proprietary, and what is a charge over the proceeds of an insurance policy if it's not a proprietary claim. That is the whole purpose of section 9(1). Would that be a convenient moment, Your Honour?

ELIAS CJ:

Well, we normally go on 'til four, but I was going to raise a couple of matters with you, one being – how much longer do you think you'll be Mr McLachlan, because it may be that we should take a break in order to conclude without hurrying too much, because I am conscious that we have to have a right of reply, as well.

MR McLACHLAN QC:

I am in your hands, Your Honour. I respectfully submit that I plan to deal with the rest of my submissions more shortly than the ones which I've already covered, and I'm confident that I can finish today and, for other reasons, I'd be most grateful if it were possible to finish today.

ELIAS CJ:

Do you expect to be, what, about another half an hour?

MR McLACHLAN QC:

I could say not more than 45 minutes.

ELIAS CJ:

We will take a short break, because there is a matter I want to raise, as well. Mr McLachlan, the matter I needed to raise that until you said so a few minutes ago, I wasn't aware that there was some insurance company behind the appellant, and a close relative of mine is associated, I think, with that

company. I'm never quite sure of these matters. I believe he's a director of the company that owns that company, I think. I would need to find out if it's material, but it occurred to me that you could take instructions on that and whether I need to make further disclosure of it over the afternoon adjournment.

MR McLACHLAN QC:
I am grateful, Your Honour.

COURT ADJOURNS: 3.28 PM

COURT RESUMES: 3.46 PM

MR McLACHLAN QC:
Your Honour, we are grateful for the short adjournment, because it's provided us with an opportunity to take instructions, and I am instructed to confirm that our clients have no objection at all to Your Honour continuing to sit on this case –

ELIAS CJ:
Thank you.

MR McLACHLAN QC:
– and we're grateful for the information.

ELIAS CJ:
Thank you.

MR McLACHLAN QC:
I've dealt at some necessary length with principles 1 to 3 because, in my submission, they are fundamental and, indeed, if you're with me on them, they're dispositive of this appeal. And the consequence is that I can deal much more shortly with the remaining two principles, principle 4, the foreign contract principle, and principle 5, the personal jurisdiction principle,

and indeed I propose really only to refer you to any additional matters that are not in my written submissions and otherwise to invite Your Honours simply to study the written submissions that have already been filed.

So, let's start though with the foreign contract principle or the question of legislative jurisdiction under section 9. The first point to make, of course, is that these categories, subject matter jurisdiction and legislative jurisdiction, are not as it were hermetically sealed, because although I have been talking about the operation of the charge over foreign assets being constrained upon the jurisdiction of the Court, it also follows that if that is so it is, without express words to the contrary, outside the legislative scope of Parliament, unless they've said otherwise, and so there is that link. But the additional point made and developed in part 4 of my submissions is that where, as here, a statutory section is silent as to its territorial scope, then the appropriate approach to adopt, as I've already submitted, in the case of a statute concerned with the establishment of civil liability or relief in respect of civil liability, is to apply the ordinary rules of the conflict of laws as an aide to statutory construction, and for that purpose the tax cases on which so much attention was paid in the High Court really, in my submission, were of very limited assistance to this Court, we don't need to go to them, it's quite clear, for example, in *Agassi* the UK parliamentary provision which was under consideration there contained very specific rules which contemplated the international situation in the sense that they specifically said, "If you do this, if you come into the United Kingdom and do this activity", in that case engaging in sport, it was specifically a sportsmen's regulation, "then you will be liable to tax." And really that tells us nothing, whereas here we have a general civil liability which is not confined territorially and where the, in my submission, the best guidance is to be found in private international law. And I said, before the short adjournment, that I wouldn't take you then to the judgment of Lord Justice Staughton in *Irish Shipping v Commercial Union* [1991] 2 QB 206 (CA), but I ought to take you to that now, very briefly, because he makes exactly that point in relation to third party rights against insurer's legislation. And it's in volume A at tab 23, and the relevant page is 294 in the bundle, 219 in the Queen's Bench reports, under the heading,

helpfully for this purpose, “The Territorial Scope of the Third Parties (Rights Against Insurers) Act 1930” the UK legislation. So, just pausing –

ELIAS CJ:

Sorry, what page again?

MR McLACHLAN QC:

294 in the bundle, Your Honour.

ELIAS CJ:

Thank you.

