IN THE SUPREME COURT OF NEW ZEALAND SC 32/2016

BETWEEN **PRATTLEY ENTERPRISES LIMITED**
Appellant

AND **VERO INSURANCE NEW ZEALAND LIMITED**
Respondent

Hearing: 10-11 October 2016

Coram: William Young J
Glazebrook J
Arnold J
O'Regan J
McGrath J

Appearances: F M R Cooke QC, S P Rennie and A G M Whalan for the Appellant
D J Goddard QC and C M Brick for the Respondent

CIVIL APPEAL

MR COOKE QC:
May it please the Court. I appear with Stephen Rennie and Anna Whalan for the appellant.

WILLIAM YOUNG J:
Thank your Mr Cooke.

MR GODDARD QC:

May it please the Court. I appear with my learned friend Ms Brick for the respondent Vero.

WILLIAM YOUNG J:

Thank you Mr Goddard.

MR COOKE QC:

Your Honours this case obviously concerns two issues. The first is the meaning and effect of Prattley's insurance policy with Vero and secondly, if that policy contemplates what Prattley says it does, does the release signed up when the insurance claim was settled preclude recovery. From Prattley's point of view, both issues turn on the meaning and effect of contracts. The meaning and effect of the contract embodied in the insurance policy and the meaning and effect of a contract embodied in the release, and whether it excludes operation of the Contractual Mistakes Act 1977 within the meaning of the Act. So we say that this is a contractual interpretation case on both issues.

I want to deal first with the first issue, what is the meaning and effect of the contract embodies in the insurance policy, and I want to begin with what I hope, or I submit are uncontroversial propositions. The first I've already foreshadowed, that an insurance policy is a contract and therefore a bargain between the two parties. In return for the payment of premiums, the insurer provides cover described by the terms of the contract. You get what you pay for. And just like any other contract the object is to interpret the contract to see what was agreed.

The second proposition, it is nothing or problematic with the parties agreeing that the insured's indemnity under a material damage policy is calculated on the basis of the costs of repair or reinstatement. The parties are free to make that kind of agreement. In fact in terms of repair that's usually what you expect, that the repairs will be undertaken, or the cost of the repairs will be met by the insurer, so there's nothing controversial about that proposition.

The third proposition is that indemnity cover can be expected to provide less cover than reinstatement cover, and there's nothing problematic with that being addressed by the parties by them agreeing on an indemnity value that defines how the insured will be indemnified. The cost of repair or reinstatement up to an agreed indemnity value. In fact that's a good way of doing things because the parties know where they stand and the premiums can be calculated accordingly, so the bargain is clear.

My fourth proposition is the parties can also agree that separate events, which are covered on that basis, can be covered with cover reinstating when there are a series of events covered by the policy. Indeed that's common and was addressed by this Court in *Ridgecrest NZ Ltd v IAG New Zealand Ltd* [2014] NZSC 117, [2015] 1 NZLR 40. Again that's simply the bargain that the parties struck, or can strike in their contract.

So the real question in this part of the appeal is was that the bargain that the parties struck in this case, and that's why I submit it is a contractual interpretation case first and foremost. Prattley has no difficulty with the idea that insurance concepts such as the nature of indemnity cover provide the context within which the agreement is to be interpreted. But nevertheless in the end it is the terms of the agreement itself that regulate what the insurers obligation is.

One other point about that in this particular case again hopefully not a controversial point, is that if there is ambiguity in the terms of the contract found in the insurance policy, it is interpreted on a contra proferentem basis, and that's what this Court said in *Tower Insurance Ltd v Skyward Aviation 2008 Ltd* [2014] NZSC 185, [2015] 1 NZLR 341. And in addition, in this particular case, Vero made in the contract specific promises relevant to the interpretation of the contract, and if I can take Your Honours to the policy in bundle 3A at page 1475, those are the terms on page 1475, under the heading "Fair Insurance Code" which include contractual promises –

WILLIAM YOUNG J:

Sorry, what page?

MR COOKE QC:

Page 1475 in 3A. These are contractual promises.

WILLIAM YOUNG J:

This is, there's a single policy for both years effectively?

MR COOKE QC:

Yes.

WILLIAM YOUNG J:

Sorry, what I meant was it's just the policy that was on the Internet. It was an insurance by reference generally to what that, rather than –

MR COOKE QC:

Yes, so the schedules really embody the meeting of minds between the parties but their schedules incorporate the standard terms.

WILLIAM YOUNG J:

Right.

MR COOKE QC:

And the point I was emphasising here was within those terms, which form part of this contract, Vero has made promises relevant to how you interpret the contract.

ARNOLD J:

So how are these incorporated into the contract, this Code?

MR COOKE QC:

By these terms on the left-hand side of this?

ARNOLD J:

Yes, they're set out there, I see, just the fact that they're reproduced there means that they're part of the contract?

MR COOKE QC:

Well you can, if you want to go further than that, two-thirds down the left-hand column there's a heading, "Insurance contract," and the second paragraph of that, "The insurance contract consists of any statements on which this insurance is based, your proposal, the applicable parts of this policy, and the schedule." So these are statements upon which the cover is based and also we say they incorporate it into the policy.

ARNOLD J:

Thank you.

MR COOKE QC:

And in those, the substance of those terms we have promises in that numbered paragraph 1 on the left-hand side, that Vero will provide insurance contracts which are understandable and show the rights and obligations of both us and the policyholder and then further promises in relation to explanations given for more technical matters. In the way the Code itself referred to that is that the policies will be written in plain English terms. So in a sense this buttresses the contra proferentem proposition.

WILLIAM YOUNG J:

So where does the Code appear?

MR COOKE QC:

The Code appears in volume – it might just be helpful just to go to that briefly, that's at 3D, 3095. Beginning at 3094, actually, in 3D. The first page of that code and then on 3095 the responsibilities in the middle there, "Act fairly and openly in all our dealings with you," and the fourth bullet point there, "Give you or your broker a copy of your policy which sets out in plain English what is insured, what is not insured and what your obligations are."

Now, you can argue that the Code itself has contractual force because of the way it's described in the policy here. Nothing particularly hinges on that, in my submission, but the point I'm seeking to make is that what Vero is promising is that we – the nature of this bargain will be set out plainly in this contract.

WILLIAM YOUNG J:
So it's our responsibilities to you, is it?

MR COOKE QC:
Yes. All those ones in that large paragraph are relevant to that and flesh out the bones of what the policy itself said about …

O'REGAN J:
But what if the policy isn't in plain English? Are you saying that's a breach of contract?

MR COOKE QC:
No. I'm saying that this case turns on contractual interpretation and in addition to in contra proferentem there is an obligation in the policy to set it out plainly so you need when interpreting the contract to find it plainly there and if you're trying to qualify what it plainly says with a more elaborate argument with a –

O'REGAN J:
Well, we're now in a second appeal where two Courts have come up with different outcomes so you'd have to say that the quest for plain English seems to have been elusive.

MR COOKE QC:
That is a fair observation about – and arguably this policy is not compliant with the obligations of Vero because it isn't plain, at least on one view of it. Of course, we say it's plain now because I said that in the High Court and the

Court of Appeal too and it didn't register with the same clarity as the submissions suggest.

So I suppose you could argue that there is a breach on the face of it and I guess you've got to say about the insurance cases that have come out of the Canterbury earthquakes generally that it is surprising how things have become more understood and these sometimes awkwardly-worded documents have come under greater scrutiny and need decisions of this Court to explain actually what they really do mean and I do think that's important context for deciding, well, how do we properly interpret this contract because we do put emphasis on the idea it should just give you what it says it gives you in plain terms, because that's what we say the contract does. The lower Courts have actually qualified the language of the policy or of the contract by reference to insurance concepts about what is meant by indemnification in reference to old cases in that context rather than just looking at what the bargain was as reflected in the contract that was signed.

McGRATH J:
But you accept that the context is important in clarifying the meaning of the text?

MR COOKE QC:
Yes. Like any contract, the context is very important to understand what the parties must have meant by their words but I say particularly in relation to these promises they shouldn't be used to qualify what it appears to say on its words.

So against that background and hopefully the uncontroversial propositions, we look into this policy to see what Vero did promise to Prattley and we begin with the general indemnity itself, which is at volume 3A at page 1479. On the left-hand side under the heading, "The indemnity. We will indemnify you for damage to the insured property occurring during the period of insurance. You will be indemnified by payment or at our option by repair or by replacement of the lost or damaged property." That's the one I want to

particularly emphasise. I just note at this point, because I'll come back to this, the next paragraph, "Subject to the reinstatement of amount of insurance extension our liability will not exceed the total sum insured." I will be submitting later that that's a reference to the fact it can exceed the $1.6 million. But going back to the point I'm emphasising now, this explains how Prattley wants to be indemnified. "By payment or at our option by repair or replacement of the lost or damaged property." Now we say that that makes it clear the indemnity is met by the insurer repairing or replacing the property or paying the cost of doing so.

Now two issues have been raised about that. The first is my learned friend's argument that replacement doesn't mean reinstatement in this context, and in his written submissions he used the illustration of the insured iPhone. So if my iPhone is insured and it's damaged, I can be properly indemnified by being given a second-hand iPhone.

WILLIAM YOUNG J:
Which, of course, won't be two years old, although it's two years, it hasn't had two years use.

MR COOKE QC:
If you're talking about Mr Goddard personally I'm not – but that's the point –

WILLIAM YOUNG J:
It's a two year old model but it's one that hasn't been used.

O'REGAN J:
No, no, it could be a second-hand one.

WILLIAM YOUNG J:
I suppose it could be a second-hand one.

GLAZEBROOK J:
They do refurbish.

McGRATH J:
Well that's what was suggested.

MR COOKE QC:
And also suggested you could trade up to a new one if you agreed with the insurer that you pay the difference between the cost of the second-hand one and the new one. The problem with that proposition is that that is not the type of property that is insured under this policy. The only property that's insured under this policy is the building for material damage. So you can't get a second-hand building and plonk it on Prattley's land. So you can't resort to that idea to say well it doesn't necessarily mean new material, that it can be a second-hand item of property, because that makes no sense of the property that is insured under this contract. And bearing in mind we are dealing with a material damage policy over a building, replacement must mean reinstatement.

The second, and we'll come later into the terms of the policy, that's the word that's later used. But the iPhone reference is talking about the different type of cover over a different type of property. The other argument that's been advanced is that the reference to payment allows Vero to make a payment meeting the indemnity calculated on a basis other than the cost of repair or reinstatement. So that under this suggestion there are two completely different substantive indemnities being referred to here, and the difficulty with that idea is that nowhere do we find what this alternative basis for indemnification by payment is, or how it is calculated. Notwithstanding that we do have here the words "repair or replacement" as I say, reinstatement of the loss of damaged property, and this partly goes back to the idea that I outlined before, this is supposed to be clear and plain on its face. If there's supposed to be some additional kind of cover embodied in the word by payment, then you would expect it to be explained as the repair and replacement has been explained.

McGRATH J:

You don't accept this clause is simply talking about forms by which the insurer could satisfy the policy obligation?

MR COOKE QC:

Yes, I do. I say this is the means of satisfying the promise not the substance of it.

McGRATH J:

So it's a form clause.

MR COOKE QC:

Yes. It's how you satisfy it, not what it is.

McGRATH J:

Yes.

MR COOKE QC:

So you can satisfy the indemnification you described either by doing the repair or reinstatement work or paying the cost of it. That's the distinction between the substance of the indemnity and how it is satisfied and recognised in many works and cases.

O'REGAN J:

But aren't you trying to use it to define it now by saying payment must be of the replacement or repair costs. It doesn't say that, it just says the insurer's got a choice, it can either indemnify you by paying you or it can, if it's better for it, it can pay repair or replacement cost.

MR COOKE QC:

Well I say that it is important that repair or reinstatement is described as the only way we find this definition of how the indemnity is satisfied is by repair or replacement.

O'REGAN J:

No, no, it's by payment.

MR COOKE QC:

And I say, and you read that naturally in context, payment is associated with repair and –

O'REGAN J:

Well you can also read it naturally or in context by the fact that it appears two words after the word indemnified.

MR COOKE QC:

Yes, but it's then describing how you are indemnified, indemnified by, and then defines, importantly in my submission, repair or replacement, or –

O'REGAN J:

Well that's an option though. So the insurer, you could read it as just saying you'll be indemnified by payment full stop, and then there's something which is at the insurer's option which obviously must be better for the insurer otherwise they wouldn't choose it, would they?

MR COOKE QC:

Although it's not uncommon to have these policies that give the insurer to do it one way or other without much hanging on that in terms of finding what the nature of the indemnification is. I mean I accept that there is a degree of ambiguity in that, in that it's capable of looking in that way, and looking at it in some other way, but then I go back to, well, the contra proferentem rule would say, look you really can't introduce different types of cover without explaining squarely what they are.

GLAZEBROOK J:

You say it's all very well that you are indemnified by payment but what does that mean and it's nowhere defined so it doesn't say payment by depreciated replacement cost, it doesn't say payment by current market value, and it

doesn't say payment by any other possible means that you might have to be indemnified, is that the point?

MR COOKE QC:
Yes.

GLAZEBROOK J:
So therefore it has to be read as being the cost of.

MR COOKE QC:
Yes, because that's where the policy has spoken, as to what the nature of the indemnity is.

So if it works this way, the way I describe it, that the indemnity is the cost of the repair or reinstatement, the obvious question then arises, well how does this policy differentiate between indemnity cover and reinstatement cover, and the policy does have detailed machinery that does just that, and when you look at that detailed machinery it confirms the interpretation that I say arises from the basic indemnity clause. If I could take Your Honours through to page 1489, on the left-hand side at the bottom you get the heading, "Earthquake indemnity." This is, I should probably just draw Your Honours' attention back to 1487 on the left-hand side, "Additional extensions," is how you get these extensions incorporated into your policy. The requirement, the extension applies is no dispute that this extension earthquake indemnity MD020 was incorporated into the policy here, and you'll see there, earthquake indemnity, "This extension applies to those items of insured property that have a company earthquake sum insured shown – "

WILLIAM YOUNG J:
Sorry, where are we now sorry?

MR COOKE QC:
I'm back at 1489.

GLAZEBROOK J:

Sorry, okay.

MR COOKE QC:

I beg your pardon. Earthquake indemnity on the left-hand side on the bottom of that page. "This extension applies to those items of insured property that have a company earthquake sum insured shown in the schedule." And then the clause goes on, "If the insured property suffers earthquake damage we will cover you for such damage." And I say "cover" in the way that has been earlier described. And there's a definition of "destroyed" on the next column, "Means so damaged that the property, by reason only of that damage, cannot be repaired." Which excludes the sort of arguments about beyond economic repair –

WILLIAM YOUNG J:

Sorry, where's destroyed, sorry?

MR COOKE QC:

If you go to the next column?

WILLIAM YOUNG J:

Yes, sorry, yes.

MR COOKE QC:

There's a reasonably elaborate description of what earthquake damage is. There is then a special provision, going down on that right-hand column under, "Special provisions. Limitation on amount payable. Where the insured property is damaged but not destroyed our liability will not exceed the amount we could have been called upon to pay if the property had been destroyed." And I guess the significance of that is that the policy turns its mind to the concept of destruction and what it means for the cover of insurance with a special provision saying what, the only significance it has is that our liability will never exceed that amount, so the cost of repairs can't be claimed as greater than the destruction amount, and there's a definition of "destruction"

being actual physical destruction, so it can't be repaired. Possibility standard. And I will come later back to the claim adjustment clause that comes next because that's relevant to the reinstatement of insurance point.

But just going back to where we started in that clause, earthquake indemnity 020, it talks about having a company earthquake sum insured shown in the schedule. And then if you look at reinstatement cover, which is on the next page, 1490, earthquake full reinstatement cover MD022, "This extension applies to those items of insured property that have an excess of indemnity value sum insured and a company earthquake sum insured shown in the schedule." So to get reinstatement cover you've got to have amounts in excess of the indemnity value, which is the company earthquake sum. And interestingly also, and this is not unusual for reinstatement cover, if you look at the special terms and conditions, and turn the page onto page 1491, if you look at clause 3, "Limitations on amount payable," 3c, "If you elect not to reinstate the property our liability under this extension in respect of any items of insured property will not exceed the indemnity value of that item." So you can get insurance for the indemnity value, which is the company earthquake sum. If you want greater insurance than that you buy insurance with excess of indemnity value sums in it, and on that basis you only can get the full cost of reinstatement if you actually reinstate, otherwise you just get the indemnity value sum that's been agreed.

GLAZEBROOK J:
It says indemnity value, where is the earthquake sum defined as indemnity value or isn't it?

MR COOKE QC:
It's not, and to make things further confusing, there was no sum disclosed in this schedule as an earthquake sum insured.

GLAZEBROOK J:
Right.

MR COOKE QC:

But these terms seem to be used, being used interchangeably in the policy.

GLAZEBROOK J:

So earthquake sum insured means indemnity?

MR COOKE QC:

The agreed indemnity value.

O'REGAN J:

Well, hang on, so what does that mean? Why does it apply, then? Why does earthquake cover apply if the thing that is a sine qua non applying it doesn't exist?

MR COOKE QC:

Well, it's been accepted that – because what the schedule says is natural disaster insured and then it has the $1.6 million sum.

O'REGAN J:

Yes but that's not an indemnity sum. That's a cap.

MR COOKE QC:

Well, again, we've got to try and make sense of these terms of the policy that are found there and I will come to the schedules in a moment but I say that it's apparent that the $1.6 million was intended to be the company earthquake sum. The schedule just says "insured" but you could argue that –we didn't argue that that meant it was unlimited. There was this figure that was their indemnity value that had been agreed and on which the calculations of the premiums were made.

O'REGAN J:

But there's nothing in the policy that says 1.6 is an agreed indemnity value. It's just a cap. So why would we interpret it to be the indemnity value? It's a maximum.

MR COOKE QC:

Well, the policy is working on the basis that there is a company earthquake sum which you can see from the other terms I've taken the Court through is synonymous with the indemnity value sum. They've used different words in different parts of the policy.

O'REGAN J:

Well, if you decide not to specify it, don't you just have to fall back on what indemnity means?

MR COOKE QC:

But that's not how this policy works. This policy has machinery in terms of how that indemnification works where the company earthquake –

O'REGAN J:

It's got machinery but nobody turned the machine on. I mean …

MR COOKE QC:

Well, I don't think there's any argument but that the machine was turned on for the cover of this policy. We've then got to work out how that –

GLAZEBROOK J:

That there is earthquake cover. How the earthquake cover works, though, is what we're now looking at.

MR COOKE QC:

Yes.

GLAZEBROOK J:

So nobody's suggesting there isn't earthquake cover.

MR COOKE QC:

No and so my point is if you look to the policy to see how it works and that is how it should be applied to this case even though there is no accompanied earthquake sum in the schedule but the $1.6 million and the word “insured”.

ARNOLD J:

So what then is the difference between the earthquake indemnity cover and the earthquake for reinstatement cover? You pointed to the opening words but in practical terms what things would be, would you be purchasing for your extra premium which you would not get under the indemnity cover? One of them you’d mentioned is upgrading to current code, I think. Is there anything else?

MR COOKE QC:

Well, there would be also be the full reinstatement of the building.

ARNOLD J:

Just the non-existence of a cap.

MR COOKE QC:

Yes, although even on that you might have a cap and I haven’t – because that talks about there being an excessive indemnity value amount subject to this insurance, so there’s again a possibility of a cap on the reinstatement obligation of the insurer as there was, for example, in *Ridgecrest*. So there are different forms of cover, and in the end the actual monetary figure, the $1.6 million here, is quite important because it’s the one on which the premiums are calculated. So that’s the most important difference that you have this figure that operates as the indemnification limit.

GLAZEBROOK J:

Is it set out as an agreed indemnity value or as a cap, or does the distinction matter too much? It might, I suppose if you’re arguing that the reinstatement was less or the reinstatement should have been more or …

MR COOKE QC:

I don't think anything would turn on what word you used to describe it, an agreed indemnity value or the cap, as long as you see how the mechanics of the policy is seeking to work.

GLAZEBROOK J:

All I'm really saying is there anything under the wording of the policy that makes a difference between those two? From what you're saying not really, they just seem to use the terms interchangeably.

MR COOKE QC:

Yes and as I've hopefully taken you through – and this goes back to my earlier point about, you know, superior Courts in the end have to look through these contracts and try and work out what they mean. It's plain that – and no doubt these are precedents being used for a long time, this one has interchangeable words that seem to mean the same thing. Company earthquake sum, agreed indemnity value, are interchangeably being used to describe the same concept, and we get that in the schedule too, because we don't have the refinement that Supreme Courts and counsel arguing before them would like in their cases, because we have to just deal with what we've got, and try and make sense of the bargain, as I said before, the bargain between the parties. So I've highlighted now these schedules, and we should go to the schedules, and if I could take Your Honours to page 1559. So there are two schedules of insurance that are relevant in this case.

O'REGAN J:

Who prepared these? Was it the insurer or the broker or don't we know?

MR COOKE QC:

I imagine it was the broker, I can't recall what the evidence about that was, but I imagine it was the broker and I say that because there was evidence about how the special note got introduced into the schedules, and the broker gave evidence about that, saying it had been requested by Vero. So there are two policies, periods of – well two contracts of insurance in this case, you'll

see from the schedule of insurance this one went through to December 2010, so covered the first event, the September one, then the Boxing Day event, and the February event were covered by the subsequent schedule in the subsequent contract.

O'REGAN J:
Does anything turn on that?

MR COOKE QC:
I don't think so.

O'REGAN J:
Okay.

MR COOKE QC:
I suppose it buttresses the reinstatement argument we make but –

O'REGAN J:
It's not really contested that there was reinstatement is it?

MR COOKE QC:
No, no. I don't think so. I won't go through all the first two pages because it's the third page, 1561, that's the important one. So we see the material damage section and there's the reference to the address, the location. Cover type, indemnity value, so we get another use of the term and you get total building sum insured, the 1.605 million. And you go down a bit further –

O'REGAN J:
Does that correlate back to anything in the policy, that terminology, "total building sum insured"?

MR COOKE QC:
No, not precisely –

O'REGAN J:

Okay.

MR COOKE QC:

So again we've got to try and make sense of what we've got and I say, especially when you go down a bit further and you see total sum insured, 1.605, natural disaster insured. It doesn't have company earthquake sum 1.605 it has total sum – it has natural disaster insured, but I say if you look at it in terms of what the parties must have meant, in terms of the machinery of this policy, there is a company earthquake sum of 1.605 million.

O'REGAN J:

And natural disaster includes earthquake does it?

MR COOKE QC:

Yes.

GLAZEBROOK J:

And also that doesn't seem to be in dispute either in fact.

MR COOKE QC:

No, no. That's right.

GLAZEBROOK J:

I'm assuming that nod was, "it's not in dispute?"

MR COOKE QC:

What is in dispute. The key, I mean there are two really key issues in dispute. One is the argument that by payment means something completely different from repair and reinstatement and secondly, that when you give meaning to by payment you just go to general concepts of what is being indemnified and what that has meant in the old cases, rather than what we say which is that there is machinery in this contract that explains how you are indemnified and

how you differentiate between indemnity cover and reinstatement cover, and we just apply the bargain in terms of it being expressed in this contract.

GLAZEBROOK J:
And I don't suppose you say well the insurer really, in many ways, doesn't care, because there's a cap on the sum insured and that's how the premium is calculated.

MR COOKE QC:
Yes and if I have –

GLAZEBROOK J:
When I say "doesn't care" if they did care –

MR COOKE QC:
They care now.

GLAZEBROOK J:
They would have defined payment in a different way and presumably the premium would have been calculated in a different manner.

MR COOKE QC:
Yes.

GLAZEBROOK J:
Or possibly the premium would have been calculated.

MR COOKE QC:
I think the reality is before the Canterbury earthquakes these clauses probably didn't have the microscopic analysis that we now subject them to so they've just had these forms of contract. That kind of foreshadows why I want to emphasise the importance of the schedule because the schedule is the document where the insured and the insurer see the key bargain between the parties. It sets out the key information so the parties understand where they

stand in terms of where their bargain is. So it is an important document. Obviously the policy wording, the standard wording is important too but the schedule of insurance is where you find the parties coming together with a meeting of minds between them. That foreshadows the significance that we place on the special notes that are in the schedule and Your Honours can see that there are two of them. I should just mention there are two schedules. The only difference between the two schedules, the changes between the year, is that the excess changes in the second year a little but otherwise they are the same.

The special notes – the first one is at heritage classification C and a reference to some earthquake strengthening. As it turned out, this building did not have the heritage classification the parties thought it did when they entered this contract. From Prattley's point of view, they found that out at trial and it would appear – although the evidence on this was very flimsy – that when the more extensive building to which this building was part was demolished the heritage status was removed but whether that's true or not is not really clear from the evidence. But it was insured on the basis that this building had a heritage status.

Then we get the second special note. We will repair or reinstate the building to as reasonably equivalent appearance and capacity using the original design and suitably equivalent materials. Now –

WILLIAM YOUNG J:
Where is this?

MR COOKE QC:
It's in the middle of that page, 1561. It's got quote marks around it.

McGRATH J:
Why?

MR COOKE QC:

It's got quote marks around it because, I imagine, it was the wording that Vero wanted inserted in the schedule. I don't know why the quote marks are necessarily there but it's quoting what someone has requested be included.

McGRATH J:

Anyway, you don't attach any significance. It's not some text out of a case or something like that.

MR COOKE QC:

No, no. It's a text out of an email from Vero. Now, I say this must mean what it says. We will repair or reinstate the building to that standard. Now, notice there when the parties are turning their minds more expressly to the particular piece of insured property it's repair or reinstate, not repair or replace, as you get in the general wording in the indemnity later on in the policy. But when we're now concentrating on buildings, not iPhones, it is repair or reinstate the building to the standard then set out.

O'REGAN J:

So are you saying this trumps the earlier clause that says the insurers are allowed to just make payment?

MR COOKE QC:

I say that this confirms the meaning of the earlier clause, that the policy was a repair or reinstate after the earthquake indemnity sum cover and what this note is doing is saying – and inserted by Vero – when we have this obligation to repair or reinstate we'll only do it to this particular standard because we appreciate that with heritage buildings, repairing or reinstating them with all their historic or heritage features, can be extremely expensive. So we want to limit obligation so that our repair and reinstatement obligation is of the more confined character of reasonable equivalence. So I don't say it trumps, Your Honour, Justice O'Regan put it to me, I say it just confirms the machinery of the earlier policy that I –

O'REGAN J:

But the net effect of it, you say, is that it's not an indemnity value policy at all, it's a replacement policy with a maximum of 1.605 million.

MR COOKE QC:

I say it is an indemnity policy calculated, or measured, on the basis of the costs of repair or reinstatement.

O'REGAN J:

That's just a contradiction in terms, isn't it? I mean it's either an indemnity policy or it's a replacement policy, it can't be both.

MR COOKE QC:

Well we then get caught up in wording. You can call it whatever you like, but the parties are free –

O'REGAN J:

Well the policy calls it an indemnity clause.

MR COOKE QC:

Yes, and then explains what that means in its more detailed terms and machinery. So the parties are free to agree on what, how a person is indemnified, and just because they've used the cost of repairing or reinstatement as the means of indemnification, doesn't mean it's not indemnification. It's just a means by, to find their bargain, we will indemnify you by repairing or reinstating the building, but only to the equivalence that's described in this clause, and subject to the indemnity value limit.

McGRATH J:

This special note to me looks like a pretty discrete and separate provision that applies only because of the mistaken assumption of heritage classification C. I don't see how you can draw on it as context for interpreting the earlier substantive indemnity provision.

MR COOKE QC:

Well it is a clause directed to this particular building and what the insurer's obligations are and it is an important limitation on what the insurer's obligations are in relation to that building. So I think it's difficult to say that that doesn't have any meaning in terms of what the promise of indemnification is.

McGRATH J:

It seems to me it's directed to the fact that in respect of certain repairs the special features of the building that are part of it being as they thought a heritage building will create a risk for the insurers that they're controlling by this provision.

MR COOKE QC:

Yes.

McGRATH J:

Now I don't see how it provides you with the further assistance you draw on to interpret the earlier provision I referred to.

MR COOKE QC:

But not, first of all not just repairs also reinstatement of the building.

McGRATH J:

Yes, yes.

MR COOKE QC:

And surely it does assist in understanding what the policy was contemplating because it is purporting to limit by special term what would otherwise be the obligation. So if they hadn't got that note in, they would have to repeal reinstatement with all its heritage attributes. So they put that in because of that implication of the policy to limit that or control that.

McGRATH J:

Thank you.

MR COOKE QC:

Now there is also no dispute that that is precisely why that was done and it was pleaded in Vero's defence and Vero called the broker, Ms Austin, to explain why this clause had been inserted in the contract, and it may be helpful just to go to her evidence. If I can invite Your Honours to go to volume 2B of the case on appeal. Volume 2B at page 795. You see at the bottom of page 795 she gives evidence that she prepared the quotation slip and that on 17 December 2009 Vero sent an email asking for the following wording being put on the placing and we recorded it as requested. 13, my understanding of this endorsement is that it is applied to older historic buildings so that the insurer cannot be forced to source or pay for old or difficult to obtain building products where a more reasonable alternative is readily available, for example, pine timber as opposed to aged rimu. I don't recall specifically whether I discussed this with Ms Yates and that's the person at Prattley.

So she explained what the reason for that was to limit what Vero would otherwise be obliged to do and I took that up with her in cross-examination at – I don't suppose much addition was gained by this but at 817 of the case if you pick it up at line 30 I point out that paragraph 13 of her evidence and over the page at the question, "Do I understand from what you say in your paragraph 13 that the point of this clause is that without it the insurance company would have to appeal to reinstate the building using exactly the same historic materials? So whilst that potentially could be the case I understand that this particular endorsement is really just to clarify an issue that could very well be raised and the issue is whether the insurance company, when repairing or reinstating the building, whether they're obliged to repair and reinstate it using the old materials." "Correct but they're expensive. You'd have to go back and use those old materials." "The purpose is, as you understood for this clause was, in a sense, to mitigate that potential financial implication that the insurance company would only have to pay for equivalent materials when repairing or reinstating the building to its former state. "Is that how you understood it?" "Yes." "Was it your understanding that reinstatement would apply when the building was destroyed?" "Yes."

Equally, I took that up with Mr Cherry of Vero about whether that was the purpose of the clause and in the same volume at page 738 a similar sort of cross-examination. You'll see at the top of the page a special note. "The equivalent was a special condition that Vero sought to have and produce because of the heritage character?" "That's correct." "And it was inserted because in the absence of a special note Vero would be required to repair or reinstate the building in exactly the same form with its heritage characteristics?" "Correct, yes. It was supposed to be a limitation under the policy for that reason."

So I don't think there's any doubt that the whole object of this was to limit and I don't say this clause creates an obligation to repair and reinstate that wasn't there in the first place. What it demonstrates is the machinery, the policy contemplated repair or reinstatement on that basis. This clause was inserted to mitigate for the insurer the costs of that.

Now, as I understand my learned friend's argument in terms of what the special note means, he says that it only applies if the Vero elect to meet the indemnity by that way.

But the problem with that is that can't be found anywhere in this language. There's nothing in the language of the special note or indeed the policy generally that says if we elect to do this we'll do it on this basis only, but if we elect to pay it'll be completely different.

That also makes no sense of the insertion of the special term into the policy. Vero's own case was this was inserted to limit the liability that it would otherwise have. But if they say, well, that only arises if we elect it, it makes no sense because you just wouldn't elect to so build it. You would just make the payment on the alternative basis. It makes no –

GLAZEBROOK J:

Well it does make sense if you get payments on a different basis and then you can elect but you elect with not such onerous obligations. So it makes some sense because…

MR COOKE QC:

Yes, I accept you can make some sense of that but it's not the obvious implication you would take from the insertion of a special note to mitigate the obligation otherwise, and it would seem odd if you could simply avoid that obligation just by making payment on some other basis that's not described in the contract.

GLAZEBROOK J:

Well the argument against you is that payment of indemnity brings in the meaning of indemnity.

MR COOKE QC:

Yes.

GLAZEBROOK J:

Which I've just had a look on the Internet and you can look up on the Insurance Council's website, or whatever, what the difference between an indemnity and a replacement policy is. So the argument if payment means payment of indemnity or if the insurer elects they can reinstate presumably only doing so if, in fact the reinstatement is less than what the payment of indemnity would be.

MR COOKE QC:

Yes, that's the argument.

GLAZEBROOK J:

The argument against that I suppose is well, if you're Joe Bloggs, how are you supposed to know what indemnity means, can you take into account the

insurance business view when you're not in the business of insurance as a background factor.

