IN THE SUPREME COURT OF NEW ZEALAND SC 141/2013

[2014] NZSC Trans 15

BETWEEN	**FIRM PI 1 LIMITED** Appellant
AND	**ZURICH AUSTRALIAN INSURANCE LIMITED** First Respondent
AND	**BODY CORPORATE 398983** Second Respondent

Hearing:	3 July 2014
Coram:	Elias CJ McGrath J William Young J Glazebrook J Arnold J
Appearances:	M R Ring QC and C R Langstone for the Appellant D J Goddard QC and W A Holden for the First Respondent R G S Hay for the Second Respondent

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CIVIL APPEAL

ELIAS CJ:

Yes Mr Ring?

MR RING QC:

May it please Your Honours, I appear with Mr Langstone for the appellant.

ELIAS CJ:
Thank you Mr Ring, Mr Langstone.

MR GODDARD QC:
May it please the Court, I appear with my learned friend Mr Holden for the first respondent, Zurich Insurance.

ELIAS CJ:
Thank you Mr Goddard, Mr Holden.

MR HAY:
May it please the Court, my name is Hay and I appear for the second respondent.

ELIAS CJ:
Thank you Mr Hay. Yes Mr Ring?

MR RING QC:
Thank you Your Honour. I have for Your Honours a summary of the submissions that I'm proposing to give today.

ELIAS CJ:
Yes, thank you.

MR RING QC:
Your Honours, there's one issue in this appeal, and it is whether the words in the policy provision MD15, "The insurer's liability will be limited to the amount of loss in excess of the natural disaster damage cover" mean that the sum insured for earthquake damage under the policy is inclusive or exclusive of the amount payable by the EQC.

From ACM's perspective, and I'm referring of course to the appellant under its former name, which seems to be the name that's used throughout the lower Court judgments. ACM's position is that the purpose and effect of MD15 is that first the operative clause the schedule and another policy extension MD25 in special provision 6 in MD25 say the maximum amount of Zurich's liability for all risks is the sum insured and then MD15 provides that Zurich's liability for loss caused by earthquake, up to the sum insured, is restricted so that it starts from the amount at which the statutory liability is exhausted instead of from the first dollar of loss which would otherwise be the position.

By comparison Zurich says that the operative clause, the policy schedule, and MD25 special provision 6, provide that the maximum amount of Zurich's liability for all risks, except earthquake, is the sum insured, and that MD15 provides that Zurich's liability for loss caused by earthquake is restricted so that it is the difference between the amount for which the EQC is liable and the sum insured.

If I can just take you briefly to the factual context first in which this dispute arises. And you'll find most, if not all of this, in volume B at 8, starting at page 43, the affidavit of Mr Leishman from the Body Corporate. The plaintiff in the proceeding is, of course, the Body Corporate of Salisbury Apartments in Christchurch which consists of 68 apartments in two blocks of 34 apartments each, and this is at paragraph 3 on page 43. On 22 February 2011 the earthquake damaged the eastern block and the western block. The eastern block has been destroyed and the western block has been damaged and there is an issue between the parties remaining outstanding as to whether that damage is such that it is to be treated as destroyed under the policy as well.

So as things stand, and I understand that there's been no advance on that, as things stand it's common ground the eastern block is destroyed, in fact, its been demolished. The western block is still standing and has been habitable but there's an issue about whether it's destroyed in policy terms or not. But what that does highlight is that one earthquake has caused differential damage to two separate, or to two blocks, and that raises one of the issues, or highlights one of the issues that we raised, about how much Zurich was potentially liable for in the event of an earthquake.

The EQC has paid its liability, and that's referred to at page 46, paragraph 17. It's paid the 6.8 million which is 68 units time the statutory liability limited of $100,000 plus the GST, less the excess, and the net has come to just over 6.7 million. That's to be compared with the estimated current cost of reinstating the damage to both buildings, which is set out at paragraph 10 of page 44, and at the moment that's about 25 million plus GST. So whatever happens for the plaintiff there is going to be a considerable shortfall and the issue really just is how much that shortfall is going to be.

If I can take Your Honours now to the statutory context in which this insurance was written and I'm grateful to my learned friends for their bundle of authorities which actually puts in the whole of the Earthquake Commission Act 1993. If I can take Your Honours to that and to tab 1. There are only a few provisions that are relevant for present purposes. The first one is section 18 and section 18 is the statutory provision which creates the statutory cover and it provides in subsection (1) that where someone enters into a contract of fire insurance in respect of a residential building while that contract is in force the building is deemed to be insured under the Act against natural disaster damage, so of course includes earthquake damage, for its replacement value. Sub paragraph 1 then goes on to identify the amount of that cover and there are three possibilities and the statute provides that effectively the statutory sum insured will be the least of these calculations. The first is if the contract of fire insurance specifies a replacement sum insured for fire, then it will be that amount also for earthquake.

Second, if the contract of fire insurance doesn't specify a replacement sum insured for fire, but does specify a replacement sum insured for statutory cover, it will be that amount. And otherwise, and that's what applies in our case, it will be the amount arrived at by multiplying the number of dwellings, that's 68, by $100,000.

What provisions (a) and (b) demonstrate, Your Honours, is that Parliament contemplated an insurance policy which might have a number of different features. One feature that it might have is that there would be different sums insured for earthquake and for other perils and the other is that there would be a different sum insured for other perils than the statutory cover might be for earthquake.

So just to summarise that again so that it's clear, the private insurance might itself have a different sum insured for earthquake as for fire, so internally different amounts, and similarly the effect of the private insurance and the EQC cover might mean that there are different overall amounts available to the insured for earthquake and for fire. And this is important when we come to look at the commercial context because one of the arguments that's being advanced to you by Zurich is that that actually makes no commercial sense and one of our answers to that is, well, Parliament specifically envisaged that that might be the case. Not that it made no commercial case, but that might be the factual position under the policies, and under the policies in the private cover.

ELIAS CJ:
So what's the statutory policy for that?

MR RING QC:
The statutory –

ELIAS CJ:
Policy.

MR RING QC:
– philosophy you mean Your Honour?

ELIAS CJ:
Yes.

MR RING QC:
The statutory philosophy is that if you take out a contract of fire insurance you will always have statutory earthquake cover and you will always pay a premium for it, regardless of whether the statutory cover operates first or operates second. Primarily, of course, it's for those people at the lower end of the spectrum where in the days, in 1993 there were a large number of houses in New Zealand for which $100,000 was not too bad. But this is a statutory regime for everybody and so those that have $100,000 homes are benefited but so are people who have homes that are worth more.

McGRATH J:
No statutory policy providing for escalation of $100,000 of course?

MR RING QC:
No, none whatsoever.

McGRATH J:
It's a fixed sum obviously for the past 20 years.

MR RING QC:
The idea is they take a premium, that's the EQC, takes a premium and it will provide in this case up to $100,000 regardless of what your home is worth and it's only dependent on how much damage you suffer. And then we have to talk, of course, next about the layering process of that but before you get to that process Parliament is contemplating two parallel pieces of insurance, one statutory and one private.

So when it comes to dealing with the – if I just take you next to section 23, which I just touched upon briefly before, that's the premium provision and what that makes clear is that if you quality under section 18, and that is you've got a residential property that meets the other statutory criteria, you will have insurance cover to the least of those three alternatives, and you will pay a premium. And that doesn't, it doesn't matter, at this stage, how the priorities are run. How the priorities are run are then dealt with by section 30 and section 30(1) is the default provision. It says that, in summary, it is the private insurance first and the statutory cover second, and I'm aware from my learned friend's submissions that this is an area of dispute. I don't quite follow his argument yet but for present purposes it's enough that I take Your Honours through the provision as I see it and explain where we think the improper interpretation is.

Section 30(1) is triggered by two things. First, there is the occurrence of an earthquake and there is earthquake damage. That damage is insured under section 18, so there's statutory cover for that damage. That damage is also insured under a private contract of insurance. And then section 30(1) says that the insurance of the property under this Act, in other words the statutory right to recover, to the limit, with the words in brackets, is deemed to be in respect of so much of that natural disaster damage as exceeds the sum insured under the private policy.

So what we say is the proper interpretation of that provision is that earthquake occurs, there is damage, the private insurance responds first up to its sum insured, and if there is still more damage that is not covered at that point, or not paid for at that point, the Act kicks in, the statutory cover then provides the next layer up to the statutory limit provide in section 18 in one of those three provisions.

ARNOLD J:
So does section 30(1) is a practical matter given subsection (2) only apply where the private insurance contract is for less than $100,000?

MR RING QC:
Well in our submission, no, it applies when there is a private insurance for whatever amount, and I think that's the possible distinction that my learned friends want to draw that I have some issue with.

ARNOLD J:
Okay.

MR RING QC:
So the way we see it is, that it is, you're paying a premium for the statutory cover, and you pay that premium whether you've got, whatever you've got in private insurance, you pay the same premium for the statutory cover. On the interpretation that I think my learned friends are advancing, if you've actually insured for more than $100,000 privately, you get no benefit ever out of the statutory cover, despite the fact that you will have been forced to pay a premium for it.

So we say section 30(1) simply says these are the priorities that will apply in default of a provision in the policy.

GLAZEBROOK J:
Do you know the Earthquake Commission doesn't take that view, does it?

MR RING QC:
Well yes it does as it happens Your Honour.

GLAZEBROOK J:
So it relies on subsection (2) to say that it doesn't pay out if you're insured for more than $100,000, is that what you're saying?

MR RING QC:
Yes. What I've got here is the EQ Cover and Insurer's Guide which I think, well what I understand was one of the redacted exhibits attached to the affidavits and I have additional copies if Your Honours are interested in seeing it.

ELIAS CJ:
Why do you say we should see it? What assistance will we get from it?

MR RING QC:
Well only in a –

GLAZEBROOK J:
I’m not sure I understand the answer to my question.

MR RING QC:
Sorry.

GLAZEBROOK J:
What does the Earthquake Commission, or whatever it’s now called, pay out?

MR RING QC:
The EQC in this guide does not draw any distinction between private insurance of less than $100,000 and private insurance of more than $100,000. It says we pay out, if section 30(1) applies, we pay out in excess of the private insurance, full stop, and it also says that the EQC is paid – is payable in respect of every residential property, even when natural disaster cover has been provided by private insurance. So even when section 30(1) applies.

GLAZEBROOK J:
Just so that I’m clear, so that means they don’t take the respondent’s view of the provision?

MR RING QC:
Correct. What I’m – I’m sorry Your Honour –

GLAZEBROOK J:
That’s what, I just didn’t understand the answer.

MR RING QC:
What I’m submitting to you is we say exactly the position the EQC takes.

GLAZEBROOK J:
So what do you say subsection (2) means then?

MR RING QC:
Subsection (2) gives the private insurer the opportunity to postpone the point at which it first starts to pay.

GLAZEBROOK J:
No that's subsection (3).

MR RING QC:
No, subsection (2). Section 30(2). Section 30(3) is the no contracting out provision.

GLAZEBROOK J:
Section 30?

MR RING QC:
Section 30(2). "Subsection (1) shall not apply with respect to any contract of insurance made otherwise than under this Act to the extent that the contract provides for cover in excess of the amount to which cover is provided under this Act."

GLAZEBROOK J:
Okay.

MR RING QC:
So the purpose of subsection (2) is to prevent subsection (1) from applying and to reverse the priorities so that the EQC cover goes first and the liability of the insurer, the private insurer, to pay the first dollar doesn't arise until the EQC cover has been exhausted. So subsection (1), sum insured plus EQC cover, subsection (2) EQC cover plus sum insured.

