

## NZILA CONFERENCE

### 2008 INSURANCE LAW UPDATE

#### Ludgater Holdings Ltd v Gerling Australia Insurance Co Pty Ltd

##### Introduction

1. This session has frequently been presented by Tom Weston QC, who has customarily presented a round up of insurance law cases in New Zealand and Australia over the previous 12 months or so.
2. I generally find it difficult enough to remember the details of the cases I have been involved in, or talk or write about them, let alone to talk about other people's cases however Ludgater Holdings is something of an exception to the normal rule.
3. The decisions I will be speaking about are the decisions of Associate Judge Christiansen dated 14 December 2007, and Chisholm J dated 12 August 2008.
4. Following the second of those decisions, Gerling sought and was granted leave to appeal to the Court of Appeal – a hearing of that appeal sometime in the first half of 2009 awaits.
5. I see every likelihood that, whatever the result, there will be an application for leave to appeal to the Supreme Court, and a hearing in that Court towards the end of 2009 or more likely 2010, so the prospect is that you will be hearing another update on this case at next year's conference, and very possibly one in 2010 as well.
6. The scene was set fairly early on. There were some early skirmishes to do with the form in which proceedings were initially issued, and a few service difficulties, from which it became apparent that Gerling intended to fully defend the claim on substantive, and whatever procedural grounds might also emerge. At an early stage of the proceedings, after one such issue arose, the Associate Judge said, prophetically, that *"this case looks to have a long proceedings history ahead of it"*.
7. So it has proved to be.

##### Background facts

8. Ludgater owns a commercial building in Auckland which on 11 February 2006 was damaged by a fire. The cost of repairs to the building was \$227,000.00, and Ludgater also lost approximately \$40,000.00 in rent as a result of its two tenants, a restaurant and a fitness centre/gymnasium, having to vacate their premises. An origin and cause investigation report was obtained, coincidentally from one of the conference's earlier presenters, Dave Noble. It indicated that the cause of the fire had been a defective capacitor in one of the fluorescent lights in the building. The evidence indicated the defective capacitor had caused a fire to commence in a fluorescent light fitting, resulting in molten plastic falling to the floor, setting fire to a carpet and other materials.
9. The capacitor was manufactured by Atco Controls Pty Ltd, an Australian company based in Victoria, which company was in liquidation. The evidence also showed that the Atco manufactured capacitors had been the subject of a number of trade alerts in Australia and New Zealand warning that such capacitors could fail in a destructive manner and, depending upon the structure of the fitting in which they had been installed, could result in a fire. Other capacitors also manufactured by Atco and retrieved from the fire scene were established to be within the batch which was the subject of the trade alerts.

10. Unfortunately, Ludgater had not become aware of the trade alert notices, and nor had any steps been taken by Atco to specifically identify or warn persons who had installed and were using the faulty capacitors.
11. Nor was this the only instance where damage had been caused by fault capacitors manufactured by Atco, indeed, the first case off the rank in terms of proceedings against Atco/Gerling was *Kroma Colour Prints Limited v Atco Controls Limited* which case was the subject of judgments by Associate Judge Sargisson, and Rodney Hansen J dated 13 December 2006, and 2 March 2007 respectively.
12. That claim was later discontinued with substantial costs being awarded to the defendant but that award of costs was set aside by the Court of Appeal in *Kroma Colour Prints Limited v Tridonicatco NZ Limited*, CA 598/07, 6 June 2008 on the basis that, essentially, the defendant and its advisors had used the proceedings as a stalking horse to provide evidence that it could use to defend other proceedings issued in respect of defective Atco manufactured capacitors.
13. Presently, the Ludgater proceedings is one of three claims before the High Court in New Zealand where the plaintiffs have joined Gerling as a defendant and sought leave to issue proceedings under s9 of the Law Reform Act 1936, where Gerling has filed protests to the jurisdiction in each case, and which proceedings await the outcome of Ludgater's appeal to the Court of Appeal. Those other proceedings, for interest, are *Electrix & Anor v Atco Controls Ltd & Ors* CIV 2005-404-5121 where the claim for damages exclusive of interest and costs totals \$1,150,000.00, and *Westforce Credit Union v Gerling Australia Insurance Company Pty Ltd*, CIV 2008-404-2128, in which the amount at stake is \$327,000.00 approx plus interest and costs.
14. Hence the probability that this proceeding will reach the Supreme Court.

