IN THE COURT OF APPEAL OF NEW ZEALAND

CA674/2011
[2012] NZCA 604

BETWEEN	PETER DAVID STEIGRAD Appellant
AND	BFSL 2007 LTD, BNL 2007 LTD, B2B BROKERS LTD, MONICE PROPERTIES LTD, BRIDGECORP CAPITAL LTD (ALL IN RECEIVERSHIP), BRIDGECORP INVESTMENTS LTD, POSEIDON LTD AND GOODMAN LTD (ALL IN LIQUIDATION) First Respondents
AND	BRIDGECORP LTD AND BRIDGECORP MANAGEMENT SERVICES LTD (BOTH IN RECEIVERSHIP AND LIQUIDATION) Second Respondents

CA842/2011

AND BETWEEN	CHARTIS INSURANCE NEW ZEALAND LTD First Appellant
AND	TIMOTHY ERNEST CORBETT SAUNDERS, SAMUEL JOHN MAGILL, JOHN MICHAEL FEENEY, PETER THOMAS, CRAIG EDGEWORTH HORROCKS AND PETER DAVID HUNTER Second Appellants
AND	ERIC MESERVE HOUGHTON Respondent

Hearing: 5 September 2012

Court: O'Regan P, Arnold and Harrison JJ

Counsel: B P Keene QC and J Anderson for Appellant in CA674/2011
M J Tingey and D J Friar for First and Second Respondents in CA674/2011
M G Ring QC and B J Burt for First Appellant in CA842/2011
A R Galbraith QC and A E Ferguson for Second Appellants in CA842/2011
A J Forbes QC and P A B Mills for Respondent in CA842/2011

Judgment: 20 December 2012 at 10 am

JUDGMENT OF THE COURT

CA674/2011

A The appeal is allowed. The declaration made by the High Court is quashed.

B Bridgecorp's application for leave to adduce further evidence is dismissed.

C Bridgecorp must pay costs to Mr Steigrad for a standard appeal on a band B basis together with an increase of 50 per cent to reflect the result of its application for leave and usual disbursements. We certify for two counsel.

CA842/2011

A The following declaration is made:

Mr Houghton is not presently entitled pursuant to s 9 of the Law Reform Act 1936 to charge money payable by Chartis to Mr Saunders and his co-insured pursuant to a prospectus liability insurance policy in reimbursement of their defence costs incurred in defending a claim or claims brought against them by Mr Houghton and others.

B Mr Houghton must pay costs to Mr Saunders for a standard appeal on a band B basis together with usual disbursements. We certify for two counsel.

REASONS OF THE COURT

(Given by Arnold and Harrison JJ)

Table of Contents

Introduction

[1] These cases concern s 9 of the Law Reform Act 1936. Section 9(1) creates what it describes as a "charge" in favour of a third party on insurance monies paid or to be paid to indemnify an insured in respect of the insured's liability to that third party. The two insurance policies in issue provide cover for liability incurred by the insured to third parties in specified circumstances and also provide for the reimbursement of the costs of defending any such third party claim. Both policies contain a single limit of liability covering both liability and defence costs claims. Broadly, the question for the Court is how the charge created by s 9(1) operates on such policies, in particular in relation to the payment of defence costs after the charge has arisen and been notified.

Background

[2] We set out the background to each case in turn.

(i) CA674/2011

[3] The appellant, Peter Steigrad, was a director of Bridgecorp Ltd and Bridgecorp Management Services Ltd (both now in receivership and liquidation), which were part of the Bridgecorp group of companies that collapsed in 2006. We will refer to them collectively as Bridgecorp. The Bridgecorp companies were

finance companies that borrowed money from the public to on-lend to property developers. Following the collapse, Mr Steigrad and several of his fellow directors were convicted of offences under the Securities Act 1978. They now face claims brought against them by Bridgecorp, on the basis that they breached duties which they owed to the companies as directors. The claims are for damages of around $450 million.

