IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2024-404-003337
[2026] NZHC 2715

IN THE MATTER OF	the Tax Administration Act 1994 and the Goods and Services Tax Act 1985
BETWEEN	MAINZEAL PROPERTY AND CONSTRUCTION LIMITED (In liquidation) First Plaintiff
	ANDREW JOHN MCKAY and REES GRAHAM LOGAN Second Plaintiffs
AND	THE COMMISSIONER OF INLAND REVENUE Defendant

Hearing:	28 October 2025
Appearances:	S Hunter KC, B Brown and M Handford for the Plaintiffs E J Norris and S J Smith for the Defendant
Judgment:	7 September 2026

JUDGMENT OF TRACEY WALKER J

This judgment was delivered by me on 7 September 2026 at 4 pm
pursuant to r 11.5 of the High Court Rules 2016

Registrar/Deputy Registrar

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Solicitors:
Mayne Wetherell, Auckland
Crown Law, Wellington

[1] This proceeding concerns damages paid to Mainzeal Property and Construction Limited (in liquidation) (Mainzeal) after four of its former directors were found to have breached duties to Mainzeal.[1] The payment was made by an insurer, QBE Australia (QBE), on behalf of the directors under a Directors and Officers Liability and Company Reimbursement Insurance Policy (the Policy).

[2] The issue to be decided is whether receipt of QBE's payment is subject to goods and services tax (GST). This turns on the proper construction of s 5(13) of the Goods and Services Tax Act 1985 (GST Act) which reads (with key contestable terms for present purposes underlined):

> **5 Meaning of term supply**
>
> …
>
> (13) For the purpose of this Act, except for subsection (13B) and section 20(3), if a registered person receives a payment <u>under a contract of insurance,</u> whether or not the person is a party to the contract, the payment is, to the extent that <u>it relates to a loss incurred in the course or furtherance of the registered person's taxable activity</u>, deemed to be consideration received for a supply of services performed by the registered person—
>
> (a) on the day the registered person receives the payment; and
>
> (b) in the course or furtherance of the registered person's taxable activity:
>
> provided that this subsection shall not apply in respect of any payment received pursuant to a contract of insurance where—
>
> (a) the supply of that contract of insurance is not a supply charged with tax pursuant to section 8(1); or
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> (b) that payment is in respect of an entitlement for any loss of earnings (being earnings within the meaning of the Accident Compensation Act 1982 or the Accident Rehabilitation and Compensation Insurance Act 1992 or the Accident Insurance Act 1998 or the Accident Compensation Act 2001); or
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> (c) the supply of the contract of insurance is a supply that is chargeable with tax only because sections 5B and 8(4B) apply to it; or
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> (d) the supply of the contract of insurance is a supply of remote services that is zero-rated under section 11A(1)(x).

1 *Yan v Mainzeal Property and Construction Limited (in liq)* [2023] NZSC 113, [2023] 1 NZLR 296.

[3] This is one of two related proceedings brought by the liquidators of Mainzeal in connection with the Policy. The proceedings share a common background and essential facts. Judgment in the second proceeding is issued contemporaneously with this judgment.[2]

[4] The liquidators argue that the payment Mainzeal received from the insurer is not subject to GST and seeks declaratory relief to that effect. Among other things, it says a person only receives a payment under a contract of insurance if they are a person who suffers a loss insured under that contract of insurance, which it did not.

[5] The Commissioner of Inland Revenue (the Commissioner) argues otherwise. He contends that the payment received by Mainzeal was correctly included as "all total sales and income" in its GST return for the taxable period ended 30 September 2023. It says, among other things, that "a loss" caught by s 5(13) does not need to be a loss insured under a contract of insurance.

Factual background

[6] The parties filed an agreed statement of facts and proceeded on that basis.

[7] On or about 12 February 2013, QBE International issued the Policy in the name of Richina Global Real Estate Limited and others. Mainzeal was an Insured under the Policy. Mr Richard Yan, Dame Jenny Shipley, Mr Clive Tilby and Mr Peter Gomm were directors of Mainzeal at various periods and were Insured Persons under the Policy. Messrs Yang and Tilby and Dame Jenny Shipley were non-executive directors for the purposes of cl 5.1 of the Policy.

[8] On or before 23 July 2018, QBE Australia assumed all outstanding obligations of QBE International under the Policy.

[9] Liquidators were appointed to Mainzeal on 28 February 2013.[3] By letter dated 31 October 2014, the liquidators asserted a statutory charge over insurance money

2 *Mainzeal Property and Construction Limited (in liq) v QBE Insurance (International) Pty Limited* [2026] NZHC 2716.
3 Companies Act 1993, s 241(2)(a).

payable under the Policy as provided by s 9 of the Law Reform Act 1936, in respect of claims which the liquidators intended to bring against (among others) the directors.

[10] Mainzeal and the liquidators subsequently filed claims in the High Court against the directors. The High Court delivered judgment on 26 February 2019.[4] That judgment was appealed and on 31 March 2021, the Court of Appeal delivered judgment.[5] That judgment was also appealed and on 25 August 2023, the Supreme Court issued its judgment.[6]

[11] By letter dated 29 August 2023, from the liquidators' solicitors to QBE Australia's solicitors and the directors' solicitors, the liquidators sought payment of the amount payable as a result of the Supreme Court judgment, together with costs and disbursements. It also sought that judgment security in the sum of $18 million and accrued interest held by QBE's solicitors be transferred in part satisfaction of the judgment debt.