MR McLACHLAN QC:

So, just pausing there, the significance here is that Lord Justice Staughton is considering the scope of a statute of the forum, it’s a statute of the UK Parliament. And what he says is, “One has to enquire”, right at the second to last line on the page, “what connecting factor as laid down by the rules of the conflict of laws is applicable to the legal dispute before the Court, even if you,” as he says immediately above it, “Given a rule of UK statute law or for common law,” and then secondly, “Which country’s system of law is relevant to the dispute.” And then he goes on at D on 220, “Where, as in this case and most others,” I’d insert parenthetically, “(including section 9 of our Act)”, “the statute in question lays down no rule as to the connecting factor for its application, the answer must be found in the common law rules of conflict of laws.” So, in fact, in *Irish Shipping* Lord Justice Staughton finds that he doesn’t need actually to answer the question with which you're concerned today, but I rely on the decision for the proposition which I’ve just cited, which is to say, well, if you have a statue of general application concerned with civil liability, the way in which you construe its territorial ambit is by applying the general rules of the conflict of laws, and that means that you have to start, you do have to start, in my submission, by characterising the nature of the claim, because unless you do that you can’t know what manner of beast it is with which you're concerned and therefore what rule may be applicable to it. And my submission is that the existence of a third party claim and its right

against the insurer is contractual. Now I accept, and there was some discussion with my learned friend from Justice Anderson this morning, I accept, obviously, that the determination of the underlying liability of the insured would be governed by the law applicable to that liability, which might be tortious, or it might be something else. Of course, in *FAI v Blundell* it was an equitable claim, which could be governed by a different applicable law, but the question whether or not there is a right to sue an insurer flows from the contract for the reason stated by Justice Moore-Bick in the second *Through Transport* case to which you were referred by my learned friend this morning, at bundle C, tab 2, page 33, paragraph 25, but it's set out in my submissions at page 16, that what you've got here is a shows in action which is subject to certain inherent limitations and those inherent limitations are the limitations of the contract. No contract, no shows in action. And we have this distinction between the law governing the question whether you can have a right of action at all and the law governing the question whether there's some underlying liability of the insured to the third party claimant, very clearly stated in the judgment which my learned friend relied upon, which is the recent judgment in the English Court of Appeal in the *Maher v Groupama Grand Est* [2009] EWCA Civ 1191, which is in volume C of the authorities, tab 10, starting at page 209, the relevant passage starting at 209. Now it's right to observe my learned friend said that I would, out of an abundance of completeness, hand up to Your Lordship, and I provided a copy to him, the most recent supplement to *Dicey,* which notes this up, and so I shall do so. And it's right to observe that both the law on jurisdiction and the law on choice of law in Europe, including the United Kingdom, has now moved on and there are pan-European rules, which is something of course that you can do if you have a treaty basis for it, but not otherwise, dealing with these issues. But on this point, in my submission, what the Court of Appeal says is equally applicable here. They start at paragraph 8 and they say, "The key question is one of characterisation," and they cite for that purpose the well-known three stage test in *MacMillan Inc v Bishopsgate Investment Trust Plc* (No 3) [1996] 1 WLR 386, in fact they cite Lord Justice Auld's judgment, or Justice Staughton –

BLANCHARD J:

I'm sorry, where are we at the moment?

MR HUNT:

We are in the judgment of the English Court of Appeal in *Maher v Groupama Grand Est,* which is in volume C of the bundle of authorities, tab 10, at page 209, Justice Blanchard, paragraph 8, and I'm simply seeking to make good the proposition that whatever law might apply to determination of the underlying liability of the insured to the third party claimant does not affect the proposition that the question whether the third party claimant can sue the insurer is governed by the law applicable to the contract of insurance. And you have that over the page in paragraph 11 of the judgment, on page 210, where the Court expressly accepts, in a running down case, a Dutch motorist insured by a German insurer running down a British pedestrian in Strasbourg. The issues relating to the driver's liability would be determined by French laws, the place where the accident occurred, but issues relating to the insurer's liability under the policy, determined by reference to German law, being the law of the contract, is the proper law of the contract, and then this is the critical sentence, in my submission, "For the same reason German law would also determine whether the injured pedestrian had a direct right of action against the insurer." That question, is there such a right, is to be determined, says the Court of Appeal, by the law applicable to the contract. And, in doing that, of course they're simply following a consistent line of English authority, through *Youell* and through *Transport*, with which my learned friend dealt this morning. And in my submission, and I shan't take you to all of the argument on this, because it's set out in my written submissions, the same position has been reached in Australia as a result of the judgment of the High Court in *Sweedman*. Although that case was not directly concerned with third part rights against insurers, it's clear, in my submission, from the judgment, and I mention the passages in my written submissions, that the High Court was approving a line of authorities which had said just that in relation to our case, and thereby disapproving a rival line of lower Court authorities to the contrary.

I thought that I might, just before I leave this section, spend a moment on a case which the Court of Appeal at least regarded as dispositive on this point, against me. And that's their own judgment in the *FAI v Blundell* case, of course a case which on any view was not an international case but which, nevertheless in view of the Court of Appeal, gave relevant guidance as to the correct characterisation of the claim. And that is in volume B at tab 3 of the authorities bundle. I made a series of submissions about the relevance of that case in paragraph 22 of my written submissions, and in view of the lateness of the hour I don't propose to repeat those. But I would, if I may, like just to supplement them in the following way.

