IN THE COURT OF APPEAL OF NEW ZEALAND

CA244/2014
[2014] NZCA 571

BETWEEN	BRIDGECORP LIMITED (IN RECEIVERSHIP AND IN LIQUIDATION) Appellant
AND	CERTAIN LLOYD'S UNDERWRITERS UNDER POLICY NO B0701LS05809 Respondent

Hearing:	8 October 2014
Court:	Harrison, French and Goddard JJ
Counsel:	M J Tingey and W D Hofer for Appellant M G Ring QC and M J Francis for Respondent
Judgment:	27 November 2014 at 3.30 pm

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant is ordered to pay the respondent costs for a standard appeal on a band A basis together with usual disbursements.

REASONS OF THE COURT

(Given by Harrison J)

Introduction

[1] Section 9 of the Law Reform Act 1936 introduced a significant statutory modification of contractual rights of indemnity and of priorities on insolvency by allowing a third party to claim a charge against insurance moneys payable by an insurer to an insured but insolvent party. On this appeal the question is whether a New Zealand court has jurisdiction to determine a New Zealand company's application for an order under s 9 charging moneys payable under a policy issued by London underwriters.

Facts

[2] Bridgecorp was a New Zealand finance company which raised funds from the public. The company in turn loaned moneys to various property development entities. Bridgecorp failed in 2008 owing large sums of money. Through its New Zealand broker, Herbert Insurance Group Limited (HIGL), the company had arranged insurance against losses suffered on realisation of securities given by borrowers over various properties. Its insurers have declined liability on Bridgecorp's claims for indemnity on a number of grounds.

[3] Bridgecorp's receivers have since issued a proceeding against the insurers in the High Court at Auckland and joined HIGL as well, alleging that, if the insurers' defences are upheld, the broker is liable for breach of its professional duties to arrange suitable insurance.

[4] HIGL, which is itself now in liquidation, has entered into a policy of professional indemnity insurance against its liability for breaches of duty with a syndicate of Lloyd's Underwriters in London. MSI Corporate Capital Ltd is the syndicate's only member. The policy's terms are the centrepiece of Mr Tingey's argument on appeal for Bridgecorp and we shall return more fully to them. It is sufficient to note now that, in reliance principally on the facts of HIGL's insolvency and the existence and terms of its policy, Bridgecorp has applied for leave under s 9 to charge the proceeds against the contingency that its claim against HIGL succeeds.

[5] HIGL's underwriters (which we will refer to as the Underwriters) filed an appearance under protest to the Court's jurisdiction to hear Bridgecorp's proceeding on the ground that s 9 does not have extraterritorial effect. In reliance on the Supreme Court's decision in *Ludgater Holdings Ltd v Gerling Australia Insurance Co Pty Ltd,*[1] Gilbert J dismissed Bridgecorp's application to set aside Underwriters' protest.[2] He was satisfied that any debt payable by HIGL's insurers under the professional indemnity policy is located in England. As a result, the High Court has no jurisdiction to order Underwriters to pay the insurance proceeds to Bridgecorp rather than HIGL. Bridgecorp appeals.

Section 9

[6] Section 9 relevantly provides:

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

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

2 *Bridgecorp Ltd (in rec and in liq) v Certain Lloyd's Underwriters under Policy No 888/50405V04A* [2014] NZHC 842.

> provided that, except where the provisions of subsection (2) apply, no such action shall be commenced in any court except with the leave of that court.

[7] It is common ground between counsel that *Ludgater* stands as authority for three foundation principles: (1) s 9 does not have extraterritorial application; (2) s 9 will only apply if the New Zealand courts have subject matter jurisdiction over any debt payable by underwriters under a policy; and (3) subject matter jurisdiction will not be conferred if the debt is situated or located outside New Zealand (called the situs or situation of the debt).

[8] Counsel accept that these three principles set the framework for argument on Bridgecorp's appeal. In support, Mr Tingey submitted that there was no single controlling factor in fixing the debt's location and conferring subject matter jurisdiction. In this case, he submitted, the policy itself was the most useful indicator of situs, in particular its provision for payment of the amount insured in New Zealand and that any disputes are governed by New Zealand law and New Zealand courts have exclusive jurisdiction. Mr Ring QC for Underwriters countered that the controlling factor is that the insurer resides in London. This statement of the parties' competing positions has assisted in identifying the scope of the issue for our determination.

