IN THE SUPREME COURT OF NEW ZEALAND

SC 54/2005

IN THE MATTER	of an Application for Leave to Appeal	
BETWEEN	**THE ATTORNEY-GENERAL**	
	Appellant	
AND	**QBE INSURANCE LIMITED**	
	Respondent	

Hearing 27 February 2006

Coram Elias CJ
Blanchard J
Tipping J

Counsel H S Hancock and H L Dempster for appellant
M Ring QC for respondent

APPLICATION FOR LEAVE TO APPEAL

10.01 am

Hancock May it please the Court I appear for the appellant and with Mr Dempster.

Elias CJ Thank you, yes.

Ring May it please Your Honours I appear QBE and might I just thank Your Honours for adjourning the case to allow me to be here.

Elias CJ Well it's nice to have you here Mr Ring thank you.

Ring I'm obliged thank you Ma'am.

Elias CJ Yes. Right Mr Hancock.

Hancock May it please Your Honours I wish to make a few preliminary submissions before getting into the written material and these are intended to set the scene. The first point I wish to make as a preliminary matter is we're looking at something arising from the summary judgment procedure. And I'd the Court at all time during this hearing to bear the fact that the defendant or the plaintiff in fact has not

had its day in Court and this matter is, I'd submit to an extent to be regarded in a way at a preliminary stage. And I quote from McGechan at page 903. It's a well known matter, I don't think I'll need to cite the matter, while the desirability of eliminating the frustration and delays which can be caused by unmeritorious or tendentious defence needs no emphasis, it's important to pay proper regard to the defendant's interests and to be wary of allowing the rule to become an instrument or oppression or injustice in the laudable interests of expediting litigation.

From the appellant's point of view, it sees itself in a position of oppression and injustice in the circumstances of this case.

May it please the Court, in terms of the criteria to be met for leave to appeal under the Supreme Court Act section 13, these have been dealt with in the appellant's written submissions. And I refer the Court to paragraph 8.

Now by way of further preliminary background and context, this is a case which you'll hear from the Court of Appeal judgment and the case on appeal where the insurer has taken every possible means to avoid honouring the policy. Therefore, in reverse, the insured is taking every possible point it can to fall under one of the policies, no matter which. And at all points, particularly from the very beginning in the initial statement of claim and subsequently and at the various levels this matter's been argued, the I'll call it MAF, MAF has been careful to say 1998/99 policy, if not 99/2000 policy, if not, if not and we preserve that position now as we have at all other points. But it will become important when my friend makes his submission because I'd say with something approaching indecent alacrity and enthusiasm, the QBE has endeavoured to corral, entice the appellant or MAF into the 98/99 policy. And one should be aware of Greeks bearing gifts according to the old adage. Here we have a situation where a contract where there should be the utmost good faith, we've got the reverse where the insurer has done its very best to bring about from the beginning a situation where the greatest disadvantage can arise to the insured.

Now I refer to an exhibit in the evidence in the case on appeal and for the Court's convenience I've simply had that photocopied and made available. I've highlighted the relevant passage. But there's two points to be made about this letter of 7 August 2003. The first point is to reinforce the point I've just made, and that is that from the outset the insurer has taken every possible point to avoid liability. The second matter more specific and very telling in terms of the reply my friend has done on the question of common intention on the estoppel point. But very telling at page 2 of this letter. The insurer no doubt after all due reflection because this letter of declination was after several months of discussion, the insurer after all due reflection has said, however, the 1998/99 policy contained the usual, I cannot emphasise

that word too strongly, the usual extension of cover for notified circumstances. And then later down it says.

Elias CJ Oh sorry, I was looking at the wrong line. Oh I see, yes.

Hancock So it's the letter of the 7th of August, it's the letter of declination by QBE to Aon and as I said, my prime, or one of my purposes for giving the letter emphasis is that it illustrates the tone if you like and it is the insureds reason for keeping all its options open at each point, even if it does incur criticism from the insurer and secondly, more specifically, this vital condition 5 which means that if you notify it of a circumstance within the period of cover, then even if an actual claim for damages or compensation doesn't arrive or arise until a later period of insurance, you go back to the original insurance policy under which you notified the circumstance and you're covered.

Now here the insurer has assumed, even after considering the matter for some months that the usual applies. Now its very much MAF's case that we thought the usual applied, and that is we were sure we had cover in the situation where we notified of a circumstance but that circumstance didn't mature into a damages or a compensation claim for some years later.

Blanchard J But Mr Hancock I hesitate to interrupt but you're not addressing the criteria. You're arguing the merits. You've got to satisfy us that there's a point of precedent here.

Hancock Yes Sir. The point of precedent which I'd actually referred to in the summary which is at paragraph 8 which I had referred to, that sets out the points at which the appellant says the criteria in section 13 apply. And I didn't intend to re-read that. But what I am doing now is giving more context to the submissions which follow. Because one of the points which is going to be an issue is how do we interpret certain clauses in the policy, that's the 99, sorry 98/99 policy, 99/2000 policy and we're going to look at the factual matrix.

Tipping J Am I right in thinking Mr Hancock that your client seeks to get home on 3 premises. One interpretation, two estoppel, and three rectification. Leaving aside the earlier bit about wrong facts and summary judgment and so forth.

Hancock Yes. I must say Sir, in terms of the summary judgment there is an extreme point of principle involved here.

Tipping J No, no. I'm not trying to ride you off that.

Hancock Mm.

Tipping J I'm just trying to ask you to agree or not that in relation to what you might call the contractual aspects of this case, 1 it's a point of

interpretation you suggest we should examine, 2 it's a question of estoppel and 3 it's a question of rectification.

Hancock Yes Sir.

Tipping J Is there anything else of a contractual or quasi contractual connotation.

Hancock Yes. Well Sir, connected closely with those points is the fact that we're submitting the Court of Appeal has incorrectly stated tests. And then applied tests.

Tipping J I suppose I could add to your list implied term could I.

Hancock Yes.

Tipping J So there are three sort of, or four contractual type issues that you seek to raise before this Court.

Hancock Yes.

Tipping J Interpretation, estoppel, rectification and implied terms. And you say that there's some error of principle in the Court of Appeal's judgment.

Hancock Yes.

Tipping J Now I would be assisted hugely by your saying what that error of principle is in relation to each of those matters.

Hancock Yes Sir. Well in relation, and I'll go into this in more detail as I progress through the submission.

Blanchard J Well bear in mind you've only got a limited period of time to argue this.

Hancock Well at this point, in relation to the estoppel point, the Court has referred to a prior agreement. And there is no evidence of a prior agreement. Therefore a necessary requirement for estoppel has not been, I'm sorry Sir, for rectification has not been met. And our response to that is that the Court has misstated the law of rectification and we say on the authorities we've cited that a common intention is sufficient. So that very very briefly encapsulates the point relating to rectification.

In relation to implied term, the Court has said that no MAF official gave evidence of what the parties might have said if asked in relation to cover for circumstances that matured into a claim at a much later date. And we say the Court has misstated the test relating to implied terms because the officious bystander test is not one satisfied by parties coming along and telling the Court after the event how they would

interpret the contract. The officious bystander implied term test is of a different nature.

If I move now to.

Elias CJ Sorry, just following up on that rectification you say the Court of Appeal judgment is in error in paragraph 29 in referring to agreement as opposed to common intention. Implied term.

Hancock The Court of Appeal is in error because it criticised the MAF case for no Crown witness said such and such and such and such about the agreement. And that is the wrong test because a Crown witness couldn't by parole evidence tell the Court what the agreement might have said if asked. It's really the officious bystander test an objective one which relies heavily on the matrix, the surrounding circumstances. And that is in fact adverted to quite properly by Justice Tipping. But that's why I was putting some emphasis at the beginning that my argument on the matrix if you like. Because this material is fundamental. It colours everything that follows. And when the Court, and the Court of Appeal came to the interpretation argument.

Tipping J Isn't your problem the first sentence in paragraph 47. The difficulty for the Crown is that it is impossible to be sure not what the parties would have agreed but that the parties would have agreed. The Court is saying in its judgment it's not at all sure that the parties would have agreed on what is said to have been the implied term. So it's not oh of course they would have agreed. The Court is saying they're not at all sure that the parties would have agreed.

Hancock Sir there are two points. The first is that in the summary judgment jurisdiction it is pretty tough for an appellant to have the whole, virtually the whole case in front of the Court at that preliminary point. I think it's almost impossibly high a requirement. But secondly and more specifically and in answer to Your Honour's question, I was referring to the last sentence of paragraph 47. Quote, but no Crown witness made such an assertion. In other words, if a Crown witness had come along and said oh that's what we would have agreed to, then we would have been alright. So the Court has actually misapplied the test and that has led to a substantial miscarriage of justice. Because as I've indicated with that letter I handed up at the beginning, we've actually got the insurer some months after discussions with the insured, still thinking the usual applies. The broker thought the usual applied. The insured thought the usual applied. And that is very compelling evidence in terms of the factual matrix.

So I've now dealt with the.

Elias CJ Well it was the usual after clause 5 had been introduced into the policies. But not before.

Hancock Well what is interesting is that the insurer under this letter thought the usual clause was there. It would probably be helpful.

Elias CJ Well but the letter is 2003.

Hancock What they're saying is that at that date, 1998/99, they thought the usual extension of cover for notified circumstances was in there.

Blanchard J That's a claims made policy.

Hancock Yes.

Blanchard J Yeah. Well that would be usual in that policy. But the problem is that you're then switched through a proposal from your broker to a different kind of policy.

Hancock The interpretation which I submit is the correct interpretation of the letter is that as at 98/99 it was usual to have an extension of cover of this nature and I'll give a reason for that. If the Court goes to the second document I've handed up which is the proposal which forms the basis of the contract of insurance, on the first highlighted page I've referred to the declaration. We agree that the proposal and declaration shall be the basis of and incorporated in the insurance contract. So part of our matrix here is that when incorporating this which has the schedule which has the, not just the Alan Johnstone matter but it's got a number of other pending claims. So it's clear from this proposal that the insured is expecting to be covered for the usual. And that is the circumstances that give rise. And if we look at the factual matrix, step back, what we've got is a major government department. It wants to be insured. It wants to be insured for things which it obviously needs to be insured for. And it doesn't cease to need to be insured simply because a circumstance has been notified and after that, well who cares if I never get covered for that in three or four years time, it doesn't matter. That is a nonsense. And if we're looking for a factual matrix or background we've got something very strong in this proposal document because it is actually the basis of the contract. And I'm now talking about the 99/2000 contract.