[12] By further letter dated 29 August 2023, from the liquidators' solicitors to QBE Australia's solicitors and the directors' solicitors, the liquidators requested that QBE confirm in writing that the liquidators would be released from certain undertakings previously provided in relation to QBE paying costs to the liquidators.

[13] By letter dated 31 August 2023, QBE's solicitors wrote to the liquidators' solicitors informing the liquidators that the total amount available and remaining under the Policy was $19,956,930.78, being the sum remaining out of the Policy limit of $20 million plus an additional $1 million payable on behalf of two of the directors under cl 5.1 of the Policy. QBE advised that:

(a) it refused to pay any additional sum on behalf of Mr Yan in reliance upon the exclusion in cl 3.7 of the Policy;

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4 *Mainzeal Property and Construction Ltd (in liq) v Yan* [2019] NZHC 255.
5 *Yan v Mainzeal Property and Construction Limited (in liq)* [2021] NZCA 99, [2021] 3 NZLR 598.
6 *Yan v Mainzeal*, above n 1.

(b) it requested confirmation of release from an undertaking in respect of the judgment security to enable QBE Australia to pay the balance of the insurance proceeds to the liquidators;

(c) it requested confirmation that payment of that sum would extinguish the statutory charge asserted against the insurance proceeds by the liquidators on 31 October 2014; and

(d) it referred to QBE's solicitors having been advised by the directors' solicitors how three of the directors had agreed the balance of the primary limit of indemnity ought to be allocated as between the three of them.

[14] By letter dated 31 August 2023, from the liquidators' solicitors to QBE Australia's solicitors and the directors' solicitors, the liquidators:

(a) reserved their position as to QBE's denial of cover for Mr Yan;

(b) agreed that, subject to the release and payment occurring simultaneously, payment of sum of $19,956,930.78 into the liquidators' trust account would release the undertaking provided by QBE's solicitors;

(c) confirmed that the statutory charge against the sum would be released to enable payment of that sum into the liquidators' trust account but maintained the charge on any additional sum that may be payable under the Policy if cover is determined to be available for Mr Yan; and

(d) reserved their position on how three of the directors had agreed the balance of the primary limit of indemnity ought to be allocated as between the three of them.

[15] On 1 September 2023, QBE Australia paid $19,956,930.78 on behalf of the directors to an account nominated by the liquidators.

[16] When Mainzeal filed its GST return for the taxable period ended 30 September 2023, it recorded that sum as "total sales and income" but subsequently issued a Notice of Proposed Adjustment (NOPA) to the Commissioner proposing an adjustment to Mainzeal's GST assessment in respect of that period to reduce Mainzeal's "total sales and income" by that sum.[7]

[17] The Commissioner rejected Mainzeal's NOPA and issued a Notice of Response (NOR) to Mainzeal.[8]

[18] The ground advanced for rejecting Mainzeal's NOPA was that the entirety of the sum paid on behalf of the directors is subject to GST under s 5(13) of the Act. Mainzeal rejected the Commissioner's NOR and the Commissioner issued Mainzeal with a Challenge Notice.[9]

Submissions

[19] The liquidators argue in summary:

(a) The words "under a contract of insurance" should be construed as referring to the insured loss to which the insurance payment responded, which here is the loss suffered by the four directors.

(b) It was the four directors who were entitled "under" the contract of insurance to the insurance payment.

(c) The words "whether or not the person is a party to the contract" do not inform the interpretation because a person may still be contractually entitled to receive a payment "under" a contract of insurance even if not a party to the contract.

7 Tax Administration Act 1994, s 89DA.
8 Section 89G.
9 Section 89P.

(d) The meaning of "relates to a loss incurred" is contextual. The context critically includes the requirement that the payment is made "under" the contract of insurance.

(e) The fact that Mainzeal is a party to the Policy does not determine one way or the other whether s 5(13) applies. What matters is whether it was Mainzeal that had suffered the insured loss to which the payment responded and whether the payment is one Mainzeal was entitled to "under" the contract.

(f) As the answer to both questions in (e) is 'no', s 5(13) does not apply.

[20] The Commissioner's position is that the "loss" to which the payment must relate need not be a loss insured under the contract of insurance but must relate to a loss incurred in the course or furtherance of the registered person's taxable activity. It says the plain reading of s 5(13) deems a payment to be consideration for a supply of services where:

(a) A registered person receives a payment.

(b) The payment is made under a contract of insurance.

(c) The payment relates to a loss incurred in the course or furtherance of the registered person's taxable activity.

[21] The Commissioner argues that "under" a contract of insurance merely requires the payment to be *sourced* from a contract of insurance. He further argues that the registered person who incurs a loss in relation to which a payment under a contract of insurance is received does not need to be a party to the contract. The recipient of such a payment can be an insured party with rights or entitlements under the contract or an injured third party with no rights or entitlements under the contract. The tax liability follows the money, not the contractual relationship.

Legal principles of interpretation

[22] The parties were largely in agreement regarding the approach to statutory interpretation. They differed only in respect of the use of extrinsic material in the circumstances of this dispute. The Commissioner contends that the legislative history is consistent with his interpretation of s 5(13) and confirms the mischief that the amendments to this section in 2000 were intended to address. I return to this aspect below.

