IN THE SUPREME COURT OF NEW ZEALAND SC 19/2013

[2013] NZSC Trans 22

BETWEEN **BFSL 2007 LTD (IN RECEIVERSHIP) AND ORS**
BRIDGECORP LTD (IN RECEIVERSHIP AND IN LIQUIDATION)
BRIDGECORP MANAGEMENT SERVICES LTD
Appellants

AND **PETER DAVID STEIGRAD**
Respondent

GARY KENNETH URWIN
Intervener

Hearing: 17 October 2013

Court: Elias CJ
McGrath J
Glazebrook J
Gault J
Anderson J

Appearances: M J Tingey and D J Friar for the Appellants
B P Keane QC and J Anderson for the Respondent

IN THE SUPREME COURT OF NEW ZEALAND SC 21/2013

[

BETWEEN **ERIC MESERVE HOUGHTON**
Appellant

AND **AIG INSURANCE NEW ZEALAND LIMITED**
First Respondent

TEC SAUNDERS
S J MAGILL
J M FEENEY
P THOMAS
C E HORROCKS
P D HUNTER
Second Respondents

Hearing:	17 October 2013
Court:	Elias CJ McGrath J Glazebrook J Gault J Anderson J
Appearances:	A J Forbes QC and P A B Mills for the Appellant M G Ring QC and B J Burt for the First Respondent A R Galbraith QC and A E Ferguson for the Second Respondents

CIVIL APPEALS

MR TINGEY:
May it please your Honours, counsel's name is Tingey. I appear with Mr Friar.

ELIAS CJ:
Thank you, Mr Tingey. Thank you, counsel.

MR FORBES QC:
May it please your Honours, I appear with my friend, Ms Mills, for the second appellant, Mr Houghton.

ELIAS CJ:
Thank you, Mr Forbes, Ms Mills.

MR KEANE QC:
May it please the Court, Keane and Ms Anderson appearing for the respondents on the Steigrad appeal.

ELIAS CJ:
Thank you, Mr Keane, Ms Anderson.

MR RING QC:
May it please your Honours, I appear with Mr Burt for AIG.

ELIAS CJ:
Thank you Mr Ring, Mr Burt.

MR GALBRAITH QC:
And I appear with Allison Ferguson for the second respondents in the Houghton appeal.

ELIAS CJ:
Thank you Mr Galbraith, Ms Ferguson. Counsel have arranged the seating, have they, to suit themselves? You're content? That's fine. Mr Tingey.

GAULT J:

Just before you begin, Chief Justice, if you don't mind.

ELIAS CJ:

Oh, I'm sorry.

GAULT J:

I think it should be disclosed. I would have thought it's well apparent that I have a relative as a member of the firm of which one of the partners appears for the appellant in the second appeal. I request whether there's any objection.

MR TINGEY:

No, Sir.

ELIAS CJ:

Thank you. Yes, Mr Tingey. Can I just ask counsel what order they want to be heard in?

MR TINGEY:

Yes. I was going to appear first and then Mr Forbes and then Mr Ring and then I think it's undecided whether it will be Mr Keane first or Mr Galbraith.

ELIAS CJ:

All right. We will wait and see.

MR TINGEY:

Thank you, your Honours.

The fundamental issue here is the effect of section 9 of the Law Reform Act, and really the issue the Court needs to determine is what is the effect of the charge on insurance monies under that section prior to that claim being determined and quantified by judgment. Effectively, Bridgecorp's position is as the section says the charge applies immediately from that point and all the effects of a charge taking place occur from then. The respondent's position is that prior to the date of liability being determined the charge does not prevent payments being made under the policy which deplete and may exhaust all the insurance monies, which are the limit of

the policy. So effectively it's a question of timing of effect of the charge and when that comes into play.

Now, the fundamental analysis as outlined applies irrespective of the nature of the alternative claim, the later claim, I'll say, in time. In this case, the issue is in relation to defence costs which are incurred first because of the timing of the policy, but in my submission the analysis is the same no matter what is the other competing claim. If the other competing claim was a charge, another charge claim like Bridgecorp's claim, the issue would still be the same. The issue is what is the effect of the charge prior to it being quantified by judgment. This is because if the respondent's position is accepted and the charge does not descend until crystallisation, then it can't prevent another charge being claimed. So the effect of it being insurance money – sorry, defence costs is irrelevant to the issue, but I'll want to explain it in more reasons later on.

McGRATH J:
When we get to looking at cases like *Chubb Insurance Co of Australia Ltd v Moore* [2013] NSWCA 12.

MR TINGEY:
Like *Chubb*, yes. In the Court of Appeal, with respect, the Court ignored the wording of section 9 and didn't consider the fundamental words which considered when the charge takes place. They didn't consider at all the priority provisions of section 9 being the provisions of section 9(3) and section 9(6), and those are fundamental, in my submission, to analysis of timing that the charge applies. They also did not take into account the policy objectives inherent in section 9 of amending the priority order of claims, and they failed to recognise that the Act changed the common law position in relation to priority. So under the section 9 provision, priority is determined by order of when the facts took place which gave rise to the claim rather than the arbitrary time of determination of liability and judgment of the underlying claim. It's fundamental to the analysis. I think it's accepted that if the charge has descended, crystallised, or come down, there's a variety of different words used in the number of cases and the policy limit is then met, the defence costs cannot be paid as the charge prevents payment and the insurer is bound to keep whole, the insurance monies intact for the charge holder under the section. In doing so, it's Bridgecorp's submission that that does not amend the obligations under the insurance policy. Rather, it reflects the effect of section 9, which is in the terms of priority. Section 9

undoubtedly does affect the contract of insurance in relation to priority, but not other matters.

ELIAS CJ:
You'll go on to expand on that?

MR TINGEY:
Yes.

ELIAS CJ:
Yes, I'll wait until you do that. Thank you.

MR TINGEY:
So that's a summary of the appellant's submissions. I was now going to turn briefly to the facts at hand, which are the subject of the dispute of the Bridgecorp appeal. While this is primarily an issue of the effect of the section of legal issue, the context and facts are important as they demonstrate the principles of the Act and how it plays out. They also demonstrate that the inability of the directors to have an advance of defence costs without an advance from the insurers is a consequence of their own failure to effect sufficient cover for defence costs rather than any nature of defect in the Act or any policy concern with having a blind indemnity and cost claim as is in this case. Conversely, the facts demonstrate the importance of considering the claimants' interests and why that's paramount under the Act. The claimant in this case is Bridgecorp companies which is effectively seeking to recover money for the investors in Bridgecorp who have lost $500 million. Now, there have been a number of decisions of a number of Courts in relation to this matter already in relation to criminal matters. Those criminal matters have been concluded and convictions entered. In sentencing, Justice Venning commented in relation to Mr Steigrad. He failed to perform the statutory duties cast upon him as a director and was bordering on considerable negligence and possibly bordering on gross negligence. Now, the relevance of that is, I suppose, to take into account the strength of the underlying claim which the Act, section 9, protects. Obviously the civil proceeding which underlies these claims is still proceeding. Proceedings have been ongoing for well over a year, but they are far from being resolved. The directors effectively had two policies in this case. The first was a statutory liability policy with an excess cover of $2 million and the second was the D&O policy which had a limited liability of $20 million.

The statutory liability policy effectively only covered defence costs. That's because it covered defence costs plus fines. Now, the fines couldn't be indemnified because of the provisions of the Companies Act, and it's clear from the underlying agreed statement of facts that that was intended to be the policy which would be used to meet defence costs. Unfortunately for the directors, the $2 million under that policy has been exhausted by the criminal claim that has taken place to date. So now the directors are effectively seeking through the insurance recourse to the D&O policy to pay their costs of the civil claim, and the directors had admitted in the statements of facts that despite the level of coverage for $20 million, the payment of those defence costs of the civil claim in addition to the criminal claim has the potential to significantly erode coverage. So effectively, take away a large part of the pool of money that may be payable to Bridgecorp and the investors in it.

McGRATH J:
Mr Tingey, you've made a comment that was in your written submissions at 2.6 that the statutory liability policy was primarily intended to cover defence costs. Now, that's something you've just said in passing without any elaboration. I'm not sure exactly what it is you're saying, nor whether it's got any relevance to our interpretation obligation under those policies.

MR TINGEY:
Well, the reason that is is because it covered fines, effectively, which couldn't be covered because of the provisions of the Companies Act.

McGRATH J:
Yes.

MR TINGEY:
So in effect it could only cover defence costs.

McGRATH J:
So the primary notion is in relation to the fines. It's not in relation to the SL policy as against the D&O policy?

MR TINGEY:

No. The statutory liability policy would not respond to the civil claim because it only covers fines and defence costs, and the evidence is that the directors –

ELIAS CJ:

Criminal defence costs.

MR TINGEY:

Criminal defence costs.

McGRATH J:

In the regulatory area, the regulatory statutes?

MR TINGEY:

Yes. What's more, the directors, when seeking that policy, had regard to their likely defence costs and were actually advised to take further cover but for whatever reason settled on the $2 million figure, so the directors had regard to what their costs may be, took out a policy to cover.

McGRATH J:

This is what I'm not sure, this sort of extra colour to it. Is this really relevant?

MR TINGEY:

Well, it goes to the policy issues of whether it's unfair for the directors to be deprived of the D&O insurance cover of $20 million for defence costs, because we say there's no problem with that and this case demonstrates that because the directors could and, in fact, did obtain a separate pool of cover to cover their defence costs. So there's no injustice in a policy perspective from saying deprived of defence costs under the D&O claim.

GLAZEBROOK J:

But aren't you saying they only covered criminal defence costs? The directors' liability only covered criminal defence? Sorry, have I misunderstood? Because I can understand the argument if you say they could have had a bigger cover which would have covered both their criminal defence costs and their civil defence costs.

MR TINGEY:

Yes. The statutory liability cover would have covered both their defence costs, civil and criminal.

GLAZEBROOK J:

All right. So you mean in fact it only covered their criminal defence costs?

MR TINGEY:

Because the criminal exceeded two million.

GLAZEBROOK J:

That's fine. I had understood it to be a more general defence cost so that it would have covered both civil and criminal liability.

MR TINGEY:

The statutory liability would have covered civil and criminal liability defence costs.

GLAZEBROOK J:

Right.

MR TINGEY:

Returning to my submissions, the difficulty with this case is effectively the coverage, the $20 million, is going to be eroded. Now, that's only a small fraction of the amount claimed. The amount currently claimed in the civil proceedings following amendment is $342 million. But if a substantial part of the $20 million is eroded, then of course that means there's only going to be a minimal return for investors even if they're successful. Of course, they can have regard to the directors' personal assets but they're unlikely to be significant.

ELIAS CJ:

On your argument, when would defence costs ever be paid?

MR TINGEY:

Well, if the claim was made which is less –

ELIAS CJ:

Yes. It's only going to be if the liability doesn't exhaust the amount of the insurance.

MR TINGEY:

So in this case, if the directors obtain sufficient cover, say they have a book of $500 million and they have $20 million cover so the first problem is they didn't have enough cover, but often directors will take out cover sufficient to cover the claim that is made. Of course, if the cover is sufficient then there's no problem. Defence costs can be paid out. The other way they can do it is they can have a separate policy, as they did in this case, a statutory liability to cover defence costs.

ELIAS CJ:

But this policy did cover both. You'll take us to the policy at some stage, will you?

MR TINGEY:

I can do, your Honour, yes.

ELIAS CJ:

Well, I'd be assisted by it, because I'd just like to be sure of the implications of your argument, which is – which may do more destruction to the contractual scheme than I think may be necessary under section 9. I have some anxiety in that area, because even if we were with you in terms of the prohibition on paying out under the insurance once notice is received by the insurer, I remain to be convinced that it means the defence costs lose any priority or that the other liabilities get priority.

MR TINGEY:

I'll come on to that because I understand your Honour's question, I think. My case is that if the cover is exhausted it's exhausted and nothing can be paid. Now, the Court of Appeal, which I'll come to in some detail later, put it a different way. My learned friends put it a different way. My learned friend Mr Ring does, to say there's separate pools of money, effectively, under the policy, notional pools for each.

ELIAS CJ:

Well, even if that's not accepted, shouldn't it be part of the event? Shouldn't it be prorated in the end?

MR TINGEY:

Well, the Act specifically deals with that because the Act says in relation to claims against a policy that's determined by the time the facts take place –

ELIAS CJ:

Well, I understand that argument but I have some substantial queries about it but perhaps carry on with the development of your argument and I'll ask you when we get to that point.

MR TINGEY:

Yes, your Honour. I suppose in answer to the last question, the last part of it is the directors could have been protected had they taken out a separate pool of cover. So they could just have taken out a defence cost claim.

ELIAS CJ:

But is that a proper argument? Because we are dealing – we are not really dealing with what they might have done. We're dealing with this policy and this provision and how they fit together.

MR TINGEY:

Yes. So I think my answer to address the policy issue is there a problem with the Act if you apply it this way because it means you can't have defence costs and I appreciate that would be disadvantageous if defendants couldn't have a course to defence costs under insurance. But that's not the necessary result of this claim being determined in Bridgecorp's favour.

GLAZEBROOK J:

Can I just check? It seems to me that the arguments on both sides at the moment don't, aren't looking at pro rata. They either say section 9 changed the priorities so first in time gets it in terms of first claim arising gets it, and the other side says, no, common law priorities still arises and that's whoever manages to get judgment first.

MR TINGEY:

Essentially, who exhausts the policy first.

GLAZEBROOK J:

Yes.

MR TINGEY:

No one suggested pro rata in this case.

GLAZEBROOK J:

So in fact the common law priority is whoever gets it gets it.

MR TINGEY:

Dash for cash.

GLAZEBROOK J:

Yes, dash for cash, and what you say happened with the section 9 reform was that it is now whoever is first in time in terms of the claim arising.

MR TINGEY:

Yes, that's absolutely right, your Honour, so it's when the charge crystallises, who wants the charge crystallised, then that fixes their position as the concept of a charge. It gives you a priority over the insurance monies and it effectively stops parties taking up the cash. But, I think, no party suggests pro rata.

ELIAS CJ:

No, but on your argument, you'd never get to the defence costs because on your argument, as a matter of fact, and this is something that I do have a query about, because it does seem to me that it's arguable that the same claim triggers both insurance obligations, just as the liability to the company is not, does not have to be ascertained under the terms of the legislation why should not the fact of negligence or whatever you're saying or breach of statutory duty which you say triggers the crystallisation that you're contending for, why does that not also crystallise the defendant's claim?

MR TINGEY:

I think that comes down to the definition of defence costs and policy. I understand now where Your Honour is coming from. It may be worth addressing that now because I hadn't intended to come on to that.

ELIAS CJ:

If it suits you best to deal with it later, that's fine.

MR TINGEY:

Volume 2, page 140, defence costs are defined, paragraph 2 at 142 defines defence costs. It means the costs incurred the investigations settlement of any claim, representation, defence or settlement of civil or criminal action and the investigations. So it's different. The costs have to be incurred for the claim to be made in relation to defence costs. They're not a charge claim, because they're not a claim by a third party so they don't fall within section 9.

ELIAS CJ:

I understand that, yes.

MR TINGEY:

So until the costs are incurred then the policy is not triggered.

GLAZEBROOK J:

Your answer to the Chief Justice's question is you just should either take out separate insurance or you should just take out enough?

MR TINGEY:

Yes.

GLAZEBROOK J:

And if, in fact, you have an overinflated claim, well, that might have a charge initially. If, in fact, it turns out not to be the case, then of course there'll be money left over to pay the defence costs.

MR TINGEY:

Absolutely. Of course, under the policy, defence costs are just advanced, too, so that's particularly relevant. Rather than paid, they're advanced.

GLAZEBROOK J:

Yes.

ELIAS CJ:

Yes. So this would also affect the insurer's conduct? I'm just thinking more generally of other, similar, cases. This would also affect the insurer's ability to conduct a defence?

MR TINGEY:

Well, the insurer can take over the conduct if it wishes to under these policies, but it won't –

ELIAS CJ:

Yes, but under your argument they couldn't.

MR TINGEY:

Well, they could but they wouldn't have their costs met from the policy if it was determined subsequently that a claim had already exhausted a policy, so they would be meeting those costs on their own, whatever the position, but if it was determined in this case the claim was worth more than $20 million, then they couldn't deduct those costs.

ELIAS CJ:

What effect would that have? Will it have practical effect?

MR TINGEY:

Well, no, because the insurer can form a view. They're effectively standing in the shoes of the defendant. They can elect whether to defend or not and take an economic decision whether it's in their interests to defend, having regard to the fact that they're going to liable up to the limit of the policy. Now, if they believe the claim has no merit, they will defend. If the claim has merit and they conceive it's worth more than the limit of the policy, it actually may make them resolve the proceeding and the fact the effective is likely to mean they're more likely to settle the claim because the converse position, if they can – not quite in this case, but if they can fund a defendant to run their claim, they can know they can give the money to use the defence costs and they can use all the limit and it doesn't expand their liability at all under the policy because their liability is capped at the $20 million. In fact, it's in their interest to advance defence costs to delay a claim, to make it more difficult for the plaintiff, because whatever happens they can only be liable up to the $20 million, up to the limit of the policy. There's no penalty for them, which is unlike most parties because there's no interest. It doesn't accrue on the limit at all until liability is determined, so there's an incentive on insurers to fund defence costs. If your Honours find against me, the position is that they can fund defence costs to fund that to wear out the plaintiff and still they can only be liable for the cap under the policy.

ELIAS CJ:
What I'm trying to get a feel for is whether the position that you're contending for is going to have flow-on effects in ways that may not be before us here.

MR TINGEY:
In my submission there's not. In my submission there's no problem with the position that's been reached. I suppose the effect may be that it's less likely that people will want composite policies. They'd rather have separate pools for defence costs. So there's some articles in the bundle saying that's what's happened in practice because of the decision, that directors are now taking out separate policies or having separate limits contained in the same policy. But there's no fundamental problem with that. It's just a different type of policy being raised. It doesn't inhibit the ability to obtain insurance. It's just slightly different in nature.

So Bridgecorp's case on the policy under the Act and the effect of it was really all around the wording of the Act. The section says that the charge arises on the happening of the event giving rise to the claim for the damages or compensation. There's no mechanism to postpone that claim. The language is clear and direct. There's no two-step process which I'll come on to, but a number of cases effectively have found a process of the charge coming down and then a process of crystallisation. The section specifically contemplates that liability may not be determined and still says the charge attaches. That's the words, notwithstanding that liability has not been determined. Thus on the date when the facts take place, the charge descends immediately.

Now, that interpretation of section 9 is consistent with the rest of the wording of section 9 and the particular subsections (6) and (3). I'll come on to more detail, but effectively the Court of Appeal's position which effectively said the claim is contingent and doesn't crystallise till later means that any claim can be paid first. Another charge claim can be paid until the liability is determined and in my submission that's inconsistent with the remainder of the section, section 3, subsection (3) which specifically sets up priority rules and this is this replacement of the common law priority of the dash for cash. It's also inconsistent with section 9(6) which prevents any other payments under the policy, including payments which the Court of Appeal would allow.

Now the interpretation I suggest that I say is consistent with the purpose of section 9, this Court's recognised that obviously the purpose of section 9 is for the interests of the claimant, not the insurer and significantly this Court has also recognised in *Ludgater Holdings Ltd v Gerling Australia Insurance Company Pty Ltd* [2010] NZSC 49, [2010] 3 NZLR 713 (SC) that a further purpose is to amend the date of order of payments. So to change the priority rules and again the Court of Appeal didn't focus on that at all.

Also I say that the Bridgecorp's contention is consistent with the well recognised case law on this and in particular Chief Justice Myers' decision in *Pattinson v General Accident Fire & Life Assurance Corporation Limited* [1941] NZLR 1029 (SC).

So now I turn to considering more detail in the Court of Appeal's decision, which is in tab 5 of my bundle of authorities. Tab 5 of Bridgecorp's bundle of authorities bundle 1. Now there is a reported version of this decision but it is slightly different because it was recalled after it was reported. So I will refer to this version rather than the reported version.

ELIAS CJ:
Why?

MR TINGEY:
It was to do with the other appeal I think. To do with the nature of the order made. Perhaps my learned friend can help about that. I think partly the costs as well in that case was amended.

ELIAS CJ:
Well do you say that this version was recalled?

MR TINGEY:
No this is the final version.

ELIAS CJ:
Oh I'm sorry, thank you, I'm sorry.

MR TINGEY:
That's what I'm referring. The reported version is not the final version.

GLAZEBROOK J:

Yes. That's tricky, yes.

MR TINGEY:

Sorry, I was just explain I wasn't –

GLAZEBROOK J:

No, no I quite understand, it's just the citation might be slightly tricky but it may a major part. You can still refer to the –

MR TINGEY:

It's almost identical, it's only minor amendments at the end.

GLAZEBROOK J:

So it's easy enough to refer to the reported version for the decision.

MR TINGEY:

For the decision, yes.

GLAZEBROOK J:

Thank you.

MR TINGEY:

So the version I refer to it's tab 5. I was going to first, by just going through section 9 which to Court of Appeal sets out at paragraph 13. Now the Court of Appeal – the key phrase is subsection (1), 9(1), which sets out the charge and you'll see in italics the Court of Appeal have highlighted some of the words. What's significant is they haven't highlighted the words which in my submission are important which are when the charge has effect. So five lines down the charge arises on, "The happening of the event giving rise to the claim for damages of compensation and notwithstanding the amount of such liability may not have been determined." So in my submission those are the key words because they are the words which identify when and how the charge descends. The Court of Appeal make no further reference to those words in the decision.

Then subsection (3), I've already referred your Honours to. This is the priority section, "Every charge created by this section have priority over all other charges

affecting the said insurance money and where the same insurance money is subject to two or more charges by virtue of this part of the Act those charges shall have priority between themselves in the order of the dates of the events of which liability arose or if such charges arise out of events happening on the same date shall rank equally." So that's the only time we get into a pro rata, if they arise at the same time but there's no contention in this case.

ELIAS CJ:
Well as you say the directors aren't eligible for a charge under the –

MR TINGEY:
That's right.

ELIAS CJ:
Under the section.

MR TINGEY:
And then subsection (5), sorry subsection (6) is the next section I draw Your Honours' attention to that, "Any payment made by the insurer under the contracts of insurance without actual notice of existence of such charge shall to the extent of that payment be a valid discharge." So this is relevant. This is effectively a provision which allows an insurer to pay without notice of a charge and not have to repay. So they don't have to pay more than the limit of the claim. And again this subsection is not referred to in the Court of Appeal's decision despite its clear, in my submission, clear relevance to this and what is also significant about it is that it says it's without notice of existence of any such charge. So it's not – there's no concept of crystallisation, it's just the existence of the charge which is relevant to whether the insurer's let off.

The Court of Appeal then –

ELIAS CJ:
So when do you say that that notice was obtained in this case?

MR TINGEY:
That notice was obtained when a letter was written in 2009 to the insurers asserting the charge.

ELIAS CJ:

Mmm. Yes it's in your submissions and it's in the chronology.

MR TINGEY:

Yes 12 June 2009.

ELIAS CJ:

Yes.