Decision

(1) Statutory charge

[9] Before evaluating Bridgecorp's primary ground of appeal we must deal with two submissions which assumed particular prominence in Mr Tingey's argument before us. First, he submitted that what is charged under s 9 is the insured party's right of action or claim for indemnity against its underwriters, not the debt represented by the amount payable. He relied on Lord Pollock MR's statement of principle in *New York Life Insurance Co v Public Trustee* that a debt or chose in action is situated in a country where it can be properly recoverable or enforced.[3]

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[3] *New York Life Insurance Co v Public Trustee* [1924] 2 Ch 101 (CA) at 109 per Pollock MR. See also at 119 per Atkin LJ.

[10] We do not read that authoritative statement of the law as referring to enforcement of a cause of action but of the debt itself. In *New York Life Insurance* the Master of the Rolls was using the phrase "debts or choses in action" synonymously. His reference to enforcement was in that particular context, as is reinforced by his reference to where the debts or choses in action are properly recoverable or can be enforced. A cause of action is not of itself recoverable.

[11] In any event, Mr Tingey's submission is contrary to the plain words of s 9(1) and Bridgecorp's own pleading that it "has a charge over the insurance monies payable". The charge is "on all insurance money that is or may become payable in respect of [its] liability" under "a contract of insurance by which [it] is indemnified against liability to pay any damages or compensation". The statute creates, on the contingency of an event giving rise to a claim for damages, "a charge on all insurance moneys which are then payable in respect of the liability against which the insured is indemnified and on all such insurance money that may become payable in respect of that liability".[4] It is a charge created by Parliament "over an asset of the (now insolvent) insured".[5]

[12] The statutory charge attaches to the debt which is itself, by s 9(4), "enforceable by way of an action against the insurer": that is, the charge or debt is enforceable by an action or claim. As noted in *Ludgater*, it is the insured party's liability that is charged on the amount payable by the insurer.[6] And as s 9(3) provides, the statutory charge has priority "over all other charges affecting the said insurance moneys".

(2) Jurisdiction

[13] Second, as noted, it was common ground that because s 9 does not have extraterritorial effect Bridgecorp must satisfy a New Zealand court that it has subject matter jurisdiction to make an order – that is, the Court is entitled to regulate the

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4 *Bailey v New South Wales Medical Defence Union Ltd* (1995) 184 CLR 399 at 446, cited with approval in *Ludgater*, above n 1, at [16].

5 *Ludgater*, above n 1, at [17].

6 At [17]. See also this Court's decision in *Gerling Australia Insurance Co Pty Ltd v Ludgater Holdings Ltd* [2009] NZCA 397, [2010] 2 NZLR 145 at [60].

conduct of persons or parties who may be brought before it.[7] Without that jurisdiction, a New Zealand court cannot adjudicate on a direct claim by Bridgecorp against Underwriters in London as though it were an action to recover moneys directly from HIGL.

[14] In *Ludgater* the Supreme Court affirmed this settled principle against extraterritoriality when applying the presumption that unless a contrary intention emerges New Zealand statutory provisions do not extend to subjects governed by foreign law.[8] As the Court noted in recognition of a foreign state's sovereignty in this situation:

> [25] … a court will not as a matter of principle exercise its power, statutory or otherwise, *in relation to property situated in another country* in a manner which would compel someone to do or refrain from doing something in relation to that property *if its order may create a risk of conflict* with an actual or likely determination of a court in that other country. In particular, it will not, and should not, make an order which cannot be given the effect in relation to the subject property which Parliament has stipulated shall be a necessary consequence of the order. …
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> (Emphasis added.)

[15] The Court further observed:

> [26] Accordingly, if a New Zealand plaintiff wishes to have the benefit of an order that something shall be done with property whose situs is in another jurisdiction it will ordinarily have to apply directly to a court in that jurisdiction. If a New Zealand court did make an order which required someone to do or refrain from doing something with property whose situs was in a foreign jurisdiction, the foreign court where the New Zealand judgment was sought to be registered would appear to have every right to decline to accept and enforce it. A New Zealand court is likely to react in a similar way if the situation were in reverse. In fact, under the Reciprocal Enforcement of Judgments Act 1934, a foreign judgment in rem relating to movable property may be registered only if that property was situated in the country of the court which gave the original judgment at the time of the proceeding in that country. …

[16] Nevertheless, while accepting this presumption against extraterritoriality, Mr Tingey sought to distinguish its application by submitting that there was no risk of a conflict here. However, that is not the point. As Mr Ring submitted, the principle is absolute: because s 9 has no extraterritorial effect, it cannot be invoked if

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7 *Ludgater*, above n 1, at [20], n 31.
8 At [24].

the property which would be the subject of an order by the Court is situated elsewhere.