[23] Section 10(1) of the Legislation Act 2019 requires the meaning of legislation to be "ascertained from its text and in the light of its purpose and its context".

[24] Text and purpose are the key drivers of statutory interpretation.[10] In determining purpose the court must have regard to both the immediate and the general legislative context.[11] Of relevance too may be the social, commercial or other objective of the enactment.[12]

[25] The predecessor to the Legislation Act 2019 (s 5 of the Interpretation Act 1999) provided for the meaning of an enactment to be ascertained "from its text and in the light of its purpose". There is nothing to suggest that the addition of "context" results in a substantive change in approach. In *Stiassny v Commissioner of Inland Revenue* the Supreme Court stated that in most cases the only evidence of purpose is the detailed wording of the provision, and the safest method is to read the words in their most natural sense.[13] The Court also said:

> [23] …In construing and applying a taxing provision, a Court leans neither for nor against the taxpayer, but should require that before the provision is effectual to make the taxpayer amenable to the tax, it uses words which, on a fair construction, must be taken to impose that tax in the circumstances of the case.

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10 *Commerce Commission v Fonterra Co-operative Group Limited* [2007] NZSC 36, [2007] 3 NZLR 767 at [22]; *Climate Clinic Aotearoa Inc v Minister of Energy and Resources* [2025] NZSC 197, [2025] 1 NZLR 1021 at [53].

11 At [22].

12 At [22], citing *Auckland City Council v Glucina* [1997] 2 NZLR 1 (CA) at 4. See also Ross Carter *Burrows and Carter Statute Law in New Zealand* (6th ed, LexisNexis, Wellington, 2021) at 287.

13 *Stiassny v Commissioner of Inland Revenue* [2012] NZSC 106, [2013] 1 NZLR 453.

[26] Subsequently, the Supreme Court clarified that the reference to "fair construction" was not intended as a gloss on the principle that taxation statutes are construed purposively in the same manner as any other statute.[14] Instead, it was a reference back to the absence of any presumption in favour of either party and to the purposive construction accorded to all statutes.

[27] I read the Supreme Court's reference (and subsequent clarification) as discouraging any construction that would distort or do violence to the express words of the statute. The purpose is part of ascertaining meaning but is not to override or dominate it.[15]

Use of extrinsic aids

[28] As noted, the parties' approach to the use of extrinsic aids in this case is slightly different.

[29] Mr Hunter KC, for the liquidators, submitted that, in a tax case in which Inland Revenue is both litigant and the agency that formulates tax policy, drafts legislation and accompanying commentaries and makes recommendations to the Select Committee, it is especially important that Inland Revenue's statements as to what its officials intended or hoped legislation would achieve are not permitted to colour what it means. This submission has heft.

[30] A leading New Zealand text comments on the particular risk in use of materials prepared by officials to support their preferred interpretation of the text and states "in disputes to which the government is a party, extrinsic material may risk becoming a statist tool of interpretation".[16]

[31] The Court of Appeal in *Commissioner of Inland Revenue v Roberts* illustrates that cautionary note.[17] In that case, the Commissioner was relying on government

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14 *Terminals (NZ) Ltd v Comptroller of Customs* [2013] NZSC 139, [2014] 1 NZLR 121 at [39].
15 *Clearspan Property Assets Limited v Spark New Zealand Trading Limited* [2017] NZHC 277, (2017) 18 NZCPR 587 at [55].
16 Ross Carter, above n 12, at 381.
17 *Commissioner of Inland Revenue v Roberts* [2019] NZCA 654, (2019) NZTC 24-026 at [62].

discussion documents, commentaries to bills and officials' reports to the Select Committee considering the relevant Bills. The Court said:

> [62] Having carefully considered the legislative history described above, we are satisfied it provides no support for the interpretation of "monetary" or "money" contended for by the Commissioner. Comments in reports by officials about "cash" do not assist the Commissioner when that is not the wording of the statute, and the term appears to have been used in a broad sense and by way of contrast with gifts of goods and services. The task of the Court is to interpret the words used in the statute, not paraphrases, and in particular imprecise paraphrases, used in discussion papers and officials' reports. We should add that comments by officials, unless they form part of a Parliamentary record are not an especially reliable, or orthodox, form of legislative history.

[32] The Commissioner argues that where there is ambiguity, extrinsic materials which form part of the parliamentary record may assist the Court in ascertaining the meaning of legislation, emphasising the statement from the Court of Appeal above in *Roberts* that "comments by officials, *unless they form part of the parliamentary record*, are not an especially reliable, or orthodox, form of legislative history".[18]

The legislative history

[33] Before the amendment to s 5(13) on 10 October 2000, the provision read:

> (13) For the purposes of this Act, except for s 20(3) of this Act, where a registered person receives any indemnity payment pursuant to a contract of insurance, that payment shall, to the extent that it relates to a loss incurred in the course of making a taxable supply, be deemed to be consideration received for a supply of services performed on the day of receipt of that indemnity payment by that registered person in the course or furtherance of that person's taxable activity:
>
> …

[34] That provision was amended by the Taxation (GST and Miscellaneous Provisions) Act 2000 (Amendment Act). It appears to have addressed a concern on the part of Inland Revenue that by an insurer paying a claimant directly, the insured person would be bypassed. There would be no GST output tax obligation on the claimant because the payment was not an indemnity payment for the claimant who

18 At [62].

was not a party to the insurance contract. There would be no GST output tax obligation on the insured party because it did not receive the payment.