The issue in *FAI* was whether or not, in circumstances where the underlying claim was not barred by limitation, it was possible to set up the right under section 9 as being in some way a separate statutory cause of action, and thereby to bar the claim by the operation of the rule in the limitation Act about statutory causes of action, and the Court of Appeal said, "No". Let me make it quite clear before you today that I don't descent from the judgment, I don't seek to argue that it was wrongly decided but the choice in FAI was not, in my submission, a choice between contract and tort, rather it was a choice between imposing a limitation period on the basis that section 9 created some separate statutory cause of action and accepting that there was no limitation where there was no such limitation on the insured's underlying liability. It's quite clear in my submission, that was the choice because the contractual limitation period under the contract of insurance could not have expired. I make this point at footnote 4 in paragraph 22.

Now I accept that this is not a separate statutory cause of action. It is a form of proprietary relief to secure better execution where two conditions are present, a contract of insurance and an underlying liability which can be recovered, or protected by virtue of that contract of insurance. Indeed, in my submission, the very facts of FAI show the fallacy of a tortious characterisation of this kind of claim because in that case, as I mention, the claim was equitable, it wasn't tortious at all. Indeed, the underlying claim brought against the insured by the third party claim and could be in any form

of cause action and through transport the underlying claim was contractual. Sole constant, in terms of the claim against the insurer, is the existence of an insurance contract. Without the existence of an insurance contract there can be no claim against the insurer and every third party insurance statute, of course, proceeds on that basis. So it's the sole common ground that we can find between all the various mechanisms that have been used to try to achieve this. Not all of them of course impose charges, as we've seen.

So let's just reverse the facts for a moment and try and apply the problem of FAI in reverse. Imagine that there's a claim by an Australian third party claimant against, for the sake of argument, my learned friend's insurers NZI in New Zealand under section 9 in respect of a contract of insurance with a New Zealand insured who is manufacturing goods for export. Right, just the reverse of our situation but the claim is sought to be brought here six years, more than six years, after the claim should have been brought under the contract, the statute barred according to our Limitation Act. Now in my submission, it's statute barred according to our Limitation Act and remember that limitation, as between at least New Zealand and Australia, is substantive and not procedural by virtue of section 28B of the Limitation Act. It is statute barred because the contract of insurance is the relevant connection to determine that New Zealand law applies and because the insured can't any longer claim under the policy of insurance, neither can a third party. Third party can't be in any better position than the insured can, that's exactly what section 9(7) says.

That would be so even if the lex loci delicti, the law of the place of the tort, said in some way that an insured could still be under a liability to a third party because there was some longer limitation period, or none. So in my submission, FAI does not stand as the Court of Appeal seems to have assumed it did as authority for the contrary proposition. Of course there's no question in this case but that this insurance policy is governed by Australian law. My learned friend says at one point in his written submissions, that disputes between Gerling and Atco in respect of exports to New Zealand, maybe subject to New Zealand law but in my submission that's to conflate and

this is, with all respect, a vice with pervades the approach, that's conflate the determination of the underlying liability of the insured with the question with which we are solely here concerned which is the existence of the claim against the insurer. The answer to it is given very aptly by Evert J in the *Wanganui Rangitikei* case, still reported at that stage without an "h" in the title, at (a) tab 3 page 48. We don't need to turn it up but what Evert J simply says at page 604 in the report is that the whole guiding principle behind the determination of applicable law for a contract is that a contract should have one applicable law.

Of course, if my learned friend's submissions were right, it would carry with it the consequence that otherwise a global liability insurance contract of the kind of which we're here concerned, could well have well over 300 concurrent governing laws if the insured was exporting to every country in the world. I say that, bearing in mind that many countries are divided into separate jurisdictions within a federation. So I don't think I need to spend any more time on principle 4, beyond the additional points that are already made which I rest on in my written submissions which support, in my submission, that logical consequence that the question whether such a right exists is to be determined by the law applicable to the contract and the law applicable to the contract is Australian law and that the consequence of that therefore is that section 9 does not apply to non-New Zealand contracts of insurance which, to come back to the beginning, is the whole point of, the only purpose of this foray for present purposes but a very important purpose.

Let me then turn finally to the fifth principle which is the personal jurisdiction principle. Really, in this case, in my submission, the application of the personal jurisdiction principle merely follows, as night follows day, from the earlier principles which I've already expounded. The reason for that is as follows and may most succinctly be supported by reference to an early judgment of Hardie Boys J which, although at first instance, was judicially approved by the Privy Council in the *Cockburn v Kinzie Industries Inc* [1988] 1 PRNZ 243 (HC) which is in bundle A tab 17 and the relevant passage starts at page 245. Here he gives a very learned, if I may say so, disquisition on

what the basis of personal jurisdiction actually is. This was shortly after the Court had been vested with new powers under the then new High Court rules, of course now superseded which enabled service to be effected out of the jurisdiction as of right, or without leave, in certain cases.

