IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
JUDICIAL REVIEW AND APPEALS LIST

Not Restricted

S ECI 2020 04488

BETWEEN:

PAUL HRONOPOULOS & ANOR
(according to the attached Schedule) — Plaintiffs

v

BUILDING APPEALS BOARD & ORS
(according to the attached Schedule) — Defendants

JUDGE:	Mukhtar AsJ
WHERE HELD:	Melbourne
DATE OF HEARING:	8 February 2022
DATE OF JUDGMENT:	4 July 2022
CASE MAY BE CITED AS:	Hronopoulos v Building Appeals Board
MEDIUM NEUTRAL CITATION:	[2022] VSC 376

BUILDING AND CONSTRUCTION — Domestic building work involving partial demolition on building site — Necessity to install 'protection work' to protect adjoining property from risk of damage or instability — Statutory obligation on building party to insure against damage to adjoining property — Distinction between insurance over the adjoining property and insurance for building party's liability for damage to the adjoining property — *Building Act 1993* (Vic) s 93(1)(a).

ADMINISTRATIVE LAW — Relief in the nature of certiorari — Building Appeals Board — Determination that type of insurance obtained by building party did not satisfy statutory requirements — Whether determination was invalid for jurisdictional error or error of law on the face of the record.

INSURANCE — Contract of general insurance — Indemnity insurance cover for liability to a third party — Whether benefit of the insurance cover extends to third party beneficiary to enable direct recourse to the insurance cover — Meaning of 'benefit of the insurance cover' — *Insurance Contracts Act 1984* (Cth) ss 11, 20, 48.

APPEARANCES:	Counsel	Solicitors
For the Plaintiffs	Mr D Fairweather, solicitor	Fairweather Legal Pty Ltd
For the First Defendant	No appearance	Victorian Government Solicitor
For the Second and Third Defendants	No appearance	Unrepresented litigants

TABLE OF CONTENTS

HIS HONOUR:

Introduction

1 This judgment is of an application for judicial review by which the plaintiffs seek an order in the nature of certiorari to quash a determination made by the Building Appeals Board of Victoria ('**the Board**') as constituted by three members.[1] The plaintiffs were the moving parties at the Board, having initiated a referral to the Board under the *Building Act 1993* (Vic) ('**the Act**') of two disputes with the owners of an adjoining residential property.[2] The Board dismissed the plaintiffs' twofold application in a determination and orders made on 2 October 2020. The Board published written reasons for its determination ('**the Reasons**').

2 A certiorari order is made in the exercise of the Supreme Court's supervisory jurisdiction over administrative tribunals and subordinate courts. The function of such an order is to remove the legal consequences or purported legal consequences of an exercise or purported exercise of statutory decision making power.[3] The rationale of judicial review is said to be 'enforcing … the law which determines the limits and governs the exercise of the repository's power … The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone'.[4]

3 This application is propounded on two recognised grounds in administrative law: jurisdictional error, or alternatively, an error of law on the face of the record. An exposition of the meaning of those grounds will be made later in this judgment.

4 The dominant application before the Board concerned what may be called the insurance dispute. The issue was whether an insurance policy obtained by the plaintiffs for what the Act describes as 'protection work' on their land (that is, protective work or installations to stabilise or support a building before alteration or

---

1 The application is brought under Order 56 of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic).

2 The referrals were made under s 152 and s 153 of the Act.

3 So stated in *Wingfoot Australia Partners Pty Ltd v Kocak* (2013) 252 CLR 480, 492 [26].

4 *Attorney- General (NSW) v Quin* (1990) 170 CLR 1, 36 (Brennan J).

demolition works) provided insurance cover of a type that satisfied the compulsory insurance requirements under s 93(1)(a) of the Act. Those requirements are directed at protecting the adjoining property from the risk of any damage being done to it by the protection work. Non-compliance with the insurance requirements exposes the plaintiffs to a substantial financial penalty.[5]

5 The insurance dispute involved a question of law about the precise meaning of the insurance requirements in s 93(1)(a) and whether the insurance cover as obtained by the plaintiffs satisfied those requirements. The Board decided the insurance policy obtained by the plaintiffs did not comply, and it dismissed the plaintiffs' application.

6 The second application to the Board concerned what may be called the building survey dispute. That involved the issue of whether the plaintiffs had complied with an obligation under s 94 of the Act to prepare, before the commencement of protection works on their land, a 'full and adequate' survey of the condition of the two storey residence on the adjoining land for the presence of any existing cracks and defects. The Board's decision on that dispute involved largely a factual evaluation and a normative judgment about the apparent adequacy of a building survey done by the plaintiffs. The Board decided that nothing less than a survey of the entire building on the adjoining land was required to be done by the plaintiffs, and, that the survey they performed in the form of a compilation of photographs did not suffice to encompass all accessible areas of the adjoining property. The plaintiffs do not seek to quash that decision, so nothing more need be said about it.

7 There is an unusual feature of the present application that influences the formation and composition of this judgment. The plaintiffs' originating motion was filed in this Court on 30 November 2020. It was confined to only seeking judicial review of the Board's decision on the insurance dispute. On 5 February 2021, the parties lodged with the Court 'Minutes of Consent' to orders sought by them to be made by the Court. The Minutes were signed by the plaintiffs' solicitors and signed

[5] 500 penalty units in the case of a natural person.

personally by the second and third defendants, Richard and Angela Sayer ('**the Sayers**'), who are the owners of the adjoining residential property.

8 Although the Sayers were the successful parties on both of the disputes that were before the Board, the Minutes state that they 'in their own right, consent to orders sought in the Plaintiffs' originating motion for judicial review dated 30 November 2020, for the Board's written determination dated 2 October 2020 to be quashed'. The Minutes also stated that the Sayers 'will not be participating further in the proceeding' and '[t]here be no order as to costs'. The Minutes do not say anything about ancillary orders such as a remittal of the matter to the Board with or without any declarations by the Court, or directions to the Board about a re-exercise of its decision making power.

9 A Court order was not made to effectuate the Minutes. But, they were acknowledged under the heading of 'Other Matters' in a consent order made by a judicial registrar on 8 February 2021 at a directions hearing that did not require the attendance of the parties. That order fixed a trial date for the hearing of the application for judicial review.

10 Before that order was made, the Victorian Government Solicitor's Office had written to the Prothonotary stating that the Board would abstain from participating in this proceeding, and would submit to the orders of the Court. That attitude takes what is known commonly as the *Hardiman* position.[6] It is based on the view that the presentation in Court of a substantive argument by the body whose decision is under scrutiny is an exceptional course that endangers impartiality, and if it is to occur, should be limited to submissions going to the powers and procedures of the decision making body. Such limited submissions were not necessary here.

11 Thus, for this trial, there was a situation of an unequivocal consent given by the Sayers as the 'winning' party at the Board to the making of a Court order to quash

---

6 That is a reference to the decision of the High Court of Australia in *R v Australian Broadcasting Tribunal; Ex parte Hardiman* (1980) 144 CLR 13, 35–6.

the whole of the Board's determination, and there was no-one to contradict the plaintiffs' application for judicial review.

12 To ask the Court to make a consent order in an application such as this entails the exercise of substantive judicial power which affects the Board as well as the parties. For that reason the Supreme Court has issued Practice Note SC CL 9 concerning consent orders sought to be made in proceedings in the Judicial Review and Appeals List. That Practice Note states that where proposed consent orders seek to set aside a decision under review, 'the Court may need to consider for itself whether the orders should be made, particularly where the proceeding or matter affected is executive or administrative in nature'. It also states that a joint memorandum explaining the legal justification for the proposed consent orders must be provided to the Court, and, '[e]ven if satisfied that the proposed consent orders are appropriate, the Court may consider it necessary to publish reasons for the making of the orders or at least to direct that a copy of the joint memorandum be served on the decision-maker affected together with a copy of the orders made'.

13 The rationale of the Practice Note is that it would be a substantial discourtesy for a court to exercise power to overturn a decision of an official decision-maker (and especially a statutory tribunal) without proper consideration of the error that leads to the decision being overturned, or, without communication of the terms of that error to the decision-maker or tribunal.[7]

14 This case arrived without a joint memorandum or an explanation for its omission. The Sayers did not attend the Court for the trial. There are no solicitors on the court record that have ever acted for them. In the exigencies, I chose not to suspend the proceeding and compel the parties to make a joint memorandum, or, to induce the Sayers to attend Court, most likely as reticent litigants in person. For the Court itself to appoint solicitors and counsel to act as professional contradictors would have undoubtedly added delay and expense.

---

7 See the decision of French J in *Kovalev v Minister for Immigration and Multicultural Affairs* (1999) 100 FCR 323.

15 Therefore, I took the course of not acting on the Sayers' consent, but to treat their decision to not participate in the proceeding as enabling the plaintiffs' application to proceed as being unopposed. The plaintiffs, as legally represented by their solicitor, took no exception to that course. But, it required them to affirmatively present and sustain their application for judicial review. As a practical matter, the absence of a contradictor meant that the Court was activated to test and judge the sustainability of the application in something of an inquisitorial way. In those unusual circumstances, this judgment has required an extensive factual exposure and legal consideration, having regard to the materials in a 400 page Court Book.

16 At the outset I shall state my decision and summarise my reasons.

Summary of reasons

17 I regard myself as bound on substantive legal grounds — that is, not on discretionary grounds — to refuse the application to quash the Board's decision.

18 Although the Reasons could have been more explicative, they did not have to conform to the judicial model. The Reasons were adequate in applying the essential legal considerations to show that the Board's decision that the insurance cover obtained by the plaintiffs did not satisfy the Act was not a decision that involved a material defect or irregularity in the exercise of the decision making power conferred on the Board, and was not the product of a material error of law.

19 Further, the decision cannot be said to have lacked an evident and intelligible justification. It is apparent that the Board performed its task according to the legal considerations as stated in the decision of the Court of Appeal in Victoria in *Colonial Range Pty Ltd v CES-Queen (Vic) Pty Ltd* (***'Colonial Range'***).[8] That decision gave specific guidance on the meaning and the requirements of the plaintiffs' insurance obligations under s 93(1)(a) of the Act which the Board was bound to apply.