[35] Section 86(5) of the Amendment Act replaced the former wording of s 5(13) of the GST Act as follows:

> (5) In section 5(13), the portion before the proviso is replaced by:
>
> (13) For the purposes of this Act, except for subsection (13B) and section 20(3), if a registered person receives a payment under a contract of insurance, whether or not the person is a party to the contract, the payment is, to the extent that it relates to a loss incurred in the course or furtherance of the registered person's taxable activity, deemed to be consideration received for a supply of services performed by the registered person –
>
> (a) on the day the registered person receives the payment; and
>
> (b) in the course or furtherance of the registered person's taxable activity.

[36] When the Taxation (Annual Rates, GST and Miscellaneous Provisions) Bill 2000 (27-1) was first introduced in May 2000, commentary by Inland Revenue explained that the proposed wording for s 5(13) was to ensure an insured party is liable for output tax where a payment is made directly to a third party (instead of the insured) under the insured's contract of insurance. The commentary provided:[19]

> **Payments to third parties**
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> If an insurer makes a payment under an insurance contract to a GST registered third party there is an argument that the insurer is entitled to an input tax credit but the third party recipient does not incur a corresponding output tax liability. However, if the payment is made directly to the insured party a corresponding output tax liability does arise.
>
> For example, Liable Company ("L Co.") sells defective goods to Victim Company ("V Co."). These goods cause damage to V Co.'s factory, which L Co. is liable for. L Co. has an insurance policy covering such liability. L Co.'s insurance company can either make a payment to settle any claim to L Co. (which would be taxed by section 5(13)), or directly to V Co. (which would, following the argument above, not be taxed).
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> Section 5(13) will, therefore, be amended to clarify that the insured party is liable for output tax where payment is made directly to a third party.

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19 Inland Revenue *Taxation (Annual Rates, GST and Miscellaneous Provisions) Bill: Commentary on the Bill* (May 2000) at 18.

[37] The Commissioner argues that the wording proposed in the initial Bill addressed the concern that s 5(13), as then worded, did not impose output tax where money was paid directly to an injured third party by an insurer. The wording proposed in the Bill read:[20]

> For the purpose of this Act… if a registered person receives a payment under a contract of insurance, or a third party receives a payment pursuant to that contract, the payment is, to the extent that it relates to a loss incurred in the course or furtherance of a taxable activity, deemed to be consideration received for a supply of services performed –
>
> (a) on the day the registered person or third party receives the payment; and
>
> (b) in the course or furtherance of the registered person's taxable activity.

[38] The wording in subparagraph (b) reflected the (then) intention that the insured party (being the "registered person") would account for the tax. This is notwithstanding that a third party may have received the payment under a contract of insurance.

[39] At the Select Committee stage, this proposed wording was amended. The amendments arose in response to Insurance Council concerns around compliance costs where the industry practice was to make payments under a contract of insurance directly to the injured third party.[21] As outlined in the recommendation for amendment by Inland Revenue Officials:[22]

> The commentary on the bill noted that under section 5(13), as currently drafted, there is an argument that, if under a contract of insurance an insurer makes a payment to a registered third party rather than to a registered insured, the insurer is entitled to an input tax credit but the third party does not incur a corresponding output tax liability.
>
> Clause 70 addresses this argument by providing that in the situation described the registered insured is liable to output tax.
>
> Officials have had discussions with the Insurance Council, which advised us that there would be significant compliance cost concerns for insurers if clause 70 proceeded in its current form. This is because if a third party suffers a loss

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20 Taxation (Annual Rates, GST and Miscellaneous Provisions) Bill 2000 (27-1).

21 Taxation (Annual Rates, GST and Miscellaneous Provisions) Bill (27-2) (Select Committee Report).

22 Inland Revenue and Treasury *Taxation (Annual Rates, GST and Miscellaneous Provisions) Bill: Officials' Report to the Finance and Expenditure Committee on Submissions on the Bill* (21 August 2000).

> at the hands of a person who is insured under a contract of insurance, the practice of insurers is to make payment under the contract to the third party directly. Clause 70 would require insurers to pay the GST portion of the payment to the insured.
>
> Officials therefore consider that the proposed section 5(13) in clause 70 should be amended to ensure that a registered third party who receives a payment under a contract of insurance, rather than the insured under that contract, is liable to output tax under section 5(13).

[40] The Commissioner says that the initial Bill would have required insurers to make a separate payment to the injured third party for their loss, and to the insured party for the GST.

[41] The Select Committee Report notes:

> General Insurance
>
> In order address concerns raised by the Insurance Council, we recommend the following changes to the proposed legislation affecting the treatment of general insurance:
>
> - The clause that would impose a GST liability on an insured person in relation to an insurance payment to a third party (if registered for GST) should be amended to place the liability instead on the third party where the third party receives the payment. This change is recommended after the Insurance Council indicated that the existing proposal would impose significant compliance costs on the industry.
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> …

[42] The amended Bill as reported from the Select Committee was ultimately passed into law, becoming s 5(13).

