IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2014-404-1711
[2015] NZHC 1384

BETWEEN	ANTHONY JOHN MCCULLAGH AND STEPHEN MARK LAWRENCE Applicants
AND	UNDERWRITERS SEVERALLY First Respondent
	(Intituling cont'd over)

Hearing:	15 June 2015
Appearances:	D T Broadmore for Applicants M G Ring QC and M J Francis for First Respondent No appearance for Second Respondent A R Galbraith QC and L J Douglas for Third Respondent L L C Cooney and A D Gormack for Fourth and Fifth Respondents D M Cross for Third Party
Judgment:	18 June 2015

JUDGMENT OF WYLIE J

This judgment was delivered by Justice Wylie
on 18 June 2015 at 4.00pm
pursuant to r 11.5 of the High Court Rules

Registrar/Deputy Registrar

Date:……..

BODY CORPORATE 326421
Second Respondent

AUCKLAND COUNCIL
Third Respondent

BODY CORPORATE 346799
Fourth Respondent

BODY CORPORATE 324371
Fifth Respondent

BOSTIK NEW ZEALAND LIMITED
Third Party

Introduction

[1] The applicants, Messrs McCullagh and Lawrence, are the liquidators of Brookfield Multiplex Constructions (NZ) Ltd (in liquidation) ("BMX"). They have applied to the Court for directions pursuant to s 284 of the Companies Act 1993. They seek a direction as to whether any monies paid or payable to BMX by its insurers under three insurance policies held by BMX are subject to a charge under s 9 of the Law Reform Act 1936 ("the Act"). In the event that the Court concludes that there is no charge, they seek a further direction permitting them to try to negotiate a reasonable settlement with the first respondent underwriters.

[2] In the event Messrs McCullagh and Lawrence did not take an active stance at the hearing. They advised through Mr Broadmore that they abide the decision of the Court.

[3] Mr Ring QC appeared for the underwriters under each of the three insurance policies and he assumed the burden of the argument that there can be no charge in the circumstances of this case. He noted that it is common ground that the underwriters have their place of business in the United Kingdom. He argued that where an insurer is based in another jurisdiction, there can be no charge under s 9(1) of the Act on any moneys that are or may become payable by the insurer to the insured, and that any moneys paid pursuant to the policy cannot subsequently become charged under s 9(1) when they are paid by the insurer to the insured.

[4] Mr Galbraith QC for Auckland Council – the third respondent - supported by Mr Cooney for the fourth and fifth respondents – both bodies corporate – argued that there is a charge under s 9(1) of the Act on moneys that are or may become payable by the insurer to the insured, that such charge cannot be enforced when the insurer is based off-shore, but that when the moneys are paid pursuant to the policy to the insured and come into New Zealand, the charge can be enforced by those entitled to its benefit. Both contended that the Court should take a purposive approach to the interpretation of the section to avoid what they described as the "random frustration" of the statutory purpose where the insurer resides overseas.

[5] Ms Cross appeared on behalf of the third party – Bostik New Zealand Limited. That company filed a notice reserving rights, but not a notice of opposition. Ms Cross appeared on a "watching brief" only.

[6] In summary, I have concluded that any moneys paid or payable to BMX by its insurers under, or in settlement of, BMX's rights under any of the relevant policies cannot be subject to a charge under s 9 of the Act. As a result any moneys paid by the underwriters to BMX will fall into BMX's general pool of assets and will be subject to pari passu distribution to all of BMX's creditors, including the respondents if it transpires that they or some of them are owed money by BMX. I now set out my reasons for this conclusion.

Background

[7] BMX is incorporated in New Zealand. It has its sole place of business in this country.

[8] Between August 2004 and March 2008, BMX was a wholly owned subsidiary of Multiplex Ltd, a company registered in Australia. In March 2008 Multiplex Ltd changed its name to Brookfield Multiplex Ltd, but it remained the sole shareholder of BMX. In December 2010 Brookfield Multiplex Ltd changed its name to Brookfield Australia Investments Ltd. It nevertheless remained the sole shareholder of BMX until January 2011. Another Australian company, Brookfield Multiplex Constructions Pty Ltd, then became the sole shareholder of BMX. BMX remains a wholly owned subsidiary of that company.