MR TINGEY:

Now the Court of Appeal then refer to the purpose of section 9 in paragraph 15 of their judgment, sorry paragraph 14. The first purpose is if an insurance party becomes insolvent it allows the claim to be made directly and the second, it avoided the possibility that the insurance monies could be reduced or diverted entirely without meeting insurer's liability, by variation of the policy. So it's stopping the policy being amended. Now significantly the Court of Appeal don't refer at all to the other purpose of the provision as recognised by this Court in *Ludgater* to amend the priority of claim because that, in my submission, is the important point of this appeal.

Paragraph 19 of the Court of Appeal judgment on the next page, sets out the reasoning in the Court of Appeal and finding on two related points. They firstly find that section 9 does not apply to insurance made payable in respect of defence costs, even when cover is combined with third party cover. This is paragraph 19(a). And I'll come on to why they say that is but effectively why they say that is because the charge hasn't crystallised. So they say because Bridgecorp's charge hasn't crystallised, then section 9 doesn't apply to it because it hasn't been determined by the time the defence costs are due to be paid under the policy.

And then further they say, "Section 9 has limited effect, is not intended to rewrite or interfere with the contractual rights." And again I'll come onto that but I say that's wrong as well because I say section 9 quite clearly does change the rights, that's the whole purpose of it and it changed the rights in relation to priority which is the key concept here.

GLAZEBROOK J:

Can you just – are there priority aspects in the insurance policy itself? It's just that the priority rights were actually common law assumed so it's not necessarily

contractual rights. So that's why I asked the question was were there contractual rights?

MR TINGEY:

No there's no specific priority rights but I suppose the policy has to respond to the claim that's made until the limit is reached. So at the common law there's no – in common law –

GLAZEBROOK J:

So it's not specifically contractual.

MR TINGEY:

No.

GLAZEBROOK J:

Although the contract will presumably have been made on the basis of an understanding of whatever the law was.

MR TINGEY:

Yes and it's not apparent –

GLAZEBROOK J:

And we'll here from the insurance companies in respect of what they say that law was.

MR TINGEY:

Yes, well the insurer in this case does not take an issue with. Kiwi Air is not before Your Honours because they elected not take part in this.

GLAZEBROOK J:

No sorry I –

MR TINGEY:

Yes, AIG in relation to the Feltex matter.

GLAZEBROOK J:

And presumably it's the same sort of issue so...

MR TINGEY:

Yes, so there is no specific contractual terms but it's just a pool of money that covers both and then it's a dash for cash.

GLAZEBROOK J:

Right.

MR TINGEY:

Common law who had right, who got there first to extinguish it.

GLAZEBROOK J:

All right thank you.

MR TINGEY:

The Court of Appeal then, in paragraph 24, go on talk about the nature of defence costs. They say, at the fourth line, that defence costs are those incurred in defending the primary claim. Now with respect that's not correct because defence costs may or may not be related to a claim under the policy and as this case demonstrates, the defence costs of the criminal claim are covered by this policy but this policy doesn't respond to any fine that was issued in the criminal claim. So they arise independently, they're not primary or secondary, they're just both different types of claim that can be made against the policy. And so similarly, when the Court of Appeal say on the next line, "Mr Steigrad is liable to pay the defence costs and QBE's liability to reimburse him, will arise independently and precede the insurer's liability" is not right. In this case the criminal case may have been after the civil case. There may be another claim which is unrelated after where defence cost claimed. There is no primary and secondary point there, are just claims under the policy which are of a different nature with fourth and the same aggregate sum.

GLAZEBROOK J:

Sorry I have lost which paragraph you are referring to.

MR TINGEY:

24.

GLAZEBROOK J:

I was taking notes rather than the – I have it now thank you.

MR TINGEY:

So the fourth line starts, "Defence costs are those defined as those incurred in defending the primary claim."

GLAZEBROOK J:

I have got the point, I just did not have the paragraph.

MR TINGEY:

And then the Court of Appeal goes on and the remainder of that paragraph says, "Primary the provisions are included for the mutual, the parties' mutual benefit." Because I think as a result of incurring defence costs, Mr Steigrad may never incur a liability." Now that is, with respect also not right because incurring costs on a criminal claim, defence cost, is not for the benefit of the insured because they can't be liable under the policy; that is just money they have to pay out. So I mean the reason why this is important is, there is no real distinction in my submission between defence costs and other types of claims, they are just another form of payment that needs to be made under the policy. Now and then I was just turning the page to paragraph 26 of the Court of Appeal's decision and in my submission, this is really their key finding in respect of this first part. And they say that section 9 cannot apply because Bridgecorp is not entitled to statutory charge of insurance monies payable by QBE to Mr Steigrad to reimburse his liability to pay defence costs incurred with the insurer's consent or otherwise, as opposed to a contingent liability for damages of compensation." Now in my submission, it is a fact that the Court of Appeal have said that the claim of Bridgecorp, as a contingent liability, and the charge hasn't crystallised that they come on to say later, which is really the crux of what they say.

ANDERSON J:

It's not so much contingent as it is indeterminate. Its value, it exists, but its value will not be known until disposal of the claim. It really raises the question of what risk is the insurer prepared to take, in paying out.

MR TINGEY:

Yes, so the insurer has the claim, Bridgecorp can see it is a claim for $350 million, they can take a view on whether they are going to pay defence costs or not, based on what they think the claim is worth.

ANDERSON J:

I am really just raising this so that the respondents can have time to consider it. But the – if costs are paid defending the claim that has been notified, then it seems to me that very plainly monies that are – where is the section. "Monies that are or may become payable in respect of the liability." So they are subject to the indeterminate charge.

MR TINGEY:

Yes and absolutely Your Honour. And that is why it says, "May become payable to deal with the fact that they are not determined at that point."

ANDERSON J:

Now this raises the question of risk management really by the insurer. Will there be enough left to meet the claim after costs have been paid, in which case they will say, "Yes well we will pay the costs." Or will there likely be a shortfall in paying the claim because we have paid costs in which case once the charge has been determined, it will be plain that the insurer has breached the charge.

MR TINGEY:

Well yes, briefed the charge but they will just be, they will just not be required, they will be required to pay the limit of the policy on the claim.

ANDERSON J:

That is right, under sub-section 4.

MR TINGEY:

So they can take an assessment of risk and they take the risk if they fund defence costs and the claim is determined to be more than the limit. And that is a risk that they can well bear.

ANDERSON J:

So the realities of it are fairly straightforward interpretation of the section and the commercial aspects of risk management.

MR TINGEY:

And if they want defence costs to be met separately, when they take out their insurance, they agree to have separate policies, so this is their policy with a

composite risk and they know the affect of it and they choose that and that is all manageable and pricing of the policy.

ANDERSON J:

There seems to be something fundamentally wrong in the theoretical proposition that an insurer could exhaust the policy defending an unmeritorious claim because the costs are really, the costs will really be incurred for the benefit of the insurer.

MR TINGEY:

Yes, so if Bridgecorp claims are completely unmeritorious and they spent $5 million on it, and the claim failed, they will be fine, they will be within the limit and the directors will have their costs met. It is only, as Your Honour points out, it is only in the condition that the claim succeeds for more than the amount, that a problem is incurred. So there is no real difficulty for an insurer in that position, it is just like a normal plaintiff really. A normal plaintiff is always in the position, that they are facing claim, they can decide whether to incur the costs in defending it or not. They can decide whether to pay it, it is just putting them on akin to a normal solvent plaintiff's position. So I was just going through the Court of Appeal's decision, I was up to paragraph 27. And the Court of Appeal then talks about, "Having a composite policy and says well that should make no difference." But of course in my submission, that makes a fundamental difference because there is only one pool of money. And they say in the final line, "That the charge attaches the balance that is available to meet third party claims after the defence costs' liability has been met." Now of course, in my submission that is wrong as well, with respect. And the reason that is wrong is because, and the reason why they say that is because they are saying, the liability hasn't crystallised and is contingent. Just on that, they do specifically say that is the issue but they don't really refer to that until later in the judgment, so it might be worth turning to that now, paragraph 45, where they really explain that in more detail. "In the present case, the statutory charge created by section 9 has not crystallised, it remains contingent, it will not crystallise until QBE becomes legally liable to meet damages or compensation." So that is the reason why they say it doesn't bite and that is why they say it is not in respect of.

ELIAS CJ:

And you say that that is contrary to the statutory provision?

MR TINGEY:

Yes the wording specifically says, “The charge arises at the time of the facts, notwithstanding that liability has not been determined.” And those key words are not considered by the Court of Appeal. It is in my submission the statutory couldn’t really make it clearer because it is a bit of an unusual concept to a charge fixing on an ascertained claim but they say it very clearly, “Whether or not liability and quantum have been determined.” So they address it clearly because that is what is necessary really to serve the purpose of the section, which is to preserve the money that the insurers have under the limited policy to pay out.

I was then going to turn to paragraph 31 and they refer to the decision of *Pattinson v General Accident”,* this is a decision from the Chief Justice Myers in 1941, so shortly after the Act. And they effectively distinguish *Pattinson* and say *Pattinson* was decided on different contractual context and does not support a general proposition to that effect. Now I will come to *Pattinson* later but in my submission that’s again, with respect, not correct. *Pattinson* is on all fours, the terms of the policy are the same. There was an aggregate limit for defence costs and for liability, in that case of two thousand pounds. So, in my submission *Pattinson* is on all fours with this case and as is a case of long standing authority cited by this Court and the High Court of Australia in *Bailey v New South Wales Medical Defence Union Ltd* (1995) 184 CLR 399 in relation to priority.

McGRATH J:
Cited by this Court in *Ludgater*?

MR TINGEY:
Cited by this Court in *Ludgater* and cited by the High Court of Australia, which I’ll come to in some detail, in the *Bailey* decision.

I now come to their second argument. So there were two legs. The second was the interference with contractual rights, which is covered from paragraph 36 onwards, and the Court of Appeal says that section 9 cannot operate to interfere with or suspend the performance of mutual contractual rights or obligations relating to another liability. Now with respect, in my submission, that too is wrong because that is, in fact, the only purpose of section 9 in this regard. It is to change the ability of the insured and the insurer to deal with funds once they are charged. So the comments by the Court of Appeal here will apply equally to another claim that relies on earlier facts as well as defence costs. The same reasoning necessarily applies.

So in my submission again, with respect, this is wrong because the charge affects the rights to choose or the insured and the insurer to choose who's paid first. That's precisely what they do, and they do that for the benefit of the claimants, and they do that for the benefit of the claimants in order of the facts in which their claims take place.

Then there's a quote from His Honour, Justice Lang's decision, which referred to section 9(3), but there's no specific comment about section 9(3) or its operation. In my submission, Justice Lang correctly noted that section 9(3) changes priority rules. That's why the concept of the charge was used. Property rights change priority, and the Court of Appeal ignored the statutory purpose of section 9(3) to change money, to divert money and change priority. So in paragraph 38 the Court of Appeal say that section 9 is largely procedural in nature and that it provides a mechanism whereby a third party claimant can access directly funds which an insurant – insurer is liable to pay its insured to meet the insurer's liability to a third party, but in my submission it goes much further than that because it changes priority, which is a substantive rather than simply a procedural change, and as this Court has recognised in *Ludgater* and as the High Court of Australia has recognised in *Bailey*, it creates a new right of action, it sweeps aside the existing concepts of charges and effectively stops money being paid out, the insurance moneys being paid out.

So I am going to turn to paragraph 44 of the decision which deals with the related appeal. In paragraph 45 they say in the present case section 9 have got crystallised, liability, until liability and cover have not been determined, and then finally in relation to the case I was just going to draw Your Honours' attention to paragraph 57, which says that Mr Houghton is not presently entitled pursuant to section 9 of the Law Reform Act to a charge of money payable to charter. So again it's determined by the timing in relation to the claim being made in a related claim. It says effectively that the charge hasn't arisen yet and that's fundamental, in my submission, to the Court of Appeal's analysis.

I was now going to turn to consider some of the authorities, only a handful of authorities in relation to the section, the first of which was the decision of the High Court of Australia in *Bailey* which is in the authorities, volume 2, at tab 14. Now I was going to firstly refer this case at page 445, or 290 in the bundle, where the Court sets out in some detail the nature and discusses the nature of the charge. I

should say firstly that the Australian provision is modelled on a New Zealand provision and I think for present purposes has the same effect. There are some slight textual changes between them but I don't think any of those changes have any relevance for the issue before Your Honours today.

And so I was just going to highlight from the High Court of Australia, starting under the heading, "The Construction of Section 6", at the bottom of that page, 445, that it's given the name of "charge". "This invokes an institution of general law and suggests the creation by the force of statute of a security for payment of a debt."

So it's 4 – we're on –

McGRATH J:
I just really don't have volume 3 of the authorities. I don't know –

MR TINGEY:
Volume 2, Your Honour.

McGRATH J:
It's volume 2?

MR TINGEY:
Yes.

McGRATH J:
And what was the number again?

MR TINGEY:
It's tab 14, page 290 of the volume. And the High Court of Australia says that the charge, "Suggests the creation by the force of the statute of a security for payment of a debt or the performance" –

ELIAS CJ:
Excuse me, sorry. This is the judgment of Justices McHugh and Gummow.

MR TINGEY:
Yes.

ELIAS CJ:

Does the other judgment, Brennan, Deane and Dawson, deal with it too?

MR TINGEY:

Yes, it does.

ELIAS CJ:

All right, so you'll take us to that as well?

MR TINGEY:

Well, they – their agreement –

ELIAS CJ:

They express agreement?

MR TINGEY:

Yes, at 415.

ELIAS CJ:

Thank you very much.

MR TINGEY:

"It is appropriate that we express" –

McGRATH J:

Can you just explain again, Mr Tingey, why it is this – this is a case about altering a policy rather than defence costs. Is that –

MR TINGEY:

This is a case about – so –

McGRATH J:

Could you just remind me, from what you said earlier –

MR TINGEY:

Well, yeah –

McGRATH J:

– as to why there is no distinction:

MR TINGEY:

Well, this is a case – so in my submission, this case, the *Bridgecorp* case, is about the nature of the charge and how it descends, and so this case is useful because it describes the charge and the nature of it which is important to understand in determining when it takes effect and how it just des – defends. Now this case is not about defence costs. It's about amendment to the articles which gave rise to the insurance and in the case found that the amendment to the articles wasn't effective to discharge the liability because the charge effectively had descended.

McGRATH J:

Thank you.

MR TINGEY:

But it does contain a useful summary endorsed by this Court in *Ludgater*. Part of this has been cited in *Ludgater* in relation to the effects of the charge. And so turning the page, 446, second paragraph, "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. The section does so by sweeping up distinctions in the general law between legal and equitable assignments," then going on, "By its own force, the statute, in circumstances where it applies, creates," and this is the important point, "on the happening of the event giving rise to the claim for damages or compensation, a charge on all insurance moneys which are then payable in respect of the liability." So that confirms the charge descends on the happening of the event and the charge descends upon the moneys, which is that, the concept of the limit of liability, the $20 million. And then they go on to say – and that section there I've just read is specifically set out in *Ludgater*. They then just note, "That the charge arises on the happening of the event giving rise to the claim for damages is apparent not only from 6(1) but from also subsections (2) and (3)." They go on to say, "It also does the conferring by section 3 of priority of all other charges." And then notes the effect of section 6(3) where there are two charges in relation to it.

And then turning the page, just above the last paragraph, they refer to section 6(6) which is equivalent of our 9(6), "Fourthly any payment made by the insurer under the contract without actual notice of the existence of the charges between the complainant and the insurer –"

ELIAS CJ:
Sorry where's this?

MR TINGEY:
Sorry this is on 447, just before the last paragraph, so about 10 lines up.

ELIAS CJ:
Yes I see.

MR TINGEY:
"Fourthly". And so that's the provision of recognising the effect of that. I was then going to come to 449 of the decision. It's the second paragraph starting with the words, "It is necessary now to return to the text of 6(1). As we've indicated the charge created by force of legislation on the happening events giving rise to the claim for damages." Again focussing on when the charge descends. "It is expressed to be charged on all insurance monies that are payable. It is clear we cover the case for the terms of the policy and events that have happened were such that it could be said that a particular sum was payable by the insurer to insureds and that's if the charge has immediate operation. However, even though all other necessary facts and circumstances for the insured have a present right to receive payment may exist, a contract for insurance may be liable to avoid non-disclosure or misrepresentation, there can be no monies payable and thus nothing upon which the charge may operate. Thus in substance it may be correct to say that the charge mentioned never comes into existence." Then it goes on to say, "The phrase in 6(1), "Insurance that may become payable is able to deal with the situation whilst the charge has descended, there is no sum which could be identified as presently payable by insurer to the insured. In such case the statutory charge operates by loose analogy to an agreement for a charge on after acquired property upon such monies as and when they do become payable. However there will be nothing in respect of which the charge may be in force if the monies never become payable." So the comments here are saying well if the policy – if there's no requirement to pay because there's been non-disclosure or misrepresentation under the policy, then the charge won't exist.

And then turning the page, and starting from the second paragraph down, and this too is important, “However, so notwithstanding that the charge may be determined not to exist because of non-disclosure or variation, once the charge has descended on the happening events giving rise to the claim for damages or compensation, no mutual and unilateral action by the insurer or the insured which is taken otherwise then under all specific contracts of insurance of general law operates upon the contract may vary, discharge or otherwise qualify.”

Then it goes on to say, “Nor” and this is significant as well, “After the charge is descended is it open to the insurer to rely upon a payment made under the contract to the insurance unless the payment was made without actual notice of the existence of the coverage of the claim.” So in my submission that's the most important bit here. They confirm that notwithstanding what they’ve said before that, it’s open to the insurer to rely upon a payment made under the contract to the insurer unless the payment was made without actual notice. So it’s not open to QBE to pay the fence costs to the insured once it has notice of Bridgecorp’s charge.

So these are all general comments but in my submission are very helpful to understand the effect of the charge. They then come to consider the effect of that on the facts of that case.

MCGRATH J:
That decision is effectively unanimous on these points?

MR TINGEY:
Yes, yes. Then the next paragraph they refer to, “In the presence case, in the Court of Appeal, the steps taken by the union in 1982 and 1985 were characterised as including a reconstruction of the union.” So this was the amendments to the articles which meant the insurance wasn't payable.

ELIAS CJ:
It’s really a little misleading to talk about crystallisation of the charge, isn't it? I mean the effect of section 9 is, as you say, a prohibition on the insurer paying out under the policy once it has notice and then an establishment of priority when liabilities are established. So it holds the position.

MR TINGEY:

Yes.

ELIAS CJ:

Pending determination of liability and – which is really the same thing as the old Wages Protection and Contractors Liens Act isn't it?

MR TINGEY:

Yes, yes. There is –

ELIAS CJ:

I mean all of this talk, sort of borrowing from equity and, it's not necessary.

MR TINGEY:

Absolutely Your Honour, it confuses the position.

ELIAS CJ:

Yes.

MR TINGEY:

It's not a two-step process. The section says there is a charge from this date. It doesn't say and it crystallises. It doesn't it's a floating charge.

MCGRATH J:

Mmm, it doesn't have a prior life.

MR TINGEY:

It doesn't have a – it's not a two-step.

ELIAS CJ:

Mmm.

MR TINGEY:

Because floating charges were known at this time and they could've, if they wanted to have a charge –

ELIAS CJ:

Well it's an analogy I suppose but it's not – it's not really necessary to go there, you can just apply the statute and arrive at the result.

MR TINGEY:

Yes, you're absolutely right, you can just read the words and in my submission, to the extent the Court have said there is this crystallisation, we don't suggest that is the proper approach. We say you read the section, it creates a charge, that's it. There's no need to have this crystallisation. I think conceptually the difficulty is, is over this sum, it's not determined the amount of it and it's over this $20 million figure which is a little bit odd because it's not like a – normally you think of a charge over an actual asset. It is an asset in the sense that it's a pool of money but that's what the words are aimed to protect, that's why they have used quite lengthy words to describe what the charge is over. You know, that may be in respect of, in answer to Your Honour's question previously. So that's, in my submission, precisely what they've done.

ELIAS CJ:

It's really a charge over a shows in action isn't it?

MR TINGEY:

Well in my submission the charge –

ELIAS CJ:

I mean if you were going to call it that.

GLAZEBROOK J:

Well the High Court they do say that I think, at the top somewhere don't they?

ELIAS CJ:

Do they?

GLAZEBROOK J:

They use that as an analogy.

ELIAS CJ:

Because it's the liability of the insurer to pay.

MR TINGEY:

But it's a charge also of the moneys that are paid. So it's preventing those moneys being paid out.

ELIAS CJ:

Well the insurer is at risk if it disobeys the injunction that it can't pay out against the money insured, that's all.

MR TINGEY:

Yes. And it's not a breach, it can do if it wants to.

ELIAS CJ:

Yes.

MR TINGEY:

It just faces the risk once liability is determined, if cover is used up by the limit then it can't – it's paying out more than the limit of the policy. But there's no problem, you know, there's no problem with that and that's, you know, that's what a normal plaintiff does if they defend a claim unsuccessfully, they pay the amount of claim and then they pay costs and they incur their own costs.

GAULT J:

Where did the use of the term "crystallised" come from in this case? Was it –

MR TINGEY:

It's the Court of Appeal.

GAULT J:

It came from the Court of Appeal?

MR TINGEY:

Yes. There is some reference to crystallisation in some of the earlier cases but I don't think – I think the Court of Appeal's raised the word of its volition, crystallisation and in my submission that's where they've fundamentally gone wrong by this two-step. In my submission I say there's one step.

And then, so I was referring on 450 to the paragraph where they apply their reasoning to the fact of this – of the *Bailey* decision, when they say, refer to the steps taken by the union to abolish the contract of assurance and then it says, "As a consequence that a structure but otherwise would have been all insurance monies and a reduction from the sum fixed by the contractor of insurance within the meaning of section 6(1)."

MCGRATH J:
So whereabouts are you?

MR TINGEY:
450, third paragraph, the paragraph starting, "The present case in the Court of Appeal", and then I'm reading from the words five lines down, "And as a consequence that a structure but otherwise would've been full insurance."

MCGRATH J:
Yes.

MR TINGEY:
Accordingly they're ineffective to deprive the charge which had arisen in 1974 of the operation upon the insurance monies under the contract of insurance. So just in relation to the last question there, there is no case which has referred to crystallisation before the Court of Appeal did so. So that's the decision in *Bailey* of the High Court of Australia, the effectively unanimous decision on this point.

I was now going to refer to the decision of this Court in *Ludgater* which is in the next paragraph, volume 2 and this was effectively, there was an issue of defence costs. It was a decision of the extraterritorial effect of section 9, but the Court made some useful comments about the nature of the charge beginning at page 312 paragraph 16, where the general effect of the charge, and there's a reference to *Bailey* and you'll see there's a section that I've taken Your Honours through. Then in the next paragraph there's, in my submission, a very useful summary of the effect of the charge, the next paragraph, 17. So four lines down in 17, the charge obviously is for the benefit of the third party claimant in this case, the litigator, it is created on the happening of the event giving rise to the claim for damages. So that's this Court confirming that, and the case they cite as authority is the case of *Pattinson*, which is the decision of Chief Justice Mayers in 1941, shortly after the Act came into effect

that I'll come back to. Then they say, "So if section 9 applies to present case, any liability to the litigator would be charged on the amount payable by way of an indemnity from the date of the fire." So again, they're saying the charge arises from the date of the fire and at that time the amount of the claim hadn't been determined.