### **S9 Insurance Law Reform Act 1936**

15. Section 9 provides:

**“9 Amount of liability to be charged on insurance moneys 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 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 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, in the case of corporation, is being wound up, or if any subsequent bankruptcy or winding up of the Insured is deemed to have commenced on later than the happening of the event, the provisions of the last preceding subsection shall apply notwithstanding the insolvency, bankruptcy, or winding up of the Insured...*

(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 Insureds:*

*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....”*

16. The purpose of this section is to provide a plaintiff a remedy and protection by giving it direct access to insurance moneys, and to prevent the insurer from obtaining a windfall to the plaintiff's expense, where it is impracticable to sue an insured defendant, where there is a policy indemnifying that defendant against liability in respect of the plaintiff's claim.
17. It enables a plaintiff to enforce the charge created against the insurer as though it were a claim for damages and effectively puts the insurer into the same position as the insured – and not the other way around.

### **The Associate Judge's decision**

18. Having filed a notice of appearance under protest to jurisdiction, Gerling sought an order dismissing the proceedings pursuant to Rule 131. The principle grounds relied on by Gerling were that:
  - (a) Section 9 did not have extra-territorial effect; and
  - (b) Ludgater had failed to demonstrate it had a good arguable case against Gerling (or Atco).
19. Gerling posed the question *“Does the Act apply to a policy of insurance issued in a foreign country by a foreign insurer to a foreign insured, neither of whom was carrying on business in New Zealand at the time of the fire?”*.
20. Gerling also argued that if New Zealand Courts had jurisdiction, the Court should nonetheless in the exercise of its discretion decline to assert it.
21. The Associate Judge accepted that in its terms, and in terms of the Act itself, there was nothing to indicate that s9 was intended to have extra-territorial effect however he also accepted that territorial Courts may assume jurisdiction where a defendant has a presence within that jurisdiction or where any payment due may be paid within that jurisdiction. He did however state that he considered the territorial argument to be irrelevant to the case.
22. Rule 131, pursuant to which Gerling had applied, is a procedural provision which offers only two possibilities i.e. the defendant may apply to dismiss the proceeding, or the plaintiff may apply to set aside an appearance filed under protest to jurisdiction. If the Court is satisfied that it has no jurisdiction to hear the proceeding, it must be dismissed. Otherwise, the appearance under protest must be set aside, and the application to dismiss the proceeding itself dismissed.
23. The Associate Judge acknowledged that he needed to be satisfied that there was a substantial and serious legal issue for trial, with a credible, plausible, factual narrative in support of the legal position before being satisfied that there was a sufficiently strong foundation to warrant a New Zealand Court assuming jurisdiction. This involved assessing whether the proceeding was properly brought within the ambit of Rule 219, and whether there was sufficient merit to allow it to proceed – with a further discretion being overlaid to be considered.
24. The Associate Judge accepted that the claim fell within the provisions of Rule 219(a) which permits proceedings to be issued and served outside New Zealand without leave where a claim arises *“where any act or omission for or in respect of which damages are claimed was done or occurred in New Zealand”*. He accepted that the fact that damage

had occurred in New Zealand was sufficient to bring the claim within the Rule, and that it was unnecessary for Ludgater to show that negligent manufacture occurred in New Zealand. He specifically noted Ludgater's pleading that Atco had allowed its defective capacitors to be sold in New Zealand and failed to take adequate steps to warn Ludgater of the dangers of using them.