[9] BMX was a contractor. It built a number of large apartment complexes and other buildings in New Zealand. It has been alleged that a number of the buildings leak and various proceedings have been threatened or commenced against BMX.

[10] As a subsidiary of Brookfield Multiplex Ltd, Brookfield Australia Investments Limited or Brookfield Multiplex Construction Pty Ltd, BMX held insurance cover under three policies, all with various Lloyd's underwriters. The brief details are as follows:

(a) a professional indemnity policy, B 0901 LB0810824000 for the period 31 March 2008 to 31 March 2009. BMX has asserted that this policy extends to any liability it has under proceedings CIV-2009-404-8136 (the "Nautilus proceedings");

(b) a professional indemnity policy B 0901 LB1218581000 for the period 31 March 2012 to 31 March 2013. BMX has asserted that this policy extends to any liability it may have under proceedings:

(i) CIV-2012-404-4933 (the "Sylvia Park proceedings");

(ii) CIV-2012-404-6290 (the "Victopia proceedings"); and

(iii) CIV-2012-404-5664 (the "Century on Anzac proceedings").

(c) a public and products liability policy B 0901 LB1218559000 for the period 31 March 2012 to 31 March 2013. BMX has asserted this policy extends to any liability it may have for claims threatened by the Minister of Education, the Secretary of Education and the Board of Trustees of Albany Junior High School.

[11] Relevantly, the policies:

(a) require that they be construed in accordance with the law in Australia;

(b) require that all notices be given to brokers in Australia; and

(c) have world-wide application, excluding some jurisdictions, none of which are relevant for present purposes.

[12] The members of the insuring syndicate in policy B 0901 LB0810824000 are four companies, based in either London or Europe. The liability of the companies is several, not joint. The business address for each member of the syndicate is care of Lloyd's address in London. Similarly, the members of the insuring syndicate in policy B 0901 LB1218581000 are companies based in the United Kingdom or

Europe, and again their liability is several, not joint, and the business address for each member of the syndicate is care of Lloyd's address in London. The insuring syndicate in policy B 0901 LB1218559000 is an entity known as QBE Syndicate 386. It is the sole underwriter of the policy. It has 1,193 members, each of whom is severally, but not jointly, liable for any debts under the policy. Eleven of the syndicate's members are resident in New Zealand. Those 11 members collectively contribute 0.1146 per cent to the capital of the syndicate. The syndicate is managed in London by QBE Underwriting Ltd. QBE Syndicate 386 has no residence or place of business in New Zealand. Its business address is again care of Lloyd's address in London.

[13] BMX was placed into liquidation on 3 December 2012. Messrs McCullagh and Lawrence were appointed as its liquidators.

[14] BMX was a defendant in the Nautilus proceedings. It notified a claim to the applicable underwriters under the policy noted in [10](a) above. In December 2012 both the second respondent (the body corporate claimant in the Nautilus proceedings) and the third respondent Council applied for leave to join the underwriters to the proceedings alleging that the underwriters were liable under s 9 of the Act.

[15] In a judgment issued on 15 April 2013, Gilbert J dismissed the applications for leave. It was common ground that the underwriters are based in London. Gilbert J determined that the Court had no subject matter jurisdiction in respect of any moneys payable by the underwriters under the policy.[1] He did grant leave, by consent, under s 248 of the Companies Act 1993 for the proceedings to continue against BMX.

[16] Prior to the trial of the Nautilus proceedings, BMX joined the underwriters under policy B 0901 LB0810824000 to the proceedings as a second third party. It sought indemnity under the policy. The underwriters sought to settle their prospective liability to BMX with the liquidators. The second respondent body

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1 *Body Corporate 326421 v Auckland Council* [2013] NZHC 753 at [23], applying *Ludgater Holdings Ltd v Gerling Australia Insurance Co Pty Ltd* [2010] NZSC 49, [2010] 3 NZLR 713.

corporate and the Council opposed the proposed settlement, asserting that, notwithstanding Gilbert J's judgment, there was an existing charge under s 9. As a result, the liquidators filed this application for directions. In a memorandum filed with the application, counsel advised that all creditors and contingent creditors of BMX were being served. Affidavits of service have since been filed.

[17] The application for directions was initially adjourned.