This Court goes on, helpfully, to summarise section 3, saying, refers to priority rule. "Not only is there to be charge for the benefit of the third party claimant, but it's set priority over all other charges effecting the insurance money. Those other charges would include general charges," and then going down further, "It is a charge created by the New Zealand legislation over asset of the insured. If there happened to be two more charges ranked between them, two more charges created under part 3 of the Act, it is provided for under subsection 3 that they rank between themselves in the order of the date of events under which liability arose. That is in priority in accordance of the date of creation of each charge. Authorities' events happened on the same day. The statutory charges rank equally between themselves. Accordingly, if there were to, say, three incidents of defence capacity related fires appearing on three different days, subsection (3) would have the effect to give the claimants in order of the date of the fires priority in respect of the insurance monies, but all those claims would have priority over any general charge which they may have in favour of its financier." So in my submission, that's this Court specifically saying the charges are effective from their date of the events which gave rise to the fires. They don't – there's no postponement, as the Court of Appeal did, until liability is determined.

Then turning the page to paragraph 21, "The fact that the section is planning and intends to operate primarily when an insurer is insolvent and alters the priority of claims against an asset of such an insured should make it apparent that where the insurer has its place of business in a foreign jurisdiction and no place in New Zealand any extraterritorial reach is doubtful," but again the importance here is this section is plainly intended to effect priority of claims. Now, the Court then comes on to consider the difference in priority claims in the *Ludgater* case at paragraph 31 of the decision. It refers to the provisions that would apply in the Australian liquidation in the Corporations Act, which doesn't have a priority regime like section 9. In paragraph 32, after quoting it, this Court said, "It is not to be observed that this section does not provide for priority between injured claimants, that it be determined by the time of events giving rise to the claims, i.e. unlike section 9, any shortfall of presumably shared pro rata."

McGRATH J:
You're just contrasting 562 with section 9, what the judgment of this Court was?

MR TINGEY:
And noted the difference of priority from pro rata to the time of events, so specifically considered the effect of it.

Now, the next case I was going to refer Your Honour to is a decision of the New South Wales Court of Appeal in *Chubb*. Tab 13 of volume 1. This is a relatively recent decision that came out after the New Zealand Court of Appeal. The matter was remitted directly to the New South Wales Court of Appeal. The decision is dated July 2013. I'm advised by counsel involved that leave to appeal to the High Court of Australia has been sought in relation to this case, so it may not be the last word in relation to *Chubb*.

The first point to note is that there is quite a lot of discussion. This case does consider the same issue, effectively, that was considered by the New Zealand Court of Appeal in this case. But the decision in this case, the result, the comments were only obiter because the Court found that, in fact, section 9 didn't apply because of a jurisdictional argument about whether the New South Wales Act applied because there wasn't equivalent acts in South Australia or Queensland. In fact, the decision, contrary to *Ludgater* on that, actually cites *Ludgater* and doesn't follow in that territoriality, but notwithstanding that, the Court does have discussion of the effect of defence costs and the charge.

Now, it's useful, perhaps, to turn to the issues the Court was considering, which are at 190 of the decision. There are two, for the purposes of this claim, matters that were considered. The first was defence costs. The two matters the Court was considering, the first one that related to this case is at paragraph 94 which are to the extent that section 6 imposes a charge on insurance monies that are or may be payable under the policy and the insurance liability to pay damages. Do those insurance monies include defence costs, legal representation, expenses, costs, and expenses to be paid? So that's slightly wider than the issue considered by the Court of Appeal but encompasses defence costs.

The second issue, issue 5, was a more general issue which wasn't considered by our Court of Appeal, which is effectively how does a section operate where there are multiple claims against each other to the extent section 6 does oppose a charge on insurance monies under the policies. Would any payment made by the plaintiffs on the policies by way of indemnity for insured liability to pay damages to be a valid discharge if the payment is made before judgment is entered or settlement is agreed. So the issue there is if you have two claims, one occurs first in time, you have a second claim in time but later judgment is incurred on the second claim, can that be paid notwithstanding the charge?

Then turning to the Court's decision, page 41 of the judgment, page 204 of the bundle, the Court will recall the essence of the dispute reflecting questions 4 and 5 is whether because the charge under section 1 comes into existence on the happening giving rise to the claim for liability, it must at that time attach to or to send on all monies that are or may become payable in respect of the claim made when forced that liability. The question concerns the meaning of the words in section 6(1) that the amount of the liability of the insured is to be charged on all insurance monies that are or may become payable in respect of that liability. So again, the Court is considering the effect and timing of the charge.

Turn to paragraph 118 where the Court says, "The source and meaning of the difficulties with section 6 is that it provides the charge comes into existence at a time made by reference to events different from the circumstances which the monies to which the charge attaches or on which it depends becomes determinant and payable. The charge comes to existence on the happening event, giving rise to liability to pay damages for a claim of compensation." Now, this is the key point here and the distinction where they say the charge, where it only attaches or descends on money that are or may become payable in respect of liability to pay damages or compensation. There is nothing to which the charge can attach onto which unless or until liability to pay damages and compensation has been determined, so they're saying that there's effectively a two-stage approach. Now, I say that's wrong and I say that's contrary to the High Court of Australia in *Bailey* which I've taken you to in some detail.

ELIAS J:

You say leave has been given. Has leave been given on this point?

MR TINGEY:
Leave has been sought in relation to this, but that has not been determined yet.

ELIAS J:
Yes.

MR TINGEY:
Then at 120, "The charges concerned with money paying liability to pay damages or compensation, the charges are not expressed to catch all monies that might be payable under contract." There's a reference to our Court of Appeal and Steigrad. So effectively this Court follows Steigrad in some respects and comes to the same result.

Now, in my submission this decision is wrong, wrongly decided. I'll come to that –

GLAZEBROOK J:
Well, not decided because you say it's obiter anyway.

MR TINGEY:
Well, it's obiter anyway and obviously it's not binding on this Court, but it shouldn't be persuasive because in my submission the logic is flawed in it.

ANDERSON J:
In what respect?

MR TINGEY:
I'll come to that.

Paragraph 130, now, what they're dealing with in 130 is section 6(3), which is the priority rule, so this is one of my fundamental points. Section 6(3) means charges are created by the time the events take place. Now, that's inconsistent with what the New South Wales Court of Appeal have said, and this is the section where they try and justify that difference. So they say, "If it is true that if priority is given only in respect of the monies that have become payable as a result of the judgment order settlement, the circumstances in which there will be competing claims that a sum of money will be rare," because of course the only time there will be a conflict of where the matters will be determined at precisely the same time, because if one is

determined before the other then that will exhaust the policy, so the first pre-condition that they say to section 6(3) is that there needs to be judgment given simultaneously.

ELIAS CJ:
So instead of a dash for cash it's a rush to judgment?

MR TINGEY:
Well, it's still a dash for cash and a rush for judgment on this but they're saying, well, how do we work section 6(3) into that and what they say is it will be rare. So what they say is – and it's slightly difficult to understand but I'll seek to – "Generally competing claims will only arise where judgment in favour of the number of claimants whose claims arise out of the same or similar facts." So I think what they mean is the only time you can have simultaneous judgment by two claimants is where you have co-plaintiffs who bring a –

ANDERSON J:
But the issue isn't about judgment. It's about when the charge arises, and if a single incident results in injury to multiple claimants, then those claimants have equal – equality amongst themselves.

GLAZEBROOK J:
And priority under 6(3) anyway.

MR TINGEY:
Absolutely. I agree with Your Honour, but they're not saying it is. They're saying it's judgment. So they need to reconcile how judgment works in section 6. In my submission you can't do that because it doesn't work.

ANDERSON J:
All that judgment does is determine the value of the charge.

MR TINGEY:
Absolutely, Your Honour, but they're not saying that. They're saying that judgment is the point. So they need to give a meaning for section 6(3) which accords with that, and so what they do is they try and envisage how that could be so they say it must be two claimants having judgment at the same time, which I say is wrong, but this is how they justify it, two different plaintiffs in the same claim getting judgment so

judgment is simultaneous, then between those two who have obtained judgments simultaneously, then you look at section 6(3) and say, which facts they relate to arose first? So they're giving section 3, in my submission, extremely limited and narrow meaning, which is just improbable from the wording of the section, because they need to give it some meaning, so they're saying it's only where you have co-plaintiffs getting judgment at the same time but in relation to the timing of different facts.

GLAZEBROOK J:

Well, they say the same or similar. Are they even saying that?

MR TINGEY:

I don't know, Your Honour, frankly. It's hard to reconcile actually what they say but I'm trying to think logically what could they mean. In my submission, they don't express themselves fully about this but I'm saying, well, based on their thesis that judgment is the thing. How could you ever invoke section 6(3)? Again, I may be wrong about what they mean but I'm trying to give them the most favourable meaning. It could be only co-plaintiffs getting judgments simultaneously but the facts arise at different times. Now, they have to do that to give a meaning to section 6(3). In my submission, that's just inconceivable that's what section 6(3) means for a whole range of reasons. Firstly, co-plaintiffs, plaintiffs can only bring claims together if their interests are the same, and of course their interests won't be the same if they are in a dash for cash. So they won't have the same interests. They'll have different interests because they'll each want to get judgment before the other, and so they can't be co-plaintiffs as their interests don't precisely coincide. So that situation just can't occur under our rules where you're only allowed co-plaintiffs if they have the same claim. Generally, if there are co-plaintiffs invariably it will be the same fact they rely on because that's why they can be co-plaintiffs so if there were co-plaintiffs it would be in relation to the same matter. So in that case it will be the same facts and their facts would also be the same and you wouldn't have the timing issue. Then just taking a step back from this, again, I think this meaning, if this is what they mean, as I understand what they may mean, why this is just inconceivable is, you've got to think back to the time the Act was passed. This is an Act that was passed in 1936 based on the 1928 and the 1908 Acts. Were there co-plaintiffs – this was mainly about physical injury. Is it likely there would have been multiple physical injury arising from Acts at different times? It's conceivable at the same time. But in my submission, it's

just not conceivable there would have been multiple losses at different times from the same incident to give this meaning.

So then they say – I think that's what they mean but I'm just surmising. "The facts on the interpretation of circumstances in which they may operate is not a reason for objecting it." Well, in my submission it is because that goes to whether it's actually a proper meaning. But they have to have, in my submission, that tortured logic to come to the decision they have in relation to the section.

Then they go on and say even on their meaning, which is you need judgment, the charge still has some consequences. A contractive insurance remains when the charge arose. That's *Bailey* and, of course, they're required to accept *Bailey* because it's binding upon them. Then they say, "Further, by operation of 6(6) it would not be open to an insurer after that time to rely on a payment made for an insurer under a contract of insurance in respect of a liability for payment unless the payment was made without actual notice of existence of the charge in favour of the claimant. To that extent, the position of such a claimant is protected, thus once the charge has arisen upon the happening of the event that gives rise to liability for damages, no mutual or unilateral action by the insured which is taken otherwise by contractor insurance or general law may discharge or otherwise qualify." Again, it's very difficult to reconcile section 6(6) with what they're saying and, in fact, impossible because if you require judgment to effectively and crystallise or perfect your charge, then you effectively have nothing. The amounts can be paid out. And their reasoning set out in 131 simply doesn't apply. So for those two reasons, effectively subsection (3) and subsection (6) in my submission the decision is wrong. Then the conclusion of the New South Wales Court of Appeal in 135, and the conclusion there effectively they answer question 4 in the negative and question 5 in the positive, that is to say, "The charge under section 6 would not extend to monies payable under the policies for defence costs and before any judgment is awarded settled in the fact of claimants, while the question has not been raised expressly if an entitlement to pay defence costs before any judgment is awarded under settlement under section 6 would not extend to monies payable under that entitlement," so that's the defence cost issue. Further, payment by the insurers under the policies by indemnity for insurer's liability to pay damages or compensation to any of the claimants may be a valid discharge for insurers made before judgment."

GLAZEBROOK J:

Does that mean you can settle with the other claimants and then force the other one to judgment? Is that what they're saying? The insurer might decide to settle with some of the claimants and accept some claims and not others.

MR TINGEY:

What they're saying is, you've got the prior claim and the subsequent claim. It's saying if the subsequent claim liabilities are determined first, you have to pay that notwithstanding the claim earlier in time. The charge doesn't operate because liability hasn't been determined.

GLAZEBROOK J:

Well, yes, but I think they're saying that you could even settle with other insurers and you don't have to wait until judgment, other insured. You don't have to wait until judgment. Other claimants, sorry.

MR TINGEY:

Yes. So in my submission it's entirely contrary what section 6(3) says, and gives no effect to the charge. This may be an appropriate time. I was just going to note that again what this Court doesn't do is it doesn't address the priority issues. It doesn't refer to the priority issue being known to the effect and it really plays down in an appropriate way the effect of the charge and the priority regime affected by the Act.

ELIAS CJ:

Yes, thank you very much. We will take the adjournment.

COURT ADJOURNS 11.32 AM

COURT RESUMES: 11.51 AM

MR TINGEY:

Your Honours, I just need to correct one thing to start off. I said that the statutory liability policy covered defending the civil claim, it doesn't. It only covers the criminal claim.

ELIAS CJ:

Yes, the regulatory.

MR TINGEY:

The statutory liability only covers the regulatory claim, yes. But that was exhausted by the regulatory claim which the D & O policy which we are talking about, covers both claims, the defence costs of both claims. Now I was referring to the New South Wales Court of Appeal decision in *Chubb* and the conclusions they reached, effectively where they find at 135, "That the position of an earlier claim in the position of defence costs is the same." So if you decide, based on the reasoning that the New South Wales Court of Appeal applied, which is the same as the reasoning effectively of the New Zealand Court of Appeal in this case, it means, firstly that the charge has no effect until liabilities are determined, which means you can pay defence costs and you can pay a prior claim if liability has not been determined on the prior claim and in my submission the reasoning of the New South Wales Court of Appeal on those matters, would apply to the New Zealand Court of Appeal, so applying the logic would have that same effect. I was now going to turn to the decision in *Pattinson* which is in volume 1, tab 7. And although this is only a decision of first instance, its relevance in my submission is that firstly it is a decision of Chief Justice Myers in 1941, right around the time this Act came in, in 1936. Secondly, it was argued by leading counsel really of that time, Messrs Mazengarb and Sim KC and what it does in my submission is effectively recognise that defence costs are not part of the indemnity. So there is a long standing authority that has been cited by this Court and the High Court of Australia which establishes the position.

ANDERSON J:

Sorry what tab are we on?

MR TINGEY:

It is at tab 7, of volume 1. So the facts of the case is that Pattinson's husband died as a result of injuries, suffered as a passenger in the Dowman family car, Pattinson took a judgment against Dowman for £2127. Dowman was insured under a comprehensive motorcar policy. The insurer was found liable under the policy for Dowman's liability to Pattinson. The Corporation, the insurer, paid Pattinson £1709, deducing amongst other things, amounts paid to the solicitors for defending Pattinson's action against Dowman that is the defence cost, so they took it off. The terms of the policy are at page 1031 of the judgment, paragraph 51 and it is at the bottom of the page and in slightly smaller font is (a) "Consideration of the extra

premium paid as hereby declared and agreed that the indemnity granted extended to cover the legal liability of the insured for compensation in respect of personal injuries sustained by the passenger's direct result of an accident." And then the next para, "Such compensation or contribution shall include legal costs incurred with the written consent of the Corporation." Then going down, "But the total liability of the Corporation shall not exceed the amount stated in the schedule," which was £2000. So it said the aggregate amount of both matters were covered by the limit, so that is precisely the same contractually as the position in this case. And the significance of that is, the Court of Appeal distinguished this case on the basis that the contract was different but in fact it is the same. Then just turning to the arguments made. Mr Sim KC, his argument is recorded at 1035, line 12. It says, "The charges given in respect of liability to pay damages not a liability to pay costs, there is nothing in the charge to prevent the parties defining their own contractual obligations, the fund must be apportioned in accordance with the terms of the contract which may involve it's not being kept intact." So here is counsel arguing effectively as my learned friends do here, that the contract prevails and that the sum does not need to be kept intact. Now that's not expressly mentioned, the result of that in the judgment, because what happened then is there was a concession made by counsel and the Chief Justice then considered that concession and commented on that if you look at 1037. So if you look at line 24 on page 1037, "At the hearing Mr Sim said that all defences were abandoned by the Corporation in respect of the three items. (a) The appellant made to Messrs Harris, Marsack and Hall." That's the defence costs. (b) interests and (c) an item of party and party costs. "After the argument the Corporation solicitors intimated the Corporation decided to withdraw its defence in respect of the payment to Messrs Marsack and Hall, its defence costs." And then the Chief Justice says, "In my opinion to deduct those three items of solicitors costs had been properly abandoned." And then the Chief Justice goes on to consider the provisions, turning the page 1038, line 3, refers to sub-section 3, says that the "Charge created by the section shall have priority over all other charges affecting the insurance money " Then he refers to defence costs, then down at 29, line 29, "However that may be and although the total liability of the Corporation of the policy to be limited to 2000, I cannot think, reading section 9 of the Law Reform Act and the insurance policy together, if the insurer the Corporation, entitled to pay his, its, or their legal costs at the expense of the injured person or as representative to charges upon the insurance monies by section 9 of the Act. In the case of the Corporation the section has chosen to pay these set of costs to its own solicitors and the solicitors for Dowmans." Now when it says it has chosen to pay, in my submission, what they mean there is

because the charge had been exhausted, they were voluntarily paying those costs knowing that that exceeded the amount, so they can't rely on their limit for the indemnity. "It was not bound to undertake absolute the payment of the costs to solicitors of Dowmans, and if it chose to do so, the amount to which the plaintiff became entitled is against the insured, is 2000 or more, then the Corporation must bear the costs itself." And then following, next page, it is for these reasons that in my – sorry, three lines down, "For these reasons that in my opinion the claim by the corporation to deduct these three items aggregating £290 pounds was rightly abandoned and the plaintiff was entitled to recover that sum." Now of course it's accepted that this was a concession but there is quite detailed reasoning on why that was correct by Chief Justice Myers and that has been followed. And this is a long-standing authority, contemporaneous, which hasn't been challenged, and its accepted by this and other higher Courts.

The other relevant thing about this case is the position in respect of interest which highlights a point I made earlier about the incentives effectively on the insurer because interest doesn't run on the limited indemnity and that's on that page from line 13 whereas the Chief Justice said, "I agree that although section 9 imposes a charge on the insurance-moneys in respect of the liability of the insured to pay compensation or damages, and although such charge accrues as on the happening of the event giving rise to the claim for damages any liability on the part of the insurer to pay interest cannot under the general law arise before the injured person has obtained a judgment against the insured."

So that confirms, effectively – the point I made before that it's in the interests of the insurer to delay paying out the principal claim because the amount doesn't increase because interest doesn't accrue on the limit until liability is determined. So they have an interest in funding defence costs, putting up the time in which liability is determined and that point about extravagant costs had been actually picked up in a case cited in *Pattinson* and slightly earlier in the decision of *National Insurance Company of New Zealand Ltd v Wilson* [1941] NZLR 639 (SC) which is at tab 24 of volume 2 and again it's a decision from 1941 before *Pattinson*, because *Pattinson* cites it. I'm just going to refer to page 645 from line 23. "Costs not coming within the ambit of this description cannot form part of the indemnity fund. If it were not so, the insurer could whittle down its liability to the insured by unnecessary and extravagant litigation, and, in the long run, the employee would lose the security for compensation he would otherwise enjoy by virtue of the policy. The charge given him by section 9

of the Law Reform Act would, in effect, be cheated, and the purpose of the section to preserve and keep intact for an injured employee the whole amount the insurer has agreed to pay to meet the employee's claim would be defeated by payments made to the insurer's own claim." So that's this policy point I made, that that, if defence costs can be paid out, then that provides an incentive for extravagant and lengthy litigation, even if the claim is a good one because it's in the insurer's interest to do so.

So those were the cases. Now I think I've made most of my points although a few points, a few points are raised just pulling those all together. So in my submission the key issue is when the charge takes effect and the Court of Appeal is simply wrong to use, or to raise the novel idea of crystallisation, that's not a concept within the charge, not a concept within the charge under section 9 and similarly the New South Wales Court of Appeal got it wrong in the same respect because they didn't apply the plain words of the section in priority. The plain words of the section make it clear when the charge descends it's on the happening of the event giving rise to the claim. It makes it clear whether or not, explanatory – whether or not the liability has been fixed. Now I don't intend to go through them but in my submission that's also consistent with all the contemporaneous material and a number of other decisions and these are referred to in the written submissions from paragraph 6.5 to 6.19. But the explanatory memorandum to the Bill and Hansard when this Bill was introduced both say that the charge applies immediately. The leading text published at the same time also says that the charge applies immediately. The Law Commission has said that the charge attaches on the happening of the event, so all consistent with a one step process. The decision of the Court of Appeal is inconsistent with a number of High Court decisions which say the charge attaches on the happening of the events and the Court of Appeal decision is also inconsistent with the High Court of Australia's decision in *Bailey*, that the charge descends on the happening of the defence. It's a one step process, the charge is there, it's on from the beginning and it causes section 9(3), the priority rules confirm they'd already gone through 9(3) and in my submission the position on defence costs in an early claim policy under 9(3) are the same and that was confirmed by this Court in *Ludgater*, I've taken Your Honours already through *Ludgater* which, where the Court said, "If there are two or more charges created under part 3 they rank between themselves in the order of the dates of the events that take place," and Your Honours will recall the fire example which I have given.

Similarly my argument is consistent with section 9(6), which I have already referred Your Honours to. Section 9(6) protects an insurer when they make a payment where they do not have notice of the charge claimed and would otherwise have priority. This also means that an insurer cannot rely on a payment made under a contract, it has no further charge in priority to the payment made. So the converse is true also and that's precisely what *Bailey* said and Your Honours will recall, I have taken you to that.

So just putting that in the context of the *Ludgater* example, if there was a fire first in time but the insurer had no notice of that claim, or the charge, and there was a second fire in time, which the insurer had notice and paid the first and exhausted the policy, section 9(6) operates to give a valid charge to the insurer for the payment of the second fire because it didn't have notice of the earlier fire. Without 9(6), if 9(6) wasn't there, under the 9(1) the first fire would have had priority being the first in time, and notwithstanding that the insurer had paid on the second fire, if the claimant in relation to the first fire claimed against that they could claim a charge which would have priority and the insurer would have to pay it again. So the effect of 9(6) is effectively to protect the insurer that they don't have to pay out more than the total liability of the claims of both. So the argument I contend for is effectively means that the insurer can't be required to pay more than the total of liability now protected by 9(6) from the position. Of course, that's also confirmed by the reading of 9(6) which refers to the existence of the charge. Nothing about attaching or crystallising or anything, so that's confirmed by the reading of it.