And then further down in this document, completion of this proposal does not bind the proposer, nor HIH Casualty etc. In other words, the QBE, the insurer still has to be ad idim in the sense that has to accept the proposal and then the argument becomes, and this is the contextual or matrix of fact argument, this is a surrounding circumstance. So when the Court has to interpret the policy, that's the 99/2000 policy now, when the Court has to interpret that policy, either it might be in the light of an implied term argument. It might be in the light of a pure contractual interpretation argument. And that's very important. The contractual interpretation point we're looking at condition 5, and we're looking at exclusion 6. And what I'm asking the Court to do is to say,

this proposal went to the heart of the insurance contract that was issued 99/2000.

Tipping J I wonder if you would be good enough to pause Mr Hancock. It seems to me that your client is not contractually covered. And that's why you're seeking to invoke implied term, estoppel and rectification. In other words if one simply looks at the face terms of the contract, sadly for your client it's not covered. Mr Ring seems to me to have put it very succinctly in his 1.4 on, is it the second page. If the broker had included condition 5 in the earlier wording or it had not inserted exception 6 in the later wording, I'm interpolating earlier and later, MAF would have been covered. Isn't it as simple as that. Contractually.

Hancock Well.

Tipping J And somehow or other you're seeking to get round that difficulty by invoking these sort of collateral arguments if you like.

Hancock Well the arguments exist in law to prevent injustice in these very situations so I should make no apologies.

Tipping J I'm not asking you to apologise for them. I'm just asking you whether you accept that as a matter of what you might call conventional contractual approach, you're not covered. Now there may be a variety of doctrines that you can bring to your assistance. But I don't see how you can get round what Mr Ring says in his 1.4. There may be a way but if there is I think it should be right up front very smartly.

Hancock Sir in relation to the 99/2000 policy my answer is that this document, that's the proposal, as it says forms part of the policy. Now if there's a conflict between this document and a condition or an exclusion then the Court within the four corners of the contract.

Tipping J Wait a minute, you say that the proposal forms part of the contract.

Hancock Yes.

Tipping J Where do you get that from.

Hancock I just read it to Your Honour.

Tipping J Well I'm sorry you'll have to read it again.

Hancock Sir. It's at the first tabbed highlighted passage on the proposal. And it's the declaration. And I/we agree, sorry it's halfway down the page.

Tipping J Yes I've got it now, thank you.

Hancock I/we agree that the proposal and declaration shall be the basis of and incorporated in the insurance contract. And then as it were to reinforce the insurer's right if it doesn't like that, to step back, I've highlighted the passage at the foot of the page which says, completion of this proposal does not bind the proposer, nor HIH, and for that we can read QBE.

Tipping J And I'm sorry, I probably wasn't concentrating enough when you were going through this Mr Hancock. Because I couldn't see where you were heading. I do now. What is it in this proposal that you say contractually binds the insurer so as to give cover for this claim.

Hancock I say that the insured has put the insurer on notice of matters of which it requires to be covered. And one of those notice, those matters is the subject claim but in fact there are a whole lot of others. And we are looking at a context Sir of a major government department. It's not trying to short-change anyone in terms it can afford the premium for heaven's sake. It's not a question of, don't get the extended cover because you'll save $5.00. That would a ridiculous suggestion and no-one's tried to make it in any evidence. But interestingly, interestingly in the Court of Appeal and in my friend's submissions this theme of, oh you didn't buy the extended cover, therefore how could you come along some years later and have the Court write it in for you. That's been the theme in the submission and the Court of Appeal seems to have run with that. But the reality is actually the opposite. And that is the best evidence we've got so far is that the premium, there's no real difference between 1998/99 and 99/2000. Now I immediately say there will need to be more evidence of that as the matter goes further. But essentially it would appear in the evidence that there's no real difference in the premium 98/99, 99/2000.

Tipping J You're sliding into the merits all the time. What is it that you say the Court of Appeal erred in principle on in relation, are you saying that they erred in principle because they didn't take account of this proposition that this proposal was incorporated into the contract.

Hancock Yes my argument Sir is that when you're interpreting the condition 5, which is the one that gives you the cover in later years, as long as you come clean and give the circumstance in the period of insurance, then if it matures to a compensation or damages claim in later years, that's fine, you're covered. Now that's one of the clauses. The other one that has to be interpreted is the exclusion 6. And I've gone into some detail in my submission as to why it is a pure matter of interpretation. Forget implied terms, estoppels, rectification, all of that. Just as a pure contractual matter, the basic fundamental rule of the surrounding circumstances, the matrix of fact in which you interpret the policy, this plus the policy, that's the acceptance of the premium, the issuing of the policy as it says at the bottom, the insurer doesn't have to take this up. But it did. Incidentally.

Elias CJ I'm sorry, before you go on, you haven't really come to the punch of that submission. You were talking about condition 6. If this proposal is included in the contract, what do you say the implication for condition 6 is.

Hancock In relation to condition, I'm sorry, we'll deal with condition 5 first. Would that be the best way to do it? And then move to exception 6.

Elias CJ Alright.

Hancock If we deal first with condition 5, the implication is that it's the condition 5 which provides that as long as you notify of a circumstance within the period of insurance, once you've done that you're covered if the thing matures into a full scale damages or compensation claim in later years.

Blanchard J But under 6 you can't notify in respect of something that was notified in a previous year.

Hancock Sorry, under?

Blanchard J Under condition 6.

Hancock I've just indicated to the Chief Justice.

Elias CJ He's dealing first with condition 5.

Hancock We're looking at condition.

Blanchard J Yeah but you've got to read the two together.

Hancock Well we probably need to deal with one and then.

Blanchard J Well they're both clear enough on their face. It's the way in which they interact in the particular circumstances of this case that's at issue.

Hancock Some of us aren't as good at multi-tasking as others. Therefore I'd probably need to work through condition 5 and then move onto exception 6. And I'll certainly meet Your Honour's point fair and square.

Elias CJ It does seem to me that exception 6 is the big impediment for you.

Hancock Well on the basis then, if we can take it as common ground that when you look at the proposal and the fact that we've notified circumstances in the proposal. If we read the proposal along with condition 5, it must be the case that just because we've notified in the course of applying for the insurance as opposed to separately notifying saying under condition 5 I hereby notify. So I'm really saying is that as an interpretation matter condition 5 must be read, it can only be read as

saying look, if you've told us in the proposal about these circumstances, that's fine, you're covered. If you tell us under condition 5, you're covered, it's one and the same thing. So that's really the interpretation I'm arguing for here on the basis that the proposal is part of the policy and the circumstances notified.

Now I'll move Your Honour to.

Elias CJ You're saying you've complied with condition 5 through the proposal.

Hancock Yes.

Elias CJ Yes.

Hancock And that when you look at the factual matrix, put the whole thing together, that can only be the answer. Now I'll move to what Justice Blanchard has raised, exclusion 6. And it would probably be helpful if I pinpointed that in the submission. Because that's discussed.

Blanchard J Paragraph 18.

Hancock Yes thank you Sir. So the argument is contained there. The key point of that argument is the opening words of exclusion 6. The insurer shall not indemnify the insured for any claim. Now it's MAF's submission that any claim is in relation to the operative clause, and that is you're covered for certain claims during the period of insurance. So that's the operative clause earlier in the policy. Now you've got that there. Then detracting.

Elias CJ Do we have the full policies by the way.

Hancock You will Your Honour have them in the case on appeal. But what you may find helpful.

Elias CJ We don't have them I don't think.

Hancock Well.

Elias CJ But anyway, carry one.

Hancock Well Your Honour you may find helpful simply the Court of Appeal judgment in the first few pages.

Elias CJ Yes.

Hancock They deal with the 99/2000 policy.

Elias CJ Yes.

Hancock And the key bits I believe are there.

Elias CJ Yes they are. In fact I'm following it from that now.

Hancock And then secondly it moves onto the, and I may stand to be correct, but I think for our purposes that may well be enough in terms of the argument we're putting forward here.

Tipping J The claim that the cover is for claims made against the insured during the policy year.

Hancock Yes.

Tipping J Yep. And in order to get cover for a claim that is made during the policy year but relates to an earlier event outside, before that policy year, you had to have given notice so as to lock in the claim didn't you. But the problem is that during the claim year you're faced with exclusion 6.

Hancock And my answer to that Sir is as follows. That the word the insurer shall not indemnify the insured for any claim, you've got that now at paragraph 18 have you of our.

Tipping J I've got it right in front of me here thank you yes.

Hancock What I'm asking the Court to do is focus very rigorously on that term any claim. And I've said that that really has to be read in the context of the insurance policy. So we're talking about claims in the period of insurance because.

Elias CJ I think the Court of Appeal uses the earlier policies and the definition of claim in those. Is it the same definition.

Hancock For all practical purposes yes.

Elias CJ Yes, yes, thank you.

Hancock So we've got the situation where, and I'm talking now of the 99/2000 policy, we've got a situation where we've got an operative clause which covers you for claims made, notified during the period of insurance which is 99 to 2000 in this case. That's where we start.

Blanchard J And this is during the period of the insurance.

Hancock Yes, yes.

Elias CJ Yes.

Hancock Precisely. And then pause, we've got something which detracts from that which is the exclusion. The word any claim relates back to the word any claim in the operative clause, that's a claim during the period

of insurance. And here we never had a claim during the period of insurance because the claim was a claim for damages or compensation and that never happened until 2001. So exclusion 6 is inapt to cover that situation. If we had had a claim, if Alan Johnstone had sued us for damages for or compensation in the 99/2000 year that would be a different matter. But that's moot.

Tipping J I'm sorry, I'm not following that. The claim, what policy here was the claim made by Johnstone against you.

Hancock 2001/2002.

Tipping J At which point you were stuck with exclusion 6.

Hancock Yes.

Tipping J Is that right.

Hancock Yes.

Tipping J Your learned Junior seems to be.

Hancock I'll keep solo at the moment Sir and I'll refuel if necessary.

Tipping J Alright. Yes. Well I just want to understand. But when the claim was made against you, the insured, surely you were stuck in that policy year with exclusion 6.

Hancock No because condition 5 fixed in the 99/2000 policy we had notified of a circumstance under the proposal in 99/2000. We notified.