[18] The Nautilus proceedings then went to trial and judgment issued. BMX was held to be liable to the second respondent body corporate and the unit owners in a total sum of approximately $25 million. The Council was also found liable to the body corporate and unit owners in respect of a number of the building defects which exist in the complex.[2]

[19] Following the conclusion of the Nautilus trial, the liquidators broadened their directions application so that it extends to all remaining claims for indemnity under any of the three policies noted in [10](a)-(c) above.

[20] The second respondent – the body corporate claimant in the Nautilus proceedings – initially filed a notice of opposition. It has since advised that it does not now oppose the liquidators' application, because Gilbert J in the Nautilus proceedings dismissed the third party claim by BMX seeking indemnity for its liability to the plaintiffs in those proceedings under policy number B 0901 LB0810824000. As a consequence, the second respondent has taken the view that there are no insurance moneys either payable, or which might be paid, to the liquidators of BMX in respect of BMX's liability to the plaintiffs in the Nautilus proceedings. It considers that the application for directions is moot insofar as it applies to the Nautilus proceeding.

[21] The third respondent Council was a party to the Nautilus proceedings. It is also a party to the Victopia and Century on Anzac proceedings. It is of course concerned to minimise its liability where other defendants are insolvent or no longer in existence.

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2 *Body Corporate 326421 v Auckland Council* [2015] NZHC 862.

[22] The fourth respondent is one of the plaintiffs in the Victopia proceedings.[3] BMX is the second defendant in those proceedings. The fourth respondent has leave to continue its claims against BMX.

[23] The fifth respondent is the plaintiff in the Century on Anzac proceedings.[4] BMX is the fifth defendant in those proceedings. Again, the fifth respondent has leave to continue their claims against BMX.

[24] BMX is seeking indemnity under the professional indemnity policy noted at [10](b) above in relation to the fourth and fifth respondents' claims.

[25] As noted in [10](c) above, BMX has asserted that policy B 0901 LB1218559000 responds to any liability it may be under to the Minister of Education, the Secretary of Education and the Board of Trustees of the Albany Junior High School. No proceedings have been issued against BMX in this regard to date. The Minister, the Secretary and the Board filed a memorandum in relation to the present application, reserving their rights to participate in the proceedings. In the event they did not do so.

[26] A similar stance was taken by Downer New Zealand Ltd, which company is both a creditor and a contingent creditor of BMX, and, as noted above, by Bostik New Zealand Limited.

Directions sought

[27] The initial application related only to BMX's claim under the policy at issue in the Nautilus proceedings. A number of directions were then sought. In an amended application filed in October 2014 (prior to judgment issuing in the Nautilus proceedings) directions were sought in respect of each of the three policies noted in paragraph [10](a)-(c) above. Again, a number of directions were sought. Broken down, those directions raised eight separate issues. The parties reached agreement on five of those eight issues. In a joint memorandum filed on 12 March 2015 the Court was advised that the three outstanding issues were as follows:

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3 *Body Corporate 346799 v KNZ International Co Ltd* CIV-2012-404-006290.
4 *Body Corporate 324371 v Clark Brown Architects Ltd* CIV-2012-404-005664.

(a) Whether s 9 of the Act applies to any proceeds payable or paid by the underwriters to BMX;

(b) Whether s 9 of the Act applies to any judgment that BMX might obtain against the underwriters in the Nautilus proceedings; and

(c) Whether, if s 9 of the Act applies to any proceeds payable or paid, the liquidators are entitled to deduct from the proceeds their fees and expenses properly incurred in connection with preserving and realising the proceeds.

[28] As a result of Gilbert J's judgment in the Nautilus case, issue (b) is no longer advanced. Further, the parties have each reached agreement in relation to issue (c). They filed a joint memorandum in this regard on 14 May 2015. The liquidators have abandoned their application for directions in regard to issue (c). The only party taking a position in respect of that direction was the Council. It agreed to the liquidators abandoning the application for directions in this regard. There was no issue as to costs as between the liquidators and the Council.

[29] It follows that the only substantive issue before the Court was issue (a).