I was now going to turn to this phrase "in respect of" which my learned friend Mr Ring, I understand, suggests that, and I understand his submission is, that the charge only attaches to the balance of the insurance money after defence costs have been paid and not all the insurance money. And of course that is inconsistent with what the text says. It says it applies over all insurance money and in my argument this wording "in respect of", which also the Court of Appeal referred to as just a question of timing, the charge doesn't, if the charge doesn't apply from the time when the events took place, then when the time the defence costs come to be paid then the charge, the monies can't be in respect of those defence costs because the money has to be paid out contractually first. So it's just a timing issue.

So really the "in respect of" argument actually just turns on timing of when the charge arises. If the charge arises and has effect then the insurance monies are all charge

and all are liable to be paid. Conversely, if the charge is not effective, as my learned friend is contending, defence costs will be incurred first before the time which money becomes payable.

Now my learned friend, Mr Ring, says that AIG accepts the charge has created a rise attachment. It descends immediately on the happening of events, giving rise to the claim, but they only to the unallocated liability part of a mixed fund comprising a maximum amount payable to meet defence costs and if necessary the balance toward the insurer's liability to the claimant. So as I understand his argument, the charge descends immediately but only on the part which is not covered by defence costs. Now the first conceptual form of that, the section says nothing like that. The charge just descends. But also conceptually it's very difficult to see how that can possibly work. You don't know what those defence costs are going to be at the time the charge descends. You don't know what, whether the defence is going to cost – what it's going to cost to defend that claim and there's just no basis, in my submission, in policy for there to be a two-step process.

It's also submitted that there's no problem in the charge descending on that fund. The matter which the charge attaches to is undoubtedly the money which could be paid under the insurance contract which is, in this case, the $20 million.

So finally I'd just like to run through, I suppose, the policy arguments, why in my submission Bridgecorp is correct in this point. Just generally, firstly, the charge is clearly for the benefit of the claimant, not the insure of the insurer, the meaning which I contend is clearly for the benefit of the charge-holder. If, as the new – if, as the Court of Appeal point out, you need to establish liability in quantum to keep the charge intact then the charge is of very little value. Effectively it's not a charge at all. It can simply be paid away by any claim which gets judgment first. The dash for cash wins.

The Court has consciously – sorry, the legislature has consciously in 1936 Act changed the timing of priorities. I won't take Your Honours to it but the House of Lords has recently confirmed that the dash for cash is the approach in the United Kingdom where they don't have a similar approach, adopting what was said in *Cox v Bankside Members Agency Co* [1995] 2 Lloyd's Rep 437 (CA).

There's no reason in policy why that causes a problem for the insurers and insureds. Insurers can have separate cover if they want. They could have a separate cover just covering defence costs or they could have sufficient cover to meet the likely claims, none of which, that I've said, does change the contractual provisions between the insured or the insurer except in respect of priority, and clearly the charge does affect priority. So there are a number of cases which says that the charge doesn't affect on the ability of the insurer to, for instance, rely on some act after the time the charge has accrued, which means there has been, say, non-disclosure of the case which means that the insured can decline liability. I accept those cases are right. Case *UEB Packaging Ltd v QBE Insurance (International) Ltd* [1998] 2 NZLR 64 (CA), *McMillan v Mannix* (1993) 31 NSWLR 538 (CA). Those cases are right, but that's not what we're talking about here. The difference between those cases is those cases are not about priority so they're not about the nature of the charge. This case is about priority which is the subject matter of the Act and if the issue is priority then the Act dictates that you can't pay away the moneys. It's not a question of the policy not responding for another reason. It's only because of the quantum of the claim.

That's to say it's not declining the insured or the insurer, the insured of the benefit of the insurance. The insured still gets the benefit. They have their claim met up to the maximum. It just determines that different persons who are claiming can claim the benefit of it as those who incur first in time.

So unless Your Honours have anything further…

ELIAS CJ:

No. Thank you, Mr Tingey. Yes, Mr Forbes.

MR FORBES QC:

Yes if Your Honours please. I won't detain Your Honours for very long at all. It is apparent from the submissions the appellant Mr Houghton in the charter's appeal, if I can call it that, the second appeal, fully supports and adopts the argument of my friend, Mr Tingey in all respects and no need to duplicate that other than to the very limited extent that I am about to refer to.

The additional ground that Mr Houghton relies on really is directed at the issue of the reasonableness of AIG, the insurers' decision to advance or pay defence costs and

properly analysed, it is premature to be looking at that, at this stage. So to that extent, that that ground of appeal is not pursued and the only matter I want to just briefly explain why is that the submissions point out that there, is fact, a discretion to advance defence costs. Defence costs are defined in the policy and it is Mr Houghton's case, on appeal, at tab 6, as requiring the prior consent as you would expect of the insurer and section 5.7 says that while it says that defence costs will be advanced unless indemnity has been declined, defence costs again nevertheless are defined to mean with the prior consent of the insurer. Now in that regard, and this is really in support of my friend's argument and taking up a point made earlier on by His Honour Justice Anderson, that – and it is at 3.11 of the submissions, and I am assuming that the Court accepts, just for the reasons and the written submissions, that the charter's policy provides a mechanism which allows the insurer to manage its risk, when deciding whether to advance defence costs. It has got to consent to them, there is no absolute mandatory right to have defence costs advanced because it has always got to agree to or consent to them. If it chooses to advance in the face of the section 9 charge, then it assumes the risk that it may become a volunteer as to payment of those costs. If it assesses the risk that the third party claim will succeed as real, then it would be reasonable for it to withhold consent to advance defence costs to the end of the claims' process, the assessment of risk is the business of the insurer so it is exactly the point that Justice Anderson was saying. They can make the decision whether to advance, in the fight of their assessment of the claim and the fact that the claimant, as in this case, is well in excess of the limit of liability under the policy. Nothing to stop them doing it, but they have to assess, are we going to do this in the light of the section 9 charge, with the consequence that will end up, or could end up being a volunteer and having to meet that cost in addition to the limit of liability because the charge bites to prevent the cost being paid in derogation of it.
Now that's as far as I want to go and nothing more or less to say in that respect Your Honour.

ELIAS CJ:
Thank you Mr Forbes.

MR FORBES QC:
Thank you.

ELIAS CJ:
Yes Mr Ring.

MR RING QC:

Yes Your Honours, while I am getting my papers sorted, perhaps I can hand you up a summary of my oral submissions.

ELIAS CJ:

A bound summary of your oral submissions.

MR RING QC:

Let me not concern you. There are two additional authorities in there.

ELIAS CJ:

Right, thank you.

MR RING QC:

But I promise you they are concise and I hope, helpful. Your Honours we have divided the argument up so that I am going to give you the overview, my learned friends are going to take you through the key authorities in a little more detail and also deal with the other sub-sections of section 9 while I am going to focus on section 1, sub-section 1. So all the hard questions, if you can save them for my learned friends, that would be appreciated.

Your Honours, just to summarise the position between the parties and of course we are dealing, in this case, only with a liability policy where the limit of liability and the defence costs have a single aggregate limit under the policy. And the competing arguments are, as we say in the table, that AIG says, "That the charge facilitates the performance of the contract of insurance as contemplated and intended by the parties when they entered into it. By first allowing the insurer and the insured to pay and receive respectfully the defence costs' indemnity and any other payments that they contracted for. And second, ensuring that the claimant actually receives the amount ultimately payable pursuant to the terms of the contract towards satisfying the insured's legal liability to him or her. By comparison, the argument to the contrary from the appellants is that the charge frustrates the performance of the contract of insurance as contemplated by and intended by the parties when they entered into it, by first preventing the insurer and the insured from paying or receiving respectfully the defence costs indemnity and any other payments they contracted for, and second, enabling the claimant to receive more than the amount which would

otherwise have been ultimately payable pursuant to the terms of the contract towards satisfying the insured's legal liability to him or her." And that is the stark difference between the parties.

GLAZEBROOK J:
Why do you say it is more?

MR RING QC:
Well because –

GLAZEBROOK J:
But that presupposes that there is a right to have defence costs paid out first under the policy and perhaps you can help me. Is there a priority in the policy itself?

MR RING QC:
There isn't a statement of priority but one of the things I am conscious of, is that you haven't actually been taken through the scheme of the policy to see how everything hangs together and although it is not here, I thought at an appropriate moment I would do that to set the context for Your Honours.

ELIAS CJ:
Well can you, before doing that, you will indicate to us, what we are to look for in the scheme?

MR RING QC:
Yes.

GLAZEBROOK J:
So the argument though is it is more because the priority is that defence costs, however high they are, are paid first and it is only what is left over that is for the claimant, so I would actually be assisted by, you showing me why that is the case under the policy, especially when there is as Mr Forbes pointed out, it is only with the consent of the insurer that those defence costs can be paid, so it is not an absolute right in any event under the contract.

MR RING QC:
Well yes I will take you to that because –

GLAZEBROOK J:

So the insurer itself decides how much is actually payable under the contract as a priority amount to the defence costs, is the, must be the argument.

MR RING QC:

Well the short answer to Your Honour's point is that the obligation to pay defence costs is mandatory. How the quantum of those defence costs, they have to be reasonable having regard to the nature of the claim and they have to be applicable, they have to be reasonably necessary for the claim. Those are the areas of discretion that the insurer has.

ELIAS CJ:

Is that, sorry, this is probably a very stupid question but is there a difference between payment under the policy in response to a claim by an insured and advancement of the costs of defence which is really what I think was being talked about?

MR RING QC:

Your Honour, they are effectively the same thing. The difference may only arise –

ELIAS CJ:

Might be timing –

MR RING QC:

Well depending on whether the insurer has accepted indemnity or whether the insurer has reserved its rights or the insurer has the client indemnity, those are its rights or the insurer has declined indemnity. Those are the three possibilities, the only three possibilities that can arise, and under the policies the obligation to pay defence costs arises in all three situations.

ELIAS CJ:

But in terms of timing, there must be a conceptual difference between responding to a contractual obligation and as insurer managing your risk of liability under the policy.

MR RING QC:

Well, the way liability insurance works, of course, is that a notification comes in and it's usually a notification of circumstances rather than a notification of a claim and

from that moment on the insurer is likely to be exposed to defence costs because the first job is to make an assessment of that notification to see whether a claim is likely to arise and whether that claim can be headed off, can be avoided or minimised, by taking some pre-emptive action and –

ELIAS CJ:
Or a run-off, I think, is the policy suggestion being put up against you.

MR RING QC:
I'm not sure what "run-off" means in that –

ELIAS CJ:
Well, "seen off".

MR RING QC:
– context. Well, I'm talking in a very neutral sense here –

ELIAS CJ:
Yes.

MR RING QC:
– about what happens when a notification arises. There are often situations, and Your Honours would have seen that all the time in legal practice, where there is a notification of circumstances but pre-emptive action might actually prevent the claimant from actually suffering a loss and thereby heading off the claim. That necessarily or usually will involve defence costs and so the first indemnity under the policy that is triggered is the indemnity to pay defence costs and it is hoped that if that indemnity is triggered and properly utilised, there may be no claim and if there is it may be a smaller claim than would otherwise be the case.

So the answer to Your Honour, Justice Glazebrook's point about and what does the contract say about priorities, it's not so much that it says defence costs have priority over liability indemnity or anything like that, it's just the logic of what happens is that the defence costs indemnity is triggered first and the indemnity against liability, fingers crossed, may never be triggered and, if it is, it's going to be triggered at the end of the process rather than the beginning.

GLAZEBROOK J:

So you're saying consent can only be withheld on an indication that it's not reasonably necessary for the claim but the fact the claim, the defence is unmeritorious is not a reason for refusing defence costs?

MR RING QC:

Well, that's precisely correct and indeed there's the decision we gave you in our authorities, the *Coulson v News Group Newspapers Limited* [2012] EWCA Civ 1547 judgment –

GLAZEBROOK J:

Well, I'm really asking under this particular policy because – which is why I asked about the wording of the policy, because telling me what the policy says or telling me what a case says on another policy isn't very helpful.

MR RING QC:

Well, I'm sorry, Your Honour. What I was endeavouring to say was that where that question arises is where you see a qualification which would be implied anyway on the defence costs indemnity that they must be reasonable, and I think in both – well, no, at least one of the policies before Your Honours, it's express and the *Coulson* judgment also has that reasonable –

GLAZEBROOK J:

So you don't have to pay defence costs on an unmeritorious defence, is that…

MR RING QC:

No, no.

GLAZEBROOK J:

Well, tell me what you're saying.

MR RING QC:

I'm sorry. The proposition is that you, an insurer cannot decline to pay defence costs on the basis that it has made an assessment of the claim, or the defence, for that matter, and that it's unmeritorious, that the qualification for reasonableness, express or implied, around defence costs is as to their quantum, or level, and as to whether they are of a type necessary to deal with that particular claim. And the case that's

authority for that proposition is *Coulson*, which is in volume 3 – on tab 3 of the respondent's authorities and is referred to in our submissions at page 20, paragraph 5.3.

So the important proposition that I'm wanting to emphasise to Your Honours at the moment in terms of how the policies work is that the defence costs indemnity is the first one that once triggered it's operating for the whole claims process until the very end. If it does its job properly at the very end there is no indemnity required for liability and so that will be the only indemnity that needs to be provided under the policy. Alternatively, it may minimise the claim so that it's less than it otherwise would have been, but the liability indemnity, the obligation to indemnify the insured for its liability to the claimant, will only arise at the very end of that claims process.

ANDERSON J:
Is an insurer obliged to pay defence costs in derogation of the value of the charge that has already arisen?

MR RING QC:
Well, in our submission, yes, Your Honour, it does, and I noted with a slight degree of apprehension Your Honour's comment earlier in Mr Tingey's submissions. The answer to that proposition, Your Honour, is fundamentally in the wording of section 9 and it's in the wording, it's in the meaning of the words "in respect of".

ANDERSON J:
I'm not really focusing on that.

MR RING QC:
I'm sorry.

ANDERSON J:
Although I did set that hare running before, but…

GLAZEBROOK J:
So your argument is that liability to the claimants only arises on judgment?

MR RING QC:

Well, that – yes, Your Honour, but that's established as a matter of insurance law and as a matter of law that when a, an indemnity policy refers to legal liability it's referring to the legal – or when it says, "The insured shall become legally liable," or words to that effect, it's referring to the legal liability as ascertained by a judgment, an arbitral award or a settlement.

GLAZEBROOK J:
We don't have the policy but you can refer us to bits of the policy.

MR RING QC:
Yep, well, let's have a look at the policy structure now, even though it's a little bit out of order.

ELIAS CJ:
Are we going to look at both policies or just…

MR RING QC:
Well, I thought I would take you to both so –

ELIAS CJ:
Yes, that would be great.

MR RING QC:
– so that you can see that there isn't a great deal of difference between them. If you turn to page 4 of that submissions that I've handed up, you'll have the reference to the AIG policy there and I can take you to the QBE policy as well in conjunction with it. So to find the AIG policy, it's in the small booklet, "Case on Appeal", dated 20 May, and it's the last tab, and – I'm sorry, the second to last tab. There's only one page in the last tab, at tab 6. And the QBE policy, "Case on Appeal", volume 2, starting at page 140.

So just following down the structure that I've adopted here in the submissions for convenience, first question, "Is the policy limit of liability inclusive of defence costs?" and if you turn first to the AIG policy at page 54.

GAULT J:

I'm having trouble finding these documents. Can you help me navigate, please, Mr Ring?

MR RING QC:

Certainly, Sir. The AIG policy is in a booklet, a rather thin booklet, headed "Case on Appeal", dated 20 May.

GAULT J:

I have that, thank you.

MR RING QC:

Tab 6. And the QBE policy, "Case on Appeal", volume 2, 28 May, at page 140. It's a Bell Gully booklet. So if we look at the AIG policy first, here on page 54 we have the main insuring clauses and the one we're concerned with is insuring clause 1.1, "The Basic Insurance Promise". "The insurer will pay on behalf of the insured persons up to the limit of liability the loss and excess of retention in relation to a securities claim." And if you turn to the next page, Definitions 2.10(d), you'll see that loss includes defence costs, and then if you go to page 60…

GLAZEBROOK J:

Well, perhaps it also includes settlements and damages or judgments entered.

MR RING QC:

Yes, yes, and that's the equivalent of what I was saying before, Your Honours, about an established liability. So all of those things –

GLAZEBROOK J:

So where did you want to take us to now, sorry?

MR RING QC:

Page 60, and I was just making the point, Your Honours, you can see from that definition of loss, the first three items are what you would expect at the end of the process, the defence costs, of course, at the beginning and all the way through. Page 60, 5.3 –

ELIAS CJ:

Well, except that the defence costs can be paid out at the end of the process also.

MR RING QC:
Well, they could be only by being withheld.

ELIAS CJ:
Yes, but there is no obligation to pay them until the liability is established, is there?

MR RING QC:
Well with respect, no that is not correct Your Honour. The obligation to pay defence costs arises when the defence costs are being incurred and the starting point for that, of course, is the wording of 1.1, "That the insurer will pay the defence costs."

ELIAS CJ:
But what about 5.6?

MR RING QC:
Yes we are running ahead a little bit.

ELIAS CJ:
Oh sorry, yes carry on.

MR RING QC:
But if you don't mind, I will just sort of wait and pick up that in a moment. So 5.3 on page 60, first paragraph confirms the total amount payable, "Can't exceed the limit of liability and the defence costs are part of that." And if one turns to the policy schedule on page 53, fifth item down, "Limit of liability in the aggregate for all loss."

GLAZEBROOK J:
Sorry I think I have lost you again, are you 5.3? Where are you?

MR RING QC:
Page 53.

GLAZEBROOK J:
53?

MR RING QC:

Sorry I was at 5.3, the first paragraph that's on page 60.

GLAZEBROOK J

Yes.

MR RING QC:

And then the policy schedule at page 53, "The limit of liability in the aggregate for all loss." The equivalent provisions in the QBE policy.

GLAZEBROOK J:

Where does it say when you pay those out?

MR RING QC:

We haven't really got to that yet. At the moment I am just taking to show you that the limit of liability is in the aggregate defence costs.

GLAZEBROOK J:

I just wonder whether it is worth finishing on the AIG policy before switching back and forth.

MR RING QC:

I am happy to do that. Let me take you right the way through the AIG policy. Go back to the insuring clause, to answer the question, "Does the policy require AIG to advance defence costs?" Focussing on the words in 1.1 "That the insurer will pay the loss." And the loss includes defence costs. And the bottom of that page, the definition of defence costs at 2.3, "Any reasonable fees, costs, expenses incurred on behalf of the insurer, insured, with the prior consent of the insurer," and the defence settlement etc of any securities claim. And we would say, implicit or explicit in those words, is an obligation to be paying them as they are incurred and not withholding payment until the very end.

ELIAS CJ:

Sorry I missed it, where is it?

MR RING QC:

2.3, definition 2.3 at page 54.

ELIAS CJ:

Thank you.

GLAZEBROOK J:

So you just take that as a, that's an implication, there is nothing specific that says when payment has to be made, or is there?

MR RING QC:

Well that is just a start. It is one indication in the policy, we say. The next clause that is relevant in this context is page 61, 5.7. Advance payment of defence costs except to the extent the insurer has denied indemnity and subject to the limit of liability the insurer will advance to the insured defence costs incurred prior to final resolution and there it is explicit.

GLAZEBROOK J:

What do you say "advance" means?

MR RING QC:

It means pay either for an on behalf of the insured or an immediate reimbursement of the insured if the insured is paid.

McGRATH J:

Again, as and when incurred?

MR RING QC:

As and when incurred, yes. To put it another way what it couldn't mean is –

ELIAS CJ:

Sorry, hang on, it doesn't say "as and when incurred" it just says "prior to final resolution" doesn't it?

MR RING QC:

Yes it does but –

GLAZEBROOK J:

Well it might be incurred prior to final resolution rather than paid prior to final resolution, so the prior to final resolution might be related to the incurred i.e. you can't pay for anything that you pay out after final resolution.

MR RING QC:
Well there would be nothing paid out after final resolution because –

GLAZEBROOK J:
Well, no, but I'm just saying that might be what this is actually making clear in the clause because otherwise it might mean you don't have to pay them until, or even advance them until after final resolution, which wouldn't be what you'd want the clause to say.

MR RING QC:
I feel I'm in a slightly surreal position here in that I'm trying to persuade Your Honours that my client has an obligation. Normally an insurer would be here defending themselves from an argument by the insured they had to pay. So –

GLAZEBROOK J:
I just want to know what the particular policy says because we're not looking at this in a void, we're looking at it in terms of a particular policy. So you say what you like about the policy, I just want to know what you're relying on to say what the priority arises under the policy.

MR RING QC:
Well –

GLAZEBROOK J:
And you're saying there is a priority arising actually under the policy, nothing to do with dash for cash, as I understand your submission on this.

MR RING QC:
Correct, what I'm saying is that, what we're talking about here is not competing charges but separate contractual obligations and the nature of liability insurance itself is such that the defence costs indemnity obligation will always arise first and the liability, the indemnity against liability will always arise last.

GLAZEBROOK J:

Well that will depend on the wording of particular policies which is why I'm asking you to come back to the wording of the policy.

MR RING QC:

Well the –

GLAZEBROOK J:

You can say that all of the policies will be similar but we are still talking about a particular policy. And you can say that that's –the nature of the policy will be the same because of the nature but for myself I never like generalisations without actually seeing it in a document.

MR RING QC:

The proposition that I was advancing then Your Honour is not so much about the particular wording of the policy but conceptually how liability insurance works in every policy. In every policy you will be paying the defence costs or you will be, as an insurer, you will be incurring the defence costs first and you will be incurring the legal liability last, if at all. So what we're saying is that the policy reflects that reality.

McGRATH J:

It's a structural argument as to how the policy applies?

MR RING QC:

Yes but it – the particular wording of the policy just simply fits in to that conceptual arrangement.

GAULT J:

Which is very easy to understand if the limit under the policy is lower, at least is beyond, the maximum claim.

MR RING QC:

Yes.

GAULT J:

That's very easy to understand. The difficulty is with the other side of it.

MR RING QC:

That's correct Your Honour and that's where we say the answer lies in what was Parliament's intention in section 9 and we then need to go to the words and see what the words mean. So 5.7 on page 61 is the advancing of defence costs. 5.6 on pages 60 to 61 deal with the obligation, or the extent and nature of the obligation, to defend and starts by saying the insurer doesn't assume any duty to defend, that the obligation is on the insured to conduct the defence but the insurer is entitled to effectively associate with that and the cases refer to that as a form of collaboration and partnership. And then on the next page, 61, condition precedent to the insurer's liability for loss is that the insured won't admit or assume liability for making any payment and that would include defence costs without an insurer's prior written consent. We say that the ability to withhold consent there is limited to those questions of whether the quantum was reasonable or whether the defence costs that the insurer was being asked to pay for are reasonably and necessarily required or of a type reasonably and necessarily required to defend that claim. That leads us to the proposition, the last bullet point in 2, that the contractual discretion has to be exercised for the purpose of ensuring the defence costs are appropriately and efficiently applied to defeating or minimising the claim against the directors and officers.

Now, the QBE policy.

GLAZEBROOK J:

So there's nothing else there about when payment arises? That's all that's there?

MR RING QC:

That's it.

Under the QBE policy at page 142 –

ELIAS CJ:

Sorry, did you take us to 510? Is there anything to be commented on in that?

MR RING QC:

No, I didn't, because I didn't think it was relevant to the issue of whether defence cost takes priority over liability or not. It's dealing with something else.