Case law on s 5(13)

[43] The parties referred to two decisions which have considered whether a payment by an insurer to a third party was subject to s 5(13).

[44] The first is *Pegasus Group Ltd v QBE Insurance (International) Ltd*,[23] on which the Commissioner relies. This was a costs decision determined on the papers

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23 *Pegasus Group Ltd v QBE Insurance (International) Ltd* HC Auckland CIV-2006-404-6941, 24 September 2010.

following the plaintiff's success against its own insurer and against a third party's insurer (American Home Assurance Company (AHA)) under s 9 of the Law Reform Act 1936. AHA was New Zealand Express Limited's insurer which owned the warehouses from which stock belonging to the plaintiff had been stolen.

[45] AHA argued that s 5(13) did not apply because Pegasus' claims arose from enforcing a statutory charge rather than directly under a contract of insurance.[24] Winkelmann J (as she then was) rejected that argument finding that the payment is ultimately received under the underlying contract of insurance via the statutory charge. The Court reached that conclusion because s 5(13) expressly provides that the obligation to pay GST arises whether or not the recipient is a party to the contract of insurance as follows:[25]

> [12] The issue is whether payment received by Pegasus from QBE (sic) is payment received 'under' a contract of insurance. I have no doubt that it is. The payment is received by virtue of enforcement of the statutory charge on money payable under the NZ Express contract of insurance. It is of significance that s 5(1) (sic) of the Goods and Services Tax Act expressly provides that the obligation to pay GST arises whether or not the recipient was a party to the contract of insurance.

[46] This conclusion is plainly at odds with the liquidator's interpretation of s 5(13). Mr Hunter observed that the issue was not the subject of full argument and that the Court was able to require AHA as insurer to pay a GST inclusive amount, so the plaintiff did not end up being under-compensated. Inferentially, the suggestion as I understand his submission is that therefore the crucial point was not necessarily squarely faced.

[47] Mr Hunter urged the Court to prefer the conclusion reached in the second case, *Southland Indoor Leisure Centre Charitable Trust v Invercargill City Council.*[26]

[48] One of the issues in *Southland Indoor* was whether GST should be added to the damages award against the Council for negligently approving defective roof trusses to compensate for the GST liability under s 5(13). The plaintiff, the Trust,

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24 At [9].

25 It is apparent that the reference to QBE in this passage was an error and ought to have been a reference to AHA and s 5(1) was intended to refer to s 5(13).

26 *Southland Indoor Leisure Centre Charitable Trust v Invercargill City Council* [2015] NZHC 1983.

argued that any judgment sum would attract GST under s 5(13) because it was a payment "under a contract of insurance" in that the payment would be received from the tortfeasor's liability insurer by virtue of its charge on the insurance monies under the Law Reform Act 1936.[27]

[49] The issue arose in part because the plaintiff's claim was a subrogated claim at the behest of the plaintiff's insurer so that while the sum was payable by the Council to the plaintiff in the first instance, it would have to ultimately be paid over to the plaintiff's insurer which must account for GST under s 5(13B).[28]

[50] The Trust argued that the words "under a contract of insurance" have a broad meaning and require no more than some causative relationship between the contract and the payment rather than a direct relationship.[29] The Trust relied on the earlier authority of *Pegasus.* It further argued that because the amount its insurer receives from the Trust as a result of the exercise of its rights of subrogation under the contract of insurance is deemed a taxable supply under s 5(13B), it makes sense that the Council's payment to the Trust should also have GST applied to it to achieve consistency between the two subsections.[30]

[51] The contrary argument of the defendant Council was that the position of the plaintiff's insurer is irrelevant; the standard enquiry as to whether the payment of damages represents a taxable supply was engaged; and a claim for compensation is not a taxable supply.[31] Additionally, any GST the Trust expended in repair of the stadium was able to be claimed back by the Trust so GST should be excluded.

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27 At [221].

28 Section 5(13B) of the Goods and Services Tax Act 1985 provides that where an insurer recovers an amount (other than aggravated or exemplary damages) as a result of the exercise of rights acquired by subrogation under a contract or insurance; and a deduction under s 20(3)(d) has been allowed to the insurer for the payment to which the recover amounts relates — the amount recovered is deemed to be consideration received for a supply of services performed in the course of that insurer's taxable activity, and a supply of services is deemed to be performed on the day of the insurer's receipt of the amount.

29 *Southland Indoor Leisure Centre Charitable Trust v Invercargill City Council*, above n 26, at [221].