The interpretation that I have submitted to you in relation to section 30(1), quite apart from being the EQC's position, was the position of Zurich in the High Court and was the conclusion of the High Court as well in volume 1, or volume A Your Honours, page 109. So it's tab 20, paragraphs 15 through to 18. And Your Honours can see in paragraph 17 the argument for Zurich is summarised and Their Honour's conclusion in paragraph 18 indicates that really what Zurich was contending for was for different cumulative insurance benefits available to the insured, depending on whether it was section 30(1) or section 30(2) that applied.

This was also Zurich's position in the Court of Appeal and if Your Honours turn to tab 4, paragraph 43 on page 25. It refers to what the High Court found anomalous. This is to overlook the evidence that no alternative to the top-up cover was on offer and as the Court acknowledged the competing interpretation produces an anomaly of its own resulting in the Body Corporate effectively having different total amounts of insurance available for fire and for natural disaster damage. As I've indicated to Your Honours under section 18 Parliament envisaged that very prospect.

The other statutory provisions I wanted to refer Your Honours too –

ELIAS CJ:
You say that subsection (2) of section 30 refers to the type of insurance contract do you?

MR RING QC:
I say that subsection (2) is required to reverse the priority so that the private insurance doesn't kick in until the statutory cover is exhausted.

GLAZEBROOK J:
So it's a top-up.

ELIAS CJ:
Yes it's top-up insurance.

MR RING QC:
Well, well I –

GLAZEBROOK J:
You don't like top-up?

MR RING QC:
I've tried to avoid the word top-up because it's being given a particular slant here.

GLAZEBROOK J:
Well top-up to the amount of the loss then, is that – so top-up to the extent that the loss is greater than the statutory cover, is that a better way of putting it?

MR RING QC:
Can I say that's okay for the moment?

GLAZEBROOK J:
Okay, just so that I – I'm sorry, it's always annoying when people put things in different words, but it's just so that I can understand what the submission is.

MR RING QC:
Well, well yes. Whether you need to top-up or not, if I can be able to just use that, depends on how much your cumulative – how much your cover is and how much your loss is and under this arrangement, and this I think is one of the fundamental issues here, the parties here did not think that the cumulative cover was inadequate to deal with a total loss. As it's turned out, it was.

ARNOLD J:
Well just following on from that, you point out in your submissions that there are a range of anomalies that arise on the respondent's interpretation and the respondent says there are some on yours. But isn't it the case that all of these anomalies arise only because of the undervalue?

MR RING QC:
Indeed, and that's the very point I'm making Your Honour. The parties, when we're looking at the common intention, wouldn't have seen any anomalies here because they came to this insurance with mindset that, the erroneous mindset, that the most that would be required for an all sources to reinstate these buildings from a total loss would be 12.95 million, and that's turned out to be wrong.

ARNOLD J:
That's right. So that then raises the issue that, I mean normally in an insurance contract it's the insured that takes the risk of underinsurance and yet your argument is that in respect of earthquake damage effectively the insurer has agreed to bear some of that risk as well.

MR RING QC:
Correct.

ARNOLD J:

Yes.

MR RING QC:
And that would have been the case if section 30(1) had applied also, there would have been a reverse of the priorities but the amount would have been insufficient. It's important that I make mention at this stage, Your Honours, so it's not lost sight of, there's another argument out there that was excluded from the assessment of the proper interpretation and that was the factual argument that in fact Zurich had agreed to cover of $100 million and so it wouldn't be right, and that argument was excluded as I say from this assessment, but it would be unhappy, if I can put it that way, if Your Honours were to make a decision which was based on the assumption that the sum insured was 12.95 million and then the case proceeded and the rectification argument succeeded and it was shown that actually the sum insured was 100 million.

WILLIAM YOUNG J:
Well it's referred to at page 57 of volume C, this is the ACM letter that obviously the Body Corporate are relying on.

MR RING QC:
Well there's a number of passages that I wanted to take you to just to show Your Honours what the argument is that's out there.

WILLIAM YOUNG J:
Well it does seem to me that a commercial context argument is a bit difficult to evaluate without knowing the commercial context.

GLAZEBROOK J:
Can I say that I also did wonder why the premium calculation wasn't a pre-contractual negotiation which wouldn't usually be looked at, because a lot is placed on that premium calculation and if the 100 million argument is excluded I'm not sure why the pre-contractual negotiation as to the premium price isn't excluded, though there maybe an argument it shouldn't be excluded but, or it is part of the commercial context in some manner, but if it's part of the commercial context then, for myself, I think you have the lot in.

MR RING QC:
Well –

GLAZEBROOK J:

And then you might have arguments from the various insurance companies as to industry practice et cetera, and words meaning something different from what they seem to me to clearly mean as written.

MR RING QC:

Well it's certainly not our argument that the premium calculation tells you anything about the issues that you need to resolve in this case.

WILLIAM YOUNG J:

Well it's explicable commercially because if the building was, had a replacement value of 12.95 million then the commercial risk that they were exposed to was 6.1 million.

MR RING QC:

Well except that if it wasn't –

WILLIAM YOUNG J:

Yes.

MR RING QC:

But even if they're right, even if they're right, it wasn't, in at least two, for at least two circumstances –

WILLIAM YOUNG J:

Well you endeavour, the one building damage.

MR RING QC:

Yes and there's another one which I was about to come to next. Shall I deal with that now?

WILLIAM YOUNG J:

Well your order –

ELIAS CJ:

I think perhaps we better go back to your order because I'm getting a little confused.

MR RING QC:

Okay, well, as it happens this does take me back to my order which is one of the reasons why I asked. It – I'm really – at the bottom of the first page and at the last bullet point, and still talking about the statutory context, because what seems to have been overlooked, at least by Zurich's argument in my respectful submission, is a prospect that, in fact, there is no statutory cover, that there might be no statutory cover, not in this case, but I'm saying when the policy was written and the covers were, were taken out, the risk that Zurich was undertaking wasn't always and immutably going to be a position in excess of the private cover because the private cover might have been nil and if Your Honours turn to paragraph –

GLAZEBROOK J:

Are you going to explain?

MR RING QC:

I'm going on to explain. If Your Honours turn to paragraph, to section 27 of the statute, section 27 says, "In addition to all other conditions imposed by this Act or by regulations, the insurance under section 18 will be subject to the conditions set out in schedule 3," and if you turn to schedule 3 which is about, which is page 38 at the very bottom left-hand corner. Section, schedule 3, clause 3 sets out a number of situations in which the Commission can decline to pay anything at all, so even if you qualify under section 18, you have natural disaster cover damage and regardless of the priorities, the Commission's liability would ordinarily otherwise have been triggered, the Commission does not have to pay if first the damage was caused or exacerbated by an earlier disaster for which the Commission made payment and the payment wasn't used to repair the property, failure to comply with a law or requirement that exacerbated the damage, property not constructed in accordance with standards appropriate and that exacerbated the damage, certificate of title has an entry under section 36(2) or section 74 of the 2004 Act and that's a notification of a building consent that is being issued by the territorial authority in respect of land containing a natural hazard, (e), there has been on the part of the insured person whether to the Commission or its agents or to the insurance company wilful material misdescription or a misrepresentation as to value, the claim against the EQC is fraudulent, natural disaster damage is caused or contributed by the wilful act or negligence of the insured person or a previous occupier et cetera. Now, all of those are situations where there may or may not be a provision in the private insurance policy that produces the same result.

ELIAS CJ:

It’s almost inconceivable that they wouldn't be, isn't it?

MR RING QC:

Well –

WILLIAM YOUNG J:

Not exactly, it’s unlikely that –

GLAZEBROOK J:

With some of them.

ELIAS CJ:

Not in the same terms.

WILLIAM YOUNG J:

– as it would be, it would be entirely the same.

ELIAS CJ:

Yes.

MR RING QC:

No. It being that there would, for example, it would be unlikely to see a clause in the private insurance equivalent to 3(a).

GLAZEBROOK J:

Well, especially if it resets in some way.

MR RING QC:

Well, that’s right and, and the claim is in any respect fraudulent, well, it may be, may or may not be unlikely but it is entirely possible that there could be lies told to the EQC for one reason that are not told to the private insurer; (e) contemplates that the wilful misdescription might only be given to the EQC and not to the insurance company. So all I’m raising is that there are circumstances here that would mean there was no EQC cover, where there would be private insurance. If there was a layering process then – there is no layering process. The private insurance is the first dollar whether you're under section 30(1) or section 30(2). So from Zurich's point of view its liability has been advanced from 6.8 million and a dollar so that it's now paying at the dollar.

Clause 4 similarly has the potential to deprive the property owner of the statutory cover without affecting the private insurance. Where the Commission settles a claim and the property is not replaced or reinstated to the satisfaction of the Commission, the Commission can cancel the insurance. Subsection (2), even if the Commission does that the subsequent renewal of the contract of fire insurance, subsequent issue of a new contract of fire insurance, doesn't change the position. So that's another situation in which whether under section 30(1) or section 30(2) the private insurance can find itself paying at the first dollar.

So against that statutory background I'd like to turn now to take Your Honours through the key features of the policy. You'll find the policy at volume C. It's the first document in volume C. But before we start looking at the individual provisions, I just wanted to take Your Honours through the structure of the policy overall which is set out at pages 2 and 3 of the booklet.

ARNOLD J:
Two and three of the?

MR RING QC:
Pages 2 and 3 under tab 1, the first couple of pages of the policy.

ARNOLD J:
Sorry, yes.

MR RING QC:
And I'm just wanting to do this to emphasise to Your Honours that in terms of structure this is just the usual structure of an insurance policy that one would expect to see. There's an insuring clause, which sets out the basic insurance promise. There's a basis of loss settlement, which says what the insurer will pay – on what basis the insurer will pay, not how much they'll pay but whether it's on replacement or some other calculation. It then has standard policy extensions to the material

damage section and you'll see in that list MD15, natural disaster, which is obviously our key provision, and MD25, the replacement value extension, which I'll come to next.

So these are standard policy extensions that are provided in every case. There are then optional extensions which can be bought or not bought. Then there are exclusions and then the same for business interruption, a similar structure, and then halfway down the page, definitions that apply to both sections. General policy conditions that apply to both sections and in there the other insurance clause at GC09, which the Court of Appeal thought was relevant but with respect we think doesn't add anything. Then general policy exclusions and then special exclusions applying to the policy.

Page 4 is the insuring clause. The overarching insuring promise.

ARNOLD J:
Just before you go onto that, where do we find the Brokernet policy certificate?

MR RING QC:
You'll find that underneath tab 16.

ARNOLD J:
Thank you.

MR RING QC:
And I am going to come to that next, once we've looked at the operative clause, but it's at page 64, rather than – 63 is the insurer closing advice. 64, you'll see the heading, "Insurer's schedule". It seems to be common ground that that is what's described in the policy as the Brokernet certificate.

So back to page 4, the material damage section insuring clause. "The insurer agrees to cover the insured for all loss or damage," loss or damage being a defined term, "to the property insured during the period of cover due to an event." And, "Provided that the liability of the insurer, for any one loss or damage, under this section, shall not exceed the sum insured as stated or endorsed onto this policy," and then it refers to multiple, or to co-insurers, which we don't have to concern ourselves with.

The sum insured is also a defined term and Your Honours will find that definition at page 23 and it, "Is the limit of the insurer's liability as stated in the Brokernet policy certificate for any one loss or damage."

If we turn to the Brokernet certificate under tab 16, at page 64, and see the total sum insured is $13,050,000 and the description of the property, Salisbury Park, the sum insured there is the 12.95 million that we've already discussed. The other $100,000, I understand that relates to paths or something else, but we don't need to concern ourselves with that for present purposes. Alongside the 12.95 million is the initials RV and that's the signal that this is insurance on a replacement value basis and that's what triggers the application of MD25 that we'll be coming to have a look at shortly.