Blanchard J You thought you were covered under the 98/99 years policy.

Hancock We've always kept, in the statement of claim we've pleaded all the policies and we.

Blanchard J Yeah but primarily you thought you were covered under 98/99 policy, correct?

Hancock No. We have changed our position.

Blanchard J I know you've changed your position Mr Hancock. But you're primary point was 98/99 policy. If that doesn't work, we'll try the later one.

Hancock Sir, MAF's position is that any policy which will cover us will be fine.

Blanchard J I know that Mr Hancock.

Hancock My friend has tried to get us into that earlier policy by saying, oh well, we'll take an, we'll accept the notification. We said that's fine, we'll argue that. If that's a gift we'll take that but we are not giving away.

Elias CJ Well you are covered it seems to me under condition 5 but for the break achieved in the 99, is it the 1998/99 year by exclusion 6. Isn't that the position.

Hancock Well the argument I've put in the appeal submissions, there's two bases. You can go 98/99, completely separate argument, 99/2000. And we've put both of those forward for whichever one will do best for us. And as I indicated at the beginning of my submission, in the context, we've had an insurer who's thrown every possible defence at us. We have thrown every possible claim at them.

Elias CJ It doesn't help Mr Hancock. It doesn't help to have the colour distracting us from the issue we're trying to close on.

Blanchard J What we're trying to determine is whether there's any point of general principle here.

Hancock These clauses Sir are very very general in the insurance world.

Blanchard J But the clauses by themselves are quite plain on their face. It's how they impact on these particular circumstances that seems to be in issue.

Hancock But it will be a significant commercial interest for people to know that by the use of the factual matrix and the rules attached to that or alternatively by way of estoppel or implied term, that these general clauses can actually be coloured in their interpretation.

Tipping J But you didn't have condition 5 did you, unless Mr Ring's table at the second page of his submissions just before 1.4 I spoke of earlier, you didn't have condition 5 in your 98/99 policy. You didn't have the runoff cover.

Hancock That takes us back to the argument that all the parties assumed the usual clause was there, as Your Honours see in the Bell affidavit and the.

Tipping J Yeah I know. But condition 5 wasn't in the 98/99 policy was it.

Hancock Sir could I perhaps answer the Chief Justice's question, and also yours by this way.

Tipping J Yes by all means.

Hancock Because it's something I haven't, it's central to our submission but in fact I've not dealt with it yet for which I apologise. And it's this central point that the Court of Appeal seems to have assumed that the

notice of the circumstance that could give rise to a claim, they assumed it was given in the 98/99 year or it was known about or should have been given and so it's reached if you like a factual determination.

Elias CJ Is your point that it didn't have to have been notified under the old one because that was only for claims within the period of insurance.

Hancock No we've got a tighter test than that Your Honour.

Elias CJ Yeah.

Hancock It's a tougher test. If we knew about the circumstances which could give rise to a claim, then my friend will argue if we're caught under the 98/99 as we should have given notice there, but our submission there, and what I've put in the written material is that, and the Court of Appeal has acknowledged this, it's talked about the MAF getting the Alan Johnston judgment. It was an application for judicial review, it had to do with regulations the department had been trying to protect for the beech forests.

Elias CJ Yes.

Hancock And it had gone about it the wrong way. It was not a damages claim. It was not a claim for compensation. And the Court mentioned institutional time and by that I assume they mean the judgment, Justice Wild's judgment, comes out on the 9th of June, it goes to the department, people look at it and they say, oh for heaven's sake, we've got all these beech trees now we thought we had.

Blanchard J But Mr Hancock, is the point that you're trying to make that the Court of Appeal in a summary judgment application has made a factual determination about something that happened in the 1998/99 year, that is that MAF either gave a notification or should have given a notification in relation to Johnstone.

Hancock Yes.

Blanchard J And you're saying that there was an error of principle in that approach by the Court of Appeal in making that factual determination.

Hancock Yes Sir.

Blanchard J And why do you say that.

Hancock Because the evidence on which the Court reached this conclusion I say is not, it's not there. The matter just wasn't the subject of evidence or debate. The evidence we do have which is clear and that is that coming back to this proposal document I've referred the Court to, we definitely know that notice was given about this time, that's the 29th.

Blanchard J Yep.

Hancock Of July. So that's firm. But as to what happened before, there's no evidence.

Tipping J Didn't they draw an inference from something that was said in a letter.

Blanchard J In paragraph 8 of the declaration I think, or of the proposal. The reference to previously notified to Aon.

Hancock Yes we've got no, what we have is an absence of any evidence which says that the claim was notified before 30 June 1998, sorry 1999. But the Court seems to have assumed something there which it should not have as a matter of principle in a summary judgment because.

Blanchard J That's your point isn't it.

Hancock Yes Sir. And.

Tipping J But you might have notified it after 30 June.

Hancock It looks most likely that that is what happened. Because the evidence we do have, at least we know that on the 29th of July we've got a clear notification. And what I was explaining to the Chief Justice before was that this was actually a judicial review relating to regulations. So you've got ministers running round, do we do some new regulations. Do we have to pass an amendment to the Forest Act to protect the trees. This is what they're worried about. They're not worried about a non-existent claim for damages or compensation which no-one's ever threatened at any time.

Blanchard J Well that comment is presumably not related to the absence of evidence about any actual notification. You've jumped on I think to dealing with the question of whether it should have been notified.

Hancock Yes. And just dealing with that point in a little more detail. You've really got two things I believe to analyse here. One is a circumstance. And we've got the circumstance, we've got the Alan Johnstone claim and that certainly is in June 1999. So we've got a circumstance.

Tipping J Sorry, what's certainly in June 99?

Hancock A circumstance.

Tipping J Oh a circumstance, oh right.

Hancock A circumstance.

Elias CJ That's through Aon, that notification is it.

Tipping J Yes.

Blanchard J Well.

Elias CJ Or it's not known.

Blanchard J I think Mr Hancock is trying to argue that there never was a notification in the 1998/99 year.

Elias CJ I see, yes.

Hancock Yes.

Blanchard J And that there was no obligation.

Elias CJ Yes.

Blanchard J To notify at that point.

Elias CJ Yes.

Hancock Yes.

Blanchard J Because it was a complicated situation.

Hancock Yes, yes.

Blanchard J And MAF needed a little bit of time to figure out whether they actually had an exposure.

Hancock And in fact if I could, Your Honour's exactly right. But I could put it more strongly still and that is that.

Blanchard J Well no, no I don't want you to. We're trying to determine whether there's a point of general principle here. So could you please address why the Court of Appeal should not have proceeded on the basis that there either was a notification or should have been a notification. Why were they wrong to proceed on that basis.

Hancock Because in the summary judgment jurisdiction there's a fundamental protection required for litigants who are facing claims or who can be deprived of a claim of assumptions being made without adequate evidence. It's a summary, it's a more peremptory procedure and there's a very serious point which I endeavoured to echo at the outset of my submission by the reference to McGechan.

Blanchard J It presumably was already in issue in the underlying proceeding at that point that there was an issue about whether a claim had been made or should have been made.

Hancock I'm sorry Sir, I didn't quite get the.

Blanchard J It presumably was already a live matter in the proceeding which underlies the summary judgment application that there was an issue about whether a claim had been already made or whether, if it hadn't already been made, it should have been made.

Hancock The.

Elias CJ Had a statement of defence been filed.

Blanchard J That's what I'm getting at.

Hancock In the summary judgment.

Elias CJ No, no, in the underlying proceedings. This was defendant's summary judgment. Had the defendants filed a statement of defence.

Hancock Yes.

Elias CJ Yes.

Hancock We don't have that in front of us. It's.

Blanchard J Well Mr Hancock can no doubt tell us. Had they put in a defence pleading directed to those two issues, the alternatives.

Hancock I can't answer that.

Elias CJ Well I think we'd better get the file.

Hancock Yes it's, the case on appeal certainly has.

Elias CJ We may have the Court of Appeal file.

Ring I can certainly help Your Honour, we did.

Elias CJ You did put it in issue.

Ring Well my friends, sorry to interrupt, but if this may assist. My friend's statement of claim says AJS had earlier brought judicial review proceedings against the plaintiff of which the defendant had been notified under an earlier 1998/99 policy. So my friend actually pleaded a notification under the 1998/99 policy.

Tipping J So there couldn't have been the slightest doubt that the notification was given before 1 July 1999 on that premise.

Ring Well there's two parts to it isn't there Sir. There's the when did MAF first become aware of the circumstance.

Tipping J Mm.

Ring And that was in the period up to 30 June 99, i.e. in the 98/99 policy. When did MAF notify that to HIH. That was in fact on 29 July so under the subsequent policy period. But it's when they become aware of the circumstances that is crucial in determining policy coverage, not when they notified.

Hancock So picking up that point of awareness of the circumstances which I did avert to earlier, I was saying that the proceedings were judicial review proceedings and it related to regulations and native forests and the like and that there wasn't a claim for damages or compensation threatened at any point in those proceedings. And so the awareness of circumstances, it is perfectly arguable that the awareness occurred some weeks after the actual judgment was received. So you've got a judgment in the matter and the judicial review on the 9th of June. Then to use the Court of Appeal's term, institutional consideration which I take to mean officials talking to ministers, what do we do now, are these forests at risk, that sort of thing. And all that's worked through and at various times these matters relating to native forests do become very very topical and they do take up a lot of time by officials and ministers.

Elias CJ Well isn't that just simply to say that people were distracted by thinking that any liability might be fixed or that events would overtake it. Is that really, is that really helpful in the present dispute.

Hancock With respect Your Honour I believe it is because the.

Elias CJ Well it's an explanation but is it confirmation with the contractual obligations.

Hancock Well I believe I can answer Your Honour's point there. You've got two things to think about. One is a circumstance. Are you aware of the circumstance. And circumstance is the Alan Johnstone claim. So yes, they would have been aware, that's MAF would have been aware of the circumstance before the 20th June 1999. Now that's one leg satisfied. The second leg is the crucial one, and that is likely to give rise to a claim for damages or compensation. And it is my argument that an insured, whether it's a large government department or just an ordinary citizen, an insured under this tort of clause will not lose cover in this situation until there is a knowledge that the circumstance, not just something unfortunate that's happened that you've got a judgment against you, it's got to be more than that.