30 At [224].

31 At [225].

[52] Dunningham J first determined that the plaintiff only required an award of damages which equalled the net cost of repairs as it was able to deduct the GST charged on the repairs as in input tax.[32] Next, she held that the damages award does not constitute a taxable supply for GST purposes.[33] On the third (and most relevant point for present purposes), she held that s 5(13) restricts its application to payments made by the insurer to the person entitled to the benefit of the money and not payments made by a third party tortfeasor to an insured party. She said:

> [232] The Council's argument turns on a question of statutory interpretation and whether it is correct to categorise a damages award payable to the Trust in these proceedings as payment under the insurance contract.
>
> [233] I consider that the only logical reading of s 5(13) is that it only captures payments made by the insurer to a person entitled to the benefit of the payment, whether or not the recipient is a party to the insurance contract. While the section specifies (as Winkelmann J noted in *Pegasus Group Ltd*), that the recipient of the payment need not be the insured, that does not justify broadening the scope of the clause to encompass payments which are not made by the insurer and which the insured would be entitled to receive independently of the insurance contract. Put another way, the Trust would be entitled to sue the Council regardless of whether it was insured. Thus the payment it receives from the Council is not "under a contract of insurance". The fact that the Trust has contractually bound itself to seek such payment, and then pass it back to its insurer, does not alter the position that the payment by the Council relates to a separate set of obligations and not obligations under the policy of insurance. Section 5(13) should be read as encompassing only a payment which an insurer is obliged to make under a contract of insurance, whether or not the recipient is the insured party.
>
> [234] I therefore am satisfied that s 5(13) does not apply to the damages payment the Council is to make to the Trust and my conclusion that GST is not payable on the damages awarded does not alter.

[53] Notably, the argument advanced by the plaintiff was not factually on all fours with the case at hand. It argued that s 5(13) alters the general position because, in an indirect way, the Council's payment to the plaintiff is a "payment under the insurance contract" resulting from the insurer exercising its rights of subrogation under the Policy. In other words, it was the insurance contract between the plaintiff and its own insurer to which the argument was tethered, not the insurance contract between the Council and its indemnifier. Not in issue was the scenario whereby the Council's

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32 At [227].
33 At [230].

insurer made the payment to the plaintiff on behalf of the insured tortfeasor. Rather, the argument was focused on the damages to be paid by the Council to the plaintiff.

[54] It is unsurprising therefore that Mr Smith for the Commissioner submitted that the conclusion in *Southland Indoor* is not inconsistent with the Commissioner's interpretation nor with *Pegasus* because it was pinned to the particular facts of the case. Mr Smith submits that the Court read s 5(13) as having wider application than a payment for which a person can sue in contract (on the basis they are entitled under the contract of insurance) and that all that is required to trigger s 5(13) is receipt of a payment made by an insurer. That is, all that both *Southland Indoor* and *Pegasus* require is payment to a person entitled to receive the benefit of that payment, howsoever arising.

[55] I accept Mr Smith's interpretation insofar as the ratio of *Southland Indoor* is concerned. In short, it does not provide the degree of assistance Mr Hunter seeks. However, Dunningham J's observations still merit consideration. In *Pegasus* the Court held that the payment was fundamentally "under a contract of insurance" because it was obtained through enforcement of a statutory charge on money payable under an underlying insurance contract.[34] This focused on the ultimate source of funds. The words "whether or not the person is party to the contract" contemplated the precise circumstances of the payment being made to a non-party and made it clear that there was no need for direct contractual privity between Pegasus as the recipient and AHA as the insurer.

[56] In *Southland Indoor*, Dunningham J observed that the Council's obligation to pay arose from its own negligence and not from any insurance policy. The payment was therefore independent of any insurance contract and the contractual obligation of the Trust to pass the recovered damages back to its own insurer did not transform the material character. This observation gave attention to the underpinning origin of the payment obligation.

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34 *Pegasus Group Ltd v QBE Insurance (International) Ltd*, above n 23, at [12].

Analysis

[57] Broken down into its constituent parts, s 5(13) deems a payment to be consideration for the supply of services where all three criteria are met:

(a) A registered person receives a payment.

(b) The payment is received under a contract of insurance.

(c) The payment relates to a loss incurred in the course or furtherance of the registered person's taxable activity.

[58] Additionally, it expressly does not matter whether the recipient of the payment is a party to the contract or not.

[59] There is no dispute that Mainzeal is a registered person which has received a payment from QBE. The loss to which the Policy responded was the damages awarded against the four directors for breach of duty. They were the parties contractually entitled to claim on the Policy and sue the insurer for payment if the insurer had not responded. Mainzeal derived its interest in those insurance funds from its statutory charge over insurance money payable under the Policy to the directors, provided by s 9 of the Law Reform Act 1936.

[60] Mr Hunter put it well when he submitted that there is potentially a disconnect between the express language adopted in s 5(13) and what Inland Revenue officials intended to achieve when s 5(13) was amended.

What was intended to be achieved by the amendment?

[61] The initial proposed amendment, as explained in [38], clarified that a GST registered insured person must account for GST on a payment relating to a loss incurred during furtherance of that registered person's taxable activity. In other words, the relevant taxable activity for the purposes of the amendment was the insured person's taxable activity. This was regardless of whether the payment was made to

the insured person or to a third party. This rationale was explained in Inland Revenue's commentary to the Bill as set out in [36].

[62] However, a change to this proposed amendment was recommended by Inland Revenue officials following discussions with the Insurance Council, so that payments made to registered third parties are subject to output tax in the hands of the third party, rather than in the hands of the insured person. As discussed this stemmed from the Insurance Council's concern about significant compliance cost for insurers if they had to pay the GST portion of the payment to the insured when making payment to the third party directly. I repeat the recommendation, as relevant, for ease of reference:

> Officials therefore consider that the proposed section 5(13) in clause 70 should be amended to ensure that a registered third party who receives a payment under a contract of insurance, rather than the insured under that contract, is liable to output tax under section 5(13).