MR COOKE QC:

Yes and to that I add also that there's nothing, you can go to all that old case law about what being indemnified means, but they all say there's no problem with whatever indemnification is, being subject to your contract. So indemnification doesn't have a fixed standard meaning that you assume must be applied when you use that word in a contract. It is all subject to the machinery in the contract, and particularly when there is no reference at all to how you would calculate an indemnity by payment on some other business, other than the machinery that's set out here, I say the suggestion you should be looking at the old English cases to decide what your contract is, doesn't really ring true. And the cases that have dealt with these issues recently in this Court and the Court of Appeal recognises that what an indemnification means is all subject to the policy terms, and as I began with, there is nothing inherently wrong with an indemnification being based on an agreed indemnity value, calculated by the cost of repair or reinstating the building, but subject to that (inaudible 10:58:11).

One reason why that is, that must be particularly attractive, is it makes real sense of the bargain struck between the parties. It puts appropriate emphasis on the agreed indemnity values the parties set out. Prattley would understand what cover it had on which it pays its premiums.

O'REGAN J:

But Prattley did understand what cover it was. It got advice from Anthony Harper telling it what it was.

MR COOKE QC:

Well –

O'REGAN J:

So I mean I just don't see how there was room for misunderstanding. That's what it thought it had, that's why it settled.

MR COOKE QC:

It is true that Anthony Harper gave that advice and on the basis of that advice Prattley thought that its entitlement was market value. But when they –

O'REGAN J:

But it was pretty orthodox advice, wasn't it, given that it was an indemnity policy?

MR COOKE QC:

Yes, I guess so. Again going back to the previous point about what people really understood insurance policies to mean immediately following the Canterbury earthquakes and before they really get to the nitty-gritty of them. I'll put it this way, perhaps not surprising that a firm gave that advice, but that doesn't mean that's what this policy meant, and when the trustees of Prattley were told that the cover was just market value, they did indicate some surprise if I could take Your Honours to volume 3A, page 1892. At the bottom of that page you get the report to the trustees filed – the staff members who have been dealing with Vero, AMP, and you see at the bottom of that page, in that email, second to last – the first paragraph is a reference to the meetings with AMP, but with the Towers, second to last paragraph, "The insured indemnity value was $1,605,000.00. The policy states that it is payable on a new indemnity valuation and we have checked that this is in fact the legal position in regard to our policy." That's the reference to the discussions with Vero and then checking it with Anthony Harper. And then you see in the middle of the page Bruce Irvine says, "So the insured indemnity value on which our premiums etc have been based for all these years was just a fiction? If the value can only get to $1.050m then I assume we have no choice but to accept it. But I do find it interesting that there was never any dispute around us stating a value of $1.6m in our insurances. You have my begrudging approval."

GLAZEBROOK J:

Was there any evidence as to how that 1.6 was set?

MR COOKE QC:

No. There's no evidence of how that figure was first inserted.

GLAZEBROOK J:

Well it can't have been plucked out of the air, can it?

MR COOKE QC:

No, presumably not. But in any event it's the agreed indemnity –

GLAZEBROOK J:

Well there's nothing to suggest that it wasn't what they thought was market value, was it?

MR COOKE QC:

There was no evidence of that, no.

GLAZEBROOK J:

Or on some other –

MR COOKE QC:

Or replacement costs, or depreciation costs or – in some ways you understand the argument for Prattley is to say look, what you've actually just go to do is apply the terms of the policy as set out. There's an agreed indemnification calculated on the cost of repair or reinstatement up to that figure and you pay your premiums on that. I think really –

GLAZEBROOK J:

But what does that mean exactly, an agreed indemnification figure? That's the difficulty, isn't it?

WILLIAM YOUNG J:

It sounds like an agreed value, but it's not.

MR COOKE QC:
No.

GLAZEBROOK J:
I was just looking at the wording of this to see if we got anything from that. But you don't really get anything from the schedule in terms of what that might mean because it's quite odd terminology. Total building sum insured, total sum insured.

MR COOKE QC:
And as I said earlier I think these terms are all used interchangeably. It's the earthquake cover they had for the building. Which is what Mr Irvine is saying. Oh, so we only get what it's worth now. Why, we had a $1.6 million agreed earthquake cover sum. Why aren't our buildings being knocked over. And this is without any knowledge of this reinstatement of insurance. This is purely on the assumption it was just one claim.

GLAZEBROOK J:
If it's gone you should get the whole lot is the…

MR COOKE QC:
Yes. Is the thinking. So I say that, you see in here two mistakes, one that it's based on market value and not the agreed indemnification and secondly, no one's paid any attention to the automatic reinstatement insurance clauses.

Now this way in which the policy works also deals with the concept of depreciation or betterment, which I accept is frequently raised in the concept of indemnity –

GLAZEBROOK J:
Can we just go back before we go onto that in terms of something that partially happened. What's the payment for that? Well I'm really coming back to what "payment" means. So say there's been a partial event, coming back to perhaps just bolstering your argument in terms of what "payment" means.

If you have a partial event what does that mean then in the context of that policy. It does seem it would have to be either repair it or payment for the repair. It doesn't make much sense to say payment means something different in the context of a repair, does it?

MR COOKE QC:
No, in some ways –

GLAZEBROOK J:
But what could it mean otherwise.

MR COOKE QC:
That foreshadows a wee bit what I'm going to say about depreciation betterment but I don't think you can say that there's some kind of – the only way you can met a repair obligation, and that's what we say arose from the September event, and then the December Boxing Day event, because it was found that the building was repairable after the December event, so we're in a repair coverage context, so there's repair, so we've got repair/repair. It's difficult to see how that obligation can sensibly be said to arise other than by either repair or payment of the cost of repairs. So it must mean that.

GLAZEBROOK J:
Which then strengthens your argument that payment in the case of a reinstatement must be payment for replacement.

MR COOKE QC:
Yes. Where you've got –

GLAZEBROOK J:
Because otherwise it's payment – but still begs the question possibly on payment for reinstatement on what basis I suppose.

MR COOKE QC:

I suppose. But again what we're suggesting arises there is that naturally you get repairs or cost of repairs for those two first events, but because of destruction there's some other basis of cover not set out in the contract, notwithstanding the contract does address the concept of destruction by saying if the building is destroyed our liability, well defining what a destruction is and saying our liabilities for repairs cannot exceed what our liability would be for destruction. So it's got machinery in it dealing with the concept of destruction, and then you've got the words of the policy dealing with the bill. Special note refers to repair and reinstatement, repair or reinstate the policy to that standard, and then there's the general indemnity clause which talked about repair or replace. So the policy is contemplating both repairing the damage caused by earthquakes and it's also contemplating reinstating as a consequence by quite detailed machinery, but subject to the earthquake company limitation, and you pay your price – that's the bargain and that's what you pay your premiums on. And there's nothing wrong with that bargain, you can revert to concepts, what indemnification mean and all sorts of literature but there's nothing wrong with that as a contractual bargain. It makes complete sense. It make this policy work as the parties must have intended when you look at the plain terms and the machinery and how it works.

GLAZEBROOK J:

Sorry to have…

MR COOKE QC:

No, no. And that also responds to this question about whether you need then to do a further deduction for betterment or depreciation because the parties have agreed how Prattley is indemnified here, that is by repair or reinstatement or the cost of repair or reinstatement. So when you go and do a repair you don't suddenly send Prattley a bill for depreciation or betterment arising because you've repaired the building. It's taken care of, the concept of betterment, by that, the machinery I've taken the Court through, you have an agreed indemnity sum limitation. That's what limits to you indemnity only.

You don't do an additional deduction for depreciation or betterment that you don't find anywhere in the machinery of the terms. You just apply the contracts machinery for working out how the insured is indemnified and no more than indemnified.

All of that makes particular sense when you are dealing with a heritage building, or when the parties thought they were dealing with a heritage building, or classified as a heritage building. Obviously it had attributes that gave it heritage appearance, if I can put it that way, because with a heritage building you get into quite difficult questions about betterment and often we talk about betterment or depreciation is that when you get new for old you're better off and therefore you need to do a deduction for depreciation. But with a heritage building you get into issues of considerable debate about whether new is better than old because when you get new, you've lost all those heritage, or can lose all those heritage attributes of the building, which you are insuring you're getting a new replica rather than your old building. So it becomes a matter of intense debate about whether you are really better. Is new really better than old, because old was one of the special attributes of the property leading you to the heritage classification. So it becomes a very debatable point and that's exactly what you find answered in the special note. So they say, well, what we will do is we'll provide you the new equivalent looking building rather than having to repair or reinstate your old building with all its attributes that gave it its heritage status. So again the parties are turning their mind to the ideas of betterment and depreciation and answering that question in those two respects. One, because they've answered it by having the agreed indemnification. Secondly, because they've dealt with it by expressly confronting this issue about whether new is better than old, by having the clause, so what we will do, it's all we have to do is provide you something that's equivalent. We'll go and get the old plans and we'll give you something equivalent looking to your old building, and that's how the parties, again, have addressed that question of betterment or depreciations.

So that's what I say about – and in the written submissions made reference to the fact that this, the use of historic or old materials in buildings is an issue

about the insurance of buildings and I pursue that kind of issue with Mr Stanley, there is, that as well as Mr Cherry in cross-examination.

So Vero's real complaint here in its case is that Prattley is seeking to convert an indemnity policy into a reinstatement policy and with respect that is a criticism that doesn't really have real foundation, and you can see that too, if we take away the confusion that's caused about the multiple events, let's assume there was just the one event which destroyed the building in February 2011, and the evidence is that the reinstate this building would cost something between 6.7 and seven point something million dollars and Prattley would be confined to $1.6 million because that would be the limit on its indemnification. So you can see that what Prattley is saying is that we're not converting an indemnity policy into a reinstatement policy at all, we're just getting –

WILLIAM YOUNG J:
But that might be regarded as a replacement policy with a cap.

MR COOKE QC:
That could be, you could describe it like that. You could divine a policy putting it that way around if you wanted to. Parties are free to describe their bargain in whatever way they wish. And the – but there shouldn't be this kind of, term of art that must be applied to insurance contracts, to say that it must be either a replacement or indemnity and they never are the same or they never can be the same. Almost set in stone like established by statute. You must only be indemnified by an indemnity policy and we go outside the policy to know what that means. It's a bargain. It's a contract. The parties are free to enter their bargain and reach it accordingly. So you could turn this policy around and call it a reinstatement policy with a very low limit, bearing in mind how much it would cost to reinstate the building, you could call it that. Parties are free to bargain as they wish, but that's not what we've got, we've got indemnity policy.

O'REGAN J:

But why would they use the word "indemnity" then, if they wanted to have a reinstatement policy, why would they call it an indemnity policy?

MR COOKE QC:

One of the answers to that would be because Vero wants to sell different products, so it has one product for indemnity, and you pay your premiums on that. You get your other product for reinstatement, which as I've taken Your Honours through would apply if you actually, you have to reinstate, if you actually do reinstate, otherwise you just get indemnity value, and you pay a higher price for that product because you're getting higher coverage.

O'REGAN J:

Well that's just a higher cap. That's just a reinstatement policy with a higher cap.

MR COOKE QC:

Yes, but there's nothing wrong with that.

O'REGAN J:

Yes, but I mean you can do that without using the word indemnity in what is a reinstatement policy.

MR COOKE QC:

You could do that without using the word indemnity. You could completely eliminate the word indemnity and reinstatement all together from insurance contracts. Perhaps they would be much easier to understand.

O'REGAN J:

But they actually did use the term indemnity, didn't they?

MR COOKE QC:

They did. So we've got to work out what did they mean by that in the contract that was entered.

ARNOLD J:

Part of the trouble is the notion of indemnification covers both replacement and what is called in technical terms indemnity cover. I mean if somebody's building is completely destroyed and they've got replacement cover it's rebuilt. It's perfectly acceptable to say they've been indemnified for their loss. So the expression is a broader one than indemnity used in the insurance context which typically has a narrower meaning. Just while I've interrupted, one of the interesting things about this policy is it's typical of these policies which is a booklet, effectively, with a whole lot of policies in and you kind of go through and take which one you want, and then at the end there's a series of general definitions, which I assume, I haven't worked my way through it, apply to all of the different forms of cover, unless they expressly say they don't. But what is interesting on the market value approach argument about indemnity, it does define market value at page 1544, but then as you look at the particular insurances, and I haven't gone through all of them, but I took the most obvious, at 1504 they say, "We will pay the lesser of the market value, or the sum insured." So in other contexts within this booklet they've used the concept of market value, and defined their liability by reference to it, which rather suggests if they haven't used that concept in the particular cover we're talking about, then that's not what they meant.

MR COOKE QC:

Yes, we did identify all those instances in the argument in the lower Courts. I don't think we've put them in our written submissions here, and I think Your Honour has identified Commercial Motor, which I think was the one that was the most obvious illustration of that. There are other illustrations too with similar point in the policy where there, the policy specifically addresses depreciation and deductions for depreciation, similar sort of thing. I could provide the Court with the references that we relied on in the lower Courts for those terms rather than the Court going through all those, going through the policy itself if it would be of assistance. But, yes, where market value is a alive and kicking, it says so. Where depreciation is alive and kicking it says so too. So that's a further little buttressing of how the whole scheme works in my submission.

GLAZEBROOK J:

It might be useful to have those references if your friend doesn't object.

MR COOKE QC:

Well I promise not to refer to something I haven't already referred to but they were in the previous submissions. So what I was saying was this really isn't a complaint that we're converting indemnity into reinstatement. Whatever those words really mean. And the other thing, Your Honour Justice Arnold's point, is that word "indemnity" you know, it's the kind of word that we as lawyers think it has a precise, with everyone using it as if it has a precise meaning, but actually it's probably quite a, not necessarily a loose meaning, but a meaning that depends considerably on the context in which we use the expression. It takes its colour from things, and I, with respect, don't think there's anything, any moment can be put on the fact that this could also be described as a discounted reinstatement policy, rather than an indemnity policy. You can devise policies using whatever language you wish.

WILLIAM YOUNG J:

Can I just ask you, the reinstatement MDO33 at 1492, I take it that doesn't apply to this because it's presumably fire or other accident or something.

MR COOKE QC:

Yes. One of those is for earthquake and the other is for property, I think.

WILLIAM YOUNG J:

This applies to the articles which should properly have an excess indemnity value shown in the schedule.

MR COOKE QC:

Yes. You'll find that that is, the wording of that is very similar – it might even be identical to the wording of MD022 on 1490. MD022 is earthquake full reinstatement cover. MD033 is other reinstatement cover. Now, I confess I've not gone through this to find any meaningful differences. My learned

friend has just indicated to me that the EQC payment might be the material difference between the two.

So Vero's real complaint about this mechanism of indemnity cover isn't really reconverting indemnity to reinstatement because of this $1.6 million cap. The real complaint is that on the evidence Prattley gets up to something like 3.8 million plus GST over the three events, getting it above the $1.6 million because of the way in which cover reinstates and if it weren't for the fact that it was over three events you couldn't see much in the criticism that we're converting indemnity to reinstatement if we've just got a single payment of 1.6 million if the reinstatement cost was actually 6 or 7 million. But that suggestion that there's something wrong about the claim because of the reinstatement of insurance clause doesn't really have any substance, again, because that is clearly what the policy provided for in terms that are even much clearer than they were for the policy that was before this Court in *Ridgecrest* where in *Ridgecrest* the Court accepted that the cover reinstated in the limit could be exceeded and can I just begin that by going through some of the key clauses in the policy that determined this and the first is at page 1479. It's the clause that I foreshadowed –

McGRATH J:
You're taking us to the clauses that show this is the same as *Ridgecrest* in that respect?

MR COOKE QC:
Yes, although the clauses that are in this policy largely weren't in *Ridgecrest*. Our policy is better for Prattley than the *Ridgecrest* policy was.

WILLIAM YOUNG J:
What page should we go to?

MR COOKE QC:
Starting with 1479. So this is the clause I hinted at when I started the indemnity on the left-hand column. In that third paragraph, "Subject to the

reinstatement of amount of insurance extension our liability will not exceed the total sum insured." Now, the significance of that is that it's clear from that that Vero sees that its liability could be for more than $1.6 million because of the reinstatement of the amount of insurance. We then go through to page 1482. Clause 19 on the right-hand side and as I understand *Ridgecrest* we didn't have this express clause in the Ridgecrest policy either but in the event of damage for which a claim is payable under this material damaged section the amount of insurance cancelled by such damage will be automatically reinstated from the date of damage. So there is an automatic reinstatement of the $1.6 million cover immediately following the damage done by the first event.

So in the September event, it reinstates for the purposes of the December event. After the December event, it reinstates for the purposes of the February 2011 event.

Then further at page 1489 and we're now in the earthquake indemnity clause of the policy, in this section on the right-hand side special provisions, claim adjustment, I think adjustment is one of these uses of art in the industry. This is talking about calculating what you, what the insurers are obliged to pay in respect of each site at which each property is located. I was just commenting about the word "adjustment" is a slightly, you know, you sometimes want to know what they mean but I say it's calculation because we're going to go through and calculate what's payable. In respect of each site at which insured properties are located, each loss or series of losses arising out of one event will be adjusted separately or calculated separately and then there's the reference to need of salvage, the amount paid by EQC, there's a reference to personal property and then the concluding words, "A series of events arising from any one cause during any period of 72 consecutive hours or between. It's one event for the purposes of applying the excess. But what this clause makes it clear if the other two hadn't already is that each claim is to be separately assessed and paid out. They do not merge into one event. The cover reinstates and is in place for the later events when they occur and unlike *Ridgecrest*, arguably, the parties have quite

clearly in these terms set out the machinery in the contract that works out how this is to work.

There are two issues that this Court in Ridgecrest identified as arising in this kind of case. The first issue was the issue of double-counting for the same damage and the second issue was the fact that the limit, total limit, was in a sense avoided and what I say here is it's absolutely clear that the limit resets and can be exceeded by a series of events that have to be separately adjusted and calculated in accordance with the policy.

In terms of the other issue, the double recovery, we accept you cannot recover twice for the same damage and so the cost of remedying the September damage and the cost of remedying the December damage is deducted from a total reinstatement cost at February 2011. So we don't recover twice for the same damage. So we get the cost of repairs for September. That doesn't disappear under the policy. We get it. The cost of repairs for December, the building wasn't destroyed in the High Court findings. That's where the $1.6 million cap bites because of the extensive damage. You get only $1.6 for that and then the cost of reinstatement for the February event excluding damage that's already been dealt with by the previous two claims and then subject again to the $1.6 million limit and that's where you get 1.6 million plus 1.6 million plus the – I think it was 192,000 for the September event. So that's how we say that operates and after the adjournment I'll show how that's consistent with this Court.

GLAZEBROOK J:
If you just go through the arithmetic after the adjournment, as well.

MR COOKE QC:
Yes. That's in the High Court judgment section.

GLAZEBROOK J:
Yes, I realise that and I've seen it but it would be quite useful going through that again if that's – because there is still a dispute over that.

MR COOKE QC:

I don't know whether the dispute is about arithmetic. I think the dispute is about how you apply these clauses.

GLAZEBROOK J:

Right. In that case we don't need to do that.

WILLIAM YOUNG J:

Okay, we'll adjourn.

COURT ADJOURNS 11.30 AM

COURT RESUMES: 11.46 AM

MR COOKE QC:

Before going to *Ridgecrest* itself I will just deal with the evidence about the cost of repairs because it's important, I think, so the Court understands the position. Can I ask Your Honours to go to the High Court judgment in volume 1, beginning at page 136. I just wanted to identify the factual finding made by the Judge that following the December event the building was not destroyed within the meaning of the policy, notwithstanding the extensive damage that was done, and you find that at paragraph 109 of Her Honour's judgment, where Her Honour finds it was only after February that the Worcester Towers could have been said to be destroyed within the policy definition. Then in terms of the costs involved in the two claims for repair and then reinstatement, Her Honour essentially accepted the evidence from Vero's experts on that question and perhaps if I take Your Honour's back to page 131 of the case, the passage begins at 84 but first in 92 and 93, though I think 92 is the most important thing to deal with September, "Accordingly, I accept that Mr Kahanek's repair scope," Mr Kahanek was Vero's –

GLAZEBROOK J:

Sorry which…

MR COOKE QC:

Paragraph 93. Again we're dealing with September here. "I accept Mr Kahanek's repair scope, which was priced by Mr Robert Spence," being the Vero expert, "and concluded that the repairs from the September earthquake totalled $178,000 plus GST, is reliable, and is the most accurate estimate." Then in 94, we're moving to December, "Similarly, but with particular deference to the opinion of Mr Henry, I am satisfied that Vero's assessment that the damage caused in the December earthquake involved further repair work costing $3,739,000 plus GST, is reliable." Mr Henry a careful witness, supported by eye witnesses, much greater damage, so that's December. Then 96, "At this stage it is common ground that the building would involve a rebuild at a cost of between $6,243,000 including GST and $7,665,610 including GST, which, in either case, well exceeded the $1,605,000 indemnity cap in the policy." So that's where we get the numbers which are summarised in the written submissions of repair, repair, reinstate with obviously the $1.6 million cap operating the material limits on December and February.

I don't understand there to be a dispute about the factual issue on that. In the end the High Court Judge really accepted Vero's experts rather than Prattley's experts on those question because Prattley had sought to argue there was actually more damage done in September than that, but that's not what the findings were.

O'REGAN J:

There is a dispute about whether it was destroyed on Boxing Day, though, isn't there? Is that not in dispute? I though the Court of Appeal…

MR COOKE QC:

I don't recall that. The High Court certainly found it was destroyed within the meaning of the policy only after February.

O'REGAN J:

Okay.

MR COOKE QC:

I don't recall that being factually challenged. And so I say, we say this is an application of the principles outlined by this Court in *Ridgecrest*, and in fact the position is clear that in *Ridgecrest* because we actually do have very clear terms describing how this works, and if I could just take you briefly to *Ridgecrest*, it's in our bundle of authorities at page 166, and going on to page 189, paragraph 52 of the judgment. I'm just going to read three paragraphs of the judgment and I apologise for doing that but 52, "The damage caused by the earlier earthquakes (and the associated diminution in value) does not merge with Ridgecrest's entitlement under cl C2 in relation to the final earthquake. This is simply a consequence of the policy (a) resetting after the earlier earthquakes in relation to the building in its damaged state and (b) providing replacement cover for the building in that state. In this respect the position is analogous to that in *Lidgett*."

And then picking it up at paragraph 54, "We accept that the indemnity principle (which is a slightly awkward phrase in the context of a replacement policy) would preclude the recovery of more than the replacement value of the property insured. As we understand it, however, Ridgecrest is not seeking to recover more than the replacement value of the building," as Prattley is not seeking to do so here either. "If so, there is no double counting in that respect. We accept that this principle might also apply more broadly, for instance in relation to any separately identifiable building component which is first damaged and then destroyed by successive events. In that situation, the insurer's liability would be confined to the replacement cost of that building element so that any diminution in value to that element resulting from an earlier event could not be separately recovered." And that has not been suggested in this case.

"Leaving aside the possibility of double counting of the kind just discussed, the indemnity principle is only engaged if $1,984,000 is deemed to be the replacement value of the building so that payment by IAG of that amount (less some deductions) to Ridgecrest is to be regarded as the equivalent of payment of the replacement value of the building." And that's, so in relation to

the 1.6 when we know that actually the replacement cost of this building is of a much higher order than those amounts. So we say that we're –

GLAZEBROOK J:
What say we look at the contract as more an agreed indemnity value contract, does this principle apply in those circumstances? So it's agreed that the indemnity value is only 1.6 as against it being a replacement value policy as such. So it's an agreed market value policy. Does *Ridgecrest* apply in those circumstances?

MR COOKE QC:
Your Honour will understand why I don't like answering that question –

GLAZEBROOK J:
Yes, I can.

MR COOKE QC:
– because the premise of it makes me have to accept a different policy from the one that I say we have. The difficulty in that kind of case would be to understand what that means, agreed in market value concept when you also have reinstatement clauses of that kind, because reinstatement clauses, there probably would still be room for multiple events to exceed that agreed value, because of those reinstatement clauses, you have to give meaning to those clauses as well. So I'm not sure you have to give effect to both sets of terms in the contract, so even in that circumstance you have to have multiple events in my submission.

So the only last point I wanted to make on this first main question in the appeal, is to respond to the pleading point my learned friend has taken, and Your Honours would have seen that he says, quite rightly, that in our amended statement of claim we did not actually say that we were advancing the argument that there was no betterment of depreciation deduction to be taken off and I accept that we didn't plead that and neither did we seek to amend our pleading during the trial. But what was always a live issue in the

trial was the meaning and effect of the policy, obviously from a legal point of view, and all relevant evidence about that was called, including the meaning and effect of the special note and why it was inserted into the policy. Indeed, it was Vero who called Ms Austin as the witness who gave evidence as to why that clause was inserted so I don't accept that there is any true prejudice that could be said to have arisen by the fact that we argued what this policy meant only in closing or not in opening or in an amended statement of claim. This was always a live issue in the case so I don't accept there's been any prejudice by it not being precisely pleaded in a statement of claim and after all it is a question of what the policy means on the face of the document.

O'REGAN J:

But isn't the argument effectively going against the evidence you called at the trial? I mean, the evidence called at the trial was there is depreciation but it's only a small amount. So in effect aren't you impugning your own witness?

MR COOKE QC:

Well, we did call someone who we thought was an expert who the Court said wasn't an expert who did an assessment based on elemental depreciation. I accept that. But I don't think that precluding us from arguing what the policy means. In a sense, when you prepare for a trial you could call all sorts of witnesses to deal with all sorts of issues. You don't – sometimes a case doesn't have complete uniformity because you're covering all aspects you might want to advance in your argument so the calling of a witness dealing with depreciation on a particular basis doesn't, didn't preclude us arguing actually in the terms of the policy there is no deduction.

WILLIAM YOUNG J:

It was a little bit – I mean, if you look at page 75 of the case, that's your pleading of what the policy entitlement was, which has avoided mention of the argument.

MR COOKE QC:

I accept that. I accept that on the pleading it's not apparent but I don't think there was any surprise in the argument unfolding during the trial.

WILLIAM YOUNG J:

Was the pleading point taken in front of Justice Dunningham?

MR COOKE QC:

Not that I recall.

WILLIAM YOUNG J:

In the Court of Appeal?

MR COOKE QC:

I believe it was mentioned that it wasn't pleaded but I don't understand – I don't recall the argument being advanced that Vero was prejudiced as a consequence. In the end, of course, it's a matter of what the policy says. It can be interpreted without it said to give rise to unfairness to Vero. So that's all I wanted to say on the first main question on this appeal. Unless Your Honours have any questions I was going to turn to the next question which is the application of contractual mistakes.

So in terms of that issue, there are – or maybe there were three sub-issues, whether there was a mistake at all, where there was inequality in exchange of values, and whether the contract makes provision for the risk of mistakes so that the act is excluded and I say that the key issue here is the third issue and again, as I started today, that issue is what the parties meant by their contract. We're dealing with a different contract now. We're dealing with a contract embodied in the release under the interim settlement agreement but we're trying to work out what the parties' bargain was under that supplementary contract. I'll deal with the first two issues first, was there a mistake, was there an inequality of exchange of values.

On the question of whether there was a mistake, I understand my learned friend's written submissions to accept that a mistake over the coverage provided by the policy is a qualified mistake for the purposes of this case, and with respect that is a proper concession, given that the Contractual Mistakes Act defines a mistake as including a mistake of law and includes the misinterpretation of a contract. Now you can't, of course, there can't be a misinterpretation of a contract you're entering, it has to be some other contract, but that's the situation here. A misinterpretation of a contract embodied in an insurance policy, where both parties misinterpreted it, thought the entitlement of Prattley was just market value, and didn't either see the repair or reinstatement obligation or the resetting of the amount of insurance, and that was how Prattley's entitlement was defined.

I think now I need then to move to the second issue, and that's under section 6(1)(b), the best version of the Act in the papers Your Honours have is in my learned friend's bundle of authorities because they put in the whole Act and for some reason we didn't, behind tab 1 of their bundle of authorities. So 6(1)(b) of the Contractual Mistakes Act, "The mistake or mistakes, as the case may be, resulted at the time of the contract – (i) in a substantially unequal exchange of values; or (ii) in the conferment of a benefit, or in the imposition or inclusion of an obligation, which was, in all the circumstances, a benefit or obligation with substantially disproportionate to the consideration therefore." It seems to me that those concepts in (i) and (ii) are driving at the same kind of idea. That because of a mistake there has been a significant financial consequence that has flowed.

McGRATH J:
How does that link up with at the time of the contract, when you talk about a consequence that flows?

MR COOKE QC:
Yes, and I, that question, Your Honour, does introduce what the real issue is between my learned friend and us, because my learned friend says, look, it's not, he accepts that if it was repair/repair/reinstatement, that's $3.8 million

plus GST, which is substantially more money than the just over a million dollars paid under the settlement agreement, but he says, look, it's not the absolute value of what the entitlement was that has been relevant, because of the words at the time of the contract. It's the understanding of what the value was at the time of the contract, or the understanding of what that value would have been at the time had they appreciated that the true entitlement was repair/repair/reinstatement. But in the end there can't be real substance to that point in the sense of it reducing that three point whatever it is million down to a lower level because in this contractual framework Vero, the insurer, had the obligation to assess what the proper payment out to Prattley was, and when they thought the proper basis of a payment was a single payment of a market value of a building, they instructed a valuer to engage in an assessment of what the market value of the building was, and there was discussion about whether that was a fair value in a claims assessment process. If they had understood that the proper entitlement was cost of repair, cost of repair, cost of reinstatement, a similar exercise would have been required to be undertaken. A proper assessment.

WILLIAM YOUNG J:

I suppose what slightly troubles me, and I find it hard to put in words, is whether, we should be measuring whether there was a mistake by reference to a final decision in this Court as to what the policy means, or whether we should be looking at it in terms of what the people at the time thought about it.

MR COOKE QC:

Well the one reason why you can't do it in the latter sense is because that reintroduces the mistake as –

WILLIAM YOUNG J:

Well, why say it's a mistake? I mean, they may say how can we possibly know what a Court is going to say in the future? We've got to deal with a range of contingencies and this is our assessment. Now, that's not necessarily a mistake. It may not be an accurate forecast of what a Court might later do.

MR COOKE QC:

Well, I think, with respect, that's an artificial way of looking at it. What the Act is saying is a misinterpretation of a contract is a qualifying mistake.

WILLIAM YOUNG J:

Right. Well, let's take perhaps a point that we can discuss and dismiss. Did I take it that if the only issue was whether the policy should have responded with a payment of 1.4 million for depreciated replacement value or a payment of 3 or 400,000 for market value, you wouldn't be saying that the payment of –

MR COOKE QC:

If that was the range I wouldn't be, no.

WILLIAM YOUNG J:

So you've really got to get into a completely different ballpark before the Contractual Mistakes Act can sensibly be applied.

MR COOKE QC:

Yes, subject to one complication which is if they have thought that the correct assessment was depreciated replacement cost and not market value, what would have happened is that when Vero instructed its valuer and produced the valuation saying that the depreciated replacement cost was 1.4 million then that's what Prattley would have gone for rather than the $1 million or the lower market value figure. So if we're putting ourselves back at the time of the contract, if the true mistake was this depreciated replacement cost, not market value.

WILLIAM YOUNG J:

I find it hard to believe that a decision, a view as to whether it was market value or depreciated replacement cost could really be said to be a mistake. They must have known that both were on the table because they got valuations for both.

MR COOKE QC:

I can see that. Once I've identified the mistake as being a failure to appreciate the mechanics of the policy they've taken the Court through this morning. It's much easier to see how the Act applies but I do come back to my initial answer to Your Honour's question. Can you in assessing at the time of the contract take into account what will a Court do as to introduce the uncertainty about the interpretation? That's not permissible because we must identify what is the correct meaning of the contract and if the parties haven't made a mistake about the true meaning of the contract what would they have done.

WILLIAM YOUNG J:

Right. Well, they haven't anticipated the series of events line of argument that featured in *Ridgecrest*.

MR COOKE QC:

They haven't mentioned it at all, actually.

WILLIAM YOUNG J:

So they thought, "Well, I suppose it's possible we can say we've got three claims but no Court would be crazy enough to go along with that. We assess the prospects of this going that way as 1%." Would that have been a mistake? Probably not.

MR COOKE QC:

Well, I think the problem with that is it reintroduces uncertainty into the value assessment that arises from the error in misunderstanding what the policy required. So we have to neutralise – the whole point of this – the whole point of the question is this substantial inequality of exchange is to neutralise the effect of the mistake.