20 In applying *Colonial Range,* the Reasons show the Board as recognising that s 93(1)(a) obliged the plaintiffs to obtain property insurance or first party indemnity insurance

[8] [2016] VSCA 328 (Warren CJ, Whelan JA and Riordan AJA).

that insured the adjoining property for any damage done to it by the protection work, so as to enable the Sayers, as first party, to have direct recourse to the insurance and make a direct claim on the insurer for damage done to their property. I think there was no jurisdictional error, or error of law, in the Board's interpretation of the words of the insurance cover obtained by the plaintiffs as not being the words of property insurance, but as being the words of liability insurance. That was the critical component of the Board's decision because, according to *Colonial Range*, liability insurance cover is not called for under s 93(1)(a) and moreover, liability insurance is not capable of satisfying s 93(1)(a) anyway. That is because outside some irrelevant statutory exceptions under the *Insurance Contracts Act 1984* (Cth) ('**the ICA**'), the Sayers would have no right of recourse to the plaintiffs' liability insurance cover to make a claim in the event of damage being done to the adjoining property by the protection work. Liability cover does not insure the Sayers' property for damage done to it; it insures the plaintiffs for their liability to the Sayers, a third party, for doing damage. That may appear to be a subtle distinction, but in this statutory context it is certainly a vital distinction. As a third party to a liability policy, the Sayers would be left to first establish the liability of the plaintiffs for damage done, in the expectation that the liability insurer would then financially indemnify the plaintiffs for the loss and damage inflicted.

21 The Board's primary finding that the insurance obtained by the plaintiff was liability insurance had the logical consequence of sterilising the plaintiffs' attempt at the Board to say that they had met their ultimate obligation under s 93(1)(a) to obtain insurance on which the Sayers, as adjoining owners, had direct recourse because under the ICA 'the benefit of the insurance cover' as obtained by the plaintiffs was extended to the Sayers, and that gave them, as a 'third party beneficiary', a statutory right under s 48 of the ICA to claim directly on the insurance cover, thereby satisfying s 93(1)(a) as extended.

22 In the present application, the question of the applicability of s 48 of the ICA in the context of s 93(1)(a) loomed large in the attack made on the Board that it made an

error of law. Under s 11 of the ICA, a third party beneficiary is one 'to whom the benefit of the insurance cover provided by the contract extends'. I would hold that to extend the 'benefit of the insurance cover' to a third party means to extend the benefit of the insurance cover itself; that is, to extend *the intrinsic benefit of the insurance cover.* By definition, the person to whom the benefit of liability insurance is provided is the person who wishes to be insured for the risk of being liable to a third party; it is not for the benefit of the person to whom the insured may be liable.

23 If, as found by the Board, the insurance cover here was liability insurance cover for the plaintiffs' risk of being liable for damage to the adjoining property, it is obvious that the intrinsic benefit of such a cover cannot possibly apply to protect the Sayers, as adjoining owners because, obviously, they cannot be liable for damaging their own property, and in any case liability insurance cover cannot satisfy s 93(1)(a). What has to be extended is the benefit of property insurance cover over the adjoining property. That is precisely what happened in *Colonial Range,* and it is why the Board cannot be said to have erred in law in distinguishing *Colonial Range* and dismissing the plaintiffs' application.

24 The subject matter of this case can be a little elusive. An exposure of the facts and an explanation of the applicable legislation follows.

The statutory field of the Board's decision

25 The Board's decision was made in exercise of authority under the Act. The field of building activity or regulation with which the decision is concerned is under Part 7 of the Act, which has the subject heading of 'Protection of adjoining property'. That means protection of 'land … which is so situated in relation to the site on which building work is to be carried out as to be at risk of significant damage from the building work'.[9] 'Building work' is defined in the Act to mean 'work for or in connection with the construction, demolition or removal of a building'.[10]

---

9 Section 3(1) of the Act (definition of 'adjoining property').

10 Section 3(1) of the Act (definition of 'building work').

26 The special type of building work with which this application is concerned is described in the Act as 'protection work'. That is defined to mean[11] —

> (a) permanent or temporary work of —
>
> (i) underpinning, including the provision of vertical support, lateral support, protection against variation in earth pressures, provision of ground anchors and other support for adjoining property; or
>
> (ii) shoring up of adjoining property; or
>
> (iii) overhead protection for adjoining property; or
>
> (iv) other work designed to maintain the stability of adjoining property or to protect adjoining property from damage from building work; or
>
> (b) any work or use of equipment necessary for the provision, maintenance and removal of work referred to in paragraph (a) —
>
> whether or not the work or equipment is carried out or used on, over, under or in the air space above the land on which the building work is or is to be carried out or the adjoining property.

27 The two disputes that were referred by the plaintiffs to the Board for its determination arose from the following facts.

The facts

28 The plaintiffs — who are also identifiable in the language of the Act as 'the owner(s)' — own residential property at 6 Linden Court in Prahran. The Sayers — who are also identifiable in the language of the Act as 'the adjoining owner(s)' — own the residential property alongside at 4 Linden Court. Aerial photographs in evidence show a rather close proximity between the two dwellings on the properties. The western masonry wall of the plaintiffs' home is contiguous to the western boundary dividing the properties.

29 By November 2018, the plaintiffs had plans prepared to extend the rear section of their home. The building work involved dismantling some existing walls and some roof and floor areas of their home, but retaining the western boundary wall. Drawings prepared by structural engineers showed the necessity for the plaintiffs to

---

11 See s 3(1) of the Act (definition of 'protection work').

erect, before the commencement of any demolition works, a section of propping to be bolted onto a deep mass concrete footing in the ground, and to rise at an angle to be bolted onto a vertical wall plate about two thirds of the way up towards the top of the wall.

30 On 12 September 2019, an agent for the plaintiffs gave to the Sayers a 'Protection Work Notice' under the *Building Regulations 2018* (Vic).[12] That is known as a Form 7. The notice stated the plaintiffs' intention to carry out the building work, and, that the dismantling of some walls in their house would require temporary propping in order to prevent any possible collapse of the retained wall. The notice also stated that the propping would be installed on the plaintiffs' side and would remain in place until the new wall and roof was erected, and would be visible to the adjoining owners. The notice sought the agreement of the Sayers to the proposed protection work. It had to because under s 88 of the Act the plaintiffs could not carry out any building work until there was agreement with the Sayers about the protection work.

31 Most pertinently for present purposes, the Form 7 also informed the Sayers that before the commencement of any protection work, the plaintiffs as owners had to take two measures under the Act.

32 First, under s 93(1)(a) and (b) of the Act the plaintiffs had to ensure that a contract of insurance was in force against 'damage by the proposed protection work to the adjoining property' and also against the risk of liability to the adjoining occupiers and any members of the public during the carrying out of building work and for some time after completion of building. The complete contents and judicial interpretation of s 93 will be examined later in this judgment.

33 The second measure was required under s 94(1) of the Act. The plaintiffs had to make, in company with the adjoining owners, a 'full and adequate survey of the adjoining property' and 'record in writing or by any other means any of the parties desires all existing cracks and defects in the adjoining property'. Under s 94(2) the

---

12 See *Building Regulations 2018* (Vic) reg 113.

record must be signed as an agreed record. Under s 94(3) '[t]he record is admissible in evidence in any proceedings relating to the adjoining property and is evidence of the condition of the adjoining property at the time the record was made'.

34 Under the Act, the adjoining owners were obliged to respond to the plaintiffs' Form 7 by giving a statutory 'Protection Work Response'. That is known as a Form 8.[13] They had to tell the plaintiffs whether they agreed or disagreed with the proposed protection work, or if more information was required to enable a proper consideration by a building surveyor. In their Form 8, the adjoining owners stated that, in principle, they agreed to the protection works being carried out, but that was subject to the plaintiffs giving them more information about the type and financial extent of the insurance cover obtained or proposed to be obtained by the plaintiffs under s 93 of the Act.

35 The process under the Act also brought in the involvement of a building surveyor. Under s 87, if the adjoining owners disagreed with the proposed protection work or sought more information, a building surveyor must examine the proposal for protection work and determine the appropriateness or otherwise of the work. By a Notice of Determination dated 6 December 2019 the building surveyor determined that the plaintiffs' proposal for the protection work was appropriate. The building surveyor is appointed by the owners but does not have the legal responsibility to ensure that insurance cover was obtained by the owners in accordance with the requirements of s 93 of the Act.

36 A building permit was issued to the plaintiffs on 25 June 2020. The plaintiffs then obtained a general insurance policy **('the Policy')** from an insurer, QBE Insurance (Australia) Ltd. The 29 page standard terms policy document is described as 'Annual (Transfer Basis): Construction, Legal Liability & Professional Indemnity Insurance Policy.'

---

13 See ibid reg 114.

The Policy – who was covered?

37 The Policy included a 'Certificate of Currency' and a 'Policy Schedule', each dated 20 July 2020. In both those documents the 'Named Insured' was identified as 'The trustee for the BBC trust T/As Blue Sky Building & Construction Group Pty Ltd.' That is the plaintiffs' builder as identified in the building permit. The 'Project Site' was identified as the plaintiffs' property. The 'Project Description' was described as 'Alterations and additions of residential home.' 'The Insured' was identified as the 'Principals, Contractors and Sub-Contractors for Sections 1 and 2A only, in accordance with the definition of Insured contained in the applicable policy wording'.

38 That leads to the 'General Definitions' part of the principal Policy document. In that part, the term 'Insured (You or Your)' was defined to include, depending on different sections of the Policy: the plaintiffs' builder, the builder's contractors and subcontractors, and the plaintiffs as 'Principal'.

39 The first point to be made here is that the adjoining owners were not named as an insured party nor did they otherwise fall within the class of persons that were insured by description. The Policy provides insurance cover largely for the benefit of the plaintiffs and their builder and others involved in the building works.

The Policy – what risk was covered?

40 There are two relevant parts of the standard terms of the Policy that state the type and extent of insurance cover being provided by the insurer.

41 The first is 'Section 1: Material Damage … What We Cover — Property Insured'. Clause 1.1.1 indemnifies the insured 'for Damage to tangible property forming part of the Contract Works occurring at the Project Site'. Clause 1.1.2 states: 'We will indemnify You for Damage to Existing Structures occurring at the Project Site …' On those words, it is plain that the property insurance cover in this section protects the owner's property but it does not protect the adjoining owner's property for damage done to the adjoining property from works occurring on the owner's land.