25. He then proceeded to consider whether, if the cause of action arose in New Zealand, Ludgater's claim could properly be brought against Gerling which claimed to be a foreign national whose contract was with Atco, itself at all relevant times a foreign national. He said

*"The question is whether any separate issue of nationality arises and concerns its indemnifiers. The answer to that is a matter of evidence, but also a matter of common sense. If I accept Mr Cole's proposition, then Gerling could never be subject to the territorial rules of New Zealand, even if Atco was. If Atco had a presence in New Zealand because its product was marketed and sold here, then to adopt Mr Cole's argument, Gerling could not be liable as an indemnifier because its contract of insurance was written in Australia. That proposition I consider to be unacceptable".*

*"As a matter of logic and reason it cannot be acceptable that an Australian insurer could provide indemnity to a company doing business in New Zealand, but not be responsible to persons in New Zealand adversely effected by the insured's product."*

26. The Associate Judge also accepted evidence showing that, contrary to Gerling's claim, it did have sufficient presence in New Zealand because it had been registered as a New Zealand company until May 2006, three months after the date of the damage; that it was Atco's actions that would be the subject of any proceeding, not any separate action against Gerling; that if Atco were held to be liable a judgment would be payable in New Zealand.
27. Of more significance was the Associate Judge's acceptance of the proposition that Gerling had a presence in New Zealand in the sense that it had insured Atco in respect of claims which arose in New Zealand – it being acknowledged that Atco held a policy with Gerling which did indemnify Atco against claims for damages in New Zealand.
28. The Associate Judge rejected Gerling's assertion that whether s9 applied to a policy of insurance issued in a foreign country by a foreign insurer to a foreign insured neither of whom was carrying on business in New Zealand at the time of the fire, was the issue. He said that whether or not Atco or Gerling had been carrying on business at the time of the fire was immaterial (although the evidence indicated that Gerling was doing so). Rather, the real question was whether the policy of insurance should be subject to New Zealand Courts jurisdiction. He found that Gerling should be subject to such jurisdiction, because if the act did not apply to Gerling it would mean that, in effect, an insured could avoid the consequences of the act by the simple expedient of placing its insurances off shore so as to be able to avoid the possibility of being required to indemnify in circumstances where their insured clients became impecunious.
29. It would be unfair to be critical of the Associate Judge's conclusion that the argument about extra-territoriality was irrelevant to the case since both counsel for Gerling and I put the case to him, primarily on the basis that the case could be determined that Gerling had submitted itself to the jurisdiction of New Zealand Courts, and New Zealand law, by virtue of the fact that it insured Atco in respect of claims in New Zealand brought against its insured, and because it was in fact present because it was a company registered in New Zealand until May 1986, after the time at which the loss giving rise to the proceeding occurred. But in fact, although stating that he considered the argument about extra –

territoriality to be irrelevant, I think that in substance he actually expressed conclusions that indicated he accepted the Act had, in the circumstances of the case, extra – territorial effect.

### The decision of Chisholm J

30. Gerling sought review of the Associate Judge's decision. The proverbial kitchen sink was thrown. The Associate Judge had got it wrong in finding that:
  - (a) Rule 219(a) applied, so as to allow the claim to be brought;
  - (b) That the defendant had presence in New Zealand so as to be subject to New Zealand jurisdiction at the relevant times;
  - (c) That Section 9 of the Act applied to a policy of insurance issued by Gerling to Atco;
  - (d) It was immaterial whether the insured was based in New Zealand or not;
  - (e) Ludgater had good arguable case;
  - (f) The Court should exercise its discretion in favour of assuming jurisdiction in favour of Ludgater;
  - (g) Gerling's application must fail and its protest be set aside.
31. It was further contended the decision was wrong because Ludgater's cause of action against Gerling was based on s9 of the Act which did not have extra-territorial effect, and did not apply to a policy of insurance issued in a foreign country by a foreign insurer to a foreign insured; Gerling didn't have a presence in New Zealand sufficient to enable the High Court to exercise jurisdiction; Ludgater hadn't demonstrated a good arguable case, and didn't have one; that the effect of the decision would be to allow a New Zealand Courts impose a charge on insurance moneys payable pursuant to a foreign policy between foreign entities who owed no allegiance to New Zealand and, finally, that if there was a jurisdiction then in its discretion the Court should not have exercised it in favour of Ludgater.
32. Chisholm J began by considering whether Rule 219(a) was correctly applied. He accepted the analysis of Eichelbram CJ in *Biddulph v Wyeth Australia Pty Ltd* [1994] 3 NZLR 429. He concluded that the rule did apply. He accepted that there was sufficient evidence that Atco had manufactured the defective capacitors which were in the fluorescent lights in Ludgater's building, and that there was evidence that the fire had been caused by one of them. He accepted that the safety alerts initiated by Atco had been published in New Zealand as well as Australia which, together with the Associate Judge's reliance on the post trading arrangements between Australia and New Zealand, was sufficient for it to be inferred that the sale and use of the capacitors in New Zealand had occurred with the knowledge and consent, or, alternatively, was reasonable foreseeable to, Atco. Those matters, together with the fact that damage had been sustained in New Zealand were sufficient to establish that the Rule applied.
33. The next issue considered by Chisholm J was whether Gerling had a "presence" in New Zealand and had thereby subjected itself to jurisdiction of the New Zealand Courts.
34. Chisholm J took a slightly different approach than had the Associate Judge and emphasised different matters, in concluding that Gerling did have a sufficient presence in New Zealand to fall within the ambit of s9 and the jurisdiction of New Zealand Courts.