[4] Bridgecorp held two relevant insurance policies, both with QBE Insurance (International) Ltd (QBE):

(a) The first was a directors and officers liability policy (the D&O policy). It indemnified the directors against any liability they might incur as a result of their acts or omissions as directors and provided for the payment of defence costs incurred either by the insurer directly or with its consent in relation to any claim to which the policy applied. The policy was subject to a limit of indemnity of $20 million.

(b) The second was a statutory liability policy, which provided cover for the costs of defending any claim against the directors based on breach of their statutory obligations (the SL policy). It had a limit of liability of $2 million. The monies available under this policy were exhausted by the directors in the course of defending the proceedings under the Securities Act.

[5] Mr Steigrad and his fellow directors made claims under the D&O policy for reimbursement of their further defence costs in the civil and criminal proceedings against them. On 12 June 2009, Bridgecorp had given QBE notice of a charge under s 9(1) over the proceeds of the D&O policy in respect of their claims against the directors. The insurer advised the directors that it would not make any payments on account of defence costs until the directors had reached some agreement with Bridgecorp about the allocation of funds under the D&O policy. When no agreement was reached, Mr Steigrad and two of his fellow directors applied to the High Court

for a declaration that s 9(1) did not prevent the insurer from meeting its obligation under the D&O policy of reimbursing them for their defence costs.

[6] In the High Court, Lang J held that the charge created by s 9(1) applied to the whole of the amount available under the policy at the date the charge was created (assuming notification).[1] Accordingly, the charge prevented the directors of Bridgecorp from having access to the insurance money to meet their defence costs. Mr Steigrad now appeals against that ruling.

(ii) CA842/2011

[7] The first appellant in this appeal, Chartis Insurance New Zealand Ltd (Chartis), issued a prospectus liability insurance policy to Feltex Carpets Ltd (Feltex) in 2004.[2] It provided cover for "losses" incurred in respect of "securities claims" against the company's directors, up to a specified limit of liability. The term "losses" was defined to include reasonable defence costs incurred in relation to any securities claim.

[8] Feltex issued a prospectus and investment statement in 2004. The second appellants, Timothy Saunders and others, were then the directors. The respondent, Eric Houghton, bought shares in Feltex at that time. The float raised around $250 million in public share subscriptions. In 2006, Feltex was placed into receivership and then liquidation. Mr Houghton, acting in a representative capacity, issued proceedings against the Feltex directors, alleging that the prospectus included untrue statements. Mr Houghton currently represents some 3,100 shareholders claiming approximately $150 million in damages.[3]

[9] Following the delivery of Lang J's judgment in *Steigrad*, Mr Houghton gave Chartis notice of a charge over the proceeds of the prospectus liability insurance

---

1 *Steigrad v BFSL 2007 Ltd* HC Auckland CIV-2011-404-611, 15 September 2011.

2 The policy was originally issued by American Home Assurance Company, whose business was subsequently taken over by Chartis.

3 The circumstances are fully recounted in this Court's recent decision in *Saunders v Houghton (No 2)* [2012] NZCA 545.

policy under s 9(1) on behalf of himself and the other shareholders he represents.[4] Consistently with Lang J's judgment, Mr Houghton claimed that the charge prevented the directors from accessing the insurance monies to meet the costs of defending his proceedings.

[10] Chartis and the Feltex directors then issued a proceeding against Mr Houghton, claiming a declaration to the effect that the charge did not operate to prevent Chartis from paying the directors' reasonable defence costs under the policy. They applied to the High Court to have their proceeding transferred to this Court and heard at the same time as the *Steigrad* appeal. Rodney Hansen J granted this application.[5]

[11] There were a number of preliminary issues between the various parties to these cases, but all have been resolved except one. That is an application by Bridgecorp to adduce further evidence of an updating nature, which Mr Steigrad opposes. We will address this application later.