WILLIAM YOUNG J:

Why would that have been a mistake? Why would have someone who said, "Well, this is a line of argument but we don't think the Court will go for it," now,

that's a forecast about the future that turns out to be wrong but it's not necessarily a mistake as to the current situation, the situation at the time.

MR COOKE QC:

Yes, I can see that there would be some situations where that kind of thinking at the time a Court may conclude, well, actually, in the end it's not really a mistake at all. But that's not the scenario we have here.

WILLIAM YOUNG J:

I understand that if there's a completely different framework that should have been adopted which wasn't anticipated then you would say that they're settling what they thought was one sort of dispute but in fact there was another dispute there which they didn't understand and that's why you're outside the effect of the settlement.

MR COOKE QC:

That's exactly right although I don't like the word "dispute" but yes.

WILLIAM YOUNG J:

Because you say there wasn't a dispute as to basis? There was only an adjustment as to what that basis produced.

MR COOKE QC:

Yes.

O'REGAN J:

Well, does that make any difference?

MR COOKE QC:

Not really in the end except it's not appropriate, in my submission, to think of this like a settlement of litigation. It is an insurance settlement where the insurer is obliged to pay what's due to the insured and toing and froing in that situation.

O'REGAN J:

But insurance claims are settled by mediated outcomes or negotiated outcomes all the time. Are you saying basically every single one is a provisional settlement, depending on whether you can find someone to fund later litigation?

MR COOKE QC:

No, no, no, we only say that we can avoid the clause in the settlement that makes it a full and final settlement if we qualify the Contractual Mistakes Act.

O'REGAN J:

But doesn't that – if in the end the amount you settle for is too low, because some other lawyer comes and tells you you could have done better, do you say that's just open season to re-litigate?

MR COOKE QC:

That's not a fair characterisation of the events here. A fairer characterisation of the events is that neither side, neither Vero nor Prattley, understood how the policy worked.

O'REGAN J:

But if Prattley had you would have been arguing it should have told you, so you would have had the same argument, wouldn't you?

MR COOKE QC:

Sorry, I didn't…

O'REGAN J:

If Prattley had known this possibility and didn't tell you, you'd be saying, there's still a mistake –

WILLIAM YOUNG J:

Vero.

O'REGAN J:

Sorry, Vero, my apologies, yes, yes.

MR COOKE QC:

And, yes, because that would have been the mistake of the other type of side where Vero knew the other party was mistaken. The problem I have with both Your Honour's questions, and Your Honour Justice Young's questions, is they introduce this idea of uncertainty about what the correct interpretation of the policy is. Reintroducing that as a factor in the value analysis and I accept that there will be situations where you say, well, look, there was just a give and take on the risk of what a Court might say about something that's not really a mistake. But here the whole thing has misfired. They've got –

WILLIAM YOUNG J:

You say that they treated it as a very simple indemnity policy when in fact it was a policy that provided for cover that was quasi replacement.

MR COOKE QC:

Yes, and it involved a significant misunderstanding of what the policy required. And once you accept that proposition you can see that there was a substantial inequality of exchange.

GLAZEBROOK J:

The idea is that you weren't just negotiating differential and valuation ideas, you were doing it on a completely different basis from what the policy required –

MR COOKE QC:

Yes.

GLAZEBROOK J:

– assuming that we accept the argument on interpretation?

MR COOKE QC:

Yes.

GLAZEBROOK J:

So it's not merely saying well I think market value is 10 and you think the market value is 20, let's settle on 15.

MR COOKE QC:

That's right, which is kind of what the negotiations were here.

GLAZEBROOK J:

That's just an argument over a number not a mistake.

MR COOKE QC:

Yes.

McGRATH J:

I'll just bring you back again to those words "at the time of the contract". Isn't that, aren't those words there to stop people looking forward to ultimately correct results in any way, or to what ultimately turns out to be the position in any way?

MR COOKE QC:

Yes, but to what extent? So it is permissible to ask what would the parties have done at the time of a contract if they had correctly understood what the policy required, and that's why I say this context is important because Vero would have an obligation to properly investigate the concept of repair/repair/reinstatement and instruct experts in much the same way as they did here. So you do have to look at the bargain at the time, but this bargain completely misfired because the parties were just on a completely different plateau in terms of what policy contemplated.

O'REGAN J:

Does your argument depend on the fact that the disadvantaged party here was the customer, not the insurer? If it was the other way around, if Vero had paid 3,8 and it should have only been 1.4 or whatever, would Vero be able to argue mistake, or would you say it depends on Vero's obligation to the customer?

MR COOKE QC:

I think it would, the insurance company would certainly have an argument that the Contractual Mistakes Act applies. There is the additional machinery around this, and I took Your Honours to this policy having those Fair Insurance Code obligations including an obligation to provide a fair settlement. Whether that would mean that in terms of these discussions the insured and insurer are in different positions would have to be considered. But if there was an insurance settlement that had completely gone on the wrong basis, then there's no reason why the insurer can't seek to apply the Act. And as I've said in the written submissions, it really would be no different, in my submission, than the parties having entered into this insurance settlement about the wrong building. They thought they were dealing with one building when actually they got the wrong building. Or, closer to our facts, they'd actually got completely the wrong insurance policy, thought it was this policy, not that policy, and I say it's like this, and this is the policy the contractual mistake – if you make an error of that kind, that results in one party getting significantly less than what they would have otherwise have got, then it bites. If there's been either a mistake that was made by both sides, or one side made it and the other side knew, that's the policy of the Contractual Mistakes Act.

So I should just, in this context of the argument about whether there was any inequality of exchange, just refer to, because of the High Court and Court of Appeal were on different views on this point. The High Court said well if Prattley is right then there would have been, there was a substantial inequality of exchange. The Court of Appeal said not, but the Court of Appeal only said that in the context of its finding that Prattley's entitlement was a

single payment of depreciated replacement cost, and the evidence is saying therefore there's no real substantial inequality of exchange here because the depreciated replacement cost is there or thereabouts of the figures that were around at the time. They didn't address that question on the assumption that Prattley's argument on the first part of the appeal succeeds.

I hope I've addressed that question, the substantial inequality of exchange question. I figure it's related to the question about whether there is a mistake. Once you've identified exactly what the mistake is, then you can see what financial significance it had for the parties.

Now the main hot issue on this appeal is the application of section 6(1)(c). Not the most beautifully drafted subsection, you have to read the first parts of section 6, "The Court may grant relief to a party to a contract," and you've got the other two requirements, but then refer to, "Where the contract expressly or by implication makes provision for the risk of mistakes, the party seeking relief or the party through or under whom relief is sought, as the case may require, is not obliged by a term of the contract to assume the risk that his belief about the matter in question might be mistaken." It takes one of those provisions that you need several wet towels on your head to read several times before you – because there's too many double negatives, but I don't think there's any disagreement that this subsection has two requirements. The first is that the contract makes provision for the risks of mistakes, either expressly or by implication, and I say the words "makes provision for the risk of mistakes" is another way of saying there are terms of the contract, or provisions in the contract, that deal with the risk of mistakes. Although they can be implied, they don't have to be express terms. The second requirement is that there be a term of the contract that one party is to assume the risk that his belief about a matter in question might be mistaken. So the term of the contract deals with the matter in question that is the mistake. So the term that requires a party to assume the risk that his belief about that matter might be mistaken.

O'REGAN J:

Do you say that requires an allocation to a named party or do you accept the possibility that the allocation could be to either party depending on the circumstances? Because as I understand Mr Goddard's argument, he's saying the risk is on whichever party it's relevant to that both parties accept it, effectively, that if they're the one who misses out they've accepted the risk.

MR COOKE QC:

I think I would have to accept that if there is a term of the contract which expressly implies which deals with the risk of mistakes and divides it, I suppose, between both parties that that would be sufficient.

ARNOLD J:

I just wonder about that, actually, because one of the possibilities for a mistake, a qualifying mistake, is a unilateral mistake, a mistake made by one party that's known to the other and would be a bit rough, I would have thought.

MR COOKE QC:

Yes. So maybe I have to withdraw that in a swift concession. That couldn't be right, could it?

It is – what this clause is definitely doing is preserving freedom of contract in that sense that the parties can regulate mistake for themselves and say no, there's going to be no prospect of mistake undoing this contract. You take the risk.

So it does preserve freedom of contract and I have – I say that there is a strong parallel with the provisions of the Contractual Remedies Act which allow the parties in their contract to regulate the matter of pre-contractual misrepresentations so just as the Contractual Remedies Act deals with that with pre-contractual representations the Contractual Mistakes Act 1979 deals with pre-contractual mistakes. Slightly different language is used in each statute. The Contractual Remedies Act talked about the representation

inducing entry of the contract. The Contractual Mistakes Act talks about mistakes that influence the entry of contracts. But we're dealing with that type of subject matter, that is, the entry of contracts being influenced by false statements made in the case of the Contractual Remedies Act or mistakes of a fundamental kind. Either one where one party knows the other party's mistaken or where both parties have made the qualifying mistake.

The key point that we make here is that the parties here did not address in any way that kind of subject matter. They didn't address the topic of pre-contractual representations, warranties, basis upon which people were entering contracts, in a way that could be said that the parties have made provision of the risk of mistakes. It's just not part of the bargain.

McGRATH J:

How do you account for the provision in the agreement that it covers known and unknown claims? You have an unknown claim here, don't you, that's based on precisely the sort of provisions that you're now complaining weren't taken into account.

MR COOKE QC:

I, with respect, think that's to mischaracterise the relevant mistake here, to refer to what was in issue as an unknown claim. That's not really the proper characterisation of what's happened here. That's not that Prattley had an unknown claim, but the claim that we were dealing with was perfectly well-known with a claim for the damage and destruction of the building. So there's no unknown claim. The mistake was of misinterpretation of the policy. It was not a failure to appreciate that there was some unknown claim in addition to the claim that was being advanced. So the argument only gets traction if you re-characterise what the mistake was.

McGRATH J:

So it can't be read as known or unknown bases for claim?

MR COOKE QC:

It can't be, no, but more importantly it seems to me that you have to look at this provision in light of what is the mistake which the term requires the party to assume the risk of the matter in question, that's the interpretation of the contract. You're looking for a term that requires Prattley to assume the risk of a misinterpretation of a policy. Describing it as an unknown claim is artificial.

GLAZEBROOK J:

What about merely the full and final settlement? Because isn't a full and final settlement by definition just that and both parties assume the risk, therefore, that there was something else that they should have taken into account. Because it seems to me that if you don't know you've made a mistake it's very difficult, if you interpret section 6(1)(c) in the way you do, as saying that you have to deal with that specific mistake because by very definition you don't know you've made a mistake. Whereas if you say that this is a full and final settlement, that's it, there's no comeback whatsoever whether you come back with Uncle Tom Cobley, 5000 different arguments, this is it, this is the end, aren't you in fact dealing with the risk of mistake in saying that's it?

MR COOKE QC:

Well, i would say no because you are obviously by entering a full and final settlement agreement, giving up the give and take that's in settlements, and that's so –

GLAZEBROOK J:

But do you go behind the contract to look at the negotiations to find out what the give and the take is, because that would go against the principles of contractual interpretation because to a degree you do that with the Contractual Mistakes Act anyway, obviously, and with any arguments about rectification, but what you're looking at here is what does this mean and what does this particular thing mean, says that's it, that's full and final.

MR COOKE QC:

But the Contractual Mistakes Act and the Contractual Remedies Act are dealing with similar sort of concepts. If you induce a full and final settlement by making false representations –

GLAZEBROOK J:

Which is not the case here though –

MR COOKE QC:

No, no, I accept that.

GLAZEBROOK J:

So we're not under contractual remedies territory.

MR COOKE QC:

True, but we are in a, both these statutes are driving the same thing, so Contractual Remedies Act talks about misrepresentation. Contractual Mistakes Act then deals with two situations. One where the party knows that the other party is mistaken, and takes advantage of that, and I would say just because you've got a full and final settlement clause in it, that doesn't bite on this, because what, all the 6(1)(c) is doing is dealing with a situation where the parties do, either expressly or by implication, address that issue, entering the contract because of a mistaken belief, and that is so in a situation where the one party knows the other party is mistaken, where I say a full and final settlement can't operate to exclude it, and implies equally, because of the policy of the Contractual Mistakes Act, where both parties misfire because they have misunderstood an essential ingredient of the whole thing. They misfire. So that's what this is really driving at and I don't think, with respect, the full and final settlement clause deals with it. Just as it wouldn't deal with it if they'd got the wrong building or the wrong insurance policy. Just because it's full and final settlement they haven't addressed or made provision for the risk of mistakes.

GLAZEBROOK J:

Except that to the extent they say its claims arising directly or indirectly out of, or a connection with the earthquake activity and/or the policy and/or the insured property damage, however they might arise.

MR COOKE QC:

Yes. That's all about the insurance claim that they are settling. It hasn't addressed as a part of the bargain the concept of entry of the contract because of –

GLAZEBROOK J:

Well it hasn't explicitly said, and if we turn out to have been mistaken about the extent of the damage or whether it was in connection with the earthquake activity and/or the policy, they haven't explicitly said that, but it's a pretty wide-ranging exclusion and full and final settlement clause, isn't it?

MR COOKE QC:

It's –

GLAZEBROOK J:

I do understand the issue about one side hiding from the other side but then that might be a misrepresentation by omission in that case, especially if it's an insurance company with a duty to disclose.

MR COOKE QC:

But you can't interpret 6(1)(c) as applicable to only one category of mistake and not the other.

GLAZEBROOK J:

No, I can see that and I understand the issue with that argument.

MR COOKE QC:

You've got to understand the policy of this Act. When you understand what 6(2)(c) is driving at, it's partly this idea of one party taking advantage of the

other when they know they're mistaken but also when both parties have got it wrong in a fundamental way and have made a mistake and there's an inequality of exchange between them as a consequence, the Act bites unless within their contract they have addressed expressly or implicitly this concept of being mistaken and then that term requires one party to assume the risk about the matter in question, the interpretation of the policy here. So they – once you understand the policy of the Act and understand why you've got the proviso you can see that simply entering a full and final settlement agreement hasn't made provision for the risk of mistakes and does not have a term in it requiring one party to assume the risk of the mistake in the matter in question, in my submission. I say this is not an unknown claim. It's a mischaracterisation of the position. The issue is –

O'REGAN J:
You say that it needs to say a settlement agreement to make itself immune from this kind of proceeding needs to say and for the purposes of the Contractual Mistakes Act each party accepts its own risk in relation to having made an error in relation to the policy.

MR COOKE QC:
That would obviously work but it doesn't have to – it can do so implicitly as well.

GLAZEBROOK J:
Well, it could just say a misinterpretation of the policy so one assumes it's a full and final settlement despite where there are claims and whether or not these parties have misinterpreted the contract.

O'REGAN J:
The parties have correctly understood the contract.

MR COOKE QC:
Another illustration of implied rather than an expressed provision might be a situation where the contractual party says in a term "I do not warrant the

accuracy of a particular factual matter in connection with contractual warranties," without mentioning mistake but if such a clause existed you could see that there is making provision for the risk of mistake in relation to that matter and passing the burden on to one party rather than the other. But it does need to either express or by implication, and I say it involves the kind of test for implied terms as is normally applied it does require the parties to actually have addressed it in their bargain to exclude the operation of the Act.

O'REGAN J:

But, I mean, how? Other than saying it's full and final, how would you say they have to do that and notwithstanding that one or both parties might be mistaken, that sort of wording. Is that what you are suggesting?

MR COOKE QC:

Yes. And I say there are – when you're looking at whether this term is good enough there are a series of relevant factors that need to be considered. The first is that it was Vero who squarely had the obligation to correctly advise what the policy provided and that's going back to the term at page 1475 of the case.

GLAZEBROOK J:

Why is that particularly relevant?

MR COOKE QC:

Well, this case and this subsection is looking to whether the risk has been put on one party or the other and so if you're going to have an insurance settlement where the risk of misinterpretation of the policy is passed to the insured you would expect that it would be required that that would be set out plainly and clearly.

GLAZEBROOK J:

But it could equally have been under this because it's a mutual mistake it could have been passed to Vero for instance if you have a situation where they decided that the clause was a replacement clause wrongly and have paid

out on the basis of a compromise of what that might mean i.e. three million instead of three point eight then if it turns out it wasn't that then Vero would be stuck as much by this clause as the insured, wouldn't it?

MR COOKE QC:

Well subject to the operation of the Act. If – because the way I put it is if the parties have completely misfired in their insurance settlement, that's how, because of this interpretation of the policy, then the Contractual Mistakes Act operates. Unless you can find a clause in it that regulates that concept of mistake that's not obtained simply by being a full and final settlement clause, even though it's a broadly worded full and final settlement clause. It hasn't addressed the concept of being induced into contract by representation or being, doing so because of a mistake, either mutual or to one party and known to the other. It's not, it doesn't address –

GLAZEBROOK J:

But you'd virtually never be able to have a full and final settlement, would you, of anything because if it turns out that it's some other sort of claim…

MR COOKE QC:

Well that's why this section exists, to – Vero could quite easily have put in clauses to the settlement agreement excluding the operation of the Contractual Remedies Act, and excluding the operation of the Contractual Mistakes Act as well, but they didn't do that.

GLAZEBROOK J:

Well I'm not sure you could exclude the Contractual Mistakes Act, could you?

MR COOKE QC:

Well I think that's what this section talks about doing. If you do –

GLAZEBROOK J:

Well I don't think you can exclude the Act, you just have to say that relief is precluded, wouldn't you, under 6(1)(c).

MR COOKE QC:

Yes, that's what I meant by…

GLAZEBROOK J:

Okay.

MR COOKE QC:

So it's perfectly open to the parties to do that, but they haven't done that, they just really haven't sought to identify that kind of aspect of their contractual bargain. It's silent on those sorts of questions and it doesn't, you don't get there through the back door by saying what's a full and final settlement. Simply because it's a full and final settlement you cannot have the operation of the Contractual Mistakes Act, because that's really what the argument is. And I do say that the fact that Vero has the obligation not only to be clear about what the position is, but to settle claims fairly, and that's going back to page 1475 on the case on appeal, that includes an obligation I say in 2 and 3, explain the meaning of technical words or phrases, explain the meaning of particular words and phrases as they apply in the policy, puts the obligation on Vero to get –

O'REGAN J:

But it doesn't require it to be a clairvoyant as to future developments of the law. I mean your case is the law changed here because of later decisions that everybody became much more informed about what these policies meant. You can't really attribute a blame to Vero, can you, that they didn't predict that any better than your client did?

MR COOKE QC:

Well I actually don't think that's a fair characterisation of our argument. It's not a law change, because the policy said what the policy said all along, so nothing has changed in that respect. So the law hasn't changed because the law was still that the contract said what it did and –

O'REGAN J:

Well the way you put it was the understanding of these policies increased as a result of Court decisions that occurred after this settlement.

MR COOKE QC:

I accept I did say that, but that was because the participants weren't doing the exercise of just looking at this as a normal contract between parties, rather than researching what indemnity meant in the older cases. So that's the explanation what I, a mistake was made, but still Vero had the obligation. First of all, as we began, it had an obligation to have an insurance contract that was understandable and showed the legal rights of each party and then explain how it applied in the circumstances and numbered paragraph 4, to settle all valid claims fairly and promptly So in light of those responsibilities resting with Vero you would need more, with respect, than full and final settlement to pass to Prattley the risk that the policy may have been misunderstood by Vero and Prattley leading to a substantial under-recovery.

Associated with that, if we're looking at the circumstances surrounding this particular agreement, is that it was clear from the negotiations between the parties that the insurance claim was settled solely on the question of market value. There was one reference in Vero's material to the alternative, or an alternative basis of depreciated replacement cost, and that was in an email from Mr Cherry to the broker, which never actually got through to Prattley, in which Mr Cherry explained why he thought it was market value and referred to the potential depreciated replacement costs, but otherwise the discussions between the parties were purely about the market value of the building. So if you're looking at what their bargain really was, they were coming to a resolution based on the market value of the building and different views about that, and fully and finally settling that matter. They didn't really in that settlement agreement relate the idea that both parties were completely misunderstanding the nature of the cover provided for by this contract.

O'REGAN J:
But Prattley did check that, didn't it, it checked that advice with its own lawyers?

MR COOKE QC:
Yes.

O'REGAN J:
So it didn't just accept at face value what Vero was saying.

MR COOKE QC:
Yes, I'm not sure what the chronology of events were. Whether the advice was sought before the meetings with –

O'REGAN J:
Oh okay, sorry.

MR COOKE QC:
But whatever the case they had the, both used the views explained by Vero and by its own solicitors. They thought the whole thing turned on the market value question, as apparently did Vero.

Now even if – one of the difficulties in saying that a clause like the clause in this contract, is sufficient in itself to meet the requirements of the Contractual Mistakes Act provision, is that my learned friend has to accept that there must be some unknown claims that wouldn't have been regarded as being settled, and we both in the written submissions referred to the House of Lords decision in *Bank of Credit and Commerce International SA v Ali* [2001] UKHL 8, [2002] 1 AC 251, which had a settlement agreement, including unknown claims, but where the House of Lords said, well that couldn't be taken to involve a settlement of the claims of fraudulent conduct on behalf of the operators of BCCI. And my learned friend says, well look, there must be some claims that aren't within the contemplation of the parties, and I take from that that if Vero had acted fraudulently, or in bad faith, he

would accept that the wording of the interim settlement agreement wouldn't be sufficient to meet the requirements of the Contractual Mistakes Act.

O'REGAN J:
But you wouldn't need to rely on the Contractual Mistakes Act, you just sue for deceit or Fair Trading Act 1986 or something, wouldn't you, in those circumstances?

MR COOKE QC:
You might but the Contractual Mistakes Act also deals with a situation where one party knows the other party is mistaken, and that would be conduct of a similar kind. So if Vero knew what the true position about the policy was, but had taken advantage of the fact that Prattley had been mistaken, then presumably it would be accepted that the clause in the interim settlement agreement wouldn't exclude that aspect of the application of the Act. But if that's the case it must equally apply to the other kind of mistake that the Act bites on, which is the mutual mistake. It's difficult to see how you've got a term, or could be said to have a term that was said to have made provision for the risks of mistake of the type mentioned in 6(1)(a)(i) but not the type of mistake mentioned in 6(1)(a)(ii). Either it addresses and regulates the risk or mistake or it doesn't. So if it does exclude mistake it would have to also cover a situation where Vero had known that Prattley was mistaken and that, with respect, demonstrates why that can't be the correct interpretation of that particular term of the agreement. It is no more or no less than a full and final settlement clause. It's not directed to these ideas of entering the contract because of such errors.

It seems, with respect, that the position in the present case is similar to the situation that His Honour Justice McGechan dealt with in the *Shotover Mining Ltd v Brownlie* HC Invercargill CP 96.82, 30 September 1987, which I have referred to in the written submissions and what His Honour indicated in that case is that it looked as though the parties had not, in their contractual dealings, turned their mind to the operation of Acts such as the Contractual Remedies Act or the Contractual Mistakes Act and made

appropriate provision to regulate those matters, and that's what I say here, that the parties simply did not address as part of the subject matter of their contract anything to do with the circumstances on which the interim settlement agreement was entered. All they did was enter a settlement of the insurance claim on a full and final basis, and so the relevant passage in *Brownlie*, which I might just briefly take Your Honours to, it's at page 163 and that is at page 193 of the case. It's the appellant's authorities. The decision begins at page 193 of the appellant's authorities and I'm dealing with, and starting 163, the passage, the page number of the decision itself, and what His Honour was dealing with there was the kind of clauses that one can find in contractual documents which do address circumstances of their entry, and at page 163 of the decision His Honour says, "Overall, it would take more than the implications perhaps available from the working clause 8(e) – "

GLAZEBROOK J:
Sorry, I don't –

O'REGAN J:
Page 355 of the volume.

MR COOKE QC:
Yes, I'm sorry. So His Honour addressing some of those clauses at the top of the page that are in that contract and concluded, "Overall, it would take more than the implications perhaps available from the wording of clause 8(e) to persuade me that requirements of a s 6(1)(c) clause have been met. I rather suspect what has happened is that a form of clause which predates not only the Contractual Remedies Act but also the Contractual Mistakes Act has been carried forward without analysis or thought as to whether it is suitable to the new world created. To the extent there is real ambiguity, the clause undoubtedly was drawn for the vendor, and the contra proferentem rule applies." So I rely on both of those concepts in the present case. Like that case it would have been entirely open to Vero to include in the settlement agreement terms that sought to regulate the very entry of interim settlement agreement in a way contemplated by both the Contractual Remedies Act and

the Contractual Mistakes Act, but they just haven't done that. And what is now sought to be done is to say, well, the very fact it's a full and final settlement per se prevents the operation of either the Contractual Remedies Act or the Contractual Mistakes Act and that, with respect, can't be right and that's not what the subsection of the Contractual Mistakes Act really contemplates. It's contemplating the residual freedom for parties to address this very issue in their contractual bargaining and they just haven't done so in this case. I do also rely on the concluding words of Justice McGechan there about the contra proferentem rule and that is because – not only because of the point that I made at the outset of the case that it's a standard that the contra proferentem rule would apply in situations where Vero is seeking that this agreement be entered for the settlement of the insurance claim.

O'REGAN J:
But the contra proferentem rule only applies to the interpretation of the policy, doesn't it, not the settlement agreement.

MR COOKE QC:
Well, with respect it can apply to the interpretation of the settlement agreement because it is a contractual document drawn up by Vero for, because it sought it as part of the settlement of the insurance claim. So it's drawn up for its benefit for the settlement of the claim so it's largely within its control what term –

O'REGAN J:
Well, it's drawn up for both parties' benefit, isn't it, once you're settling a claim?

MR COOKE QC:
Yes but prepared by Vero and requested by Vero in the settlement of this insurance claim. In circumstances where, as I've already taken the Court to, Vero has obligations to provide a fair settlement, to provide policies that are clear, to explain how they apply in the circumstances of a case. So in those circumstances you, if you're going to say this arises by implication I would

submit you need far more than what was done here. The simple act of settling the case can't really be described as the parties and their contract making provision for the risk of mistakes and having terms of their contract requiring Prattley to assume the risk that of misinterpretation of the policy. That's not a fair characterisation of the position.

GLAZEBROOK J:
Shotover doesn't really apply in the sense that that wasn't a settlement agreement and that the errors or misdescription clause was interpreted as only applying in relatively limited circumstances for relatively minor errors.

MR COOKE QC:
Yes.

GLAZEBROOK J:
And so in that circumstance, it's difficult to see if it only applies to minor errors, how it could exclude in terms of s 6(1)(c) in any event a more major error. But that's as a matter of interpretation of it, not as a matter of whether in fact it did exclude that.

MR COOKE QC:
There was another clause 18 which was a little bit different from the omissions but of course the circumstances of *Shotover* are different from this and apart from anything else it was held by the Court that there had been –

GLAZEBROOK J:
Where's the 18?

MR COOKE QC:
Sometimes I can find it slightly more easily in – can I perhaps draw your attention to where that is after the adjournment? It does take a bit of finding. The party in that case had been found to engage in fraudulent behaviour so it's different circumstances for that reason as well. But we do have to think about the circumstances we are dealing with and I'm sorry for belabouring this

point but where the insurer has this obligation of good faith it has specific contractual promises, the obligation to explain how this policy works in the circumstances of the case, for it to be clear, and to settle claims fairly. It would take quite striking terms to say if there wasn't a fair settlement and was based on a misunderstanding of the policy including because Vero had misdescribed it, the risk was with Prattley about that. You would have to …

AUDIO STOPS: 12:54:44
AUDIO RESTARTS: 12:56:15

… find a very clear term that passed that risk in circumstances where Vero plainly had that risk in the first place. And we do also make the point that there is a contractual promise that this be a fair settlement and it is not a fair settlement to be paid what Prattley was paid when the true entitlement was so much greater than that in circumstances where Prattley was unaware what its true entitlement was and Vero didn't describe what it's true entitlement was, and after all what we're dealing with in this case is a situation where Prattley is simply seeking what it is entitled to under its contract. When it has first approached its insurer to make a claim, because of the mistake they both have made, they've focused on a completely different question, and the insurer, as is standard practice, has asked for a settlement deed to be signed when the payout is made. It's difficult to see, in those circumstances, that the inequity that the Contractual Mistakes Act is driving to is really triggered. It's difficult to see if the parties truly have reached their bargain deciding that the risk of mistakes is to be with Prattley. That's not really what happened here. What happened here is that it was simply an insurance settlement. Understandably there was a full and final settlement clause required, it was in broad language, but the whole thing miscarried because of this misunderstanding about what the policy provided which Vero had the primary obligation to correctly set out in the process. 336, I think my learned friend tells me, is (inaudible 12:58:09) E, yes. So that was broader term the purchaser acknowledges that it has purchased the licence solely in reliance on its own judgement, not upon any representation of warranty by the vendor or any agent of a vendor, et cetera. So that is a little bit more than the errors

and omissions type of clause, and His Honour Justice McGechan said that that was insufficient to trigger the operation of the subsection in the Contractual Mistakes Act. And I would say that if that doesn't do so, it's difficult to see how full and final settlement does so in the present contract. And if this, if the qualifying mistake here had literally been wrong building, or wrong policy documentation, it's difficult to see how you could read these terms as actually regulating that issue, just because it's full and final settlement, albeit full and final settlement drawn in broad language.

So I have one last matter to deal with and I wonder if it might be appropriate I deal with that after the adjournment?

COURT ADJOURNS: 12.59 PM
COURT RESUMES 2.19 PM

WILLIAM YOUNG J:
Mr Cooke.

MR COOKE QC:
Thank you, Your Honours. So on mistake the issue is did the full and final settlement clause covering unknown claims mean that the parties had made provision for the risk in mistakes and did it mean that Prattley was obliged by a term of the agreement to assume the risk that Prattley's belief about the meaning of a policy might be mistaken?

I thought I'd attack that question by reference to the *Bank of Credit* case that we both have referred to in our written submissions and I'd invite Your Honours to go to that in the appellant's authorities beginning at page 15 but I will take Your Honours to a passage in the judgment of Lord Nicholls at page 29 of the bundle of authorities.

There are other references in other judgments of Their Lordships but this one perhaps is the most appropriate one to go to and I'm going to paragraph 27 of the judgment starting with the second line at the end, "Courts are accustomed

to deciding how an agreement should be interpreted and applied when unforeseen circumstances arise for which the agreement has made no provision."

That is not the problem which typically arises regarding a general release. The wording of a general release in the context in which it was given commonly make plain the parties intended that the release should not be confined to known claims. On the contrary, part of the object was that the release should extend to any claims which might later come to light. The parties wanted to achieve finality. When, therefore, a claim has existence and was not appreciated does come to light on the face of the general words of the release and consistently with the purpose for which the release was given, the release is applicable. The mere fact the parties were unaware of the claim is not a reason for excluding it from the scope of the release. The risk that further claims might later emerge was a risk the person giving the release took upon himself. It was against this very risk that the release was intended to protect the person in whose favour the release was made, for instance, a mutual general release and the settlement might well preclude a party from bringing a claim if it subsequently came to light that inadvertently his share of profits had been understated in the agreed amounts.

This approach, however, should not be pressed too far. It does not mean that once the possibility of further claims has been foreseen a newly-emergent claim will always be regarded as caught by a general release whatever the circumstances in which it arises and whatever its subject matter may be. However widely drawn the language, the circumstances of which the release was given may suggest – and frequently they do suggest – the parties intended or more precisely the parties are reasonably to be taken to intended – that the release should apply only to claims known or unknown relating to a particular subject matter. The Court has to consider, therefore, what was the type of claims at which the release was directed, for instance, depending on the circumstances the mutual general release on settlement might properly be interpreted as confined to claims and it cannot reasonably be taken to preclude a claim that later comes to light the encroaching tree root from a

property had to undermine the foundations of the neighbour party's house, echoing judicial language used in the past that would be regarded as outside the contemplation of the parties at the time the release was entered into, not because it was an unknown claim but because it was related to a subject matter where it was not under consideration. This approach is an orthodox application of the ordinary principle interpretation is now well-established. Over the years, different Judges have used different language when referring to what is now commonly described as the context or matrix of facts in which this contract was made. But although expressed in different words, the constant theme is that the scope of general release depends upon the context furnished by the surrounding circumstances in which the release was given. The generality of the wording has no greater reach than this context indicates. It's that principle which is echoed in other judgments that we say applies here because it was not within the reasonable contemplation of Prattley that the whole settlement discussion was being predicated on a completely wrong understanding of the reach of the policy. That's particularly in the context when it was Vero who had the obligation to set out what the policy was, what it meant, how it applied. If there had been – if there were no discussions about the true basis of the policy and it's been completely misunderstood it can't be said that it was within the contemplation of the parties that Prattley was accepting the risk that Vero had misdescribed the policy reached to it in reaching the settlement agreement. The metes and bounds, the field of the negotiations suggest otherwise. The field of their negotiations were limited to market value. What's a proper resolution of that? There was no discussion whatsoever in the discussions about the meaning and effect of the policy along the lines that I've taken the Court this morning.