What he says is, "At common law" and I'm reading from line 7 in the last paragraph on page 245 in the report, 169 in the bundle. "At common law, the Court's jurisdiction and actions in personam is territorial and when it exists, is of right. It is territorial not in any sense concerning the cause of action but in the sense that jurisdictions is restricted to those on whom the Court's process can be served within the territorial limits. Subject to particular exclusionary rules, set out in page 78 of Cheshire but not relevant for present purposes..." and pausing there, highly relevant in our case, "...it is a universal jurisdiction within those limits." Over the page, "The Common Law Procedure Act extended the common law jurisdiction discretionary power to serve out of the territorial limits, now found in rules 219 and 220 of our High Court rules. This is the assumed jurisdiction. The expression emphasises that by allowing the service, the Court assumes jurisdiction over the defendant."

So the first point is that it's service which determines personal jurisdiction and only service. Here we are concerned, the service with which you are concerned is service effected on Gerling in Sydney, pursuant to the original leave given by Christiansen AJ which you find in volume 1 of the case on appeal. The application which was made is at tab 5 and the order which was made on the application is at tab 6. So no jurisdiction in respect of service here, the service is effected abroad and it is effected under rule 220. Now, granted it is that rule 20, or so Hardie Boys J decided, was in very broad discretionary terms but the one restriction which he recognised on rule 220 was the one to which I've already adverted, namely the exclusionary rules referred to in Cheshire.

What we've done, is to reproduce for you in bundle C, the relevant passage from the 10th edition to which he was referring and then in the following tab to the current passage which is not materially different, except to the extent that

it further supports my point. If you look at tab 13, you have the 10th edition and at page 244 in bundle C, C13, 244, Cheshire says that, "The first kind of limitation that affects the jurisdiction of the Court is limitations affecting the subject matter of the issue." That passage appears in identical terms in the 14th edition on which my learned friend seeks to place so much reliance, at page 246. An example is given of the kind of way in which that rule might apply and the last example given is *MacKinnon v Donaldson Lufkin and Jenrette* [1986] Ch 482, the very case on which I rely for submitting to Your Honours that, in this case because the charge relates to property outside New Zealand, it is outside the subject matter jurisdiction of the Court.

So my point is a very simple one and that is if, as I respectfully submit, there is no subject matter jurisdiction. The position cannot be improved through personal jurisdiction because you get back, even under the broad discretion of rule 220, to exactly the same limitation and if, as the courts below insisted in seeking to do, you nevertheless analyse the position under rule 219, under which of course no service was effected in this case. That gets you nowhere because if you're with me, the claim is contractual on any view, this was not a New Zealand contract and it was not to be performed here, all of the relevant obligations were to be performed in Australia. I don't propose, in view of the lateness of the hour, to spend much time on an argument which I've consistently submitted is wholly irrelevant to the question before you which is this amorphous test of presence on which my learned friend places so much reliance.

That set of arguments was rejected by the Court of Appeal and it was rejected because since jurisdiction depends solely upon service, the only relevant question before you is whether this particular service is one upon which the Court can properly assume jurisdiction and all of the rest of the factual inquiry with which my learned friend would encourage you to engage is irrelevant. Even if it were relevant, on our submission and for the reasons set out on pages 23 and 24 of the submissions, it gets him nowhere because none of it establishes that my clients were doing business in New Zealand at the time of the loss if which we deny, that's a relevant time.

So, in conclusion then, I propose simply to do two very short things. Firstly, just to make a short submission derived from paragraph 2 of my written submissions about why all of this makes sense, as a matter of principle. Then finally to conclude and, as it were, to answer the concern raised by Justice Anderson this morning, as to why in my submission Gerling's approach is not a tactical but on the contrary, makes sound practical sense in the circumstances of this case.

ANDERSON J:

I wasn't being pejorative when I suggested that.

MR McLACHLAN QC:

I know that Your Honour but, nevertheless, there are sound practical reasons why this case ought not to proceed in the way that the plaintiffs propose to pursue it. So very, very briefly, the points that I made in paragraph 2 support the proposition that we should approach this in a contractual framework. As Staughton LJ said in the *Irish Shipping v Commercial Union* [1991] 2 QB 206 (CA) case, "For most of life's activities insurance is not compulsory." Manufacturers are not obliged to take out product liability insurance covering third party claims or otherwise, nor are insurers such as my client, obliged to provide it. When they do, what this does is to create this additional asset in the form of the shows of action represented by the insurer's liability to pay the claim which may or may not be present in other cases.