So it's in this context of the 12.95 million sum insured, but I just want to turn back and deal with this $100 million issue because that's an unresolved issue as to –

ELIAS CJ:
The $100,000 –

WILLIAM YOUNG J:
He said 100 million.

MR RING QC:
No 100 million –

ELIAS CJ:
Sorry, so not going back to the paths.

MR RING QC:
No, no, I'm not – no, something a little more fundamental.

McGRATH J:
Just at the top, I'd like to keep along on your hand up to us, is this at the top of page 2?

MR RING QC:
Yes, yes I am.

McGRATH J:

Can you just remind, seeing I interrupted you, Brokernet is the trade association of brokers is it?

MR RING QC:

It's a group of brokers who have gathered together to provide themselves with a bit more muscle in dealing with insurers.

McGRATH J:

That's right, thank you.

MR RING QC:

So the issue here that has, was excluded from the scope of the preliminary question was whether there was an agreement between Zurich and ACM on behalf of the Body Corporate that, in fact, the sum insured would be $100 million and not 12.95 million for both policy years because Zurich came on risk for the previous year of 2009/2010 and this issue applies to both years and you'll find the issue is factually captured in volume B at page 2, sorry, at tab 2, page 8 and paragraph 9. This is the affidavit by Mr Barrett on behalf of Zurich and he's talking about a meeting between himself and the ACM representative in 2009 and he says the draft slip that he was shown by ACM and, of course, a draft slip is just an anticipated policy schedule like we've looked at as the Brokernet certificate schedule, "Had a blanket loss limit of 100 million which I understand was what was agreed with another insurer when the Body Corporate's business was transacted between ACM and that insurer". It says, "I'm not going to comment on this issue in the affidavit, say we didn't agree to the $100 million."

Now, the issue is also reflected in some of the documentation that you've been given in volume C and under tab 5 in volume C, page 37, this is a letter of report by ACM to the Body Corporate, Boutique Body Corporates Limited is the agent of the Body Corporate itself, so I accept entirely that it's a communication on only one side of the fence, but it just does identify or help to clarify the issue. This is for the first year of cover, 1 July 2009. Recommends in the second paragraph a change to Zurich. Zurich's pricing the same as NZI's and provides lower excess and enhanced benefits, then goes on to say at the bottom of that page talking about the policy wording that we're dealing with here, "These are exclusive contracts with enhanced benefits. The policies provide levels of cover available under commercial insurance policies while including relevant and important benefits for residential Body Corporate clients." And the relevance of that apart from how it flows into the 100,000, $100 million issue is that when we're talking about what's standard and not standard here, well, of course, this is not necessarily standard cover that we're looking at.

On the next page 38, the property under policy coverage, "The property insurance is subject to the exclusive Boutique Body Corporate policy wording arranged by ACM with Zurich. There are many policy extensions that provide considerable benefits to the Body Corporate, however, main policy highlights are as follows," and you can see the first bold line there, "Policy limit $100 million," so just for present purposes, whatever the true position may or may not be and it's never going to be resolved at this stage, ACM clearly believed that it was dealing with Zurich on a $100 million basis.

WILLIAM YOUNG J:
There's nothing in the policy wording to which that relates though, that's referable to the …

MR RING QC:
No and that's why there's a rectification cause of action.

ARNOLD J:
So how does this relate though to the issue that we're to deal with?

MR RING QC:
Well, where it relates is every time my learned friend says to you, you have to judge commercial common sense against the sum insured of 12.95 million then I'm, I'm saying to Your Honours that's a very dangerous thing to do because it might turn out that the sum insured wasn't $12.95 million.

ARNOLD J:
Well, that's a really unsatisfactory basis on which the, to deal with an issue of this sort.

MR RING QC:
Well –

ELIAS CJ:

You're not arguing for that though?

MR RING QC:

No, I'm not arguing for that and I'm saying that Your Honours can actually resolve the issue on a pure interpretation basis without needing to go there.

WILLIAM YOUNG J:

But can I – where's the rectification pleading?

ELIAS CJ:

Yes –

MR RING QC:

If you look at volume A at tab 23, this is, sorry, tab 22. Look at 135, first of all, paragraph 9, and then turn over to 136, first cause of action rectification, paragraph 16 and 17.

GLAZEBROOK J:

What would the policy actually have said? "Replace 12.95 with 100 million?"

MR RING QC:

Correct.

GLAZEBROOK J:

That doesn't seem terribly plausible, does it, in the sense that that would reset at each event. I mean, I can understand an overall policy limit that might be, you know, you could have, you could have however many go into 100 million of the 12.95 because that letter does actually still refer to the 12.5, doesn't it. I'm actually now getting confused, like I was at the legislation, but doesn't the letter you took us to which I've now lost –

MR RING QC:

Page 37, in the middle of the insurance summary –

GLAZEBROOK J:

Yes, it still talks –

MR RING QC:

– "Our quotation's based on the information you've provided to us, brief details are as follows."

GLAZEBROOK J:

Okay.

MR RING QC:

So those are details that have been provided.

GLAZEBROOK J:

Okay. I understand.

MR RING QC:

And that's just by background. My understanding of the context of this is, is that this was according to ACM another marketing feature, you will never be, effectively, you will never underinsured because we're going to get you, or we've got you a $100 million worth of cover.

GLAZEBROOK J:

And, of course, it wouldn't be priced on 100 million, it would be priced on the chance of it being up to 100 million presumably rather which is likely to be very slight.

MR RING QC:

Well –

GLAZEBROOK J:

Is that the, is that the argument?

MR RING QC:

Well, I'd prefer again, from my position, I don't say that price and the 100 million really or the price in the 12.5, 95 million really have a direct correlation necessarily anyway, so but, yes, you might be able to rationalise it on that basis.

GLAZEBROOK J:

Well, no, it will be a risk, it will be a risk-based analysis of what the, the pricing would be depending upon the amount of cover and the risk of the event occurring and –

MR RING QC:

Yes.

GLAZEBROOK J:

– whatever else they do when setting premiums.

MR RING QC:

And just while you're looking at page 38, I should give you –

ELIAS CJ:

Sorry, which volume is it again, B?

MR RING QC:

This is volume C. This is the Ahlers' letter for the 2009 year. There's an equivalent letter for the 2010 year, that's the year we're concerned but, of course, at page 56.

WILLIAM YOUNG J:

So do I take it that for practical purposes this litigation is ACM's litigation?

MR RING QC:

Yes it is at the moment on this issue.

WILLIAM YOUNG J:

But essentially because, I mean, whatever Zurich may have had to do with $100 million, Ahler certainly has represented that that's the cover?

MR RING QC:

Correct.

WILLIAM YOUNG J:

And – okay.

MR RING QC:
So –

ARNOLD J:
So just to be clear, then the – I notice at 94 and this is a document from your client to Zurich, this seems to be the premium calculation but at 96 at all based on the 11 and a half million and so.

MR RING QC:
Yes, it is and this, this is my learned friend's argument that –

ARNOLD J:
Yes, and that's subject to the point that Justice Glazebrook raised, I mean, isn't, is this simply a matter of subjective intention or is it something that's properly brought within the background?

MR RING QC:
Well, I'd like to deal separately when I come to the commercial context with what's to be made of the premium calculation point, if I may. So those are the relevant provisions that relate to sum insured.

Next, if I can turn to the extensions, the policy extensions, so if we go back to the beginning of those which is at page 5. This is the heading to the section to which both MD15 and MD25 are found. The terms of the – it's headed "Standard Policy Extensions to the Material Damage Section", "The terms of these extensions are deemed to be incorporated within the policy. If there is any conflict or inconsistency between the extension and any other terms of a policy other than the general exclusions and the terms the extension will prevail." And goes on to say, "Where a standard policy extension shows a separate sum insured on the Brokernet policy certificate, the insurer's limit of liability shall not exceed the sum insured in relation to that extension." I will come back to that but, of course, the relevance of that is that effectively Zurich says they do have a policy sublimit, but you won't find it in the exten – in the certificate, you find it buried in the wording of MD15. But the point to be made at, for present purposes is MD15 and MD25 are part of a section of the policy which extend the cover and what that means is that you should end up with more cover as a result of the particular provision being in there than if it wasn't. And if you go down and you just briefly look through each one of these, you'll see that that's the clear effect of them, many of them say like MD1, this section's policy extends to cover. But I don't believe if you look through you will find any one of these that actually would mean Zurich was less liable because this is in here than if it wasn't. so the effect of an extension should be to make Zurich more liable than if the extension is not there but it seems that on my learned friend's argument MD15 is unique in this context in not only maintaining the status quo, it makes Zurich less liable than it was before, and we say that's a very strong pointer towards interpretation.

If I can turn to MD25, which is at page 8, this is the replacement value extension that picks up on those initials RV in the Brokernet certificate. In the event of loss or damage insured by this extension and the initials RV are the qualifier that means that that property is insured by this extension, the amount payable is to be the cost of reinstatement of such property where stated in the certificate as the basis of settlement. And again the Brokernet certificate as the basis of settlement is the RV. This is subject to the following definitions and special provisions. The definitions then identify things like what "reinstatement" means and what "destroyed" means.

Page 9, the two special provisions I wanted to draw Your Honour's attention to specifically are special provisions 1 and 6. This, of course, is in the context that this is an all risk policy in the sense that everything is covered unless it's excluded and so MD25 applies to earthquake as much as to any other risk, fire or whatever. Subject, of course, to whatever MD15 might have to say. So special provision 1 says, "Where required by the insurer, the insured shall at the commencement of such insurance and when required provide the insurer with a written estimate of the cost at such date of reinstatement of the property 8insured to which this extension applies and certified by a valuer acceptable to the insurer." And then, "The sum insured under the policy and this extension in respect of each item will not be less than the amount of the estimate."

For the effect, the purpose and effect of special provision 1 is to require the insured to provide a certificate of the estimated reinstatement value of the property and that's indeed what happened in this case. I'll take you to the certificate in the moment but the effect of SP1 is that then sets the minimum sum insured. In other words Zurich will not countenance the Body Corporate being able to provide a certificate for one value but to say, well we don't think it's ever going to get to this stage so give us some cheaper insurance for half that value or whatever. You provide the certificate.

You have to insure for at least the certificate. But all that does is set the minimum. It doesn't set the maximum that you have to or are allowed to insure for. It only prevents Zurich from suffering the disadvantages of deliberate underinsurance. And the certificate in this case Your Honours will find at page 47, under tab 10, that's the letter that accompanied it, the actual certificate itself is at page –

GLAZEBROOK J:

Sorry, I missed –

MR RING QC:

Tab 10, page 47, that's the letter that accompanied it. The actual certificate itself is at page 39.

WILLIAM YOUNG J:

So this is the SP1 certificate, is that what you refer to?

MR RING QC:

Yes, correct. I'm sure Your Honours will have seen these certificates before, they're in a relatively standard form. The reinstatement estimate is 11.6 and if you add 11.6, the 575 and the 775, you get 12.95 million.

ARNOLD J:

Do I take it that this was so short of the mark because of the post-earthquake status of the land and, and foundation requirements which hadn't been allowed for?