Blanchard J Can I summarise that. You had a judgment against you in the previous year, the 98/99 year, for judicial review. It wouldn't immediately have been obvious that that was going to give rise to a follow up monetary claim and you needed, it was reasonable to have a little bit of breathing

space while you thought through the implications of the judgment and the light bulb went on and you said, oh we might face a monetary claim. And at that point only should you have to notify.

Hancock Yes Sir.

Blanchard J Right. So okay well that seems to me anyway to be something that is at least arguable in the proceeding. The real question though is whether the Court of Appeal should appropriately have closed it off in the summary judgment, at a summary judgment application level.

Hancock Yes and we criticise that approach on principle in the context of summary judgment. Because on the one hand the Court is acknowledging this institutional consideration so they, but on the other without evidence of the date on which the link was made between the circumstance and the potential for damages.

Blanchard J Alright, well I understand the point of principle.

Hancock Yes Sir.

Tipping J It's really in essence that the Court of Appeal have been too peremptory. They haven't given you the opportunity to have your say on why you didn't think, or why it was appropriate not to think it likely that this was, on top of the issue as to when precisely was the notification give.

Hancock Yes Sir.

Tipping J There were those two points they'd been too peremptory.

Hancock Yes Sir.

Tipping J Well at least we've now got some clarity.

Hancock We've detoured a little Your Honour. I was dealing with the exception 6 and that term the claim. And I was arguing that exception 6 was not apt to exclude anything that happened in the 99/2000 year because MAF made no claim in the sense of a claim for damages or compensation in that 99/2000 year. But what did happen we say in the 99/2000 year, clearly from the proposal that went in, we can be certain that there was a notification of a circumstance and then at that point condition 5 bites and from then on there's cover.

Elias CJ Yes I understand.

Hancock And to reinforce that submission about exclusion 6 I could possible summarise it in this way. That QBE knew that MAF was seeking indemnity cover for these matters. So it was a core factual circumstance at the time of formation of the contract. Which

incidentally went through in September 1999. And so the matters that are there recorded in the proposal had become part of the policy of insurance itself.

Tipping J If all this is correct, you still have to have either a condition 5 or something equivalent to it in the policy year ending 30 June 99 don't you.

Hancock No Sir.

Tipping J No?

Elias CJ Not on the argument.

Hancock No, this is the alternative argument. On this alternative argument we are waving goodbye, my friend has been kind by offering us at least notification under the 98/99 policy, we're saying thank you, it's alright, we'll take our chances with the 99/2000 policy. And so the arguments I've just been addressing are on the basis that we could properly and did properly notify a circumstance in the 99/2000 year. We did not have to notify in the 98/99 year. And the insurer does have a.

Elias CJ That's really a matter of fact.

Hancock Yes, yes.

Elias CJ As to whether it was reasonably practicable.

Hancock Yes.

Elias CJ To give notice.

Hancock Yes.

Elias CJ And you say that should not have been determined on defendant's summary judgment.

Hancock Yes Your Honour.

Elias CJ I mean all of this is about the application of the policy. Why do you need all this rectification and implied term and.

Hancock It's a, I think it is very strongly arguable that shorn right down to its basics, we have an interpretation, we've got a summary judgment and then we've got our standard insurance clauses and we've got an interpretation matter of clauses which are widely in use. And yes, the implied terms, the estoppels, the rectification's.

Blanchard J What's the interpretation point which you say is of general application rather than being specific to the facts of this case.

Hancock It's when you've got a proposal forming the basis of the insurance that that be read as part of a factual matrix so that when you're looking at condition 5, if you have in fact substantively fulfilled condition 5 in a different way and that is that you've told the insurer everything, then the insurer can't come back to you, having been told everything, having had a chance to critically analyse it, having accepted the arrangements and then paid the premium, the insurer can't come back and say, oh no, but we're not including this.

Blanchard J But if you'd included in that list something that had been notified previously, then what's unreasonable about exclusion 6 saying well there's no cover under this new policy for that.

Hancock The position there Sir is that my friend has on a number of occasions argued very strongly that each policy, you see you've got to, we've looked at this that we've got continuous insurance. It's not like we're chopping from one insurer to the other and then giving the new person the old risk. This is the same insurer. And in this situation my friend's come back and said, but each of these policies are different, they're each separate, they each have to be read within their four corners. So we say, well that's a little harsh considering it's the same insurer right through. But let's take that argument and in answer to Your Honour's point, that's too bad for the insurer. Because they're insisting that each of these policies stands on its own feet and this is the policy we're looking at, it's nothing to do with 98/99, that's been and gone, this, the four corners of this which is the proposal plus the policy is what bites in terms of cover.

Tipping J So are you saying although you don't surrender it, you're not really relying on the 98/99 policy, you're relying on the 99/2000 policy.

Hancock I believe Sir that is our best and strongest.

Tipping J Well that's helps, at least so that we know where we're primarily focusing.

Hancock And Sir I must also indicate to the Court that we have moved in the alternative, I think we've always clearly signalled that we were keeping all our options open.

Tipping J I understand all that.

Hancock But I'm partly responsible for that confusion Sir.

Tipping J Well you're relying primarily, for our present purposes anyway, on the 99/2000 policy year.

Hancock Yes Sir.

Tipping J As covering you.

Hancock Yes.

Elias CJ Well I'm now a little confused about the, where do I find the carry-on provisions in the policy up to 1999. Were there any.

Hancock No, there weren't.

Elias CJ Yes. Because it was simply for claims in any particular year.

Hancock Yes.

Elias CJ Yes.

Hancock And it was the same insurer year after year.

Elias CJ Yes.

Hancock And in the evidence of the MAF and the broker, they treated it as a policy which if it didn't contain a condition 5 it was certainly treated in practice as giving that cover.

Tipping J Well it would if you, the trap here used to be that if you changed insurers. But the trap in this case is that you've changed the terms of the policy. It's very simple really.

Hancock Yes, yes. But Sir on that point, you're absolutely right, but it's interesting that we did put forward an argument at an earlier stage that it must have referred to only a previous insurer. If you kept with the same person, you couldn't possible be invoking that.

Tipping J Well it was always going to be, if material at all, it would be a claim in a policy year in relation to the same insurer. So it didn't matter.

Hancock Exactly, yes.

Blanchard J Can I just clarify one point. If on the first, within the first week shall we say of the period covered by the 1999/2000 policy, the Johnstone judgment had been given, then there wouldn't have been any doubt that there would have been coverage.

Elias CJ Yes.

Blanchard J Under that policy.

Hancock Yes.

Blanchard J The problem is entirely that it is argued against you that the Johnstone claim was old business.

Hancock Same old insurer, but old business.

Blanchard J So it all comes back to the same point.

Elias CJ I suppose exclusion 6, 6A is not a problem for you because there was no.

Blanchard J Notification.

Elias CJ Notification or claim. 6B I suppose you'd say that you gave notification of those circumstances in your proposal which is about as good as you could do.

Hancock Yes.

Blanchard J So really it turns on whether you had an obligation to notify those circumstances prior to the 1st of, is it July, 1st of July 1999.

Hancock Literally 4 pm on the 30th of June 1999. Yes.

Blanchard J So it's that factual question that underlies the whole of this case. Did you have that obligation before 1 July.

Hancock Well the timing issue is a very important one but.

Blanchard J Well if you didn't have that obligation then, you're covered under the 99/2000 policy.

Hancock Yes. And I think as a matter of general importance in insurance law, this sort of situation on the knife edge between.

Blanchard J Well it's very factual, very fact specific to the case. The question in my mind is whether the Court of Appeal at summary judgment stage should have ruled it out.

Elias CJ Yes.

Blanchard J That seems to me maybe your only real point of principle.

Hancock One wonders if the miscarriage of justice aspect, it's a very substantial sum.

Elias CJ We haven't, that expression we haven't had to consider yet, but I suppose it is arguable that it's not a reference to anything other than, well it's usually used in respect of criminal appeals isn't it. It's a rather odd notion to use when you've got two substantial parties.

Blanchard J Even in relation.

Elias CJ Well able to look after themselves.

Blanchard J Even in relation to criminal appeals, it's problematic because it would mean that if anybody came along and said look, I'm an innocent person sitting in prison, they'd be raising an issue of miscarriage of justice. And when you apply it in a civil context, it would mean that everybody could come along to this Court and say, look the Court of Appeal got it wrong on the facts. It's a miscarriage of justice accordingly and the Supreme Court must give leave. And we'd get completely bogged down in either case.

Hancock I would argue Sir this is quite an interesting insurance case in the sense that you've got this notification under the proposal. If the matter went further there'll be arguments when you, QBE calculated the premium in 98/99 or were you assuming the usual applied. And just say the answer to that was yes, we levied a premium on the basis that the usual would apply and that is that a notified circumstance would be covered if it matured into a full claim at a later year. And you go to 99/2000, was the premium about the same when you had an explicit condition 5 giving that extension as opposed to just everyone's understanding that it was there. And I think at that point, if that's not a miscarriage of justice, you've been told that you've got the B grade policy because you're cheap, you only paid for the B grade policy when in fact you thought you had the A grade policy, you paid for the A grade policy, the insurance company thought you had the A grade policy, the broker thought you had the A grade policy and you paid for it. Now that's the sort of thing which would be explored at a trial. But in terms of what we're doing now, the potential for a miscarriage of justice in that situation I'd submit is very very high indeed. Although I do take Your Honour's point about the criminal law element and whether that.

Elias CJ I wonder whether you were right to say that the factual issue is whether notification was required before 1 July. Because I suppose there might be an issue as to whether notification was required before the proposal was accepted. Even if, yeah I'm just wondering whether there's, whether it's necessary to be as absolute as to say that the issue is whether there should have been notification before 1 July. I'm wondering about the period between 1 July and when the policy was actually entered into. I suppose it's the same as saying, in this case notification before 1 July.

Tipping J I wonder if I could just have some final help Mr Hancock and then I think I will have grasped it. Is it the fact according to your submission that you were bowled out summarily by the Court of Appeal under both 6A and 6B, in other words they found that you did notify under the previous policy, they seem to have found that by inference from that previously notified to Aon. And they have also, if not directly, at least indirectly have found against you on B, that it arose out of a circumstance which was likely to give rise and you were aware of that

circumstance. And that that is, well one or both of those, whichever it is, either or both, is too peremptory for summary judgment.

Hancock Yes Sir.

Tipping J That seems to me with respect to be your best point.