[17] In *Ludgater* the Supreme Court referred to the risk of a conflict of laws in the context of explaining the rationale for the settled principle – that is, any order made in one country which affects the property rights of citizens in another country of itself creates the risk of a conflict. As Gilbert J observed, the risk of conflict arises whenever one sovereign state trespasses upon the authority of another by exercising its own authority to make an order relating to property in a foreign state.[9]

[18] The extraterritoriality principle cannot apply in some cases but not others, or mandate an inquiry into the risk of a conflict on a case by case basis. It would be inappropriate for a New Zealand court to purport to decide conclusively on a protest to jurisdiction that its order made on the particular claim will not conflict with law in a foreign jurisdiction. Once it is determined that s 9 does not have extraterritorial effect, any inquiry must be limited to determining the situation of the debt.

[19] We should add that the risk of conflict is obvious here. Mr Tingey emphasised that the Third Parties (Rights Against Insurers) Act 1930 in the United Kingdom operates differently from its New Zealand counterpart. Whereas s 9 creates a charge, the English provisions operate by way of assignment of rights. Mr Tingey emphasised also that the Act would not operate because HIGL is a New Zealand company and the English provisions only apply to an English company in liquidation. He sought to find consistency elsewhere in the principles governing liquidation.

[20] But that is not the point: to the contrary, the fact that s 9 is plainly intended to operate primarily when an insured party is insolvent and alters the priority of claims against its assets is material, if not decisive, in determining that the provision does not have extraterritorial reach.[10]

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[9] At [16] and [17], citing *Société Eram Shipping Co Ltd v Cie Internationale de Navigation* [2004] 1 AC 260 (HL) at [54].

[10] *Ludgater*, above n 1, at [21].

[21] At a later stage Mr Tingey appeared to use the concept of conflict differently, submitting that the potential conflict at issue in *Ludgater* was the risk of having to pay a debt twice in different jurisdictions. Here, he forecast, an English court is likely to recognise the s 9 jurisdiction in New Zealand as well as the choice of law in jurisdiction provisions of the policy. We repeat that that risk is not relevant to the principle of conflict addressed in *Ludgater*.

(3) Situation of the debt

[22] This brings us to the essence of Bridgecorp's appeal. What determines whether a New Zealand court has subject matter jurisdiction given that s 9 charges the debt payable by the insurer?

(a) Competing cases

[23] Mr Ring answers this question by relying on the general rule that a New Zealand court will not make an order which can only be given effect against property located in another jurisdiction.[11] For the reasons given in *Ludgater* s 9 will only apply if the debt is situated in New Zealand.[12] A debt is situated where the debtor resides.[13] In this case the debt is the amount payable by Underwriters on HIGL's claim for indemnity under the policy. Unless it can be said that the Lloyd's syndicate resides in New Zealand, "that is an end to the matter".[14]

[24] Mr Tingey's counter is that an underwriters' place of residence does not control jurisdiction. Instead, he said, residence is simply a factor to be considered along with others in determining where the debt is situated. *Ludgater*, he submitted, requires the Court to consider all the circumstances of the debt.

[25] In support Mr Tingey drew heavily on a favourable comparison with the facts of *Ludgater* for the apparent purpose of showing that the circumstances of the

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[11] The rule is described as general but not universal because in a limited category of recognised exceptions which are not in issue here, such as for maritime or aircraft debts or speciality debts or negotiable instruments, the location of the debt, not the debtor, is decisive: *Kwok v Commissioner of Estate Duty* [1988] 1 WLR 1035 (PC) at 1040H.

[12] *Ludgater*, above n 1, at [26].

[13] At [27].

[14] *New Cap Reinsurance v Faraday Underwriting* (2003) 12 ANZ Insurance Cases ¶61-581 (NSWSC) at [30].

insurer's indebtedness were much more closely connected to New Zealand than in *Ludgater*. In that case the claimant, Ludgater Holdings Ltd, owned a building in Auckland which was damaged by fire. The company alleged that the fire was caused by a defectively manufactured or supplied part within a fluorescent light. An Australian company, Atco Controls Pty Ltd, which went into liquidation soon after the fire, had manufactured the item.