[30] There was also one subsidiary direction sought – namely whether, if any monies paid or payable to BMX under the policies are not subject to a charge, the liquidators will be acting in good faith, in a fair and principled way, and consistently with statutory requirements, if they reach a reasonable settlement with the underwriters of BMX's rights under the policies. I deal with this briefly below.

Analysis

[31] The Law Reform Act 1936 deals with a number of disparate subjects where the legislature considered it was appropriate to reform the law. The Act was divided into seven different parts, each of which reformed common law rules. The parts were each only one or a few sections long. Much of the Act has since been repealed.

[32] Section 9 was in Part 3 of the Act. It remains in force and it provides as follows:

Part 3
Charges on insurance moneys payable as indemnity for liability to pay damages or compensation

9 Amount of liability to be charge on insurance moneys payable against that liability

(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.

(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 moneys, and where the same insurance moneys are subject to 2 or more charges by virtue of this Part 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) 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 contained.
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> (7) No insurer shall be liable under this Part for any sum beyond the limits fixed by the contract of insurance between himself and the insured.

[33] The origin and development of the section were discussed in a report prepared by the Law Commission in 1998 – *Some Insurance Law Problems*.[5] This discussion was referred to in a recent judgment of the Supreme Court – *Ludgater Holdings Ltd v Gerling Australia Insurance Co Pty Ltd.*[6] As the Supreme Court there noted, the section responds to the obvious unfairness arising from 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.[7] Where it applies, it prevents insurance proceeds being paid to the general pool of creditors of an insolvent insured rather than the third party claimant who has suffered the insured loss.[8] The Supreme Court cited with approval views expressed by McHugh and Gummow JJ in the High Court of Australia that the general effect of nearly identical legislation in New South Wales, is as follows:[9]

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

[34] Under s 9(1), the insured's liability to a third party claimant to pay damages or compensation is charged on the insurance moneys which "are or may become payable" by the insurer to the insured in respect of that liability. The charge descends immediately on the happening of the event giving rise to the claim for damages and it secures all available insurance proceeds up to the full amount of the

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5 Law Commission *Some Insurance Law Problems* (NZLC R46, 1998).

6 *Ludgater Holdings Ltd v Gerling Australia Insurance Co Pty Ltd*, above n 1.

7 At [14]; And see *BFSL 2007 Ltd v Steigrad* [2013] NZSC 156, [2014] 1 NZLR 304 at [86]-[114].

8 *Body Corporate 326421 v Auckland Council*, above n 1, at [12]; *Bridgecorp Ltd (in rec and in liq) v Certain Lloyd's Underwriters Under Policy No 888/50405V04A* [2014] NZHC 842, (2014) 21 PRNZ 760 at [2]; upheld on appeal [2014] NZCA 571, [2015] 2 NZLR 285.

9 *Bailey v New South Wales Medical Defence Union Ltd* (1995) 184 CLR 399 at 446.

eventual liability by the insured to the third party claimant, whatever it turns out to be.[10]

[35] The charge created by s 9(1) is in favour of the third party claimant over an asset of the insured – namely the insurance moneys payable to the insured. The essential purpose of the subsection is to impress the insurance monies with the charge while they are still under the control of the insurer, and before they reach the insured.

[36] The charge created by s 9(1) is not against the chose in action the insured has against the insurer. Rather it is against the insurance moneys or debt payable by the insurer.[11] The insurer is liable under the charge to the limit of its liability to indemnify the insured under the policy.[12] If, pursuant to the policy, the insurer has no indemnity obligation to the insured, then there is nothing for the charge to descend on.[13]

[37] To enforce the charge, the claimant against the insured is given a direct statutory right of action against the insurer.[14] Proceedings to enforce the charge can only be taken against the insurer and they can be taken even if the claimant already has a judgment against the insured.[15] Payment by an insurer to an insured does not erode the charge unless the payment is made without notice.[16] The subsection "puts the risk on the insurer" in respect of payments made under the insurance contract.[17]

[38] In terms of the section, a s 9 charge is on all insurance moneys "that are or may become payable" in respect of the insured liability. The word "payable", in its ordinary and natural meaning, refers to a future payment - an amount that is to be paid.[18] The charge will usually come into existence prior to both a claim for liability

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10 *Ludgater Holdings Ltd v Gerling Australia Insurance Co Pty Ltd*, above n 1, at [17]; *BFSL 2007 Ltd v Steigrad*, above n 7, at [8], [25], [31], [33], [34],[35], [77], [115], [116] and [120].