Hancock Sir.

Tipping J That they've just made these evaluative and one evaluative, the other purely factual, determinations without sufficient solid evidence to shut you out from trial.

Hancock Yes.

Tipping J I think for me that's the best point you've got. The rest of it seems to me to be pretty case specific. But it is a point of principle as to how robust one should be if you're arguing summary judgment matters. And this does seem to, subject to what Mr Ring says, and he may of course put a completely different light on it. Particularly B is a sort of evaluative question which it's a bit tough to find against an insured without giving them the opportunity to be heard orally. Anyway, thank you.

Hancock What's rather interesting is QBE's alacrity in saying, notice accepted under 98/99.

Tipping J Well this is all just jury stuff Mr Hancock.

Hancock Well no it's not Your Honour. It's a bit more than that.

Elias CJ Well you could say it's blowing hot and cold I suppose if you wanted to find a less jury way of doing it.

Hancock Well I could turn it against myself or at least against MAF by saying that we have also run one way and we've run another. Always in the alternative but there's no doubt that for some purposes at some stages of this case we've put our money on 98/99 and at others.

Elias CJ Well pleadings force you into that of course. And summary judgment is based on pleadings.

Tipping J I think it could be said if it's a matter of general commercial significance as to how robust the Court of Appeal or the Courts generally are going to be in these sort of disputes at summary judgment stage.

Hancock Well Sir I was not trying to be.

Tipping J We're saying it all for you Mr Hancock. I'm not inviting you to elaborate.

Elias CJ Mr Hancock I wonder whether you need to be heard further on some of the belt and braces argument. We've read your submissions on those. I'm bound to say it doesn't seem that there is any point of principle. It's all in the application and no real point of general importance in respect of those.

Hancock Well I probably can't do a lot better than the written material. I'd simply urge that to be again carefully considered because although the Court has been most helpful in really shaping and expressing more clearly my best points, the other ones are not made lightly either and I believe there certainly are arguments to support them. I can I think conclude reasonably soon now.

Elias CJ Yes.

Hancock Because I think we have in the course of the exchanges really covered the points. We've covered the mistakes which we say the Court has made in terms of the statements of the law, the application and in relation to the evidence in the summary judgment matter. There is the matter about Mr Morrison's affidavit. And I have fashioned this submission very much on the basis that we can live perfectly adequately without Mr Morrison's affidavit.

Elias CJ Yes.

Hancock But nevertheless, de bene esse, it's there and it does.

Elias CJ I hope that's not an argument we hear often in this Court. If we're meant to be considering things with more perspective and more leisure it should never really be necessary for us to receive material like that.

Hancock Yes as I say, having gone back through the evidence, I think the common intention evidence, we've got plenty of material to put that. Certainly I'm not saying to … but certainly to put it in issue.

Tipping J Well it seems extraordinarily late, putting it bluntly.

Hancock My learned colleague has made a point which does go to the Morrison affidavit. And it's a very important procedural point, and that is that QBE has never actually pleaded to our rectification pleading. Which we pleaded rectification in June I think 2000.

Tipping J Well did you ask for summary judgment for rectification then.

Hancock Oh no, we're the innocent.

Elias CJ They've been precluded.

Tipping J Well I know but you could have made a cross-application if you're taking some fine pleading point. No, no, look, let's move on.

Hancock Yes Sir. I think we'll leave it at that. So unless there are any further matters which the Court wishes to hear me on.

Elias CJ No thank you Mr Hancock.

11.18 am

Elias CJ Yes Mr Ring, as you've heard, the only aspect that troubles us it the summary judgment and the way the Court of Appeal seems to have been a little peremptory in its dismissal or in its ability to rely on summary judgment in the circumstances.

Ring Well thank you Your Honour. I will focus my submissions on that point. Can I start just by getting rid of this letter that's been put before you today. I thought it was a dead duck because it hadn't appeared in the written submissions at all. As to the unchallenged affidavit of Jennifer Woodman and the High Court said, the letter was written with a mistaken impression that the 2002 and onwards policy wording was the one that applied. And so the writer of that letter had the 2002 and onwards policy in front of them. And that is patently obvious by the references to the specific exclusions in the letter which only appear in that policy wording. Nobody could have been under any mistaken impression for more than a minute or two at the Aon end of things because of course Aon drafted these policies and it knew as well as QBE which inherited the business from HIH, it knew only too well which were the policy wordings that applied in which years, as I say, because it drafted them.

Elias CJ So this is directed at the usual terms point.

Ring Yes.

Elias CJ Yes.

Ring Yes Your Honour. That's because the person who had that letter was looking at a policy wording which everybody agrees doesn't apply. So the letter is totally irrelevant to our purposes today.

So can I against that background just make a couple of points about the concepts of claims made and notified policies and then look at the individual policy years and in doing so perhaps we can then deal with the point that seems to be troubling Your Honours.

Claims made and notified policies have an operative clause which says if a claim is first made against you during this policy period and notified to us the insurer during the same policy period, you're

covered. So it has twin requirements. The claim has to be made during that policy period and it has to be notified during that policy period. Now as a result of the decision which Your Honour Justice Tipping will be only too familiar, Sinclair Horder and O'Malley, many many years ago for Your Honour, the position legally is that the notified element of those two elements is subject to section 9 of the Insurance Law Reform Act 1977. So that even, you must still have the claim made against you during the policy period but if you notify that outside the policy period, provided there's no prejudice, you're still insured under that policy.

Nothing about this has to do with circumstances that you become aware of that might give rise to a claim but haven't yet. That requires another policy provision and that is the missing condition 5 in the 1998/99 policy. And it says, in broad terms, if you become aware of circumstances during the policy period and you notify them to the insurer, and a claim is later made arising out of those circumstances at a later date, whenever, we will treat that as if the claim had been first made against you during the policy period. So we will engage in the legal fiction that you've satisfied the operative clause of this policy.

Again that has twin requirements. The insured has to become aware of circumstances during the policy period. And has to notify the insurer during the policy period. And again, thanks to Sinclair Horder, the notification part of it to the insurer has that leeway of being after the policy period had expired provided there's no prejudice. But still there is that unqualified policy requirement that the insured has to be aware of the circumstances during the policy period, otherwise that extension to the cover will not apply.

So that's the structure of the insurance. And now we have to apply that to each of the policies. And my friend started off by saying that we wanted to treat these individually and that was somehow wrong and then he ended up by saying that these were one and the same and that was somehow wrong. We have always maintained, and our statement of defence if you saw it would be crystal clear, because it deals with it policy by policy.

Each policy is a separate contract as obviously it is. And when you decide whether there is cover or not, you have to apply the circumstances on a policy by policy basis. Totally stand alone policy by policy basis. So the starting point is the 1998/1999 policy. That is the old wording.

Tipping J That's without condition 5.

Ring No condition 5 and no exception 6. And if it's of any assistance.

Elias CJ And no carry on.

Ring No.

Elias CJ No.

Ring No condition 5 so no notified circumstances clause and no exception for prior circumstances. And if it's any assistance Your Honours, what I'm broadly doing is going through the chart that's at page 2 of my submissions.

Blanchard J Yes.

Elias CJ Yes.

Ring But amplifying on it. So we have to consider the circumstances in a 1998/99 context. First question is, operative clauses. They're a claim first made against MAF during that policy period. Everybody agrees no because the claim wasn't made until 2001/2002. Is there a condition 5, no. There is no cover. Full stop. That is the end of the 1998/99 policy.

Tipping J Well it would be perhaps, although this is pedantic, more accurate to say there was nothing to cover.

Ring Well precisely Your Honour.

Elias CJ But if the 1998/99 policy had continued in those terms when the claim was made, there would have been cover.

Ring Ah, yes. And I'll come to that.

Elias CJ Yes.

Ring But I'm talking about the period up to 30 June 1999.

Elias CJ Yes.

Ring And at 30 June 1999 MAF had an adverse judgment against them. But they had no claim against them. No cover … the 1998/99 policy. Now my friend referred to the pleadings. And whether these issues of notification were raised. And Your Honour Justice Blanchard also asked about that. I've gone back to the statement of claim. And MAF's statement of claim is as I read it out to you, that MAF notified the circumstances under 1998/99 policy.

Blanchard J But do they plead when they notified.

Ring No. But we agreed that it was in July 1999. And I'll come back to that. But in our statement of defence we admitted that. So there is no dispute, or there wasn't on the pleadings anyway that MAF was trying to slot this claim into the 1998/99 policy. And as Your Honour Justice

Tipping has observed, that is just not possible because it does not fit within the four corners of the indemnity provided by that policy.

Elias CJ Sorry, when you say you agreed that notification of circumstances was given in July 1999, was that admitted to in the statement of defence.

Ring We admitted that they, MAF notified HIH of the judicial proceedings and their outcome under the 1998/99 policy. But the point we make is that that has no contractual implications because there is no cover under that policy.

So next we turn to the 1999/2000 policy which starts of course at 4 pm on 30 June 1999. Now again, the operative clause doesn't apply because still there's been no claim by Alan Johnstone Sawmilling on MAF during that policy period. So we then have to resort to the condition 5.

And again Your Honours, you just need to keep in mind at a factual level that if we're talking chronologically about life in July 1999, of course at that stage everybody thought that this was insurance for the 1999 year under the old policy wording. It's only in September of 99 that MAF announced it was redrafting the policy, sent the new wording with the inclusion of condition 5 and exception 6 to HIH and HIH basically said, yeah okay, you can have this new wording. And MAF wanted it backdated to 30 June 99. And HIH said okay.

So there's no cover under the operative clause of the 99 policy. The next question then is whether the notified circumstances clause will apply. MAF was aware of circumstances that might give rise to a claim when it received the Alan Johnstone Sawmilling judgment prior to 30 June 1999. Now that's the point of contention, of factual contention that seems to be the focus of some attention.

Tipping J That's what your client contends.

Ring That's what we content. Now in my friend's submissions, certainly in his written submissions, his complaint was not about when MAF first became aware of the circumstances, but that the Court of Appeal had made some erroneous decision about when MAF notified those circumstances. Well that's obviously not the case because the Court of Appeal made no such erroneous finding and they were clear that the circumstances were notified after 30 June 1999.

Tipping J Could we just go to the passage.

Ring Yes we can. If you have a look at paragraph 49 Your Honours.

Tipping J So in other words they weren't knocking them out under 6A.