So – and that becomes even a stronger point when you see that we're not just dealing with the interpretation of the release and what is meant by the general words, but when we go back to what the requirements of section 6(1)(c) of the Contractual Mistakes Act are, and the two requirements. That it must make a provision for mistakes and it must require Prattley to assume the risk that its belief about the meaning of a policy was mistaken in circumstances where Vero had that obligation.

So that's, I've exchanged with the Court the nature of that argument. That probably captures it as best as I can in terms of describing why I say section 6(1)(c) doesn't apply. It's just outside the field of the bargain the parties were making, and that's why I began the submissions by saying, this case really is a case about identifying what was the bargain the parties reached first in the insurance policy, and what was the bargain in the settlement agreement, the release, and that bargain was not a bargain relating to the potential giving up of rights to the misinterpretation of the policy.

The last aspect of this argument is my learned friend's submission that even if we get over that suggested application of 6(1)(c) that the Court should, in exercising its discretion under section 7, deprive Prattley of its entitlement under the insurance policy and with respect that couldn't be the correct way to apply relief under section 7 in these circumstances. This is not a contract that had other machinery or terms and conditions in it where you use the discretion under section 7 to correctly identify the appropriate relief arising from the mistake. The mistake caused the settlement in its form to be entered and Vero had the underlying obligation to meet the insurance claim. So the appropriate form of relief is to remove the effect of the mistake and let the legal entitlements that otherwise existed take effect. And that is really what needs to be remembered about this case generally. All that Prattley is saying, is that we want what we paid for when we took out our insurance policy, and the settlement does not mean that we can't get that because in the policy the Contractual Mistakes Act the settlement misfired in a substantial way, and we did not have a bargain about the meaning of a policy which was settled in that exchange.

So unless Your Honours have any further questions, those are the submissions I wanted to present. We haven't got the table of references in the policy to market value and depreciation that I said we would have immediately to hand but I apprehend it won't be a difficulty if I pass that up maybe tomorrow morning. So unless Your Honours have any questions, those are the submissions.

MR GODDARD QC:

I'll just hand up, if I may, through Madam Registrar a short road map and one more case. One of the continuing themes of this case has been disagreement between counsel about the most sensible order in which to tackle the issues. Whether to deal with the policy interpretation issue first or the Contractual Mistakes Act issue first and the Courts below have divided evenly on that. I am happy to take it either way, although the road map I have handed up begins with the mistake issue on the basis that that, it seems to me, with respect, is logically prior, but if the Court would prefer me to do it in the other order I'm happy.

All right, Contractual Mistakes Act. I think, although it's clear from Your Honour's questions, that the Court's gone to it, that it's nonetheless a little helpful to just start by looking at the settlement agreement, that's in volume 3A of the case on appeal, it begins on page 1932, towards the back. It's almost, but not quite the last thing in that volume. And, setting out the parties, and a background set of recitals recording –

WILLIAM YOUNG J:

I'm sorry, I missed it.

MR GODDARD QC:

I'm sorry Your Honour, 1932. It's the executed version. It's labelled, as the Court can see, as an interim settlement agreement, that's because certain issues were parked and subsequently resolved. Nothing turns on that, I think it's common ground. So we've got parties, then we've got the background, which sets out the circumstances in which the settlement agreement was entered into.

ARNOLD J:

It doesn't actually identify a dispute, does it. I mean normally they say there's a dispute between the parties and this is how we're going to solve it. This one just says there's a claim and this is how it's going to be solved.

MR GODDARD QC:

There's a claim, and it's left implicit that the amount payable is the subject of some uncertainty, and there was evidence about that from Mr Cherry that my learned friend cross-examined on. In what circumstances does Vero simply make a payment, in what circumstances is a settlement agreement entered into and there are a significant number of matters settled on both bases and Mr Cherry gave some evidence about why a settlement agreement was seen by Vero as appropriate here, and that was also explored with him. And also essentially that there was obviously room for differences of view about what the appropriate amount to be paid was under this policy. There are a number of valuations floating around, each of them contained a different number for each of several bases for assessing the loss, as is not uncommon when one starts talking to valuers, and against that backdrop what Mr Cherry said is, "Look, if it would settle it, I was happy to pay this highest market value figure that anyone had come up with, if it would make it go away." It's not to say he thought it was the right answer, but he was happy to do that. So the backdrop is that there had been, and of course Your Honour will also remember that Vero had obtained a valuation which had a market value for the buildings, I think it was 370,000-odd and that had been met with some unenthusiasm to the extent of Prattley not allowing that valuer to value any of their other buildings, they insisted on different valuers being used henceforth, and asked for a second valuation, so there was plainly a difference of opinion about what amount was payable under the policy.

So the Christchurch earthquakes recited in B, and the existence of a claim, and agreement that a cash payment will be made as an interim settlement on the terms set out below. After setting out some background information about insurance cover and other interested parties in 3, Vero has offered to pay the amount of 1.2 million including GST, which is the same, of course, as the 1.05 excluding GST, which the insureds have agreed to accept subject to clause 5 below, that's the carve outs, and then importantly 4, "Except as noted in 5 below, the interim settlement sum is paid by Vero and accepted by the insureds in full and final settlement and discharge of the claim." What's the claim? We have to go back to background C. It's the claim that the insureds

have made under the business insurance policy that they hold. So they made a claim under the policy and in full and final – and that claim in turn relates to insured property damage, which is defined in recital B, has the damage caused by the series of earthquakes. So coming back to that, "In full and final settlement and discharge of the claim and any claims against Vero arising directly or indirectly out of, or in connection with the earthquake activity," that's the sequence of Canterbury earthquakes, "and/or the policy and/or the insured property damage whether such claims arise under statute, common law or equity are in existence now or may arise sometime in the future, are known or unknown, in the contemplation of the parties or otherwise. This includes the discharge of any further claim under the policy for damage, loss or other entitlement under the policy occurring subsequent to the date the insured property damage occurred whether or not that further claim has been notified to Vero."

Now, in Lord Hoffman's dissenting speech in *BCCI* after setting out the clause in issue there, His Lordship said one has the impression the drafter meant business. The same could be said, I think, of this clause. It is on its face clearly broad enough to cover the claim that is now advanced by Prattley, the claim in relation to the insured property as defined in A arising out of the earthquake activity referred to in B which has caused damage to the insured property and it settles the C claim and any claim, so not just the claim that's been made, but any other claims arising out of the earthquake activity and/or the policy and/or the insured property damage.

Now, it has been common ground at every level of this case, at least up to this Court, that on its face the settlement agreement settles the claim that is now pleaded by Prattley. The way that Prattley's claim is made in these proceedings, the way it's pleaded in the third amended statement of claim to which Your Honour Justice Young took my learned friend earlier today, it's a substantive claim under the policy in one course of action and the other causes of action challenging the validity of the policy under the Contractual Mistakes Act, under the Fair Trading Act and various other bases for challenge.

But it has consistently been the position of both parties that properly interpreted this agreement settles Prattley's claim and that is why Prattley needed to find a basis for setting it aside in order to advance its claim and that's not a surprising concession when one looks at the way this is drafted. It is, however, a little difficult to reconcile with the submission hinted at by my learned friend at various points this morning and finally made in terms I think after lunch that the analysis of Lord Nicholls in *BCCI* has some bearing on this case because, of course, *BCCI* was a case about the proper interpretation of a settlement agreement. All of Their Lordships agreed that whether or not the claim for stigma damages by the former employees of BCCI arising out of the fraudulent way in which the business of BCCI had been conducted, which tarred them all with the brush of having worked for this disreputable bank, that that question was a question of interpretation and the correct approach to interpretation of an agreement of compromise was also not something on which Their Lordships differed in any material way. The difference was that when Lord Hoffman came to apply that test His Lordship considered that the claim did come within the settlement agreement whereas the other members of the House considered that read in context, read against the backdrop of the matters that were in the contemplation of the parties at the time of settlement, it cannot have been the intention of the bank and those employees to settle a claim of a kind that as a matter of law had never been established in England previously and that arose out of facts that none of them had any knowledge of or would have in their wildest dreams have anticipated was, in fact, the factual situation, so it was a claim of a kind wholly unanticipated, so wholly unanticipated that even references to full and final settlements, even references to unknown claims, did not extend to a claim of that kind. It's like the tree root example in the passage from Lord Nicholls' speech that my learned friend referred to a moment ago. So that's an interpretation case and the conclusion there was that properly interpreted the settlement agreement did not reach the claim which the employees wished to pursue whereas here there is no pleading that the settlement agreement does not extend to this. The case has been argued at every other level on the basis that it did and when one looks at the agreement it seems difficult to see how that would not

be the case. It is either the claim that is being settled here or it is some other claim against Vero against out of the very specific matters identified in this agreement.

My learned friend says it is not an unknown claim because it is a known one. My learned friend submitted earlier this morning that it's wrong to focus on the references to unknown claims because this is a known claim. It was a claim about damage to this building arising out of these earthquakes but if it's a known claim then this clause applies even more clearly.

So what we have here is a settlement agreement that on its face and when interpreted in context was intended to settle this claim and the whole of the complaint by Prattley has been we did settle it but we settled it on the basis of a mistake or because we were misled or because there was a representation and with the greatest of respect to my learned friend it is not open to Prattley to argue on a second appeal that this is an interpretation case and it's not within the policy as a matter of interpretation, but more importantly because this Court has not always been entirely receptive to arguments that matters are outside pleadings. I think I managed to persuade one –

WILLIAM YOUNG J:
Well, it wasn't argued and it wasn't really challenged in the High Court, was it?

MR GODDARD QC:
That was, that the agreement applied?

WILLIAM YOUNG J:
No, no, that the claim was outside the pleading. You said the Court isn't always receptive to allegations of claims or outside pleadings.

MR GODDARD QC:
That arguments are outside pleadings, I should have said.

WILLIAM YOUNG J:

Yes.

MR GODDARD QC:

This is a very clear case, in my submission, of an issue that seems to be being argued now but has never been taken before.

GLAZEBROOK J:

Isn't it really – it's not covered by the agreement. It's that because it wasn't in the contemplation of the parties it's not covered by 6(1)(c) which is a different argument.

MR GODDARD QC:

It is a different argument.

GLAZEBROOK J:

So it may well be covered by a full and final settlement as a matter of interpretation but the risk isn't allocated under 6(1)(c)?

MR GODDARD QC:

So that is an argument has been made but the reason I think that my friend's argument has slid from 6(1)(c) into *BCCI* territory is that if properly interpreted this agreement does allocate the risk that a claim of the kind now sought to be pursued, might be pursued, and has precluded it, then the risk has been allocated for the purpose of 6(1)(c). In order to argue that 6(1)(c) doesn't bite my friend has really been driven to argue that neither the reference to full and final settlement, nor the additional clarifying language –

WILLIAM YOUNG J:

He's arguing, it's a sort of a near miss BCCI case and therefore section 6(1)(c) can be applied more easily, is that right?

MR GODDARD QC:

That's possibly the argument but it's, not so far out of the contemplation of the parties that properly interpreted the agreement doesn't apply but it's close enough to the edge that one can get to 6(1)(c). But that's, with respect –

GLAZEBROOK J:

It's a slightly odd mistake actually as well, in terms of the settlement agreement because it's a mistake about the interpretation of the underlying contract that's been settled, not a mistake about the particular contract in which the release is, which is probably more what section 6(1)(c) is looking at.

MR GODDARD QC:

No I don't think so Your Honour because a mistake about the interpretation of the contract that is challenged is not a mistake for the purpose of the Contractual Mistakes Act. I'll come to the Act in a moment. Those ones are out. It has to be a mistake about something else.

GLAZEBROOK J:

No, sorry, the mistake that's alleged is a mistake in the interpretation of the insurance policy. The actual contract where the 6(1)(c) releases isn't actually anything to do with that original policy. So it's one step removed, in any event, it's more like there's been a mistake as to the need or the basis upon which you're settling as against in relation to the particular settlement agreement.

MR GODDARD QC:

Yes. It's like the cases about mistake about the quality of the subject matter of something that's been bought and sold, and I'll come back to that concept. But it's, for reasons that I'll expand on in my submission, there is no gap of the kind that Your Honour put to me between what is allocated by way of risk in the agreement, and 6(1)(c).

WILLIAM YOUNG J:

So the point you're making is the *BCCI* case does the settlement apply, and if the *BCCI* approach is adopted well then the settlement isn't a bar to this claim.

MR GODDARD QC:

Yes. If the *BCCI*, that's right, so one wouldn't need to go to the Contractual Mistakes Act, and Your Honour put a question a little like that, actually it was Justice O'Regan, I apologise, put a question a little like that to my friend earlier. If *BCCI* argument was available to Prattley here, we wouldn't need to go to the Contractual Mistakes Act. The claim just wouldn't have been settled. That has never been argued. There was, at any earlier stage, a pleading, by Prattley I think, in the first and second amended statements of claim, but not in the third one which is what we went to trial on, that the settlement agreement extended to the September claim but not subsequent events. But that was abandoned. So the argument that one event was settled but the others weren't, was originally pleaded and then abandoned. Prattley chose not to go to trial on it. Prattley is not –

WILLIAM YOUNG J:

This isn't that sort of – this isn't a claim that it only related to some events, that's' not the contention. This is a contention that you're relying on the settlement agreement to answer a claim which was in contemplation. Now that's the debate.

MR GODDARD QC:

Yes but it's never been pressed so far.

WILLIAM YOUNG J:

As to say the settlement is not a barrier to the claim.

MR GODDARD QC:

Properly interpreted, that's right, which is the *BCCI* analysis. So, and yet if that's not the argument, if properly interpreted settlement agreement does apply, and that's been the basis on which the whole of this case has

proceeded, then, and we'll get to this in a moment, section 6(1)(c) necessarily bites the risk of a mistaken view about what Prattley can claim has been allocated. If one thinks about how one might get the sort of claims, other than the capital C claim that I referred to, here, it can only be either because the facts are not fully known to one or both parties, or because the application of the policy to the facts has been missing, apprehended, has been misunderstood. There's no other way one could get a claim not known to –

WILLIAM YOUNG J:

Can you postulate a claim which might not be covered by the settlement agreement? Either on a basis of interpretation or by reason of the application of the Contractual Mistakes Act?

MR GODDARD QC:

So the Britten Group owned a number of other buildings, Prattley didn't, but suppose Prattley owned another building. The way clause 4 is drafted it talks about certainly any claims against Vero arising out of or in connection with the earthquake policy and/or the policy and/or the insured property damage, read literally this would settle a claim in relation to another building. But when one looks at the context in which this was negotiated, it seems to me that one would quickly reach the conclusion that it can't settle a claim in relation to another building owner.

WILLIAM YOUNG J:

Can I just ask a question? The actual dealings were with Windlass Holdings Limited. That's where the money went, so what's the status of Prattley vis-à-vis Windlass vis-à-vis the ownership of the property?

MR GODDARD QC:

My understanding from cross-examination of Ms Britten was that Windlass effectively managed the property portfolio for the Britten Group. This was never as clear as it might ideally have been. Which company did which things within the estate seemed somewhat flexible, so the financial statements had one name on them and the bank account was in another company's name.

But what was clear was that this property was registered in the name of Prattley Enterprises Limited and it was appropriate that the settlement agreement because entered into with it in relation to this policy.

So that's one example and I suppose that again if there had been a separate contents policy with Vero even in relation to the contents of this building, against the backdrop of a discussion that related solely to the building and its value Vero couldn't rely on the general language of clause 4 to say, well, you've settled your contents claim as well. So context does set some limits but the context which was a discussion of the claim in respect of this building and damage to this building arising out of the various earthquakes, squarely locates us in the territory of the further causative action sought to be pursued by Prattley here.

So as I say, my learned friend's submission earlier today that it wasn't an unknown claim in relation to this building, it was precisely the claim everyone was focused on actually reinforces the point that the agreement applies. It doesn't undermine it. Perhaps worth just continuing on with the agreement. There are the carve-outs in paragraph – clause 5 which have all been subsequently resolved. 6 provides Your Honour Justice Young will see for payment to a specified bank account in the name of Windlass which were the details provided by Prattley. 7, the insured acknowledges they've been advised by Vero to obtain their own legal advice before entering this agreement.

So if one wondered whether Prattley was accepting the risk of an error in the interpretation of this agreement – and there's not much room for wondering that after reading clause 4 – clause 7 underscores this. They had been advised to obtain their own legal advice. They were responsible against the backdrop of facts known to them not only as well as but actually with respect, better than Vero, they had primary access to all the information about the building, its value, the purpose for which they held it, and they had been advised to take their own legal advice and did take their own legal advice and Vero knew that. Vero had provided a draft of this agreement and received it

back from Prattley with certain changes which Vero was advised had been made by their legal advisors, Anthony Harper. So not only did the agreement expressly record that the insured, that Prattley had been advised by Vero to obtain their own legal advice but Mr Cherry's evidence on which he wasn't challenged –

ARNOLD J:
That wouldn't affect the meaning of clause 4, though, would it? I mean, if they hadn't had legal advice would you say there's some other meaning applies there?

MR GODDARD QC:
No. I think the result would be the same, even without clause 7. But it's more like the braces to go with the belt. If one's asking what risks have been allocated by clause 4, this underscores that they were taking on the risk of having misinterpreted, as a matter of law, their entitlement under the policy and that's why they'd been encouraged to take their own legal advice.

So I would absolutely say that the same result was achieved by 4 but this really underscores that point of risk allocation. And Mr Cherry's evidence, which was not contradicted, which he wasn't cross-examined on, was that he had orally given the same advice previously at a number of points, and that he knew they were taking legal advice, and of course of the four trustees one was a partner in Anthony Harper and two of the others had law degrees. One was a practicing lawyer, formerly a practicing lawyer, now a company director, Mr Corcoran, and the other Mr Bruce Irvine, although he had a law degree was, in fact, also had an accounting degree, was a very senior accountant, on many boards, Moray, a person with commercial expertise and legal expertise as his career had developed.

But you'd have to say in terms of Your Honour Justice Glazebrook's question about how Joe Bloggs might understand the policy, and I'll come back to that, you couldn't be much further from Joe Bloggs than this insured. So those are the key points I wanted to identify in relation to the settlement agreement and

as I say the starting point is that it applies to the claim now advanced, and that's why we've spent so much time on the Contractual Mistakes Act and in the Courts below on the Fair Trading Act and the Contractual Remedies Act, although those are no longer pursued, and also breach of contract, there was an argument that Vero had breached its obligations under the policy and in particular the obligation to have a policy in plain English and to explain – but that was rejected below and that's not the subject of an appeal to this Court. So again just noting now, because we'll need to come back to it in the context of my friend's arguments that Vero can't take advantage of its own wrong, a suggestion that there was some wrong associated with the way in which this policy was drafted, or the way it was explained, has been rejected and is not the subject of any appeal to this Court.

I can't resist also picking up Your Honour Justice O'Regan's question to my friend, or observation perhaps, earlier today, that the facts that the Courts below have differed on entitlement suggests there'd been a failure to draft in plain English. It's also possible, of course, that even when one drafts in plain English the answer to every problem is not clearly spelled out. Indeed sometimes the endeavour to write things down in plain English can lead to less precision when it comes to apply an agreement to particular facts. So I doubt that the fact that there's room for argument about how an agreement applies means it's not written in plain English, it just means that even plain English can, when it comes to applying it to certain situations reasonably be the subject of different views.

ARNOLD J:
It would have been pretty easy to spell out the basis of an indemnity payment if that's what you wanted to do.

MR GODDARD QC:
I'll come to that later, with respect, I'm not sure that's right because of course what the case is saying in relation to an indemnity is that it's the loss to the insured and –

GLAZEBROOK J:
Could have said that for a start.

MR GODDARD QC:
I think that –

GLAZEBROOK J:
In that a loss to the insured and that will be measured by depreciated replacement cost, that'll be measured by market value based on the three valuers and taking the mean of the valuations.

MR GODDARD QC:
I will come back to that when I come to the policy. The policy clearly proceeds on the basis today we will indemnify you implicitly means against the loss that you have suffered and although market value and depreciated replacement cost are the most common ways of calculating what's required to indemnify someone, of course they're not exhaustive and depending on the facts of a particular case, other methods of indemnification may be appropriate. The most famous example which is referred to in cases, certainly in New Zealand and Australia, I think possibly also Auckland, is *Falcon Investments Corporation (NZ) Ltd v State Insurance General Manager* [1975] 1 NZLR 520 (SC) where the evidence was that the building was to be demolished and redevelopment was to occur on the site, but it was intended to keep it for I think around a year and let it in the interim and it was held that what indemnity required there was neither market value, which is effectively zero, nor replacement cost, because that was never what was intended, but the lost rent for the year during which the structure would have stood before it was demolished, so indemnity to refer to indemnifying is actually to bring into play the enquiry into what the insured loss actually is in those circumstances, which has been the focus of insurance law, the basis of insurance law for hundreds of years.

Perhaps the other point just to make at this stage, although I'll come back to it, is that not only was Prattley not a consumer in any normal sense of being

unsophisticated because of the trustees but it was of course purchasing the policy through its own broker whose responsibility it was to advise it.

GLAZEBROOK J:

Well, the trouble is, if this is standard wording for everybody then can we take into account those things in relation to particular contracts? I can understand the argument very much so in relation to the settlement agreement because that's a specific agreement between these two particular parties and not a generic on the Internet type agreement.

MR GODDARD QC:

The policy also was entered into by Vero following an approach by Prattley's broker.

GLAZEBROOK J:

I can understand that but what – is it only entered into on that basis or is it entered into with any person being insured?

MR GODDARD QC:

This policy is offered by Vero only by brokers, so it's not, as I understand it, possible for someone to enter into a policy on this form on these terms with Vero unless they have an insurance broker advising them and that was certainly the case in relation to this agreement. Indeed, it was entered into in the context of Prattley having changed its insurance broker and the new broker going out to the market to insure the entire portfolio and discussions, advice was given by the broker and Ms Austin, the broker, gave evidence of this, that she'd advised the trustees to ensure on a replacement basis and to obtain new replacement valuations of all of the relevant buildings but the response from Prattley, from Ms Yates, was that the trustees would continue to insure one new building which they owned, relatively new building, on a replacement basis but did not want to incur the extra cost of insuring the three older buildings in the portfolio on a replacement basis so they would continue to insure those on an indemnity basis.

So we had a sophisticated entity going out to an insurer, I think more than one insurer but this was the one that ultimately they ran with, seeking cover, in terms of cover, for four buildings, expressly saying, "We want to insure three on an indemnity basis and one on a replacement basis," and in answer to a question from the Court to my learned friend earlier this morning, the source of this, 1.65 million figure was Prattley nominated it and I cross-examined Ms Britten about it because I also wondered what the origins of this very precise one, you know, number was and Ms Britten confirmed that it was the level of cover sought by Prattley. She thought that it would have been the trustees who decided on it and she thought also – though she wasn't sure – that that was probably the amount for which the building had been insured with another insurer before it was first insured with Vero in 2009 but she wasn't sure about that. She couldn't shed any light on how the number had been come up with by Prattley. But it was their number. So they went out to the market saying, "We want indemnity cover. We want it with a sum insured of 1.605 million for this. We also want indemnity cover for two other buildings. We want replacement cover for this fourth building because it's newer."

McGRATH J:
You're putting a lot of emphasis on this background, Mr Goddard, but it doesn't really help to interpret the words of the policy unless, perhaps, it's in relation to the intent of what they intended to do with the building after damage or something like that.

MR GODDARD QC:
It's important to that.

McGRATH J:
But only on that, perhaps.

MR GODDARD QC:
Yes, that's my primary position, Your Honour. I then respond to my learned friend's arguments about the importance of a fair insurance code and consumer, you know, protection implicit in that by saying –

McGRATH J:

I'm not criticising. I'm just trying to get what's relevant straight and –

MR GODDARD QC:

It's a good question and Your Honour has caused me to pause and think, why am I spending so much time on this, and the answer is firstly because it sheds light on the purpose for which the building was held and therefore on how Prattley can best be indemnified, how its loss can be made good, but second, and defensively rather than offensively, I say that to the extent that my friend puts the emphasis on fairness, on consumer protection, one needs to bear in mind that this is a commercial policy entered into by sophisticated parties. There is perhaps one other purpose for which I rely on it, which is that my friend's argument about the proper interpretation of this policy suggests that it's not really an indemnity policy, it's a replacement policy with a low cap, and the Court explored that with my friend, and in my submission the fact that Prattley went out to the market, to Vero, asking for an indemnity policy because it was cheaper, knowing that it would provide less extensive cover than replacement policy, which cross-examined about, is an important part of the background.

McGRATH J:

Important part of the background, all right.

MR GODDARD QC:

And how I use that I'll come to when I come to the policy. In my submission my argument can be made out simply by reading the policy but to the extent that one looks at background that's a very important feature. So that's the settlement agreement. The next thing that I think it's helpful to look at is the Contractual Mistakes Act, partly to pick up Your Honour Justice Glazebrook's point about the relationship between the two agreements and whether the settlement agreement can be impugned because of the misinterpretation, alleged misinterpretation of the policy. So that's in my authorities, the respondent's authorities, volume 1, tab 1. Interpretation section 2 mistake means a mistake whether of law or of fact. We got there in relation to the law

of mistake at least in 1977, arguably earlier, the English Courts arrived there in the last 10 years or so, finally, that relevant mistakes for the purpose of setting aside a contract on the ground of mistake including mistakes of law. then subsection (2), “For the purposes of this Act, and without limiting the meaning of the term mistake of law, but subject to section 6(2)(a),” and I’ll come back to that, “A mistake in the interpretation of a document is a mistake of law.” So a qualifying type of mistake is a mistake in the interpretation of document.

Section 4, the purpose of the Act is important, and when I come to a couple of articles by Professor Brian Coote, the Court will see that Professor Coote, who of course was a member of the Contracts and Commercial Law Reform Committee that developed this Act, puts considerable emphasis on section 4(2). So (1), “The purpose of this Act is to mitigate the arbitrary effects of mistakes on contracts by conferring on courts appropriate legal powers.” And (2), “These powers are in addition to and not in substitution for existing powers to grant relief in respect of matters other than mistakes and are not to be exercised in such a way as to prejudice the general security of contractual relationships.” Professor Coote says this wasn’t intended to open up whole new spheres of intervention on the ground of mistake, and in particular it wasn’t intended to interfere with contracts where the risk of a mistaken view has been allocated by the contract.

5, “Act to be a Code,” not too much turns on that. And then 6, “Relief may be granted where mistake by one party is known to opposing party,” it’s unilateral known, “Or common or mutual.” And then we have subsection (1) “A court may in the course of any proceedings or on application made for the purpose grant relief under section 7 to any party,” so relief may be granted, not of course must be granted, and that discretion remains (inaudible 15:09:40), “If entering into that contract,” and it’s indeed (a)(ii) that has been the focus in these proceedings, “All the parties to the contract were influenced in their respective decisions to enter into the contract by the same mistake.” (b) “The mistake or mistakes… resulted at the time of the contract (i) in a substantially unequal exchange of values,” then that’s been the focus, and (c) “Where the

contract expressly or by implication makes provision for the risk of mistakes, party seeking relief or the party under whom relief is sought as the case may require is not obliged by a term of the contract to assume the risk that is belief about the matter in question might be mistaken."

Subsection (2) deals with this question about which contract one might be mistaken in the interpretation of. Your Honour Justice Glazebrook's question, for the purposes of an application for relief under section 7 in respect of any contract, a mistake in relation to that contract does not include a mistake in its interpretation. So one couldn't argue that the settlement agreement was entered into under a mistake because of a mistake about the interpretation of the settlement agreement, but as I read subsection (2) – and this has been common ground throughout – if there is another contractual relationship which forms part of the background to a negotiation and if a mistake is made in relation to the interpretation of contract number 1 which influences entry into contract number 2, then that is a qualifying mistake under the Act or at least it's capable of being a qualifying mistake under the Act. Does that address Your Honour Justice Glazebrook's question about which contract the mistake related to?

GLAZEBROOK J:
Sorry, my point was more in relation to interpreting what the clause actually meant rather than the mistake.

MR GODDARD QC:
Right. That's why you can't say –

GLAZEBROOK J:
And whether it was excluding the particular mistake.

MR GODDARD QC:
Which I think I covered earlier. But it is clear that the Act was intended to embrace the possibility that a mistake about interpretation of an existing

document which influenced entry into a subsequent contract could be a qualifying mistake if it ticked all the other boxes.

And then section 7 confers a broad discretion in relation to relief. It's not automatically the case that the fact that section 6 applies means that a contract is void. That was exactly one of the arbitrary effects relating to the effect of mistakes on contracts referred to in section 4(1). The common law rule that said if a contract was entered into under a mistake it was void and then there was a suggestion continuously controversial based on *Solle v Butcher* [1950] 1 KB 671 (CA) judgment of Lord Denning, that there was a separate broader equitable jurisdiction to set aside a contract on terms if it was entered into under the influence of some broader but ill-defined category of mistake. And more recently the UK Court of Appeal in the *Great Peace Shipping Ltd v Tsavliris (International) Ltd* [2002] EWCA Civ 1407 has held that that line of cases was misconceived, and that there is no separate equitable jurisdiction to intervene in circumstances where there is no mistake that renders a contract void, and what the Court said in that context was, but we understand the drive to remedial flexibility which drove Lord Denning to that end, and the same sort of remedial legislation that England has in relation to the consequences of frustration, which we have copied in our Frustrated Contracts Act, is also desirable in relation to mistaken contracts. I'll come back to that, there's an important parable between mistake and frustration of course. Often it's just a question of timing as to when the thing that's gone wrong, went wrong. Whether it was before the contract was entered into or just after. You often get exactly the same fact situation, for example, a horse dying unbeknownst to the parties goods being lost at sea unbeknownst to the parties. If it happens before the contract is entered into it's a mistake issue. If it happens after the contract is entered into but before it's performed it's a frustration issue, and that's why we see exactly the same situation dealt with, for example, in sections 8 and 9 of the Sale of Goods Act. Contract for the sale of specific goods that are destroyed unbeknownst to the parties. If it's pre-contract section 8 says the contract is void. If it's after the contract is entered into but before it's performed section 9, before risk is passed to be precise, section 9 says it's avoided. And that's

why it's not surprising. Actually we see a number of themes running through the law of mistake and the law of frustration which we'll come back to.

So arbitrary consequences at common law of mistake is crude, it's a voided consequence, or possibly a controversial equitable jurisdiction. What we have here in subsection (2) is a broad discretion. Sorry, subsection (3) is a broad discretion. Subsection (2) is important though. "The extent to which the party seeking relief, or the party through or under whom relief is sought, as the case may require, caused the mistake shall be one of the considerations to be taken into account." Unsurprising, and of course here the finding is that Vero did not cause Prattley to make its mistake. Those arguments have been rejected, if a mistake there was.

Subsection (3) is the broad discretion. "The court shall have a discretion to make such order as it thinks just and in particular, but not in limitation, it may do 1 or more of the following things." And (a) is, "Declare the contract to be valid and subsisting in whole or in part of for any particular purpose." So just like under the Illegal Contracts Act 1970, one of the possible responses to illegality may be in that context to validate. Here, they don't need to validate, it's just you need to declare it to be valid and subsisting, or you can cancel the contract, or you can grant relief by way of variation, or grant relief by way of restitution or compensation. And subsection (6) orders can be made on terms. I don't think there's anything else I need to look at in the Act at this stage.

In terms of the structure of the Act and this case, as my learned friend said, what we have are four issues, and they correspond to the three paragraphs in section 6(1) and section 7. The first issue was there a mistake. So I'm in line 3 of my road map. Still, briefly in my written submissions, and the case has proceeded on the basis that if both parties were mistaken about Prattley's entitlement under the policy, as a result of a mistake in the interpretation of the policy, then that would be a qualifying mistake. Now the Court of Appeal thought that might have, that that was a concession that we might have been a little too swift to make, the Court had some doubts about whether there was

a qualifying mistake on the facts, and that really emerged from the point made by Your Honour Justice Young, well wasn't it the case that Vero, at least, recognised the possibility of different outcomes. There was the email from Mr Cherry that my learned friend referred to, and perhaps it's worth just looking at that in this context, if I can find it quickly, it's in volume 3A, at page 1869. When Prattley's broker, and agent of course Ms Austin, saw the first valuation and realised that -

WILLIAM YOUNG J:
Sorry, I've just lost that page reference?