[12] Both appeals were argued together on the premise that there were no material differences between the QBE and Chartis policies and that our judgment on the *Steigrad* appeal would dictate the same result on the Chartis appeal. Accordingly, we will focus on the QBE policy without further reference to the Chartis policy.

Section 9

[13] We begin by setting out s 9 in full.[6] It provides:

> **Amount of liability to be charge on insurance money payable against that liability**
>
> (1) If any person (hereinafter in this Part of this Act referred to as the insured) has, whether before or after the passing of this Act, *entered into a contract of insurance by which he is indemnified against*

---

4 The directors have not disclosed the limit of liability under the policy. But Mr Ring QC advises that it is less than the amount of Mr Houghton's representative claim, which he understood was for $73 million (it now appears that it has been increased to around $150 million).

5 *American Home Assurance Co trading as Chartis v Houghton* HC Auckland CIV-2011-404-7152, 2 December 2011.

6 For a discussion of the legislative precursors to s 9 see *Bailey v New South Wales Medical Defence Union Ltd* (1995) 184 CLR 399 (HCA) per McHugh and Gummow JJ at 440–444.

liability to pay any damages or compensation, the amount of his liability shall, on the happening of the event giving rise to the claim for damages or compensation, and notwithstanding that the amount of such liability may not then have been determined, *be a charge on all insurance money that is or may become payable in respect of that liability.*

(2) If, on the happening of the event giving rise to any claim for damages or compensation as aforesaid, the insured has died insolvent or is bankrupt or, in the case of a corporation, is being wound up, or if any subsequent bankruptcy or winding up of the insured is deemed to have commenced not later than the happening of that event, the provisions of the last preceding subsection shall apply notwithstanding the insolvency, bankruptcy, or winding up of the insured.

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

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

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

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

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

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

(Emphasis added.)

[14] Section 9 was enacted to remedy two problems:[7]

(a) First, where a third party had a valid claim against a person who had relevant liability insurance, the third party could not require that the insurance monies be paid to him or her directly. So, if for example the insured party became insolvent, the monies would go into the insolvent's estate and become available for distribution to the insured's creditors as a class. The third party simply became another of the insured's creditors.

(b) Second, it was possible for the insurance monies to be reduced in amount, or even diverted entirely from meeting the insured's liability to the third party, by a variation to the policy made after the event that gave rise to the third party's claim.

[15] These consequences were perceived to be especially unfair in personal injury cases, where employees had valid damages claims against their employers for injuries suffered in the course of employment. As the Supreme Court noted in *Ludgater Holdings Ltd v Gerling Australia Insurance Co Pty Ltd*:[8]

> [Section 9] and a predecessor responded to the obvious unfairness in the denial by the common law of priority for an injured plaintiff's claim to insurance proceeds received by or payable to an insolvent insured defendant.

Section 9 responded to this unfairness by creating a "charge" in favour of the third party over any insurance money "that is or may become payable" in respect of the insured's liability to the third party.

[16] The essential question raised by these appeals is whether the phrase "all insurance money that is or may become payable in respect of that liability" in s 9(1) includes insurance money that is or may become payable on account of an insurer's

---

7 See the discussion in Law Commission *Some Insurance Law Problems* (NZLC R46, 1998) at ch 5.

8 *Ludgater Holdings Ltd v Gerling Australia Insurance Co Pty Ltd* [2010] NZSC 49, [2010] 3 NZLR 713 at [14].

liability to reimburse an insured party for defence costs incurred in defending a claim.

[17] It is unnecessary for us to recite Lang J's reasoning separately at this stage. That is because the grounds which we regard as decisive were not addressed in his judgment in the way that they are dealt with here. Instead we shall refer to Lang J's judgment where it is relevant to our reasoning.

Analysis

[18] We will determine Mr Steigrad's appeal according to the settled approach of applying the plain words of s 9 to the relevant circumstances and policy provisions. Previous decisions given in different insurance contexts will be of limited assistance to our analysis.