Ring Well we haven't go to 6A yet.

Tipping J Well yes, alright. I'm anticipating.

Ring And quite frankly Sir, we wont until we get to 2001 if you can wait that long.

Tipping J Alright. Well I'm not sure that I can Mr Ring.

Ring In 49.

Elias CJ In fact that reminds me, that it is almost time for the adjournment so perhaps carry on but we'll take the adjournment shortly. Thank you.

Ring Whenever you're ready Ma'am.

Elias CJ Yes.

Ring You'll see it's likely MAF received Justice Wild's judgment on or very shortly after its delivery on 9 June. And then further ground, but we can see no justification for an argument that the parties agreed that if there was a delay in notification until after the end of June, that would convert a notification that should have been made under the 98/99 policy into a notification under the following year.

So they've obviously got clearly in mind the factual position that the notification was after 30 June 1999. But this is in the context of an argument by my friend that there was some breach of the notice provision in the policy which is one we haven't talked about at all up until now. That's where the as soon as practicable heading comes from. But we're not contending that there's any breach of any notice obligation under any policy. Our case is not predicated on any complaint of that sort at all.

Another passage which also seems to indicate that the Court of Appeal.

Elias CJ Well is that quite what the Court of Appeal is saying. Because they seem to be focusing on when notification should have been made.

Ring But in the context of the as soon as practicable provision in the policy which is the notice provision in the policy.

Elias CJ Yes.

Ring We'd never pleaded the notice provision. The soon as practicable doesn't form any part of any argument that we have ever presented to any Court.

Elias CJ No.

Tipping J So you're not relying in any shape or form on non or late notification.

Ring Never have. And again, at paragraph 5 of the judgment, the Court of Appeal has specifically recorded the Crown notified QBE of Wild J's decision. The evidence doesn't record when precisely that was done although a proposal dated 29 July for cover responded to a question etc.

Blanchard J So they're not making any finding about that.

Ring No. And we accept, which is my friend's best position, that we were notified in July 1999.

Blanchard J And are you saying that had it mattered, that would have been timely enough.

Ring We're saying if that had mattered, we wouldn't have been prejudiced enough for section 9 to apply.

So just coming back then to the 99/2000 policy, MAF can only succeed if they can show that they became aware of circumstances which might give rise to a claim after 30 June 1999. Now the problem for MAF in that, quite apart from that they pleaded notification under the earlier policy and we agreed, is that the Alan Johnstone Sawmilling circumstances appeared on MAF's statement of potential liabilities dated as at 30 June 1999.

Blanchard J Can you repeat that.

Ring MAF, the Alan Johnstone claim appeared on MAF's statement of potential liabilities as at 30 June 1999.

Elias CJ Oh so it's a different date is it, that schedule. I didn't look at that.

Ring Well if you look at the schedule you'll see it is the statement of liabilities, potential liabilities as at 30 June 1999.

Blanchard J Is this attached to the proposal.

Ring Yes it is.

Tipping J As at, yes. So they must have been aware prior to the date where they had to become aware.

Elias CJ Well they had to give information as at 30 June 1999 for the purposes of the proposal.

Blanchard J That doesn't mean they were actually aware of it.

Elias CJ No.

Blanchard J At that point.

Ring No. No, well I can concede that. But the date of that document, I think there's a hand written date on one of the pages of 12 July 1999.

Blanchard J 14 July is one.

Ring Oh I'm sorry, thank you Sir. The judgment we're talking about is a judgment issued on 9 June 1999 to MAF. In it Justice Wild made clear findings that MAF had acted contrary to the Bill of Rights, issued statutory instruments which were repugnant to the statute, did so for improper purposes, and based on irrelevant considerations and in doing so interfered with Alan Johnstone Sawmilling's commercial interests.

Now anybody knowing that those were the issues and being aware of the fact of an adverse judgment, couldn't fail to immediately recognise that those were circumstances that might give rise to a claim.

Blanchard J Baigent. Baigent damages claim.

Ring A damages claim, yeah. It's just.

Elias CJ Well not necessarily a Baigent claim is it because it, was it?

Ring It's just, it was a claim for compensation.

Elias CJ Oh yes, it would have been.

Ring For, well the causes of action that were actually advanced were, in the statement of claim ultimately, were negligence and breach of statutory duty.

Elias CJ Takaro.

Ring We don't have to get down to.

Elias CJ No, no. We were just thinking.

Ring With respect to a legalistic analysis. Anybody becoming aware of the existence of the judgment and knowing in the most broadest terms what it was all about, couldn't fail to appreciate that there were circumstances that might give rise to a claim.

Blanchard J So you're saying there was a 21 day period between then and the end of that policy year.

Ring Correct.

Blanchard J And within that 21 day period MAF must have been aware that they were likely to face a claim for let us say Baigent damages.

Ring Well.

Elias CJ They didn't have to give notice under that policy though did they.

Ring They had to give notice under that policy but the fact that they gave the notice a month later.

Elias CJ Yeah.

Ring Is no problem because of section 9.

Tipping J But the point is that the claim was not made against them.

Ring Correct.

Tipping J During that policy year.

Elias CJ Yes.

Ring Correct. So the question is whether they were aware of circumstances. The key question under the 99 policy is, as at 30 June 1999 4 pm, was MAF aware of circumstances that might give rise to a claim. If they were, then they can't get under section 5 under the 99 policy because that's only if you become aware of circumstances after 4pm on 30 June 1999. They can't get in under the prior policy because it has no section 5, it has no condition 5.

Tipping J The point being that they must show that they first became aware.

Ring Correct.

Tipping J That's the significance of the word first isn't it.

Ring Correct.

Tipping J In the. Yes.

Ring Because otherwise if you didn't have the word first, well.

Tipping J You'd have a continuing state of awareness.

Ring Mm.

Tipping J It's very subtle stuff this Mr Ring but it's starting to sort of come back to me a little bit.

Ring I'm surprised it's taken this long Your Honour.

Elias CJ We'll fortify him with some coffee and he might be sharper after the adjournment. Thank you.

Ring We're obliged thank you.

Court adjourns 11.41 am
Court resumes 11.56 am

Elias CJ Yes Mr Ring.

Ring Your Honours, we're talking about the 1999/2000 policy. And as I'd just submitted, condition 5 introduced into that policy did not apply because MAF was already aware of circumstances that might give rise to a claim before 30 June 1999 at 4pm. Now my friend seeks to overcome that contractual interpretation problem by resort to the proposal for the 1999 policy. And with the greatest of respect, the submissions that have been made in that context are wholly misconceived. The basis of those submissions is in fact the basis clause in the proposal which says something along the lines of that the contents of this policy will form the basis of any contract that the insurer may choose to enter into.

The basis clause has a 200 year history. And that 200 year history has nothing to do with notifiable circumstances in a claims made and notified policy. Claims made and notified policy has actually only been in existence since the late 60's. The basis clause has its origins in everything that you say in the proposal is a warranty and if we issue a policy on the basis of this, then they become conditions of the policy. That's what the basis clause does. It incorporates the terms of the proposal into the policy as conditions or warranties.

As you can see Your Honours, that's a completely different concept to the one we're talking about here. And it also needs to be kept in mind that when this policy was to be renewed, MAF had an obligation of disclosure of all material circumstances, all material facts which would affect the insurer's decision to enter into the insurance and if so on what terms.

At the end of every policy year, nobody knew for sure that MAF would want to seek further insurance with QBE or HIH. And HIH didn't know for sure whether it wanted to take it. So of course every year there needs to be the duty of disclosure satisfied. That means tell us all you know MAF, that might affect whether we're going to give you insurance and if so, on what terms. That's the context in which MAF provided the information that is now sought to, or now MAF seeks to rely on to say that QBE effectively agreed to cover it.

The proposition that's being put to you is that if an insured fulfils its duty of disclosure by telling an insurer everything that it knows that

might be material to the insurance and the insurer grants the policy, the insurer has automatically agreed to cover any claim arising from those circumstances regardless of the policy wording.

Now as you can see, with respect, that's a wholly untenable proposition. And it confuses the purpose of the proposal and the information that is provided in that context with the proper interpretation of the policy wording which is then issued.

So in my respectful submission the proposal is an irrelevant document to this case except to the extent that it shows when MAF notified QBE of the circumstances in terms of satisfying one half, but only one half, of condition 5.

So that still leaves MAF in the position that it can't satisfy the operative clause of the 99/2000 policy because there's no claim. And it can't satisfy condition 5 because it first became aware of circumstances during the preceding policy period. In fact the preceding month.

For what it's worth, exclusion 6 would have applied anyway but we don't need to go there because at that point there's no cover.

Elias CJ I still don't quite understand your reliance on condition 5.

Blanchard J I don't either but I don't know that it matters because of exclusion 6.

Elias CJ Yes I would have thought.

Ring We don't rely on condition 5.

Elias CJ Ah.

Ring My friend does. And what I'm submitting to Your Honours is condition 5 is not satisfied here in the 99 policy.

Elias CJ Well I would have thought arguably it is if the notification is as soon as reasonably practicable but that is not the wording of exclusion 6.

Ring No. Well I'm happy to put it on the exclusion 6 basis as well. But in the logical train, I wouldn't have thought it met condition 5 and so you didn't need to go to exclusion 6. But if you do need to go to exclusion 6, again it doesn't, exclusion 6 obviously applies because these are circumstances which are known to MAF as at 30 June 1999.

Now my friend's interpretation, this is where my friend's interpretation argument then comes in. He says no, exclusion 6 doesn't apply to things between this insurer and this insured, it applies to some other things with previous insurers or previous insureds or whatever.

There's two answers to that. One is that is not the plain wording of the exclusion. The word any couldn't be more clear. Any means any. Not one. The second is that one of the authorities that my friend relied on in the Court of Appeal, decision of the High Court of Australia in Perry, and particularly the judgment of the Chief Justice, Chief Justice Gleeson, says exactly what I'm submitting to Your Honour. And that's one of the materials that you would have been provided with and if you haven't got it convenient, I have got some booklets here that I can hand up.

Elias CJ I don't have it. I think I'm the only one who doesn't however. So if you could.

Ring Well let me just hand up.

Blanchard J I don't think I've got it either.

Elias CJ Perhaps we'll all have one thank you.

Tipping J I've got a bundle of authorities from Mr Ring.

Ring This is the same booklet but in a more convenient form Sir.

Tipping J Yes.