MR RING QC:

I think that's right, Sir, I'm not entirely sure as to why it was so wide of the mark, but suffice to say it's not the only one. If you turn over to page 50, you'll find some helpful explanations as to what each of these terms are making up the 12.95. Middle column, "The reinstatement estimate is the estimated cost at the date of valuation of reinstating the building to as new condition. In the case of partial destruction no specific allowance for regulatory upgrade." The inflation reprovision is to take into account the fact that the certificate is being given at the beginning of the insurance period and the loss might occur at the end and when the loss comes to be paid for, it might be a good deal of time after that as well, so there has to be an allowance for inflation for escalating costs. Well, of course, it doesn't allow for and this is perhaps yet another reason for the differential is when you have a widespread situation like there is in Christchurch, there's a suggestion of I think it's called "demand surge" where – because everybody is looking for the same thing, there is greater competition and less supply. So that's the inflation, the purpose of the inflationary position and then 4.0 at the bottom of the right-hand column is the demolition estimate and that's, of course, because you can't reinstate before you've removed what's there, so it's those three components that then make up the 12.95 million.

If we turn back to page 9 to the policy, SP6 in the same section, "The liability of the insurer under this extension in respect of any item of property will not exceed the sum insured in respect of that item." So …

ELIAS CJ:
Sorry, what page is it?

MR RING QC:
Page 9, SP6. So what this allows for is that there might be a number of different buildings on the schedule and each one of them might have a separate amount alongside it. The insurer's liability is then being limited to the amount ascribed to that building. The alternative to that is that, on a properly worded policy, you can have a global sum insured which allows the insurer to access the whole of the sum insured in respect of any particular building and we've had those issues in Christchurch as well, but doesn't arise here because there's only one building. But what that is saying before we get to SP15 – to MD15 is the liability of the insurer under this extension in respect of the buildings for earthquake damage, will not exceed the sum insured in respect of that item, whether that's the 12.95 or the 100 million.

WILLIAM YOUNG J:
I take it, implicit in the question that's been put to the Court, would have to be an assumption, I guess, that the $100 million limit wasn't agreed. Because if it was agreed then this is just a, this has got no, is entirely irrelevant?

MR RING QC:
Well I wasn't involved in the case at the time – well until after the High Court hearing had been concluded so probably the best place to find the answer to that, from an objective point of view, is to have a look at volume A to the minute of Justice Courtney at tab 19, page 98.

WILLIAM YOUNG J:

Okay. So it's the last sentence of para 1?

MR RING QC:

Yes.

GLAZEBROOK J:

Did both parties seek a preliminary hearing on this?

MR RING QC:

I don't think it – it wasn't a defended application for a preliminary hearing so yes it must have been by consent.

GLAZEBROOK J:

As usual when preliminary hearings are made it doesn't seem to be satisfactory.

MR RING QC:

But it's our position that Your Honours can resolve this issue.

GLAZEBROOK J:

I understand.

MR RING QC:

So that then takes us to MD15, which Your Honours will find at page 5 – sorry at page 6. That, as we've said in the hand up this morning, it's a standard policy extension. It should be expanding the amount that Zurich has to pay from what it would have had to pay in the absence of the extension, and what MD25 has shown is that before you get to the extension – before you get to MD15, Zurich is up for the sum insured under the policy in full for earthquake.

WILLIAM YOUNG J:

But where does that actually come from other than in the MD section?

MR RING QC:

Well it comes from the operative clause as well Your Honour on page 4 provided the liability shall not exceed the sum insured.

WILLIAM YOUNG J:

All right. And then, sorry, when did the extension start?

MR RING QC:

The extension start at page 5.

GLAZEBROOK J:

Where is the "loss of damage" definition?

MR RING QC:

The "loss of damage' definition is at page 22.

WILLIAM YOUNG J:

So you say that if a policy stopped at page 4, we excluded all the extensions, then you win, you will win?

MR RING QC:

Well I would. If the policy stopped at the end, if it didn't have MD15, I also –

WILLIAM YOUNG J:

Yes, that's what I meant, that if you just look at the insuring clause on page 4, and then eliminate all the extensions, and then the rest of the policy applies, well you succeed effectively under section 30(1).

MR RING QC:

Correct. Well except that under section 30(1) Zurich would be paying ground up –

WILLIAM YOUNG J:

Yes.

MR RING QC:

– and even I'm not saying that.

WILLIAM YOUNG J:

No, no, but what I'm, I'm just trying to get my head around your extension argument, you're saying that if it were not for the extensions, there couldn't be any question that you were right?

ARNOLD J:

And so MD15 on your argument just reverses the priorities?

MR RING QC:

Correct. It's only there to invoke section 30(2). It doesn't have a second buried purpose of also reducing Zurich's liability below the sum insured. That's the essence of my argument and the, the point in relation to what you would expect from extensions is that it, it will be the only extension in this policy by a long shot that got Zurich off the hook for millions of dollars as opposed to putting them on the hook for millions of more dollars.

GLAZEBROOK J:

But on your argument it doesn't make any difference. It reverses the priorities but it doesn't actually make any other difference because if otherwise they would get 12.95 million, wouldn't they, so I mean that's the limit –

MR RING QC:

Correct.

GLAZEBROOK J:

– and then the earthquake and more damage would pop in over the top.

MR RING QC:

Correct.

GLAZEBROOK J:

And on your argument all that happens here is that earthquake and more damage come first and Zurich pops in over the top, so if the damage was less than 100,000 then Zurich would be off the hook because of the extension –

MR RING QC:

Correct and –

GLAZEBROOK J:

– but only in those circumstances.

MR RING QC:

That's right and Zurich doesn't, Zurich doesn't dispute that one purpose of section, of MD15 is to reverse the priority so it’s second and not first, but what it says is that it’s got a second purpose and that’s the, that’s the point where I’m querying the, whether it’s, can be ever described as a policy extension at that point if its purpose is to reduce Zurich’s liability from 12.95 million to something less than that.

GLAZEBROOK J:

There will be clauses that would do that explicitly though.

MR RING QC:

But not in the extensions.

GLAZEBROOK J:

So you’d put them elsewhere, is that what you’re saying, in an exclusion clause.

MR RING QC:

You’ve got the insur –

GLAZEBROOK J:

You know the High Court had examples of clauses that seem pretty clear that they were, they did have that dual purpose.

MR RING QC:

I mean the idea of the policy, of policies in broad sense is the insurant clause is the promise and then the exclusions come along and they start carving out pieces of that promise that you’re not going to get. The extensions go the other way. They take the promise and say, “The promise might be circumscribed like this, but we’re going to give you this extra bit as well.”

GLAZEBROOK J:

So those clauses in the High Court judgment that clearly did have the dual purpose would go in an exclusion section, is that what you’re saying?

MR RING QC:

I’m, I’m, I’m not sure which particular provisions Your Honour is looking for.

GLAZEBROOK J:

Well, I think they were clause, they were clauses in the High Court or might've been the Court of Appeal –

WILLIAM YOUNG J:

Well, you've got one, you've got an example of this at the end of your, of your submissions that the lia – which says, which would say the liability of the insurer will be the difference between the limit –

MR RING QC:

Yes, yes.

WILLIAM YOUNG J:

– of the sub, between the sum insured –

MR RING QC:

Yes.

WILLIAM YOUNG J:

– and the amount paid out by EQC.

MR RING QC:

Yes, which is the other wording that is available in the marketplace.

WILLIAM YOUNG J:

But that, that might appear in an extension section, although you'd say bad drafting if it does?

MR RING QC:

No. Well, see, normally what happens, Your Honours, I know that the Court's often not interested in what normally happens, but what does normally happen is that there is actually a policy exclusion for earthquake –

GLAZEBROOK J:

Well, I was going to ask you that because that would be the normal thing, so you'd have a policy exclusion and then that would be a true extension because it would be –

MR RING QC:
Absolutely.

GLAZEBROOK J:
– extending it as – I know you don’t like top-up either, but it would be extending it as top-up cover.

MR RING QC:
Well, yes, and to look at it another way the insured would then be grateful for something less than the sum insured because without it they’d have nothing at all.

GLAZEBROOK J:
So this policy is unusual in not having that exclusion –

MR RING QC:
Correct.

GLAZEBROOK J:
– and then it being, being a true extension.

MR RING QC:
Correct. So that takes us into MD15 and what we’re saying in the middle bullet point in the handup is that passage that I referred Your Honours to, to the, the introduction to all of the extensions, where the schedule shows a separate sum insured for an extension, Zurich’s liability is limited to that amount. And in 2009 and 2010 if you have a look at same volume, tab 8, at page 44, you’ll find the equivalent, effectively the equivalent to the schedule for the 2010 year, and you can see at page 44, standard policy extensions, extra covers,

ARNOLD J:
Sorry where is this?

MR RING QC:
Page 44.

ARNOLD J:

Yes, I've got 44. I see, yes.

MR RING QC:

Yes, that second main section there, you can see there's a large number of sub-limits, and that's what those opening words of MD15 – in the extension section is referring to. So if MD15 –

ARNOLD J:

There's a much cleaner copy of that document under tab 36. One that's much easier to read.

MR RING QC:

Tab 36?

ARNOLD J:

Page 95.

MR RING QC:

Yes, I'm sorry, that is the one you took me to before, correct. So, and again you can see its headed, "Standard Policy Extensions, Extra Covers" emphasising that what's been given here is more than you would have had in their absence.

GLAZEBROOK J:

Did they find their way into the policy?

MR RING QC:

These?

GLAZEBROOK J:

Yes.

MR RING QC:

Well these will be heading in the MD. If you have a look at, for example, the first one is MD06 on page 5, "Contractual Value."

GLAZEBROOK J:

Sorry I meant the sub-limit.

MR RING QC:

Well when you say that, did they find their way into the policy, they are in the policy by virtue of being the sub-limits that are referred to in the opening words to the policy extensions in page5 and they are referring to MD number whatever on the next two or three pages. So, for example, contractual value, $100,000 at page 95, if you turn back to page 5, MD06 is the contractual value extension.

GLAZEBROOK J:

Where's 100,000, is what I was asking.

MR RING QC:

It's the number alongside contractual value at page 95.

GLAZEBROOK J:

Well I know but that doesn't seem to be, that just seems to be a letter of ACM.

MR RING QC:

Page 95 is the policy schedule.

GLAZEBROOK J:

Is it?

WILLIAM YOUNG J:

It does say on the, important notes, this document is a schedule only and is not the policy.

MR RING QC:

Yes.

WILLIAM YOUNG J:

But it is actually part of the policy because it –

MR RING QC:

Well this is, I think this is the best we've got for a policy schedule for the 2009/2010 year.

GLAZEBROOK J:

But the Brokernet schedule is something different then?

MR RING QC:

The on that we looked at before at page 64, that is for the subsequent year. That's 2010/2011 which I was going to take you to next because –

GLAZEBROOK J:

Sorry, which tab, sorry, so I can just –

MR RING QC:

Tab 16, page 64. There you've got standard policy extensions, extra cover included. So what that is saying is whereas in 2009/2010 there were those extra covers sub-limited, they're now included in the sum insured so effectively for every one of the extensions you have the full policy sum insured available to you.

GLAZEBROOK J:

But the year before, this thing at page 94 was the Brokernet certificate, is that …

MR RING QC:

That's the effect of it and so in the previous year, instead of having the whole sum insured available to you, for example, for a contractual value type claim, you only had $100,000 available to you.

GLAZEBROOK J:

It just doesn't seem to accord terribly well with the wording of MD06 which just says "limited to the sum insured". It doesn't talk about a sub-limit.

MR RING QC:

But then if you go up to those opening words "understand policy extension" –

GLAZEBROOK J:

Well, so you say that the Brokernet certificate for the first year was at page 94?

MR RING QC:
Yes.

GLAZEBROOK J:
Doesn't actually look like a certificate but –

MR RING QC:
Well, I'm not saying that's exactly the certificate, but it would be in that form –

GLAZEBROOK J:
And then this is the one for the subsequent year.