11 *Bridgecorp Ltd (in rec & in liq) v Certain Lloyd's Underwriters* (CA), above n 8, at [9] and [12].

12 Law Reform Act, s 9(7).

13 *Bailey v New South Wales Medical Defence Union Ltd*, above n 9, at 449.

14 Law Reform Act, s 9(4).

15 Section 9(4) and (5).

16 Section 9(6).

17 *BFSL 2007 Ltd v Steigrad,* above n 7 at [53] (in relation to s 9(3)) and [116].

18 See Lesley Brown (ed) *The Shorter Oxford Dictionary* (vol 2, Clarendon Press, Oxford) at 2130; and see Bryan A Garner (ed) *Blacks Law Dictionary* (10th ed, Thompson Reuters, Minnesota, 2014) at 1309.

against the insured being made and determined, and the liability of the insurer under the policy being accepted, or otherwise established and qualified. The section recognises this prospective feature of the charge.[19]

[39] I now turn to consider the law in the circumstances of the present case.

[40] First, in terms of the s 9(1), (and leaving aside the extraterritoriality issue), any charge descended on the happening of the event or events giving rise to the claim for damages or compensation. It follows that any charge would have descended when BMX negligently undertook the defective building works at issue in the proceedings to which each policy potentially responds. The wording of the section does not allow for any argument that the charge can descend at a later point in time, for example, when the insurance proceeds are paid by the insurer to the insured.

[41] Secondly, s 9 does not apply where the insurance contract, is governed by foreign law. The section does not have extraterritorial application.[20] It is common ground that the underwriters who are liable for any debts arising under the policies, are based outside New Zealand. Under the policies the situs of any debts owing under the policies is the United Kingdom.

[42] Thirdly, any charge under s 9(1) could only descend on moneys that "are or may become payable" by the insurer to the insured. There is nothing in the section suggesting that an insurance payment, once made, can be belatedly charged under s 9(1) when the moneys come into the hands of the insured.

[43] Fourthly, a charge created by s 9(1) can be enforced by judicial process under s 9(4) direct by the third party claimant. A charge does not have the effect of transferring to the third party claimant any property in or possession of the moneys that are or may be payable under the insurance policy.[21] There is nothing in the

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19 *BFSL 2007 Ltd v Steigrad*, above n 7, at [144] per McGrath and Gault JJ (the minority). See also [33]-[36], [57], [71], [77], [115] and [196] per Elias CJ and Glazebrook and Anderson JJ (the majority).

20 *Ludgater Holdings Ltd v Gerling Australia Co Pty Ltd*, above n 1.

21 And see Wayne Clark (ed) *Fisher and Lightwood's Law of Mortgage* (14th ed, LexisNexis, London, 2014) at [1.5].

section giving third party claimants the right to enforce the charge against the insured.

[44] Fifthly, the section provides that unless the insured was bankrupt or insolvent when the event triggering liability happened, a claimant against an insurer requires leave to enforce a s 9 charge.[22] The purpose of the leave requirement is to ensure that a third party claimant does not take direct action against an insurer when a perfectly good common law defendant is available.[23] Again there is nothing in s 9 suggesting that a third party claimant can enforce a s 9(1) charge against the insured. Indeed requiring a third party claimant to obtain leave would make no sense when he or she already has a direct right to claim against the insured in respect of the damage suffered.

[45] All of these considerations compel the conclusion that where an insurer is based off-shore, there can be no charge under s 9(1) on any moneys that are or may become payable by the insurer to the insured, and that any moneys paid do not belatedly become charged under s 9(1) when payment is made by the insurer to the insured in New Zealand.

[46] Mr Galbraith argued that a charge exists under s 9(1), albeit that it cannot be enforced where the insurer is resident overseas. With respect, that argument cannot stand. It is inconsistent with the terms of the section, and with the Supreme Court's decision in *Ludgater*. The section does not have extraterritorial affect.