Now, when the insurance is written here, Parliament has acted to provide for a mechanism by way of a compulsory deposit to ensure that persons who may have claims are not left without recovery and that's section 12 of the Insurance Companies Deposit Act but, on the other hand, where the only link with New Zealand is that it is alleged that a tortfeasor is liable to a third party claimant as a result of the occurrence of damage here, the third party claimant has a choice. It can sue the alleged tortfeasor here, subject to the requirements for long-arm jurisdiction being met, or it can sue the insured tortfeasor domicile but if the third party wishes to pursue a direct claim against

the insurer which is the sole claim with which you're here concerned, for proceeds under the insurance contract, it is in my submission quite reasonable that the third party claimant should do so at the place where those proceeds are payable and it's for that country to determine the extent to which and the manner in which such a claim maybe pursued, not least because of the need which I traversed earlier, to ensure that an appropriate distribution from a limited fund is made to all those persons who may have valid claims in respect of it.

When issuing a global product liability insurance, the insurer does take the risk that its insured may claim against it in respect of liability wheresoever arising but in my submission it does not at all follow from that, that the insurer itself is thereby submitting to the jurisdiction of the Courts of every country in the world where one of its insured products may happen to turn up. On the contrary, the insurer would normally expect, in the absence of some express provision to the contrary, to be sued at its domicile. The consequence, if my learned friend's submissions were accepted, would be that Gerling is to be treated as being present and amenable to suit by a third party in every country in the world where a product of its insured is used and damage is alleged to result and that, in my submission, would be an exorbitant test of infinite inequity for which there is no authority in the cases.

So finally, on the reasons why, in my submission, our approach is practical as well as principled. The first point is the point to which His Honour Justice Anderson already adverted this morning which is, this is an important point of principle which could well have considerable practical ramifications in other cases in other parts of the world in which Gerling is active. The decision will also impact on other pending cases and there's material in the evidence on that. In my submission, I've taken you to this letter, it's Ludgater and NZI, in fact in this case who have acted tactically when they were told at the beginning, perfectly reasonably, if you've got a claim you come in here and prove it and if you want to sue us here you can provided you get the leave of the Court and by the way there may be a policy of insurance that's held by Gerling, you better be in touch with them. So in other words right at the outset

before this action was commenced other options were available which my learned friend solicitor's just decided not to pursue for whatever reason. And the practical point here is that Gerling's task of defending this action in its own name when Atco is in litigation will inevitably be more difficult – sorry, in liquidation. In liquidation, will inevitably be more difficult despite the generous provisions for Trans-Tasman evidence taking if it was to be pursued in New Zealand. Now I haven't sought to layer this case with further details in relation to the underlying claim in tort because in my submission that's really not relevant to the issue before you but it is in my submission relevant to bear in mind that there is no strict liability in relation to the manufacture of ordinary goods of this kind. My learned friends know that they need to establish that the goods were negligently manufactured and on any view the manufacture by Atco took place in Australia, this is a company in liquidation. The witnesses who might have relevant evidence to that will primarily be in Australia so this is not one of those cases like *Distillers Co (Bio-Chemicals) Ltd v Thompson* or *Amaca Pty Ltd v Frost*, both of which are in the bundles, where the real gravamen of the complaint was a failure to warn. My learned friend has put in a failure to warn prayer in his draft statement of claim or pleading in this draft statement of claim but it's difficult, in my submission, to attach much weight to that in circumstances where with what we're concerned with here is a little bit, a capacitor, which is subsequently inserted by somebody else, we don't know who, into a light fitting and which then ultimately turns up in a warehouse in New Zealand according to the allegations that are made. So the central question on the underlying litigation will be negligent manufacture and then causation and that will be easier to try in Australia and there is, of course, no prejudice to my learned friend in this regard because of the existence, the accepted existence of a similar remedy in New South Wales under section 6 of their Act which would enable their position to be protected quite apart from the equal but different remedy in the Corporations Act. So for all of those reasons, in my respectful submission, this honourable Court ought to dismiss this appeal and on behalf of Gerling we seek such an order together with an order for our costs in this Court including, subject to the Court's dealing with it, any costs wasted in relation to the further evidence application. Unless I can assist Your Honours further those are the submissions for Gerling.

ELIAS CJ:

Thank you Mr McLachlan. Yes Mr Hunt.

MR HUNT:

I'm not sure what the Court –

ELIAS CJ:

We'll sit on, Mr Hunt.

MR HUNT:

Thank you. I will try and therefore be brief. What I might do, if Your Honours please, is direct the Court to passages that I won't traverse in detail but they can be noted insofar as they seem to be relevant and I will try and go pretty much seriatim through points in the way that Mr McLachlan has addressed them to you. He started by reference to the letter and he concluded indeed by reference to the letter from the liquidators of Gerling and you have that at page 249 of the case volume 3. Liquidated Atco, correct.

ELIAS CJ:

Yes.