42 The second relevant part of the Policy is Section 2 which is headed 'Legal Liability'. Under the sub-heading 'Section 2A: Construction Liability', clause 1.1 states, where relevant —

> We agree to pay to You [the insured] or on Your behalf all amounts You shall become legally liable to pay as Compensation in respect of Personal Injury and/or Property Damage occurring within the Territorial Limit:
>
> (a) … caused by or arising out of Construction Activities in connection with a Covered Project …

43 'Compensation' is defined in the Policy to mean 'monetary amount of judgment, award (including costs taxed or awarded against the Insured) or settlement for Personal Injury, and/or Property Damage …'

44 'Property Damage' is defined elsewhere in the Policy to mean, relevantly, 'physical damage to, physical loss or physical destruction of tangible property and any resultant loss of use …' The term 'Construction Activities' is defined within clause 3 of Section 2 to mean —

> all construction and/or building and associated activities, including but not limited to:
>
> 3.2.1 occupation of the Project Site;
>
> 3.2.2 loading and unloading of Vehicles at or near the Project Sites in connection with Contract Works;
>
> 3.2.3 erection, use and/or maintenance of signs at or in the vicinity of the Project Sites;
>
> 3.2.4 provision and management of canteens at the Project Sites; and
>
> 3.2.5 provision of first aid, firefighting or other emergency services at the Project Sites;
>
> in connection with any Covered Project.

45 It might be thought that protection works could come within the broad expression 'construction and/or building and associated activities'. If the examples given in clauses 3.2.1 to 3.2.5 inform the type of work intended to be covered by the expression 'building and associated activities', they seem to be in the nature of ground support services and amenities. What matters though is that the cover in

this part of the Policy was liability insurance given to 'You'. There was no cover given directly to the adjoining owners or over the adjoining property for damage done by 'construction and/or building and associated activities' that would enable the adjoining owners to themselves claim on the Policy as an insured or first party.

46 For completeness, Section 2B of this part of the Policy brings in 'Incidental Activities' as another source of possible risk of 'Property Damage'. It states—

> We agree to pay to You or on Your behalf all amounts You shall become legally liable to pay as Compensation in respect of Personal Injury and/or Property Damage occurring during the Period of Insurance within the Territorial Limit as a result of an Occurrence in connection with Incidental Activities.

47 'Incidental Activities' is defined in clause 3.3 within Section 2 of the Policy to mean 'reasonable business activities necessary to support Construction Activities of the Named Insured [i.e. the plaintiffs' builder]'. That is stated to include activities such as ownership and occupation of premises apart from the project site, repair and maintenance of vehicles and machinery, participation in building industry conferences and operation of display homes. I think that does not include protection works because they are not 'business activities' of that type. Further, it should be noticed that the cover in this part of the Policy was liability insurance given to 'You'. There was no cover given directly to the adjoining owners for damage done to their property by 'Incidental Activities'.

48 There are other standard terms of the Policy which cover ancillary activities, building or otherwise, on the owner's land. The point to be made is that nothing in the standard terms of the Policy seems to concern or cover the specific activity of protection works under the Act, or, the insurance for the owner's liability for damage done by protection works to the adjoining property. It was not submitted otherwise by the plaintiffs.

49 This brings me to an endorsement forming part of the Policy, the meaning and effect of which was the epicentre of the case at the Board.

The endorsement for protection works

50 The Certificate of Currency as signed on behalf of the insurer had this typewritten endorsement:

> **ENDORSEMENT:** Total Dewatering Exclusion
> We will not be liable for any costs associated with dewatering.
>
> 104 PROTECTIVE WORKS NOTICES (QBE) (Refer separate document issued with full endorsement wording).
>
> $5,000 excess will apply for all claims associated with protection works.

51 The 'separate document' repeated some information from the Policy Schedule and the Certificate of Currency concerning the Policy Number; the Class of Insurance; and the Named Insured. Below those matters, in prominent type form, there was the addition of the following 'Additional Endorsements' ('**the Endorsement**') to which I have added underlining to show the words on which the Board attached decisive significance in finding this was liability cover —

> **ADDITIONAL ENDORSEMENTS APPLICABLE:**
>
> 104 PROTECTIVE WORKS NOTICES (QBE)
>
> Adjoining Owner 1: Richard & Angela Sayer
>
> Adjoining Property 1: 4 Linden Court, PRAHRAN VIC 3181
>
> IT IS HEREBY AGREED AND DECLARED THAT, IN ACCORDANCE WITH RELEVANT SECTIONS OF THE BUILDING ACT 1993, AND ANY SUBSEQUENT AMENDMENTS, THIS POLICY IS ENDORSED TO NOTE THE ISSUE OF PROTECTION WORKS NOTICES, FORM 7 AND FORM 8, <u>AND COVER IS CONFIRMED IN RESPECT OF THIRD PARTY LIABLITY IN RELATION TO CLAIMS FOR PROPERTY DAMAGE TO THE ADJOINING PROPERTIES ARISING OUT OF THE PROTECTION WORKS STATED IN THE NOTICES.</u>
>
> THIS ENDORSEMENT DOES NOT COVER LOSS OR DAMAGE

ARISING OUT OF DIRECTLY OR INDIRECTLY FROM THE PERFORMANCE OR IMPLEMENTATION OF ANY PROTECTION WORKS NOT STATED IN THE PROTECTION WORKS NOTICES FORM 7 & 8.

$5,000 excess will apply for all claims associated with protection works.

52 In the field of insurance, the meaning of the expression 'third party liability' would be well known. It is explained in *Sutton on Insurance Law* in this way[14] —

> There are two types of indemnity insurances, namely, first party and third party. A third party or third party liability insurance is an insurance against liability; it is also a contract of indemnity. The definition and scope of a liability; the core of the risk in a third party liability insurance, is a matter of some complexity.
>
> A third party liability insurance policy is a contract between the insured and the insurer in which the insurer promises to indemnify the insured against claims against it by clients or persons affected by the insured's activity; the insured and the insurer are the first and second parties.
>
> It is necessary to distinguish first party insurances from third party liability insurances first by the type of risk and secondly by the nature of the subject-matter. First party policies are insurances on persons (eg accident), property, goods, businesses or other interests which are normally insured against accident, storm, fire, theft and similar perils. The point of distinction between first party insurances and third party liability insurances is that the peril in a first party insurance destroys or diminishes the insured's person, property or interest or deprives the insured of its use, but the risk in a third party liability insurance is that the insured will be subject to a claim or obliged to transfer a benefit or make a payment to another person because of the resulting liability.

53 In looking to discern objectively what was in the knowledge and contemplation of the parties to the insurance contract and their presumed common intention in endorsing the Policy this way, it is significant that the Endorsement is made distinctly under the banner of '104 Protective Works Notices' and expressed in broad terms as being '[i]n accordance with relevant sections of the Building Act 1993'. The Endorsement follows the lexicon of the Act by identifying the 'Adjoining Owner' by name and the 'Adjoining Property' by address. A little more precision is shown by

---

14 Ian Enright and Robert Merkin, *Sutton on Insurance Law* (Lawbook, 4th ed, 2015) vol 2, 846 [23.10] (citations omitted).

identifying the subject matter to be the protection works as described in the Form 7 and Form 8.

54 It can safely be presumed from the Endorsement's subject matter that the 'relevant sections of the Building Act 1993' was intended to be a reference to those sections of the Act dealing especially with protection works; and as this was an insurance policy, it would presumably mean sections dealing with the requisite insurance for damage caused specifically by protection works to an adjoining property. However, whether or not the Endorsement truly did satisfy or was '[i]n accordance with relevant sections of the Building Act 1993' is another question entirely. Indeed, that was the question for determination by the Board.

55 The 'relevant sections' can only be, or must especially include, s 93(1) of the Act. Where relevant, it states —

> (1) Before any protection work is commenced in respect of an adjoining property, an owner must ensure that a contract of insurance is in force, in accordance with this section, against —
>
> (a) damage by the proposed protection work to the adjoining property; and
>
> (b) any liabilities likely to be incurred to adjoining occupiers and members of the public during the carrying out of the building work and for a period of 12 months after that building work is completed.
>
> Penalty: 500 penalty units, in the case of a natural person.
>
> 2500 penalty units, in the case of a body corporate.
>
> (2) The contract of insurance must be entered into with an insurer and for an amount —
>
> (a) agreed to by the owner and the adjoining owner; or
>
> (b) in the event of a dispute, determined by the Building Appeals Board under Part 10.

56 In its own language, s 93(1)(a) speaks of the owner's obligation to obtain insurance for 'damage … to the adjoining property'. The subject matter of the insurance is damage to someone else's adjoining property. The section does not speak of an

obligation on the owners to obtain insurance cover for the risk of their *liability* for doing damage to the adjoining property.

57 By contrast, s 93(1)(b) is not stated to be concerned with protection works or damage to property. But more importantly and unlike s 93(1)(a), it speaks of the owner's obligation to obtain insurance for 'any liabilities' to adjoining occupiers and members of the public during the carrying out of the building works and for some time thereafter. That is liability insurance. The subject matter of such insurance is the risk of being liable to pay compensation for harm done to persons by the activity of the liable party.

58 In *Colonial Range*[15] the differences within s 93 received close scrutiny in a way that directly affected the Board's task and the judgment of the present application.

The decision in *Colonial Range*

59 In construing the requirements of s 93(1), the Court of Appeal in *Colonial Range* recognised a conceptual difference between property insurance and liability insurance, even though they are both forms of general indemnity insurance. The Court adopted a definition of property insurance as being —

> A form of indemnity insurance protecting the insured against loss of or damage to property. Damage to property means disturbance of the physical integrity of the subject property … It is presumed that an insured, under a contract of property insurance, intends to protect only his or her interest. The presumption may be rebutted if the insured is under a duty to insure on behalf of others, or if it is shown that the insured's intention was to insure on behalf of others …[16]

60 By contrast, the Court of Appeal recognised liability insurance as being '[a] form of general insurance providing cover in respect of the insured's liability for loss and damage to another person …' and that '[u]nder a contract of liability insurance, the insurer has no obligation to indemnify the insured until he or she becomes subject to a liability covered by the policy'.[17] To add to that now, in the ICA a contract of liability insurance is defined to mean 'a contract of general insurance that provides

---

15 [2016] VSCA 328 (Warren CJ, Whelan JA and Riordan AJA).
16 Ibid [57], quoting LexisNexis Butterworths, *Encyclopaedic Australian Legal Dictionary*.
17 *Colonial Range* [2016] VSCA 328, [57], quoting *The Encyclopaedic Australian Legal Dictionary*.

insurance cover in respect of the insured's liability for loss or damage caused to a person who is not the insured'.[18]

61 In making the distinction between liability and property insurance, the Court of Appeal reached these conclusions about the legal requirements of ss 93(1) (a) and (b)—

(a) '[s]ection 93(1)(a), in terms, requires insurance "against damage to … adjoining property". The text is most consistent with a requirement to ensure that there is property damage insurance. That would ordinarily mean insurance upon which the owner of the damaged property can itself claim';[19]

(b) '[b]y contrast, s 93(1)(b) clearly requires liability insurance. The specific obligation in s 93(1)(b) of the Act is for there to be insurance against "any liabilities". The party suffering loss cannot claim under this policy (unless specific legislative provisions operating on death or deregistration of the insured apply[20]), but the owner who has incurred the liability to the damaged party can claim on the policy and thereby have funds to meet the claim';[21]

(c) s 93(1)(a) cannot be interpreted 'as if it contained the words "any liability for" before the words "damage … to the adjoining property";[22] and

(d) '[t]here is no warrant for the addition of words rendering the insurance provided for by s 93(1)(a) to be a form of liability insurance, being the type of insurance which is expressly provided for in s 93(1)(b)'.[23]

62 One can discern the basis in legislative policy for imposing the insurance burden on an owner this way. When it comes to protection works, it is the owner who actually and unilaterally creates a potential peril over the adjoining property. Therefore it

---

18 Section 11(7) of the ICA.

19 *Colonial Range* [2016] VSCA 328, [58]. See also at [64] and [73]. See also Ian Enright and Robert Merkin, *Sutton on Insurance Law* (Lawbook, 4th ed, 2015) vol 2, [23.10].