35. The factors he considered relevant in determining that Gerling had a presence in New Zealand, and was subject to the jurisdiction of the New Zealand Courts, were:
- (a) That Gerling had conceded that the relevant policies provided an indemnity to Atco in respect of the event giving rise to the claim for damages (although despite the formal requests, Gerling had never produced a copy of the policy itself, under pressure from the Associate Judge had confirmed that there was no issue that such a policy was in existence, or that that was its effect).
  - (b) The event in question was a fire in New Zealand.
  - (c) Accordingly, it was clear that Gerling had elected to provide insurance cover in relation to an event occurring in New Zealand.
  - (d) Read literally, the prerequisites in s9(1) of the Act had been satisfied and thus Ludgater should be entitled to enforce a charge pursuant to s9(4).
  - (e) Rule 219(a) applied.
  - (f) Although Gerling had declined to produce the insurance policy despite formal request, there was evidence from the litigation manager of Ludgater's insurer to the effect that it is usual industry practice for an insurer to conduct the defence of an insured. This evidence, and the absence of the insurance policy, led to the reasonable inference that Gerling would conduct the proceedings on behalf of Atco and in terms of s9(4), the proceeding would be in the same Court as if the action were an action to recover damages from Atco. Put simply, Gerling would be conducting the proceeding in the High Court.
  - (g) The fact that Atco was in liquidation would not prevent Ludgater taking steps to enforce its charge (against Gerling).
36. Chisholm J concluded
- "In my view those factors, particularly Gerling's election to provide an indemnity policy covering risks in New Zealand and the likelihood that it will actually conduct any litigation in New Zealand, add up to compelling support for the proposition that Gerling has submitted to the jurisdiction of the New Zealand Courts".*
37. Having agreed with Associate Judge Christiansen that Gerling had a presence bringing it within the grasp of s9 of the Act for the jurisdiction of the New Zealand Courts, Chisholm J considered whether, in the alternative, s9 has extra-territorial effect in any event.
38. Ludgater's submission was that if insurers were able to avoid the application of s9 by arranging insurances through offices outside of New Zealand, such as Australia, the implications could be extraordinary and profound and that the Court should therefore read s9 as having extra-territorial effect in the sense that it is intended to apply to insurance moneys payable by a foreign insurer in respect of liability which arises in New Zealand.
39. Ludgater submitted that it could not have been intended that there should be a distinction in the way s9 is to operate, between insurers resident in New Zealand, and those who are not.
40. Section 9, Ludgater submitted, raised a simple question of fact as to whether an insurer indemnified the insured against a liability to pay damages on the happening of an event, and that it should not matter whether that insured was situated within or without New Zealand. Ludgater submitted that to give s9 extra-territorial effect would not encroach on

the sovereignty of Australia (vis-à-vis Gerling) because it only affected an indemnity given by Gerling in respect of a claim for damages arising out of an event in New Zealand, because it is the existence of indemnity which brings Section 9 into play.