[19] In our judgment Mr Steigrad's appeal must succeed on two interrelated grounds:

(a) s 9 does not by its terms apply to insurance monies payable in respect of defence costs, even where such cover is combined with third party liability cover and made subject to a single limit of liability; and

(b) s 9 has limited effect and is not intended to rewrite or interfere with contractual rights as to cover and reimbursement.

We address each ground in turn.

(a) Defence costs

[20] First, the insuring or operative clause of QBE's policy provides:

> … subject to the terms of this policy QBE agrees to pay on behalf of:
>
> (a) each Insured Person [Mr Steigrad] any Loss for which they do not receive payment by way of indemnity from the Insured Company [Bridgecorp] ...

> on account of any claim for a Wrongful Act first made against any Insured Person individually or otherwise during the Period of Insurance and notified to QBE during the Period of Insurance or within 60 days after its expiry ...

[21] These definitions are also relevant:

(a) "Loss"

> … all sums that [Mr Steigrad] becomes legally liable to pay on account of all claims made against [him] for any Wrongful Act to which this insurance applies, *including but not limited to Defence Costs*.
>
> (Emphasis added.)

(b) "Defence Costs"

> ... costs incurred by QBE or with its consent (which will not be unreasonably withheld) in: ... the investigation and defence or settlement *of any claim to which this insurance applies*, including the threat or intimation of any such claim; …
>
> (Emphasis added.)

(c) "Wrongful act"

> ... any actual or alleged ... breach of duty ... made, committed, attempted or allegedly made, committed or attempted by [Mr Steigrad], individually or otherwise, in the course of his … duties to [Bridgecorp] ...

[22] Clause 4.17 of the policy deals with progress payments in relation to defence costs. It provides that if cover has been confirmed in writing, QBE will advance defence costs to the insured as and when they are incurred; if cover has not been confirmed in writing, then QBE's obligation is to advance reasonable defence costs incurred with its prior written consent, up to a limit of 20 per cent of the limit of indemnity or $500,000 (whichever is less). While QBE has refused to make any payments to Mr Steigrad by way of reimbursement of his defence costs following receipt of Bridgecorp's notification of its charge, confirmed by the High Court's declaration, it has not declined his claim for liability cover. At the very least, then, QBE is liable to pay Mr Steigrad's reasonable defence costs as required by the policy where cover has not been confirmed in writing.

[23] The focus of our consideration is on the composite phrase "all sums" where it is used in the definition of "loss". In that context "all sums" is inclusive of and recognises two distinct types of payment constituting losses for which Mr Steigrad may become legally liable on account of a claim made against him for any wrongful act. The primary loss envisaged by the operative provisions is payment of damages or compensation in satisfaction of a claim by a third party, such as Bridgecorp. The secondary but discrete loss is costs incurred in defending the primary claim. The contract of insurance distinguishes between these two liabilities.

[24] Thus, while the two losses might arise from one claim on account of the same wrongful act, Mr Steigrad is independently entitled to indemnity for his defence costs immediately after they are incurred. Subject to conditions as to reasonableness, his right is absolute. Defence costs are defined as those incurred in defending the primary claim. Mr Steigrad's liability to pay defence costs and QBE's liability to reimburse him will necessarily arise independently of and precede the insurer's liability, if any, to indemnify him on the primary claim, at least in circumstances where liability on the primary claim is not admitted immediately. Plainly these provisions are included for the parties' mutual benefit because, as a result of incurring defence costs, Mr Steigrad may never incur a liability to Bridgecorp. In those circumstances, QBE will have no liability to Bridgecorp but will still be liable in respect of Mr Steigrad's defence costs.