20 Footnote reference to the *Insurance Contracts Act 1984* (Cth) s 51, and *Corporations Act 2001* (Cth) s 601AG.

21 *Colonial Range* [2016] VSCA 328, [59].

22 Ibid [60].

23 Ibid [73].

may be thought that to protect the susceptible and passive adjoining owner, it is the owner doing the works who should be visited with the legal responsibility to obtain property insurance over the adjoining property which as stated in *Colonial Range* 'would ordinarily mean insurance upon which the owner of the damaged property can itself claim'.[24] Direct recourse to the property insurance cover gives the adjoining owner the benefit and the certainty of being able to make a claim directly against the insurer — which is a loss bearing entity — to be compensated for the damage done to the adjoining property, rather than having to deal with the uncertainty or difficulties of proving the liability of the adjoining owner and pursuing the payment of compensation, possibly by legal action.

63 Another basis for a legislative policy of requiring an owner to obtain property insurance over the adjoining property for damage done to it rather than liability insurance for doing the damage, is that the adjoining owner is a third party to such insurance and does not have direct recourse to the liability insurance policy to make a claim for the damage done. Under s 51(1)(c) of the ICA, the only situation recognised as enabling a person to have a right of direct recourse to recover from the insurer an amount equal to the insurer's liability under the insurance contract in respect of the liability of the insured is where the owner as the insured liable party 'has died or cannot, after reasonable inquiry, be found'.[25]

64 Otherwise, the only benefit that an adjoining owner stands to gain from liability insurance is the *indirect* benefit of knowing that without the insurance, the owner may be unable to meet the adjoining owner's compensation claim for any damage done. But that indirect benefit is not the relevant benefit required to satisfy s 93(1)(a). *Colonial Range* shows that the relevant benefit and protection to be afforded to the adjoining owner is the benefit of property insurance over the adjoining property, being insurance cover on which the adjoining owner can claim. Ordinarily that would be achieved by including the adjoining owner as a named insured or as being within a class of insured persons by description and identifying the property to be

---

24 Ibid [58].

25 See s 51(1)(c) of the ICA.

insured. Another way is by the extrinsic application of the third party beneficiary provisions in the ICA. The statutory interaction may occur in the following way.

The *Insurance Contracts Act 1984* (Cth)

65 Section 20 of the ICA provides that '[a]n insurer under a contract of insurance is not relieved of liability under the contract by reason only that the names of the persons who may benefit under the contract are not specified in the policy document'.

66 Section 11(1) of the ICA recognises a 'third party beneficiary' of a contract of insurance as being 'a person who is not a party to the contract but is specified or referred to in the contract, whether by name or otherwise, as a person to whom the benefit of the insurance cover provided by the contract extends'.

67 From there, a substantive right is given under s 48 of the ICA which states —

> (1) A third party beneficiary under a contract of general insurance[26] has a right to recover from the insurer, in accordance with the contract, the amount of any loss suffered by the third party beneficiary even though the third party beneficiary is not a party to the contract.

68 The effect of s 48 of the ICA was explained in *Zurich Australian Insurance Ltd v Metals & Minerals Insurance Pte Ltd*[27] in this way —

> Section 48 confers a statutory right of recovery upon a non-party referred to or specified in a general contract of insurance as a person insured or to whom cover extends. It does so directly. Its enactment predated the extension, by the decision of this Court in *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* [citation omitted], of common law rights of recovery for non-party insured persons under an insurance policy. Section 48 does not deem such a person to be a party to the insurance contract thus attracting the rights conferred on a party. It does not purport to confer contractual or equitable rights upon such a person. There is therefore no basis in s 48 for assimilating the position of a non-party insured to that of a person who has "entered into" a contract of insurance within the meaning of s 45(1).[28]

69 The added significance of *Colonial Range* is this: the owners' obligation under s 93(1)(a) to obtain property damage insurance on which the adjoining owners can

---

26 Under s 11(6) of the ICA, 'contract of general insurance' means 'a contract of insurance that is not a contract of life insurance'.

27 (2009) 240 CLR 391, 403 [24] (French CJ, Gummow and Crennan JJ).

28 Section 45 of the ICA concerns the invalidity of 'Other Insurance' provisions that limit an insurer's liability 'by reason that the insured has entered into some other contract of insurance'.

directly claim may be satisfied even though (as in this case) the adjoining owners are not parties (or 'privy') to the contract of insurance.[29] The insurance obligation can be satisfied if the adjoining owners are, as s 11 of the ICA says: 'specified or referred to in the contract [of insurance], whether by name or otherwise, as a person to whom the benefit of the insurance cover provided by the contract extends'. If so, they are a third party beneficiary and able to claim the benefit of the policy under s 48 of the ICA.

70 To demonstrate the effect of s 48 of the ICA, it is necessary to consider the facts of *Colonial Range*, particularly as the Board distinguished the wording of an insurance endorsement in that case from the wording of the Endorsement in this case to determine that the Policy was non-compliant.

71 In *Colonial Range*, the owner of a 13 storey building at 150 Queen Street in Melbourne's Central Business District proposed to demolish the building. There were two adjoining properties. The owner was required under the Act to carry out protection work and was therefore legally bound to obtain insurance under s 93 of the Act. The owner obtained an insurance policy which named the demolition contractor as 'the named insured'. Later, a written 'Contract Endorsement' was made to the policy that added the owner as an insured.

72 The outcome in *Colonial Range* turned on the slender words of clause 4 of the 'Contract Endorsement' which stated that a separate Protection Works Endorsement 'shall apply in respect of the owners of property adjoining 150 Queen Street'.[30] The Protection Works Endorsement gave the following indemnity which noticeably followed words and phrases in ss 93(1)(a) and (b) of the Act:

> During the Policy Period and for a period of twelve months after the expiry of the Policy Period, this Policy indemnifies:

---

29 See s 20 of the ICA; *Colonial Range* [2016] VSCA 328, [79].

30 *Colonial Range* [2016] VSCA 328, [7].

> Damage to the Adjoining Property caused by the proposed Protection Works and any legal liabilities incurred to the Adjoining Property occupiers and members of the public …[31]

73 By operation of clause 4 of the Contract Endorsement, the indemnity in that Protection Works Endorsement was applicable 'in respect of the owners of property adjoining' the demolition site. The Court of Appeal concluded —

> Although the words used are not as clear as they might be, cl 4 of the Contract Endorsement does specify that the 'owners of property adjoining' are persons to whom the benefit of the insurance cover provided by the Contract of Insurance as endorsed extends. There is no apparent purpose for cl 4 of the Contract Endorsement other than to extend the property insurance cover to the adjoining owners. In our view, it does so with sufficient clarity.[32]

74 It is critical to see that what was found to have been extended was *property insurance* which as a type satisfied s 93(1)(a). From there, it was a short step for the Court to conclude —

> Once it is accepted that Colonial is within a class of persons specified or referred to in the Contract of Insurance as endorsed to whom the benefit of the insurance cover extends, s 20 and s 48 of the [ICA] mean that first party indemnity insurance cover is provided.[33]

75 The critical words in the definition of 'third party beneficiary' are 'person to whom *the benefit of the insurance cover provided by the contract* extends'.[34] In the interaction between the ICA and the satisfaction of the requirements of s 93(1)(a) of the Act, what is extended to the ostensible third party beneficiary is the 'benefit of the insurance cover provided by the contract'.[35] The extension then enables the third party beneficiary to claim on that same insurance cover under s 48 of the ICA as if it was an insured.

76 In the definition of 'third party beneficiary', the words 'person to whom the benefit of the insurance cover provided by the contract extends' does not in my view mean benefit in some loose or indirect sense. To my mind, the words 'benefit of the insurance cover provided by the contract' naturally convey a meaning of being an

---

31 Ibid [8].
32 Ibid [78].
33 Ibid [79].
34 Section 11(1) of the ICA (definition of 'third party beneficiary') (emphasis added).
35 Section 11(1) of the ICA (definition of 'third party beneficiary').

extension of the benefit of the insurance cover itself. That is to say, what is extended to the third party is *the intrinsic benefit of the insurance cover.* In *Colonial Range* the intrinsic benefit of the insurance cover that was extended to the adjoining owners was property damage insurance, and by means of that extension, first party indemnity insurance was provided and s 93(1)(a) was held to have been satisfied.

77 In the context here of seeing whether the requirements of s 93(1)(a) were satisfied by means of the third party beneficiary provisions, the relevant insurance cover to be extended to the adjoining owner had to be property insurance upon which the adjoining owner as third party beneficiary could claim directly.[36] To purport to extend the benefit of *liability* insurance cover to an adjoining owner as third party beneficiary would fail to satisfy s 93(1)(a) at the threshold because liability insurance is not what s 93(1)(a) requires. But moreover, the adjoining owner as the party suffering loss or damage by the activities of the person liable cannot directly claim under that person's liability insurance policy. The person for whom the benefit of a contract of liability insurance is provided is the person who may be subject to claims from third parties. Liability insurance does not benefit the third party who makes the claim except in the indirect and irrelevant sense that if a claim is made by the insured on the liability insurance policy, and accepted by the insurer, then there will be insurance funds to meet the third party's claim.