MR HUNT:

A little early for that and the only point I make about that is this is a letter obviously following service of the demand. Atco had gone into liquidation in July 2006 by which time, insofar as the charge had become effective, it had occurred already and that was the case whether it be in terms of section 9 or whether it be in terms, for that matter, of section 6 of the New South Wales legislation. The next point I wanted to make concerned the reference that Your Honours have made to the instructed decision of the Supreme Court of Canada in *Tolofson*, that's at bundle B. Your Honours were taken to it and I want to take you back to something within the balance of that case that is, in my submission, relevant. It's bundle B, tab 7 and page 74 of the bundle, page 304 of the transcript, decision. You were taken to the earlier initial part of

La Forest J analysis, his critique and reformulation on the earlier page. Where I want to draw Your Honours' attention to is what is said from line A on page 304 through to 305, line H, because for completeness the analysis of the extent to which Courts develop or have developed rules governing and restricting the exercise of jurisdiction overseas and those circumstances in which they need to be able to exert such jurisdiction are addressed and in the last part of that passage on page 305 what appears to me to be an observation of sound common sense at line F and following, "Ordinarily people expect their activities to be governed by the law of the place where they happen to be and expect that concomitant legal benefits and responsibilities will be defined accordingly. The government of that place is the only one with the power to deal with these activities. The same expectation is ordinarily shared by other states and by people outside the place where an activity occurs." Yet the states routinely applied their laws to activities taking place elsewhere. Confusion would ravel, certainly that's the case but the analysis talks about the way in which jurisdiction is controlled by virtue of real and substantial connections and it is one of Ludgater's submissions here that the insurance contract has a real and substantial connection to New Zealand because it covers liability established worldwide.

I think Mr McLachlan suggested that I rely perhaps wholly or primarily on the underlying liability regarding the incident, that's the tortious liability. I do, in fact, also rely on the underlying reality that we are concerned with a contract which, as I just said, has, in the words of La Forest J, real and substantial connections with New Zealand and it must be the case that it does given that it gives worldwide coverage for Atco's negligence.

Your Honours were also referred to the judgment of Staughton J in *Irish Shipping* and I too was about to do that. That authority you will find at bundle A, tab 23, and again I won't go through it. You were taken a moment ago to the concluding remarks at page 296 of the bundle, page 221 of the judgment, as regards connecting factors and this is at line F through to the beginning of line H. The observation that it is not necessarily right but the same connecting factor must apply to all rules of law inactive in one statute

and the intention of Parliament could be frustrated because they were open to parties choosing a contact of insurance to exclude the operation of section 1 by choosing a foreign proper law and then the observation that there was a limit to the important point, many activities are not those that require compulsory insurance. Well, that's a sound enough observation. I don't have any difficulty with it but in terms of footnoting how much of this passage is significant I would start Your Honours where you left off at line D on page 295 where His Honour Staughton LJ starts by saying, there is a considerable field of choice and then describes how that choice is to be dealt with so that passage through to the end of page 296 I refer Your Honours to.

The question of the approach to be taken to this Act and its interpretation extraterritorially does raise this issue. It was mentioned that this is an Act passed by far-sighted legislators in 1936. The position in 1936 was a very different one than that of which we are concerned today and I won't take Your Honours to it except to highlight where it is but the question of how an Act comes to be applicable to legislation over time is one that is addressed by Professor Burrows in his statutory interpretation text which is at tab D 24 and he, and it's also addressed in paragraphs 8.13 to 8.16 of my synopsis so I just refer the Court to those submissions. And also the reality, one of the realities being touched on by His Honour Robertson J in the article that you'll find also in tab D 30 or volume D, tab 30, that's an extra judicial discussion of the connections between Australia and New Zealand. As I said volume D, tab 30. That are connections between Australia and New Zealand in particular in relation to insurance and I refer Your Honours to the introduction at page 309 and also at page 312 the discussion about the changes that occurred in New Zealand's insurance and I won't take Your Honours to it but at the time that this Act was passed we were in a regime where there was something in the order, according to the Parliamentary debates, of having 24 domestic insurers. Now the landscape as far as insurers are concerned is considerably different than that and this is the milieu, if you like, this is the environment in which this legislation is now having to be considered as to whether it does or does not create the rights that Ludgater argues for. And one, in that context, does return to this situation. You have far fewer insurance companies in

New Zealand. You have far more insurers that are domiciled overseas and unless section 9 is to be applied in the way Ludgater contends, there is going to be very much reduced application for, for this section. And that would apply not just to parties in the position of Ludgater and Atco but also to those parties in the position of Ludgater vis á vis New Zealand domiciled defendants.

So I return from that to the question here and that is really the challenge that I put out to the submission that's been made. Having come to New Zealand can Gerling come halfway? Can it only come halfway? It agrees to indemnify but its proceeds of the insurance are back in New South Wales and I suppose again slightly rhetorical point but if section 9 doesn't have this application you might as well say that there is an arbitration clause requiring the matter to be dealt with in Sydney. You might as well say there's some other obligation to pursue the client because section 9 will be robbed, in effect, of its effect. And you might as well also acknowledge, or one will have to acknowledge, that if the insurer happens not to be in a location such as Gerling is where there is the option of the use of section 6, then the policy is not in fact enforceable against the insurer at all by a plaintiff where the insured happens to be insolvent.