41. Gerling had submitted that in determining whether s9 applied to a foreign insurer, the focus has to be on the insurer's act and conduct, and not on the claim against the insured. Ludgater's response was that it was inappropriate to focus on the relationship between the insured and insurer, or to apply rules of private international law regarding actions for recovery of a debt. This, as best as I can understand it (and I don't claim that I do), was an argument that the High Court should not regard itself as having jurisdiction, in an action founded on s9, in respect of a contract of insurance itself, or "a charge over a chose in action" being the insurance money (situated abroad), such that it may grant the relief provided by s9. Ludgater's answer to this submission was that such matters are not the focus of the charge created by s9. All the section required, and achieved, was to create a charge over moneys payable pursuant to a policy indemnifying the insured against liability to pay damages to the plaintiff.

42. Chisholm J stated, in response to these arguments, that

*"If s9 is to operate properly the plaintiff must be able to seek leave once s9 is triggered regardless of the identity or location of the insurer. If the identity or location of the insurer was allowed to dictate whether or not this section was available, the wide application of the section would be severely negated in a way that could not have been intended by Parliament. ...The focus...should be on the status of the payment, not the identity of the payer...The only possible qualification to an extra-territorial application of this section is that the insurer would have to be located in a country, such as Australia, where it would be possible to enforce the charge".*

43. He therefore concluded that

*"It follows that had it been necessary to consider whether s9 has extra-territorial effect I would have found that it did...In my view this reflects the clearly expressed legislative intention behind the section. Any other interpretation would deprive this section of its intended effect and would open it up to anomalies that could not have possibly been intended I agree ...that extra-territorial effect would not encroach upon Australian sovereignty".*

44. The pivotal authorities relied upon by Chisholm J in this latter respect were two decisions of the House of Lords *Clark v Oceanic Contractors Inc* [1983] 1 All ER 133, and *Agassi v Robinson* [2006] 1 WLR 1380.

45. In *Clark*, the House of Lords had to consider whether a UK tax statute requiring the deduction of PAYE applied to Oceanic, a non resident overseas company albeit one carrying out its operations, inter alia, within the United Kingdom sector of the North Sea and maintaining establishments in the UK at which PAYE tax was deducted in respect of employees at the UK based establishments. The issue was whether Oceanic was obliged to deduct PAYE from salary wages paid to its North Sea based employees.

46. The principle of extra-territoriality was explained by Lord Scarman as follows

*"Unless the contrary is expressly elected or so plainly implied that the Courts must give effect to it, United Kingdom legislation is applicable only to British subjects or to foreigners who by coming to the United Kingdom, whether for a short or long time, have made themselves subject to British jurisdiction. Two points would seem to be clear: first, that the principle is a rule of construction only and, second, that it contemplates mere presence within the jurisdiction as*

*sufficient to attract the application of British legislation. Certainly there is no general principle that the legislation of the United Kingdom is applicable only to British subject or persons resident here. Merely to state such a proposition is to manifest its absurdity. Presence, not residence, is the test”.*