[25] The short but decisive point is that in terms of s 9 the "... contract of insurance by which [Mr Steigrad] is indemnified ..." is against both (a) his "liability to pay any damages or compensation ..." and (b) his liability to pay defence costs. In this context the words "damages" and "compensation" are used synonymously to mean recompense for loss suffered by Bridgecorp for which Mr Steigrad is liable: (a) as awarded by a final decision in the civil proceeding; (b) as an arbitral award; or (c) as agreed between those parties. The phrase "*in respect of*" qualifies the phrase "*all insurance money ... payable*" and is synonymous with "towards satisfying" or "relating to". The insurance money to which Mr Steigrad is now contractually entitled in terms of s 9(1) is "... all insurance money ... payable *in respect of* that [defence costs] liability", not "*in respect of*" his "... liability to pay any damages or compensation".

[26] Section 9 cannot apply because Bridgecorp is not entitled to a statutory charge over insurance money lawfully payable by QBE to Mr Steigrad to reimburse his existing liability to pay defence costs incurred with the insurer's consent or otherwise as opposed to a contingent liability for damages or compensation payable to Bridgecorp.

[27] To put the point another way, there was no suggestion that, if there had been separate defence costs and third party liability policies, s 9 would have applied to the defence costs policy. Combining the two forms of cover – defence costs and third party liability – in a single policy with separate sums insured would not affect this outcome. In our view, combining the two forms of cover in a single policy subject to a single sum insured does not change the analysis either. There is a single, aggregated fund from which the two distinct liabilities can be met. The charge attaches to the balance that is available to meet third party claims after any defence costs liability has been met.

[28] While this ground was not raised directly in the High Court in this way, Mr Tingey relies upon Lang J's conclusion that denying the director's access to the insurance money available under the D&O policy is consistent with s 9's purpose:

> [58] … although this result may be harsh for the directors, it is clearly in accordance with the object and purpose of s 9. If the directors are able to obtain access to funds under the policy to meet their defence costs, the pool of funds available to meet civil claims will be significantly depleted. The interpretation for which the directors contend therefore has the effect of defeating the purpose of the statutory charge.

[29] With respect, this statement does not answer the point. The object and purpose of s 9 is to provide a charge over money payable by an insurer to indemnify an insured party against his liability on a claim by a third party. It does not provide a charge or security over insurance money that is not payable in settlement or discharge of that liability.

[30] It is irrelevant in this context that the funds available to meet Bridgecorp's claim against Mr Steigrad will be progressively depleted by performance of QBE's contractual obligation to reimburse Mr Steigrad for his defence costs. That is the necessary consequence of the policy's structure in providing for the one sum insured

to be available to meet claims for indemnity for two separate liabilities, consistently with the contractual contemplation that by incurring defence costs the insurer may avoid its contingent liability to Bridgecorp. And it would always be open for the parties to strike a compromise on terms designed to ensure that the sum insured is not further exhausted by defence costs.

[31] Mr Tingey relies also upon *Pattinson v General Accident Fire and Life Assurance Corp Ltd*.[9] Lang J construed the decision of Myers CJ in that case as:[10]

> ... authority for the proposition that the payment of defence costs should not reduce the pool of funds that would otherwise have been available to meet claims in respect of which a charge has arisen.

[32] However, *Pattinson* was decided in a different contractual context and does not support a general proposition to that effect. There the insurer had issued a comprehensive vehicle policy which, among other things, indemnified the owner against liability for personal injuries suffered by a passenger. Indemnity extended to defence costs incurred at the insurer's expense. The total sum insured was not to exceed £2,000. Following a trial in the (then) Supreme Court, the driver of a vehicle was found liable for the death of a passenger in an amount in excess of £2,000. The insurer accepted liability but when accepting the claim it deducted from the £2,000 sum insured the aggregate of three sets of legal costs that had been incurred with its consent. The plaintiff sought to recover the full £2,000 from the insurer.

[33] It appears from the report in *Pattinson* that during the trial the insurer abandoned its reliance on the defence costs provision. Myers CJ's brief judgment on the point noted that the insurer was a volunteer to liability in these words:[11]

> In this case the corporation has chosen to pay the three sets of costs to its own solicitors and the solicitors for the [insured and her son]. It was not bound to undertake absolutely the payment of the costs of the solicitors for the [insured and her son] and, if it chose to do so, and the amount to which the plaintiff became entitled as against the insured is £2,000 or more, the corporation must bear the costs itself. *A fortiori* is this so, so far as the costs for the corporation's own solicitors are concerned.