[47] Both Mr Galbraith and Mr Cooney argued that the s 9(1) expression - "moneys that are or may become payable" - can include insurance money actually paid to the insured. Again, in my judgment this argument must fail. The statutory charge descends on the happening of the event giving rise to the claim for damages. It is against all insurance monies that are or may become payable. The phrase used in the subsection envisages prospective payments which fall to be paid on the happening of the insured event. No charge is created over any payments that have

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22 Law Reform Act, s 9(2) and (4).

23 *Campbell v Mutual Life and Citizens Fire and General Insurance Co (NZ) Ltd* [1971] NZLR 240 (HC) at 243; *FAI (NZ) General Insurance Co Ltd v Blundell and Brown Ltd* [1994] 1 NZLR 11 (CA) at 15, 18 and 22.

already been made, and a charge cannot belatedly descend on payments once they are made.

[48] Both Mr Galbraith and Mr Cooney submitted that the section should be given a purposive interpretation pursuant to s 5 of the Interpretation Act 1999. They noted the purpose of the legislation, and submitted that where there are overseas insurers, the consequence of the *Ludgater* decision is to "produce an arbitrary achievement of the purpose of s 9, dependent on the random accident of where the underwriters of a particular insurance policy are domiciled". It was submitted that this random frustration of the purpose for which s 9 was enacted justifies the Court in giving emphasis to the principles stated in s 5 of the Interpretation Act.[24]

[49] Section 5 of the Interpretation Act requires that the meaning of an enactment must be ascertained from its text and in light of its purpose. In effect the meaning of the text must be cross-checked against the purpose, even if the meaning of the text appears plain in isolation.[25]

[50] While it is a general principle of statutory interpretation that "strict grammatical meaning must yield to sufficiently obvious purpose",[26] the text of the statute cannot be interpreted to give it a meaning that it is incapable of bearing. The plain meaning of the words used must be the starting point to any exercise in statutory interpretation. If, notwithstanding its apparent clarity, a literal application of a statutory provision would lead to a result seemingly in conflict with the policies of the Act, then the Court can in some circumstances go further.[27]

[51] There are constraints on the purposive approach to statutory interpretation. It does not permit a Court to ignore the plain language used on the ground that the interpretation preferred by one party would better serve the assumed statutory purpose. The proper scope of the statute is primarily for the legislature, and its

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24 And see, *BFSL 2007 Ltd v Steigrad*, above n 7, at [105] and [153].

25 *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [22].

26 *McKenzie v Attorney-General* [1992] 2 NZLR 14 (CA) at 17.

27 *Auckland City Council v Glucina* [1997] 2 NZLR 1 (CA) at 4.

assessment of that purpose must be taken to be recorded in the plain language it has used.[28]

[52] In my judgment, the language used in s 9 is clear. The section dictates when a charge descends and what it descends over. It puts in place provision for enforcement of the charge by the third party claimant against the insurer. There is nothing in the section suggesting that it has extraterritorial effect. The Supreme Court has held that it does not do so. There is nothing in the section suggesting that a charge can belatedly descend when the monies are paid to the insured in New Zealand. Indeed the section says that the charge descends much earlier. Nor is there anything in the section which permits enforcement of any charge against the insured, as opposed to the insurer.

[53] There are in any event difficulties in ascertaining the statutory purpose relevant to the circumstances of this case. There is little contemporary material from which to infer the purpose of s 9 at the time the legislation was passed.[29] As the Supreme Court has made clear, the section derived from earlier legislation dealing first with workers' compensation and then with motor vehicle insurance.[30] When the Law Reform Act was introduced, the Honourable Rex Mason MP said in Parliament that s 9 consolidated previous provisions, and made them of general application.[31] It seems clear enough that the legislature intended to ensure that available insurance moneys were not depleted in such a way as to deprive third party claimants of the benefit of any insurance payment falling due in respect of the events giving rise to the damage they suffered. It is not clear what the purpose was beyond that. The Supreme Court's decision in *Ludgater* makes it clear that it was never the purpose of the Act that it should apply to overseas insurance companies.[32] Quite what was the purpose of the legislation, in the circumstances which apply in this case, is far from certain.

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28 *Commerce Commission v Progressive Enterprises Ltd* [2010] NZCA 374, (2010) 9 NZBLC 103, 060, at [36].
29 *BFSL 2007 Ltd v Steigrad*, above n 7, at [67].
30 At [86] to [98].
31 (17 September 1936) 247 NZPD 237.
32 *Ludgate Holdings Ltd v Gerling Australia Insurance Pty Ltd*, above n 1, at [23].