The plaintiffs' case before the Board

78 At the Board, it appears the plaintiffs' submission or assumption was that the words in the Endorsement that 'cover is confirmed in respect of third party liability in relation to claims for property damage to the adjoining properties arising out of the protection works …' were words that provided property insurance cover. Their written submissions to the Board stated: 'The Adjoining Owners are a class of persons endorsed under the contract of insurance as third party beneficiaries and can claim directly on the property damage insurance, if an insurable event occurs.' They contended that the Sayers were identified in the Endorsement by name as

36 *Colonial Range* [2016] VSCA 328, [58].

'Adjoining Owner' and by the address of their 'Adjoining Property'. Those references were said by the plaintiffs to show that the adjoining owners were, according to s 11(1) of the ICA, 'specified or referred to in the contract … as a person to whom the benefit of the insurance cover provided by the contract extends'. On the premise that the insurance cover was for property damage, the plaintiffs contended at the Board that the adjoining owners were therefore entitled to make a direct claim on the Policy for damage done to their property as a 'third party beneficiary' under s 48 of the ICA, and by that means the plaintiffs had satisfied their insurance obligation under s 93(1)(a) to provide first party indemnity insurance or insurance on which the adjoining owners could claim directly.

79 The plaintiffs' case at the Board depended on establishing that the Endorsement truly did give property insurance cover over the adjoining property, as if to take the same path as in *Colonial Range.*

80 But the outcome in *Colonial Range* was reached after three distinct analytical steps were taken by the Court of Appeal.[37]

81 First, the particular wording of the 'Protection Works Endorsement' in *Colonial Range* was viewed by the Court of Appeal as the insurer giving property insurance cover over the adjoining property. The wording was 'this Policy indemnifies … Damage to the Adjoining Property caused by the proposed Protection Works'. That was the benefit of the insurance cover. And it was also the type of first party indemnity insurance that *Colonial Range* held was required by s 93(1)(a) of the Act.[38]

82 Secondly, the Court of Appeal said: 'There is no apparent purpose for cl 4 of the Contract Endorsement other than to extend the property insurance cover to the adjoining owners. In our view it does so with sufficient clarity.'[39]

83 Thirdly, and cumulatively, once it is shown that the adjoining owners are specified or referred to as persons to whom 'the benefit of the insurance cover provided by the

---

37 See ibid [74]–[80].
38 Ibid [58].
39 Ibid [78].

contract extends' then first party indemnity insurance has been shown to be provided to the adjoining owner, and, the contract of insurance satisfies s 93(1)(a).

84 It would be simplistic and wrong to say that the authoritative test for compliance with s 93(1)(a) is to go to the end point and ask the question whether there is insurance upon which the adjoining owner of the damaged property can itself claim. Free of terminology, I think the litmus test for compliance with s 93(1)(a) comes from the basal finding in *Colonial Range* that the words of s 93(1)(a) call for the owner 'to ensure that there is property damage insurance. That would ordinarily mean insurance upon which the owner of the damaged property can itself claim'.[40] I interpolate that the claim could 'ordinarily' be made by the owner of the damaged property as an identified insured, or, as a third party beneficiary of that property insurance cover under s 48 of the ICA as happened in *Colonial Range.*

85 Thus the insurance issue in this case could be framed in this way: did the Endorsement give property insurance over the adjoining property on which the adjoining owners could claim as an insured or if not as an insured, then by extension as a third party beneficiary? Or, was it the case that the Endorsement gave liability insurance cover to the owners (and to their builder and others) to indemnify them for any liability they incurred for claims made by the adjoining owners for damage done to their adjoining property by the protection work? If it was liability insurance, that is a type of insurance cover the benefit of which would be inapplicable by extension to the adjoining owners because, obviously, they do not face the risk of being liable for damage to their own property. Secondly and in any case, if it was liability insurance, that is a type of insurance that will not satisfy s 93(1)(a) because the adjoining owner cannot claim on it for damage done to the adjoining property.

86 Under the Act, the insurance dispute could be referred to the Board for determination.[41] The plaintiffs did so by application filed on 27 July 2020. Under the Act, the Board 'must consider and determine a matter referred or application made

40 Ibid [58].
41 See s 152 of the Act.

to it … and may make any order that it considers appropriate in the circumstances'.[42]

In its conduct of proceedings, the Board —

> (b) may inform itself in any manner it thinks fit; and
>
> (c) is bound by the rules of natural justice; and
>
> (d) is not bound by any rule or practice as to evidence; and
>
> …
>
> (f) must proceed with as little formality and technicality and with as much expedition as the requirements of this Act and the regulations and the proper consideration of the matter before it permit …[43]

87 An electronic audio visual hearing before the Board occurred on 3 September 2020. The Board adjourned that day but made orders requiring the parties to file and serve written submissions on the question of 'whether the insurance procured by the [owners] complies with the requirements of s 93 of the [Act]'. The matter was to be determined on the written submissions.

88 Of course, the Board is not a court of law. But, a relaxation of the procedures and rigour that characteristically mark the conduct of judicial proceedings does not derogate from the requirement on the Board to decide the insurance question by a 'proper consideration' which in this case has to mean according to law. That is more so because the Act states the Board's determination 'may be enforced as if it were a judgment or order of a court of competent jurisdiction'.[44]

89 In aid of considering and deciding the dispute according to law, the Board was in the stable and informed position of having the guidance and binding force of the statements of the applicable law made in *Colonial Range*. The Board's legal task was reduced to applying the law to the facts, by construing the words of the insurance cover as stated in the Endorsement to see if it gave property insurance cover over damage to the adjoining property on which the adjoining owners could have direct

---

42 Section 161 of the Act.
43 Schedule 3 of the Act, cls 15(3)(b)–(d), (f).
44 Schedule 3 of the Act, cl 19.

recourse to claim, either by contractual rights as an identified insured or by statutory rights as third party beneficiaries. If so, s 93(1)(a) would be satisfied.

90 The proper construction of the Endorsement was a question of law.[45] The task for the Board was to construe the given words of the Endorsement according to the legal principles of the construction of commercial contracts, which are applicable to a policy of insurance, even one required by statute.[46] By well-established legal principle, the construction of an insurance policy is an objective exercise to discern the intention of the parties, confined to the sense and meaning of the words and the terms used, and in their context. The terms may have been used in an ordinary or popular sense, or may take on a particular sense in the subject matter or the field of trade and commerce in which the words and terms are being used.[47] In a commercial context, the law looks to give a businesslike interpretation by determining how a reasonable business person would have construed the policy and to bring about commercial efficacy and to reflect common sense.[48]

The Board's determination

91 The Board's approach to the dispute and the relevant elements of its determination can be adumbrated as follows —

(a) it acknowledged on the authority of *Colonial Range* that 's 93(1)(a) of the Act requires insurance on which the owner of the damaged property can itself claim (described … as first party indemnity insurance)';

(b) it regarded as being significant that the adjoining owners did not come within the definition of 'Insured (You or Your)' in the standard terms of the Policy;

(c) it accepted as correct that the Policy did not have to identify the adjoining owners by name in order for them to be covered, and it noticed that their

45 *Admiral International Pty Ltd v Insurance Australia Ltd* [2021] NSWSC 1440, [228] (Fagan J).
46 *McCann v Switzerland Insurance Australia Ltd* (2000) 203 CLR 579, 589 [22] (Gleeson CJ).
47 See Ian Enright and Robert Merkin, *Sutton on Insurance Law* (Lawbook, 4th ed, 2015) vol 1, 778 [10.130].
48 *Liberty Mutual Insurance Company Australian Branch v Icon Co (NSW) Pty Ltd* (2021) 396 ALR 193, 232 [152] (Allsop CJ, Besanko and Middleton JJ).

names and the address of their adjoining property were stated in the Endorsement as recipients of the protection work notices;

(d) it isolated and gave emphasis to the words of the Endorsement which stated 'and cover is confirmed in respect of third party liability in relation to claims for property damage to the adjoining properties arising out of the protection works stated in the notices'; and

(e) it also recited the plaintiffs' reliance on clause 1.1 of Section 2 of the standard terms of the Policy which stated: 'We [the insurer] agree to pay to You or on Your behalf all amounts You shall become legally liable to pay as Compensation in respect of … Property Damage'.[49]

92 The first step of the Board's Reasons to consider whether the adjoining owners were or were not the 'Insured' was the logical starting point to approach the issue for determination. As a first expositive step, it is relevant that the adjoining owners were not named as the 'Insured' in the standard terms of the Policy; nor were they otherwise within the class of the 'Insured'; nor was their adjoining property expressly covered under the standard terms of the Policy for damage done by the named insured and others within the class of the 'Insured'. That cleared the way to reduce the single remaining issue for determination to be whether the adjoining owners were legally recognisable as third party beneficiaries to whom the benefit of the insurance cover in the Endorsement extended. Taken from the plaintiffs' written submissions, the Board adopted the issue for determination to be:

> 7. The issue to determine is whether those references [ie the references in the Endorsement to the name and address of the adjoining owners], read together with the Endorsement and Policy as a whole, leads to the conclusion that the Respondents are third party beneficiaries under the Policy, namely persons to whom the benefit of the Policy extends. [footnote reference to s 11 of the ICA] As third party beneficiaries they would be entitled to recover damages directly against the insurer. [footnote reference to s 48 of the ICA]
>
> 8. The Applicants submit that the Endorsement and, in particular, the underlined words [as underlined above] mean that the Respondents

[49] That clause was considered in paragraphs 42–8 above.

are third party beneficiaries under the Policy, and able to claim directly against the insurer.

93 The Board recited what I take to be the gist of the adjoining owners' submission to the Board in this way —

> 10. … They submit that the Endorsement does not make clear whether the insurance provided protects the adjoining owners' property directly (property insurance) or only provides protection to the builder from claims by the adjoining owners (liability insurance).

94 The Board then made these findings on the insurance question —

> 11. The Respondents are not persons to whom the benefit of the Policy extends so that they have a direct right of recourse against the insurer. The Endorsement provides cover in respect of "third party liability" for property damage to the Adjoining Property. The use of the words "third party liability" excludes what is described in Colonial Range as first party indemnity insurance. The Endorsement contemplates that an adjoining owner needs to crystallise third party liability by suing the insured named in the Policy. The Respondents' names and addresses are, therefore, given by way of identification, rather than vesting any substantive rights in them vis a vis the insurer. The Endorsement differs significantly from that considered in Colonial Range which stated "the attached Protection Works Endorsement shall apply in respect of the owners of property adjoining 150 Queen Street [the building site]". (footnote omitted)
>
> 12. The argument based on clause 1.1 of section 2 of the standard terms of the Policy does not assist the Applicants because the word "You" is not defined to include an adjoining owner, and, as we find, the Endorsement does not make the Respondents insureds under the Policy.