47. Lord Wilberforce had asked “*Who, it is to be asked, is within the legislative grasp, or intendment, or the statute under consideration?. The contention being that, as regards companies, the statute cannot have been intended to apply to them if they are non resident, one asks immediately: why not?*” These conclusions supported Chisholm J’s acceptance of the proposition that Gerling did have the necessary presence in New Zealand to bring it within the reach of s9, and the jurisdiction of New Zealand Courts.
48. The *Agassi* decision involved Andre Agassi, the well known tennis player. The issue the House of Lords had to consider was whether according to the relevant UK tax and statutes, money paid to foreign entertainers and sportsmen or foreign companies controlled by them in connection with their commercial activities in the United Kingdom should be subject to tax.
49. Mr Agassi argued that it could not be correct that companies such as Nike and Head, his sponsors, who had no trading presence in the United Kingdom, should be under a statutory obligation to deduct income tax from payments due to Mr Agassi’s company which was also situated outside the United Kingdom where such payments reflected Mr Agassi’s participation in various UK tournaments, principally Wimbledon.
50. Mr Agassi’s argument was rejected by the House in a 4:1 decision. The majority’s reasoning was, paraphrased, that:
  - (a) If the tax liability could be avoided simply by ensuring that potentially taxable payments were made by foreign entities, it would have made payment of tax voluntary, which could not have been Parliament’s intention.
  - (b) The provisions of the Act provided that where a relevant payment had been made in connection with a prescribed activity (a sports event in the United Kingdom) the Act made it clear that the payment was subject to deduction of tax by the payer. The identity of the payer, as a matter of construction, was irrelevant to the obligation to pay. The liability to pay arose because of the nature and status of the payment, not the identity of the payer or the payer’s location.
  - (c) Implying a territorial limitation to the legislation on the basis that of the foreign status of the payer was not justified on the basis of a presumption legislative intention. The statutory language was to be given its natural meaning and that meant that it applied to foreign entities, even those with no residence or trading presence in the United Kingdom.
51. Chisholm J accepted this analysis, in particular the observations of Lords Scott and Mance that the focus needed to be on the status of the payment, not the identity of the payer. He therefore concluded if that it was necessary to consider whether s9 had extra-territorial effect, he would have found that it did, and that this did not encroach on Australian sovereignty.

#### **Other issues**

52. Counsel for Gerling mounted a concerted attack, both before the Associate Judge and Chisholm J, on the evidence relied upon by Ludgater to establish a good arguable case. His primary concern was that an affidavit sworn in support of Ludgater’s position by a solicitor, annexing the cause and origin report provided by Dave Noble, was hearsay.

53. These objections had been considered and ruled against by the Associate Judge, and Chisholm J took the same view. He concluded that he was entitled to have regard to the material provided by way of affidavit, for the purposes of these applications, in the exercise of his discretion, and that the Associate Judge had been entitled to proceed on the basis that the evidence, even if hearsay, could be permitted pursuant to Rule 249(2)(c). He did not accept that the Associate Judge had been wrong to give weight to the material, in particular the comprehensive report from Mr Noble, in determining whether a good arguable case was established.
54. He rejected a contention that there was no evidence about negligence nothing that the evidence before him indicating that the capacitors concerned were in a batch that had overheated, and about which there had been trade alerts, provided a good arguable case that the capacitors were defective. Such other criticisms as were advanced of the evidence were regarded by Chisholm J as requiring Ludgater to an unrealistic threshold level, incompatible with the requirement that Ludgater establish a good arguable case.
55. Chisholm J also accepted that the factors that had led Associate Judge Christiansen to exercise his ultimate discretion in favour of Ludgater were appropriate, and his assessment was correct with no error in the exercise of that discretion having been exposed.

#### **Gerling seeks leave to appeal**

56. Gerling's response was to seek leave to appeal. This led to another contested application, and a further judgment by Chisholm J dated 12 August 2008 as to the terms upon which leave to appeal should be granted. Ludgater accepted that the questions that had been identified by Chisholm J in his decision were appropriate questions justifying leave to appeal, these being:
- (a) Whether Gerling had a "*presence*" in New Zealand at the relevant time thereby subjected itself to the jurisdiction of New Zealand Courts;
  - (b) If not, whether s9 of the Act had extra-territorial effect.
57. However Ludgater did not accept that Gerling should have leave to appeal on any of the questions which had been the subject of discretionary decisions by the Associate Judge and Chisholm J i.e. whether the Court should decline jurisdiction on the basis that Ludgater had not established a good arguable case, or in the exercise of the Court's ultimate discretion.
58. The first issue that had to be confronted was Gerling's contention that in granting leave to appeal, the High Court had no jurisdiction to define, limit or even identify the questions that Gerling would be permitted to raise in the Court of Appeal. Gerling's submission was that the High Court's jurisdiction is limited to deciding whether to grant leave or not.
59. Chisholm J did not accept Gerling's argument that the Court did not have power to define the questions in respect of leave to appeal was to be granted. He assessed that as being contrary to the approach traditionally followed by the High Court, and if it were to be the practice, it should be at the direction of the Court of Appeal. He also noted the sound reasons for requiring the High Court to formulate the questions for which leave to appeal is granted. Before the High Court could determine whether a question of law or fact satisfying the necessary threshold for appeal existed, the question itself had to be formulated. Further, Chisholm J did not accept that once one question satisfying that threshold was established, the door is thereby thrown open for an appellant to pursue whatever else it wants to include in a notice of appeal as "*such an approach would undermine the observations of the Court of Appeal...that it is not every alleged error of law (or fact) that justifies further consideration by the Court of Appeal*".