GLAZEBROOK J:

Those are the securities claims generally?

ELIAS CJ:

But this is a contractual arrangement for priority of the different claims covered by the policy?

GLAZEBROOK J:

Just the securities claims. It doesn't seem to cover the defence costs.

MR RING QC:

Yes. It's in relation to all losses and losses includes defence costs.

GLAZEBROOK J:

Yes, I understand that.

MR RING QC:

What it's talking about is different securities claims, claims by different D&Os.

GLAZEBROOK J:

Well, why would it do that, actually, because if it comes to be apparent to the insurer that the limit of liability will not be sufficient to cover all losses, well, it doesn't really mean much, does it? You say it's just dealing with different securities claims.

MR RING QC:

Yes. Because what it says in A is that the insurer will first pay for loss which is covered under insuring clause 1 and of course that loss is indistinguishable between defence costs and liability.

GLAZEBROOK J:

Well, if anything, it could be helpful to you because it says that any losses in excess of the retention in the order in which they are presented to the insurer and you say well, the defence costs will be presented to the insurer before the other claims.

MR RING QC:

Yes, thank you, Your Honour.

ELIAS CJ:

But that's why I drew it to your attention.

MR RING QC:

I'm sorry, Your Honour, I was too slow.

ELIAS CJ:

You told me it was irrelevant.

MR RING QC:

I'm sorry.

GLAZEBROOK J:

That's why I like looking at documents for that very reason, because people who deal with documents all the time often overlook what they actually say. They only think – give a conceptual view and they say, often, nothing of the sort.

MR RING QC:

Quite right. I apologise to both of Your Honours. I should have paid more attention. I don't think there's an equivalent provision to that in the QBE policy but I'll have another look because I may be too familiar with it. The QBE policy, page 142, the insuring clause is A, 1.0A, each insured person, any loss, which they don't receive indemnity from the company. Loss, again, further down, page 142, is all sums legally liable to pay. So that would be, again, by judgment, arbitral award, or settlement including but not limited to defence costs. And at page 146, paragraph 4.13, the limit of indemnity is a limit is respect of all loss that falls in respect of the policy. And at page 151 –

ELIAS CJ:

Are you intending to come back to page 147?

MR RING QC:

Yes, I am. I'm just showing you the aggregate limits at this stage.

ELIAS CJ:

Yes.

MR RING QC:

At 151 there's the last of those. Third item down in the schedule, limited indemnity, 20 million, any one claim and in the aggregate. Then the obligation to pay defence costs, first, 142, the definition of defence costs, costs in period by QBE or with its consent which will not be unreasonably withheld in investigation, defence, or settlement of a claim.

ELIAS CJ:

Are these – maybe you can't tell us – but has cover been confirmed in these cases?

MR RING QC:

In relation to the QBE policy, no, on my understanding, primarily because of the convictions that Mr Tingey referred to. In relation to the AIG policy, you'll see the memorandum we filed earlier in the week. The insurer has reserved its position, neither confirmed nor denied.

ELIAS CJ:

I'm not sure that I did see that, actually. So does that mean there is no obligation?

MR RING QC:

No, that means there is an obligation because under the AIG policy, it said "except where the insurer has denied indemnity".

ELIAS CJ:

Yes, I see.

MR RING QC:

So there has been no denial.

ELIAS CJ:

But under this one, there's no obligation, is that right?

MR RING QC:

Yes, there is, and it's because of clause 417 on page 147.

ELIAS CJ:

Well, that's if cover has been confirmed.

MR RING QC:

Yes. Then the next sentence, "If cover has not been confirmed in writing by QBE, it's that provision.

ELIAS CJ:

I see, yes, thank you. So the question for us is whether section 9 cuts across this.

MR RING QC:

Correct.

GLAZEBROOK J:

Of course, if – okay. If cover is denied to the directors, then presumably they have to pay back those defence costs at the end, do they? Where's that dealt with?

MR RING QC:

In the QBE policy, expressly at the provisos to -

GLAZEBROOK J:

Because you have to advance on –

MR RING QC:

Yes. If you look at the very bottom of 4.17 on 147, "QBE reserves its right to recover from the insured any defence costs advanced in accordance with the above if the judgment or other final adjudication establishes the insured was not entitled to payment under this policy."

I'll give you the equivalent provision in the AIG policy and that's at 61, 5.7. Second sentence, "Such repayments must be repaid to the insurer." So again, all of those provisions contemplate that the defence costs will be paid in advance of a final resolution of the claim.

ELIAS CJ:

Can you give some indication of how you think you're going, how much longer you think you'll be? I won't hold you to it.

MR RING QC:

I think I should be able to do this in 45 minutes, maybe a bit less.

ELIAS CJ:

All right, thank you. Would it be convenient to counsel if we resume at 2.00?

MR RING QC:

That's fine, thank you, Your Honour.

ELIAS CJ:

All right.

COURT ADJOURNS 1.03 PM

COURT RESUMES: 2.05 PM

MR RING QC:

Your Honours, if I can go back to my summary of submissions to paragraph 2, and just talk for a minute about the wider context. That wider context is that liability insurance in general is voluntary. No one has to have it. There are no limits or prescribed requirements as to what liabilities are insured so no one had to have the liabilities that are relevant in the two policies before us.

ELIAS CJ:

Where does that lead?

MR RING QC:

Well, it's just that the context, the wider context in which Parliament enacted section 9 is that it enacted it against the prospect that somebody has insurance and we say and so the claimant's benefits are subject to the terms of that insurance.

ELIAS CJ:

Yes. Well, it's subject to the cover, yes.

MR RING QC:

Well, yes, but it's also subject to the existence of the insurance. I mean –

ELIAS CJ:

Yes.

MR RING QC:
– Parliament hasn't said, "You have to have insurance –

ELIAS CJ:
No.

MR RING QC:
– and we'll have the section 9."

ELIAS CJ:
Yes.

MR RING QC:
It says if you do then this is the benefit the claimant will get, and so the benefit the claimant is getting is very much a circumscribed benefit subject to whatever voluntary insurance arrangements the insurer and the insured have seen fit to enter into, and that leads us to say that the liability insurer and insured contracted for a package of insurance benefits and obligations, including the payment by the insured for the right to receive from the insurer all of the agreed benefits which include defence costs. Similarly, the claimant didn't pay for the benefit to it of the existence of any collectible liability insurance at all. So the existence of the insurance and the amount of the cover are entirely a bonus for the claimant.

That leads me to talk very briefly again about the mischief that Parliament addressed or identified and addressed by section 9, and unlike in some other cases, there is very clear documented confirmation of the specific concerns that led to the introduction of section 9, and they – those concerns were the result of actual decided cases where the result was seen as unfair or unjust. The two concerns that arose were that if the insured has collectible insurance, liability insurance at common law, a claimant was not entitled to enforce payment direct to him or her of the amount payable under the policy towards the insured's legal liability, and that's both in fact so that the payment fell into the insured's estate if the insured was insolvent and the claimant shared along with all the other creditors and, second, in full so that the payment could be discounted or diverted by a post-casualty contractual variation

between the insured and the insurer, along the lines of the *Bailey* case that you've heard about this morning.

So it was the insured and the insurer in that second situation getting together after the liability event had occurred and the insurer saying, "Well, I've got a policy with a $10 million limit but give me $5 million and I'm out of here to South America," and the claimant is then left with nothing. So it's those two mischiefs that Parliament expressly identified.

Contrary to the submissions suggested by my learned friend, there was no additional perceived mischief requiring statutory remedy that the amount ultimately payable under the policy towards the insured's legal liability to the claimant should be maximised by preventing the insurer from performing other pre-existing payment obligations under the policy, and by "pre-existing" I'm talking about those that were entered into at the time that the contract was made.

So again, Parliament perceived that a claimant would take the policy as it found it but similarly, once the liability event occurred, insured and insurer had to leave the policy as it then was and couldn't change the obligations or the terms.

So the solution that was then identified was a charge attaching at the time of the casualty to the amount ultimately payable, we say, if any, under the policy towards satisfying the insured's liability to the claimant so that if and when a legal liability was actually established, including quantified, this amount would be sure to be available in full and payable direct to the claimant.

So there's been some discussion this morning about a two-stage process or a one-stage process and sometimes those sorts of labels don't necessarily help, but the way that we say that section 9 works is that at the time of the liability event it holds the position, it holds the insurance position as at that moment, so that once the insurer has notice of that liability event any payment that the insurer makes towards satisfying that liability will be in contravention of the charge and they are at risk of paying twice. However, at that stage nobody knows whether there really is going to be a liability and, if so, how much will it be. That gets determined at the end of the claims process and when and if there is a liability established at that point in time then the claimant is assured of getting the amount that the parties contracted would be paid by way of an indemnity for that liability. It is all about, Your Honours, the

name on the cheque at the end of the process. Section 9 says take the insured's name off the cheque, put the claimant's name on it. Section 9 also says, and that cheque will be for exactly the same amount as the insured would have been entitled to receive if the payment by the insurer, when the liability was established, was paid to the insured for the insured to on-pay to the claimant. That, we say, is the purpose of section 9, and that's how it works in those two stages of time.

So that leads me to that middle box that the proper meaning of section 9(1) is if the insured is indemnified under a contract of insurance against a legal liability, the insurance money ultimately payable by the insurer pursuant to the terms of the contract to the insured or on his or her behalf towards satisfying, that is, for that liability, is subject to a charge in favour of the claimant.

ELIAS CJ:
Sorry, where are you?

MR RING QC:
In that middle purple box on page 2.

GAULT J:
How do you get there from the wording of the section?

MR RING QC:
Well, that's where we're going next, Your Honour.

GAULT J:
I hope so.

MR RING QC:
I think one thing we are agreed on, that this is a matter of parliamentary intention and it all comes down –

ELIAS CJ:
Well, not necessarily. It's a matter of the meaning of the provision.

MR RING QC:
Yes, but that's what I mean by parliamentary intention.

ELIAS CJ:

Yes, all right, if it's a shorthand.

MR RING QC:

I'm sorry. It actually comes down to the meaning of the words "in respect of" in section 9, in the last line of section 9. What is charged here is all insurance moneys that is or may be payable in respect of that liability and the liability, we say, is the insured's legal liability, established both as to existence and amount by a judgment, an arbitral award or a settlement, and there's been some discussion also this morning and out of the Court of Appeal judgment about the word "contingent" being used in this context, whether the charge is contingent or not. The contingent is the right concept here because what is contingent is the liability. There may not be a liability, at the end of the process.

ELIAS CJ:

You are saying that the charge is contingent on liability?

MR RING QC:

Well I can't – no I am not saying the charge is contingent on liability, I am saying the effect of, the ultimate practical effect of the charge is contingent on whether there is a liability established against the insured at the end of the day.

ELIAS CJ:

Yes, but that's right but we are concerned with the charge and the holding.

MR RING QC:

That's correct and what the charge does, because the charge in the terms of section 9 arises on the happening of the liability event.

ELIAS CJ:

Well that's – then you are saying the charge is contingent.

MR RING QC:

Well no, with respect Your Honour, I am not saying that. I accept that a charge arises, a non-contingent charge arises over the aggregate limit of liability under the policy which includes defence costs entitlement, liability entitlement. I am happy to

accept that the charge arises but what I am saying is, that when the charge comes to be enforced, that might be, that is contingent, at that first moment in time when the charge arises, whether it will ever be enforced is contingent because it will not be enforced obviously if there is in fact no liability established against the insured.

ANDERSON J:

It is really a question of what is the value of the charge isn't it. It will be somewhere between nought dollars and in the case of your client $20 million, somewhere in that range?

MR RING QC:

Yes.

ANDERSON J:

And whatever X is, that is what the charge is for.

MR RING QC:

Yes.

ANDERSON J:

But is it open to the insurer to derogate from the value of X?

MR RING QC:

Well the answer to that, we say, is yes because of the terms of section 9. And in particular because of the wording, "That the charge is only in respect of insurance," well it is only for insurance money in respect of the liability and we say that there is a distinction between insurance monies payable in respect of the liability and insurance monies payable in relation to defence costs and it is the money that is left over, to pay liability, that the amount that the insured would have been entitled to receive, after his defence costs, his or her defence costs have been paid, that is what the claimant is entitled to receive.

ANDERSON J:

So the value of the entitlement, to the claimant, can be reduced by the costs of defending, unsuccessfully, the claim?

MR RING QC:

By the incurring of reasonable defence costs, yes.

ANDERSON J:
Unsuccessfully?

MR RING QC:
Yes that is what the parties paid for.

McGRATH J:
Is this not the argument that was advanced successfully in *Pattinson*?

MR RING QC:
Well my learned friend Mr Galbraith is going to talk more about *Pattinson,* but yes that was the argument that was run in *Pattinson* but it hard to tell from the judgment exactly why, or why the argument failed because –

GLAZEBROOK J:
Well the argument failed because it was conceded it would fail and then it was explained why that was a good concession, wasn't it?

MR RING QC:
Well yes, except for one thing. What's missing from there is the arguments that were advanced for the contrary proposition.

GLAZEBROOK J:
Well the arguments were recorded in relation to the arguments at the beginning of the – we were taken to the arguments, the arguments were recorded in the normal way.

MR RING QC:
Well with respect, Your Honour, I don't think the arguments were recorded because of the concession –

GLAZEBROOK J:
Well, Mr Sim's argument was recorded. I haven't looked totally at that but we were taken to Mr Sim's argument this morning.

McGRATH J:

I don't need this argument twice, as I say, if we're going to get it from Mr Galbraith, you –

MR RING QC:
Yes, let me leave it to Mr Galbraith.

McGRATH J:
Can I though, you, however, are doing the statutory interpretation argument –

MR RING QC:
Yes.

McGRATH J:
– and so we're focusing on the final words of 9(1) and you've, can you just explain to me, I mean I would have thought you were focusing on what the word "liability" covered. You say you're focusing on "in respect of". Can you just do that because I mean in the end we've got to interpret the words Parliament used and certainly in light of Parliament's purpose but I'd just like you to link your argument specifically to those final words and why it is that "in respect of" you think is the key phrase?

MR RING QC:
Well –

GLAZEBROOK J:
Have we got section 9(3) available? I know it's in the Court of Appeal judgment.

MR RING QC:
Tab 1 of the Bridgecorp submissions.

GLAZEBROOK J:
Thank you.

MR RING QC:
The three parts of the last few lines of section 9 are, "Charge on all insurance moneys that are or may become payable in respect of that liability." So that tells us what the charge is on, so we say those are the key words to focus on.

GLAZEBROOK J:
What about the "may become"?

MR RING QC:
Well the –

GLAZEBROOK J:
That assumes that it isn't a fixed sum yes, doesn't it?

MR RING QC:
Correct and it also brings in that contingency that I was talking about but what it is talking about –

GLAZEBROOK J:
But it's a charge on moneys that may become payable?

MR RING QC:
Correct and we say –

GLAZEBROOK J:
So you say it's actually not a charge that may become payable, it's a charge on moneys that are payable?

MR RING QC:
No, no –

GLAZEBROOK J:
Sorry, I'm not sure.

MR RING QC:
On the happening of a liability event it's hard to conceive of a situation in which insurance moneys become instantly payable because no liability has yet been established. So the "may become payable" is almost inevitably going to be the operative part of section 9. The "may become payable" refers to that contingency that I was talking about before, that there may or may not be a liability established. If no liability is established then no insurance moneys will become payable. If a liability is established then insurance moneys will become payable but they will become

payable at the point that the liability is established. What becomes payable at that point is what the parties agreed by way of contract would be available at that moment in time to meet that liability. And what we say the parties agreed would be available at that moment in time, is what is left after reasonable defence costs have been paid up to that point in time.

If you break down the clause a bit more, all insurance moneys payable, we accept that that in isolation refers to all of the insurance, all of the amounts you're entitled to get contractually under the policy, of all types.

GLAZEBROOK J:
So which refers to that?

MR RING QC:
All insurance money payable, full stop. Just that part of the wording. And all insurance moneys that are or may be payable but it's qualified after that to only those insurance moneys that are or may be payable in respect of that liability. What those words means, and I draw the distinction between –

ELIAS CJ:
Sorry, what are those words qualifying?

MR RING QC:
They're qualifying all insurance moneys that are or may be payable.

GLAZEBROOK J:
And you accept that means everything payable under the contract –

MR RING QC:
It could mean everything –

GLAZEBROOK J:
– in this case –

MR RING QC:
– yes I do –

GLAZEBROOK J:
– the 20 million?

MR RING QC:
Yes, I do. But it doesn't say all insurance moneys that are or may be payable under the contract of insurance, which would be picking up a term that is used earlier in section 9. That would be an unqualified expression but Parliament has chosen not to do that, it has chosen to qualify. So the question is, what are the insurance monies that may become payable in respect of that liability. And we say in support of what the Court of Appeal said, that that means the insurance monies payable towards satisfying, relating to or for the insured's liability to the claimant. And we say that that is consistent with judicially accepted meanings of the word in respect of "In an insurance context." I have given you a number of those in the submissions but if I can take you to one more that is at tab 1 of the booklet you are looking at. It is *Tesco Stores v Constable & Ors* [2008] EWCA CIV 362 (16 April 2008). It was a product liability –

GLAZEBROOK J:
I am not looking, I am unsure of what you are referring to, so what?

MR RING QC:
In my little booklet.

GLAZEBROOK J:
Oh the little booklet.

MR RING QC:
So just under the first tab. Decision of the English Court of Appeal, product liability case and the relevant policy passage is found at page 638, paragraph 7. "Liability at law for damages in respect of (a) death,(b) loss or damage to material property" And the issue in this case was whether that covered pure economic loss caused by the claimant who did not have any actual property, physical property damage as well so whether that liability was insured. And the relevant passage is at 21 and 22 on page 640. "Before considering the effect of the extension etc, it is necessary to look further at the meaning of the words, "In respect of" in the insuring clause because they are important. Put shortly these words mean "For and not really caused by a consequential upon or in connection with."

GLAZEBROOK J:
What you are really arguing here though is not payable for that liability because you are actually saying that it is payable only up to the limit of because the liability is whatever it happens to be in terms of the negligence or whatever. It happens to be in the terms of the prospectus isn't it?

MR RING QC:
Yes it is.

GLAZEBROOK J:
And that's the insured liability. So what you are saying is, in respect of, means whatever is left over in respect of that liability. That is the argument isn't it, it is just that I don't think this case helps you with that argument, because all this is saying, you don't get economic loss because it is not related to the –

MR RING QC:
All I am showing you this case Your Honour is to show that, in an insurance context, a liability insurance context, the words, "In respect of" have been interpreted to mean "For." I am not trying to take it any further than that –

GLAZEBROOK J:
But it is for that liability it is just that there is a cap on the insurance monies that might be payable for that liability, isn't it? Because the liability could be, well in this case you would say the liability is the $500 million.

MR RING QC:
Yes.

GLAZEBROOK J:
Well that is the liability, it's just that the only insurance monies that are available in respect of that, are the capped $20 million with or without the defence costs.

MR RING QC:
Well if you assume that section 9 doesn't exist and this claim proceeded like any other claim, insurers would be paying the defence costs as they are contractually obliged to do under the policy. At some point, there may or may not be a liability

established against the insured, let's suppose there is. At that point how much of the limit of liability would be contractually available for the insurer to pay the insured, how much would the insurer be obliged to pay the insured at that point so that the insured could meet that legal liability that had been established. And the answer to that is whatever is left after the defence costs have been paid, after reasonable defence costs have been paid.

GLAZEBROOK J:

How do you get that out of this wording because you said "in respect of" and that means for. Well for that liability, do you say the liability is only up to the cap, because liability seems to relate to a claim.

MR RING QC:

Well, no, the liability is whatever is established ultimately as the insurer's liability. So the insurance moneys –

GLAZEBROOK J:

Well the insurance liability is going to be 500 million in this case, assuming, I can't remember the actual figures, but assuming the claimants are successful, the liability is going to be 500 million. The insurance company will only pay in respect of that liability whatever it's obliged to pay under the contract, won't it?

MR RING QC:

Yes but that, that limitation is already found in section 9. Section 9(7) –

GLAZEBROOK J:

What I'm really trying to get you to tell me is why those words means what's left over?

MR RING QC:

Um –

GLAZEBROOK J:

Because you accept that all insurance moneys can mean everything payable, ie the 20 million, so what is it about those words that qualify that back down to the 20 million minus?

MR RING QC:

Because the only insurance money that is subject to the charge is the insurance money that the insurer is contractually obliged to pay the insured.

GLAZEBROOK J:

That's 20 million?

MR RING QC:

Well, no, it's not 20 million. It's a maximum of 20 million assuming no defence costs have been paid.

GLAZEBROOK J:

All right so you say it's – so if I understand the submission, it's what they're contractually obliged to pay the insured, being whatever is left over after payment of any prior costs?

MR RING QC:

It's what they're contractually obliged to pay the insured, when they're contractually obliged to pay the insured.

ANDERSON J:

I thought, the essence of your argument was to the effect that the claimant cannot get more than the insured would have had if the claim had not been met.

MR RING QC:

That is my argument Sir and what I – the argument that I'm advancing, the propositions I'm advancing are the only ones that meet that requirement, because otherwise the – in an ordinary clime, again taking away section 9, having paid defence costs all the way through, the insured could not come to the insurer and say, well I know you've paid me a million dollars in defence costs, but I've now got a 25 million dollar liability, so pay me the whole 20 million limited indemnity. The insurer would say, well no, aggregative limit of liability. You've had a million of it, you've got 19 left.

McGRATH J:

Mr Ring, your argument is a question of timing, but shouldn't we be looking at this from the time that the charge comes into existence? It comes into existence on the occurrence of the event, doesn't it?

MR RING QC:

Well that's right but it only comes into existence in relation to the amount that is going to be ultimately contractually payable by the insurer to the insured.

McGRATH J:

The charge is in existence but exactly what it's, the value of the pool of money that's over, can only be ascertained downstream, which is why the words "are or may become" are used.

MR RING QC:

That's right but what you have is a notional fund. The limit of liability of 20 million is a notional fund that's sitting there and it's got a number of contractual purposes and a number of contractual obligations attached to it.

McGRATH J:

Yes.

MR RING QC:

For convenience it's one fund but out of it is defence costs and liability and the contractual scheme between the parties is defence costs get paid first, because they're the logical ones to come first. What is left will be available to meet the liability if and when established.

McGRATH J:

But at the time the event occurs, aren't the defence costs within the description of moneys that are or may become payable, at that time, because you're looking forward?

MR RING QC:

Your Honour's right if you stop the words at "payable" but they're not insurance moneys that are or may become payable in respect of the liability. They are insurance moneys that are or may become payable in respect of a completely different contractual obligation, namely defence costs. So what is potentially payable

in respect of the liability is what is left in that fund, that mixed fund, when that liability is established.

McGRATH J:
So the liability is a narrow term that in fact leaps forward to the ultimate, the sum of money that in the end will be paid over? That's how you invite us to read "liability"?

MR RING QC:
Yes, yes, I do and perhaps I can explain that –

ELIAS CJ:
Well, where's the protection then? What's the point of the charge?

MR RING QC:
Well, the point of the charge is to prevent the –

ELIAS CJ:
What's the point of the charge being referable to the time at which the event happens, yes, the happening of the event?