95 The finding in paragraph 12 of the Reasons concerns clause 1.1 of Section 2 of the standard terms of the Policy, to which I have already referred.[50] That clause provided liability cover to the insured 'in respect of … Property Damage'. Ultimately on the present application, the plaintiffs' solicitor made a written concession that the liability cover in clause 1.1, in the absence of the Endorsement, meant that the adjoining owners could not make a direct claim on the standard terms of the Policy for damage done by the owners to the adjoining property.[51]

---

50 See paragraphs 42–8 above.

51 The concession is made in a letter dated 9 February 2022 sent to Judge's Chambers after the completion of the trial.

Therefore, the question whether the Policy satisfied s 93(1)(a) turned only on the insurance cover as expressed in the Endorsement.

96 The Board's first finding in paragraph 11 of the Reasons is explicable by the bright line dichotomy derived from *Colonial Range* between property insurance (or first party indemnity insurance) on which the adjoining owner could have direct recourse for damage done to the adjoining property, and, liability insurance from which the adjoining owner is precluded from having direct recourse (unless s 51 of the ICA applied).

97 The words 'third party liability' are not esoteric, and they are striking. I think it plain enough that the Endorsement is giving cover to the insured for any liability incurred to the adjoining owners (as third parties to the insurance contract) for damaging their adjoining property. Who else but the adjoining owners would make third party claims against the insured 'for property damage to the adjoining properties arising out of the protection works stated in the notices'? As those words naturally denote the grant of insurance cover to the insured for liability to the adjoining owners for damage done to the adjoining property, the damaged third party is precluded from claiming directly on that liability insurance cover, or as the Board put it, the Endorsement has the effect of 'excluding' first party indemnity insurance.

98 The Board's statement that '[t]he Endorsement contemplates that an adjoining owner needs to crystallise third party liability by suing the insured named in the Policy' gives meaning to their conclusion that: 'The Respondents [the adjoining owners] are not persons to whom the benefit of the Policy extends so that they have a direct right of recourse against the insurer.' The Board is saying, correctly, that in the case of liability insurance, the person to whom the insured is liable cannot claim directly on the Policy, but must establish by admission, or by proof, or possibly by judgment in legal proceedings that the insured is liable, so as to then bring in the insurer to indemnify the insured and make payment to the damaged third party.

99 This also explains how the Board was able to readily distinguish the Endorsement here from the Protection Works Endorsement in *Colonial Range.* In direct and much clearer terms than in the present case, the endorsement in *Colonial Range* stated that 'this Policy indemnifies: Damage to the Adjoining Property caused by the Protection Works …'[52] So expressed, the clarity of that Protection Works Endorsement enabled the Court of Appeal to see it as providing the benefit of property insurance to the adjoining owners as third party beneficiaries for damage to their property. In turn, that enabled the adjoining owners to have the statutory right to claim on the property insurance cover policy as third party beneficiaries, thereby satisfying s 93(1)(a) of the Act.

100 The Board's finding that this was liability insurance meant that one could not say, as was said in *Colonial Range*, that the statement of the adjoining owners' name and address in the Endorsement had 'no apparent purpose … other than to extend the [benefit of the] cover to the adjoining owners'.[53] As the Board said with justification, the placement of the names and the address of the adjoining owners in the Endorsement did not confer substantive insurance rights or entitlements, but appeared to serve the purpose of identifying the adjoining owners as being the respondents to the plaintiffs' protection works notices and therefore the persons to whom the insured owner could be liable for damage done by the protection work.

101 Under the Act, there is no right to appeal the Board's decision, hence the plaintiffs' recourse to an application at common law to this Court for judicial review of the decision. That leads me to the grounds of this application.

The grounds of this application

102 The first ground of review is for jurisdictional error. That is an entrenched legal concept in administrative law on the limits of the exercise of public power. The legal

52 *Colonial Range* [2016] VSCA 328, [8].
53 Ibid [78].

principle is that statutory decision making power must conform to the express or implied requirements of its conferral by statute.[54]

103 'Jurisdictional error' is not a test. It is a conclusion that is reached when defects or irregularities are shown up in the manner in which the decision maker exercised jurisdiction in the carriage of the statutory task, being defects or irregularities that were a breach of the express or implied condition of the valid exercise of decision making power under the statute, and especially if the decision had finality or immediate or serious consequences.[55] Materiality of the breach is an essential factor,[56] and '[o]rdinarily … breach of a condition cannot be material unless compliance with the condition could have resulted in the making of a different decision'.[57]

104 Within the different kinds of error of law coming under the rubric of 'jurisdictional error' to be found in the cases (such as the frequently cited *Craig v South Australia*[58]) jurisdictional error can be recognised as occurring for example, where an administrative tribunal 'falls into an error of law which causes it to identify the wrong issue, to ask itself the wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the tribunal's exercise or purported exercise of power is thereby affected …'[59]

105 In *Minister for Immigration and Multicultural Affairs v Yusuf* a joint judgment by McHugh, Gummow and Hayne JJ in the High Court of Australia described the concept of jurisdictional error in this way:[60]

> "Jurisdictional error" can thus be seen to embrace a number of different kinds of error, the list of which, in the passage cited from *Craig*, is not exhaustive.

---

54 See *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123, 132–3 ('*Hossain*').

55 See ibid 134–5 [28]-[31]. See also Mark Leeming, *Authority to Decide: The Law of Jurisdiction in Australia* (Federation Press, 2nd ed, 2020), ch 3.

56 *Hossain* (2018) 264 CLR 123, 134–5 [29]–[31].

57 Ibid 135 [31].

58 (1995) 184 CLR 163, 179.

59 Ibid. See also *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, 567–74. See also *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147, 171B-G (Lord Reid).

60 (2001) 206 CLR 323, 351 [82] (footnotes omitted).

> Those different kinds of error may well overlap. The circumstances of a particular case may permit more than one characterisation of the error identified, for example, as the decision-maker both asking the wrong question and ignoring relevant material. What is important, however, is that identifying a wrong issue, asking a wrong question, ignoring relevant material or relying on irrelevant material in a way that affects the exercise of power is to make an error of law. Further, doing so results in the decision-maker exceeding the authority or powers given by the relevant statute. In other words, if an error of those types is made, the decision-maker did not have authority to make the decision that was made; he or she did not have jurisdiction to make it. Nothing in the Act suggests that the Tribunal is given authority to authoritatively determine questions of law or to make a decision otherwise than in accordance with the law.

106 Amidst the numerous judicial and academic explanations of jurisdictional error, the focus is upon identifying the limits of power. As Hayne J has said:

> The difficulty of drawing a bright line between jurisdictional error and error in the exercise of jurisdiction should not be permitted, however, to obscure the difference that is illustrated by considering clear cases of each species of error. There is a jurisdictional error if the decision maker makes a decision outside the limits of the functions and powers conferred on him or her, or does something which he or she lacks power to do. By contrast, incorrectly deciding something which the decision maker is authorised to decide is an error within jurisdiction. (This is sometimes described as authority to go wrong, that is, to decide matters within jurisdiction incorrectly.) The former kind of error concerns departures from limits upon the exercise of power. The latter does not.[61]

107 As a second and alternative ground of judicial review, the plaintiffs seek an order in the nature of certiorari on the basis of an error of law. That is a limited challenge in that the legal error has to be shown as being apparent on the face of the record; that is without the need to refer to any evidence or materials at first instance, or inferences from them. By statute in Victoria, the 'record' incorporates the Board's Reasons.[62] As this ground of judicial review is not based on a challenge to the exercise of power, it invites much closer attention to the decision maker's reasoning process for the presence of legal errors that are causally relevant to the way the decision was made.

108 I turn now to the various bases on which the plaintiffs made their application.

---

61 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, 141 [163].

62 Under s 10 of *Administrative Law Act 1978* (Vic). See consideration given in *Craig v South Australia* (1995) 184 CLR 163, 180–3 and in *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, 575–8.

The first basis: failing to take into account, or give proper consideration to, relevant matters that it was bound to take into account

109 The plaintiffs submit the Board made a jurisdictional error in failing to take into account three relevant matters that it was bound to take into account in deciding the question of whether the Policy complied with s 93 of the Act. It is said that those three matters were fundamental to the plaintiffs' case and as they were not discussed in the decision it is permissible to infer that the Board did not consider them.

110 The three relevant matters were said to be —

(a) 'the Adjoining Owners were in fact third-party beneficiaries under the Policy despite it being unnecessary in law for the Policy to expressly name the Adjoining Owners (albeit they were specifically identified by name and their property by an address);'

(b) 'being third-party beneficiaries under the Policy, the Adjoining Owners are able to claim directly on the Policy for property damage; and'

(c) the applicability of ss 11, 20 and 48(1) of the ICA to the facts before the Board.

111 I think the matter in paragraph (a) is begging the prime question that was in issue before the Board for its determination. It is a misconception to call matter (a) a 'fact' which the Board was bound to take into account. It was not a 'fact' at all. Whether or not the adjoining owners were third party beneficiaries was the issue to be determined by the Board, as it stated itself in paragraph 7 of the Reasons. In the context of compliance with s 93(1)(a) the determination of that issue depended on the anterior question of whether the insurance cover was for property insurance (on which the third party could claim) or liability insurance (on which the third party could not claim). The Board squarely tackled that question. The Board's finding that the Endorsement gave insurance for the insured's liability meant that the benefit of such insurance cover was not capable of satisfying s 93(1)(a) of the Act. That sterilised the applicability of the third party beneficiary provisions of the ICA because, as already explained in this judgment, the third party beneficiary of liability

insurance cover gains nothing more than the benefit of non-compliant liability insurance cover on which it cannot claim anyway.

112 The same defect exists in paragraph (b). It is begging the question. The Board considered whether the adjoining owners were third party beneficiaries and decided they were not, or more precisely, decided that they were not third party beneficiaries of a property insurance policy that complied with s 93(1)(a). That was because, properly in the context of the requirements of s 93(1)(a), the Board considered that the words 'third party liability' in the Endorsement within the words 'third party liability in relation to claims for property damage to the adjoining properties' were words of liability insurance and not first party indemnity insurance. In that arrangement of words, it would have been short-sighted to seize upon the words 'property damage' and conclude this signified property insurance. The Board acted on the words 'third party liability' as signifying that this was liability insurance for the risk of the insured being liable on claims made by a third party for property damage to the adjoining property of the third party. I think that interpretation was correct. This was not property insurance.