MR GODDARD QC:
I'm sorry Your Honour, 1869. If we start at 1870 and work backwards, as one so often has to with email chains annoyingly, what we see is at the bottom of 1870 is Mr Cherry sending the Knight Frank valuation to Prattley through its broker and the Knight Frank valuation came up with a market based indemnity value of 370,000, a depreciated cost figure of 1.4 million and, yes, so that was where they landed, and Ms Austin realised that which of those Vero was going to use would have a significant effect on whether her client was happy or unhappy and so we see at the top of page 1870 Ms Austin saying, "Hi Derek. Just wondering if you have obtained some advice as to which method of settlement will be applied to this cover i.e. depreciated value much higher than indemnity value," 1.4 versus 370. Also if insured is wanting to obtain a second valuation at their cost to be picked up by AMP. AMP and Vero are used interchangeably in this context. We don't need to worry about the fact that this class of insurance effectively changed hands.

So then we have Mr Cherry's response on 1869 sent at 5.01 am and if I could write equally coherent emails that early in the morning I'd be happy. It says, "I'm flying to Auckland this morning on the first plane hence the early start. When we have looked at this issue, i.e. market versus depreciation replacement cost previously on other claims, the result has been that the policy provides an indemnity to compensate the property owner for their loss. Just so often this involves the actual cost of repairs less than appropriate

allowance for betterment. The market indemnity value is typically the outcome. This compensates the owner for the actual value of the improvement so there is a neutral position. They still have the land and cash equivalent to investing in a similar property yielding the same returns." So that's Mr Cherry's understanding of the legal position and it could pretty much have come out of an insurance textbook and then he continues, "In this case, the valuation's low compared to the depreciated value and sum insured. I am discussing the issue internally this week and will advise the outcome."

So what the Court of Appeal was saying was, was Mr Cherry really mistaken? Wasn't this really like the situation like Your Honour Justice Young put to my learned friend of people saying, well, it could go one way. It could go another way. I think this is where it's likely to go. A forecast about where things might land if you spent more time and money investigating the position and litigating it, rather than a statement of presently existing law or fact and I think Your Honour's question, if I may so, is spot on and that perhaps this concession was made too swiftly and it all depends really on the metaphysical question of whether the correct interpretation of a contract always exists. It's just that until it's been argued here one doesn't know what it is. In other words does the law always exist, does the correct interpretation of a contract always exist but it's perceived through a glass darkly, that gradually clarifies as one works one way up the Court system or is it in factor more realistic to say that when you express a view about the interpretation of a contract you're forecasting how it might ultimately be applied and interpreted after an argument and this gets into issues such as the declaratory theory of the law and whether when this Court says no the law is X, it's always been X, whether the Court can be seen as changing it if the previous understanding has been that it was other than X and similarly an interpretation of a contract and it's the, in the context of interpretation, it's the famous difficulty captured in the proposition that a Court of final appeal it's said is right because it's final, not final because it's right, although I wouldn't want to say that here with any disrespect but those of us who were, you know, grew up in households with first instances Judges in them, heard that point quite often, made in my case mostly about the Court of Appeal, one imagines my learned friend may have

heard the same proposition from time to time but directed more at the Privy Council. Either way I think there's room for an argument and it's for another day because I haven't taken the point before and I'm not pressing it now that expressing a view about how a contract is properly interpreted in circumstances where there's room for doubt, is actually a forecast about the future, not an expression of opinion about an existing question of law but that isn't how Vero pleaded its defence. It seemed to me that I couldn't at the same time complain about my friend running arguments that hadn't been taken below and reasonably seek to do so myself and that in those circumstances it was neither appropriate nor necessary for me to press that point. What I think it highlights, though, is the nature of the judgment that had to be made by the parties at the time the contract was entered into, to pick up Your Honour Justice McGrath's questions from earlier today, and I'll come back to that when I deal with paragraph B.

So let's proceed on the basis that if both parties interpreted the policy as providing for an entitlement on Prattley's part to be paid market value, and if, in fact, Prattley was entitled to be paid something else, then that's a mistake in the interpretation of the policy and a mistake for the purposes of 6(1)(a).

McGRATH J:
So that's your paragraph 5.7, I think, of your submissions.

MR GODDARD QC:
Yes.

McGRATH J:
You recorded that, that's been your basis, in this Court at least, at the outset.

MR GODDARD QC:
And below that, in the High Court I simply accepted this in an unqualified way, and the Court of Appeal was a little bit surprised I think by that and thought that perhaps it needn't have been conceded that there was a qualifying mistake, given the uncertainty Mr Cherry expressed. I see the force of that

but it didn't seem to be really open to press it and I thought again, with respect, the way the Court of Appeal dealt with that is to say, either way, what's quite clear is this is the type of mistake, a mistake about the interpretation of entitlements under the policy, that was dealt with in the settlement agreement was a helpful way to think about it. Because Mr Cherry was clearly recognising that there was a possibility that when you drilled into this, you get a different answer, and one of the things that was being precluded by the settlement agreement was that drilling, was the quest for a different answer.

So that's A. I think I've dealt with quite a lot of paragraph 4 of my road map. As I said earlier the settlement agreement expressly allocates the risk of unknown claims, including claims about which one or both parties may be mistaken. It also allocates the risk of known claims, the quantum of which is misapprehended because of an error of fact or law, hardly be clearer on that. 4.1 seemed right when I wrote it. I think it's still right despite the late run at an interpretation argument. We are within the settlement agreement and the settlement agreement requires Prattley to accept the risk that it may have a claim under the policies for a greater payment, which is not known to Prattley or within its contemplation, and what the agreement provides is that Prattley won't pursue any such claim. So the agreement deals with the situation. It says if Prattley, you had some claim that you haven't raised with us, arising out of the earthquakes in relation to this building, you accept this money in full and final satisfaction of that claim as well, and you won't sue us for it. That's the essence of the agreement. And indeed if such a claim exists, if a claim different from that advanced by Prattley at the time of contracting, at the time of settlement, did exist, if the sort of thing that the agreement tries to rule out actually did exist, and the clause was doing some work, it must be the case that Prattley was mistaken about its existence, otherwise it would have put it forward, and that mistake is likely to be shared by Vero. That's the most likely scenario in which a provision of this kind will operate. Where there's some relevant fact about which the parties are mistaken, or which they're ignorant of, which leads them to a view about how the policy applies, which with the benefit of hindsight one might say is wrong.

So the requirement in 6(1)(c) is not met because what we have here is, if we go back to the settlement agreement, no, let's go back to the Act, section 6(1)(c), what we have is an express provision that if there is a known or unknown claim, it's settled and Prattley won't pursue it. So it expressly makes provision for the risk of claims that have not been raised, including claims that haven't been raised because of a mistake, and that's a subcategory, the most important subcategory of unknown claims, and says, you accept that you've settled them and that you can't pursue them, you have to assume that risk.

I'll come back to my 4.5 in some of my detailed written submissions in a moment but as I was reflecting on this issue and in what section 6(1)(c) is doing in this Act, it occurred to me that actually there is a helpful parallel with the concept of allocation of risk as this Court has explained it in a frustration context in *Planet Kids Limited v Auckland Council* [2013] NZSC 147, [2014] 1 NZLR 149. That's hardly surprising because as I mentioned earlier, the same sort of change in circumstances unknown to the parties, unexpected by the parties that causes frustration if it occurs, after the contract has been entered into, will often give rise to a relevant mistake if it occurs before the contract is entered into, an agreement to sell a particular horse which perhaps situates this idea squarely in the nineteenth century whence it emerged. Unbeknown to the buyer and seller the horse has died. If you enter into the contract while the horse is alive, then it dies before risk passes, the contract is frustrated and that's now picked up in section 9 of the Sales of Goods Act. If the horse has died before the contract is entered into and the parties don't know there's a mistake always accepted at common law, now codified in section 8 of the Sales of Goods Act as rendering the contract for the sales of goods void.

And the law of mistake and the law of frustration have developed at common law very much in parallel with a lot of cross fertilisation of ideas, cross reference of case. It's made a linkage, it's made explicit for example in *Bell v Lever Brothers Ltd* [1932] AC 161 (HL) in the1940s but that's certainly not where it began. It's a link that UK Court of Appeal again drew heavily on

the *Great Peace* when they were rationalising the modern English law of mistake and this Court has had cause to think about it in the frustration context.

So *Planet Kids* which I think the Court should have separately loose, it was handed up with my road map, in the most helpful discussion of this issue the question of whether the supervening event took the parties outside the contract or whether the risk of this event was allocated by it is found in the judgment of Justice McGrath, Justice Glazebrook and Justice Gault, delivered by Justice Glazebrook which begins on page 163 of the report. I never quite know whether that term "the plurality" is positively encouraged, discouraged or somewhere in between but anyway a unanimous Court as to result. The reasons of Justice McGrath, Justice Glazebrook and Justice Gault, delivered Justice Glazebrook and if we jump to paragraph 134 on page 185, this was the case where the Council entered into an agreement with a childcare centre for settlement of public works at claims, surrender of a leases, purchase of certain chattels, payment of goodwill because the childcare centre was going to have to close down as a result of the Council wanting the site I think for a road if I remember rightly for some Council purpose and the High Court and Court of Appeal had held that the fact that the centre burned down before the date on which the lease was to be surrendered frustrated the agreement entered into for the surrender of the lease and settlement of Public Works Act claims. This Court reached a different view. One of the issues the Court considered was allocation of risk.

So 134, the issue here is whether clause 8 of the settlement agreement allocated the risk of fire and lease termination to one of the parties and if so whether the effect of such allocation is to exclude the doctrine of frustration. Notice how close that language is to the language of section 6(1)(c). Did the contract allocate the risk to one of the parties and that's because it's essentially the same question being asked about essentially the same sort of issue and then the heading "Risks allocated by contract", paragraph 139, "Where risk is allocated to one of the parties under a contract", 111, note referring to Chitty and Treitel, and see the quotations there at 53 and 55

above which both suggest that a contract will not be frustrated where the risk of the event in question is sufficiently covered by the contract. And that's right, that's an established part of the common law of frustration, because you can hardly say if a risk of something happening has been allocated to one of the parties that it happening takes everyone so far outside the framework of the contract, that the contract should be treated as having come to an end, it makes no sense, it's a contradiction in terms.

So 139, "Where risk is allocated to one of the parties, under a contract, then the doctrine of frustration is excluded, in so far as it relates to the occurrence of one of the allocated risks. The allocation of risk can be express or by necessary implication," again notice the parallel with 6(1)(c), "for example, through being reflected in the price agreed for the provision of the goods, services or facilities to be provided under the contract. This does not mean that the doctrine of frustration cannot be brought into operation by other events affecting the performance of such contracts, like impossibility… or illegality," and then the note in 141, "Despite a clause apparently allocating risk in a contract, there have been instances, as pointed out by the Council, where the courts have held that frustration has occurred. This is because the clause in question has been interpreted as being only wide enough to apply to events of a less seriously disruptive kind." So again, it's a matter of interpretation. And this, in the mistake context is exactly like the *BCCI v Ali* type issue. You interpret it properly, does it apply to the risk which has materialised here. Does it apply to the type of claim which has materialised. And then Your Honour went on to consider risks that are allocated to one of the parties by operation of law, and we don't need to go there.

But the short point is that although the Contractual Mistakes Act was intended to provide more remedial flexibility where a mistake affected the substratum of a contract, it wasn't intended to broaden in any radical way the circumstances in which a mistake would enable a Court to set aside a contract, or modify a contract, and it was always the case, as a matter of common law, that if a risk had been allocated by the contract, then the fact that the parties were mistaken about that matter did not trigger a claim in mistake, and we see

exactly the same analysis applying to frustration, and what that really underscores is that the more ambitious form of my friend's argument, which is that you need to expressly provide for mistakes, you need a clause which says if a party is mistaken that's their problem, can't be what legislature, what the Contracts and Commercial Law Reform Committee had in mind when 6(1)(c) was enacted. As Professor Coote points out in the articles that I'll get to shortly, I think, the most common type of risk allocation in a contract is a warranty. So in the example I give in my written submissions I agree to sell to my learned friend my car, and I warrant that it's in good working order, I'm unlikely to enter into a contract that contains that provision unless I think that's the case. I'd be buying a world of grief for myself. People don't usually give warranties about things that they think are not the case. And similarly my friend is unlikely to enter into the contract unless his understanding, although he's not prepared to take the risk on it, is that it's in good working order. Why would he buy a car that's not with that warranty in order to acquire a non-working car and a claim against me. That would be unhelpful to say the least. Even assuming I'm good for it and –

O'REGAN J:
He seems to find it quite attractive.

MR GODDARD QC:
As long as I keep working, you know, time in my 80s and raised all my children and paid all my debts, perhaps I might be able to pay my friend, but nonetheless the normal scenario is that both parties think the warranties given in a contract are likely to be true, but what they're doing by including a warranty in a contract is allocating the risk of it being wrong. So if it turns out that there's something fundamentally wrong with my car and this is where my knowledge of mechanics unfits me for developing this metaphor, really, let me just say, there's something in the engine that's really, really dead and other people could give better examples but I can't. If that's the case, then neither of us can say, well, this contract should be set aside on the grounds of common mistake, even though we were both mistaken, even though it's going

to have a significant impact on its value it needs a whole new engine, for example. Burned it out by –

WILLIAM YOUNG J:
The big end is shot.

MR GODDARD QC:
The big end is shot. I wondered about saying something about big ends but then I wasn't quite sure whether cars still had them. I've burned it out by doing, you know, doughnuts to burn off the frustration of another day in Court, something like that. So neither of us can turn round and invoke the Contractual Mistakes Act in relation to that contract. Rather, the contract proceeds. The car is sold and my friend has a claim against me which hopefully I would immediately honour but if not my friend would sue and my friend would sue for breach of contract, not under the Contractual Mistakes Act. So that's the most common kind. My friend gave the example of the converse of that. The situation – and this is much more appealing to me –

WILLIAM YOUNG J:
As is, where is.

MR GODDARD QC:
Absolutely. I sell my car to my friend as is, where is accepting no responsibility whatsoever for its condition and it turns out the big end – whatever that might be – has come to an end and it's again not the case that it can be re-opened on the grounds of mistake. The classic case in this space which the Contracts and Commercial Law Reform Committee treated as correctly decided and basically everyone has treated as correctly decided, although the reason why is not excited exactly the same level of unanimity is *McRae v Commonwealth Disposals Commission* (1950) 84 CLR 377. That was the case where the Commonwealth of Australia sought tenders for the purchase of a tanker on a reef somewhere and explicitly said we make no promises as to its conditions or as to whether there's any oil in it, certain other

things that were expressly disclaimed. It actually turned out rather embarrassingly there was no such reef and no such tanker and a problem that presumably wouldn't arise now that we have Google Earth to check that sort of thing but in those days the seas were still more of a mystery and claims brought against the Commonwealth to recover effectively the wasted costs associated with the tender and going to look for this thing that wasn't there and the High Court of Australia said well the contract expressly allocates the risk that the tanker won't have any oil in it but also implicitly warrants that the tanker exists. So all those risks are allocated expressly or impliedly by the contract and the Commonwealth is liable because it's in breach of an implied warranty that there is such a tanker on such a reef. The word "mistake" didn't occur anywhere in that contract, didn't need to.

Let me just see if there's anything else in my written submissions that I need to cover before moving off.

GLAZEBROOK J:
I probably lost what the point of that was.

MR GODDARD QC:
I'm terribly sorry Your Honour. The point of that was that the suggestion that you can only trigger 6(1)(c) by expressly providing for mistakes can't be right, that most claims relating to mistake made by one or both parties are precluded by a term of the contract to which 6(1)(c) applies and mostly those terms do not say anything about contractual mistakes, that do not say anything about mistakes, they just allocate the risk of something being so to one or other party.

ARNOLD J:
It does mean though that in the case of the unilateral mistake known by the other party, the Contractual Mistakes Act is pretty ineffective isn't it, because if you have one of these general clauses you say – whereas if you say what's required is that it addresses the problem more specifically, you know, what it's excluding, then that doesn't produce this sort of problem.

MR GODDARD QC:

I don't think that concern does arise and I think that it doesn't arise really for two reasons. The first is that when one comes to interpret the provision one has to ask whether there is risk of a mistake about that issue known to the other party has been allocated. It's not I think the case, as my learned friend suggested, that you have a blanket allocation of risk in respect of mistake or no mistake, either it's there or it isn't and the approach of Justice McGechan in *Shotover Mining* for example, was to say that whatever that clause, clause 80 I think, was doing it wasn't allocating the risk of fraud. So it might allocate the risk of an innocent mistake about the issue but it couldn't fairly be interpreted as allocating the risk of a fraudulent mistake. So there's an initial question of interpretation, has the risk been allocated, which obviously drives 6(1)(c).

The other reason that I don't think that's a concern is that in many contractual contexts there is no obligation to point out that the other party seems to be making a mistake about some quality, some attribute of the subject matter of the contract, even if you suspect that that might be so and there's a long catalogue of such situations covered in *Bell v Lever Brothers* and the suggestion made by their Lordships is that effectively commerce would grind to a half that every time that you suspected that someone was willing to buy something because of a mistake they were making about a potential use of it or a potential attribute of it, was making them willing to deal with you or pay the particular price, even though you hadn't represented that or warranted that but they were taking a view on it, they're entitled to take a view and some will be right, some will be wrong but that's not a situation which, and we'll see this in the Coote articles when we come to them, the Act was intended to reach.

WILLIAM YOUNG J:

Sorry what does 6(1)(a)(i) mean then?

MR GODDARD QC:

It deals with – so Sir I'm not saying that the Act wasn't intended to reach unilateral mistakes known to the other party but what I'm suggesting is that

where there's an explicit allocation of risk, there's no objection in the allocation of the risk. So again suppose I'm selling my car as is where is.

ARNOLD J:

Well just stop there, the point is what is an explicit allocation of risk, which is why I asked the question. You've taken us to the clause in the settlement agreement which is written in extremely broad terms and would cover, on your view of it, a unilateral mistake that the other party knew about, whether they were fraudulent, they just knew about it and so all I'm asking I guess is that is it oughtn't one to interpret section 6, whatever it is, (c).

MR GODDARD QC:

(1)(c).

ARNOLD J:

(1)(c) against the reality that Parliament has decided that that unilateral mistake known to the other party will give rise to a claim under the Act, for a claim for relief, subject to the operation of (c) but what it tends to suggest to me at least is that the clause you're relying on for the purpose of (c) needs to be reasonably specific as to the, otherwise if you can just put in a very wide general form of words, then you're home free as far as the Contractual Mistakes Act is concerned.

MR GODDARD QC:

Let me see if I can break that down into a couple of steps. First, it's plainly the case that a natural mistake known to the other party can trigger the operation of the Act, as a common mistake can, but again it's also plainly the case that that's subject to the possibility that the risk of that will have been allocated by a contractual provision. The question then becomes whether that tells us anything about the nature of the provision that is required to allocate that risk, and my first answer is that it is possible, although I don't think we need to say it here, that a more explicit provision would be needed to allocate the risk of unilateral mistakes known to the other party than is needed to allocate the risk of a shared mistake. Just because the more unusual provision is in its effect

the clearer it will often need to be. The extreme example of that in the old cases of exclusion clauses was Lord Denning's written in red with a red hand pointing to it. So it's always been accepted that the more draconian provision, the clearer its language may need to be, and it's certainly the case that the law has always leant against interpreting contractual provisions to require one party to take the risk of fraud by the other party. Indeed it may not be possible as a matter of public policy for such a provision to be effective. So I think if we were in a case where there was a unilateral mistake known to the other party, one would need to look particularly carefully at the clause to satisfy oneself that against the backdrop of the parties' dealings, and having regard to its word, it did fairly allocate that risk. But we're not in that space here. We're in the normal contractual space of a shared assumption which turns out, on my friend's case about interpretation of the policy, to be wrong, and the question is whether that risk has been allocated by this clause and just as in the case of frustration so too here that allocation can take place using a wide range of contractual mechanisms and terms. A simple warranty, or a full and final settlement provision, reinforced by the extra language here. But I think it would be wrong to read down 6(1)(c), especially in that common mistake scenario, by reference to the particular concerns that arise once you get into unilateral mistakes known to the other party. That can be dealt with by interpretation techniques and ultimately by a public policy rule that you can't exclude responsibility for fraud I suspect.

So I think I've covered most of what I've got in my written submissions, what I was going to say about this, 5.10 I make the point that the settlement agreement was a compromise and it the essence of a compromise that there is uncertainty about the parties' rights and obligations. "The parties agree that rather than going to Court to determine the correct answer they will settle the claim and forego the opportunity to argue about the correctness of their views on the merits of the claim." That's the very nature of a contract of this kind. It responds to uncertainty and it avoids the need to carry out more investigations and litigate. It's actually implicit in an agreement of this kind that the parties accept the risk that their view about the claim may not be correct and the amount they pay or receive may differ from that which a Court

would ultimately find to be payable. I doubt that there would be any claim that settled on a basis that corresponds perfectly to what the result would be if the current case was litigated through because it usually involves striking a balance between the different possible outcomes.

I note at 5.12 the expertise and access to advice on both sides of the table and the fact that, as I say, rather than spend time and money discovering the open "right" answer, what the parties reached agreement on was a figure that was satisfactory to both of them. They both made a decision to forego the opportunity to negotiate further or seek a binding Court determination of the amount payable under the policies with the exception of the three specific things carved out in clause 5.

It's implicit in acceptance of the compromise, the decision to forego a formal determination of the right answer that they accept the risk that their assessment of whether the compromise was a good deal could be wrong, either for reasons they're aware of or for reasons they're not aware of. If the matter was formally determined they might be better off.

We deal with both Your Honour Justice Glazebrook's point that it's implicit in a full and final settlement and that that's underscored by the express terms in clause 4, building on that concept. At 5.16, it's clear from both the nature, the inherent nature, and the terms of the agreement that was needed to finally conclude all known and unknown claims arising out of the earthquake damage to this building and allocate to each party the risk that their rights and obligations under the policies were more favourable to them than the agreed basis for settlement, allocating to each party the risk that its views about those rights and obligations were mistaken and emphasise the importance of the clean break principle also referred to in some of the cases as "buying peace". That's what you pay for.

I do emphasise the strong public policy reasons for the Courts to give effect to settlements of this kind. In my submission, the Courts should be very slow to find that whenever a settlement agreement has been entered into without

averting to a more favourable claim, a materially more favourable claim, that might have been pursued by one of the parties. It's exposed to a challenge under the Contractual Mistakes Act. That would, as Your Honour Justice Glazebrook said, make it extremely difficult to finally settle claims unless – and this is the issue Your Honour Justice O'Regan explored with my friend, some sort of boilerplate was to be added into such settlements saying "and in particular nothing in this agreement shall not be affected by any mistake made by both the parties or by one party known by the other". Now, that boilerplate could be added but that really takes us back to the interpretation question, does that really add anything as a matter of ordinary English and business common sense to the language that's in there already and in my submission it doesn't. It is inherent in the phrase "full and final settlement". It is implicit in the expanded language, pointing out which claims may no longer be pursued.

I deal with the need for express reference to mistakes and say that can't be right and then refer to the Coote articles. I'll come back to those. Refer at 5.20 to the *Dennis Friedman (Earthmovers) Ltd v Rodney County Council* [1988] 1 NZLR 184 (HC) case. That's in my authorities. I won't go to it now. Volume 1 under tab 5 and that was a case where a contractor was required by the contract to satisfy themselves about the tender site and the works that would be required and the Court said, well, that was a sufficient basis to trigger 61C and to say that the fact that there was a common mistake or a unilateral mistake known to the Rodney County Council, possibly, but I think it was a common mistake that wasn't emphasised about the amount of fill and about how much work was involved was not – the risk was allocated by the contract and so the Contractual Mistakes Act didn't apply. Again, no reference to mistakes in there but provisions saying you the contractor must satisfy yourself of the earth conditions. You must satisfy yourself of every aspect of your tender.

That really brings me to the two Coote articles and that is all I will need to say about this issue. I'm conscious of the time.

WILLIAM YOUNG J:

We'll take them at 10 o'clock tomorrow morning.

MR GODDARD QC:

I think Professor Coote's fine analysis of the Act will be much better fresh and bright in the morning, Your Honour, yes.

COURT ADJOURNS 4.00 PM

COURT RESUMES ON TUESDAY 11 OCTOBER 2016 AT 10.02 AM

WILLIAM YOUNG J:
Mr Goddard.

MR GODDARD QC:
Your Honour, just to situate ourselves I'm going to finish off my submissions on section 6(1)(c) of the Contractual Mistakes Act, the allocation of risk point I'll deal very briefly with the other aspects of the mistake issue, and then I'm going to turn to the policy interpretation issues.

I had talked about the provision, the concept of allocation of risk, the various ways in which a contract can allocate risk, and identify the fact that this is an issue that comes up in both the mistake and the frustration contexts, and in both contexts risk is often allocated without any reference to the concept of mistake or to the legislation. That point has been emphasised by Professor Coote, eminent contract scholar and member of the Contracts and the Commercial Law Reform Committee, and there are two articles by Professor Coote which are helpful on this point. They're in the second volume of my authorities, the smaller volume, volume 2, under tabs 17 and 18. The first is specifically about this issue. It's an article from 1993 from the *New Zealand Recent Law Review*, as it was then called, it's under tab 17. Professor Coote begins by noting that the overall purpose of the Contractual Mistakes Act, "To enlarge the scope of relief in cases of mistake, may be obvious enough, the individual provisions of the Act are not all of them easy to understand." And just pausing there, that reference to enlarging the scope of relief just picks up one of the points I sought to make yesterday, which was that the Act wasn't intended to enlarge significantly the circumstances in which the Courts could intervene on the grounds of mistake. Rather it was intended to provide remedial flexibility. And one such provision, the professor says, is section 6(1)(c), which we read yesterday, "This paragraph states one of three requirements a party must meet in order to qualify to be considered for relief under section 7."

Professor Coote goes on to deal with some confusion which had arisen about whether the Act, including section 7, provided a new remedy for enforcing contracts, or rather just a different form of relief in the event of mistake, and expresses a preference for the view that it's just an expansion of relief, and over on page 436 of the article, 339 of the bundle, explains how the issue will normally arise, which is that party seeks enforcement of a contract, the other says, no, hang on, you can't enforce it against me, I want some relief under the Act and the first party, the party seeking to enforce the contract, says no, you've accepted the risk of this mistake.

WILLIAM YOUNG J:

Well he deals with it a bit later in the article. The problem is that a party isn't going to seek to challenge a contract on grounds of mistake unless absent the claim under the Contractual Mistakes Act the contract would cast the risk of that mistake on that party. So it is a problematical section because in a sense if you take section 6(1)(c) too literally it means that there's no occasion to grant relief because it's only the party who's trying to seek the contractual allocation of risk who would seek relief.

MR GODDARD QC:

In a sense, that's right Your Honour, yes. That if one simply applied the words of the contract without more there would be a disadvantage to the person seeking to argue that there's been a mistake.

WILLIAM YOUNG J:

Yes.

MR GODDARD QC:

And so the question then becomes has there been an express or implied allocation of risk by a term in a way which makes it clear it was part of that argument that that risk should be borne by them, whether mistaken or not.

WILLIAM YOUNG J:

But it must be more than that. It can't just be that absence a claim under the Contractual Remedies Act the plaintiff loses because then – but that will always be associated with the particular risk in question being cast by the contract on that party, because otherwise they say the contract's great, we want to uphold it.

MR GODDARD QC:

Yes, but Your Honour is exactly right –

WILLIAM YOUNG J:

So you can't just say because a contract appears to be unfavourable to a party who alleges mistake, therefore the contract is beyond review.

MR GODDARD QC:

That must be right and therefore what one is looking for is a term that specifically allocates some type of risk to a party in a way which embraces the risk of a mistake about that issue and that's really what Professor Coote goes on to explore in this article. It picks up on page 436 of the article the express or implied allocation. It looks at the methods of risk allocation, wording appears a little strange. The professor says, notes at the foot of the page that the Committee's preferred formulation was, "It was not a term of the mistaken contract, express or implied, that one or other or both parties should assume the risk of that mistake," and suggests that can be reconciled by reading the words by a term of the contract in the provision as enacted to include an implied term which must be the case.

"Even so the reference to a term… seem to have a restrictive effect." I don't think we need to worry too much about that, and then turns to express allocations. "If enquiry is confined to express or implied terms, one obvious means of allocation risk would be by the use of exception and other clauses which exclude or limit a party's undertakings and obligations." And here we do get some helpful illustrations of the sort of provision that the Committee had in mind in crafting this exception.

McGRATH J:

Whereabouts are you in the article at the moment, page 427 is it?

MR GODDARD QC:

Page 437, under the heading, “Express allocations.”

McGRATH J:

Thank you.

MR GODDARD QC:

“If enquiry is confined to express or implied terms.” So the professor has considered the fact that sometimes risk is allocated by background circumstances, not by a term at all, but then turning to express or implied terms, it looks at *McRae*, a case I mentioned yesterday. “The Commission entered into a contract to sell a non-existent tanker allegedly stranded on a non-existent reef. The Commission sought, it would seem successfully, to allocate to the buyer the risk that the parties might be mistaken as to the quality or condition of the tanker. This they did by the use of a clause which stated that the goods ‘are sold as and where they lie with all faults’,” Your Honour Justice Young’s as is where is example from yesterday, “And that no warranty was given as to ‘condition, description, quality or otherwise’. So far as the possible contents of the tanker were concerned, the advertisement stated merely the vessel is said to contain oil and the contract referred to one oil tanker including contents without specifying what those contents might be. There was therefore no contract that the vessel contained oil… On any ordinary understanding of the law, that would mean the risk that there might be no oil (and hence of a mistaken belief as to the contents of the vessel) would have been assumed by the buyer. On the other hand, the risk of mistake as to the existence of the tanker itself had not been assumed by the buyer. On the contrary, existence had been promised by the seller. The risk of existence had not been shifted to the buyer by the exception clause.”

So that’s an example of both an allocation of risk by denying any promise about a certain matter and an assumption of risk as to the existence of the

tanker by promising that it existed and promising to sell it. Another example, this time of a positive rather than a negative expressed allocation of risk, and again it's another contract that didn't use the word "mistake" in any way like *McRae* is provided by *Dennis Friedman (Earthmovers)*. The conditions require the contractor to satisfy himself as to the nature of the ground and subsoil and the quantities and nature of the work and materials necessary. They also stipulated the contractor obtained all necessary information as to risks, contingencies and other circumstances which might influence or affect his tender. Compare that with the provision in our contract "you should seek legal advice to cover the risk of misinterpretation, among other things of the policy".

On this basis the contractor was held to be obliged to assume the risks that his belief might be mistaken as to the time in which the contract could be carried out, the water content of the material to be encountered, and the sheer strength to which it could be compacted. Examples of these kinds are clearly compatible with the intention expressed in the report of the contracts and Commercial Law Reform Committee at paragraph 23. The Committee stated, "We also consider that it should be a bar to relief for mistake that the contract itself puts the risk of error on one or other of the parties. If the parties have provided for the events that have occurred, then it seems impossible to argue that their contract has become inappropriate to the real situation which they did not know," and that, I think, is the answer to Your Honour's question. What one has to ask is, have the parties provided for the events that have occurred? That's the question we tend to ask.

WILLIAM YOUNG J:
Well, they will always have provided for the events that have occurred and that's why someone wants relief from the contract in terms otherwise provided for by the contract.

MR GODDARD QC:
Sometimes the contract has –

WILLIAM YOUNG J:

I don't think it's enough to say, well, the contract covers the point and therefore that's the end of the Contractual Mistakes Act.

MR GODDARD QC:

The question is whether the contract, fairly interpreted, was intended by the parties to deal with the particular type of issue.

WILLIAM YOUNG J:

That's just *BCCI*. That doesn't add anything to the Contractual Mistakes Act.

MR GODDARD QC:

And – yes.

WILLIAM YOUNG J:

You're as bad as your learned friend is on that because you've actually just come up with an interpretative issue, an interpretative proposition.

MR GODDARD QC:

Well, certainly we're in the same camp to this extent that you need first to understand what the contract provides for. But if we turn back to the text of section 6(c) we're asking a question which, I think, always has been understood as a meaningful question in the context both of a mistake and of frustration. As a matter of common law and under the statute in relation to mistake, which is –

WILLIAM YOUNG J:

I think it's a different question for frustration. If there isn't any risk, the fact that if a party is not subject to a risk, well, frustration hasn't got anything to do with it. You don't need to go, as it were, beyond the terms of a contract.