MR RING QC:
And this is definitely the one for the subsequent year. For present purposes if we're looking at what would've been under the heading "Standard Policy Extensions" in both documents, then the one at page 94 will reflect what was in the 2009/2010 policy and the one at 64 is actually the 2010/2011 policy. And so what the opening words to the standard extensions say in page 5 is where you have a standard policy extension that has in the certificate a separate sum insured, then the limited liability for Zurich won't exceed that amount. And so when you come down to, for example, MD06 "contractual value" when it says, "The definition set under the base of settlement shall not apply in respect of a claim, but always limited to the total sum insured," then, of course, that's modified by or qualified by those words at the top of the page so, yes, it can't exceed the total sum insured, but the, it also can't exceed the amount set outside, set alongside contractual value in the certificate, ie. the $100,000.

And the point that I'm making here is really to show what happened between 2009/2010 and 2010/2011 whereas before there were sub-limits and having regard to the opening words of MD15 if the parties had intended that effectively there was something less than the sum insured going to be available for earthquake, that was the logical place to put it. In 2010/2011 all of those sub-limits were gone and the Body Corporate had the benefit of the whole sum insured for all of those extensions and, again, that makes it even more anomalous that somewhere buried in MD15 is actually a reduction from the sum insured even when the schedule says "standard policy extensions extra cover included", meaning included in the sum insured of 12.95 million.

COURT ADJOURNS: 11.35 AM
COURT RESUMES: 11.53 AM

MR RING QC:
Thank you Your Honour. Before the adjournment I was just finishing up on page 64 with the, drawing Your Honours' attention to the standard policy extensions extra cover included reference, that be included in the sum insured, and making the point that it would be inconsistent with the purpose of an extension and with all the – with all the other extensions, that Zurich actually, on its interpretation, is paying less than it would have, and less than the sum insured.

If I can now turn to page 6 and the wording of MD15 itself. I know it's been a long time getting here but I think that context is important to give it the right flavour. We have broken down the key part of MD15 in the hand up this morning and to four components. First of all the insurer's liability, and we say that that just simply refers to Zurich's financial obligation to the Body Corporate. It doesn't refer to the quantification of that obligation in dollar terms. That actual quantification depends on the Body Corporate's loss which, if necessary, is then capped at the sum insured. We say that it's not equivalent to the sum insured because otherwise the drafter would have used this defined term.

"Will be limited to," we say that "limited" refers to boundaries and that can be circumstances and/or a dollar figure. In this case MD15 deals with circumstances. It restricts Zurich's liability by reference to the amount to which statutory cover is provided and I'm taking those words in italics directly out of section 30(2). Section 30(2) is specifically directed to that point, the boundary between the EQC cover and the Zurich cover, and so it restricts, MD15 restricts Zurich's liability from the first dollar to the first post-EQC dollar and that is the agreement that is required to invoke section 30(2). This says nothing about the upper boundary of Zurich's liability and it doesn't need to because that is already proscribed in the sum insured and in the operative clause, the schedule, and SP06 of MD25. By comparison we say that Zurich's interpretation requires a rewriting and/or the adding of words not there in MD15 so that the sum insured, or any limited by the operative clause and those other provisions, is further limited. We say the logical place, if the parties had intended to achieve that, would have been in the schedule, but the schedule states to the contrary when it talks about the extra cover being included in the sum insured. And it’s also contrary to the description and purpose of an extension as I’ve discussed already.

“The amount of the loss” we say is the amount of the Body Corporate’s loss in dollar terms. It can’t mean the loss insured by the policy because otherwise the drafter would have used the defined term “loss.” In addition it is the purpose of MD15 to allocate the actual loss between the EQC, which is not insured, that loss not insured by the policy, and Zurich, which loss is insured by the policy.

And finally, “In excess of the natural disaster damage” we say refers to the point at which the statutory cover is exhausted and it is equivalent to those words in section 30(2) in excess of the amount to which cover is provided under this Act.

Just before I complete this section, I’d just like to ask Your Honours to look at section 30(5) – sorry section 30(1).

GLAZEBROOK J:
I’m glad other people get confused.

MR RING QC:
It’s in the first respondent’s bundle of authorities and I’d just like to focus Your Honours’ attention to the equivalent words in section 30(1) to the words in MD15 that we’ve just been looking at. That starts, “The insurance of the property under this Act, the amount at which it is so insured, shall be deemed to be in respect of so much of that natural disaster damage as exceeds the sum of the total amount payable under the contract.” And what we say is that, if you look at section 30(1), those words are saying the EQC’s liability to the statutory cap is limited to the amount in excess of the policy private insurance coverage. The EQC’s liability to the cap is limited to the amount in excess of the policy private insurance coverage. The EQC’s liability to the cap is limited to the amount in excess of the policy coverage and if you look at it that way and you compare that to MD15, it’s expressing exactly the same idea and no more than exactly the same idea. This is the reverse, the statutory reverse of MD15. So against that, let me turn to the commercial purpose and I think I can deal with this relatively briefly because these are matters that we’ve already touched upon to some extent.

First, there’s been a heavy emphasis in the argument from my learned friends in the written submissions that Zurich would never have to pay more than 6.15 million for earthquake and that is simply not correct even on Zurich’s own interpretation of MD15 and that exposes the fallacy of trying to retrofit back from the premium calculation. Even on Zurich’s interpretation, it’s exposed to paying more than 6.15 million for earthquake under MD15 in at least two situations. First, if there’s no statutory cover for the reasons that we’ve just talked about, EQC decline the claim or cancel the cover and you can add to that set of circumstances the fact that the claim against the EQC might be made late. There is a statutory time limit I think of three months and that is not amenable to any relief under the Insurance Law Reform Act in the same way as private contract notice provisions are under section 9 of the Insurance Law Reform Act 1977.

ARNOLD J:
But that would apply, wouldn't it, even if the clause were explicitly worded like the one we talked about earlier so – yes.

MR RING QC:
Yes, that's correct so on that scenario then even on Zurich’s own interpretation it drops down to ground up and it is exposed undeniably to 12.95 million. Second, it’s the partial loss situation that is expressed in our submissions.

Second, we make the point that the parties are entitled to lower the earthquake coverage so that the private insurance kicks in at the amount which the statutory cover is exhausted and the private insurance layer remains subject to the policy sum insured. There are clearly two types of wording in the market. One expressly provides the insurer’s liability as the difference between the sum insured and what EQC pays, the other expressly provides that the insurer’s liability is in excess of the EQC’s. Zurich underwrites both wording and we say each must be indicative of a different common intention and so subject to a different interpretation.

And I’d like just to take you to just the Zurich ones because they are indicative of the position and they best highlight the point that we’re making. You have, of course, MD15 which is in the category of expressly providing that the insurer’s liability is excess EQC’s and in the same category is the policy at page 81, policy at page 81 is

Zurich wording, clause 1.2.7, "Our liability will be limited to any costs in excess of those covered by the Act."

WILLIAM YOUNG J:

But this, presumably, is a residential one, is it? So there won't be a policy limit?

MR RING QC:

Ah –

WILLIAM YOUNG J:

The problem in this case here is that it involves the facts that (a) there's EQC cover because it's residential but (b) there's a policy cap because it's treated as if it were a commercial building and there's a sum insured, which there almost always isn't in residential policies.

MR RING QC:

Well I –

WILLIAM YOUNG J:

Well up until post-Christchurch earthquakes.

MR RING QC:

Well I wouldn't have said it was that universal but – the point I'm just trying to highlight here is there are two vastly different wordings.

WILLIAM YOUNG J:

Yes. What I'm suggesting is this might be a different policy, it might not have a policy limit, a sum insured limit.

MR RING QC:

That is indeed possible except if you have a look at 1.2.5 it refers to the amount being included within the total sum insured of the material damage section, which suggests that it does have a policy limit.

WILLIAM YOUNG J:

Yes.

MR RING QC:

So it's that and MD15 compared with the one at page 89 –

McGRATH J:

Sorry, just before you go, you've gone to 1.5 but there's also 1.27?

MR RING QC:

Yes, 1.27 is the earthquake provision.

McGRATH J:

Yes.

MR RING QC:

And I'm saying this is in the same form as MD15.

McGRATH J:

Yes and now we go to?

MR RING QC:

And the other one is at page 89, under tab 31.

WILLIAM YOUNG J:

So is this also a Zurich policy?

MR RING QC:

This is a Zurich policy underwritten, it's underwritten by Zurich, issued by Crombie Lockwood the brokers, and you can see at the bottom –

ELIAS CJ:

Sorry, what page, I missed it?

MR RING QC:

Page 89. You can see at the bottom it says, CL, that's Crombie Lockwood, material damage agreed wording with Zurich, and you can see that the wording there is vastly different.

GLAZEBROOK J:

We're on page 89?

MR RING QC:

Page 89, 1.26, where the property comprises residential buildings, the indemnity shall extend to include loss or damage caused by earthquake provided always the EQC admits liability and the liability of the company shall not apply to that amount. And then shall not exceed the different between the sum insured and the maximum amount for which EQC would be liable if no excess applied.

GLAZEBROOK J:

And actually just in terms of Justice Arnold's point, if EQC does not admit liability then it's the full sum it looks like under that particular clause.

MR RING QC:

Yes but –

GLAZEBROOK J:

Well it says –

MR RING QC:

That's right but presumably it would be open to the insured and/or to Zurich to challenge EQC's declinature and if that was found to be incorrect then it would be, this is the word –

GLAZEBROOK J:

Yes.

MR RING QC:

– this is the wording that would then apply. This fact that Zurich underwrites both different wordings was also discussed in the, also mentioned in Zurich's own affidavits in the proceeding. Tab 1 of volume B, page 3, paragraph 7.

ARNOLD J:

What was the page number, 3?

MR RING QC:

Page 3, paragraph 7. "Zurich also underwrites material damage cover using several other broker wordings. Also has its own material damage/business interruption wording." And the essential point is, of course, that Zurich, if you're looking at page 89, 1.26, Zurich is trying to persuade Your Honours that that actually means exactly the same as the other one.

ARNOLD J:

Is there any evidence about industry practice on these clauses?

MR RING QC:

There was – a lot of it got redacted because of the 100,000. I think that the high watermark of what's left for Zurich is in volume B at tab 2, page 16.

ARNOLD J:

Right so that 46, is it, paragraph 46?

MR RING QC:

At paragraph 46. The difficulty with that for Zurich is, of course, there's obviously no binding usage here and unless it reaches the stage of some sort of a stop or buy convention and everybody's using the same wording, what this amounts to is no more than we've always believed that the two different wordings we write mean the same thing, so it doesn't actually get anybody anywhere.

ARNOLD J:

Right, and there was no, a stop or buy convention argument?

MR RING QC:

No.

ARNOLD J:

No, okay.

WILLIAM YOUNG J:

And you, I think you footnoted rectification and mistake arguments were expressly abandoned.

MR RING QC:

Well, they're not in this hearing. They're not –

WILLIAM YOUNG J:

No, but there's no rectification in relation to, argument relating to MD15 saying that if it doesn't mean what Zurich said it means then it should be rectified so that it does.

MR RING QC:

No, no, I don't think there's any argument to that effect. So I then deal in the handup with the effect to the mistake putting aside the $100 million insured issue. The parties mistakenly thought that the most that was required to reinstate the buildings after a total destruction was about 12.95 million so that if EQC paid the statutory limit, Zurich would pay 6.15 million, but that doesn't mean that the parties agreed that Zurich's earthquake liability would be capped by that 6.15 million and even on Zurich's interpretation that's not the position anyway because of at least the two examples that we've set out at the top of the page. That's now known to be based on an incorrect factual assumption and we say that it's not logical to use the figures that are now known but weren't then known to test the commercial absurdity versus the commercial common sense of a particular interpretation, and we've set out in the written submissions a number of places in the *Vector Gas Limited v Bay of Plenty Electricity Limited* [2010] 2 NZLR 444 (SC) judgment where this Court made the point that the interpretation principles that were being expressed there were pure interpretation and didn't take into account circumstances where there was rectification or mistake.