MR RING QC:
Well, first of all, it isn't going to necessarily follow that in every policy defence costs and liability are subject to the same limit, and the charge still has the same purpose that Parliament intended, that is that it doesn't fall into – the insurance moneys will never fall into the claimant, the insured's insolvent estate so the moneys will always find their way to the claimant, and the insured and the insurer can't enter into a bargain to compromise the amount that would have been payable at the end so that the insured gets a benefit or the insurer gets a benefit or both and the claimant misses out on what they otherwise would have got.

ELIAS CJ:
But all of that could be achieved by a charge which takes effect when liability is ascertained.

MR RING QC:
Well –

ELIAS CJ:

Because you've got no contractual entitlement to pay out except in terms of either the costs or the liability.

MR RING QC:

If the charge was only to take effect when the liability was established then insured and insurer could enter into that compromise agreement that I was talking about before the liability was established and remove the insurance moneys. That's why –

ELIAS CJ:

So it's alteration that requires the earlier establishment.

MR RING QC:

Well, Your Honour described it as "holding the position", and I'm happy to adopt that because I think that, with respect, correctly encapsulates what Parliament was trying to achieve.

ELIAS CJ:

Well, but except the position is that you have an undifferentiated obligation to pay defence costs plus the liability. I don't know whether we're using the right terms here or not. So it's an undifferentiated amount. So why isn't it a protection in respect of all of that obligation?

MR RING QC:

Because section 9(1) refers to the charge only relating to the insurance moneys payable in respect of the liability, not in respect of other contractual obligations that the insured and the insurer may already have agreed to.

ELIAS CJ:

Well, it does bother me that it all seems to be either/or on the arguments that we're getting from both sides, and I don't see that the liability for defence costs can't come out at the end of the day, can't be part of the payout at the end of the day consistently with section 9. What I'm having difficulty with is the idea that section 9 can be wholly evaded because of some priority you say is implicit in the contract for defence costs.

MR RING QC:

Well, Your Honour talks about it being evaded but I would actually say no, this is exactly what Parliament intended. Parliament intended that the claimant take the insurance contract as it found it and I'm coming on to deal with all of those aspects shortly, but non-disclosure, breach of condition, exceptions, doesn't satisfy the operative clause, the claimant wears the burden –

ELIAS CJ:
Yes.

MR RING QC:
– of all of those things. This is just another burden of the contract that the claimant wears. If the parties had agreed that there would be a dollar worth of liability insurance here and a million dollars worth of defence cost insurance, the most the claimant would ever get is a dollar.

ANDERSON J:
The lawyers would make a bit out of it.

MR RING QC:
I can't speak for the lawyers, Your Honour.

ANDERSON J:
I'm just –

MR RING QC:
But the point is that the policy just simply doesn't work in the way the parties intended if you whip away the defence costs cover right at the beginning.

ANDERSON J:
Let's assume, you probably won't accept this, but let's assume that the insurer cannot derogate from the value of the charge at the time it arises. Now in the vast majority of cases there'll be enough leeway in the cover to leave the full amount of the claim plus the reasonable defence costs and I just wonder whether we're letting the peculiar circumstances of these cases drive the appropriate interpretation of the section.

MR RING QC:

Well, with respect, I don't think so, Your Honour, because I'm trying to take this as a matter of structure, concept and principle rather than to focus in on the individual facts and circumstances of these cases. The reality is, as we've set out towards the beginning of our submissions, on day one, which is when the charge arises on the happening of the event, on day one nobody knows what the claim is going to be worth. Even assuming there is a liability, which there might not, nobody knows on day one whether it's going to be a liability as ascertained finally within the cover or outside the cover. So what do you do about paying defence costs? What happens, as is very typical, claim starts small, suddenly mushrooms out. So insurer has notice, pays defence costs because everything looks like it's going to fall happily within the cover. Suddenly the claim is not 5 million any more. It's 50 million. Insurer is now, not now, is retrospectively a volunteer for what it's just paid. What about the other situation? Claim comes in at 50 million, cover 20. Insurer can't pay any defence costs so what does the insured do? The insured didn't have to save its own assets because the whole purpose of insurance is it puts the insurance company's assets on the line so the insured doesn't have to put their own assets on the line. It's a mechanism for saving your own resources by paying a premium. Insured's done that. However, the claim has come in at 50 million. Insured can't afford to run it. Turns out the claim is only 5 million. What happens in the million? The insured's gone broke because they can't afford to run the claim. So the person who benefits from this, of course, is the claimant because the claimant not only gets to bring a claim against the insured but they also get to tie the insured's hands behind their back to fight it, and the insurers. Parliament never intended that. Parliament intended that the insured and the insurer could bargain for anything they liked on their day one and when the event happens, the liability event happens and the claimant comes along, the claimant takes the good with the bad at that point.

ELIAS CJ:

The bad with the good?

MR RING QC:

Well, the bad with the good.

ELIAS CJ:

Yes.

McGRATH J:

Mr Ring –

MR RING QC:
Well, the claimant starts from the proposition they're jolly lucky there is an insurance policy.

ELIAS CJ:
Yes, I've got that point.

MR RING QC:
Yes.

McGRATH J:
Mr Ring, you've – I want to just try and tease out a bit more on the purpose of this statutory provision, so perhaps I can put my question this way. What is it about the purpose of the statutory provision that should persuade us of the two alternative meanings of that liability, you say, well, perhaps in respect of that liability. What is it about the purpose that should cause us to put aside the appellant's position and take yours?

MR RING QC:
Well, there can be two answers to that, Your Honour. The first is from the mischief point of view, the very clear mischief that Parliament was directing its attention to, as I said, is well documented. This is not one of them.

GLAZEBROOK J:
When you say "well documented", where is it documented, because in fact there's not terribly much said in the parliamentary debates or the explanatory note on this and certainly not well documented in terms of referring to actually either of them? It's possible that it was with the 1928 Act because, of course, section 9 was only a consolidation bringing it back into accidental death as well, and it's possible something was said about workers' compensation legislation in 1908, but the 1908 one can't have had the purpose to override two 1928 cases that you refer to in your submissions.

MR RING QC:

Well, when I say that the purpose is well documented, what I'm saying is this. There were those cases in England and similar cases in New Zealand.

GLAZEBROOK J:
Were they before 1908 when the workers' compensation one came in?

MR RING QC:
No, no, they weren't.

GLAZEBROOK J:
So the 1928 one might have been in response to – well, they were, I think they were reported in 1928. They may well have been 1927 cases. Well, it's just that we – do we have anything on the 1928 motor vehicle or on the workers' compensation 1908?

MR RING QC:
Well, no, what I was referring to by "well documented" is the Law Commission Report which you have and the historical –

GLAZEBROOK J:
Well, even that doesn't seem to say terribly much either but – and anyway that was written in 1998 so it can't say terribly much about the purpose in 1936 I would have thought, even less about the purpose in 1928 or 1908.

MR RING QC:
Well, I was relying on the fact that this Court in *Ludgater* adopted all of those things as the purpose for which section 9 was established.

McGRATH J:
Could you – I mean, I don't want to be going off on a question of – you've used the word "documented" –

ELIAS CJ:
I'm getting concerned about the time.

McGRATH J:

– which was a bit unfortunate, it's diversion, but I want to give you the opportunity to try and say what the policy of the Act is that should turn us away from the appellant's proposition, because that in the end might, for me, be definitive.

MR RING QC:

Well, again, I was about to come to those things about the non-disclosure and confining it to the terms of the policy as the claimant found them.

McGRATH J:

Yes.

MR RING QC:

That purpose is evident throughout section 9. The historical background that I'm referring to that seems to have been accepted, certainly by the Law Commission and certainly by this Court in *Ludgater*, and our submission is that since Parliament is to at least some extent cutting across contractual rights then the section should be interpreted so that it does that to the bare minimum necessary to meet the mischief that was perceived at the time, and what we're saying is that our interpretation does directly, directly deal with that mischief, no more, no less, but at the same time it doesn't give the claimant any more insurance entitlement than the insured was entitled to get and what the insured paid for.

McGRATH J:

Thank you.

MR RING QC:

And the second indicator of that, we say, is in the interpretation of the actual words. I've referred you to some authorities on what in respect of the liability and in respect of means in that context. Can I also refer you at tab – my second tab in my little booklet here, to – this is the latest edition of Derrington & Ashton, the leading Australian liability insurance text, which only came out in the last week or so, and so it's post the Court of Appeal New Zealand but it hasn't picked up *Chubb* yet, and yes, I accept entirely that some of the propositions that are in here have been attributed to the New Zealand Court of Appeal and for that purpose I have given you, just at the last page and this tab, the footnote, so you can see where that is. But what I wanted to refer Your Honours particularly to because there is total author endorsement of the Court of Appeal analysis. If you turn to the second page in where it says "Security

against Insurance Monies." And to the right-hand side, page 3026, and where it says, "The third parties remedy does not extend to the insured's entitlement to costs for the defence of the underlying action which comes within the policy's first party cover. First party cover of a liability insurance policy which includes an indemnity for the insured's costs of defending any claim, is quite different from a third party indemnity in respect of his liability to a claimant for damages. The indemnity against costs is clearly first party cover because it refers to the insured's loss through his contractual obligations and not to his liability to a third party for harm done to that person. In this important respect, it is of a quality and nature which is different from those of a third party cover as the terms of the respective insuring promises manifest." And then in the next paragraph, "Because these distinct forms are not logically covered for practical purposes, they're usually in the same composite policy but that does not affect their separate and distinct natures." And then the next paragraph, "The result is, it doesn't apply to the costs indemnity and the amount over which its charge will apply may not be determinable until the amount of costs indemnity has been established in order to ensure the aggregate limit of cover will not be exceeded."

And again I think with respect, that that helps to highlight what the words, "In respect of that liability," mean. There are two covers here, two contractual promises, one is a first party loss. If you have entered into a contract to pay defence costs you have suffered a loss, as a result of having to pay those defence costs, that's a first party loss. That loss is conceptually different from the liability that you may or may not incur to a third party. The policy provides two contractual promises; one a promise to indentify against that first party loss for defence costs and the second promise, to indemnify you in respect of that third party liability. Section 9 is addressing the insurance monies payable in respect of that liability. So it can only focus on the amount of the composite fund, that will be available to meet that liability. And the insurer must be entitled to pay out of that fund, for first party losses, in the meantime.

GLAZEBROOK J:
Do you say that they are also allowed to pay other claims arising which would be the situation that *Chubb* says, follows from that?

MR RING QC:
With respect no.

GLAZEBROOK J:
So you make a distinction between the first party liability, and third party liability and you say that third party liability is covered by section 9 and first party, isn't.

MR RING QC:
Correct.

GLAZEBROOK J
Is that correct?

MR RING QC:
That's correct, Your Honour and if I can take that a little bit further. Let's suppose you had a situation where an insurer is paying for the defence of a major trial that is running in the Auckland High Court and then a notice of claim hits the deck for the same insured, totally different circumstances and in excess of the policy limits and for the same year of account. If my learned friend's argument about section 9 was right, the insurer has to stop paying those defence costs for that trial that is running because another dollar it pays, it is at risk of paying again, if that second claim matures in an established liability of the policy limit. And that highlights the potential unworkability of this in a practical sense. It doesn't just apply to this claim; it applies to defence costs payable in respect of any claim that falls within the same policy period.

ELIAS CJ:
Which is why the *Pattinson* case is adverse to you?

MR RING QC:
Oh look I accept that I cannot reconcile that that is the case with our position, but what we do say about that is what is missing out of the *Pattinson* case is two things. First, in the end we argue it was withdrawn so the judgment was not in respect of an actual live issue. And second, what is not present is the arguments to and fro, that led the Chief Justice to say, "I reject this argument and I prefer this argument." And the inference that I would ask you to draw from that, is that it is inherently unlikely that it has been rehearsed in the same way before the Chief Justice as this issue has been rehearsed before the Courts in New Zealand, to date, on this case.

So it leads me to point number 6. What is the nature of the charges?

ELIAS CJ:

I am sorry, I am just thinking about your first party/third party. The contract, I know it defines insured as insured persons and the company, but who is the contract actually with? Is it just with the company because it is an interesting feature of certainly the Bridgecorp one, that it is Bridgecorp bringing the claim.

MR RING QC:

Well what happens in these cases is that the company takes out the policy on behalf of itself and its directors and officers.

ELIAS CJ:

Yes.

MR RING QC:

And these days, no director or officer will take up the job, unless the company does take out this cover.

ELIAS CJ:

No, I understand that but I just wondered whether there is an underlying obligation between the company and its directors, which actually makes the directors more appropriately regarded as third parties. That's not the case?

MR RING QC:

No, because what is being talked about, about a third party liability is the claimant.

ELIAS CJ:

Oh, I understand that in terms of the section 9 but I was just really querying your terminology. I know they're named as insured, I suppose that is sufficient to make them first parties is it. It is very strange.

MR RING QC:

Well they are, they become, within the definition of insured. . And so even if they are not the primary insured named in the schedule, they are within the extended definition of the insured and so they are first parties, just in the same way as the company would be. Their position, in terms of being the insured and having the

benefit, the several benefit of the insurer's promises, they are in the same position as the company would be in.

ELIAS CJ:

Well how does your argument then, attach to the indemnity of the directors? Do you say that that's – if there was enough money for that, oh no it is all right, I see, getting confused.

MR RING QC:

The nature of the charge. It has been variously described as a lean on insurance money as a compulsory statutory assignment of the claims proceeds and agreement for a charge on after acquired property, a charge conditional on the insured's liability of the claim being established and representing the insured's liability to the extent of the cover. We say all these legal, illegal mechanisms to divert to (c), a payment otherwise payable by (a) to (b). In every case (c) is not entitled to a payment greater than what (b) was entitled to receive, directly from (a). Then the effect of the charge, it's subject to the existence and terms first of all of the liability, whether the insured is actually held liable to the claimant and if so in what amount, and the policy, first, whether the policy is valid, that is, there's no material non-disclosure or mis-statement entitled the insurer to avoid the policy, whether the policy indemnifies the insured for this type of liability, depends on the operative clause in the exceptions, whether the insured has complied with all the conditions precedent including those operating post-casualty such as notice, co-operation, no admissions, and the like, and they will affect directly whether there are any insurance monies that are payable in respect of anything. And finally, whether the liability exceeds the policy limits because there is specifically no liability to the insurer beyond the limits fixed by the policy. It's common ground, we say, that as a result of these agreed restrictions on the amount payable, if any, pursuant to the policy the claimant could still get nothing and that this was Parliament's intention with section 9. So we say in conclusion the proper application of section 9 is that if the insured is indemnified under a contract of insurance against the legal liability the claimant is entitled to receive directly from the insurer the amount which the insurer is obliged to pay under the policy to or on behalf of the insured towards satisfying the insured's legal liability to the claimant if and when established, and if the limit of liability under the policy is defence-costs inclusive, this amount is the balance of the limit of liability after reasonable defence costs incurred to that date have been deducted and that the charge is on this amount. And just one final comment in relation to that point that Your Honour Justice

Anderson raised about using up the policy proceeds, the defence costs is still subject to a reasonableness requirement, and just as the insured would be entitled to say to the insurer, "You've paid too much and left too little for my liability and so you owe me a bit more," or the insurer is entitled to say, "You've spent too much on defence costs to the insured," so the claimant can come along and say, "You have spent unreasonable defence costs and dissipated the amount that has been left for me that I'm entitled to and the claimant has the same challenged rights as any other party to the contract would." Unless I can help Your Honours with anything further, those are my submissions.

ELIAS CJ:
Thank you, Mr Ring.

MR GALBRAITH QC:
My learned friend Mr Ring and I are in general agreement. I have perhaps some slightly different emphasis about one or two matters. Can I just pick up the question which I'll have to come back to which His Honour Justice McGrath asked about purpose, this in my respectful submission, is a classic example of text in the light of the purpose sort of case, and when reads the Australian authorities in particular, because this has been more litigated in Australian than here, you'll see that the Australian cases, I think, allowed any exception. All have some – I use the term "critical" for the moment – description of the wording of the equivalent section, their section 6, which is as my learned friend Mr Tingey said, not an exact transcription of our section 9 but to all intents and purposes it's the same. The kindest description, I think, in the Australian cases is that it's opaque and there are descriptions that may sum up more vigorously Australian than that about the wording of the section.

What happened in Australia – and Your Honours will see this when you look at some of the Australian cases and it's necessary to go behind Bailey and look at *Mannix* and one or two of the other Australian cases – but the debate that started there was exactly the debate which His Honour Justice McGrath was asking about, about what was the purpose? There were two schools of thought which Justice Kirby was the principal proponent of one school of thought, which was that section 6 was to drive a bulldozer through the contractual provisions and everything was in favour of the claimants and there were judgments of other Courts following various statements of Justice Kirby. He ended up being in a minority in *Grimson v Aviation & General (Underwriting) Agents Pty Ltd* (1991) 25 NSWLR 422 (CA) for example and *Mannix*,

et cetera, and you'll see in *Bailey* that they approve the decision in *Mannix* which was, as I say, a decision where he was the assenting Judge. The majority view in Australia has developed that no, section 6 in Australia is to be interpreted consistently with the contractual provisions of the policy of insurance and not to aggravate the terms of the contract of insurance, which is why the Australian cases say that at the end of the day if, for example, the insurer can say, can rescind the contract for misrepresentation or failure to disclose or we've got the *UEB Packaging Ltd v QBE Insurance (International) Ltd* [1998] 2 NZLR 64 (CA) in New Zealand which unfortunately I said was Justice Tipping. It was the Court of Appeal and Justice Tipping writing the judgment, where the insured didn't co-operate in the defence of the claim then that was a ground upon which the insurer could then say, "Well, we're rescinding the policy," and end of section 9 and that's so respecting that whole approach is respecting the contractual obligations which the parties, the insured parties, have entered into and recognising that the claimants should get no more than the insured could get under the policy and maybe nothing. If the insured would get nothing under the policy because the insured did some wrong, they've breached the policy, and so as I say when you read the cases you'll see that there was that debate that went on there and in my respectful submission that's the way it ended up being resolved, but Your Honours will judge that.

McGRATH J:

I hear, Mr Galbraith, what you're saying is that whereas Justice Kirby's approach was at great emphasis on claimant protection the others are saying claimant protection subject to the terms of the policy. But is there any further light shed on purpose?

MR GALBRAITH QC:

I'll come back to purpose in a moment.

ELIAS CJ:

When you say that the cases say that the third party would get no more than the insured would get, I don't think anyone is suggesting that. It's just an argument about what the insured gets.

MR GALBRAITH QC:

Well, no, because the insured would get the defence costs and what the argument is, the insured shouldn't get defence costs and the claimant should get the defence costs. That's what it boils down to. But just perhaps to give you a flavour –

GLAZEBROOK J:

Well, it doesn't really, does it, because the insured gets protection against the third party claim and defence costs, so the insured gets both of those. The claimant doesn't get any of those. It just has a charge over it.

MR GALBRAITH QC:

The claimant's not insured, of course.

GLAZEBROOK J:

Well, exactly. So the insured gets 20 million. The question is how that's divided up between defence costs and payment out in respect of a claim that he's been found liable in respect of, so it's slightly different. Now, if they don't get 20 million because they've made a material misrepresentation, then the insured gets nothing and the split between defence costs and liability is immaterial or irrelevant.

MR GALBRAITH QC:

That's right. But just leaping to that issue, it has got something to do or perhaps a lot to do with what my learned friend Mr Ring said. Nobody has to take out this insurance. When the insured takes out the insurance, the insured takes it out from the insured's benefit, and so there are two benefits, and Your Honour's quite correct, that there may be more, defence costs and ultimate liability costs may only be part of it and I've noted that in our submissions that when you look at some of the policies they have all sorts of things in there which are obligations to pay under the contract, but the insured is taking out at least two protections, defence costs which are going to hopefully protect the insured from paying anything, being liable to pay anything at the end of the day, and then if that all fails a cover for whatever the insured might be found liable for, and of course the insured may be found liable for less or more or whatever of when Bloggs & Co wrote the first letter making a claim and nobody knows until five years and 11 months after the letter was written and the proceedings were issued and five years 11 months later when a judgment is given, and so if one takes the appellant's view then as soon as Bloggs & Co writes a letter saying something happened last week and we're going to make a claim for $100 million, then the insurance policy is frozen for five years and 11 months if they want to spin out the limitation period and however long it takes that the liability to be determined. Now, the Australian Courts have, in my respectful submission, have set their faces

against that sort of construction. It's certainly one of the problems which arises if the appellants, the charge freezes everything.

ELIAS CJ:
Well, it is true that the argument for the appellants probably affects all such policies.

MR GALBRAITH QC:
Yes, and they're not all D&O policies. They're solicitors' liability policies, any policy which provides for damages or compensation, any policy, so it's across the board. As soon as a claim is notified, and that only requires a letter as was provided here, then –

ELIAS CJ:
It doesn't mean, of course, that it's frozen, as you say.

MR GALBRAITH QC:
It depends on the quantum.

ELIAS CJ:
Yes and if the claim that comes in is for 300 million then the insurer has some decisions to take.

MR GALBRAITH QC:
Well, yes.

ELIAS CJ:
Maybe he has the decisions to take if the claim is less.

MR GALBRAITH QC:
Let the claim be for the amount of the insurance cap or exceeding that. It's not a question of the insurer then having to make a risk assessment. It's a situation where in relation to defence costs, and it could be a lot of other categories of cost, where the insured will be fully entitled if the insurer doesn't pay up for the defence costs when they're incurred, to issue summary judgment proceedings. Then the Court in the summary judgment proceedings, what's the defence to that from the insurer? Not that I'm making a risk assessment. The defence has got to be section 9 has aggregated. My legal obligation, which is what it is under the contract, to pay for this

category of cost, whatever the category of cost is. And so that's why it is, with respect, a pretty stark choice in the way that one approaches the interpretation of section 9. Is section 9 actually intended to freeze, legally freeze, or abrogate the rights that the insured has under the contract and to that extent, also, of course, the division of benefits and obligations under the contract between insurer and insured because under such a contract, of course, as the Court will be well aware, the insured has obligations not to admit liability and in many cases to defend, and of course the balance is that they get paid for defending reasonable costs et cetera. So you change the whole – once you start doing what the appellants are suggesting, you change the whole balance of benefits and obligations under the policy and he raises all sorts of other issues. So just to pluck another example out of the air, it's the second claim that the insurance company says, "Well, we can't pay because it's section 9," so the insured is then defending the claim, joins the insurance company as third party under the insurance policy. The plaintiff proves liability against the insured. The insured says to the Court, "Well, I've got this insurance policy." Again, there's that same issue so section 9 – is the Court going to say, "Well, section 9 says you can't get judgment against the insurer but we don't actually know because this claim is only a letter from a solicitor. We've got to wait five years and 11 months to see whether it's actually going to become an actual claim then we've got to wait until it's adjudicated upon, so in the meantime we can't give you judgment against the insurer. We'll all just sit around twiddling our thumbs and wait and yet you've got a judgment against you by the plaintiff." So Her Honour the Chief Justice asked are there implications. Yes, there are lots of implications.

GLAZEBROOK J:

Yes, but aren't you in that case actually having the statute liability priority set out in section 9.3?