MR GODDARD QC:

And yet it's always been seen as necessary to decide whether a contract is frustrated.

WILLIAM YOUNG J:
I agree. It's just the same expression having a different meaning in a different context.

MR GODDARD QC:
Yes. That's right. One turns one's mind to whether the parties have already provided for this eventuality.

WILLIAM YOUNG J:
But undoubtedly the parties have provided for this eventuality in the settlement clause. You can't sue. I mean, that's what it says. You want to sue so what you're doing is banned within the terms of the contract.

MR GODDARD QC:
Yes and in the context of a settlement clause I do think that the inquiries end up being the same. It seems to me that if the mistake complained about is a mistake as to what claims were being settled, then there is no difference between the interpretation of the contract and the application of section 6(1)(c). That won't always be the case in relation to other types of contract, the famous example being a contract to sell specific goods that don't exist, they've been destroyed, unknown to the parties and the contract doesn't deal with that in any meaningful way. There's a common mistake as to the existence of the subject matter and you just can perform contract, so what happens is one or other party in breach or is it discharged and the answer the law provides is it's discharged.

Now I don't think one can say in that situation that the contract provides for it, you can't perform it as it's drafted, so the question is, is someone or other liable for the inability to perform and in particular is the vendor going to be liable for their inability to deliver those specific goods and that is the paradigm example of a common mistake that's not provided for in the contract in any meaningful way and that has the effect at common law of discharging the contract under the Act of triggering the availability of relief. But I do say that in

a contract that's basically about risk and that's what this contract is, it's a contract about the risk of claims that are being pursued in the future, including claims that haven't been identified at the time the parties settle and the whole purpose of the contract is to allocate risk and to say you will get this money but you take the risk that you had some better argument.

WILLIAM YOUNG J:
Okay well I think we've sort of covered this point on top of it. Was there anything in the second article of Professor Coote that was important?

MR GODDARD QC:
It doesn't add anything to this except to echo and let me just go to, in this first article, the point that comes up in both. It's on page 440 of the article and again just makes the point in the second paragraph in a far more important way historically than exemption clauses or exclusion clauses, allocating risk of a mistake is by the use of a contractual promise covering those matters and the committee sort of paused which of course is part of the legislative history is quoted in more detail at the foot of that page. I don't think I need to go further into that.

And the second article, it's a very brief discussion, it doesn't add anything to the first article really except to confirm that six years later that was still Professor Coote's view and it's explained in slightly different words and the Contractual Mistakes Act is discussed on pages 43 to 44 of that article from *The Journal of Contract Law.* So I can move on from that. As I say I think the answer to Your Honour's question is that there are other scenarios where a mistake is not provided for in the contract but actually in this case, given the nature of the contract, the two questions become the same.

I wanted to come back then to Justice Arnold's question yesterday afternoon about the operation of section 6(1)(c) in the context of unilateral mistakes. Just reflecting on that overnight, Your Honour, it occurred to me that one point, further point I should have made is that of course if the mistake that one party has made has been induced or encouraged by the other party then

there will be claims under the Contractual Remedies Act and under the Fair Trading Act. If it's been induced dishonestly, then that's fraud and both as a matter of interpretation and I suspect as a matter of public policy, liability can't be excluded in relation to the representations for that fraud and couldn't be excluded under 6(1)(c). You couldn't sensibly interpret any contractual provision as someone saying, "I accept the risks that I am mistaken because you have dishonestly misled me." I think that would be a great stretch. I wouldn't want to be trying to argue that in this Court or any other Court, I think I'd have a really bad at the office. So I think that's pretty clear.

If on the other hand the error by the mistaken party has been induced but not dishonestly, carelessly for example, then of course you can exclude liability for those representations by a clause, which properly interpreted, has that effect and it doesn't need to say it will exclude liability under the Contractual Remedies Act, it can, if it's clear enough say, you know, you satisfy yourself as to X and there are no representations or warranties, that would do the trick.

Actioning that for mistake then, if the conduct has been dishonest of the non-mistaken party, 6(1)(c) is never going to bite because no clause is going to be interpreted as allocating that risk. If it hasn't been dishonest, then if the provision fairly interpreted, allocates of that kind of mistake, there's no reason not to give effect to it and there's no reason to interpret a clause of that kind in any strained or artificial way, you simply read it in the normal way and ask whether it embraces situations, including that mistake and in a situation where you call for tenders to do some work on a section and someone comes in with a tender which seems to you optimistic and you suspect maybe the result of a view about conditions that you don't share, is an example of a situation where if you've said, "You take the risk on this, you commit to a price" and if you're not snatching at a bargain that plainly cannot be right, then you're not going to have a problem, even if, you know, you think they probably are mistaken, if you've allocated the risk to them, they can be held to that contract and mistake that doesn't enable contracts of that kind to be revisited in the Act was not intended to open up dramatically contracts of that kind which were not liable to challenge on the grounds of mistake at common law.

So intuitively we do I think, think well there's probably some sort of difference between unilateral and common mistake scenarios, that's what drove Your Honour's question, but that intuitive distinction we draw I think is accommodated first by interpretation techniques and in particular in relation to fraud and induced mistakes, *Shotover Mining* type cases. Second, the inability to exclude fraud by any provision, even if you tried to but certainly the interpretation of any ordinary clause is not excluding it and then third, the availability of other remedies where the mistake is induced or encouraged by the other party but if you're not in that space then it seems to me that one shouldn't distort the interpretation and application of section 6(1)(c) in the more frequently encountered scenario of shared mistake because of a concern about unilateral mistakes and allocation of those risks which is accommodated by those other techniques.

Moving on then from 6(1)(c) and coming back to my road map, paragraph 5, "No substantially unequal exchange of values." This very much drives off the point that Your Honour Justice McGrath raised on a couple of occasions with my learned friend that the inequality of exchange has to be assessed at the time of contract and so you have to say, "Well at the time of the settlement agreement in circumstances where the parties hadn't commissioned extensive work by engineers and quantity surveyors and other people to look at rebuilding costs in circumstances where the parties had views about how the contract might operate, knew that they could pursue those further, seek advice from senior counsel, litigate before the Courts, was there a substantially unequal exchange of values in agreeing to settle this claim, with all the different outcomes it might produce for 1.2 million, including GST.

ARNOLD J:

It is an objective test though.

MR GODDARD QC:

It is. So you have to apply an objective test and ask was there a substantially unequal exchange of values and that means that if the parties had properly understood the range of potential outcomes.

GLAZEBROOK J:

Why would there be a range of potential outcomes if the interpretation of the contract is as is submitted by your friend, there's no range of outcomes at that stage?

MR GODDARD QC:

No there's always, at that stage –

GLAZEBROOK J:

Well there might be a range of outcomes in terms of what you would settle for in relation to that, so it may be that you'd say well it was destroyed in the December earthquake, it wasn't destroyed in the February, the repair costs in September were half of what's been asserted but if the interpretation is as is indicated and was known at the time then –

MR GODDARD QC:

But if there's room for differences about how a contract is to be interpreted and applied, then to ask whether there's been a substantially unequal exchange of values when you settle, rather than explore those before the Courts, necessarily involves recognising uncertainty.

WILLIAM YOUNG J:

But you can't take – you can't assume the parties would settle on the basis of a mistake.

MR GODDARD QC:

But you wouldn't –

WILLIAM YOUNG J:

You'd have to exclude the mistake from the assessment of the values.

MR GODDARD QC:

But to exclude the mistake in this scenario doesn't involve knowing what the outcome will be after a matter that's open to reasonably different views.

WILLIAM YOUNG J:

Well that might've been an upstream issue as to whether there was a mistake.

MR GODDARD QC:

I think it comes in at both levels. The mistake, if there's a mistake, is to think that there's only one answer when at the least there's the potential for other arguments and as we've seen from the High Court and Court of Appeal, room for differences about how you go about quantifying an indemnity value for example, quite apart from anything else. We've also seen that if you explore this more, you in fact discover that the market value, the indemnity value assessed on a market approach of this building is not over one million, it's about $520,000. That was the finding of the High Court and the reason that a higher value was identified was because of incorrect information provided by Prattley to the valuers, information about rental streams that didn't allow for outgoings, that treated the leases as net leases when they were gross leases.

GLAZEBROOK J:

But if your friend is right and the mistake is that the interpretation of that contract as an indemnity contract was wrong, then where is – and you had to take that mistake out, so the parties are negotiating on the basis that it's either a fixed value contract or alternatively an actual replacement cost, then where's the scope for different views that?

MR GODDARD QC:

If that was the relevant mistake but in my submission to ask if that's the relevant mistake, that's an incorrect characterisation of the mistake if there was one at that time. The complaint has to be that the parties mistakenly

assumed that the only possible answer was market value. The correct understanding of the position at that time, without having commissioned substantially more advice and without legal and engineering and quantity surveying, all those others, and without having litigated the matter, a correct appreciation of the situation would have been that there was room for argument and different views could be taken about the likelihood of different outcomes. That would've been a completely unmistaken –

WILLIAM YOUNG J:

Well look I'm just looking at your submissions, 5.3, 5.4, "The mistake alleged by Prattley is that both parties believe the appropriate measure of indemnity was the market value of the building. It's common ground that Vero considered the appropriate measure of indemnity under the policy was market value, that was also Prattley's view. Vero says it wasn't a mistake but if the parties were mistaken on this point", oh I see you then say there that, "Prattley does not meet the criteria under section 6B(a).

MR GODDARD QC:

Yes.

WILLIAM YOUNG J:

But you do accept that if they were mistaken and that was a mistake for the purposes of the Act.

MR GODDARD QC:

To believe that there was only one answers, when there could be multiple answers and the answer was uncertain would be a mistake.

WILLIAM YOUNG J:

I may be being unfair to you, I thought you accepted that the mistake was –

MR GODDARD QC:

No.

WILLIAM YOUNG J:

Sorry wait a minute, that if it were the case that the proper value was not indemnity value, if sorry, I'll put that away, that if the parties shared a mistake in believing that it was indemnity value, then that was a mistake for the purposes of the Act. I thought that was what you considered.

ARNOLD J:

Well that's what's said at 5.7 I think isn't it?

MR GODDARD QC:

Yeah, that if they –

GLAZEBROOK J:

Well it's probably just mixing the two questions because it's mixing the question that Justice Young I think put to you yesterday that before it's finally decided there might be a whole lot of different outcomes and it's not necessary a mistake looked at at that particular point to decide on one particular outcome but once I think you have a mistake in terms of the interpretation of the contract and you have to take that out of the equation, then it seems to me a bit difficult to say that there wasn't an unequal exchange of values, you can't say well – because in fact the mistake, if there was one, was not to think there was only one interpretation but it was actually to get the wrong interpretation because there aren't a range of – if your friend is right there aren't a range of interpretations, there is only one.

WILLIAM YOUNG J:

Or to put it another way, if there are a range of interpretations they're all north of the one that they mistakenly adopted.

MR GODDARD QC:

No that's not right Your Honour because –

WILLIAM YOUNG J:

Oh because you can get a disputed – a depreciated replacement value.

MR GODDARD QC:

Yes which is actually a lot – or first of all you could get a market value which is a lot less but you could also get a depreciated replacement cost which is a lot less. So they are both south and north and indeed –

GLAZEBROOK J:

But where would you get a depreciated replacement cost out of your friend's interpretation?

MR GODDARD QC:

No this is responding to Justice Young's question if there's a range –

WILLIAM YOUNG J:

Well he's not really relying on that anymore anyway, as I understand it it's basically all or nothing.

GLAZEBROOK J:

Yes.

MR GODDARD QC:

That's exactly right Your Honour but the fact that they have contended for different outcomes shows I think, if there was –

WILLIAM YOUNG J:

Well can I put it, I mean I think we're arguing about nothing here because if there was a mistake and Mr Cooke is right that they simply should've been paying you out $3.8 million and not a little over a million, he should've been paid out 3.8 instead of a little over a million, then isn't it plain as a pikestaff that there was an unequal exchange of values? The real issue is whether (a) there was – the real issues are (a) whether there was a mistake and (b) if so it's a mistake they've got to wear because of the terms of the settlement.

MR GODDARD QC:

What I think this underscores is the importance of clarity about what is said to be the mistake and going into this the mistake was said to be market value rather than depreciated replacement cost.

WILLIAM YOUNG J:

Yes but it's now market value against replacement value but capped.

MR GODDARD QC:

In itself it seems to me what that shows, if it's permissible for Prattley to be arguing that all, but the different mistake –

WILLIAM YOUNG J:

Well if it's not permissible then you win the case.

MR GODDARD QC:

Yeah it's not permissible but if it's –

WILLIAM YOUNG J:

I mean I don't think you need to worry about a depreciated replacement value.

MR GODDARD QC:

Even if it's open, what it shows that the argument is that the mistake was proceeding on the basis of a confident view that the answer was market value when other –

GLAZEBROOK J:

No it's proceeding on the basis of a wrong view that it was market value, that's what's being asserted and if that's right, then it can't be that there are possible other interpretations because it will just be wrong, otherwise it's not a mistake, if there are possible other interpretations it's not a mistake.

MR GODDARD QC:

On Your Honour's approach, whenever parties go into a settlement discussion and accurately identify the range of possible outcomes but take a view, accurately identify the range of possible outcomes and settle in the middle.

GLAZEBROOK J:

But then the mistake is, if you like, that you pick the wrong one but then presumably you will have identified those options and said well we are settling and it will be a case of whether you've put the risk of you being wrong on one or the other and mostly you will have put the risk of being wrong, well you've covered the risk of being wrong in the contract.

MR GODDARD QC:

But Your Honour is saying is that there's always a substantially unequal exchange of values in a settlement agreement because what is paid will not be –

WILLIAM YOUNG J:

No, look I really don't think this is a very good point. I mean there are much better points you have than this, if that's a more encouraging way of putting it.

MR GODDARD QC:

That's certainly a more encouraging way of putting that point.

WILLIAM YOUNG J:

I mean there are real issues as to whether there's a mistake, there's a real issue as to whether the settlement is conclusive but failing that, if those arguments fail, I think this is really grasping at a straw.

MR GODDARD QC:

Your Honour might be right that a better way of looking at this is that it goes to whether there was a qualifying mistake and if that's really what this argument is in drag then I have made it before and I persist with it and I won't take up more time on it. The other point that does need to be dealt with is my point 6

briefly, which is the question of what the response should be if there was a qualifying mistake and what we see in section 7 –

GLAZEBROOK J:
This probably isn't your best point either but –

MR GODDARD QC:
It's not my strongest point, my strongest point is section 6(1)(c) in the mistake context.

GLAZEBROOK J:
Yes, yes.

MR GODDARD QC:
Plainly and it's like two orders of magnitude more important than all the other points in this case. I've made it, the Court's read the written submissions against that indication, I won't spend time on it this morning. What I will do is move on to the entitlement under the policies and although I was going to begin with the submissions, I think probably it's worth just going back to the policy and reading it a little bit more carefully than my friend did and drawing attention to some structural features of it before I get into the distinctions that I draw in my submissions.

So if we take volume 3A of the case on appeal and turn to "Policy" which begins on page 1472, my 9.1 is wrong on that, that should be, "See policy at 3A 1472" and that's a schedule page to the reference. The first thing again perhaps to note, just picking up on a point I made yesterday, is this is a business insurance policy, it's not a residential one, not a consumer, it's a product offered to businesses and as I said yesterday my instructions are that it's only offered through brokers as a –

McGRATH J:
Sorry I missed the page number.

MR GODDARD QC:

I'm sorry Your Honour 1472, the first cover page of the policy and I wouldn't normally have a cover page except here it would help, it's a business insurance policy and again if we turn over to 1473 a business insurance policy document. And then what we have on page 1475, after the reference to the fair insurance code, is a heading "Insurance contract. In consideration of you having paid or promised to pay the required premium, we agree to indemnify you in the manner and to the extent set out in the applicable parts of this policy." So there's a range of forms of cover provided by the policy, they may or may not be purchased. This is the overarching statement, we'll indemnify in the manner and to the extent set out in the applicable parts of this policy.

GLAZEBROOK J:

Now indemnify in that context must include therefore replacement, given that the policy itself includes replacement.

MR GODDARD QC:

It can and there's a helpful discussion in *TJK (NZ) Ltd v Mitsui Sumitomo Insurance Co Ltd* [2013] NZHC 298 by Justice Miller of how the concept of indemnify can include indemnify against the full costs of repair or replacement. On the other hand as this Court observed in *Skyward Aviation*, it's a slightly awkward and in *Ridgecrest* slightly awkward use in that context.

GLAZEBROOK J:

Well it's not awkward except in – because in plain English it's perfectly unawkward if you like, it's just awkward in the context of the old insurance law.

MR GODDARD QC:

The way that it has been explained helpfully I think, is to make the point that where you see replacement policies they, I'll say almost invariably, though I haven't come across any exceptions ever I don't think, provide for payment of indemnity upon loss and for the additional costs of repair or replacement only once they're occurred. So in that sense it's indemnifying you against expenditure as and when you incur it and what it then says is and we're not

going to claw back any allowance for depreciation for betterment if you've purchased replacement. So it's still an indemnity in the sense that you're indemnifying against expenditure actually incurred to repair or replace.

GLAZEBROOK J:
Actually I'm not sure that the *Ridgecrest* one was that because I think you actually got –

MR GODDARD QC:
Only if you actually did.

WILLIAM YOUNG J:
But they could waive I think.

GLAZEBROOK J:
They could, yes.

MR GODDARD QC:
You can always waive something that's there for your benefit.

GLAZEBROOK J:
Well no I think they were able to build or buy elsewhere, they just got the money to go and do it.

MR GODDARD QC:
But only when they bought elsewhere, unless you positively –

GLAZEBROOK J:
No I don't think they were actually, but it doesn't matter really but I'm not sure it's again your best point.

MR GODDARD QC:
Well it's an important backdrop to the way in which the language is used in insurance policies and it is an important point when we come to consider the interpretation argument made by Prattley in this case and let me just keep

working through that. We don't need to – I think just pause on the general exclusions. My friend took the Court, and I just want to come back to it, to the material damage part of the policy and this is the one we're concerned with beginning on 1479, the indemnity, "We will indemnify you for damage to any of the insured property occurring during the period of insurance." So that's the substantive promise, that's to indemnify and then as Your Honour Justice O'Regan pointed out yesterday, what we have is a how provision. You will be indemnified, same as the previous one, how, either by payment or at our option by repair or replacement of the lost or damaged property and that serves two functions, it serves the function of enabling the insurer to control cost and it also addresses the issue of moral hazard by ensuring that if the insurer wishes to do so, they can require by repairing or replacing themselves that the proceeds be outlaid.

WILLIAM YOUNG J:
Is there anything, I mean it occurs to me that the words "by repair or at our option by repair or replacement of the lost or damaged property" is to address moral hazard but is there a basis for that other impression?

MR GODDARD QC:
It's quite extensive recognition in the insurance literature that that's the function it serves and that's referred –

WILLIAM YOUNG J:
Can you refer us to any?

MR GODDARD QC:
Well I wonder if this Court didn't pick up some of that in *Ridgecrest.*

WILLIAM YOUNG J:
We may have picked that up in *Ridgecrest* but that was particularly with respect to replacement policies.

MR GODDARD QC:

Replacement policies but more – I think Your Honour might actually have gone further than Your Honour thinks. Let me just find out, Ridgecrest, it's in my friend's authorities, it begins on page 166, but the relevant passage is in sort of the 20s and it's certainly an issue that's discussed in that Canadian case *Brkich & Brkich Enterprises Ltd v American Home Assurance Co Ltd* (1995) 127 DLR (4th) 115 (BCCA) at [29]. and I'm not quite sure how to – if I've got the pronunciation right.

WILLIAM YOUNG J:

What page in *Ridgecrest*?

MR GODDARD QC:

Just finding the right – actually I think – I think it's *Skyward Aviation* that deals with it more clearly, sorry Your Honour. Yes so *Skyward Aviation* which is at 401 of my friend's bundle of authorities and the discussion of this issue begins at paragraph 24 and this specific point is made by Your Honour for the Court at 26. It says, "The figures provided illustrate how replacement value insurance creates heightened moral hazard. The associated risks can be mitigated by insurers in various ways, including by policies (a) providing insurers with the option of reinstating the property and (b) limiting replacement value recovery to reimbursement of expenditure incurred by the insured." So the option of doing it yourself is a technique for addressing moral hazard and Your Honour refers to the *Brkich* case which makes that point and refers to an article in a Canadian journal. So there are two reasons for a provision of that kind. It's also touched on, let me just check a reference my learned junior has given me. In the replacement context in *TJK* at paragraph 38 but even outside the replacement context it's common for insurers to reserve to themselves the ability to repair or replace themselves and there are two reasons for that, one is that they can often do deals with suppliers to have repairs done at lower cost.

WILLIAM YOUNG J:

Is there's nothing that's specific to indemnity as opposed to replacement policies on the moral hazard issue?

MR GODDARD QC:

I think it's touched on in *Brkich.*

WILLIAM YOUNG J:

Okay *Brkich.*

GLAZEBROOK J:

Yes I think it looks as though it probably is from what's said in *Skyward.*

MR GODDARD QC:

I re-read it last week and I think it did but I just don't have it with me I'm afraid, other than electronically and it would waste the Court's time for me to check it on the computer and do that now but I'm pretty sure Your Honour is right that it's *Brkich.* But intuitively, I think Your Honour's intuition also makes perfect sense in this context which is that it's serving the function of managing moral hazard because an insurer can say I'm just going to give you this money, I can actually do the work myself. So an insured with an indemnity policy who wants to cash up runs the risk that they won't actually end up cashed up they will just get their property back reinstated.

GLAZEBROOK J:

But possibly make sure it's done as well rather than the money pocketed and it not done which can sometimes be important for continuing insurance.

MR GODDARD QC:

For continuing insurance it often will although that's not always of course the case.

GLAZEBROOK J:
No, no obviously otherwise we wouldn't have the leaky building problem that we do no doubt.

MR GODDARD QC:
And the other one is just a very practical one that, you know, if one finds that one's daughter has broken the wing mirror on one's car, as I did recently, your insurer will usually say yes we will repair that and they will have a specific repair place that you must go to because they've some sort of deal in relation to costs with them, so it also enables them to manage cost by doing it themselves.

So it's a mechanisms which serves those two functions and the fact that it's an option doesn't mean that it's the only way in which the indemnity can be provided and it doesn't tell us anything about what is meant by indemnifying you. There are two, maybe three ways in which we can shed light on that question of what it means to promise to indemnify you for damage, one is the backdrop of more than 100 years of insurance law against which this sort of policy is written in the expectation and in my submission legitimate expectation that that is a framework that will continue to be applied to the interpretation and application of policies of these kind. These are very well settled concepts and when you write a contract against the backdrop of settled law, you can expect that it will be interpreted against that backdrop. Second, ordinary English, when I looked last night at my New Zealand Oxford dictionary, it defines indemnify as "Compensate a person for a loss, expenses et cetera" often followed by "for" and that's exactly what we've got here, so we will compensate you for this damage. What does it mean to compensate you? But third and most importantly, where we get, no equally importantly with backdrop actually, equally importantly, where we get guidance on what's meant by indemnify here is the structure of the policy and the fact that reinstatement cover is an extension that you have to purchase and I'm going to come to that shortly but just note here that the basic indemnity is obviously something different from reinstatement cover because reinstatement cover for risks other than natural disaster has to be purchased separately under

extension MD033 and replacement cover, reinstatement cover for earthquake has to be purchased separately under MD022. So we know that you're buying something different, that you haven't bought the extended form of cover and that comes up again and again in the structure of the policy and we'll see that as we work through it.

Just pausing to shed light on one question that was asked by the Court yesterday, the third paragraph under the indemnity, subject to the reinstatement of amount of insurance extension, I don't think there's any dispute about –

GLAZEBROOK J:
So sorry which page are you on now?

MR GODDARD QC:
I'm still back on 1479, Your Honour, I've moved on.

GLAZEBROOK J:
Sorry I've flicked ahead to something, so I've lost where you were.

MR GODDARD QC:
So 1479. "Subject to the reinstatement of the amount of insurance extension our liability will not exceed the total sum insured or where more than one item is included in the schedule, not exceeding in respect to each item the sum insured applicable to the item", if we just jump to the schedule now which on - and the relevant page is 1561, the Court will see the whole range of different things which could be insured under this policy, not only buildings but also plant, machinery and contents, stock, tenant's improvements and so on down. Most of those were not in fact insured by Prattley but the reason we see the phrase "Total building sum insured" is that it's the sum insured for that item, so it's a sum insured for an item and then you get a total sum insured which will, if you've taken out cover under this policy for your contents and your plant and other things, be a bigger number, so –

GLAZEBROOK J:
Oh okay I see.

MR GODDARD QC:
So the Court was asking what's this total building sum insured, isn't that a funny thing? It's not a funny thing and it does link into the policy. It links back into the policy by being an item for which there is a sum insured, the building. The other point that just drops out of that and it's in my 9.1A is that it is important to bear in mind when reading this policy that the material damage section is drafted to apply not only to buildings but also to content, plant, machinery, stock and other contents in a building. It's a generic set of provisions and my friend's argument that the indemnity provision on 1479 of itself entitles an insured to replacement cover even before you get to the special note, would lead to the extraordinary proposition first of all that you weren't buying anything meaningful extra when you bought replacement insurance, the extension, MD033 or MD022 but second that all contents, all chattels included in the material damage cover were insured on a replacement basis, that the promise to pay is a promise to pay, repair or replacement of chattels without depreciation and that can't be right and we see that it's not right from a host of other provision that recognise that distinction as we work through. One of those which as it happens, although it's a happy accident drops out of my – it links into my iPhone example, if we turn over the page to page, oh no immediately under "Indemnity" the Court will see "Automatic extensions". So those are –

GLAZEBROOK J:
It's 1479 again is it?

MR GODDARD QC:
1479, yes sorry, jumping around, 1479 automatic extensions. So here are some extensions that extend what might otherwise be thought of as indemnity that provide additional cover. So these are clarifications upwards that are automatic, you don't have to pay anything extra for them and the reinstatement of amount of insurance clause that my friend went to on 1482 is

one of those, that's an automatic extension. Another one is "13 portable equipment. We will cover you for portable computer equipment away from your business premises anywhere in the world including while in transit." So that extends the indemnity of contents to your contents while they're removed.

In the next paragraph, "In respect of any loss or damage at or away from your premises, the reinstatement of additional extension if taken will be extended only to any item of portable computer equipment" da da da da, "that is less than two years old at the time of the loss or damage." So here what we have said is even if you've bought reinstatement cover, that extension will only apply to your iPhone, to your computer, if it's less than two years old. In the example I gave in paragraph 8.1 of my submissions of the iPhone dropped in the swimming pool, something that a couple of my family members have also managed to achieve, although in one case to be fair one of them had it in her jeans pocket and jumped in to rescue a child so maybe that was more permissible, even if I had purchased reinstatement cover it wouldn't have applied to the phone. What would have applied, the general indemnity. What's the general indemnity, well it's obviously something different. It's indemnification for your loss, the loss being a two year old iPhone. So it's explicitly distinguished that this reinstatement is something extra and that you won't always get it for certain things.

Then we come on, on page 1483, to the exclusions and the policy. This just helps to make sense of 20 and 22, the exclusions and item 7 excludes natural events and other processes. So if you insure a building under this policy, the default position is that you don't have cover for natural disaster. It's something extra that has to be purchased and that's why we then, if we move on to page 1487, get to the additional extensions. So these are the additional extensions, 1487, as my friend said, "Each of the following extensions will have no effect unless there's a statement in the schedule that a particular extension will apply." So these are extras you have to buy and you can expect to pay more for them, over and above the base indemnity and from a structural perspective, the most important of the extensions for

understanding what's meant by the original indemnity is MD33 which I'm just locating again. So that's on page 1492, reinstatement MD033, bottom of the left-hand column, "This extension applies to those items of insured property that have an excess of indemnity value shown in the schedule. In the event of any insured property to which this extension applies being lost or damaged, the basis on which the amount payable under this material damage section is to be calculated, it will be the cost of reinstatement of that property." So it's something different, reinstatement is different and when do you get it? Well that's also explained in the provision. Reinstatement is defined at the foot of that right-hand column in 1492, "If the property is lost or destroyed it's replaced by an equivalent building or equivalent plant and where it's damaged but not destroyed restoration to a condition substantially the same as but not better or more extensive than its condition when new ie without taking into account appreciation or betterment." And the special provisions are important, in particular number 4, so over on page 1493, left-hand column, bottom of the column, "Circumstances if this extension does apply, no payment beyond the amount that would've been payable had this extension not been incorporated in this material damage section will be made if you elect not to reinstate, if the work of reinstatement is not commenced and carried out with reasonable despatch, until the cost of reinstatement has been actually incurred" and certain other things. Then, "Whereby reason of any of these circumstances no payment is to be made beyond the amount that would've been payable if this extension has not been incorporated in the material damage section, your now rights and liabilities in respect of the damage will be the same as if this extension had not been incorporated in this material damage section. So this is where you buy replacement cover if that's what you want and if you're willing to pay for it and even then if you don't actually do the work, you don't get more than indemnity value.

GLAZEBROOK J:

Indemnity value as far as I could tell, which is what I was looking at before, doesn't seem to be defined anywhere.

MR GODDARD QC:

It's not.

GLAZEBROOK J:

Although in the schedule it does say, oh now I've lost it.

MR GODDARD QC:

It's on 1561.

GLAZEBROOK J:

Oh cover type is indemnity value.

MR GODDARD QC:

Yes.

GLAZEBROOK J:

And then they have a total sum insured being 1.6.

MR GODDARD QC:

I wanted to come back to that.

GLAZEBROOK J:

Which could suggest that that is the agreed indemnity value.

MR GODDARD QC:

Except that it doesn't say that and there's no provision that would give it that effect.

GLAZEBROOK J:

Well but there's no provision that says what the indemnity value is apart from saying agreed indemnity value.

MR GODDARD QC:

But there's no promise to pay anywhere an agreed amount, unlike with other assets.

GLAZEBROOK J:

Well it says you only pay the indemnity value, indemnity value is not defined. You have here cover type indemnity value and then you have a number.

MR GODDARD QC:

Which is described as a sum insured and the function that the sum insured performs is explicitly identified as a ceiling in that indemnity provision.

GLAZEBROOK J:

Well do you want to show me where that says that?

MR GODDARD QC:

Yes we were there a moment ago Your Honour, it's back on 1479, third paragraph, "Subject to the reinstatement of amount of insurance extension, our liability will not exceed the total sum insured", so that's the total sum insured, "Or where more than one item is included in the schedule will not exceed in respect of each item the sum insured."

GLAZEBROOK J:

Okay.

MR GODDARD QC:

That's what that is and the reference to indemnity value is against cover type and it's clearly –

GLAZEBROOK J:

No I understand that.

MR GODDARD QC:

Yes okay. But this is not a valued policy, the sum insured is a cap and not an agreed indemnity value.

GLAZEBROOK J:

And you take that from that third paragraph, nowhere else?

MR GODDARD QC:

And the whole structure.

GLAZEBROOK J:

Well I don't know that you can say the whole structure in terms of that.

MR GODDARD QC:

Well there are frequent –

WILLIAM YOUNG J:

I'm still trying to catch up, this is 1479?

MR GODDARD QC:

Yes 1479 is the reference to "Will not exceed the sum insured."

McGRATH J:

The third paragraph you say, do you mean the paragraph under "Automatic extensions"?

MR GODDARD QC:

No Your Honour, the third paragraph under the heading "The indemnity".

McGRATH J:

Oh sorry, yes thank you.

MR GODDARD QC:

That's where liability is limited to the sum insured or if there's a sum insured for a specific item to the sum insured for that item and it's picked up in many other clauses as well with a reference to it being a ceiling, the lesser of often the sum insured and certain other things.

GLAZEBROOK J:

Do want to give us those references to save us going through them? You can do what your friend was going to do and provide them to us.

MR GODDARD QC:

I'm happy to do that. I'll mention one or two of them as I go through now. So where I was, was on 1484 noting the natural events being excluded, then I'd gone to the additional extensions on 1487. I'd taken the Court to MD033 which is the clearest structural indication of the difference between how this policy works as an indemnity policy and as a reinstatement policy, replacement policy. You have to separately buy the reinstatement cover and then you only get something more than indemnity if you actually embark on the work of reinstatement and that again is a provision which manages moral hazard and that's the way that works was addressed by Justice Miller in the High Court in *TJK (NZ) Ltd v Mitsui Sumitomo Insurance Company Ltd* [2013] NZHC 298 and was summarised by this Court in *Tower Insurance Ltd v Skyward Aviation 2008 Ltd* [2014] NZSC 185, [2015] 1 NZLR 341.