[63] As noted above, the Select Committee in its report-back on the Bill adopted this suggestion recommending that the text of the amendment in the Bill as introduced be amended to read:

> For the purpose of this Act, except for subsection (13B) and section 20(3), if a registered person receives a payment under a contract of insurance, whether or not the person is a party to the contract, the payment is, to the extent that it relates to a loss incurred in the course or furtherance of the registered person's taxable activity, deemed to be consideration received for a supply of services performed by the registered person:
>
> …

[64] This is the presently contested wording. There were three fundamental differences between the drafting at the introduction stage and as passed, at least on the Commissioner's interpretation. First, the identity of the material registered person changed from the insured person to the person who receives the payment. Second, it is (consequently) the loss incurred in the course or furtherance of the recipient's taxable activity which is relevant, rather than the insured person's taxable activity. Third, on its first introduction, the draft amendment distinguished between a payment "under" a contract of insurance (being one received by the insured) and a payment "pursuant" to the contract (being one received by a third party). This suggests that the

legislative history does not support treating "under" and "pursuant" as synonymous in this context.

[65] It is clear from the legislative history however, that the purpose of the amendment was always to ensure some GST incidence provided there is a loss incurred in the furtherance of the relevant registered person's taxable activity. In this instance, I do not accept Mr Hunter's submission that the various commentaries and reports including the Select Committee's report are of no assistance to interpretation.

Commissioner's guidance as to the operation of s 5(13)

[66] The Commissioner has released a statement as to its position and the operational approach being adopted under s 5(13) which states:[35]

> The Commissioner's position is, and has been for many years, that when an insurer of an insured person pays an amount to a GST-registered third party claimant, in relation to a claim that the third party claimant has against the insured person, and the other requirements of section 5(13) of the Act are met, then the third party claimant must return GST on the receipt of that payment.
>
> …
>
> When interpreting section 5(13), the Commissioner considers that the word "receives" as used in section 5(13), is intended to have a more constrained meaning, restricted to "actual" receipt of a payment (by the GST registered third party claimant) under a contract of insurance rather than any "constructive receipt" by the insured person.
>
> It is considered that "receives" also has the meaning of "being paid". Therefore, a third party claimant of a damages payment funded by the liability insurer of the insured person is "being paid" when they obtain a cheque, cash or have their bank account credited with that sum. Assuming that the relevant amount is being paid under a contract of insurance, then the third party clearly "receives" the payment within the meaning of section 5(13).
>
> The word "under" as provided for in section 5(13) requires a broad interpretation. This is reinforced by the words that follow that – "whether or not the person is a party to the contract [of insurance]". These words confirm that a person receiving a payment under a contract of insurance might not be a party to that contract. It is consistent with this to take the view that the focus is on whether the payer of the payment is doing so under a contract of insurance rather than whether the recipient receives the payment under that contract or under another agreement (such as a settlement agreement).

[35] Inland Revenue *CS 20/01 GST Liability for insurance and settlement payments to third party claimants – Section 5(13) of the Goods and Services Tax Act 1985* (February 2020).

[67] The Commissioner's position then is that “under” a contract is to be construed broadly. Thus, it suffices if the insurer makes the payment *because* of the contract. Correspondingly, it is immaterial whether the recipient receives that amount on account of some right it has independently of the insurance contract. This broad construction might be said to sit uncomfortably with the narrow interpretation he advances in respect of the term “receives” which he contends refers only to the actual receipt. In other words, focusing on the physical flow of funds without regard to who is contractually entitled to receive the funds.

[68] Although taxpayers may have organised their affairs accordingly relying on this indication from the Commissioner, I do not consider that it can or should inform the exercise of statutory interpretation and I put it to one side.

What does “under a contract of insurance” mean?

[69] To receive something under a contract connotes a relational element arising from a contract between a payor and payee. It does not easily connote the receipt of something because of a contract between other parties. The focus or lens is on the receiver, rather than the payor. If the wording was “paid under a contract of insurance” then Mainzeal would more clearly be *paid* under a contract of insurance. The focus then is on the payor and QBE’s contractual obligation to pay the insurance proceeds, albeit not contractually required to pay Mainzeal.

[70] The term “receives” is open to two interpretations. It may refer to actual physical receipt irrespective of the reason for or entitlement to the payment. This is the narrow interpretation relied on by the Commissioner. Alternatively, receipt *under* a contract of insurance may be contextually understood to connote the receipt of something one is contractually entitled to.

[71] Mainzeal’s only entitlement against the insurer arises independently due to the operation of the Law Reform Act 1936.[36] It has no contractual entitlement, only an

[36] Section 9 of the Law Reform Act 1936 entitles third parties to a first ranking charge against insurer funds, enforceable by action against the insurer. The purpose is to prevent an insured using insurance funds other than to meet the claims of the person “wronged” by the insured and to overcome the risk of an insured’s insolvency.

indirect statutory entitlement. Further, to pick up the language employed by Dunningham J in *Southern Indoor*, Mainzeal's claim against the directors is completely legally independent of the existence of the Policy.[37] That analysis, at least in isolation, tends to favour Mainzeal's position but is not the end of the story.

What does "relates to a loss incurred in the course or furtherance of the registered person's taxable activity" mean?