MR GALBRAITH QC:

Ah, but the problem about that, Your Honour, is that the –

GLAZEBROOK J:

There is a statutory priority, so how – because I can –

MR GALBRAITH QC:

Yes, but the statutory priority is in relation to a letter which has been written.

GLAZEBROOK J:

Well, it may or may not be, but how do you get around the statutory priority?

MR GALBRAITH QC:

We'll come to that.

GLAZEBROOK J:

I'm not suggesting there aren't difficulties with it, but there is a statutory priority scheme in respect of competing claims.

MR GALBRAITH QC:

Yes, sure, and what's been recognised in Australia is that there are problems whichever interpretation you decide to choose, which is why, as I said, it's been driven by the purpose, ultimately, in Australia as to what's the purpose of all this, and perhaps just picking up on the question that Her Honour Justice Glazebrook asked about 1928 et cetera, actually, if one does look at the Law Commission report, you'll find the first four or five pages are about the history of the 1928 and some cases in 1928 and shortly thereafter, but also you'll see that the 1928 legislation referred to in *Bailey*, and *Bailey* you'll find behind tab 14 in the Bridgecorp appellants volume 2, and I want to come back to *Bailey* because this may be helpful, you'll see at page 441 they set out there, it's a short route to seeing the 1928 Act. You'll see in subsection 1 what it's all about. "In the event of an owner dying insolvent, making insolvent the owners of Body Corporate or in the event of proceedings being commenced or winding up after the happening of the accident," so what it's about is protecting the money which the insured would receive under the insured's contract of insurance from falling into the general pool for the insured's body of creditors, and that was the principal driving purpose of the 1928 Act and of the 1936 legislation. It included, and the Courts have noted this issue about collusive arrangement between insured and insurer, but the principal purpose which has always driven this has been the unfairness of monies which otherwise would go to the insured and on to the claimant, falling into the general pool of creditors where it was never intended that's where they'd fall. That's consistently recognised through all the cases and I think in paragraph 3 of our written submissions I referred to the *Ludgater* –

McGRATH J:

The only reason the pool came into existence, in fact, was the event concerned.

MR GALBRAITH QC:

Yes. So that's the driving purpose but there is also this collusive purpose. The driving purpose, with great respect, wasn't to change priorities or dash for cash or anything like that. It was this unfairness that was perceived of insurance proceeds falling into the hands of the general body of creditors when that wasn't a purpose of the insurance.

So in our written submissions, as I say, we referred to *Ludgater* in that respect and you'll see there the two short extracts but there's more said in *Ludgater* about it, but you'll see exactly that statement, the obvious unfairness, it says, in the deniability of an injured complainant's claim to insurance proceeds received by or payable to an insolvent insured defendant, and the fact that this section is plainly intended to operate primarily when an insured is insolvent or there is a priority of claims against the assets of such an insured, so that's the driving purpose of section 9. So in essence, what we submit is that one doesn't have here a contest between two claimants who are claiming for damages or compensation which is what section 9 is actually about. What we have here is a claim by a claimant for damage or compensation to say that that claim in some way freezes, charges, abrogates, whatever word one likes to use, the contractual right which the insured has to be paid by the insurer for the loss which the insured suffers and, of course, the – forgetting all about the words about defence costs and when they're payable or not, the primary insuring liability is for loss and, of course, as soon as the insurer pays, sorry, the insurer pays out $1 for defence costs, that's a loss as defined in the policy, which is the principal reason why the insured is entitled to be paid for defence costs immediately they're incurred because that is a loss under the policy.

The struggle I've always had, if I can say something personal about interpreting section 9, is to keep trying to get out of my head the idea that we're talking about a charge such as one's used to, a charge which fixes over some asset, and you'll see right at the start of the section in *Bailey* that they talk about "in the name of a charge" or words to that effect, and they go on to say, well, look it's called a charge but it really isn't a charge. It's certainly not a common law concept of a charge, and if I can say, if I can, with respect, what the Chief Justice said was if it's a charge over anything it must be a charge over a chosen action. That's all that exists at the time. But it's a charge over a chosen action which in respect to the claim for damages or compensation by some third party can't be brought at the time because it's not

quantified. There's no liability established. You can't do anything about it. So it's a chosen action which is waiting in limbo to see what happens down the track.

Now a quite different position about the obligation to pay defence costs. That's a loss that arises immediately. As I say, the first time a dollar is paid out in defence costs, that's a loss under the policy and you can sue for that. So it is, if one wants to analyse it in that way, in my respectful submission, that's the correct approach, but I think more significantly, again if I can say, with respect, it is what the Chief Justice said, that really one should put to one side this idea of, or the false idea that tends to come into my mind of a charge and think more about well, what does section 9 – what's the statute say? And you'll see in these cases, including in *Bailey*, they don't use the word sui generis in *Bailey* but they use it in *Chubb*, for example, that this is really a sui generis remedy, if you can use that phrase, which has been called a charge and the name of charge has been applied to it but it's only what's in section 9. That's all it is and one shouldn't get overwhelmed by the concept of charge that I normally think of.

What it provides for, of course, in section 9 in relation to a charge is that it's something which is or may become, sorry, may be or become payable. So Bloggs & Co. writing a letter doesn't fix anything in terms of a quantum of, if we can still use this term, charge. It –

ELIAS CJ:
It still may become payable.

MR GALBRAITH QC:
It may or may not become payable.

ELIAS CJ:
In respect of that liability.

MR GALBRAITH QC:
I prefer, Your Honour, to see the "may be payable" or "may become payable" as simply the alternate to "is". I mean, either it is now or it may be in the future, but until it is in the future, it is contingent. It may or may not become payable, so it is, in my respectful submission –

ELIAS CJ:

But the insurance moneys are payable or may become payable in respect of the liability for which the claim is made.

MR GALBRAITH QC:

They may or may not, yes, Your Honour. I mean, that's –

ELIAS CJ:

Yes.

MR GALBRAITH QC:

That's right. But the insurance moneys may become payable in respect for some other liability too. They may –

ELIAS CJ:

No, but if we're trying to work out what the effect of subsection (1) and I think really more importantly subsection (6), isn't it, or subsections (3) and (6) have, I just don't see that this language at the end of subsection (1) answers the question that we have here.

MR GALBRAITH QC:

I don't think it answers the question, Your Honour.

ELIAS CJ:

No.

MR GALBRAITH QC:

I agree with you. That's really what I was inadequately saying before, that I think that –

ELIAS CJ:

So you differ from Mr Ring on this?

MR GALBRAITH QC:

I don't see it as being a mixed pool or whatever that concept is. It seems to me that one just looks at – well, I'm sorry, I shouldn't say one just looks at the statute – one looks at the statute and looks at the purpose and then endeavours to make it work in

a way which is consistent with that purpose but which doesn't go and drive it as – I'm sorry, it's a slightly inexact term – drive a bulldozer through the contract.

McGRATH J:
Well, Mr Ring did very helpfully point us to the words that he thought meaning had to be given –

MR GALBRAITH QC:
Well, I agree with him –

McGRATH J:
Do you differ from him –

MR GALBRAITH QC:
No, I agree with him entirely in respect of –

McGRATH J:
– in terms of the key words?

MR GALBRAITH QC:
– of that liability. I think that is important.

McGRATH J:
Yes.

MR GALBRAITH QC:
And so the difference between the defence costs, they're not a payment in respect of that liability at all. They're simply a contractual obligation under the policy. They're not a payment in respect of the liability to pay damages or compensation. No, I think that is an important interpretative point.

McGRATH J:
I mean, it turns on those final words –

MR GALBRAITH QC:
Yes, yes.

McGRATH J:

– in section 9(1) and the purpose perhaps can help us to which, towards what have –

MR GALBRAITH QC:

Yes.

McGRATH J:

– it seems to me two possible meanings.

MR GALBRAITH QC:

Yes, yes. No, and I fully support that view, and so –

GLAZEBROOK J:

I just have a slight difficulty with two possible meanings. I quite understand there are two separate liabilities there but it's the insurance moneys that may become payable and what the argument has to be is that they may become payable depending upon what happens in the contract to other things that may become payable.

MR GALBRAITH QC:

Well, they may become –

GLAZEBROOK J:

But as soon as you have – but if you have two or three completing claims, forget defence costs because they're totally different liabilities. So you have three claims. You seem to have three charges and a priority set up in the section itself.

MR GALBRAITH QC:

Yes, I –

GLAZEBROOK J:

So it's nothing to do with the contract because the contract may say the first person who gets judgment gets paid out but the priority rules would have to ride roughshod over that because they're statutory ones, wouldn't they? Or do you say they don't?

MR GALBRAITH QC:

Well, that's one of the interesting things about *Chubb* and perhaps we'll just have to have a look at that in a moment, but…

GLAZEBROOK J:

Because *Chubb* will say yes.

MR GALBRAITH QC:

Yes, *Chubb* would say – no, *Chubb* would say that until liability has been determined that there is no liability under the policy and so you take my example of you're in Court and you're being sued by a second claimant and first claimant might have written a letter but hasn't got you to Court yet then that liability, if the Court determines it, would be the liability which has to be met under the contract. That's what *Chubb* would say and my learned friend, Mr Ring, said he doesn't agree with *Chubb* on that basis but I think I'm – if Your Honours read *Chubb* and the reasoning in it, you can see why the Court's driven to that position. I'm not saying it's right or wrong but –

GLAZEBROOK J:

Well, because they then have to read out any of the words that say the charge arises on the happening of the event, don't they?

MR GALBRAITH QC:

Well, the –

GLAZEBROOK J:

Because if the charge arises on –

MR GALBRAITH QC:

No. They'd still the charge arises but they would say the charge doesn't arise in relation to – there is no liability at the time. If we go to *Bailey*, for example, what you see in *Bailey* –

GLAZEBROOK J:

Well, there is really a liability.

MR GALBRAITH QC:

Well, you see, there's no liability if you look at the Australian cases – well, sorry, there is no liability because liability is defined under the policy as you've already seen as judgment, settlement or –

GLAZEBROOK J:

Well, the indemnification only happens on judgment but your liability to pay damages arises from the happening of the event, doesn't it? Different – so the insurance company's liability arises but the insured's liability arises on the happening of the event, doesn't it, whether they accept it or not?

MR GALBRAITH QC:

Well, under the – well, yes, in a sense, Your Honour's right in the sense that if a Court 15 years or 10 years or five years later says that you were liable on that date because of something you've done then you're quite right but –

GLAZEBROOK J:

So the liability arises on that date. Not the insurance company liability.

MR GALBRAITH QC:

No, no, no, no. You're quite right. But it's – this section 9 only applies to insurance money –

GLAZEBROOK J:

Well, no, but –

MR GALBRAITH QC:

– under the policies.

GLAZEBROOK J:

– it says you're indemnified against liability to pay any damages becomes payable in respect of that liability. It has to refer back to the liability to pay damages. The liability arises on the happening of the event whether you agree with it or not. So if you're ultimately held to be liable, you're not ultimately held to be liable from the date of judgment.

MR GALBRAITH QC:

No, no, no. That's right.

GLAZEBROOK J:

You are held to be liable from the date of the happening of the event.

MR GALBRAITH QC:
Absolutely.

GLAZEBROOK J:
Well, so that liability has to refer back, doesn't it, on the wording to the liability to pay damages or compensation, not the indemnification which does arise on the judgment.

MR GALBRAITH QC:
But it's not identified at that time, Your Honour, so there may be a –

GLAZEBROOK J:
It doesn't matter whether it is identified. Just in terms of –

MR GALBRAITH QC:
I know, I understand what you are saying.

GLAZEBROOK J:
Oh sorry, yes, you got the point.

MR GALBRAITH QC:
But it is not identified in terms of whatever the charge is at that time. The charge has no content at that time because the liability is still contingent. It may exist, it may not exist, just as much as the fact that as you will see from *Bailey*, the recognition that if something allows the insurer to say that the policy doesn't respond, then in fact what *Bailey* says is no charge, no charge will have arisen so that is a little bit inconsistent with just what we were talking about Your Honour, about liability.

GLAZEBROOK J:
That's because there are no insurance monies. So you can't have a charge over something that doesn't exist.

MR GALBRAITH QC:
No that's right, that's right.

GLAZEBROOK J:

I would have thought if your argument would have to come down to insurance monies unlike Mr Ring, accepting that that means everything.

MR GALBRAITH QC:
Yes, I agree with that.

GLAZEBROOK J:
So you are relying on the insurance monies.

MR GALBRAITH QC:
Well it depends on what question you ask me. Yes, Your Honour, at that time there is no insurance money to which can be charged, yes.

ANDERSON J:
It seems to me Mr Galbraith that everybody is agreed that once the charge arises, the insurer cannot deal with the insured in a way that unlawfully derogates from the charge. And the main difference between the parties is that the appellants say that any dealing with the insured in a way that leaves a shortfall, over the full amount of the claim, is derogation from the charge. And the respondents say, "No, the charge is over the – what is left after the policy, the contract has been performed according to its terms"

MR GALBRAITH QC:
Yes Sir, that's it in a nutshell. Perhaps it just may be worth going to *Bailey*, I am conscious of time and I could keep saying general things, but perhaps we just have a look at *Bailey* for a moment, you will find *Bailey* behind tab 14, just where we looked a moment ago in volume 2. Remember *Bailey* is not, it's not a case about defence costs for example. It's a case about whether the entity could change its rules to effectively exclude this doctor from getting cover under what had been a contractual entitlement under the rules. But Their Honours, Justice McEwan and Gummow from page 445 on, dealt with section 6 as it is over there. That first half of it, you will see, even the first sentence, as I say, they say, "That which is created by section 61 is given the name, they put in quotes charge and that is the point I was making a moment ago, it's not the charge that we normally think of. And they go across the page to talk about, some of the background, some of the more technical background to charge. You will see the first full paragraph on page 446, they say, "It is to be read against the background of those distinctions. What it achieves is the creation of a

new right" and that's I think, a fair way of describing it, it's a new right with an associated remedy because you know, the other thing we have to remember is that another right, which is given, or a right which is given the claim it is to effectively, if I say sue in the name of the insured, it doesn't put it like that. But it can sue in the same way that the insured could sue and in some circumstances, leave is required first, which is another indication in our respectful submission, that the claim can only recover what the insured could recover.

And you will see about the middle of that first full paragraph, it says, "By its own force the statute in circumstances where it applies creates on happening of event a charge on all insurance money, so it is by force of the statute which is a point that Her Honour the Chief Justice made. It goes on to say, "Advance interests of the claimant etc," there is nothing surprising about that. But the footer page, 447 is of significance. "Reference in section 6, sub-section 7, of the contract of insurance is in our view that contract referred to in section 6, sub-section 1, by which the insured is indemnified in the happening of the event giving rise to the claim for damages of compensation. It is not that contract identified in section 6(1) is varied or replaced by unilateral and mutual action of the insurer and the insured, and the interval between the happening of the event giving rise to the claim for damages or compensation, and thus to the charge in some later date, such as the recovery of judgment in the action by the claimant to enforce the charge against the insurer." So what, perhaps I will read the next bit.

ELIAS CJ:
I have lost you sorry.

MR GALBRAITH QC:
I am sorry. On the foot of page 447 to the top of page 448. And they go on to say, in 448, "That is not to say that the contract may not at the time the charge arises, contain provisions conferring rights which in the events which have already happened, or which later happen, are exercises by the insurer against the insured. That those rights were never exercised, draw their life from the contract at the time when the charge descended, not from any subsequent variation or replacement of that contract. So what they are saying there, is that the charge when it arises, prevents the contract being varied, that is what they are saying but the rights, and they are talking about the insurer's rights there, because they are talking about the right to say that there is no obligation under the contract insurance, because the

insurer has done something wrong. Those rights, as they say, draw their life from the contact at the time when the charge descended not from any subsequent variation. And so they then turn to the, what they say is the central issue in the case and they're dealing with the possibility of the insurer disclaiming liability and you will see right at the foot of page 448, the very last few words, for example in *McMillan v Mannix* (1993) 31 NSWLR 538 (CA) and that was a case where Justice Kirby descended the minority and they talk about the policy of insurance there. And they say at the end of that top paragraph on 449, in *McMillan v Mannix,* the New South Wales Court of Appeal by majority held correctly in our view, that there were no insurance monies which were or might become payable in the sense of section 6(1) of the Law Reform Act. They then go back to the text, you will see return to the text at 6(1). "Charge created by force of legislation happening in events, expressly charged on all insurance monies payable in respect of that liability. That clearly would cover the case with the terms of policy, events would happen with such, it could be said, that in particular someone is paid by the insurer to the insured, in other words, the "is" is payable now. In that state of affairs, the charge has an immediate operation upon the existing and quantified obligation of the insurer to make payment to the insured. However even though all other necessary facts and circumstances of the insured to have a present right to receive payment may exist, the contents of insurance may be liable to avoidance for non-disclosure, then there can be no monies payable and thus nothing which the charge might be brought in time, and it may be accurate to say the charge never comes into existence." They then go on to look at the may become payable and they say, that is apt to deal with the situation where the charges was descended," I must admit I have a question mark about that use of that term, it is probably about as bad as crystallised I would have thought. There is as yet no sum which could be identified as presently payable by the insurer to the insured, in such a case the statute charge operates by loose analogy to an agreement for a charge on after acquired property." Now that's what Bailey says, that is a loose analogy but after acquired property, so that is not freezing anything, at the moment. Until the property actually comes into existence, the charge has got nothing to bite on. "Upon such monies as and when they do become payable. However there will be nothing in respect to which the charge may be enforced if the monies never become payable by reason of the exercise by the insurer rights to avoid the contract of the factor in its formation. So also in the case of breach which pursuant to the terms of the contract or the general law entitles the insurer to disclaim liability and this state of affairs exists when actions bought by the claimant under section 6(4) or as necessary, leave is sought to commence that action. Now in all

these cases there were no insurance monies which were payable when the charge arose and none had become payable. Then you will what they go on to say, "However," so they're saying, however the charge is empty in my respectful submission, is what they are saying at this time, "However," they say, "Once the charge has descended on the happening of the event."

GLAZEBROOK J:
What did they mean, "descended?"

MR GALBRAITH QC:
Well that is a very good question.

GLAZEBROOK J:
No I have got the earlier reference to it.

ELIAS CJ:
It is like crystallisation. They are avoiding – they are sensibly avoiding that word.

MR GALBRAITH QC:
But to me, I would have thought a better word, was to use the word of the section, which, "The charge arises" and that would have been a more sensible thing.

GLAZEBROOK J:
Yes but can you just tell me where the "descended" is earlier.

MR GALBRAITH QC:
Oh sorry, it's back on page 449, the third line of the last paragraph. So they used this term "descended." However once the charge of descended of the event giving rise –

GLAZEBROOK J:
They must mean the event has happened, don't they?

MR GALBRAITH QC:
Oh yes, yes.

GLAZEBROOK J:

So they don't mean crystallisation at all. Because nothing yet is payable, so they must mean –

MR GALBRAITH QC:
Well that is true, that is fair.

GLAZEBROOK J:
They must mean, "At the time the event happened." Is that –

MR GALBRAITH QC:
That's fair. So they go on to say then, "No mutual or unilateral action of insured, insurer or insured, which is taken otherwise under a pursuant of the contract of insurance, as general as it operates in the contract may vary, discharge or otherwise qualify or abrogate the quality of insurance so as to deny to the claimant what otherwise would be the fruits of enforcement of the charge by action taken under section 6(4) against the insurer," so that's the collusive bargaining thing. They're saying –

GLAZEBROOK J:
Not to go down to the end of the paragraph?

MR GALBRAITH QC:
I'm going to. I was just going to make a comment on the way.

GLAZEBROOK J:
Sorry.

MR GALBRAITH QC:
So what they're saying, even if the charge has got no dollar content, if I can use that phrase, it, however it has that effect it stops any collusive playing around with the contract. "The contract of insurance charge is nor after the charge is it open to the insurer to rely upon a payment made under the contract to the insured unless the payment was made exist on the claimant's charge." Now that's all they say about section 6(7).

GLAZEBROOK J:
But what does that mean?

MR GALBRAITH QC:

Sorry?

GLAZEBROOK J:

What does it mean?

MR GALBRAITH QC:

Yep, that's a very good question. It's just they don't analyse –

GLAZEBROOK J:

Because descended –

MR GALBRAITH QC:

– that. They simply –

GLAZEBROOK J:

Well, descended must mean at the time the contract, a time the event happened –

MR GALBRAITH QC:

Yes.

GLAZEBROOK J:

– and it says no payment can be made under the contract of insurance to the insured.

MR GALBRAITH QC:

They're simply repeating section 6(7), Your Honour.

GLAZEBROOK J:

Yes, well, but –

MR GALBRAITH QC:

That's all they're doing.

GLAZEBROOK J:

Well, why doesn't that mean what it says then?

MR GALBRAITH QC:

Well, I'm just going to explain why that doesn't, Your Honour. Because again it comes back to the purpose of the section, that –

GLAZEBROOK J:

So no payment may be made –

MR GALBRAITH QC:

No, I understand –

GLAZEBROOK J:

– under the contract –

MR GALBRAITH QC:

Yes.

GLAZEBROOK J:

– means no pay – every payment can be made if it's available under the contract because of the purpose of the provision.

MR GALBRAITH QC:

No, what, in my respectful submission, that means consistently with the rest of the text of section 9 when one reads it is that no payment can be made in respect of a claimant's, a claim to damages or compensation which is what section 9 is about. Section 9 isn't trying to deal with payments for defence costs or investigation costs or there can be a whole swag of other things which could be provided for as payments that are due under the contract, and so, with respect, while, yes, that sentence is there, that says nothing more than what section 7(6) says and it, in my respectful submission, doesn't, isn't in any sense determinative of the issue that we have, or the Court, sorry, has before it today which wasn't an issue before this Court, I mean, the High Court in this case. So – and it's the same when you look at section 6(3), it's talking about priority between charges and charges only arise as the Court realises in respect to claims made in respect of damages or compensation. Charges don't arise in respect of a claim for payment of defence costs or a claim for payment of any other contractual cost under the contract. So the section, section 9, is dealing only with

claims that can be made that can give rise to charges and payments in respect of such claims. Well, that's my respectful submission. While we've –

GLAZEBROOK J:
So you'd read in under the contract to the insured in relation to other claims on which charges can arise?

MR GALBRAITH QC:
In respect of that liability, that word that Your Honour had before. Perhaps just while we're in this volume, without taking you through, and we haven't got time, many of the other cases, behind tab 16 you'll find *McMillan v Mannix*, which is the decision I was referring to that obviously the High Court approved, the majority judgment, and you'll see a discussion in that case, particularly at page 548 of the case, 329 of the volume, of some of the conflicting authorities which had – were in existence in Australia at the time. That was a 1993 case.

Under the next tab, tab 17, there's *Grimson* which was a slightly earlier case, a couple of years earlier. Again, Justice Kirby, I think, in a minority. And you'll see at page 429 of the judgment and page 338 of the volume one of the more colourful comments in, on that page at about line F, just after that, reference to higher sentiments no doubt containing an element of truth but didn't extend to authorising the Court to mangle the section. So I –

ELIAS CJ:
Can I just ask you, Mr Galbraith, on your argument, if a claimant obtained judgment, how does that affect –

MR GALBRAITH QC:
You mean another claimant, if I can put it…

ELIAS CJ:
Yes, can you still keep on shelling out defence costs? Can you still make these payments on the basis that –

MR GALBRAITH QC:
Once the charge had been quantified, so as you say, if the claimant got judgment for 30 million, you have only got a 10 million cover.