ARNOLD J:

One of the things I wondered about and may be it's a side issue, but when you're trying to assess in an objective way what this agreement's designed to do, do you make any assumption about the reinstatement value?

MR RING QC:

Well, I would have to accept that in the background, in the factual matrix that led up to this policy, there was obviously some consideration given to what the reinstatement cost would be if the buildings were totally destroyed, but it's one thing to make that assessment and to then act on it in the belief that the assessment is reliable, the mistaken belief the assessment is reliable. It's quite another to say that Zurich's liability is circumscribed by that belief.

ARNOLD J:
Well, yes, I'm not really thinking about it in terms of the particular facts, I'm just trying to think about it in terms of an overall context approaching the interpretation of a, of an insurance contract and sometimes there will be provisions which deal explicitly with under insurance and so on.

MR RING QC:
Well, the, the only provision that expressly, well, that, that doesn't even expressly but almost expressly refers to underinsurance is SP1 and if you're looking for a clause that recognises the risk of underinsurance that's it, but where I do agree with my learned friends is that we are talking about here the allocation of risk between what the EQC pays and what the sum insured is. There's no question that, in respect of everything, the Body Corporate took the risk in excess of the sum insured, I mean, that is the purpose of a sum insured, but it's quite another thing to say that for earthquake alone, it took, Zurich had the benefit, if you like, of a $6.8 million saving on its, on its sum insured and Zurich was not taking the risk in respect of anything above 6.15 million because self-evidently it was, it was taking that risk. It was taking that risk if the EQC didn't pay, it was taking that risk if there was only partial destruction.

And that does led me to the premium calculation point and we say that the premium calculation for earthquake based on 6.15 million can't be used to determine the policy obligations because that does not prove or infer a common intention to limit Zurich's liability for earthquake to this figure and there are a number of reasons for that independently and cumulatively pointing to that conclusion.

First, the argument arises from the same factual mistake point. Second, it's common ground that it doesn't reflect Zurich's maximum exposure for earthquake and I've mentioned the two issues at the top of the third, and then there's the third one that is at least $2.72 million worth of additional benefits to the sum insured that's by way of fixtures, landlord's fixtures and fittings and loss of rent that were not factored into the premium calculation either.

And the last point to be made is that, in the end, as far as the Body Corporate is concerned, it's being charged one number for, effectively, all risks. That number includes what is the statutory requirement for EQC, but for the Body Corporate it's the total that it’s looking at and from Zurich’s however Zurich makes up that total can't drive what Zurich then says is its maximum exposure for the component parts. Zurich is exposed to paying up to the sum insured and the rest is a result of commercial negotiation and includes, of course, is well market factors.

ARNOLD J:
In this case the negotiation occurred around the 0.50 and the 0.20, didn't it?

MR RING QC:
Yes.

ARNOLD J:
And once you negotiated those and they, the broker didn't negotiate one of them down, the rest of it was a formula?

MR RING QC:
Well, yes, it was but then it ended up including for nothing things like those additional benefits, yes.

ARNOLD J:
Yes, yes, I understand that.

MR RING QC:
And the final point we make on the commercial factors is that this different policy coverage for different risks issue that is suggested as giving rise to a lack of commercial common sense but, again, it only arises because of the same factual mistake. There’s no commercial absurdity anyway, we say, in either party having a different contractual entitlement or obligation for different risks and, indeed, section 18 itself contemplates that. If the statutory cover is not available, there would be the same policy coverage for all risks and this also reflects, we say, of ACM’s description of the exclusive contract with enhance benefit, the exclusive policy wording and special benefits that I’ve referred to earlier.

I’ve mentioned here the historical statutory context. I’m conscious and my learned friend reminded me yesterday that we haven't given you, either of us, the section 14(2)(b) and section 18(1)(b) which were amendments to the Earthquake and

War Damage Act 1944. We have those available but I'm not proposing to say anymore about those other than what's in my submissions already.

ELIAS CJ:

All right, it probably would be useful to have them if you've got them, thank you.

MR RING QC:

We'll hand them up. So finally, Your Honours, we say that properly interpreted MD15 means that Zurich's liability to pay the Body Corporate for loss caused by earthquake is limited by MD15 so that it doesn't commence until the amount at which the EQC's liability is exhausted and by the operative clause the policy schedule and MD25 special provision 6 so that the amount of this liability does not exceed the sum insured. And unless I can help you with anything further at this stage, those are our submissions.

ELIAS CJ:

Thank you, Mr Ring.

MR GODDARD QC:

Your Honour, it's never a bad idea to begin by asking why are we here and in the case of –

ELIAS CJ:

It's better to ask before you come.

MR GODDARD QC:

And it was asked, as I understand it although, of course, I wasn't directly involved in the asking as I didn't appear below, but my understanding is that the parties considered that it would be helpful to facilitate settlement discussions to know what the position would be as between them in the event that the rectification argument, the 100 million argument were not to succeed because that might well facilitate the resolution of the differences that arise. It was also drawn to the Court's attention that this is the question of the relationship between the sum insured and a policy drafted in this way and EQC cover is relevant to other cases before the Courts where this rectification type issue simply doesn't arise, so both because it's important to know what the position is if there's no agreement to a sum insured of 100 million and because the issue arises shorn of that additional issue – in other cases when ACM propose a preliminary issue that was agreed to by the other parties. It was agreed to on the basis that for the purpose of resolving this preliminary issue, the sum insured would be taken to have been agreed as $12.95 million. My learned friend took the Court to the memorandum recording that and it's perhaps also helpful to draw the Court's attention to the fact that that's recorded in the High Court judgment, that's in volume 1 under tab 20, I should say, under tab 20 and at paragraph 2 from page 104 of the bundle. The Court notes that the sum insured under the policy is agreed for present purposes to be $12.95 million, so the whole of this argument proceeds on the basis that there is no agreement to 100 million as the sum insured. That was has been agreed as the sum insured is 12.95 million and it goes on to ask what that means in terms of the operation of the policy and the interaction between the policy and EQC cover. What that means and I'll come back in a bit more detail later to the question of what the relevant context is when interpreting the policy, but what certainly is not part of the context is any agreement on the 100 million that's expressly excluded from the scope of this preliminary issue then rather the parties and the Courts below and in my submission, this Court all need to proceed on the basis that there's an agreement on a sum insured of 12.95 million. So that's why we're here because it's useful to know what the position is if what the parties was a sum insured of 12.95 million.

Second, I think it's important to be clear on the process by which the contract came into existence and this I think answers Your Honour, Justice Glazebrook's question and part about the relevance of the premium calculation but, of course, there are some rules restricting the extent to which reference to pre-contractual negotiations are admissible, it's not entirely easy always to discern exactly what those restrictions are in light of the different views that have been expressed by the Court in *Vector*, but that they are to some extent admissible for some purposes and not for others I think is clear. However, we don't fact that difficulty in relation to the premium calculation because of the way in which this contract came into existence and it's perhaps worth looking at what is, in my submission, the relevant offer by Zurich and that's in volume C under tab 4.

So there's background discussion obviously on the wording which will be used where Brokernet broker brings a proposal to Zurich against that backdrop and against the backdrop of entry into many other policies. What we have is an offer, that is –

GLAZEBROOK J:

Can we just make sure I'm on the right page.

MR GODDARD QC:

Page 36 of the bundle, Your Honour, it's a little email so volume C, tab 4, page 36. This is Zurich's offer.

GLAZEBROOK J:

Yes.

MR GODDARD QC:

And what it says, so it's from Mr Barrett of Zurich to Mr Thompson at ACM, ACM the broker representing the Body Corporate and the offer is to confirm rates as 0.050% non-EQ and top-up EQC at 0.020% on excess as is discussed. So this is the offer and it was accepted by a communication back saying, "Yes, we want to write cover on this basis," in fact, there was a little bit of haggling about rates and other things to be included, but this is where the price comes from. The price is meaningless without a shared understanding of the calculation that will be undertaken using those rates. You need to know what's going to be done with them and everyone did know what was going to be done with them which is that they would be dropped into a spreadsheet of the kind found under tab 7.

So the offer, which is the rates, necessarily pulled in by reference the premium calculation, that's what produced a price for the cover which ACM could communicate to its client to say, "So, do you want this?" then the answer comes back, "Yes," and what you get back to Zurich is "yes" and then that produces a, in the fullness of time, a policy schedule or it ought to although we don't actually have that in exactly that form for the 2009/2010 year and it produces a, links into the wording which has previously been discussed.

So if we look at this premium calculation sheet which the evidence shows is prepared by the broker and subsequently sent to Zurich for checking, but only I think after the contract –

GLAZEBROOK J:

Why do we need this? I don't understand. Are you suggesting this is part of the contract or it's just admissible because it's offer and acceptance –

MR GODDARD QC:
Yes, it's part –

GLAZEBROOK J:
– but that would normally, but, well, well, how is it part of the contract? I mean it might be irrelevant anyway because it might be, the premium calculation is actually at page 94 to 95 which says it's a schedule and not the policy although and addressed to Zurich but it's hard to know – that's not the Brokernet certificate so, in it's actual form.

MR GODDARD QC:
That – I think it's common ground that this is a, the equivalent to the Brokernet certificate for the nine, 10 year.

GLAZEBROOK J:
Well, in that case it probably is irrelevant because you do have the premium calculations on page 96.

WILLIAM YOUNG J:
This is the –

MR GODDARD QC:
Yes.

WILLIAM YOUNG J:
– the preceding year though, isn't it?

MR GODDARD QC:
That's right, Your Honour but, of course, the structure once understood all that happened the next year was, there was a modification to one of the rates and some additional minor refinements but the basic structure stayed the same.
1230
It's really that you can't understand the meaning of the offer without knowing how it's going to be used.

GLAZEBROOK J:

Well, I don’t really care what the meaning of the offer is normally. What I would care is what the written contract said when I’m being asked to interpret that because anybody who is wanting to take an assignment of the contract, for instance, is not going to, well, it would be rather unfortunate if they have to go back and find out what the original offer and acceptance were and any haggling in between in order to find out what the meaning of a contract was.

MR GODDARD QC:

It would be I think surprising if the formal documents that were issued were not consistent with the offer and acceptance that brought the contract into existence. With insurance, what you usually have is the offer, an acceptance and then subsequently the issue of documentation to record the terms of an insurance policy. I mean that’s –

GLAZEBROOK J:

Well, but you do with lots of contracts –

MR GODDARD QC:

Yes.

GLAZEBROOK J:

– and it might be surprising but it doesn't necessarily make it admissible, does it?

MR GODDARD QC:

I think it does, Your Honour, I think the offer and acceptance by which a contract comes into existence are admissible and this is the point the Court, this Court made in *Vector* that there wasn't a problem with referring to the original letter from NGC, as it then was, to BoPE because that was the offer which was then accepted and you can look at the offer and acceptance when you’re trying to interpret the contract. Indeed, at least some members of the Court said where what you have is an exchange of correspondence with reference back. You have to read the whole of that exchange of correspondence in order to understand what the final contract is and how the language is used.

ELIAS CJ:

But it’s a little different though.

MR GODDARD QC:

Yes, this is different –

ELIAS CJ:

Yes.

MR GODDARD QC:

Yes, this is different because this is actually …

ELIAS CJ:

There's no reference back.