[26] Atco was insured under a policy issued by a New South Wales company, Gerling Australia Insurance Co Pty Ltd. Gerling was obliged to indemnify Atco for public and product liability arising anywhere in various locations including New Zealand to an indemnity limit of €1 million. Ludgater sued Gerling directly by relying on s 9. In dismissing Ludgater's appeal against Gerling's successful protest to jurisdiction, the Supreme Court affirmed this Court's finding that New Zealand courts had no subject matter jurisdiction as the debt was situated or located in Australia.

[27] On a comparative analysis, Mr Tingey argued, Bridgecorp's case on jurisdiction is considerably stronger than *Ludgater*. In *Ludgater* both the insured and insurer were Australian, and the policy was payable in Australia for the Australian equivalent of €1 million. Here, by contrast, all the relevant insurance factors recited in *Ludgater* – except the residence of the debtor – connect the claim to New Zealand rather than a foreign jurisdiction.[15] That is enough, Mr Tingey submitted, to establish that the *claim* is situated in New Zealand. (We must note our earlier rejection at [9]–[12] of Mr Tingey's submission that it is the claim or cause of action, not the debt, that is charged under s 9.)

[28] While relying upon the provisions of the policy as a whole, Mr Tingey's emphasis was upon what he says is the policy's provision for payment of a claim in New Zealand to establish that the underwriter's debt is situated here. His argument was centred on this passage from *Ludgater*:

> [28] The insurance policy in this case was issued to Atco by Gerling in New South Wales. Gerling's obligation to pay Atco's claim is an obligation to pay in Australia for that is naturally where Gerling could expect to be able

[15] *Ludgater*, above n 1, at [27] and [28].

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

[29] In addition, Mr Tingey identified this particular combination of features of HIGL's policy:

(1) HIGL, the insured party, was a New Zealand entity carrying on business as a broker in Auckland.

(2) The limit of indemnity, deductibles and premium are denominated in New Zealand dollars. The amount payable on any claim is NZD 10 million, with NZD 20 million in the aggregate.

(3) The period of insurance is measured in terms of local standard time in New Zealand.

(4) New Zealand is the proper law for interpretation of the policy and New Zealand courts have sole jurisdiction to determine any litigation arising out of or connected to a dispute under the policy.

(5) The policy gave rise to New Zealand tax obligations and specifically provided for HIGL's insurers to pay New Zealand tax relating to the policy.

(6) The policy specifically addressed New Zealand legislation (for example, the Fair Trading Act 1986) and as such anticipates claims made under New Zealand law.

[30] Mr Tingey also emphasised the provisions of the Insurance Companies' Deposits Act 1953 which was in force when the policy was entered into but has now been repealed. It required Lloyd's of London on behalf of all Lloyd's Underwriters to deposit $500,000 with the Public Trust. Its purpose was to act as a security for policy holders or claimants in respect of policy or other contracts issued, granted or entered into in New Zealand – that is, where the insurer or an agent receives in New Zealand any proposal or premium relating to the contract. In Mr Tingey's submission, the statute specifically contemplated proceedings in New Zealand by claimants other than the policy holder against Lloyd's Underwriters.

(b) Conclusion

[31] As we shall explain shortly, we are satisfied that Mr Tingey's argument relies upon reading a particular passage in *Ludgater* out of context and as introducing a gloss on the rationale for the residence rule.[16] The rationale for the rule is not, as Mr Tingey submitted, that the debt is typically easiest to enforce in the debtor's home jurisdiction. It is that the debt is located in the country where it is properly recoverable or enforceable or where the means of satisfying the judgment may be discovered. The policy underlying the rule is that the country where the debt is located has control over the property.[17] Any other rule would offend the principle against extraterritoriality.

[32] Issues about the situs of a debt feature most frequently in claims against companies which carry on business in multiple countries. Conceptual difficulties arise from the legal notion that for the purposes of suit a corporation resides in as many places as it carries on business.[18] As it could logically be said that the debt

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16 *Ludgater*, above n 1, at [28].

17 Lord Collins of Mapesbury (ed) *Dicey, Morris and Collins on The Conflict of Laws* (15th ed, Sweet & Maxwell, London, 2012) at [22–030] and *Ludgater*, above n 1, at [25].