---

9 *Pattinson v General Accident Fire and Life Assurance Corp Ltd* [1941] NZLR 1029 (SC).
10 At [46].
11 At 1038.

[34] The Chief Justice's obiter comments, effectively approving a settlement, do not assist here. QBE has made a contractual promise to pay Mr Steigrad's defence costs as and when he has incurred a liability to pay them. They constitute an insured loss in terms of the policy. QBE would not be a volunteer to liability when discharging its contractual obligation. With respect, Lang J's conclusion to the contrary proceeds on a misconstruction of *Pattinson*.[12]

[35] Mr Steigrad's appeal must succeed on this ground alone.

(b) Interference with contractual rights

[36] Second, as both Mr Ring QC and Mr Keene QC submit, the effect of Lang J's decision is to deny Mr Steigrad his contractual right to reimbursement of his defence costs as and when they are incurred. This result is inconsistent with the text, purpose and policy of s 9. The statutory provision is limited to granting a charge in favour of a third party over "all insurance money" that an insurer is liable to pay in discharge of the insured's liability to that party. Its terms cannot operate to interfere with or suspend the performance of mutual contractual rights and obligations relating to another liability.

[37] Mr Tingey relies upon Lang J's conclusions that:

> [55] ... s 9 charges "all insurance money" that is or may become payable in respect of liability to pay damages or compensation. The use of those words suggests that, where the level of cover is less than the amount of a notified claim, the entire amount for which cover may be available is subject to the charge. The section does not contain any mechanism that would enable funds to be released to meet the insurer's other obligations under the policy.
>
> ...
>
> [59] … the wording of s 9(3) makes it clear that the statutory charge has priority over all other charges affecting the insurance money. In *Ludgater*, the Supreme Court noted that the charge has priority over any general charge given by the insured, including charges given under a general security agreement and general floating charges granted by the insured prior to the introduction of the Personal Property Securities Act 1999. If the charge takes priority over all other forms of security given by the insured, it is

[12] At [57].

> difficult to see how the insured could be in a better position than his or her secured creditors.

[38] With respect, these factors do not allow s 9 to defeat Mr Steigrad's contractual right to reimbursement of his defence costs. As Mr Ring submits, the purpose of s 9 is not to rewrite the bargain struck between the parties. It is largely procedural in nature, in that it provides a mechanism whereby a third party claimant can access directly funds which an insurer is liable to pay its insured to meet the insured's liability to that third party. Yet Lang J's analysis, which gives decisive weight to the circumstance that the insurer's limit of liability under the policy applies to both the defence costs and third party liability covers, has precisely that result. In practical terms, the High Court declaration means that QBE's inability to discharge its contractual obligation in relation to defence costs is likely to compromise Mr Steigrad's ability to fund and defend Bridgecorp's claim to his best ability. Effectively, it places defence costs outside the limit of indemnity provided under the policy, so that the insurer would be obliged to take on an additional cost burden if it wished to ensure that the third party claims were defended appropriately.

[39] Lang J himself was conscious that his judgment would produce this unjust result when observing:

> [61] In reaching that view, I am conscious that it produces some unsatisfactory consequences. In particular, it means that the charge prevents the directors from being able to resort to the D&O policy to meet their defence costs even though the Bridgecorp defendants have not yet filed a claim against them and may not do so for some considerable time. That result may seem unfair given the fact that the Bridgecorp companies took the policy out at least in part for that specific purpose.