So that is, that was the point I made before about the inability to confine the reasoning to this case alone. It must apply more broadly than that. Reference was made to Ludgater's argument, moving on, to extraterritoriality and essentially, as I listened to Mr McLachlan, he submitted to you that you should pay no regard and it was irrelevant to look for the purposes of determining this case on the way the House of Lords dealt with the questions of extraterritorial application in the *Clark* and *Agassi* cases. I won't take you to the decision but I do refer you to my submissions which deal with the point and as I have said in them there are no provisions in the legislation, the taxing legislation, which indicate that it is to have extraterritorial effect but the Court asked itself the question, who is it intended to cover? Who is in its grasp and had no difficulty in concluding that it was a statute which was intended to have that extraterritorial effect. The point is not that it's a tax case. The point is as

to the way in which the Court applied itself to interpreting what the intentions of Parliament were.

Mention was made of the decision in *Sweedman*. You will see that the Court of Appeal touched on that case in considering what the characterisation of the claim should be. They did not consider that the *Sweedman* reasoning was apposite for the reason that the statutory provisions were quite different and they thought not able to be applied in the way that I understand Gerling would suggest can be done here. So I rely on the Court of Appeal's reasoning there.

The next point concerns the submissions about rule 209 and perhaps 220. I wouldn't want it overlooked that while our concentration here has been on the extent to which the claim is tortious and the jurisdiction of, or the provisions of rule 219 in that regard have been relied on, 219(a) is the tortious provision, there is also a basis upon which it could be said that a contractual characterisation is appropriate and here I refer to my submissions at paragraph 7.18 to 7.20 and that very briefly you do have rule 220 in the bundle. It's at bundle D, tab 15 and I am specifically referring to rule 219(b)(iii) which reads, "Where the contract sought to be enforced or rescinded, dissolved or annulled or otherwise affected in any proceeding." Now I won't read the rest of that introductory paragraph, "Was to be wholly or in part performed in New Zealand." That is the basis on which proceedings may be issued outside of New Zealand without leave just as a tortious claim may be. Now if you accept that performance of the contract in New Zealand would be required if the insurer were to, as is the normal course, take over the reins of the defence and pay the policy there is an arguable basis for regarding –

ELIAS CJ:

It doesn't have to, though.

MR HUNT:

I beg your pardon?

ELIAS CJ:

It doesn't have to.

MR HUNT:

It doesn't have to –

ELIAS CJ:

It's not performance of the contract. Is the point I am putting to you.

MR HUNT:

The defence might, that's true, the defence itself might not be performance of the contract although what we do know is that that is what happens. It's not in the contract, it's part of another right that exists. The payment of what is required if the liability is established would be because that's the insuring clause –

ELIAS CJ:

But that's different.

MR HUNT:

I would submit Ma'am that if the insuring clause requires the insurer to indemnify Atco against any liability then if Atco, let's leave aside the insolvency situation for the moment, if Atco were to be found liable performance of their obligation in New Zealand would require payment of whatever the judgment was and in that sense that would be in the very broad words of 219(b)(iii), the basis for the contractual analysis.

BLANCHARD J:

It couldn't require the payment to be made in New Zealand though? It's an Australian company, entered into the contract of insurance in Australia. It could be performed simply by tendering payment in Australia?

MR HUNT:

Ah, if the insured was left to defend the claim itself you mean? Or maybe without is that what you –

BLANCHARD J:

Well the insurance company doesn't have to defend the claim.

MR HUNT:

No the – no it doesn't, leave aside –

BLANCHARD J:

That's just a practice?

MR HUNT:

Yes.

ELIAS CJ:

And if it doesn't, and the judgment doesn't get enforced directly against it, if it doesn't indemnify there's a breach of contract, you sue on that, don't you?

MR HUNT:

You sue on the breach of contract if it's not paid, indeed you do but that's not –

ELIAS CJ:

But you said in your submission that you talked about enforcing the judgment meaning that –

MR HUNT:

Yes.

ELIAS CJ:

– the judgment you tort and it's not quite accurate I think.

MR HUNT:

Well I go to the words of the rule. The – well it would be the contract sought to be enforced, the words I'm relying on, "otherwise affected in any proceeding." It's a very broad phraseology, "otherwise affected in any proceeding, was to be wholly or in part performed in New Zealand."

BLANCHARD J:

But it isn't.

MR HUNT:

I'm sorry, Sir, I didn't hear you.

BLANCHARD J:

It isn't.