Turning then to the two types of natural disaster cover that you can purchase, and again this is a helpful indication of how the policy is structured and what's meant by indemnity, we have on pages 1489 through 1491 the two types of natural disaster cover you can buy, earthquake indemnity and earthquake full reinstatement and what has been purchased here, it's common ground, is the earthquake indemnity cover and what is said there and it's the very foot of the left-hand column of 1489 is, "In the event of any insured property to which this extension applies suffering earthquake damage or certain other natural disaster damage during the period of insurance, we will cover you for such damage." And as Justice Miller explained in *TJK* a policy offered by a different insurer but which has identical provisions, identically numbered in fact, what that does by saying we will cover you, is reapply the general indemnity. So it's been excluded by the exclusion in 7. This is not a separate promise of indemnity, this just says the general indemnity comes back in.

GLAZEBROOK J:

So whereabouts are you exactly there?

MR GODDARD QC:

I'm in the –

GLAZEBROOK J:
What page sorry?

MR GODDARD QC:
1489, left-hand column, I'm in "Earthquake indemnity MD020".

GLAZEBROOK J:
Yes, yes.

MR GODDARD QC:
And I'm in the very last paragraph on that column. So in the event –

GLAZEBROOK J:
The first column, okay I've got you.

MR GODDARD QC:
So we will cover you for such damage and what that means is the indemnity cover provided under the indemnity will apply to that damage, despite the exclusion we saw a moment ago. You've bought back in to cover for natural disaster and that cover is the indemnity cover which is not the reinstatement cover because you have to buy that separately and we see that explicitly dealt with in relation to natural disaster. In the cover that was not purchased by Prattley, earthquake full reinstatement cover, MD022, which begins over on page 1490, and again what we see is a provision that's similar to MD033, there are a few differences in relation to the EQC Act and one or two other differences which I'll come back to in a moment but critically what we see is that same special provision, the special provisions begin in the right-hand column on 1490, they continue over to 1491 and special condition 4 again, "Circumstances where this extension does not apply. No payment of more than the indemnity value will be made under this extension if the work of reinstatement is not commenced and carried out with reasonable dispatch until the work, cost of reinstatement has been actually incurred or if the property is damaged but not destroyed and it's impermissible to do it." So again you can't get more than indemnity value, you can't get that extra cover,

even if you purchased it, unless you actually do the work and what I think the comparison in these provisions underscores is just how ambitious it is for my friend to argue that the general language of the indemnity on 1479 provides for repair or replacement without any allowance for betterment because that makes no sense of the additional extension you have to buy for risks other than natural disaster. It makes no sense of the distinction between buying cover under that indemnity under 020 and buying full reinstatement cover for earthquakes under 022 and it makes sense of the structure of reinstatement cover for other risks for natural disaster damage, which is that you can never get more than indemnity value, the base cover, unless you've actually embarked on the work and yet my friend is arguing here that Prattley can get that full amount without having undertaken the work.

WILLIAM YOUNG J:
All right, I think we've got that.

MR GODDARD QC:
So is there anything else on the policy that's worth looking at? Perhaps worth noticing also that if you're going to buy that full replacement cover and it wouldn't make much sense to have it for natural disaster unless you had it for other risks as well, then if we turn over 1493 we see that you also have to provide annual valuations of the property and you're subject to an average condition. The, again, slightly surprising that a same outcome could be achieved without those requirements.

I then, coming back to my road map, make the point at 9.2 that Prattley expressly chose indemnity cover for this building and nominated the sum insured. I've provided references, I won't take up the time of the Court going to them, I don't think there's anything controversial about that. The special note was requested by Vero. The email requesting that note is in volume 3A on page 1558 and Your Honour Justice McGrath's question about the quote marks, someone very literal – if you have a look at 1558.

McGRATH J:
Sorry 3A is it?

MR GODDARD QC:
3A, almost everything of interest is in 3A. I don't quite know why we've got the rest. So, "Could you pleases put the following wording on your place" and Your Honour will see that it has quote marks around it and someone very literal has put the following wording on including the quote marks, that's the explanation for that. There's no legal significance but boy have they done their job. So that's why I diverted through that to answer that question.

9.4, it was understood by Prattley's broker, their agent and certainly their agent to know a point that this Court made in the *Firm PI 1 Limited v Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015] 1 NZLR 432 case limited Vero's exposure, it was a limit not an extension of it. So my friend's argument doesn't get there on the general indemnity provision and that's wildly optimistic, with respect, to suggest that the special note which Vero intended to limit exposure, Mr Cherry says so in his evidence and which Prattley's agent knew was a limit is again extremely ambitious and with respect implausible argument and my friend puts a lot of emphasis on the use of language relating to reinstatement in the indemnity clause and various other places in the policy but as I'd have thought was obvious and has been recognised by authority and there's the *Reynolds v Phoenix Assurance Company Ltd* (1978) 2 Lloyds Rep 440 case which I refer to there, the use of language contemplating reinstatement replacement in a policy simply recognises it as a possibility not as an invariable outcome and that's almost exactly the language of the *Reynolds* decision which is also a good decision on betterment generally. I'm not going to spend a lot of time on it at this stage but it is in volume 2 of my authorities under tab 12 and if we just go for now to the passage that I am referring to. It's on page 450 of *Reynolds* and about half way down, just where that first sideline bar and the Lloyd's law reporters helpfully put in whenever anything exciting is happening, to a report, so page 450 of the report, "Mr Beldam for the Plaintiffs on the other hand argues that both from the wording of the policy itself and from surrounding circumstances

it must be taken the parties contracted on the basis reinstatement was here the appropriate method of giving indemnity." So that's essentially what my friend is arguing, "And that as there is no doubt of the genuine intention of the plaintiffs to reinstate, an indemnity must necessarily amount to the cost of reinstatement." Just pausing here, that's not the case, the plaintiffs have consistently said here it's keeping its options open. "Now I think I must start by rejecting Mr Beldam's first argument," which comes from the wording in the policy, "Of course there are words used in the policy which are appropriate to reinstatement, but they are there because the parties must be taken to have contemplated not the inevitably but the possibility that reinstatement might be the appropriate way of giving indemnity." And that's really the short point. It's an option. It will often by the appropriate option and how it will work is then regulated, but it's not the only way of giving an indemnity, as a matter of ordinary language, or as a matter of hundreds of years of insurance law.

Mr Cherry, in a passage again that I won't take the Court to now, and it's noted in my 9.5, when he was cross-examined about the special note and what it did was very careful to say, yes, if we were repairing or replacing then this governed how we would do it. But it's not the only thing we will do and it's not the only measure of a payment. It deals with a possibility. It doesn't lock anything in.

I then want to loop back to some of the basic principles that apply to the interpretation of this policy and that shed light on the problems with my friend's arguments. Some of the conceptual distinctions that are important I run through in paragraph 8.1, let me go to that first, of my main submissions, and I do just want to emphasise the importance of keeping all of these things, which logically are distinct, distinct when reading the policy and understanding what it does. First, and most importantly, the basis of cover, is it indemnity or replacement cover, and that's a structural distinction that pervades the policy, and as I note, part way down, 8.1(a), where you get more than an indemnity, where you get the cost of repairs or replacement typically that were provided only either by the insurer doing that work or by paying for it when it's done,

and that manages the moral hazard issue discussed by this Court in *Tower v Skyward* at paragraphs 24 and 26.

Prattley's argument that it gets full cost of repair or replacement without any allowance for betterment, and without any requirement to apply the funds towards repair or replacement, really is a contradiction in terms, it says, this isn't an indemnity policy, it's a replacement policy, and it will be an astonishing way to read either the general provision or an astonishing way to treat the special note, given it's understood intention and effect.

The second key concept, the sum insured or policy limit, and it is important not to blur the level of sum insured and the nature of the cover provided as my friend's submissions do. The existence of a sum insured and its amount, don't determine whether a policy is an indemnity policy or a replacement policy, they're quite distinct issues, and again at the risk of stating the obvious, that any given sum insured a replacement policy will give you greater entitlements and will cost you more in terms of premium, than an indemnity policy. Because, of course the vast majority of losses are not total losses. Particularly if you have contents insured, you're going to lose one item, or have one item damaged, not everything. A building normally is partly damaged, not completely destroyed, and the difference in entitlement between a replacement policy and an indemnity policy will be very substantial, all those partial loss sort of cases, even though you're nowhere near the sum insured. So you're going to get more valuable cover if you have a replacement policy than an indemnity policy for any given sum insured, and you can expect to pay a different premium. They're just different things at a fundamental level and that difference is independent of the amount specified as the sum insured.

Then you get to the third concept, which is important here, the measure of indemnity. There's a promise to indemnify for your loss, to compensate you for your loss, but how do you work that out? Well, the Courts are used to this challenge in many other contexts. What is the compensation for loss, in a tort case, for example, it will depend on what's been lost, and it's value to the

person who suffered that loss, and in my submission the generality of the language reflects the variety of circumstances that the policy needs to be applied to. Far from being a matter of criticism, it's inevitable that it'll be general because what someone loses as a result of damage to property will depend on the nature of the damage, nature of the property, and the purpose for which that insured held it. The case law again has been consistent for certainly decades, probably, I suspect, longer. More than 100 years, anyway. You ask what the loss is to this insured as a result of this damage. What have they lost? The answer will often be market value. It will often be depreciated replacement cost, but it will sometimes be something different and I gave the example yesterday where what you lost was some rentals for a brief period before demolishing the building, which we're going to demolish anyway. There are other situations that have come up which the Courts have adopted different techniques for assessing what this person has actually lost as a result of this damage to this property.

Then finally mode of satisfaction, the how point. I think I've covered that sufficiently. You can perform both an indemnity obligation and a reinstatement obligation, either by paying the appropriate amount reflecting the value of what's lost or by providing the item or undertaking repairs to it. So in the two year old iPhone example, you can go on TradeMe and buy an iPhone that's two years old and it's been used for two years by someone but they've upgraded to the iPhone 7 and you are happy to buy a more basic one, especially if you're venturing into the iPhone world for the first time as some, I understand, may contemplate doing today such as my learned friend, although I think my learned friend is going to cut straight to the new.

Anyway, mustn't confuse mode of satisfaction which is the context in which repair or replace is referred to in the general indemnity provision with the substantive entitlement. So those are some basic conceptual framework issues.

I then turn to some related principles in section 6 of my written submissions. The way it has been put is the focus is on ascertaining the insured's actual

loss measured in money terms. That's explained in a very helpful judgment, *Leppard v Excess Insurance Co Ltd* [1979] 1 WLR 512 which quotes the famous passage of Lord Justice Brett, as he then was, in *Castellain v Preston* (1883) 11 QBD 380. The insured in case of a loss against which the policy has been made shall be fully indemnified but shall never be more than fully indemnified. That's the fundamental principle of insurance. If ever a proposition is brought forward which is at variance with it, that is to say, which either will prevent the assured from obtaining a full indemnity or which will give to the insured more than a full indemnity, that proposition must certainly be wrong. That's a touchstone that 133 years later continues to be used by the Courts in England, New Zealand, Australia, Canada, to measure arguments by. Perhaps worth pointing out that the concept of an indemnity and indemnity value as well as being pervasive in insurance policies is found in legislation. This Court dealt with the fire service levies which set premiums by reference to indemnity values. The concept of the indemnity value of property is also used in the Earthquake Commission Act, for example, in section 19. Again, it's not a really obscure concept. It's something that pervades insurance law and turns up in our legislation and the meaning of the term which was adopted by the Court of Appeal and expressly approved by this Court in the fire service commission case was that indemnity value means depreciated replacement cost of insured property or its current market value depending on the nature of the property and the purpose for which it's held by the insured, and for most purposes that's a perfectly good definition.

I don't think I need to go through – I do make the point at 6.5 that where reinstatement is not likely to occur, diminution in market value will usually be the more appropriate measure, because the purpose of an indemnity payment is to indemnify the insured for a loss that has actually been suffered, not to provide a windfall gain. That becomes important when we turn our attention to multiple events. If it's a reasonable thing to do, and if the insured is expected to repair or reinstate, then indemnifying them by meeting that cost, less an allowance for betterment, will often by the appropriate way of providing an indemnity. But it makes no sense to measure the loss by reference to those costs, if those costs are not going to be incurred.

There's an argument about whether one looks at pre-loss matters or post-loss matters. I come back to that later, and it doesn't actually make a difference in this case, and then I deal with the allowance for betterment very briefly, again I'll loop back to that, but it's perhaps worth noticing at 6.7 that although there's no fixed way to calculate an allowance for betterment where an insurer pays on the cost of repair, basis of cost of repair or reinstatement, under an indemnity policy of course, the two most common approaches are, increase in value of the property upon its reinstatement or replacement over its value immediately before the loss, and we'll look at a case later, very shortly in fact, where what the Court did was to say, well, you're going to be able to earn increased rents of X dollars per year, the present value of that is $60,000, so that's the betterment from doing this work, and that was one of the approaches to betterment that was the subject of evidence below. The alternative is just to estimate depreciation. In a rational market those would come to much the same thing.

But the ultimate purpose of an assessment of betterment is to determine the amount which the insured would be better off if the property were to be reinstated following a loss. There must be an allowance for such betterment in the calculation of the indemnity sum consistent with the indemnity principle, and I cite some cases that deal with that point.

Two cases which I'll come back to in the context of multiple events are *Ridgecrest* and *QBE Insurance (International) Ltd v Wild South Holdings Ltd* [2014] NZCA 447, [2015] 2 NZLR 24, so I'll skip over my 7.2 and 7.1 at the moment. That brings me to my point 8. I don't think I need to spend much time on this in the light of Your Honour's point. Your Honour took my friend yesterday to the pleading, the unequivocal pleading by Prattley at first instance that the entitlement of Prattley under the policy was to depreciate it, replacement cost, that was in paragraph 17B of the third amended statement of claim on page 75 of volume 1, I won't go back to it, but there's no alternative pleading or anything like that. The statement was it's depreciated, replacement cost, and that was the way on which the case was consistently

conducted by the plaintiffs below, and I provided some references to my friend's cross-examination of Ms Austin where questions were to put to her on the premise that Prattley's case was that Prattley was entitled to depreciate a replacement cost to Mr Cherry again on the same premise, and I provided a reference to my cross-examination of Mr Keys where I, first of all, tried to work out with him what was common ground before I moved on to what his evidence was doing, and I said to him, "So it's Prattley's case that the measure of indemnity is depreciated replacement cost?" "Yes." "And what your evidence is seeking to do is to quantify that depreciation?" "Yes." And then we moved on.

Now Mr Keys was giving evidence in part 2 of this trial, it ended up running over time in, I've lost my dates now – so we had a week, two weeks, in December 2014 and then we came back and had several days in the course of one week in March 2015, and as late as March 2015, while the evidence was being given, Prattley's case was still unequivocally that its entitlement was depreciated replacement cost, and that, as I say it's probably clear from the questions I was putting to Mr Keys, who as well as being called as an expert witness was, of course, Prattley's claims advocate and the funder of Prattley's claim. It was only in closing that my friend, perhaps presciently recognising that Mr Keys' evidence on depreciation might not commend itself to the Court, sought to reframe the case as a claim for the cost of repair or replacement with no allowance for depreciation or betterment and, of course, by then it was too late for me to cross-examine Ms Britten –

WILLIAM YOUNG J:

The truth is, this is an issue which is quintessentially one of interpretation of the documents. There's very limited scope to be obtained from getting into the providence other than perhaps in relation to the heritage provision, but that's been fully explained and it's not in dispute.

MR GODDARD QC:

If it had been pleaded and argued below that the effect of that heritage provision was to provide for repair/replacement with no allowance for depreciation –

WILLIAM YOUNG J:

But you can't be allowed to call someone to say well I didn't think it meant that.

MR GODDARD QC:

I would have sought rectification. So I would have sought rectification to – I think it's a matter of interpretation. So my primary argument, Your Honour, is that it is a matter of interpretation. This is the *Reynolds* situation. It's if we repair or replace, then this is how it works. But if there's a serious argument that that's not what it means, that it's not –

GLAZEBROOK J:

But I don't think your friend is even putting that argument, that it means anything different. He just put it as he explained, I think to Justice McGrath, that that just backs up his interpretation of the indemnity clause itself.

MR GODDARD QC:

And if it's that the argument then, because the indemnity clause can't possibly mean what it's said to mean, that's not a problem. But –

GLAZEBROOK J:

Well that was my understanding of his argument and I think he explicitly said so when Justice McGrath asked him.

MR GODDARD QC:

And if that's the position then I'm happy to run with it. Your Honour will appreciate that Prattley's position has not been firmly fixed in this, it's been a bit of a moving feast, and I've been anxious as a result to anticipate a range of forms it might take. It's been a bit like, you know, a balloon where you

squeeze it and it pops up somewhere else, especially on this issue of depreciated replacement cost or replacement cost with no depreciation. I don't think I need to spend any more time on this anyway, but I just want to make it clear that if the argument is being run that the special note, and the way it's crafted, has any material relevance to a claimed entitlement to repair or replacement with no allowance for betterment, then in my submission it isn't open to Prattley to run that argument because other issues could, and probably would, although hindsight is, you know, hard to shed, have been explored at trial.

Moving on then, I've covered nine in my road map, so we're down to 10. So this is the argument that the appropriate measure of Prattley's loss is, in fact, market value, that the High Court was right on this, and the Court of Appeal was wrong to find that it was depreciated replacement cost. I'm conscious that it's –

WILLIAM YOUNG J:
Let's stop now. One of our number is required to go to a funeral at 1 o'clock so we'll stop at 12.40 and then resume if necessary at 2 pm. Well, in fact, we probably be able to resume at 2.15 because I think you're starting to run out of steam aren't you?

MR GODDARD QC:
That's not the way I would put it, Your Honour, but I'm starting to run out of matters that it's worth troubling the Court with.

WILLIAM YOUNG J:
Thank you, we'll adjourn now.

COURT ADJOURNS: 11.30 AM
COURT RESUMES: 11.46 AM

MR GODDARD QC:

Your Honour, two loose ends from this morning, first Your Honour asked about the entitlement of the insurer to repair or replace an interim indemnity policy when that was also addressed in moral hazard. There's quite a helpful discussion of the purpose of such provisions in *Colinvaux*. I don't have copies I'm afraid but it's on page 540 of the current edition of *Colinvaux's Law of Insurance in New Zealand* and the point that the learned authors makes is that reinstatement clauses, that in the absence of reinstatement clause the insurer's obligation is to pay, they can't insist on themselves repairing or replacing, so the basic rule under insurance policy, will indemnify you is that you have to pay. So insurers have included clauses, giving them the option of repairing or replacing to enable them to do so for two main purposes identified by the authors, first to deal with the situation where there are different interests insured and you face the risk that if you pay any one the others might be aggrieved, so you can just do the work and then everyone's happy, mortgagees, lessees, others but also second, the authors say, "A reinstatement clause is a significant anti-fraud device, an assured who is tempted to set fire to or otherwise destroy their own property in an attempt to obtain its doubtless inflated cash value from their insurer will have no incentive to do so if all they will receive is the same subject matter with repairs." So it's exactly the moral hazard point Your Honour made and it's pointed out that that was actually one of the purposes of section 83 of the Fires, Prevention, Metropolis Act 1774. So when I suggested that this had been the position for some time.

WILLIAM YOUNG J:

So that's *Colinvaux* at page 540.

MR GODDARD QC:

540, it makes exactly the point that Your Honour was making as a matter of intuition earlier today and makes the point that that's been the position for almost 300 years. That such provisions have served that purposes, long before of course Your Honour the concept of replacement.

WILLIAM YOUNG J:

Or even I was born.

MR GODDARD QC:

Yes Your Honour and long before, I was going to say, the concept of replacement insurance had emerged. That's a relatively recent phenomenon. Back in the 18th century, the only sort of cover that was around was indemnity cover. The other point that I wanted to pick up from this morning was just to identify the one place where there is something like an agreed value operating as an alternative basis of settlement and that's in the commercial motor part of the policy which the Court was taken to. So if we go very quickly to volume 3A and to page 1504 and this is the provision that Your Honour Justice Arnold asked my learned friend about yesterday. So the commercial motor cover begins with an indemnity provision, at the top left-hand column of 1504, "We will indemnify you for loss or liability as defined by part 1 and part 2 as applicable occurring during the period of insurance." Again we've got that "indemnifying you for loss or liability." What's meant by indemnifying you, there are alternative basis of settlement that are available in relation to commercial motor vehicles. Part 1, lost to the insured vehicle begins in the left-hand column of 1504, "We'll indemnify you for loss to the insured vehicle occurring during the period of insurance. We will at our option repair, replace or make a cash payment. When an insured vehicle suffers loss certain other costs" and then over at the top of the right-hand column, "Basis of settlement", so here we do have more detail about how the indemnity will be given and the reason for that is that insureds have an option, they can elect between market value/sum insured and an agreed value. So the limit of our liability is as follows, and it would've been helpful if this had been organised into subparagraphs but that's how it works. The first is market value/sum insured, "We will pay the lesser of the market value of the insured vehicle or the sum insured." So that's ruling out other measures of loss if you just have a sum insured, "Or agreed value if any insured vehicle is subject to the agreed value option shown in the schedule, in the event of a total loss or a constructive total loss will pay the sum shown in the schedule."

So this links into Your Honour Justice Glazebrook's questions as well. You can have an agreed value policy in respect just of cars under this policy. There's no other asset in respect of which it's contemplated and if you opt into that it's a separate express option that will be shown in the schedule that you've taken it and what –

GLAZEBROOK J:
Is there a schedule that we can see that? I can't immediately see it, so you might have to put it in, do you?

MR GODDARD QC:
Yes because they didn't purchase commercial motor. If Your Honour has a look at the schedule, if we go back to 1559, the schedule of insurance, what the Court will see is that there's the general schedule of insurance, then we've been focussing on 1561 which is the material damage bit of the schedule because that's the only thing that Prattley purchased, no it's not the only thing sorry, because Prattley did purchase loss of rent, so if you go over to the next page we've got the loss of rents schedule and then property owner's liability, that's been purchased, that's on 1564 and then there are certain other policy purchases, including on 1566 business interruption but because they didn't purchase motor vehicle, that page doesn't appear, so we don't see it in Prattley's schedule.

GLAZEBROOK J:
So there is a separate motor vehicle one is there?

MR GODDARD QC:
Page there would be. If that had been purchased that page would be there and there are various other types of covers you can get, machinery breakdown for example and because they didn't buy machinery breakdown because they didn't have machinery, that machinery breakdown page isn't there either. They only got the pages that were relevant to the cover they purchased. But if you purchased motor vehicle –

GLAZEBROOK J:
Sorry I hadn't quite realised that, so this is a copy of what they actually had?

MR GODDARD QC:
Yes.

GLAZEBROOK J:
All right because there was an indication that there was something on the Internet wasn't there?

MR GODDARD QC:
That's just a general language. The broker will have – so that's the one we were looking at at 1472. It wasn't just on the Internet but I think in answer to a question from one of the members of the Court yesterday about where are the terms, the answer for both periods is that it's this version of the business insurance policy first issued in February 2007, it was held by the broker, it would doubtless have been available on the Internet as well. Oh my learned junior is not so sure actually but anyway it was held by the broker and held by the insurer obviously and then you have the detailed schedule issued each year which identifies which parts of this package have been purchased and on what terms and Prattley purchased material damage cover for the building but not for contents or tenants improvements or all those other things that we see identified on 1561 as not insured and it purchased loss of rents cover and property owners liability cover, business interruption cover. Business interruption is a separate chapter but it didn't purchase some of the other forms of cover available under this umbrella policy, like commercial motor, like machinery breakdown.

Does that address Your Honour's question about the structure of the policy in the terms?

GLAZEBROOK J:
I don't think I had a question.

MR GODDARD QC:

You were checking what was and what wasn't in there and how it all fitted together.

GLAZEBROOK J:

Oh, no, sorry, it wasn't entirely clear to me that from what had been said earlier that this was the policy that was provided together with the schedules.

MR GODDARD QC:

Yes. That is the position.

GLAZEBROOK J:

Rather than merely the schedules provided in a reference to the Internet or whatever for the actual policy terms.

MR GODDARD QC:

No, I don't understand that to be the position. I don't know whether the full policy booklet was sent by Prattley's broker to Prattley or not. That wasn't explored at trial.

GLAZEBROOK J:

Well, that's not really relevant.

MR GODDARD QC:

It doesn't matter, no. So we saw the way that that was dealt with where you could have an agreed value option and that's not available in relation to material damage so the issue just doesn't arise. If you were going to have that agreed value the option would be identified and the value would be identified in a schedule relating to commercial motors. That also ties into that top auction market value/sum insured. This narrows the concept of indemnity for cars, so rather than saying what is the loss to the insured, to reduce the scope for argument it's tied back to the lesser of market value and sum insured and that links into a provision on 1510, sums insured. It's a condition of this commercial motor section that you will declare as the sum insured

shown in the schedule the current market value of each insured vehicle valued, values such as book value, depreciated cost, written down value, and residual value will not be sufficient to comply with this condition. So it's not that it's a different concept. It's that it's a deliberate narrowing down to reduce debate and it's accompanied by a requirement that that specific value be identified for each vehicle in question each year.

There is no similar narrowing down in relation to material damage, taking us back to the general law of insurance. What is the loss to the insured in the circumstances?

That brings me neatly to my item 10, the appropriate measure of Prattley's loss. In my road map, paragraph 8.17 of my main written submissions, my submission that a High Court Judge was right to find that the appropriate measure of Prattley's actual loss in this case and thus a measure of indemnity for that loss was the market value of the building. The question as I identified back in my submissions at 6.1 by reference to *Leppard* is –

GLAZEBROOK J:
We just do need to check whether we do need to deal with this or not in the sense that I don't understand the backup argument to be being put by your friend.

MR GODDARD QC:
I'm glad Your Honour asked me that because something I meant to say earlier was if the Court agrees that the Courts below were right on the Contractual Mistakes Act point of view the Court actually doesn't need to deal with the policy interpretation issue at all.

GLAZEBROOK J:
We may not need to deal with it if we decide that the interpretation that the contract now indicated by your friend is incorrect.

MR GODDARD QC:

Yes, so there are two ways in which the Court would not need to deal with whether its market value or depreciated replacement cost –

WILLIAM YOUNG J:

I don't think we have to deal with it at all because depreciated replacement cost isn't being relied on.

MR GODDARD QC:

Yes, I think that's right, yes. Your Honour is right so we don't need to go there.

WILLIAM YOUNG J:

So what you have to do is if the appropriate measure indemnity is repair, reinstatement, should there be depreciation or should there be a betterment allowance, which is another way of saying the same thing? Point 11, I think.

GLAZEBROOK J:

But if it's not being relied on –

WILLIAM YOUNG J:

No, well, the argument is that it's a repair reinstatement insurance.

GLAZEBROOK J:

Oh, okay.

WILLIAM YOUNG J:

There isn't required to be a discount for improvement and for betterment/depreciation.

MR GODDARD QC:

The reason, I suppose, that this is in the submissions, and that I went there, is that when I sought to just deal with that issue, I was in the uncomfortable position of effectively proceeding on the basis of what, in my submission, was

a misunderstanding of the way the policy worked in this situation at all. So starting with repair/replacement and then arguing about whether or not there's betterment, in my submission, is the wrong approach here because it's just market value. But I don't need to dwell, I think, on that.

WILLIAM YOUNG J:
You dealt with that argument anyway.

MR GODDARD QC:
In writing. So I'll move now into what, in my submission, is the artificial space of assuming that the appropriate way to assess this indemnity is by reference to the cost of repair or reinstatement, and the submission here is, of course, my 11.1, as Your Honour pointed out, that there must be an allowance for betterment. The principle is touched on in my submissions 6.8. Probably the most helpful authorities on this are not so much *Leppard*, which is more concerned with the broad concept of indemnity, but *Vintix Pty Ltd v Lumley General Insurance Ltd* (1991) 6 ANZ Insurance Cases ¶61-050 *and Tower v Skyward*. And it's really implicit in this Court's analysis in *Tower v Skyward* that depreciation is something that is not normally compensated for in an indemnity policy, and that's because that's a loss that has occurred before the insured event. The insured has taken that hit anyway, and so when you indemnify them for the loss caused by the insured event, you're only indemnifying them for how much worse off they've been made by that event, the depreciation having occurred, and then the question is so how do you measure that. One way, of course, is by looking at the market value –

WILLIAM YOUNG J:
Well we're not really worried about the how to. I mean if you're right then you win on the interpretation point. If there is a deduction for betterment or depreciation then the case is not an issue anymore.

MR GODDARD QC:

Yes. The reason why you need to do it is, I think, informed by the two approaches to doing it. One is to say that you have something worth X before the event, now it's worth X minus 10, you've lost 10. The other is to say we are going to meet the cost of repair or reinstatement but if we just do that you have something that's worth X plus 5, and so you've been over-indemnified by five, and we need to bring you back to X. So we will pay you what it costs to get to X plus 5, minus 5. So because on either approach if you pay, because if you pay what's required to fully repair or reinstate and that creates a value of X plus 5, you've overshot, there needs to be that adjustment, and I don't think it's necessary to dwell too much more on that *Vintix* is –

GLAZEBROOK J:
On the alternative repair or reinstate the insurer just chooses to do that whether there's betterment or not presumably?

MR GODDARD QC:
Yes, if the insurer was –

GLAZEBROOK J:
Subject, obviously, to the heritage issue that was the exclusion in this policy.

MR GODDARD QC:
And even so it's an option under the general indemnity provision.

GLAZEBROOK J:
Yes, but this is something the insurer has chosen to do.

MR GODDARD QC:
Well no, in my submission there hasn't been an unequivocal election always to repair or replace, and my friend –

GLAZEBROOK J:

No, no, no, if the insurer – so once the insurer elects to do it, that's what the insurer has elected to do.

MR GODDARD QC:

That's right, and that's why if it was going to be more expensive than paying after an allowance for betterment, you wouldn't normally expect an insurer to do it except by negotiation with the insured, and that does happen and an insurer, under an indemnity policy, will say to the insured, well look, we'd only pay you X, but we're happy to actually pay for the work to be done if you contribute a smaller amount.

WILLIAM YOUNG J:

But just pausing on that point. If the insurer says, okay, we'll repair it, and then says we've actually given you something better than you have, well it's probably too late to say that, isn't it?

MR GODDARD QC:

Yes, I think it would be. I haven't, because that's not the situation here, I haven't given it a lot of thought and I would be cautious about inviting this Court –

WILLIAM YOUNG J:

So the betterment is – okay, betterment is going to come in when the parties are negotiating a repair/reinstatement strategy?

MR GODDARD QC:

Exactly. But I think Your Honour is right but if you just set out as an insurer you say, "We're electing to repair and replace, we've done this", there's no machinery in the policy for coming along later and saying, "Oh and by the way would you write us a cheque for $30,00 please or $3 million." So either it will inform the way in which the repair or replacement is approached, for example by using second hand materials, that's cheaper and will bring it back to the same standard as before the event, which is the indemnity standard, as

opposed to as new which is the replacement standard or there will need to be a negotiation but when it comes to payment, if you're assessing that payment by reference to the cost of repair or reinstatement, as I say if what you had was something worth X dollars before the event and it's going to cost you a million dollars to do the repairs or reinstatement and the result would be that the property is worth X plus 100,000, there's betterment and you pay 900.

So my friend says quite rightly that it, the burden falls on an insurer to show betterment in circumstances where the insured establishes that the appropriate method of providing of indemnity is by repair or replacing. I deal with this in 8.25 and 8.26 of my submissions and I think *Vintix* is a good illustration of that and the point is also made in my friend's submissions at paragraph 52 by reference to *General Accident Insurance Asia v Sakr* [2001] NSWCA 402, (2001) 11 ANZ Insurance Cases ¶61-508 but here, in circumstances where the focus was on or what is the, you know, one of the keys at trial was what is the depreciated replacement cost. Evidence was called about betterment by Vero. Mr Stanley, the valuer called by Vero gave detailed evidence about the assessment of betterment on a number of different approaches to quantifying it. So that obligation to show that there was betterment was met. My friend said well maybe there wouldn't be betterment if you repair or replace to the standard in the special note because you're not getting the original heritage building back you're getting a modern replica but what we had here was a specific repair reinstatement scope which had been identified by the engineers, costs by the quantity surveyors and then an analysis by the valuer, Mr Stanley, of whether that would deliver betterment and the evidence was that it would produce a building that was more valuable on the market, it would produce a building that was more attractive to tenants, it would produce a building that generated higher rentals and that the ability to earn higher rental is a relevant form of betterment is confirmed by decisions like *Vintix* which I referred to in my 11.1 in the authorities. I won't take time going to it.