18 *New York Life Insurance*, above n 3, at 120–121; *Jabbour v Custodian of Israeli Absentee Property* [1954] 1 WLR 139 (QB) at 146; *Kwok*, above n 11, at 1041A–B. See also James Fawcett, Janeen M Carruthers and Peter North (eds) *Cheshire, North & Fawcett Private International Law* (14th ed, Oxford University Press, London, 2008) at 1226.

would be situated in each place, the Court must choose between which of the places is the company's residence for the purpose of jurisdiction.[19] To answer this question in the multiple residence cases the courts have asked where the contract creating the debt is required to be performed.[20]

[33] As the Court noted in *Ludgater*:

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

[34] A brief chronological survey of the leading authorities illustrates the application of this principle in the multiple residence cases:

(1) In *New York Life Insurance* the defendant insurer had registered offices around the world including London and New York.[21] In reversing Romer J, the Court of Appeal gave decisive weight to the contractual stipulation that the company's life policies were payable in pounds in England. Accordingly the contract debts were situated in London, not New York, and London was the proper place of residence.

(2) In *Jabbour v Custodian of Israeli Absentee Property* an English insurance company issued a material damage policy through its agent in Haifa which was then part of Palestine but by the time of hearing

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19 *New York Life Insurance*, above n 3, at 117.

20 *New York Life Insurance*, above n 3, at 111, 115 and 121; *Jabbour*, above n 18, at 146; *Cambridge Credit Corp Ltd v Lissenden* (1987) 4 ANZ Insurance Cases ¶60–776 (NSWSC) at 74,720; *Kwok*, above n 11, at 1041E–1042C. See also *Dicey*, above n 17, at [22–029] and *Cheshire, North & Fawcett*, above n 18, at 1226–1227.

21 *New York Life Insurance*, above n 3.

was in the state of Israel.[22] In the High Court Pearson J found that the insurer resided both in Haifa and England. Following *New York Life Insurance* Pearson J held that the indemnity payment due under the policy was primarily payable in Israel, which was where the debt was situated.

(3) In *In re claim by Helbert Wagg & Co Ltd* an English company loaned money to a German company denominated in English sterling.[23] The contract provided for repayment of principal and interest in sterling in London, even though its terms were to be construed in accordance with German law. Upjohn J found that the debtor resided in Germany, and rejected an argument similar to Mr Tingey's that the rule that a debt is locally situated where the debtor resides is altered by the terms of the contract. It was decisive that the borrower had no place of business in and was not therefore resident in the United Kingdom.

(4) In *Kwok* the Privy Council affirmed the rule that a debt was generally situated in a country where it could be enforced.[24] In that case the debtor company was assumed to have two places of residence – in Liberia and in Hong Kong. In choosing which was the proper situation of the debt, the Board found that the primary contractual obligation was expressed to be performed in Liberia. Accordingly the courts of Hong Kong had no jurisdiction.

[35] Mr Tingey sought support from the first instance decision in *Cambridge Credit Corp Ltd v Lissenden* where the firm of Australian accountants and a large number of underwriters had entered into a professional indemnity policy.[25] Some were Lloyd's syndicates and others were companies in a number of countries. All were resident outside of Australia. The consequential conceptual problem was that no single underwriter carried on business in another sovereign state, so it could not be said where the debt was enforceable or recoverable.

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22 *Jabbour*, above n 18.
23 *In re claim by Helbert Wagg & Co Ltd* [1956] 1 Ch 232 (Ch).
24 *Kwok*, above n 11.
25 *Cambridge Credit Corp*, above n 20.

[36] Clarke J decided that the only solution was to resort to the multiple residence rule to determine subject matter jurisdiction by inquiring where the debt was payable.[26] This critical distinguishing factual difference renders *Cambridge Credit* of little assistance here. Of much more assistance is the later decision in *New Cap Reinsurance* where Windeyer J, in dismissing an argument similar to Mr Tingey's, applied the general, single residence rule.[27]

[37] While Mr Tingey's reliance on this policy's features closely mirrored the factors referred to in *Ludgater*,[28] the Court's analysis was not, with respect, necessary to the result: the result was already settled by the Court's earlier finding that the debt was located in Australia.[29] It was not suggested in *Ludgater* or in this case that the insurer had a place of business in New Zealand. It is unclear why the Court referred to or discussed the place for performance of the insurer's contractual obligation – whether Australia or New Zealand – given its affirmation that that factor only becomes relevant where the debtor has multiple places of business. We can only assume that the Court was explaining its primary statement of law at [27] by way of cross-reference according to the multiple residence rule. Whatever is the reason, we do not read this passage in *Ludgater* as allowing a departure from the Court's earlier affirmation of the single residence rule.