MR GODDARD QC:

No, but what follows is simply a documentation of the effect of what was agreed by this short exchange –

ELIAS CJ:

Mhm.

MR GODDARD QC:

– and there's been no suggestion that there's any inconsistency, so the short point again is that when this, first of all, when this communication was sent, Zurich knew exactly what they meant by saying that the rates would be 0.050 non-EQ and top-up EQC at 0.020, they knew that a price for the cover would be calculated by the broker and passed back to the broker's client based on multiplying the 0.050 by the sum insured and the top-up EQC, and I'll come back to that phrase, at, of 0.020 by the difference between the sum insured and the maximum EQC cover for buildings with 68 units in and that is certainly part of the shared background knowledge of the parties but, in my submissions, actually more than that here. It's an integral part of the contract formation process. It's – if one needs –

ELIAS CJ:

But the issue really is what, what was meant by top-up EQC.

MR GODDARD QC:

It is and I'm going to, I'm going to come to that because that's critical.

ELIAS CJ:
Yes.

MR GODDARD QC:
Essentially, in a nutshell, what Zurich says is that as a matter of commercial common sense and as reflected in the way in which cover was priced, although that's only one element of the commercial context, one element of the commercial common sense. What was sought was top-up cover to ensure that the Body Corporate had the same level of insurance cover for all risks, that it didn't have a lesser level of cover for EQC and I think it's helpful to just think through again what the objective of this –

ELIAS CJ:
Same level of cover but no more, is that your point?

MR GODDARD QC:
Yes, because they didn't want to pay for more. The more cover you get the more you pay for, normally. If you want more cover you have to pay your insurance company more for that and so you don't normally see people seeking cover in excess of what they require and it's common ground in relation to fire, the Body Corporate didn't and this picks up the next important point which is that it's common ground I think between the parties that in order to understand the commercial context one has to look at the context at the time the contract's entered into and what was the purpose of the agreement and the commercial backdrop to that agreement at that time, we don't bring hindsight to bear in relation to the fact that now it's going to cost more. But insurance is all about risk, and again I think my friend agreed with this, that what this contract does is allocate risk.

So if we start with all perils other natural disaster, fire, floods, all those things, what the basic deal was between the parties was in the light of the replacement cost valuation for our year of 12.95 million, that Zurich would be on risk for the first 12.95 million of loss, ignoring excesses because that's a distraction we don't need to worry about, and after that the risk would lie with the Body Corporate, and that comes back to the question Justice Arnold asked just a moment ago about the relevance of assumptions about replacement value. Of course one doesn't proceed on the counterfactual assumption that the replacement cost was 12.95 million, and that's not what commercial parties do. Commercial parties know that what they've obtained is an estimate of the cost of replacement, and they also know that there's a risk they'll be wrong. And so what you're looking at when you look at this contract is how the risk of that being wrong is allocated, and it's absolutely clear, it's common ground, that in relation to perils such as fire the risk of the 12.95 million being too low is retained by the Body Corporate, no dispute about that. So what you had was the Body Corporate going out the market saying, we want cover up to what we've been told is the value of this, with an allowance for demolition and inflation, 12.95 million, will you agree to provide cover for those perils to that level? And you've got Zurich and a couple of other insurers coming back and saying, yes, and this is our price, and there's no dispute but that if in fact, if the buildings had burned down and it was going to cost 14 million to rebuild them, then the risk of it costing 14 million rather than 12.95 remained with the body corporation, where it would have been in the absence of any insurance. They weren't looking to shift that risk, they weren't offering to pay to shift that risk.

Now, in the absence of the Earthquake Commission Act that would have been the end of it. They would have bought all risks, all perils, material damage cover to $12.95 million, and they would have been entitled to be paid $12.95 million, if any peril materialised causing loss equal to or greater than that. If it caused loss greater than that, that excess is the Body Corporate's. But then we've got the Earthquake Commission Act, and the parties needed to accommodate that in their bargain –

WILLIAM YOUNG J:

So, just, are you referring here to section 18 of the Earthquake and War Damage Act?

MR GODDARD QC:

I'm –

WILLIAM YOUNG J:

As to the position prior to 1993?

MR GODDARD QC

No, I'm saying suppose there just was no such thing as Earthquake Commission legislation.

WILLIAM YOUNG J:

Oh, I see, okay.

MR GODDARD QC:

No statutory regime for earthquake cover or natural disaster cover. So then what you've got is a desire to insure against all risks to 12.95 million, and you'd have a single premium. But the world's messier than that, which is why we're here. What you have is a statutory regime – and I'll need to talk a little bit about its purpose and the language in which it's framed – a statutory regime for ensuring that so far as administratively workable home owners, dwelling owners, will be insured to a sufficient level to be able to rebuild a basic dwelling, and I'll take the Court to some of the legislative history material which makes that policy very clear. And the way that's achieve, as my friend explained, is to say that whenever you insure against fire, which most people in New Zealand do, then automatically, like it or not, you get compulsory natural disaster cover from EQC, you have no choice about that. You have it to the level you're insured against fire or to the 100,000 cap or, in some circumstances, to a level specifically stated in the policy as the amount of statutory cover that you want, but there's a minimum you can't below which is basically $1000 per square metre, you have to buy at least that much cover and that's to manage the moral hazard of people not insuring against natural disaster then looking to the Government to rebuild their houses and that points is expressly made in the legislative history, it's not I think controversial.

So because they were insuring their buildings against fire for $12.95 million, they were deemed to have statutory insurance to $6.8 million from EQC. The insurance company was required to pay a premium to EQC and was entitled to recover that from its insured.

Well, what does that mean for the basic bargain? That means that there's no point in paying the insurer to provide that 6.8 million of cover because you have to pay EQC to provide it; no point paying for it twice. So obviously you don't want your insurer to provide that first layer, as my friend says, of cover. What do you want from your insurer? Well, if you have dwellings worth more than 100,000 and you think that there's a material risk of earthquake damage against which you want to protect yourself, and there might be some parts of the country where you didn't, but the majority of insurer's do throughout New Zealand, then you say, well, I don't want to end up with less cover for earthquake than for other risks, I want my cover topped up, topped up from where to where, topped up from the level of cover provided by EQC to my desired level of cover. That's what top-up cover is about. Top-up cover gets you from the EQC cover to your desired level of cover.

What was the desired level of cover here? It was the level of cover that the Body Corporate sought in relation to all other perils above which it did not seek cover above which it wasn't willing to pay for cover and that produced the perfectly sensible result that if, for example, the buildings burned down, it didn't matter whether they burned down because of a fire started by a road works contractor cutting through a gas main outside or because the fire was started by an earthquake breaking a gas main and starting a fire. Included, and I'll take the Court to the definitions in the Act in a moment, but natural disaster is defined to include natural disaster fire and that's because and in the previous Act, 1944 Act, earthquake damage was defined to include earthquake fire damage and that's because earthquakes have often historically been followed by serious fires and the 1906 San Francisco earthquake history books suggest that the fires raged for four days and nights after that earthquake and that the fires caused about 90% of the damage suffered by San Francisco in 1906, so it's recognised form of damage following on from earthquake is earthquake fire. Our Act expressly defines fires relating to earthquakes. So whatever the cause of your fire, if your building burns down whether it's because of a contractor or because of an earthquake, the Body Corporate had obtained the level of cover that it wanted which was $12.95 million. On my friend's argument, what you had was the Body Corporate going out in the market to obtain and Zurich agreeing to provide cover up to the 12.95 million cut off for fire and other perils outside natural disaster with the Body Corporate accepting the risk beyond that, but the Body Corporate saying, "Oh, but hang on, in relation to natural disaster we want to buy $12.95 million worth of cover on top of what EQC provides. We want to insure to a total level of $19.75 million." Now, the only significance of $19.75 million is that it's the number you get if you had the EQC cover to the 12.95 million. It bears no relationship at all to any valuation of the buildings, any estimate of their value, it would be a completely arbitrary point to which to insure, and the Body Corporate wasn't in the business of insuring to an arbitrary level divorced from what it believed its buildings to be worth, it was willing to accept the risk. I've attempted, rather than my usual, I'd like to say one, but it's usually two pages of bullet points, in this occasion to reduce my case to a picture on one page, and ultimately Your Honours will be the judges of whether that succeeded, as of so much else, but if I could provide the picture through Madam Registrar to the Court?

So if we look at the first column, it's common ground that this is the deal, the bargain, for all perils other than natural disaster. Zurich provides cover up to the estimated replacement value, including demolition and inflation allowance, of 12.95 million. Above that, the green space in that first column, the Body Corporate's at risk. So if it costs more in fact to rebuild the buildings after a fire, it costs 15 million, then they're up for 2.05 and so on, and there's no doubt about that. What Zurich says happened as a result of the policy accommodating EQC cover is that the party said, "Well, hang on, Body Corporate has to buy cover from EQC for the first 6.8 million of loss, so there's no point paying Zurich for that, but that's not as much cover as we want, we want to be covered up to our estimated replacement value, we're only willing to take the risk beyond that, and so we will buy from you the red cover in the second column, which fills the gap between that maximum liability and the estimated RV," and there certainly are circumstances where in fact the dollar value can be greater than that, this shows what happens on a total loss. I'll come back to those circumstances.

What my friend is arguing is that the position at the date of contract was as shown in the far right-hand column, that EQC had been paid, pursuant to the compulsory statutory insurance to provide $6.8 million of cover, and that the Body Corporate had sought and Zurich had agreed to provide an additional 12.95 million of cover, increasing the Body Corporate's insurance cover to $19.75 million and leaving the Body Corporate at risk only above that level. But there's not a whisker of a suggestion that the Body Corporate wanted more cover in respect of natural disaster than other perils, my friend nowhere identifies any rational reason for wanting more cover in the case of natural disaster than other perils, no one's suggested that Zurich should have understood that it was agreeing to provide cover to a total level of 19.75 million. As the Court of Appeal said, "Where has this number come from?" It bears – there's not a, you know, a 10 percent or 20 percent allowance for inflation or for increased regulatory costs, it's a random number so far as the value of the buildings is concerned, no reason to think that there was a desire to purchase that random level of cover, no reason to think Zurich was supplying it.

So, in terms of what Lord Walker, for example, in *Chartbrook Limited v Persimmon Homes Limited* [2009] UKHL 38, referred to as, "The general structure of the parties' bargain," the basic architecture of the deal, it's common ground that the first column's right, that's the basic architecture of the deal, Zurich on risk up to 12.95, Body Corporate on risk above that level, it took the risk of the estimate being wrong, knowing that that's possible. What Zurich says is that the architecture was modified to take into account the statutory cover, in the way shown in the second column, by modifying it to ensure that the Body Corporate didn’t pay twice for that base level of cover, and that it still had the same aggregate level of cover that it only remained on risk from the same point upwards, makes perfect sense, absolutely understandable why that's what it would want, absolutely understandable why insurers would offer to supply it, it’s topping up from the blue to the green, where they want to be. What makes absolutely no sense what, there’s no commercial logic to support, is the arrangement shown on the far right-hand side and, as I said a moment ago, no one, neither my friend nor the High Court, has suggested any rational basis for seeking to achieve that outcome. So that's the basic architecture of the deal, that explains why the, what would otherwise be a very simple insurance contract, “We’ll pay you a premium, we’ll get 12.95 million of cover, we’re on risk above that,” has been adapted to reflect the compulsory EQC cover, and it explains how it’s been adapted to reflect that.