Ring If Your Honours look at the last judgment in the booklet. And in particular if you look at the bottom of 77891. I should just say as a preface Your Honours, this is a case about claims made and notified policies but the particular point at issue here was whether section 54 of the Australian Insurance Contracts Act applies which provides relief for insureds in some circumstances In order to get to the stage where you're considering section 54 of course you have to go through the contractual analysis and interpretation and then apply the statute. And this is what His Honour's doing.

If you have a look at the bottom of that right hand column of 77891, you'll see that he reproduces clause 3 which is effectively the same as our condition 5. And then on the next column, he says the significance of condition 3 is increased by certain exclusions.

Elias CJ Well it's not quite the same is it because it's very much grounded on during the subsistence of the contract.

Ring Our wording. It's the same wording.

Tipping J It means if.

Blanchard J Yes it is the same.

Tipping J If, during the policy year.

Ring Yes.

Tipping J Effectively means.

Elias CJ Sorry, what are we looking at.

Blanchard J Clause 3 and our clause 5.

Elias CJ Oh yes.

Blanchard J They're just a slight variance of the same clause.

Tipping J People tend to see insurance as a seamless stream. In fact it's a series of individual yearly contracts. That's part of the difficulty people sometimes find.

Ring Well indeed. And if you go back in history, Your Honour, as I'm sure you're aware, claims made and notified was only introduced because insurers couldn't stomach what it was costing them on occurrence wordings. And their response to that was to offer no PI cover at all. And so when claims made was introduced, we said okay, we'll insure you for claims made against you, first made against you in the policy period, there was universal relief amongst the professionals. And at that stage there was no such thing as the extended cover for notified circumstances.

But everybody was so happy they were getting something they weren't complaining at that stage. It's only later when that gap started to cause people problems that the extension was introduced. And that's why it is in a condition and it's not part of the operative clause. It's a later introduction to solve a problem that was recognised. And it is recognised. You only get covered for what the words say.

Blanchard J So are you saying that in this case this combination of clauses which is much the same as we've got here, was applied to a situation where there had been successive policies issued by the same company.

Ring Well indeed. And the wording I wanted to help Your Honours, to refer Your Honours to was half way down the first paragraph on 77892. If an identical policy were issued for the subsequent period as it was the exclusion just referred to would have applied in that subsequent period.

So read that to mean the 1999/2000 policy. That is the subsequent period for which the exclusion has been issued.

Now it's quite clear from that passage that His Honour is talking about consecutive policies of insurance with the same insurer. And insured of course.

And if Your Honours want to see the exclusion that's referred to in that case, one place I've found it is at the top of 77897. So exclusion 6 doesn't apply either.

The next policy period is 2000/2001. Well that was a quiet year for everybody because nothing happened that has any implications for the insurance and I don't think anybody contends otherwise.

Then we move to 2001/2002. In that policy period, and again in June of 2002, Alan Johnstone Sawmilling first made its claim on MAF. And that is an accepted fact. That was the first demand for compensation in terms of the policy. So the operative clause is then triggered for the notification of that claim and for cover.

The condition 5 doesn't apply for the same reasons that it didn't apply in the previous two years. MAF was already aware of circumstances at the beginning of the 2001 policy. So the only thing standing between MAF and cover is exclusion 6. And again, exclusion 6 in its plain terms says you're not indemnified for any claim arising out of circumstances likely to give rise to a claim which were known to the insured prior to the period of insurance specified in the schedule.

So if MAF knew of a circumstance likely to give rise to a claim as at 30 June 2001, exclusion 6 applies and there is no cover.

And again, that is how the policies year by year work. And the problem, as identified in my submissions and Your Honour Justice Tipping has identified, is everything was fine until Aon changed the policy wording in September 1999.

So my submission Your Honours is there is no matter of general principle here, or general commercial significance. It's the simple application of interpretation to policy terms and there is no interpretation issue here. The interpretation is perfectly orthodox and perfectly straightforward. And again in my submission, it's not something which should trouble this Court any further.

Tipping J And your essential point on the summary judgment issue is that the knowledge by MAF pre 4pm on 30 June 99 of circumstances likely to give rise to a claim per force of its knowledge of Justice Wild's judgment is so patently unarguable if you like to the contrary that it was a proper case for summary judgment. Is that the.

Ring Well indeed. That's both an objective and a subjective test. MAF has to be aware of circumstances, whether they're likely to give rise to a claim or not is not MAF's subjective belief, because otherwise insurers would be at risk of.

Tipping J The dumber you are the more you're covered.

Ring Well exactly. So it's an objective test, whether a reasonable insured in MAF's position would have appreciated that that judgment might give rise to a claim. And so the absence of any specific evidence from MAF shouldn't have stopped and didn't stop the Court of Appeal from reaching a conclusion on that. Because in the circumstances that I outlined before to Your Honours about the findings of Justice Wild and the context in which those findings were made, that substantial commercial interests had been affected over a number of years despite complaints and representations by Alan Johnstone Sawmilling.

Let me introduce Your Honours to two concepts. One is bolt from the blue. It really has to be a bolt from the blue for MAF to be able to say it wasn't something that was likely to give rise to a claim. And the fact that it has given rise to a claim is a big help of course but not decisive. It's obviously not a bolt from the blue in those circumstances.

The other concept is an Australian expression which is a reference to blind Freddie. That's the other end of the spectrum.

Blanchard J I think I'm familiar with those.

Ring Yes I'm sure you've heard it before. Although we only have to show that it wasn't a bolt from the blue. But in my submission, on these facts and given that judgment, blind Freddie would have appreciated that there was a realistic risk of a compensation claim now being brought.

But as I say, that's far, far more than we need to show for these purposes.

Tipping J I think that's one subject in the Sinclair Horder litigation on which I wasn't reversed Mr Ring.

Ring Yes indeed.

Tipping J Although it probably didn't really come in issue.

Ring I tried valiantly in subsequent years to save parts of that judgment of yours but I failed each time.

Tipping J No, miserable failure Mr Ring.

Ring So unless I can help Your Honours with anything further, those are my submissions.

Elias CJ Well it just may be fatigue setting in. But why should not clause, exclusion 6B be irrelevant on the basis that presumably the period of insurance specified in the schedule is the current year, so that's the 2000/2001 year is it.

Ring 2001/2002 when the claim was made?

Elias CJ Yes sorry when the claim was made, 2001/2002.

Tipping J Because it's excluded by 6B on Mr Ring's factual hypothesis.

Elias CJ Yes. Why doesn't condition 5, however, apply deeming it to have been made in the period of insurance if it was, if the notification was made as soon as reasonably practicable.

Ring Condition 5 sits in the 2001/2002 policy against the eventuality that in 2003 and onwards a claim materialises out of circumstances that are known in 2001/2002.

Elias CJ I see, of course, yes it's prospective.

Ring Yes.

Elias CJ So you are driven back to the, yes I see, yes.

Ring In the High Court there was an attempt to persuade the Associate Judge that condition 5 and exclusion 6 were inconsistent clauses. But of course they deal with complementary situations.

Elias CJ Yes.

Tipping J One is to lock in an event for the purpose of a future year's cover.

Ring Correct.

Elias CJ Yes.

Tipping J The other is to exclude an event of which notice.

Ring For past years.

Tipping J For past years.

Elias CJ Yes, yes. But does not that mean that the key is whether in 1999 the notification given was given as soon as reasonably practicable.

Ring Well.

Elias CJ Oh it's because during the period of insurance, yes. Okay I understand the argument thank you.

Ring Thank you Your Honour.

12.19 pm

Hancock May it please Your Honours I believe an essential point in this leave application comes down to the question of the Court of Appeal applying the test for summary judgment incorrectly. And the evidence that is connected with that is the point when did someone at MAF, presumably of sufficient seniority, become aware of circumstances etc. Now this can only be resolved on the evidence.

Tipping J It's not subjective awareness Mr Hancock is it.

Hancock The verb is aware and it's perfectly arguable that the verb when someone becomes aware is when that person, in this case a person of the appropriate official position and one assumes responsibility, when the person of the appropriate responsibility for this task becomes aware. There's no reason why it should be restricted in the way Mr Ring has contended for. And if we just take this as a matter of more general.

Blanchard J Where's the word aware.

Hancock Sir that is.

Elias CJ Clause 5.

Hancock Clause 5. It's conveniently picked up from page, or at least at paragraph 12 of the Court of Appeal judgment.

Blanchard J Yeah but you've got the problem of clause 6B, circumstances known to the insured prior to the period of insurance.

Hancock Well Sir.

Blanchard J The judgment was three weeks before that period of insurance began. Wouldn't even blind Freddie have realised there was a significant problem if you've got a judgment saying there's a Bill of Rights breach and bad faith.

Hancock Sir there's a very interesting legal passage, I think it's, I can't remember the origins, along the lines that when the evidence comes out there's no case which does not necessarily have an answer when the evidence comes out at trial is cross examination. I haven't, I'm afraid I haven't paraphrased it at all well but I think the Court will be familiar with that dictum and I'm now about to illustrate the fact that you can't take this simplistic.

Blanchard J It's a judgment of Justice McGarry.

Hancock Thank you Sir, yes.

Tipping J John and somebody or other.

Hancock Thank you Sir. Now that is absolutely apt.

Elias CJ John and Rhys.

Tipping J Thank you.

Hancock That's a lot of legal knowledge floating around here.

Elias CJ Well sometimes.

Hancock If I was to forget the case I couldn't have found a better forum in which to be assisted.

Elias CJ Well it is really the last refuge of the desperate Judge.

Hancock Well many Judges of the New Zealand Court have used that on many occasions. And I'm sure not in desperation.

Tipping J But Mr Hancock before you move on to illustrate it, could we just get the construction of 6B clear in our minds. Because I think it's 6B that really matters, not 5. The circumstances which, this claim arose out of circumstances which were known to the insured prior to the policy period. They must have been known. I mean it's inconceivable. The only issue could be as to the likeliness that they were to give rise to a claim. And that is conventionally in insurance law I'm sure determined objectively.

Hancock Well let's just take it at a level which is more favourable to my friend and that is that objective level. And if I could just illustrate the sort of Lord McGarry.

Blanchard J But that must be the level.

Tipping J Yes. Otherwise the dumber you were, the less caught you'd be by 6B. It has to be an objective test.