So clear evidence, uncontradicted of betterment in a financial sense which is the sense in which it's relevant under an insurance policy compensating you

for your loss in money terms and in those circumstances, both as a matter of principle and on the evidence, there had to be an allowance for it. That's where we are.

That just leaves the multiple event issue. Now there's a short answer and a long answer. Let me offer the short answer and then see whether the Court –

WILLIAM YOUNG J:
The short answer is that the indemnity value nominated was greater than the actual value.

MR GODDARD QC:
Yes.

WILLIAM YOUNG J:
So that there isn't the insurance, the value nominated doesn't operate as a cap.

MR GODDARD QC:
That's right Your Honour. And that's the short answer. The short answer is that you only get into this over cap recovery issue as a result of multiple events where the sum insured –

WILLIAM YOUNG J:
Where the cap bites.

MR GODDARD QC:
Yes.

WILLIAM YOUNG J:
And where the argument then is that the insurers have perhaps unwittingly taken it on themselves to reinsure with the old cap in a now damaged and less valuable building.

MR GODDARD QC:

Exactly Your Honour. But in circumstances where the indemnity value, however assessed, by reference to market value or depreciated replacement cost, is less than the sum insured, that issue just doesn't arise. That's the short answer.

WILLIAM YOUNG J:

For myself I'm sort of more enthusiastic about the short rather than the long answer.

MR GODDARD QC:

That's what I thought I'd test. I am happy to spend half an hour going through *Ridgecrest* and *Wild South* in detail.

WILLIAM YOUNG J:

Well I think, perhaps if we just see what Mr Cooke has to say, but for the moment I think the short answer is a reasonable one.

MR GODDARD QC:

I thought I'd introduce it that way in the hope that the Court might prefer that. In those circumstances, unless there is anything that I can assist the Court with, and subject I think to providing the schedule of references to sum insureds Your Honour Justice Glazebrook asked for, and there are dozens and dozens –

GLAZEBROOK J:

It just saves us doing it.

MR GODDARD QC:

We'll do it overnight or within a couple of days if that's all right Your Honour. Unless the Court has any questions?

WILLIAM YOUNG J:

Thank you Mr Goddard. Mr Cooke? Just while I think, or before it escapes my mind, what's your response to the short answer to the *Ridgecrest* argument that Mr Goddard's just given?

MR COOKE QC:

Well the answer to that depends on interpretation of how the policy works in the first place. So if the policy works so that the costs of repair or reinstatement up to the cap –

WILLIAM YOUNG J:

Then the cap does bite?

MR COOKE QC:

Then the cap does bite.

WILLIAM YOUNG J:

Yes, yes. But the general principle is that on the other hand if it's an indemnity policy then the cap isn't biting and *Ridgecrest* is an only sort of contextual interest.

MR COOKE QC:

Which goes back to the main argument about whether you, I would say, water down what this policy says by indemnity principles, yes. I was going to –

WILLIAM YOUNG J:

I just wanted to really make sure that we haven't short-changed ourselves by depriving us, by abandoning the possibility of a long answer.

MR COOKE QC:

I think you've got your money's worth out of my learned friend. I was going to deal firstly with the question of the policy and what it meant and respond to my learned friend's submissions on that in reasonably concise terms and then deal with the mistake issue.

In terms of the argument about what the policy means. Although my learned friend went through in more detail some of the terms of the policy, in a sense he missed, in my submission, the really important part of the way the machinery of this contract works, and that is if Your Honours go back to clause MD020, the earthquake indemnity on page 1489, and this is particularly in response to the difference between indemnity cover under this policy and replacement cover and it is a point I made in my primary submissions, but it's important to go back to it. On page 1489, earthquake indemnity, "This extension applies to those items of insured property that have a company earthquake sum insured shown in the schedule." And then you compare that with the full reinstatement cover, MD022 on the next page, "This extension applies to those items of insured property that have an excess of indemnity value sum insured and a company earthquake sum insured shown in the schedule." So that's where you see how the policy differentiates between indemnity cover and reinstatement cover. You've got to have the excess of indemnity value cover that you're given by reinstatement, and it means that indemnity value and company earthquake sum are synonymous in the terms of how this works.

So then if you go through to the schedule on page 1561, although we don't have it called company earthquake sum, we have it described as indemnity value and we don't have 1.605 million in that same line, but I'm the line beneath indemnity value, that's where you see what this is. This is the company earthquake sum, the indemnity value insurance which Prattley has purchased.

WILLIAM YOUNG J:

1.605 is opposite the total sum insured.

MR COOKE QC:

It is but there is not dispute that this Prattley purchased the earthquake indemnity insurance. It gets it when you have a company earthquake sum which is synonymous with the indemnity value for earthquakes so this is what

this is, the 1.605 million. Then when you read that, how about machinery works that differentiate between indemnity value insurance and reinstatement insurance and you only get full reinstatement if you actually reinstate. If you don't reinstate you only get the indemnity value. Then when you go further in the schedule –

WILLIAM YOUNG J:
Sorry, what do you mean by indemnity value?

MR COOKE QC:
This is the company earthquake sum.

WILLIAM YOUNG J:
So do you mean you get 1.6 million?

MR COOKE QC:
Well, you get your – you get the repair and reinstatement up to your 1.6 million and that's where you look down further in the schedule to see the special note. How do you – what's the kind of cover you get? We will repair or reinstate the building to the standard that's specified and when you read that special note together with the indemnity clause in the policy back on page 1479 which speaks of "you will be indemnified by payment or at our option by repair or replacement" you can see that to an ordinary reader of this contractual documentation that it must mean that you get the costs of repair or reinstatement up to the company's earthquake sum, earthquake value, that's been agreed on which you pay your premiums. It really doesn't make any sense of this special note, which there's no dispute that it was inserted to minimise Vero's obligation. It makes no sense of it to say it's only applying if we have an option to meet the insurance by making some form of payment by a machinery that's not set out anywhere in the mechanics of the policy.

The best my learned friend can do in my submission is suggest that there must be ambiguity about this, at least. If there is ambiguity, the contra proferentem principle applies. An ordinary reader of these contractual terms

and conditions would take that as to be the natural meaning of this. If there's an alternative interpretation is should not be adopted given this is Vero's standard form material and that's particularly so in circumstances –

O'REGAN J:
But this isn't a Consumer Guarantees Act case. This is somebody – this is two parties negotiating a policy both advised – well, in Vero's case having its own people and your clients having an insurance broker and everybody knows what indemnity insurance is. That's what that shows.

MR COOKE QC:
But that doesn't mean the contra proferentem principle doesn't apply.

O'REGAN J:
Well no but there isn't anything to – any reason to apply it. If they were offered the choice of indemnity or replacement and chose indemnity, how can they say well we thought we were getting replacement?

MR COOKE QC:
But they don't say that. They say that their indemnity is measured by the cost of repair or reinstatement up to the agreed indemnity value.

O'REGAN J:
That's still replacement cover though isn't it?

MR COOKE QC:
No with respect I don't think that is. It's a contract of indemnity where the method of indemnity has been agreed by the parties.

WILLIAM YOUNG J:
Well if this means that they've got to repair or reinstate the building or pay the costs, that's –

MR COOKE QC:
Up to the limit.

WILLIAM YOUNG J:
– a more onerous obligation at least in part than the obligation they would incur under an express replacement extension because they've got to pay you irrespective of whether you reinstated or not. That the measure of the payment is reinstatement or repair.

MR COOKE QC:
Up to the agreed –

WILLIAM YOUNG J:
So up to the point of the cap, this little extension has imposed an obligation on Vero more extensive than the obligations would've been if it had got an extra premium for the replacement cover.

MR COOKE QC:
Sorry why is that?

WILLIAM YOUNG J:
Because under that policy, because under that cover they only have to pay indemnity until there is reinstatement or repair.

MR COOKE QC:
Yes so they would be – the indemnity value would be the same as this indemnity value under MD –

WILLIAM YOUNG J:
No but okay let's say after February 2011 Prattley says kindly pay out on the policy, we think you should be paying out for the cost of repairing or reinstating the building, subject to the 1.6 million cap and Vero would say well hold on we've only got to pay out we think the market value of the building but in any event it's a bit on the nose you saying pay out the reinstatement repair

cost, when we'd only have to pay that out if you'd taken the more expensive form of insurance, had you actually yourself incurred repair and reinstatement costs.

MR COOKE QC:

But that's not quite how it works, is it? The way that it works is that the insured is always entitled to the indemnity value whichever of the options they choose and then they only get the additional cost of full reinstatement, and that's beyond the $1.6 million.

WILLIAM YOUNG J:

I thought you were saying here we will – when the contract says we will indemnify you that means because of the additional words and because of this clause, which means we will indemnify you by meeting the costs of repair or reinstatement up to the $1.605 million.

MR COOKE QC:

Yes that is right.

WILLIAM YOUNG J:

Okay, well that is a more onerous obligation than they would've incurred had your client taken the replacement extension.

MR COOKE QC:

No because if they'd taken the replacement extension they would –

WILLIAM YOUNG J:

I know they would've got different but it's like we would've envisaged it as a Venn diagram and there would be a corner there where they're getting a better – there would be a section of it where they're getting a better deal than replacement.

MR COOKE QC:

I still don't see that because under the full reinstatement cover, they would've only have been entitled to the indemnity value payment.

WILLIAM YOUNG J:

Yes that's exactly right.

MR COOKE QC:

Which would be no greater or lesser than the indemnity value that I've just described that's under MD020 and they would only get more if they purchased more.

WILLIAM YOUNG J:

So you're saying that under the – if they'd taken replacement cover they would've been entitled to indemnity being the cost of reinstatement or repair up to –

MR COOKE QC:

Because that's what the policy provides. So –

WILLIAM YOUNG J:

It's a rather awkward idea though, isn't it?

MR COOKE QC:

But why? But why?

WILLIAM YOUNG J:

Because repair or reinstatement is normally a cost that an insured is entitled to when that expenditure is incurred.

MR COOKE QC:

For a full reinstatement or repair cost but there's no problem with a policy providing for how an indemnity is measured.

WILLIAM YOUNG J:
All right.

MR COOKE QC:
So MD022 in those special conditions say is, MD022, special provisions on page 1491, "If you elect not to reinstate the property our liability in this extension in respect of any other item of insured property will not exceed the indemnity value of the item." And as we've said the indemnity value of the item, come the earthquake same as all synonymous.

WILLIAM YOUNG J:
So you say they're entitled to 1.605 million, they would be entitled to that irrespective of what they did?

MR COOKE QC:
If that was the cost of repairing or reinstating.

WILLIAM YOUNG J:
Okay.

O'REGAN J:
Where do you get 1.605 as being the indemnity value though? You're saying that's assuming they spend at least that much repairing or reinstating?

MR COOKE QC:
That is because, there's a combination of that being how you calculate it, together with what the terms say, that your earthquake indemnity arises when you have a company earthquake sum and your full reinstatement –

O'REGAN J:
But they actually haven't got a company earthquake sum have they?

MR COOKE QC:
Well that is what – there's no dispute that this extension was purchased by Prattley. It's true the schedule doesn't have the words "Company earthquake

sum", it has instead the words "Indemnity value" but we can see that those are synonymous, if you look at MD022, this extension applies to those items of insured property that has an excess of indemnity value sum insured and a company earthquake sum.

O'REGAN J:
But that's just excess of indemnity value, it's not excess of 1.6 million.

MR COOKE QC:
But the company earthquake sum and the indemnity value sum must be the $1.6 million, there's not two different figures that that could be.

WILLIAM YOUNG J:
So the expression "indemnity value" is not in italics, so they're not using it as a defined term.

GLAZEBROOK J:
It isn't defined in the definition.

WILLIAM YOUNG J:
No, so one – and you say it means well it could mean the market value of the building if that's the most it is or if not it means what it would cost to repair or replace up to the cap.

MR COOKE QC:
It's the second is what I say it means, yes.

WILLIAM YOUNG J:
Yes, well except – but if the market value was greater then, well it wouldn't be I suppose.

MR COOKE QC:
Well if the market value, that would be against Prattley because I say this policy works to say the indemnity met by the cost of repair and reinstatement

up to the cap. So that's what the – when you look at these words, to an ordinary reader, that would be what makes sense of it.

O'REGAN J:
Well no because under the 020, if you had in fact had a company earthquake sum in the schedule and then you wanted 022, you'd have something in excess of it. We haven't got that.

GLAZEBROOK J:
No you have excessive indemnity value which isn't necessarily the same as company earthquake sum. If you look at the first paragraph of MD022.

MR COOKE QC:
Well it seems to me that one sum is the indemnity value and to get reinstatement you've got to purchase in excess of that.

GLAZEBROOK J:
Well you certainly have to purchase excessive indemnity value but it doesn't – that first paragraph suggests that there can be a company earthquake sum which is different from indemnity value.

MR COOKE QC:
Does it? I would've thought that that first paragraph –

GLAZEBROOK J:
Well it says "An excess of indemnity value and a company earthquake sum."

MR COOKE QC:
So you've got the company earthquake sum which is the indemnity value sum and then you have the excess of indemnity.

GLAZEBROOK J:
Well no not necessarily is it? I mean you could have an indemnity value which is different from the company earthquake sum. Because if you say the company earthquake sum is the total sum insured, then the total sum insured

has different definitions and is used in a different sense throughout the policy, as I think Mr Goddard is going to show us when he gives us his references.

MR COOKE QC:

It would be quite unusual to suggest that this clause MD022, that there was some gap between the indemnity value sum and the excess of the indemnity value sum. Surely the company earthquake sum must be the indemnity value and then –

WILLIAM YOUNG J:

Why would it be? Because if that was – so wouldn't you expected there to be a valuation that that 1.605 million was a fair value?

MR COOKE QC:

Well it doesn't have to be a fair value, it's just the level of cover that you're purchasing and that's what the parties have agreed is the indemnity value for the purposes of 020 and then you purchase in excess of that to get greater cover.

WILLIAM YOUNG J:

And you need a valuation for that.

MR COOKE QC:

For the excessive –

WILLIAM YOUNG J:

For the excess. If you're looking for replacement cover, you need a valuation don't you?

MR COOKE QC:

Yes but the valuation is not of its market value but what cost it will be to reinstate it.

WILLIAM YOUNG J:

Yes, yes.

MR COOKE QC:

So that makes sense of it all and can there really be a gap between the company earthquake sum and the –

GLAZEBROOK J:

Well I wouldn't have a problem with this if it didn't say "Total sum insured" and if there was a definition of indemnity value which said "The indemnity value picked by the parties" but there isn't anything in there. That's because indemnity value is used quite a lot throughout this and if indemnity value means the cost of – means the sum that's called the total sum insured, except that it can't because it's used in different sense throughout the policy isn't it?

MR COOKE QC:

Well it is but –

GLAZEBROOK J:

And it only says it won't exceed the total sum insured at 1479, not that it will equal the total sum insured.

MR COOKE QC:

There is, on any view of this, imperfections and untidiness around the language that is used.

GLAZEBROOK J:

Appallingly draft, yes but –

WILLIAM YOUNG J:

That's so with earthquake fund but the words "total sum insured" are used at 1479 and that is the exact expression that's used in the schedule. So there's complete congruence there.

MR COOKE QC:

But there has to be congruence between indemnity value in the schedule and company earthquake sum because that must be what the –

WILLIAM YOUNG J:
Well I'm, yes I'm inclined to think that's right, yes.

MR COOKE QC:
It must be what the parties have meant by that.

GLAZEBROOK J:
Well I'm not sure, because the company – the earthquake value may just be the total sum insured and presumably is because otherwise there isn't an earthquake sum insured that's set out in the schedule yet it is clear that there is a natural disaster extension from the schedule because there's a tick or whatever or a "yes" beside it, I can't remember what.

MR COOKE QC:
So doesn't that mean the indemnity value sum is the company earthquake sum? It has to be.

GLAZEBROOK J:
Well I wouldn't see that as necessarily following but –

WILLIAM YOUNG J:
I think the difficulty is to get a contractual link between 1.605 million and indemnity value as opposed to being a cap on liability which appears to be its purpose given what appears at 1479.

MR COOKE QC:
All I can do is, in a sense, repeat what I've said about that looking at the how this works in terms of its machinery. You get –

GLAZEBROOK J:
So it would only work when you have an earthquake extension. It doesn't work in any other sense, though. Because that's the slight difficulty I have because say you don't have an earthquake and we have a fire, this argument in terms of earthquakes, it might work for that but does it work if you just have

a fire? Does indemnity value mean the total sum insured? Well, it would suggest not at 1479 and actually if you go through – when we get those other references I suspect it will be even clearer for other parts of the policy. The total sum insured doesn't –

MR COOKE QC:
I'm not sure what my answer would be about fire.

GLAZEBROOK J:
So this only applies to earthquakes, then?

MR COOKE QC:
I'm not sure is my answer on that.

GLAZEBROOK J:
All right. Well, the specific argument about earthquake sums can only apply to earthquakes.

MR COOKE QC:
Well, certainly the argument I've made about what indemnity value means is synonymous with the calculated earthquake sum arises because it's beyond question that the parties intended in their schedule to pick up the O2O cover.

GLAZEBROOK J:
And so the total sum insured must be the earthquake cover because otherwise …

MR COOKE QC:
It doesn't make sense, yes. So they must be synonymous and that's how you make it all work and how you would have got more if you purchased more, and that makes sense in the special note, too, because the special note then explains Vero confining its obligation to repair or reinstatement costs up to that level and with respect it doesn't make any sense to suggest that was there only when Vero elected to do so rather than the wording of the

indemnity on page 1479. "You will be indemnified by a payment by repair or reinstatement."

GLAZEBROOK J:

Well, it does make some sense because if Vero wants to elect that and then finds that it's going to have to pay an awful lot more money than it would if it just paid out then it's a disincentive for it electing. So it's just making sure that if it does elect it doesn't have to bring it up to heritage standard, isn't it? I mean, it makes some sense.

MR COOKE QC:

I can see that that would make some sense of it but it isn't the natural reading you take of the special condition when you read it. When you read it, you see what the insurer is doing there is –

WILLIAM YOUNG J:

I suppose when you look at natural reading it wouldn't be unkind to say that this is a natural reading that didn't occur to anyone until closing submissions in the High Court.

O'REGAN J:

Yes, it would be unkind.

MR COOKE QC:

It would be tremendously unkind but whatever interpretation you say this policy has it's been one that's been a matter of contest so the High Court has said it was market value. We've got the Court of Appeal saying it's depreciated replacement costs and I say now in this Court that it's the cost of repairing up to the level so I'm not sure it's a point that purely resonates against me. It can resonate equally strongly with my learned friend.

WILLIAM YOUNG J:

Okay. We probably – I don't know. There's a limit to what one can say about the wording of the policy.

MR COOKE QC:
Yes.

WILLIAM YOUNG J:
Is there anything else you want to say about it?

MR COOKE QC:
I've come close to the limit of what I can say about the wording. I didn't want to make one more point about –

WILLIAM YOUNG J:
Just pause. You're not under any time constraint because we can start at 2.15.

MR COOKE QC:
Maybe it's appropriate to adjourn now and I can make my *Reynolds* point when we come back and then deal with mistake.

WILLIAM YOUNG J:
Okay, thank you.

COURT ADJOURNS: 12.35 PM
COURT RESUMES: 2.18 PM

MR COOKE QC:
Thank Your Honours, I wanted to round off the discussion about the meaning in the policy, essentially where we were leaving the discussion in terms of the various interpretations. The critical issue here is whether the policy by including the possibility of meeting the indemnity by payment contemplated something other than a payment based on the cost of repair or reinstatement to the standard specified in the special note and the difficulty with that approach is you can't find in the policy how you calculate that payment and in fact if you see what's happened in this case, there would be various

interpretations landed upon trying to give meaning, alternative meaning to payment in that context. So the High Court Judge thought that that mean it was the pre-earthquake market value but she only reached that conclusion because, in her view, it changed because Prattley did not intend to reinstate the building and what she said and I'm reading from paragraph 147 of the judgment, "The situation would have been different for Prattley if I had accepted that a rebuild of Worcester Towers was going to take place. In that case following *QBE* and *Ridgecrest* it would depend on the cost of repair, which I found at 187,000, 1.6 for the second event and in all likely 1.6 for the third event." So she would've accepted Prattley's view of its entitlement but for the fact that Prattley didn't actually intend to rebuild Worcester Towers. So that was one interpretation.

The Court of Appeal adopted a different view. It said that, and I'm reading from 118 in the judgment that they "Preferred the view that reinstatement costs was the starting point for calculating the loss on destruction and that was so because we have found that repair or reinstatement of the particular building was the primary measure of indemnity in the material damage section." And then later in 127, "Therefore conclude that the entitlement is depreciated replacement costs and a single payment of that." That's their interpretation of the payment obligation and of course both of those interpretations are different from the one –

WILLIAM YOUNG J:

Are they perhaps different applications of the same interpretation, that indemnity means what's been lost, that may, depending on the circumstances, be best represented by the market value of the building or it may, in other circumstances, be better represented by a depreciated replacement value?

MR COOKE QC:

You couldn't say that of the High Court judgment because the High Court judgment followed Prattley's argument that it was repair, repair, reinstatement costs but for the fact that they weren't actually going to reinstate. So you can't describe that as being –

WILLIAM YOUNG J:

Well it might just depend on what happens at the time when the claim comes to be finalised, if at that time the building is going to be reinstated, well perhaps depreciated replacement value will be the most logical. If it's not, then what have they lost?

MR COOKE QC:

Well I guess you can say –

WILLIAM YOUNG J:

I don't see those as being – I see them as being matters of application rather than interpretation.

MR COOKE QC:

Right, in which case you can reconcile it on that basis on the assumption that you're interpreting the contract on the basis it doesn't really prescribe in any particular way what the measure of indemnity is, it all depends on the circumstances and therefore you need access to a lawyer, you need access to the law library and you might get different answers to that question because we've got at least three different answers on that approach, my learned friend's which is different from both High Court and Court of Appeal, the Court of Appeal's and the High Court, all different views of what that means, not necessarily – I accept Your Honour's point about different interpretations but what that interpretation means in particular circumstances and that is all in a contract where Vero have promised to provide insurance contracts which are understandable and show the legal rights and obligations of both us and the policyholder, explain the meaning of legal or technical words or phrases, explain the special meanings of particular words or phrases as they apply and settle all claims fairly and promptly and so I say that the interpretation that we are proposing is not only an available interpretation of this policy but it is an interpretation that corresponds with the requirement that the policy show the legal rights and obligations of both us and the policyholder and for that reason it is an interpretation that should be preferred and that's not purely based on the contra proferentem basis but also this promise that we will set out clearly

what you're entitled to in our policy and once it's accepted that the interpretation that I have proposed is available, notwithstanding the, to take the exchanges before the adjournment, the untidiness about certain phrases that might be in the policy, once it's accepted it's an available interpretation, it should be adopted if it corresponds with the promises made by Vero about its policy and given the contra proferentem rule and I mentioned I was going to refer to *Reynolds*. When the Court in *Reynolds* said well you don't – there are some words which are consistent, whether a repair or reinstatement obligation under the indemnity, that's not what it meant. You've got to understand or look at what the clause in *Reynolds* actually said and I can just read it or –

ARNOLD J:
Where is that?

MR COOKE QC:
That's behind tab 12 in the respondent's authorities, volume 2 and just going to the first page of that report, page 260, and you see the actual clause in question is quoted in the headnote there. "The insurers severally agree the property insured or any part of such property be destroyed or damaged by fire. The insurers will pay to the insured value of the property at the time of the happening of its destruction or the amount of such damage, or the insurers at their option will reinstate or replace such property or any part thereof." Now, it was obvious going to be an uphill argument for the insured to say there that the measure of the indemnity was repair and reinstatement, which is why the Judge said, "Well, there's words in the clause consistent with repair and reinstatement." But that doesn't mean –

WILLIAM YOUNG J:
It's actually a very similar clause to this.

MR COOKE QC:
Well, it doesn't have any of the mechanics that I say arises. It doesn't have the special note. It doesn't have the earthquake sum, how you differentiate between that and full replacement cover. So I don't think, with respect, and it

– certainly this one says it's going to be the value of the property at the time of a dysfunction or at the insured's option, repair or reinstatement. So with respect there's – this policy has in its plain terms nothing to identify what payment means and also specifies in quite detailed machinery a repair and reinstatement obligation to a standard specified in the special note indicating what is the repair or reinstatement standard. So that's how I say *Reynolds* is different and why I say that the available interpretation that Prattley advances should be adopted.

Unless Your Honours have any questions about that part of the case, I'll turn to mistake.

Of course, on mistake we proceed on the basis that the Court has accepted the interpretation in the contract that Prattley advances in the first point of the appeal. If that is accepted, it's important to step back and be realistic about what happened here because what happened was a reasonably routine insurance claim settlement process. In order to settle Prattley's claim, Vero commissioned a valuer to value the building. The valuation was $370,000. Vero gave that to Prattley, advised Prattley that was what its entitlement was not only in the email Your Honours have been taken to but at meetings that Ms Britten and the staff had with Vero. Prattley understood that that was correct from their own legal advice but didn't like the valuation at 370,000. There was no reference to in the discussions at all to the 4.1 million because everyone thought that was irrelevant. Vero agreed to pay for another valuation. That was commissioned, obtained, given to Vero and that was about $1 million and Vero said, "Well, we're prepared to settle your insurance claim on that valuation if you sign a release."

The problem if the principal argument, the first argument and the meaning of the policy accepted by the Court is that claim settlement process is, in fact, misconceived because the whole emphasis and information-gathering on market value is simply irrelevant and the true entitlement is not approximately $1.2 million. It's approximately $4 million.

Because the parties have made that fundamental mistake, the Act applies subject to 6(1)(c). The question then arises, well, does the general wording of a full and final settlement clause mean that relief is not available under the Act?

My principal argument is that section 6(1)(c) requires something more than simply that this was part of the contract and it was settled, the claim was settled under the interim settlement agreement. It does require more than that and 6(1)(c) does contemplate particularity. It does so because it not only requires the parties make provision for the risk of mistakes, the first requirement, but it is also in 6(1)(c) that there is a term requiring the party to assume the risk of mistake concerning the matter in question. The matter in question here is the meaning of the insurance policy and general contractual wording might be capable in some cases of stretching far enough to contemplate what 6(1)(c) contemplates but only in particular circumstances and we say not in these circumstances and that's why I was referring to *BCCI*, not because I say the clause doesn't settle the insurance claim but because I say adopting the reasoning in *BCCI* that general contractual language is not always sufficient to deal with particular requirements and I say it's not sufficient here to deal with mistake within the meaning of 6(1)(c) and the particularity that that requires.

I say I emphasise essentially five reasons why that is the case here. The first is in some ways this might be a complete answer. The first is the clause was not directed to mistake or even the circumstances of the entry of the interim settlement agreement at all. Its subject matter – in clause 4 in particular – was simply directed at effecting a final settlement of the insurance claim. We don't have the kind of clauses which we might call the Coote clauses. We don't have an as is, where is clause. We don't have a we make no promises clause. There's no clause saying Vero makes no promises that what it has said about the meaning and effect of the policy is correct. We don't have any of that kind of language where you can infer the risk has been passed.

O'REGAN J:
It does have one about them getting their own advice, doesn't it?

MR COOKE QC:
It does have a clause that records that Vero has advised Prattley to seek its own legal advice but goes no further than that. It doesn't say we make no promises about what we've said about the policy being correct or not. It's just an acknowledgement, we've told you to take legal advice. So again in some ways it's double-edged for Vero because although that's there and they can take advantage of it, it means they could have gone further and put in this kind of language and they didn't.

So if you look at the – another way of looking at this, if you look at what the language of this settlement clause is, it talks about the claims arising out of in connection with the earthquakes or the policy et cetera. We're at page 1932 of volume 3A.

So a way of putting this is I say it doesn't settle a claim under the Contractual Mistakes Act because their claim under the Contractual Mistakes Act is not – in the wording of section 4 – arising directly or indirectly out of or in connection with the earthquake activity and/or the policy or the insured property damage. It's a completely separate claim arising out of mistake on entry of the agreement.

So that's my first point. It's not the subject matter of clause 4, including that additional clause about legal advice is not directed – directly or indirectly – to the entry of the agreement or to mistake.

The second point is that this is Vero's policy and because it's a policy applying to many people it will presumably apply to hundreds and possibly thousands of other people who have insurance policies of this kind. It is said that Vero didn't understand its own policy and I submit it cannot have been in the reasonable contemplation of Prattley that Vero didn't understand its own policy that applied throughout all of the products in this way.

Thirdly – and this is important – Vero had obligations not only of good faith but they had the express contractual obligations to correctly identify what the policy meant and what Prattley was entitled to. Again, those are the fair insurance code and promises I read out to Your Honours a few moments ago.

Given those promises, it would require in my submission very clear language before it could be said that Prattley had been said to take the risk that Vero had failed to meet those obligations by explaining what Prattley was entitled to and the meaning and effect of the policy. In a sense that this was settling a claim for breach of that term as well as a claim for breach under the Contractual Mistakes Act. We look here at the reasonable expectations of how an insurer would respond to a claim and it's not correct to characterise this as an arm's length commercial negotiation. This is Vero meeting its obligation of good faith in light of its contractual promises in relation to the claim settlement process, including that they will provide a fair settlement on the settlement of claims.

O'REGAN J:
But it was still a negotiation between two commercial parties. So it was arms length that it was commercial and there was a clause telling them to take their own advice.

MR COOKE QC:
Yes, I have to accept all of that but you also have to accept where Vero have an obligation of good faith, where it had these particular promises to explain what the policy meant, how it applied to the circumstances and to settle the claim fairly in that context. So it's different from your run of the mill commercial negotiation because it has that additional feature that puts it in a different class from a pure commercial negotiation and in that context when an insurer has the obligation of good faith and those additional contractual promises, if a fundamentally erroneous settlement is reached, there is a reasonable expectation the insurer would recognise that and pay what it was

obliged to pay rather than rely on the generally wording of a release document which the insurer sought to be signed when the insurance claim was paid out.

My fourth factor is particular to this case and that is that the negotiations between the parties focussed solely on the market value of the building in question. As I said there wasn't even a reference or a claim for the $1.4 million that the first valuation produced, in fact once Prattley had worked up its own valuation it came up with a lesser number. So the negotiations proceeded purely on what the market value of the property was. So that was the field of the difference between the parties that was being resolved by the signing of the release. So it's the field of the area of difference and that is important, recognise what the parties could reasonably expect the general wording to mean.

And then my fifth factor is the mistake not only involves a fundamental misapplication of a policy but also involves a fundamental underpayment of Prattley's entitlement. Rather than being paid $1.2 million odd, Prattley was owed just over $4 million. So that's a very big difference in terms of actual entitlement and for those reasons I say it's beyond the reasonable contemplation of the parties that this issue was captured by the words "Unknown claims" and it can't been Parliament's intent that such general words would capture this kind of issue in terms of a fundamental mistake made in the settlement of an insurance claim. In those circumstances the Court needs to bear in mind that all Prattley is seeking is what it is entitled to, what it paid for and a contract that gives it or gave it peace of mind and raised reasonable expectations of a fair settlement and there are policy considerations that are relevant to how you apply this section and they aren't the policy considerations that encourage the parties to come to full and final settlements of disputes, they are policy considerations behind the fair and appropriate settlement of insurance claims and claims settlement process and if insurers are able to avoid their obligations because of their own mistake, because of the wording of a release that they have asked be signed when the claim is settled, that undermines the real value of insurance and the need for effective and fair claim settlement processes when those claims arise and

what Prattley is seeking is not simply what it is entitled to in terms of its substantive policy but what it was promised in terms of a fair settlement of its entitlement and if it can't get what was promised because something that it was required to sign in purported fulfilment of that promise, then you really have to question what the point of that promise was in the first point which then raises questions as to the true value of the insurance contract which is taken out and the importance of that for commerce generally.

So those are the five factors I stress and also the importance I place on the policy considerations and why I say something more than just a generality of a settlement, full and final settlement clause is contemplated by 6(1)(c) and would have been appropriate in a case like this and it probably is appropriate to say that this is of importance in of itself, no doubt, the Court has given leave for it but it probably will have implications for other cases in terms of how one applies this particular section in the context, not only of the Christchurch earthquake settlements but other cases as well. So unless Your Honours have any questions, those are my submissions in reply.

WILLIAM YOUNG J:

Thank you Mr Cooke. Thank you Mr Goddard too. We'll take time to consider our judgment and deliver it in writing in due course.

COURT ADJOURNS: 2.41 PM