60. The three questions that Chisholm J accepted satisfied the threshold for consideration by the Court of Appeal were as follows:
1. Does the High Court have jurisdiction to hear and determine the plaintiff's application against the defendant under s9 of the Law Reform Act 1936?
  2. Alternatively, does s9 apply extra-territorially to the defendant, the policy, and the proceeds of the policy, in this case?
  3. If the answer to either 1 or 2 is yes, should the Court have declined jurisdiction?
61. Chisholm J noted that whether leave to appeal should be granted in respect of the third question was a finely balance matter but in light of the fact that leave had been granted in respect of the first two questions, the third question, which was interrelated, should also be permitted.
62. A notice of appeal has now been filed. It runs to 8 pages. Given the three questions that I have identified above, one might wonder how that could be so however, ingeniously Gerling asserts that each of the questions, in turn, gives rise to a multiplicity of further specific issues and sub - issues.
63. However, and helpfully, in addition to identifying the outcome of the appeal sought, as a notice of appeal must do, answers to each of the questions identified by Chisholm J in granting leave have been already been supplied (with reasons) by Gerling.

### Conclusion

64. Gerling's position and its concern about having to face up to Ludgater's claim in a New Zealand Court is summarised by this statement, from the notice of appeal
- "If Chisholm J's approach were correct, the consequence would be that any insurer anywhere in the world would be subject to the jurisdiction of the New Zealand Court in an action under s9, where it had issued general liability insurance to a foreign insured under a foreign insurance policy, provided only that one product of the insured reached New Zealand and was allegedly defective, causing damage here."*
65. Bearing in mind that there had been four sets of proceedings issued in relation to defective capacitors manufactured by Atco, and sold and distributed in New Zealand, and which have led to events causing losses of over \$2,000,000.00, the rhetoric is, perhaps, a little overplayed.
66. However, assuming that a New Zealand Court has jurisdiction to deal with a claim against a foreign domiciled defendant, because a tort which comes within say, R219(a) occurs, is there any reasonable justification for depriving a plaintiff of the ability, where the primary defendant is insolvent, of obtaining a charge over moneys payable by that insurer in respect of that insured's liability, pursuant to an insurance policy which provides indemnity for that insured in respect of any liability it sustains in New Zealand, just because the policy happens to have been issued overseas.
67. Ludgater's proposition is that there is none.
68. It may also be questioned whether Gerling's argument would be open to an overseas insurer, insuring a New Zealand based defendant pursuant to a policy issued overseas – a situation which applies to a good number of New Zealand law firms, for example.

69. Ludgater's position is that the intention behind s9 of the Act would be substantially thwarted if its operation were dependent upon whether insurance moneys were to be paid or were payable by a New Zealand based insurance company, or an overseas insurance company, and in the latter case the Act had no effect or created no means of enforcing a charge s9(1) provides for.
70. The anomalous situation would be created whereby, as regards third parties, some of whom require provision of evidence of adequate insurance in respect of their dealings with apparently insured potential defendants, the benefits of such insurance could ultimately turn out to be worthless and this, on Gerling's arguments, is precisely what is contemplated.
71. In summary, Ludgater's argument has been that Gerling had a presence in New Zealand, was otherwise subject to the provisions of Section 9 of the Act, by reason of the fact that it insured Atco, a company which sold or allowed to be sold its products into New Zealand, in respect of risks that have arisen in New Zealand created by those products. Gerling elected to cover those risks. It should not be permitted to avoid its obligations to indemnify or to require a plaintiff entitled to sue in New Zealand to issue proceedings outside of the jurisdiction.
72. We now await the Court of Appeal's consideration of those questions.