[40] With respect to the Judge, the question is not whether s 9 contains a mechanism that enables QBE to release funds to meet its contractual obligation to reimburse Mr Steigrad for defence costs where the level of indemnity ($20 million) is less than the amount of Bridgecorp's claim ($442 million plus). The contract of insurance itself provides that mechanism, obliging the insurer to reimburse Mr Steigrad for defence costs as and when they are incurred and for his third party liability as and when it arises. We are satisfied that the enactment of s 9 was not intended to have the unsatisfactory consequences to which the Judge refers.

[41] This approach reflects what has long been recognised about s 9, namely that it takes effect subject to the terms of the contract of insurance as they stand at the time the charge descends. So the charge is subject to the limit of liability in the policy, even though that may be less than the amount of the claim(s).[13] It is also subject to the right of the insurer to avoid the contract for material non-disclosure or for breach of a contractual term (such as the obligation to notify claims promptly or to co-operate with the insurer).[14]

[42] We consider that the appeal must be allowed on this ground also.

(c) Conclusion

[43] We conclude that the statutory charge does not prevent QBE from meeting its obligation under the policy to reimburse defence costs. The only reason that the contrary can be argued is that there is a single, aggregated limit of liability in the policy. In our view, that factor – the existence of a single, aggregated limit – cannot operate to deprive Mr Steigrad of the right to obtain reimbursement for his defence costs as that would render his defence costs cover, in practical terms, useless. That is not what s 9 was intended to achieve. As Mr Ring observes, s 9 is simply a legal mechanism to divert to a third party funds that would otherwise be available to settle a contractual obligation to indemnify the insured for liability to that third party. The amount of the funds available in Mr Steigrad's case will be determined once the other cover provided by the policy – defence costs cover – has been determined.

[44] We consider that the declaration sought by Mr Saunders captures the true position:

> … where, by the terms of a liability policy, the insurer has agreed that:
>
> (1) it will provide to the insured an indemnity against legal liabilities and against defence costs; and
>
> (2) its maximum amount payable under the policy is a single aggregate limit, inclusive of both the amount of any legal liabilities and of all defence costs,

---

13 Section 9(7).

14 See, for example, the discussion in *Bailey*, above n 6, per McHugh and Gummow JJ at 448 and *UEB Packaging Ltd v QBE Insurance (International) Ltd* [1998] 2 NZLR 64 (CA).

> the amount of the insurance money charged pursuant to s 9(1) of the Law Reform Act 1936 in favour of a claimant against the insured is the balance of the policy limit at the date when the insurer is required under the policy to discharge its promise to the insured to provide indemnity against the insured's legal liability to the claimant (subject to s 9(3) in relation to prior charges); …

[45] In the present case, the statutory charge created by s 9 has not crystallised – it remains contingent. It will not crystallise unless and until QBE becomes legally liable to meet any damages or compensation that Mr Steigrad must pay Bridgecorp, whether as a result of judicial decision, arbitration or settlement. That requires, first, that Mr Steigrad's liability to Bridgecorp be established; and second, that QBE's liability to Mr Steigrad under the policy be established. In the meantime, the amount, if any, of the insurer's contingent liability is unknown.[15] At present QBE's only crystallised liability is to pay Mr Steigrad's defence costs.

Application to adduce further evidence

[46] Bridgecorp has applied for an order granting leave to adduce further evidence on appeal. Mr Steigrad opposes the application. The evidence is confined to a decision made by the Official Assignee on 5 September 2011, after the hearing in the High Court but before judgment was delivered, to admit a claim by Bridgecorp against one of the company's former directors, Rodney Petricevic, for $422 million. It is notable that Bridgecorp applied to the High Court after Lang J had reserved judgment for leave to adduce the same evidence. The Judge declined the application on the ground that the further evidence would not affect his decision.

[47] Mr Tingey submits that, even if Mr Steigrad's substantive arguments are correct and we find that the s 9 charge could not take effect until Bridgecorp had established the directors' liability, such a charge is now enforceable against Mr Petricevic's interest in the insurance money.[16] Accordingly Mr Steigrad is prevented from accessing the money to meet his defence costs in any event. The fact that Messrs Petricevic and Steigrad have applied to set aside the Official Assignee's

---

15 *FAI (NZ) General Insurance Co Ltd v Blundell and Brown Ltd* [1994] 1 NZLR 11 (CA) per Hardie Boys J at 19; *Bailey*, above n 6, at 449–450.