Hancock Well let's just take a scenario that could apply in this sort of case with the judicial review judgment, an administrative law judgment containing the materials which Mr Ring has pointed to. If you have a situation where in terms of economic loss, and let's just take this as hypothetical at this stage, but you've got a person who's got a regulation invoked against them to stop them clear-felling beech forest. And just say that that regulation has been in force for a number of years and the person complains about it. And then takes legal proceedings. And just say it's four or five, six years before it actually gets to Court. And again hypothetically you could have a situation where the officials say, well this person is complaining about this regulation, that it's going to harmfully affect his business, so there is a dispensation in here. We'll play safe, we will actually allow the man to export in the meantime so there'll be no question of him sustaining a

loss. So if we could just look at a scenario where you've got judicial review, you've got a regulation being, even though it might be an ultra vires one, is a regulation being in force but there's a safety valve and that is if in this specific situation you can export as long as you've got special approval.

And say that position like almost an interim order informally was adopted between the parties over a number of years. So that the officials would say, right we'll either get Parliament to pass a new law which protects the forest better than this regulation or we'll get the Court to tell us whether our regulation is legal or not. And if the plaintiff in the judicial review goes along with this on the basis they're still able to export because no-one's stopping them, then at a certain point they said you've had long enough to change the law, you've had long enough to buy the forest, you've had long enough, I'm going to bring this to Court now because you're not interfering with my business at the moment but this thing hanging over my head, I want to get rid of it, let's get it dealt with once and for all.

Now in that scenario, and I'm just posing different potential facts, when the judgment is obtained out of the judicial review attacking the regulation, there's no suggestion, there's been no letter shall we say of claim over 5 years, not a whisper, I'm losing money every month over this, you'd better get rid of this regulation, nothing like that. There's nothing in the claim saying administrative law or any other damages. There's nothing. So the MAF people think this is purely a judicial review, it's an administrative law judicial review. And so when they get the decision they say, oh, we're going to have to talk to the minister now because the regulation doesn't stand up. We can't protect the trees in the way we thought we could. So we'll have to change the Forest Act. That's what they're thinking about.

And in that situation it's not a blind Freddie at all. It is a perfectly reasonable response to a factual situation which I've just given you. And it really comes back to Mr Ring's difficulty here, and that is no matter which way he approaches this problem, it's a matter of evidence. And this peremptory point that it's obvious to anyone, well no, it's not necessarily so using the McGarry dictum at all.

Tipping J Do you accept that the word likely in this context is conventionally construed as something that could well happen rather than more probable than not. I think I myself held to that effect in Sinclair Horder I think in reliance on reasonably convincing reasons and I don't think that was attacked as it would ever have been doubted ever since.

Hancock Could well happen or more likely than not. I'd prefer to approach the submission in this way Sir, that the potential factual situation of the sort I've mentioned could well be the factual situation divorced from any claim for damages or compensation whether you use more likely than not or likely. Just completely divorced from a damages claim.

Tipping J Yes I understand that point thank you.

Hancock So essentially my submission here is that it's a matter of evidence and the appellant here hasn't had its opportunity to deal with that matter as to when the claim under the policy should have been made.

Now there's some subsidiary matters going to exclusions 6. My friend in my view did not really answer to the Court in my submission about the term the claim. If we look at exclusion 6, the insurer shall not indemnify the insured for any claim. That cannot apply in the 99/2000 year because there had simply been no claim for damages or compensation during that period. So exclusion 6 doesn't come into play but we argue that condition 5 certainly exists in the 1999/2000 policy.

Tipping J But in the end you need cover by one means or another in the year in which the claim is made don't you.

Hancock We say the claim is.

Tipping J You don't need cover for a non-existent claim.

Hancock Yes we argue Sir that under the 99/2000 policy under condition 5 we have cover because we've notified properly a circumstance.

Tipping J Yes I understand that but we're looking at exclusion 6 I thought you were telling us.

Hancock Well what I've endeavoured to say there Sir is that exclusion 6 in the 1999/2000 policy doesn't get off the ground.

Tipping J Doesn't have to. What we're, oh no, forget it.

Elias CJ But I wonder, look I'm a bit dim about these things but am I right in thinking that the earlier type of policy indemnified for claims as they arose during any particular year. The new system is for circumstances notified during the period of insurance if they are notified as soon as reasonably practicable. And that means if it was notified as soon as reasonably practicable there is cover under the 1999/2000 policy. But if there isn't cover, because it wasn't notified as soon as reasonably practicable, exclusion 6B excludes, there's a gap, there's no bridge between the different forms of the contract.

Hancock The analysis that the appellant applies to 6B is that you've got to go to the beginning of clause 6 and reference to any claim. So we start there. So you've actually got to have a claim, that's a claim for damages or compensation presented under that policy in that year. And if I could illustrate it this way. If the Court accepts that we notified in the 99/2000 policy, so we got in on the first leg under condition 5, no in

fact, no, that's not leading anywhere. No the point I really need to make is that the term any claim is not triggered in the 99/2000 year because the claim for damages or compensation arose many years later.

Elias CJ Well I understand that but I would have thought the effect of condition 5 was to deem it to have been made in the period of insurance which would be the 1999/2000 year.

Hancock The interpretation that MAF is urging is that the circumstance is what occurs and what in fact did factually occur in the 99/2000 claim didn't occur and given that only a circumstance incurred in that year, it can't be excluded by exclusion 6.

Elias CJ Thank you.

Hancock Now the further point, and my last point, is that the parties, and this is Mr Ring's argument about the basis of the proposal or the proposal being the basis of the policy that was issued, Mr Ring made submissions that the policy proposal was really just the basis for the insurance but not more than that. But on the evidence it's clear that the proposal with the schedule attached to it of potential claims does in fact contain a claim, that was the Alan Johnstone claim, which has been treated as a notification. So what the parties have done is they've used the proposal as not just a basis as my friend says for the insurance full disclosure, but they've used it for something else as well. They've used it as a notification. And it's been clear it's been treated as a notification. So when my friend says it has only a narrow specialised use, that is as a basis, I think he might have said a basis clause, in fact on the evidence, particularly the practice between these parties, the proposal goes a lot wider than that. And so its contents are part of the insurance bargain, and as I argued earlier on, the bargain includes you will cover us for all of these listed circumstances.

Tipping J Could you just help me with one point and it may not be of great moment, but just a strange point Mr Hancock. On this page of the schedule that bears the signature of Mr Ferguson, I think the second of your flags, it says that the A Johnstone Sawmilling claim was first received in 1996.

Hancock Yes that was the date of the judicial review.

Blanchard J Judicial review proceedings.

Hancock Yes.

Tipping J Yes well it's a bit hard to say then isn't it that if you're notifying it as a relevant circumstance or even as a potential claim, you first received it in 1996 but you didn't realise it could come to charge if you like until a huge amount later. Is that how you would reconcile that.

Hancock No-one's made an issue at any point about the date of the judicial review. And one can only assume that it was treated as a judicial review.

Tipping J Well it says nature of dispute, loss of income from export beech chip forest.

Hancock Well the judicial review relates to changing the laws.

Tipping J Well I mean really, if your people saw it in those terms from 1996, it seems a little difficult now to say that you weren't aware that it was likely to give rise to a claim.

Hancock The matter has been treated as a judicial review.

Tipping J Well I know.

Hancock If you lost the judicial review you'd have to change the regulation or you might have to change the Forest Act.

Tipping J But you were telling the insurer that here's a potential risk.

Hancock Well the.

Tipping J That you might be called on to indemnify or reimburse loss of income by this Johnstone organisation.

Hancock Well that is written out in 1999.

Tipping J Well I know that. But you've received the claim in 1996.

Hancock Well we're probably going a little bit around in circles in the sense that whether we call it a claim. A claim is a claim for damages or compensation. In 1996 there was a judicial review and I've explained the circumstances in which a judicial review does not necessarily involve a claim for damages or compensation.

Tipping J No I understand all that. I'm just drawing it to your attention in case you can. But if that's your response to it, I fully understand. It was seen only as a judicial review. Not as a potential claim for damages or compensation.

Blanchard J Because they would have to proceed in that way because otherwise it would be a collateral attack on the regulation and they'd be told to go back and proceed by way of judicial review. They couldn't just bring a damages claim first off.

Hancock Well Sir that was 1996. And damages and judicial review are a combination far more in people's minds in 2005 than say 10 years ago.

Blanchard J Now, the Court of Appeal took the absolute opposite point in favour of the Crown in the Sugrue case. You can't have it both ways. You won Sugrue partly because of that.

Hancock The simple proposition I'm putting forward is that judicial review you aren't necessarily guilty of being a blind Freddie if you see a judicial review to change some Customs regulations and you don't see that as a damages claim, particularly in a context where the evidence might be that the lawyer putting forward the judicial review never once writes and says, um, if we're successful etc etc, or there's no threatened claim and then out of the blue in 2001 extraordinarily, this claim emerges. If there's going to be a claim one would have thought that after the Court case, that's the Justice Wild and.

Blanchard J Look, even by July of 1999 it was seen as potentially having damages attached to it.

Tipping J The blueness has become a little.

Blanchard J I think we're going to have to look at Justice Wild's judgment. I wonder if we could have a copy of that.

Elias CJ Well is it, I was going to ask whether it's in the material before the Court of Appeal. We don't have the material before the Court of Appeal.

Hancock I'm almost certain it's in the case on appeal.

Elias CJ In the case on appeal.

Blanchard J Well we don't have that.

Elias CJ But we can get that from the Court of Appeal.

Hancock Yes that could be obtained from the.

Elias CJ Can someone confirm that because otherwise we'll have to ask the Counsel to provide us with copies of it.

Tipping J Why don't we just do that.

Elias CJ Alright, perhaps to cut through it, it would be easier. Can Counsel please provide us with that.

Hancock Certainly.

Elias CJ I would also like a copy of the policy. The two policies. The pre-1999/2000 year policy and also if there's no material difference you can just supply one of the subsequent ones.

Hancock Yes. The 1998/99 is in fact, it'll say 1996 on it. But it was just used again and again.

Elias CJ I see, yes, yes.

Hancock So that can be supplied. And then the 99/2000 which is the new policy. Yes that can be supplied.

Unless Your Honours have any other matters.

Elias CJ No, thank you. Alright we'll consider what we'll do in this matter. Thank you Counsel for your assistance.

Hancock As Your Honours please.

Court adjourns 12.42 pm