ELIAS CJ:

Yes.

MR GALBRAITH QC:

Then I think you would be stuck, then.

ELIAS CJ:

Why? Because your argument would be that, well there are different liabilities and you have a contractual entitlement to keep paying out, you can prefer.

MR GALBRAITH QC:

Yes but the difference is Your Honour, my respectful submission then, is that at the time that the charges descend, I would say to arise, but they have said, to descend, to arise, it doesn't have a quantum at all, it's – the mere fact it is saying $20 million.

ELIAS CJ:

No, no I understand that.

MR GALBRAITH QC:

Yes, right.

ELIAS CJ:

But your argument must hold, this sort of bifurcated approach that you have got an insurance contract which covers two sorts of liabilities, because you are placing a lot of emphasis on. So does the statutory charge never bite, as long as you have a basis for payment that is distinct from the third party claim?

MR GALBRAITH QC:

No at the moment, on my feet, I would accept that it bites once there is a judgment which exceeds the limit of liability under the policy.

ELIAS CJ:

But not as a matter of contract, that would have to be some equity.

MR GALBRAITH QC:

Well it would probably, well it may depend, of course on the terms of the policy, Your Honour, I suppose but I am just thinking of the insurer's point of view, that there is a cap on liability and at the time that there is a judgment against the insured, that fixes the insurer's liability under the policy, to the insured and that would exhaust whatever the insurer's liability is under the policy.

ELIAS CJ:
But there may be bills in, there may be legal fees that haven't been paid.

MR GALBRAITH QC:
But the insurer only has a liability to pay whatever the quantum of the policy is and so it would, the insurance policy would be exhausted, the insurer's liability would be exhausted.

ELIAS CJ:
Well, as a matter of fact it would be. But your argument is that they would be paid in preference.

MR GALBRAITH QC:
Well no but the insurer, sorry the insured couldn't get the insurer to pay more money than is the cover under the policy.

ELIAS CJ:
No, I understand that but you could use up any money that could be available for the liability claim, the third party claim, on your argument.

MR GALBRAITH QC:
No, I would have thought at that stage, that the charge does bite Your Honour.

GLAZEBROOK J:
So what is it in the words of the statute that has it biting, when quantum is fixed. Does that come back to the insurance money is available.

MR GALBRAITH QC:
Yes.

GLAZEBROOK J:

So at the end of 9(1), so as soon as insurance monies are available, whatever it happens to be at the time, quantification is what the charge covers.

MR GALBRAITH QC:

Yes because it has got to bite if it is going to have that purpose of preferring the claimant to the unsecured creditors of the insolvent insured, so it is got to bite in that quantum, otherwise, as Her Honour, the Chief Justice says, otherwise it would be eroded by these other payments being made. So it seems to me it would bite at that stage and that is part of the purpose of section 9. I am conscious of the time.

ELIAS CJ:

I am sorry I shouldn't have interrupted.

MR GALBRAITH QC:

I will be very quick, I promise. In our written submissions, I have referred to that judgment in *UEB Packaging Ltd v QBE Insurance (International) Ltd* [1998] 2 NZLR 64 (CA). As I say I apologise, I said it was a conclusion arrived at by Justice Tipping, it is actually a Court of Appeal judgment and he gave the judgment in that. There may not be much else that I need to trouble you with. Oh *Chubb*, can I just talk about *Chubb* for one moment and the Court will obviously read *Chubb* and I don't want to take you through it at this time. But you can see how *Chubb* got, well the Court and *Chubb* got driven to the position they got driven to, in respect of competing claims, which is the slightly questionable part of the *Chubb* determination. No problem in the way that the Court has approached the question of defence costs. They've recognised, as I have respectfully submitted to you, that it's a question of whether their section 6 is directed towards abrogating the contract. They discuss the question of, my learned friend, Mr Tingey spoke about, about having – why should insurers be driven to having separate policies because that actually is undesirable in that, or it may be undesirable in that surpluses of money available for defence costs can fall into the general pot and vice versa, and they see that as being advantageous. They approached on the basis, in part, of why should the claimant be exposed or put in a more favourable position to the insured and all of those, all of that reasoning, in my respectful submission, seems to be entirely appropriate.

The slightly questionable aspect of the decision is their determination in respect to competition between claimants for damages or compensation. So now our situation at all, and in fact, in my respectful submission, this Court, if it chose, doesn't even

have to get into that debate because if the Court was prepared to accept that the section 9 is directed towards such claims, in other words claims about damages or compensation, then the defence costs aren't in that category at all and so one doesn't have to try and resolve the Gordian knot about what happens if you have two claims in relation to damages or compensation.

The sort of problem that they identify and they're grappling with there is the sort of slightly exaggerated version I gave to Your Honours before about where you get a letter written week after an event saying there's going to be claim for $100 million and then nothing happens about it for five years and 11 months or however long it might be and then the proceedings are prosecuted for a long time. It's a problem which the Law Commission identified in their 1998 Report, and in fact their answer to that, Your Honour, was what Her Honour, the Chief Justice, suggested about rateably apportioning these matters. But that doesn't, of course, necessarily resolve the whole problem because if you –

ELIAS CJ:
You could always go and apply under the Declaratory Judgment Act, couldn't you?

MR GALBRAITH QC:
Yes. Well, I noticed –

ELIAS CJ:
I'm always surprised people don't use that legislation more but if you were an insurer which was holding money, there are ways –

MR GALBRAITH QC:
Yes, you might have to.

ELIAS CJ:
– of getting authorisation to do it.

MR GALBRAITH QC:
You might have to do something like that. But that was the sort of issue that I think lies behind the *Chubb* discussion and the way that they dealt with it was on the basis that there is no – until liability is determined, there is no liability under the policy, which I think everybody accepts, and if there was a claim brought under the policy at

that time by the insured having had a judgment entered against the insured, that the insurer would be obliged to pay out because that's the contractual obligation of the insurer, and so the argument to the contrary, of course, was the section 6(3) argument as it is over there, 9(3) here, and that's why in paragraph 131 they're narrowly confining that priority contest, or resolution, which is found in subsection (3) and they're saying it still has some but a very narrow sphere of operation and, as I say, one can see the reason that they've come to the conclusion they have to try and make section 6 work in a practical situation. Now, as I say, that's the more questionable aspect of that decision but there is reasoning lying behind it contrary to what my learned friend suggested, but you have to read the earlier paragraphs to see how they get to that.

There may be nothing else that I can usefully help the Court on. I think that's all I need to say unless there are any questions.

ELIAS CJ:
Thank you, Mr Galbraith. Mr Keane.

MR KEANE QC:
First Mr Steigrad adopts the submissions made by my two learned friends for the respondent's, particularly those relating to the need to have clear regard to the purpose of section 9 and of course its historical background. If I could take you to the section, and make what may appear to be a simple submission but one which I submit could be telling, is that if one goes to section 9 (1) and the first thing that gets talked about in that section is the fact that the rights that are now available to the claimants, come out of a contract of insurance. In other words, section 9 (1) draws its life from the insurance contract and what we are now being asked to deal with, is whether given that contract which is a whole set of mutual obligations, going each way, effectively gets trumped by sub-section 3 which is actually a priority sort of question. If one takes the first party and third party view, which Mr Ring put to you, in my submission that one then gets to looking at the very last words in sub-section 1 of section 9, talking about monies payable. Again bear in mind that they are monies payable under the contract.

Your Honour, Chief Justice, asked Mr Galbraith the question if there were a judgment obtained, would it be the case that on his argument, you could continue to spend defence costs. My response to that would be that of course the insurer, nor the

insured, can go to each other for unreasonable costs. If what you have is a judgment in another set of proceedings, then unless you have got some very good reason –

ELIAS CJ:
But the costs might have been incurred and been entirely reasonable.

MR KEANE QC:
No I am talking about incurring costs after the judgment which I understood was Your Honour's question. And if there is a judgment, I think it would be very, very hard to defend any incurring of costs thereafter.

ELIAS CJ:
No but what about paying already incurred costs which was my question.

GLAZEBROOK J:
All costs that didn't have anything to do with that claim but had to do with some other claim?

MR KEANE QC:
Well I think that incurring further costs certainly would fall foul of what I have just spoken of. So far as payment of costs are concerned, there is a distinction drawn in sub-section 6, the words "Any payment" is used. And so sub-section 6 would need to be applied according to its term but under sub-section 7 the words are, "No insurer shall be liable." So I can only point to Your Honours that different form of wording and I think you would need to look at which of the two, the situation embraced. But all I am saying is that it is certainly not a mandate for the insurer to just go off and do whatever it likes and indeed, I think that there is some questions around the issue of whether the insurers are taking a willy-nilly view about costs to the detriment of claimants and one can understand, on a sociological basis, some concerns about that. That, of course, is not a one sided policy, depending upon how Your Honours decide because it may not have escaped Your Honours' notice that in the Court of Appeal decision of *Steigrad v BFSL 2007 Ltd [2013] NZCA 253* , the quantum of the claim was put at 450 million and this morning we were told that it is 340 million and what has happened is an amended statement of claim and I'm not saying that this applies in this case but the question of the indeterminate nature of claims that may be notified and the fluctuations which can be severe in the claims as they go through various iterations is something which would bedevil any practical dealing with this

sort of situation. You can't stop it happening but that's one of the things that may happen.

There is another element that I wish to take Your Honours to and that requires me to ask you to get volume 2 of the case on appeal at page 140, which is the directors' and officers' liability policy. Now I preface these comments by saying it is accepted that if there is some reason under the policy for there to be a refusal to make a payment, whether it's some intervening event or whatever, then that is something that is outside of the claimant's control and the claimant is the victim of it, depending upon how you may want to see it.

If I ask Your Honours to go to page 145 and clause 4.6, you will see there an obligation on the insured to co-operate with the insurer and that –

GLAZEBROOK J:
I'm sorry, I've lost where you are. Page what, sorry?

MR KEANE QC:
Paragraph 145, paragraph 4.6 under the name, under the heading, "Claim Conduct".

GLAZEBROOK J:
Yes, thank you.

MR KEANE QC:
The insured is required to co-operate with the insurer and if the insurer does not get that co-operation he is entitled to look to clause 4.3, which is on the preceding page at the bottom, breach of claim conditions, and what that in effect says is if there is a lack of co-operation between the insured and the insurer, the insurer is entitled to take a view as to what that might mean in terms of ultimate effect on the claim. Now one could imagine there's a great deal of width in making these assessments but the purpose of my referring these things to you is that if this happened, if an insured said, "I am not able to assist in the defence of the claim and nor am I willing because even if there is assistance in the defence of the claim, the amount which is being claimed against me is clearly going to drive me into bankruptcy anyway so why should I bother," so the insurer may want to do something about this but the insured says, "Well, I'm off to South America," and – or, "You can come and bankrupt me," then the claimant, who is expecting the benefit, and it's a windfall benefit for a claimant, as

has been said, because a claimant is lucky if there is insurance. We do not wish to discourage insurance because that's one of the things that is permitting claims to be met, but if that happened you could well find that the claimant will miss out by virtue of the insured's breach of its obligations, and that's just an example, although perhaps a poignant one, of the need to give effect to the contract of insurance.

Now unless I can help Your Honours further, that's all I have to say.

ELIAS CJ:
Thank you, Mr Keene. Mr Forbes, do you want to be heard in reply?

MR FORBES QC:
No, Your Honour.

ELIAS CJ:
Thank you, Mr Forbes. Yes, Mr Tingey.

MR TINGEY:
Mr Galbraith says I've got two minutes. I will try and be brief.

ELIAS CJ:
You don't need to listen to him.

MR TINGEY:
The first point is in relation to claims and defence costs. Now in my submission there is no difference under the effect of section 9 between these two matters. Defence costs are not always incurred before the claim is determined. They may be determined after, if it's a different claim. There is no special relationship of defence costs which gives them a different status than a claim. In fact, if anything, defence costs are not charged. So what my learned friends are effectively saying is an uncharged –

ELIAS CJ:
Sorry, what do you mean?

MR TINGEY:

Well, they don't attract the benefit of a charge under section 9. So what my learned friend is saying is an uncharged ability – an uncharged claim has priority over a charge claim. Now that simply can't be right. They must be after all claims, so – and that's central to the reasoning of Bridgecorp in this case, and that's also why *Chubb* in the decision of the New South Wales Court of Appeal drew the same conclusion in relation to defence costs as in relation to other claims. There's no difference in the sections to determine them.

GLAZEBROOK J:

The only argument would be the one Mr Galbraith made, I think, that you have to read the whole section as only relating to priority between charge claims. So effectively the third party as against the first party.

MR TINGEY:

Yes, but how – but if you have a – if it is between charged claims, how can an uncharged claim have priority over both of them? I mean, by definition all the charge claims have priority.

GLAZEBROOK J:

Well, I suppose what Mr Galbraith would say, I don't want to put words in his mouth, was, well, that is because the contractual position under the contract, which in this case, as we've seen, does give priority to those if they're incurred first, not in relation to later incurred ones, and that therefore it has to be read as being, doing as little violence to the contract as possible and the only thing that happens is – so having accepted that it doesn't apply to competing claims, third party claims, so he'd say it's not that an uncharged claim has priority, it's just that the whole section doesn't bite changing the priority of that.

MR TINGEY:

Well, to get there you need to say that the charge doesn't bite when the acts occur, and that's why it's central also to Bridgecorp's position that the charge arises from the happening of the event, so prior to those defence costs being incurred, the charge is already in place, and that's, with respect, the error the Court of Appeal made as well by in respect of. The charge is in place and then the defence costs are incurred after the charge.

GLAZEBROOK J:

Which is why I think Mr Galbraith was forced to look at the insurance money and say that that was what was limited by the contract –

MR TINGEY:
Yes.

GLAZEBROOK J:
– rather than the charge or the liability.

MR TINGEY:
Yes.

GLAZEBROOK J:
So what would you say about that in terms of the insurance moneys means everything that's payable under the contract.

MR TINGEY:
Well, it's any money that may become payable in respect of that charge, which is the full 20 million. It's determined as at the date the charge arises.

GLAZEBROOK J:
So you say it's just everything that –

MR TINGEY:
A timing, yes.

GLAZEBROOK J:
– that could become payable.

MR TINGEY:
Because the charge must be determined at the time it arises, so it's the 20 million. Those defence costs haven't been incurred in that time. The charge is there. It's set. It's a one-step process. And then the defence costs occur. They're an uncharged claim. They're defeating the charge if they're paid.

ANDERSON J:

I understand the nature of the respondent's position to be this, that the fact there is a charge doesn't mean that it will necessarily be met in full and that the expression "may become payable" means may become payable when the value of the charge is determined, in the meantime, the contract of insurance having been performed according to its tenor.

MR TINGEY:

Yes, that means, though, that any claim could be paid as well. Well, I suppose the fundamental point is we'd say the charge arises at that time over all the moneys and if you allow any payments of claims or defence costs you're defeating the charge.

GLAZEBROOK J:

Well, you'd have to say also that subsection (6) should be read as it actually says, that you can't pay anything under the contract of insurance at all.

MR TINGEY:

Absolutely, it, it says under the –

GLAZEBROOK J:

That's what it says.

MR TINGEY:

It says under the –

GLAZEBROOK J:

It doesn't say except in relation to something else so I presume –

MR TINGEY:

Absolutely, Your Honour. It says the contract of insurance. It doesn't say "other charged claims". It's broader than that. So it doesn't allow any claim to be – any payments under the contract of insurance, and that's what the High Court of Australia also say in *Bailey* in relation to subsection (6).

ANDERSON J:

What about a situation where the likely liability plus the reasonable costs of defending it are obviously not going to deplete the cover?

MR TINGEY:

Now that actually is what, that is what the words, and I was going to get onto this, the words "in respect of that liability" mean in subsection (1). So in my submission, and this may be a roundabout way of answering the question, but as Your Honour, Justice Glazebrook pointed out, the liability referred to in subsection (1) on those last three words is the liability to the claimant, but those words in respect of that liability are there to say if you've got a claim that's less than the full amount of the limit, so in this case a claim for 15 million say, the charge only operates to that amount, the 15 million, so that the insurer can still pay up the balance, the 5 million without breaching the charge. So I mean that's a complete answer in my submission, to my learned friend, Mr Ring's suggestion of the meaning, in respect of that liability. Those words are there to meet that problem that Your Honour, Justice Anderson has pointed out, where the claim is less than the full amount of the charge.

ANDERSON J:

The difficulty lies really where the – it is balance isn't it?

MR TINGEY:

I am sorry?

ANDERSON J:

Where it is balanced.

MR TINGEY:

But then is it really a difficulty. The insurer, it is not an impossible situation, the insurers and they have to decide whether they want to, or don't want to advance defence costs. If they decide it is in their interests to do so, because it limits the potential for the claim, they may decide, notwithstanding that the limit has been breached and they are paying it with their own volition, they may choose to do that. Just like any normal plaintiff, who is solvent, chooses to pay costs to defend a claim. So it doesn't, it is not an invidious position that the insurer is placed in, if it is around about, that they just need to make a decision about what they are going to do. And if they are wrong and the claim is established for more than the limit of liability, well they just incur that cost. So it is not a dilemma which can't be answered; it is just simply a commercial position that the insurer gets itself into and they need to make a commercial decision about whether they want to advance defence cost to minimise the claim or not.

The next point I wanted to raise was just the terms of the insurance policies. My learned friend Mr Ring, helpfully took you through the policies. Just one comment in relation to that. In each case the requirement to pay the defence costs is said to be subject to the limit of liability, so there is no obligation to pay defence costs if the limit of liability is met on that. Maybe in answer to the question from the Chief Justice about that point. But if the limit of liabilities is effectively charged, which is the position if a claim is made in excess of the limit of liability, then in effect the limit of liability is met by the charge and there's no requirement to pay defence costs under the terms of the contract, this is in addition to my arguments in relation to the effect of the section, but the terms of the contract say if the limit of liability is reached there is no requirement to pay defence costs.

The next point I wanted to make was about – much has been said of the fortuitous nature of the insurance in this case, but of course in this case, in Bridgecorp's case, Bridgecorp took out and paid for the insurance in circumstances where a claim of this nature was covered by that insurance, a claim against the directors for which it would receive the benefit. So there's nothing particularly fortuitous about this. It paid for and arranged that insurance. This is what it, the contractor, bargained for. It bargained for a claim where it could sue its own directors if they were negligence.

ELIAS CJ:
I think it was said that it was fortuitous as far as the third parties were concerned. You say, well, it's not because they were the people for whose benefit, effectively, this was taken out.

MR TINGEY:
Bridgecorp is the claimant. Its benefit as the contract, it's trying to reach the benefit of the insurance it paid for.

ELIAS CJ:
It's not like a running down accident or something.

MR TINGEY:
No. It took out insurance and a high likelihood of a directors and officers claim. The most likely claim is a directors and officers claim is a claim by the company itself.

That's covered by the policy, so it is getting from the insured, in its position as claimant, this time –

ELIAS CJ:
But Mr Tingey, I mean, there is fortuity in it in the sense that as far as the third parties are concerned whether the company was insured.

GLAZEBROOK J:
Bridgecorp here is the third party. I think that's the point you were making. It's an unusual situation. If you were looking at the antecedence to this in terms of the motor vehicle running down cases et cetera, it would have been, and the accidental death.

MR TINGEY:
Yes. In D&O policies it's usual. Now, the other point I was going to make about that is, all of this is only a problem where there's a composite policy. Now, most policies are not composite policies.

McGRATH J:
Well, not now.

MR TINGEY:
No, previously. Previously directors and officers' policies were often composite policies, but it's referred to in Mr Kendall's article about the High Court decision. It makes the point that most policies are not composite policies. D&O policies are often composite policies, but this is not a problem that has a more general effect. The problem here is caused specifically by the fact that between the insurer has a policy with a limit that covers both, if there are separate defence costs, which is often the case, or an obligation to pay defence costs in addition to the limit, then there is no problem with the insurance covering it.

My learned friend Mr Ring referred you to Derrington and placed some reliance on the statements of the author there. I would ask that Your Honours look at the references or what's relied upon for those statements. In each case, it is the Court of Appeal's decision in Steigrad, so with respect, Derrington cannot be any assistance to you in the case being appealed from.

GLAZEBROOK J:
Do we know what the previous edition said or did it make any comment on this?

MR TINGEY:
I don't know, Your Honour, I'm sorry.

The next part was *Patterson*, and my learned friend Mr Ring tried to distance *Patterson* because it was a concession, but it was relevant in *Patterson* that the concession was made after argument of both parties on the point, so the matter was fully argued before the

ELIAS CJ:
I think we have that point. You made it originally.

MR TINGEY:
Yes, thank you. My learned friend Mr Galbraith referred to the difference of approach of Justice Kirby and the other Judges in the Court of Appeal in the Australian cases. Now, it's important to understand what the difference was between Justice Kirby's and the majorities approach to those cases. In each case, the issue was if there was some action after the charge arose, say, non-co-operation by the insured whether that would release the claim. Now, the position in Australia, and in fact the position in New Zealand, as well, from the Court of Appeal's decision, is that actions after insurance can release the claim but those cases are not about priority, and that's the distinction between those cases and this case. In each case, those are about non-co-operation or other matters that are not related to priority and not related to the subject matter of section 9. This case is different because the reason why the respondents say the claim couldn't be made is solely one about priority, that effectively the payments under the policy have exhausted the claim. So it's quite a different situation between the reasons why Justice Kirby took a dissenting view in those Australian cases.

There was some reference to the 1908 Act, which were the predecessors of the Law Reform Act 1936. Now, those Acts are set out in *Bailey* but it is significant that the priority provisions which are the equivalent of subsection (3) and (6) of section 9 are contained within the 1908 Act. They are not additions made in either the 1928 or the 1936 Act, and in fact in the 1908 Act the section which dealt with competing claims

for the point of subsection (3) or subsection (2) and it confirmed that a charge claim had priority over another claim or a charge claim. So in fact it was wider.

Finally, if there is any difficulty with competing claims and if an insured is not sure to do as the Chief Justice suggested the declaration under the Clarity Judgments Act, the other action they could take is that they could interplead and seek a determination of whether that claim is going to be brought or the value of it. But that is an issue that arises, and I think my learned friends –

ELIAS CJ:
You mean it's a subsequent issue?

MR TINGEY:
Yes. My learned friends concede that is an issue about the claims, if their claims conflict, so that's not an issue specific to defence costs, but that is there anyway and I think Mr Galbraith suggested that *Chubb* might be wrong in that respect in relation to competing claims so that is a known problem that is not determined by this claim.

Unless Your Honours have anything further.

ELIAS CJ:
No, thank you. Thank you very much, counsel, for your submissions which we have greatly enjoyed. Indeed, since Mr Tingey, you were arraigned against all Queen's Counsel, may we say how much we appreciated the excellence of your written and oral submissions. They're not entitled to that sort of compliment because they're Queen's Counsel.

HEARING ADJOURNS