16 *Law Society of England and Wales v Shah* [2007] EWHC 2841 (Ch), [2007] All ER (D) 488 at [44].

decision is irrelevant. While his decision remains in force, Bridgecorp's charge is enforceable.

[48] Bridgecorp's application must fail because, as Lang J found, the further evidence is irrelevant for a number of reasons.

[49] First, as Mr Keane submits, Bridgecorp's position is factually wrong. The company has claimed $442 million from the directors. The proof of debt filed on Bridgecorp's behalf deliberately limited the claim to $422 million, being expressed as a net figure or balance due to the company as an unsecured creditor in Mr Petricevic's estate after deducting from the total damages claim of $442 million the amount of a specific charge of $20 million (being the sum insured under QBE's policy). By following this course, Bridgecorp was attempting to value the insurance money as subject to a specific charge in its favour, elevating the company to the status of a secured creditor for the insurance proceeds of $20 million.[17] The Official Assignee's admission of Bridgecorp's claim, on the company's own application, expressly excluded all "insurance money available" under QBE's policy.

[50] Second, cl 4.6 of the policy prohibits any of the insured parties, including Mr Petricevic, from admitting or settling any claim without QBE's written consent, which is not to be unreasonably withheld. As Mr Keene points out, the Official Assignee acts in right of Mr Petricevic. He stands in the same legal position against the insurer as Mr Petricevic. QBE is entitled to decline Mr Petricevic's claim on the ground of his contractual breach. Thus, one of the two preconditions to the insurer's statutory liability will remain unsatisfied.

[51] Third, the Official Assignee admitted Bridgecorp's claim on 5 September 2011. But Mr Petricevic had been discharged from bankruptcy on 3 September 2011, two days earlier. Questions may arise about that chronological sequence. And the challenge to the Official Assignee's decisions means that it is presently unenforceable. QBE would be entitled to say, if evidence was allowed in answer, that in terms of s 9 "all insurance money" is not payable while those disputes remain unresolved.

---

[17] Insolvency Act 2006, s 243(1)(b).

[52] Fourth, any proof of debt, if it was valid against QBE, would not be enforceable until 5 September 2011. Mr Steigrad would at the very least be entitled to reimbursement of his defence costs incurred and payable before that date. The insurance monies should have been available to him for that purpose if Bridgecorp's actions had caused QBE to breach its contractual obligations.

[53] Bridgecorp's application to adduce further evidence is dismissed.

Result

CA674/2011

[54] The appeal is allowed. The declaration made by the High Court is quashed.

[55] Bridgecorp's application for leave to adduce further evidence is dismissed.

[56] Bridgecorp must pay costs to Mr Steigrad for a standard appeal on a band B basis, together with an increase of 50 per cent to reflect the result of its application for leave and usual disbursements. We certify for two counsel.

CA842/2011

[57] The following declaration is made:

> Mr Houghton is not presently entitled pursuant to s 9 of the Law Reform Act 1936 to charge money payable by Chartis to Mr Saunders and his co-insured pursuant to a policy of prospectus liability insurance policy in reimbursement of their defence costs incurred in defending a claim or claims brought against them by Mr Houghton and others.

[58] Mr Houghton must pay costs to Mr Saunders for a standard appeal on a band B basis together with usual disbursements. We certify for two counsel.

Solicitors:
Lowndes Jordan, Auckland for Appellant in CA674/2011
Bell Gully, Auckland for Respondents in CA674/2011
Chapman Tripp, Auckland for First Appellant in CA842/2011
Wilson Harle, Auckland for Second Appellants in CA842/2011
Wilson McKay, Auckland for Respondent in CA842/2011