[72] The second criterion in the section is that it only applies "to the extent that [the payment received] relates to a loss incurred in the course or furtherance of the registered person's taxable activity". "Relates to" is a broad and indeterminant word coloured by its context. It could refer to the third-party recipient's loss — in this case Mainzeal's loss attributable to the directors' breaches. Alternatively, it could be the loss which triggers the insurer's obligation to pay, being the loss to which the insurance contract responds. That is defined in the insurance contract as "all sums that the Insured Person becomes legally liable to pay on account of all claims made against the Insured Person for any Wrongful Act to which this Insurance applies…". The directors were Insured Persons and their loss was an obligation to pay damages to Mainzeal for breaches of duty to Mainzeal.

[73] As s 5(13) was amended to ensure that payments made to registered third parties are subject to output tax in the hands of the third party, I am not persuaded that "loss" is confined to the insured's loss to which the payment responds. It must include the loss of the third party where that loss is incurred in the furtherance of their taxable activity.

What do the words "whether or not the person is a party to the contract" achieve?

[74] It is then necessary to consider the effect of the words "*whether or not the person is a party to the contract*". On its plain meaning the words remove any requirement for a contractual relationship between the insurer and payment recipient which might, but for this phrase, be required. Winkelmann J in *Pegasus* placed significant emphasis on this phrase in her conclusion that a payment to a third party

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37 *Southland Indoor Leisure Centre Charitable Trust v Invercargill City* Council, above n 26, at [233].

from an insurer by virtue of enforcement of the statutory charge amounted to a payment received "under a contract of insurance" in this context.[38]

[75] I consider this phrase must do some work in s 5(13). Redundancy cannot have been intended. Mr Hunter pointed to other situations in which, even on Mainzeal's interpretation, the phrase would still have operative effect. These are instances in which a person may be entitled to receive a payment under a contract of insurance without being a party to the contract. Examples include a contents insurance contract entered into by one family member which entitles other family members to cover, or a motor vehicle insurance contract which extends cover to permitted drivers of the vehicle. Section 12 of the Contract and Commercial Law Act 2017 applies to a promise in a deed or contract that confers, or purports to confer "a benefit on a person… who is not a party to the deed or contract". Section 17(1) provides for such an obligation to be enforced by the beneficiary "as if the beneficiary were a party to the deed or contract".[39]

[76] Those instances are not however persuasive since they are unlikely to involve GST registered persons.

[77] Mr Hunter pointed out the anomaly if the identity of the payor becomes the overriding trigger for a GST liability, falling on the claimant in receipt of damages if they are paid by the insurer. Mr Hunter gives the example of a hypothetical plaintiff awarded $1 million in damages in respect of loss incurred in the course or furtherance of its business for which it is GST registered:

(a) If the plaintiff receives $1 million from the defendant, no GST liability is triggered.

(b) If the defendant is insured and the plaintiff receives $1 million from the defendant's insurer, a GST liability will be deemed and the plaintiff will be left with only $869,565.

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38 *Pegasus Group Ltd v QBE Insurance (International) Ltd*, above n 23, at [12].
39 Contract and Commercial Law Act 2017, s 17(1).

[78] The plaintiff is under-compensated relative to the award made by the Court. It is not clear why GST obligations ought to be dependent on who makes the payment. This is particularly so in those cases where the claimant lacks awareness about a defendant's insurance arrangements resulting in non-compliance or unmet expectations which they may be unable to mitigate.[40] It elevates form over substance because where a defendant is not bypassed, receives funds from its insurer, and pays them on, the ultimate source of the funds remains the insurer and the GST liability is different. It might be thought more obvious that it should be the status of the insured which is the determining factor for the incidence of GST, because it is the insured who receives funds under the contract of insurance in respect of an insured loss.

[79] The Commissioner's response is that, to the extent these are "consequences" of his interpretation, they are not determinative because the purpose of the legislation was to address another problem — the prospect that an insurer could be entitled to an input tax credit without the third-party recipient incurring a corresponding output tax liability.

[80] Although the practical ramifications suggest a lack of coherence, I have concluded that the legislative history clearly illustrates that the addition of *whether or not the person is a party to the contract* was intended to deal with the situation of payments by insurers to third parties.

Result

[81] The internally inconsistent language in the section leads to an ambiguity. That elevates the need to understand the provenance of the section and its purpose. I conclude that s 5(13), as the Commissioner argues, imposes a GST liability on the actual recipient of a payment made under a contract of insurance. The loss to which the payment relates in this case is the loss of Mainzeal as an injured third party and it was incurred in the course of furtherance of Mainzeal's taxable activity.

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40 Inland Revenue is cognisant of this potential and has written an Issues Paper setting out the difficulties and options for reform: Inland Revenue *GST policy issues - An officials' issues paper* (February 2020).

[82] Accordingly, I find in favour of the Commissioner's interpretation. Mainzeal is liable to account for GST on the payment in accordance with s 5(13) of the Act.

[83] I dismiss the liquidator's claim.

Costs

[84] The Commissioner is entitled to an award of costs on the standard category 2 basis with reference to band B. I expect costs can be resolved between the parties. If not, then memoranda may be filed within 14 days, with any responsive memorandum within a further seven days. Memoranda are to be no longer than three pages.

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Tracey Walker J