113 As for the matter in paragraph (c), I think it unfair to assert that the Board did not consider ss 11, 20 and 48(1) of the ICA. Sections 11 and 48 of the ICA are referred to in paragraphs 7 and 8 of the Reasons. Although s 20 of the ICA is not explicitly cited in the Reasons, paragraph 6 of the Reasons recognises the essential effect of s 20 by saying 'the Applicants correctly submit that it is not necessary for the Policy to identify the adjoining owners by name'.

114 Accordingly, I reject this first basis of the application. The Board did not fail to take into account proper considerations to the question for determination. To the contrary, in substance it adhered to the proper and decisive considerations as laid down by *Colonial Range,* and did not commit legal error in viewing the cover as liability cover.

The second basis: the Board relied on irrelevant considerations

115 This is based upon the contents of paragraph 5 of the Reasons. That paragraph must be considered by reference to what the Board said beforehand in paragraph 4:

> Section 93(1) of the Act requires that prior to the commencement of protection work the Applicants must ensure that a contract of insurance is in force against (a) damage by the proposed protection work to the Adjoining Property, and (b) any liability likely to be incurred to adjoining owners and members of the public during the carrying out of the building work, and for a period of 12 months after that building work is completed. In *Colonial Range Pty Ltd v CES-Queen (Vic) Pty Ltd* the Court of Appeal explained that s 93(1)(a) of the Act requires insurance on which the owner of the damaged property can itself claim (described in the judgment as first party indemnity insurance). [footnote omitted]

116 Paragraph 5 of the Reasons stated (excluding footnotes) —

> The certificate of currency attached to the policy proffered by the Applicants ("**Policy**") states that the "Named Insured" is the trustee of the BBC trust trading as Blue Sky Building & Construction Group Pty Ltd (the company being the builder). The "Insured (You or Your)" are defined in paragraphs (a) and (b) of the definition as, amongst others, the principal, contractors and sub-contractors engaged by the Named Insured. Significantly, the Owners of property adjoining the Land are not mentioned in (a) or (b). The "Project Site" is the Land. Under the heading "protective (sic) works notices" the address of the Adjoining Property is given, and the names of the Respondents set out as its owners. The endorsement ("**Endorsement**") also states:
>
> > It is hereby agreed and declared that, in accordance with relevant sections of the Building Act 1993, and any subsequent amendments, this policy is endorsed to note the issue of protection works notices, form 7 and form 8, and cover is confirmed in respect of third party liability in relation to claims for property damage to the adjoining properties arising out of the protection works stated in the notices. [emphasis added in original]

117 The plaintiffs submitted that the 'considerations' in paragraph 5 were irrelevant to the question that was before the Board as to whether the Policy complied with s 93 of the Act.

118 The submission isolates three components of paragraph 5 said by the plaintiffs to be irrelevant but which the Board regarded as significant —

(a) the Certificate of Currency stated that the 'Named Insured' was the plaintiffs' builder;

(b) the parties that were insured under the Policy under the definition 'Insured (You or Your)' includes: 'amongst others, the principal, contractors and sub-contractors engaged by the Named Insured'; and

(c) the adjoining owners were not mentioned in the definition of 'Insured (You or Your)' and the 'Land' was identified as the 'Project Site', that is, the site of the plaintiffs' land.

119 The plaintiffs submitted that the Board made its decision 'on the basis of irrelevant answers to those wrong considerations'.

120 I do not accept this submission. I think it mistreats the Reasons by isolating paragraph 5 without seeing it in the context of the Board's method in the preceding parts of the Reasons.

121 The Board's reasoning starts in paragraph 4 of the Reasons on a foundation already laid by *Colonial Range* that s 93(1)(a) requires insurance on which the owner of the damaged property can itself claim. The first logical step in the Board's method had it looking at the standard terms of the Policy to see if the adjoining owners were named as being insured under the Policy. If they were, and if it was property insurance, then they could claim as an insured, and s 93(1)(a) would be satisfied. In paragraph 5 of the Reasons, the Board observed, correctly, that the adjoining owners were not identified as the 'Insured', nor was their land identified as the 'Project Site'. But saying that does not expose the Board as acting on an irrelevancy in a way that was material to the decision. Rather, on a fair reading of the Reasons, those observations then led to the Board acknowledging in paragraph 6 of the Reasons 'that it is not necessary for the Policy to identify the adjoining owners by name, and that it suffices if they are within a class referred to in the Policy'. But under the Policy the adjoining owners were not within an insured class. Then, proceeding with its step method, the Board observed that the adjoining owners were referred to by name in the Endorsement and their adjoining property was also identified. From there, paragraph 7 of the Reasons show the Board to have been certainly alive to the

issue for determination as being whether the adjoining owners were third party beneficiaries under the Policy and therefore able to claim directly against the insurer.

122 I think all of that puts into fair and proper context the contents of paragraph 5 and demonstrates the Board correctly identified the question for determination as depending on the meaning of the insurance cover in the underlined words of the Endorsement and whether those words gave the benefit of property insurance cover over the adjoining property, being insurance cover on which the adjoining owners could, even though they were not named as insured, have direct recourse as third party beneficiaries under s 48 of the ICA and make a claim directly against the insurer. But because this was seen by the Board as being liability insurance, the Board, faithful to *Colonial Range,* decided the adjoining owners could not have recourse.

123 Accordingly, I reject in whole this second basis of the application. The Board identified correct considerations.

The third basis: legal errors

124 This basis had a number of facets, but they are all directed to an attack on the Board's interpretation of the Endorsement in paragraph 11 of the Reasons in which the Board said that '[t]he use of the words "third party liability" excludes what is described in Colonial Range as first party indemnity insurance'.

125 The plaintiffs submitted that in the exercise of its decision making power the Board was required to make its decision according to law. That is so, although in judicial review, the errors of law to be examined are those that are causally relevant to the way the legal determinations were reached.

126 The plaintiffs submitted first that the Board 'was wrong in law insofar as it erred', or alternatively there was an error of law on the face of the record, in the following five ways —

(a) 'in finding that the Adjoining Owners are not persons to whom the benefit of that insurance inures;'

(b) 'in finding that the Adjoining Owners do not have a direct right of recourse against the insurance;'

(c) 'in finding that the phrase "*third party liability*" in the [Endorsement] to the Policy, meant that it was incapable of being construed as (or granting any) "*first party indemnity insurance*";'

(d) 'in finding that the [Endorsement's] reference to the Adjoining Owners' names and addresses, was merely for identification purposes and did not vest in them any substantive rights under the Policy; and/or'

(e) 'by misapplying the Owners' arguments in relation to s 93(1)(b) of the Act when incorrectly determining that the Adjoining Owners cannot claim on a first party indemnity insurance (*viz* under s 93(1)(a) of the Act) under the Policy at paragraph [12] of the [Reasons]'.[63]

127 Each of sub-paragraphs (a) to (d) are elements of the finding made by the Board in paragraph 11 of the Reasons that '[t]he Respondents are not persons to whom the benefit of the Policy extends so that they have a direct right of recourse against the insurer'.[64] That was a finding on the stated issue of whether the adjoining owners were able to claim directly on the Policy as a 'third party beneficiary' under s 48 of the ICA. The Board viewed the phrase 'third party liability' in the Endorsement as excluding first party indemnity insurance because '[t]he Endorsement contemplates that an adjoining owner needs to crystallise third party liability by suing the insured named in the Policy'.

128 For the Board to say 'needs' to crystallise liability means this was viewed as liability insurance, on which the adjoining owner has no right of direct recourse to the insurance, but must first 'crystallise' (ie bring into existence) the insured's legal liability for damage done to the adjoining property. If liability of the insured is

63 Paragraph 12 of the Reasons did not concern the Endorsement but concerned clause 1.1 of Section 2 of the standard terms of the Policy and the definition of 'You' which did not include the adjoining owners.

64 See paragraph 94 above.

established, that induces the insurer to become involved and assume responsibility for the matter, and, if liability is accepted, the insurer will be bound to satisfy the insured's liability to the damaged party. That explains why s 93(1)(a) imposes the obligation on an owner to obtain property insurance — it is to enable the adjoining owner, as the party singled out to be protected under the Act, to claim directly on the insurer as first party without having to go through the steps of crystallising liability.

129 The plaintiffs do not say that the words 'third party liability' in the Endorsement do not denote that this was liability insurance. They acknowledge that the phrase 'third party liability' means a liability to a third party, 'notoriously understood as being a party who is not nominated as either the insurer or the insured and is typically not a contractual privy to an insurance policy'. However, they submit there was no justification for the Board to interpret the words 'third party liability' as excluding first party indemnity insurance.

130 That submission appears to be referable to the statement in *Colonial Range* that 'the ordinary meaning of s 93(1)(a) is that what is required is insurance upon which the owner of the damaged property can itself claim: what we have termed first party indemnity insurance'.[65] The plaintiffs submit, by attribution to *Colonial Range*,[66] that:

> Once it is accepted that the Adjoining Owners are within a class of persons (either by specification or by implication) to whom the benefit of the insurance cover extends, sections 20 and 48 of the *Insurance Contracts Act 1984* operate to provide first party indemnity insurance to them (or in other words, an insurance upon which they, as an owner of the damaged tangible property, may claim).

131 The plaintiffs submit it was an error of law for the Board to find in paragraph 11 of the Reasons that the 'third party liability' cover given in the Endorsement excluded first party indemnity insurance. They submit the adjoining owners were a third party beneficiary of the 'third party liability' cover given in the Endorsement because their names and address were stated elsewhere on the Endorsement, and as

65 *Colonial Range* [2016] VSCA 328, [64].
66 Ibid [79], as quoted in paragraph 74 of this judgment.

such, they were entitled under s 48 of the ICA to have direct recourse to that cover and make a claim for any loss and damage suffered by them for damage done by the protection work to their adjoining property. The destination of the argument was to say: the plaintiffs had satisfied the *Colonial Range* test of having obtained insurance upon which the owner of the damaged property can itself claim.

132 As I understand their submissions, the plaintiffs accept that 'third party liability' means liability to a third party. The submission seems to be saying that the decisive test to be applied to see if the owner has met its obligation under s 93(1)(a) is simply to ask whether the insurance cover obtained by the owner is cover on which the owner of adjoining property can itself claim either as an identifiable insured or if not, then as a third party beneficiary. But, *Colonial Range* held as a paramount matter of statutory construction that s 93(1)(a) requires property insurance cover for damage done to the adjoining property and categorically not *liability insurance* cover for damage done to the adjoining property.[67] It so held because the adjoining owner suffering loss cannot claim under a liability insurance policy unless certain (inapplicable) exceptions under s 51 of the ICA apply.