MR HUNT:

Well I'll let the submission rest Sir. I would have thought there was a basis for saying that there is. The submission at paragraph 26C of Mr McLachlan's synopsis takes issue with what is said to be a conflation of the jurisdiction of courts and the law applicable. That in part, there were two reasons for the submission being made in the way it was and one of them was that in relation to the provision in the contract regarding the determination of disputes other than those in North America that I took the Court to earlier, and that clause which said that disputes in those circumstances could only be dealt with in Australian Courts seems to give rise to the flip side of the coin which was that other disputes could be dealt with by the law of other places. That was that point and the other reason for the observation was based on the decision of Associate Judge Lang as he then was *Lovett & Ors v Crown Worldwide* and this is, I'll just give the reference, it's B17 and the page reference is at pages 295 and 296, paragraph 56 to 64 and then again at page 322 of the bundle, paragraphs 180 to 182 and also paragraph 190 and 191. Now this is a case where Crown, a New Zealand warehouse operator was insured by an Australian insurer and it was sued because a fire burnt its warehouse down in Hornby and Crown was a party, joined as a party to the proceedings because

there was some dispute as to indemnity and these passages that I'm referring to relate to the fact that the Court readily accepted that such issues as to indemnity in terms of the contract would be dealt with or could be dealt with in the New Zealand Courts as part of the case otherwise involving the liability of the defendant.

The phrase that has been used, and I'm not just repeating it because it's such a gorgeous one, about exorbitant jurisdiction of infinite ubiquity is one way in which Ludgater's position can be criticised as if that is the case. The answer to that criticism, in my submission, is that which the Law Commission in England gave as regards the choice of or the characterisation, that is simply this, where it is only exorbitant and it is only ubiquitous if the insurer elects to give unqualified coverage for liability in any part of the world, which is the case here. If the insurer chooses not to limit the liability as in this case was done for North America, and chooses not to insure that the liability is established in any particular place such as where it is resident or some other place which it is no doubt satisfied that decisions and processes will be satisfactory, then it does leave itself exposed to the possibility of being liable in all places where it's insured carries on business and to the law of those places including the direct recourse provisions that exist if they are there. So that's the response I make to that.

Perhaps finally the – I haven't touched on, I meant to but stopped before lunch, the additional evidence about which there hasn't really been much further discussion. From my perspective that feeds into the submission that Gerling was present in New Zealand in more than just its capacity as a trade credit insurer but in its capacity in two other capacities. Firstly, that it wrote general insurance policies via New Zealand brokers for New Zealand risks. Secondly, it wrote insurance policies in Australia for New Zealand risks under the last scheme. Now that is what is being relied on in addition to the evidence that the Court already has regarding Gerling's presence as a registered company until May 2006 which of course post-dates the event which gives rise to the liability. So we haven't touched on that and I don't

want to dwell on it anymore but that is the, that is why it was alluded to and why it is being relied on.

And then very summarily and finally the practical issues that are addressed in Mr McLachlan's conclusion paragraph. There are four points here, or five I should say. Well, as to point A, I can only agree with the first sentence. It follows as night follows day. If the court has no jurisdiction then Gerling is entitled to have the proceedings set aside, that's what we're here to determine. The important principle is not quite so easy for me to acknowledge or discern. What is the principle? That Gerling will not be liable other than where its location is. That Gerling will not be liable to the direct recourse statutes of locations where the risks it insures exist. I'm not quite sure what it is. Obviously it's important but probably in a commercial sense. I'm not sure what the principle might be.

B, I needn't touch on. Obviously the Court's decision will impact on pending cases in New Zealand. C, well I don't want to get into a tit for tat about what is tactical and what's not but you can see from the response of Atco's liquidators the set of hurdles that were going to have to be surmounted by Ludgater if it chose to issue proceedings in Victoria and this process, at least at the start, seemed to be a more expedient way of doing that and avoiding that.

The fourth point is that Gerling's task of defending the action when Atco is in liquidation would inevitably be more difficult in New Zealand. It's not apparent to me how much more difficult Gerling's task would be than it might have been if Atco had not been in liquidation the same position would attain.

And as to difficulties which really turns us more into a conveniens type argument I refer Your Honours to the, again to the *Lovett* decision where exactly those considerations were addressed and not found to be pivotal because of the ease with which evidence can be taken abroad and the closeness of Australia.

The fifth point was prejudice. Well there is the acknowledgement from Gerling and that's obviously depending on the outcome of this case. Something that Ludgater will have the option or would have the option of pursuing but that it so happens that in New South Wales there was a direct recourse provision is fortuitous and if that were not the case and Ludgater were not in a position to access the insurance proceeds by virtue of the charge then that would amount to the windfall which this provision was designed to avoid occurring. Those are my submissions Ma'am.

ELIAS CJ:

Thank you Mr Hunt. Thank you counsel for your submissions. We'll take time to consider our decision in this matter. Thank you.

COURT ADJOURNS: 4.53 PM