[38] It follows that we must reject Mr Tingey's particular submission that, because the policy provides for payment of the debt in New Zealand (assuming for the purposes of argument that is correct), the debt is situated here. We repeat that a contractual stipulation requiring payment in a country where the debtor does not reside does not affect the general rule that an entity is resident wherever it carries on business. The place of payment is only relevant to the situation of the debt where the debtor has multiple places of business.

[39] Thus the place where payment is due could only become a relevant factor if Bridgecorp sought to establish that the Underwriters reside both in England and New Zealand. Lloyds's payment of a $500,000 statutory deposit as security for

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26 At 74,720–74,721.
27 *New Cap Reinsurance*, above n 14, at [31].
28 *Ludgater*, above n 1, at [28].
29 At [26].

performance of its contractual obligations does not bear upon that question. Mr Tingey conceded that the syndicate is resident only in London. He did not suggest that Underwriters have a place of business in New Zealand: that conclusion must, we repeat, be the end of the matter.

[40] It follows, as Mr Ring submitted, that other factors such as the law of exclusive jurisdiction under the policy, and the currency of payment, the sum insured, the premium deductible and limit of indemnity are also irrelevant. Mr Tingey's complaint that Bridgecorp only became aware of the debtor's place of residence at a late stage falls into the same category: a complainant's state of knowledge about the debtor's residence cannot affect the fact of it – the Underwriters' residence is in London and does not depend on Bridgecorp's knowledge of that fact.

[41] Mr Tingey also submitted that *Ludgater* stands as authority for the proposition that the law of a contract determines whether third parties have a direct claim against the insurer; and that this factor is of itself dispositive.[30] His submission is that an insurer's obligation under a contract incorporates s 9. That in turn includes statutory provisions for direct actions by third parties against the insurer. We disagree. In *Ludgater* the Court was simply reinforcing the point that, if s 9 was given extraterritorial effect, it would apply in Australia where no statutory provisions for special priority existed. The relevant passage in the judgment was not addressed to the point raised by Mr Tingey.

[42] Contrary to Mr Tingey's submission, there is no injustice in this result. In fact, it accords entirely with HIGL's contractual relationship with Underwriters. In the event of a dispute between them HIGL could only sue Underwriters in New Zealand. If HIGL wished to enforce a judgment against Underwriters' assets in England, it would have to follow the orthodox course of applying for registration in the United Kingdom under the Foreign Judgments (Reciprocal Enforcement) Act 1933 (UK). There is no reason why Bridgecorp should be placed in a better position than the insured party.

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30 At [33].

(4) Insolvency

[43] Mr Tingey advanced a secondary or alternative argument based on the law of insolvency. It is that HIGL is a New Zealand company, its liquidation is in New Zealand and has been conducted by a New Zealand liquidator, and all rights and obligations must be determined according to the New Zealand insolvency regime. Included within that regime is s 9, which affects the assets available to HIGL's distributor for distribution. Bridgecorp, and all HIGL's New Zealand creditors, would be severely disadvantaged if the New Zealand insolvency regime including s 9 did not apply. A claim in England, commenced by HIGL against Underwriters, would be the only other potential avenue of recovery. However, this is prevented by the exclusive jurisdiction clause.

[44] The short answer is that Mr Tingey's submission begs the question: if s 9 does not have extraterritorial effect, it does not form part of the New Zealand insolvency regime. Bridgecorp has no entitlement to override the ordinary pari passu rule, to secure a prior claim to the insurance moneys ahead of HIGL's other creditors.

[45] Mr Tingey may be correct that one consequence of our conclusion on jurisdiction would be that Bridgecorp would not be able to assert its charge in either England or New Zealand, despite those countries being the only two jurisdictions involved and both having enacted legislation for charging insurance moneys. In our judgment, that factor is immaterial if s 9 does not apply in this case – which we have held it does not.

[46] In any event, the exclusive jurisdiction clause only applies to disputes under the policy. Contrary to Mr Tingey's submission, the provision does not bar a creditor who obtains judgment against HIGL for breach of contract from enforcing that judgment in the usual way. If Bridgecorp obtains judgment against HIGL, its liquidator would be entitled to look to Underwriters for recovery if Bridgecorp establishes HIGL's right of indemnity under the policy. Bridgecorp would appropriately fund HIGL to follow the orthodox course of applying to register and enforce its judgment in the United Kingdom.

Result

[47] The appeal is dismissed.

[48] Bridgecorp must pay Underwriters' costs for a standard appeal on a band A basis together with usual disbursements.

Solicitors:
Bell Gully, Auckland for Appellant
DAC Beachcroft New Zealand Ltd, Auckland for Respondent