[54] In any event, the Court's task is to interpret text in light of purpose, and not to override text to accord with the perceived purpose of Parliament.[33] I cannot ignore the plain meaning of the section, in pursuit of the assumed purpose of the legislature. If the section is to be extended to deal with the alleged "randomness" of the result produced in this case, then that is a matter for the legislature, and not for the Courts. I decline to depart from what I see as the natural and ordinary meaning of the words used in s 9.

[55] It was suggested by Mr Galbraith that a finding that there is no charge in the circumstances of this case, will result in a windfall for the insurer.

[56] I do not accept that argument. The underwriters remain liable under the policies. If the policies respond to the claims made, the underwriters will have to meet their liabilities, at the suit of the liquidators, unless any claims can be settled.

[57] Finally, it was asserted that the result of finding that there is no charge will be unfair, because any moneys paid by the underwriters will fall into the general pool of assets of BMX, and will fall to be distributed pari passu between all creditors.

[58] I do not consider that there is an inevitable unfairness in that consequence. What is unfair to one party, may be fair to another. I record Mr Ring's submission that the Council and the bodies corporate did not pay for the insurance, and that the pool available for other creditors has been reduced by the amount of the premiums paid. Even if there is any unfairness, it was not an unfairness which troubled the Court of Appeal in *Bridgecorp*. In that case it was common ground between the parties that there was no subject matter jurisdiction, because the debt there due was payable by an insurer outside New Zealand. Counsel accepted that *Bridgecorp* was not a case where a charge arose under s 9 and that there was nothing to enforce under s 9(4). As a consequence, the Court of Appeal observed that s 9 does not form part of the New Zealand insolvency regime, with the result the Bridgecorp had no entitlement to override the ordinary pari passu rule.[34]

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[33] At [67]; And see D Derrington and R Ashton *The Law of Liability Insurance* (3rd ed LexisNexis, Australia, 2013) at [13-144].

[34] *Bridgecorp Ltd (in rec & in liq) v Certain Lloyd's Underwriters* (CA), above n 8, at [7], [42] & [44].

Result

[59] For these reasons, I direct as follows:

> Any moneys paid or payable to BMX by its insurers under or in settlement of BMX's rights under any one or more of the following policies:
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> (i) Professional indemnity policy B0901 LB0810824000,
>
> (ii) Professional indemnity policy B0901 LB1218581000, and
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> (iii) Public and products liability policy B0101 LB1218559000;
>
> are not subject to a charge under s 9 of the Law Reform Act 1936.

[60] Having reached this point, all parties agreed that it is appropriate to also make a direction that the liquidators of BMX will be acting in good faith, in a fair and principled way, and consistently with statutory requirements, if they reach a reasonable settlement with the underwriters of BMX's rights under the policies. I so direct.

Costs

[61] All parties agreed that costs should be fixed on a 2B basis.

[62] The applicant liquidators and the first respondent underwriters are entitled to their costs and reasonable disbursements on a 2B basis. Allowance will have to be made by the liquidators for the fact that no submissions were presented on their behalf at the hearing.

[63] The liability of the Council, and the fourth and fifth respondents for the costs and disbursements is joint and several.

[64] I expect that counsel will be able to agree the quantum of costs. If there is any disagreement, then the same is to be referred to me by way of a joint

memorandum, within 15 working days of the date of this decision. I will then finalise the costs payable on the papers unless I require the assistance of counsel.

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Wylie J

Solicitors:
Buddle Findlay, Auckland for Applicants
M G Ring QC, Auckland & DAC Beachcroft, Auckland for First Respondent
Rainey Law, Auckland for Second Respondent
A R Galbraith QC, Auckland & Heaney & Partners, Auckland for Third Respondent
Grimshaw & Co, Auckland for Fourth and Fifth Respondents
D M Cross, Minter Ellison Rudd Watts for Third Party
Bell Gully, Auckland for Downer New Zealand Limited
Meredith Connell, Auckland for Minister of Education, Secretary of Education and the Board of Trustees of the Albany Junior High School