133 The plaintiffs seem to be submitting that even in the case of liability insurance, the third party beneficiary provisions of the ICA can operate so as to enable the adjoining owners as a third party to claim directly on the liability insurance policy under s 48 of the ICA, and by that way, there was first party indemnity insurance to satisfy s 93(1)(a). So, to repeat an realistic example that I raised in the course of argument at trial, in the case of a solicitor's professional indemnity insurance for liability to a client for negligence, the plaintiffs' submission would have it that such liability insurance protecting the solicitor is also 'for the benefit' of the solicitor's client as third party beneficiary under s 48 of the ICA , and therefore the client has direct recourse to the solicitor's insurance cover for any damage suffered regardless of the limitations in s 51 of the ICA.

---

67 *Colonial Range* [2016] VSCA 328, [58].

134 I do not accept this submission. First, I think it is a fallacy to think that *Colonial Range* supports a submission that even though liability insurance for damaging the adjoining property will not satisfy s 93(1)(a), it will become transformed to satisfy the section if the benefit of that very same *legislatively non-compliant* liability insurance is said to have been extended to the adjoining owner as a 'third party beneficiary' under s 11 of the ICA so as to thereby enable the third party to directly make a statutory claim on the liability insurance policy under s 48 of the ICA.

135 It could have been said in different ways, but I think the Board was right to say in paragraph 11 of the Reasons that '[t]he use of the words "third party liability" excludes what is described in Colonial Range as first party indemnity insurance'. To say 'excludes' means that the third party suffering damage is precluded from making a direct claim on the liability insurance policy for damage done by the liable party. That was precisely what was held in *Colonial Range,* subject to irrelevant exceptions in s 51 of the ICA if the insured 'has died or cannot, after reasonable inquiry, be found'.[68]

136 Secondly, the plaintiffs' submission (attributable ostensibly to *Colonial Range*) that ss 20 and 48 of the ICA operate to provide first party indemnity insurance[69] is overstated or disregards a critical and obvious context. The *ratio decidendi* of *Colonial Range* is that s 93(1)(a) requires there to be property insurance on which the owner of the damaged property can itself claim.[70] The Court of Appeal was saying no more than this: the owner's insurance obligation under s 93(1)(a) *to provide property insurance* to the adjoining owner on which a direct claim can be made, can be satisfied if the adjoining owner is not named as an insured to the property insurance but is, by apparent extension, given the benefit of the *property insurance cover* as a third party beneficiary under s 48 of the ICA. That does not apply to non-compliant liability insurance.

---

68 Ibid [59].
69 See paragraph 130 of this judgment.
70 *Colonial Range* [2016] VSCA 328, [58].

137 Thirdly, the plaintiffs' submission does not grapple with the expression 'benefit of the insurance cover' in another critical sense. In s 11 of the ICA a 'third party beneficiary' is defined to mean a person referred to in the policy by name or otherwise 'as a person to whom the benefit of the insurance cover provided by the contract extends'. As I have said,[71] I am firmly of the view that the words 'benefit of the insurance cover provided by the contract' mean the *intrinsic benefit* of the insurance cover.

138 If, as I think is the case, the Board was correct to view the Endorsement as providing liability insurance on the plaintiffs for their liability to the adjoining owners for damage done by the plaintiffs' protection work, then that intrinsic benefit is manifestly inapposite or inapplicable to the adjoining owners, if not absurd, in its ostensible 'beneficial' application. It is absurd because the adjoining owner cannot be liable for doing damage to its own property for protection works done by the plaintiffs. That is also why I think the Board did not make a legal error in paragraph 11 of the Reasons in viewing the placement of the adjoining owners' names and address on the Endorsement as being given 'by way of identification, rather than vesting any substantive rights in them vis a vis the insurer'. Much of the content of the Endorsement is taken with identifying the protection works notices and the parties to those notices.

139 So understood, I cannot see how the Board's construction of the words 'third party liability' in the Endorsement was 'plainly' wrong in law, as the plaintiffs say. I think the expression in the Endorsement that 'cover is confirmed in respect of third party liability in relation to claims for property damage to the adjoining properties' is, by its verbiage, providing insurance cover for the risk of liability to a third party. The third party in contemplation to whom there lies a risk of liability for damage would be the adjoining owner. Who else would be asserting liability against the insured for damage by protection work to the adjoining property? The verbiage of the Endorsement does not purport to provide property insurance. Therefore, there was

---

71 See paragraph 76 of this judgment.

no relevant benefit according to which the adjoining owner could make a claim as third party beneficiary.

140 The Board's statement in paragraph 11 of the Reasons that the wording of the Endorsement 'differs significantly from that considered in Colonial Range' was also attacked by the plaintiffs as legally erroneous because '[t]he significant differences are not identified by the Board' and because on a comparison 'there is no substantive difference in law'. In oral submissions it was said that the Endorsement in this case was clearer or more precise than the *Colonial Range* endorsement in that, for example, the Endorsement made reference to the 'relevant sections of the Building Act 1993, and any subsequent amendments'.

141 I think there certainly are significant differences. And they are self-evident. The words of the endorsement in *Colonial Range* followed closely the words of ss 93(1) and (b) and stated in crystalline clear terms: 'this Policy indemnifies: Damage to the Adjoining Property caused by the proposed Protection Works'. That bespeaks property insurance cover for damage to the adjoining property, just as is required by s 93(1)(a). As a next step the Court of Appeal found that those words of the endorsement were enough to show that the adjoining owners were persons to whom the benefit of that (compliant) insurance cover extended. It was at that point — and not before — at which the Court of Appeal in *Colonial Range* was then able to conclude:

> Once it is accepted that Colonial [the adjoining owner in that case] is within a class of persons specified or referred to in the Contract of Insurance as endorsed to whom the benefit of the insurance cover extends, s 20 and s 48 of the [ICA] mean that first party indemnity insurance cover is provided.[72]

142 By comparison, the Endorsement in this case was: 'cover is confirmed in respect of third party liability in relation to claims for property damage to the adjoining properties arising out of the protection works'. The words 'property damage' appear not as the subject matter of insurance but as the subject matter of liability. *Quod erat demonstrandum.*

---

72 *Colonial Range* [2016] VSCA 328, [79].

143 The Endorsement cannot be construed as granting property insurance to the adjoining owners. It is manifestly providing the plaintiff with liability insurance cover, which is not first party indemnity insurance cover. What was required, so *Colonial Range* held, was property insurance being a type of first party indemnity insurance on which the adjoining owner could ordinarily claim for damage to its property. In my view, it was not a legal error for the Board to say: 'The use of the words "third party liability" excludes what is described in Colonial Range as first party indemnity insurance.' The Board was saying clearly enough, and correctly, that the type of insurance cover provided by the Endorsement was liability insurance cover which according to *Colonial Range* is not the type of insurance cover required by s 93(1)(a) of the Act.

144 Thus, for a benefit analysis concerning compliance with s 93(1)(a) of the Act, s 48 of the ICA and *Colonial Range* must be properly understood. I would restate it as follows. To comply with s 93(1)(a) the owner doing the protection work must obtain property insurance over the adjoining property on which the adjoining owner can ordinarily claim. Section 48 of the ICA will be available to satisfy the obligations under s 93(1)(a) if the insurance cover as extended to adjoining owners is property insurance. If the insurance cover obtained by the owner is liability insurance to indemnify the owner in the event of incurring liability for damaging the adjoining property, s 48 of the ICA will be of no avail to satisfy the owner's insurance obligations under s 93(1)(a). The Board was not in error as seeing the Endorsement as providing liability insurance.

145 For those reasons I would reject this third basis of the plaintiffs' application.

The prospect of a financial penalty under the Act for non-compliance

146 It was urged in argument that a decision adverse to the plaintiffs could attract a financial penalty under the Act. The plaintiffs submitted that —

> When interpreting penalty provisions any ambiguity should be resolved in favour of confining, rather than enlarging, the relevant penal category. If there is any ambiguity about whether the Owners have complied with section 93 of the Act, the less harsh interpretation should be preferred. The preferred interpretation is one that confines the penal category by allowing compliance

with the section in a more flexible manner while still achieving the aims of the section (to ensure the requisite insurance is in place).

The fact that a breach of section 93 is an offence is a factor weighing in favour of the Court exercising its discretion to impugn the Decision.

147 In calling for 'flexibility' in the application of s 93(1)(a), I think the submission strays and goes too far. All that may be said as a general statement of statutory interpretation is that if the language of a penal statute remains ambiguous or doubtful, then as a last resort, the ambiguity or doubt may be resolved in favour of 'the subject'.

148 Section 93(1)(a) does not create a criminal or quasi criminal offence. It imposes an obligation on an owner, and a pecuniary or civil penalty for non-compliance. With the illumination of *Colonial Range,* it cannot be said that s 93(1)(a) is ambiguous or doubtful. The language of the Endorsement called for careful attention but, as the Board stated, it was not clear enough to display an intention to confer anything but liability insurance when compared with the endorsement in *Colonial Range.* I do not see legal error.

Summation

149 The Endorsement was found by the Board to not provide first party indemnity insurance to the adjoining owners or provide property insurance, but to provide insurance for the insured's liability to a third party which of course by proximity is bound to include liability to the adjoining owners. But that cannot satisfy s 93(1)(a) because that section is unconcerned with liability insurance, and required the plaintiffs to obtain property insurance. Nothing in the Endorsement transforms or enables the liability cover to become first party indemnity insurance or property insurance.

150 Accordingly, the grounds of the application are not made out and the application must be refused. In that outcome, I wish to say I do not see an apparent injustice in the circumstances. The parties are neighbours. The Act protects patently the plaintiffs' adjoining owners. The materials show that the adjoining owners agitated reasonably their concerns with the plaintiffs about the adequacy of the Policy. They

asked the plaintiffs to seek and obtain clarification from the insurer to be certain that the adjoining property was protected by property insurance, and it does not appear that the plaintiffs were in some way impaired from doing so. According to the law as I have exposed it, I do not think the Board erred in deciding that the Policy did not comply with the Act.

151 I propose making the following orders:

(a) The originating motion is dismissed.

(b) There be no order as to costs.

SCHEDULE OF PARTIES

S ECI 2020 04488

BETWEEN:

PAUL HRONOPOULOS	First Plaintiff
VICKIE LIMPRAYOON	Second Plaintiff
- v -	
BUILDING APPEALS BOARD	First Defendant
RICHARD SAYER	Second Defendant
ANGELA SAYER	Third Defendant