What does that mean in terms of how the policy works? Well, clause MD15 doesn’t exist in isolation, I think much is common ground, and what it does is modify the operation of the other provisions of the policy, and it talks about limiting the insurer’s liability in respect of natural disaster. It limits it because it takes what was otherwise the red block and it carves out the amount paid by EQC. So when it says, “The insurer’s liability is limited to the excess over EQC,” what it says is, “That red thing over there in the far left-hand column, if you’ve got natural disaster it’s limited. It’s limited to the amount of that liability in excess of what EQC pays, the blue,” and that produces the desired commercial outcome. So both the text, which talks about limits, and the commercial purpose of the transaction –

WILLIAM YOUNG J:

So, but it’s still a bit more difficult than that on the text though I think, isn’t it?

GLAZEBROOK J:

You might need to take us a bit more closely to the text, at least from my point of view.

MR GODDARD QC:

I’m going to. This is the helicopter overview.

ELIAS CJ:

And indeed it, all of this, depends on the assumption this is all a matter of what the parties contracted for, and you're going to have to sheet us back to the effect of the legislation as well.

MR GODDARD QC:

The legislation's an important part of the backdrop, but –

ELIAS CJ:

I wonder whether it is just backdrop though.

MR GODDARD QC:

I think it's common –

ELIAS CJ:

Because on one view, the bargain is just the red block, the big red block, the block which is identical in the first and the third.

MR GODDARD QC:

It's common ground that the statute provides for the blue block –

ELIAS CJ:

Yes.

MR GODDARD QC:

– and it's common ground that the statue permits insurance to be provided on the basis that it cuts in only after the blue block –

ELIAS CJ:

Yes.

MR GODDARD QC:

– has done its thing.

ELIAS CJ:

Yes.

MR GODDARD QC:
It's also common ground that the Act doesn't tell us anything about how much top-up cover is provided by a policy. You could provide a finite dollar amount, or you could say, "We'll provide top-up cover above the EQC cover of $1 million," or you could say explicitly, "We'll provide top-up cover between EQC cover and the sum insured," or you could say, "We'll provide top-up cover from the EQC cover for an incremental amount equal to the other sum insured." The question of whether that would be a sensible thing to say, and I'll come to that, and it's whether it's what it says. All of those are possible, Your Honour, and the Act doesn't help us to choose between them.

ELIAS CJ:
Right. Yes. But you do have – yes, it does get back into the contract…

MR GODDARD QC:
Yes.

ELIAS CJ:
Yes.

MR GODDARD QC:
We're driven back to the contract, because all of these arrangements are open under the Act, and the question is what happens. There is, there are two reasons I'm going to need to go to the Act and its legislative history though. One is just to look in a bit more detail at some aspects of section 30, and the other is to deal with the argument which the High Court was attracted, by, it was a key part of its reasoning, that if the layers worked the other way round you get a total of 19.75 million, so it would be odd if you got less when you invoked subsection (2) and flipped them, and that, in my submission, was wrong, and I had thought that my friend agreed, based on a passage in his submissions, but it seems not, based on the oral submissions today. But the High Court's assumption on that is wrong and I'm going to need to tease through that a little bit.

Perhaps just in a nutshell, it stems both from the language of section 30, which I'll go to, but also the purpose of the legislation, which was to make sure that people had enough insurance cover to be able to rebuild a modest dwelling. The state had no desire to be providing additional insurance for better-off people above that base level of a hundred thousand per dwelling, and that's very clear in the legislative history and it's reasonably apparent from the language of the Act and from other provisions of the Act.

Let me see if I can do the provisions of the Act before 1 o'clock, just so we have that statutory framework straight. So that's in my authorities at tab 1. First of all in section 2, "Interpretation", I will just draw the Court's attention on page 4 of the Act to the definition of "natural disaster" and, as well as earthquakes and various other disasters in paragraph (a), what we have in (b) is, "Natural disaster fire" and that's important when we start thinking about allocation of risk and what is and is not rational. Natural disaster damage, "Any physical loss or damage to the property occurring as the direct result of a natural disaster," that's all we need to worry about for now. And then over the page, "Natural disaster fire," is defined to mean, "Fire occasioned by or through or in consequence of an earthquake, natural landslip, volcanic eruption, hydrothermal activity," or so on. So if you live in an apartment building next door to a restaurant, there's an earthquake, things fall on their cookers and a fire starts, that's a natural disaster fire, and if the fire spreads to your building EQC cover bites, and that's the classic San Francisco earthquake issue, but it's happened in many others as well.

So that's the sort of natural disaster we're concerned with, including natural disaster fire. And then my friend took the Court to section 18 on page 15 of the Act – but it is perhaps just worth looking at section 18, because 30 refers back to it. So, subject to any regulations and schedule 3, we'd have a contract of fire insurance, a residential building, "Shall, while that contract is in force, be deemed to be insured under this Act against natural disaster damage for its replacement value to the amount which is the least of those three amounts."

Just picking up Your Honour Justice McGrath's point about potential increase of the hundred thousand cap, paragraph (c) contemplates that that could be increased over time by regulations. So there was a mechanism incorporated in the Act for ratcheting that up to reflect inflation and, similarly, the minimum per square metre amount in subsection (2), but that's never been done. Successive governments have made a conscious decision not to take action on that and let that move backwards, limiting effectively further their liability in terms of real value over time. But it was contemplated that there would be a simple mechanism for increasing it if the Crown so wished.

So we’ve cover up to this – and for present purposes it’s paragraph (c) that's important, a hundred thousand per dwelling. Importantly in terms of what – and then residential land, there are certain caps, we don’t need to worry about land – personal property, section 20, a maximum of $20,000, paragraph (b).

When we get to section 22, what we see is voluntary insurance against natural disaster damage. The Act gives the Commission the power to enter into contracts to insure buildings, land or personal property, “For such period and to such amount and upon or subject to such conditions as the Commission thinks fit,” but the qualification in brackets is extremely important. “Not exceeding the amount which would apply if the property were insured under any of sections 18 to 20.” The Commission’s not allowed to provide cover over that cap, and that's again because of the policy that the Government should not be in the business of providing and underwriting cover about the amount necessary to rebuild a modest home.

WILLIAM YOUNG J:
So who was this, who’s this aimed at? Mortgagees would normally be covered by the policy…

MR GODDARD QC:
It created the possibility of writing cover on different terms from those provided for in the Act, and it was also designed to deal with situations where it wasn’t clear whether or not the Act applied. There are a range of buildings where the application of the Act poses difficult issues, and some of those will no doubt find their way to the Court in the fullness of time, but, boarding houses are really hard. How independent does every room need to be in terms of facilities before it becomes “a dwelling” and you’ve got lots of dwellings rather than arguably one dwelling or maybe none, because it’s a motel, and it was envisaged that this power, which is a power to write – if Your Honour looks at subsection (2), you can write for the insurance of residential buildings that are not insured under 18 to 20, or in substitution for insurance. So this enables you – oh, and it also enables cover to be written for earthquake without there being fire cover, that's the other important situation. You don’t have automatic cover if you don’t have fire cover, or you might have fire cover to a lower level than the threshold prescribed in the Act, but the Commission can write cover up to the level prescribed in the Act but not more, for natural disaster. So this was intended to provide some flexibility to manage a range of boundary issues effectively.

So, importantly, the Commission's hands were being tied in terms of the level of cover it could provide. It could never agree to provide cover over and above the section 18 to 20 levels.

I see it is 1 o'clock…

ELIAS CJ:
I think – I have an appointment, so…

MR GODDARD QC:
Yes, and I'm mid-flight, it's not going to finish soon, I'm afraid.

ELIAS CJ:
All right, thank you. Quite soon, perhaps. Not within five minutes though, no.

MR GODDARD QC:
That's what I meant, Your Honour.

ELIAS CJ:
All right, we'll take the adjournment now thank you.

COURT ADJOURNS: 1.02 PM
COURT RESUMES: 2.15 PM

MR GODDARD QC:
Your Honour, I was in the Act and I was just coming to the end of some comments on section 22 on page 17, the voluntary insurance provision. What I particularly wanted to emphasise was the limit on the voluntary insurance the Commissioner can write. It can't exceed the amount which would apply if the property were insured under any of sections 18 to 20, that's in brackets and that reflects a policy that the Court will see when we go to the legislative history of not letting the Commission write top-up cover. It's only providing that base cover. It's not, as an automatic operation of the Act providing top-up and it can't voluntarily compete with private insurers to write top-up cover and yet on my friend's argument, in the absence of clause invoking section 30(2), that's exactly what it would be doing, it would be topping the EQC so it would be topping up the Zurich cover but that's actually contrary to the policy of the Act.

WILLIAM YOUNG J:
That's your section 30(1) argument?

MR GODDARD QC:
Yes and I'll come to that in a moment. And it also goes to why the High Court was wrong to see an anomaly depending on the order in which the two sets of cover responded.

Section 23, I just want to deal with very quickly, that provides for premiums to be paid and that was set at the level of – in regulations again, picking up on His Honour Justice McGrath's point, where did the flexibility come from over time, premium rate to be set in regs. In fact it was set at five cents per $100 from 1993 all the way through the period we're concerned with until it was increased on 1 February 2012 to 15 cents. So a big jump. It had been left at the same rate for many years like all the other figures in the Act. The next –

WILLIAM YOUNG J:
Sorry, so at the time it was five cents?

MR GODDARD QC:
It was. Five cents per $100.

WILLIAM YOUNG J:
Did that figure actually appear anywhere in the calculation?

MR GODDARD QC:
Yes Your Honour, it's in the premium schedule.

WILLIAM YOUNG J:
Okay.

MR GODDARD QC:
And it also, yes, it appears in a couple of places, including the premium schedule. Perhaps just looking at that very quickly. If we go to the 2010 premium calculation, which is in volume C, tab 15, page 61, what Your Honour will see, the rates quoted turned into by the Body Corporate's insurer. You've got the building total sum

insured of 12.95. That's made up of three elements. The reinstatement estimate of 11.6, the inflationary provision –

GLAZEBROOK J:

Sorry, whereabouts are you?

MR GODDARD QC:

I'm sorry Your Honour. I'm in that table on page 61, under tab 15, sorry I went there a bit fast. So tab 15, premium calculation schedule, and then we've got that 12.95. We've got a reinstatement estimate of 11.6. That's what the valuer CBRE thought it would cost to rebuild the building at the start of the relevant policy period. There's an inflationary provision, as my friend explained, allowing for increases in costs of construction during the policy year and there's a demolition estimate. Those are the three figures that add up to 12.95. What we then see is Earthquake Commission and then in the column for units there's 68, because there are 68 dwellings, 6.8 million at .05%. So Your Honour that's the five cents per $100.

WILLIAM YOUNG J:

Yes.

MR GODDARD QC:

So that flows through to an EQC, if we go to the EQC column, of 3400.

ELIAS CJ:

Where is…

MR GODDARD QC:

Across about five, there's a column headed, "EQC". This is the money EQC gets –

WILLIAM YOUNG J:

For the earlier year you can see that at page 96 in a slightly different way but it's the same figure.

MR GODDARD QC:

Yes Your Honour because the premium rates stayed the same and the amount of cover provided by EQC was the same.

WILLIAM YOUNG J:
Yes.

MR GODDARD QC:
The amount provided by Zurich moved about, corresponding to the change in the replacement value estimate, consistent with the logic of the policy that I've been explaining, but not the EQC amount. And then if we just run there what you see immediately under, still on page 61, "RE less EQC," that's the real estate estimate, less EQC, that's 4.8 million and then the same full inflationary provision and the same demolition estimate. So there's an inflationary provision that's still calculated by reference to 12.95, demolition estimate and those are multiplied by the negotiated rate of .0183. And it's perhaps worth noticing that the inflationary provision is multiplied a further 70% reflecting the fact that that's not relevant for the whole of the year. So Zurich was accepting a liability which would increase through the year, it was charging a premium for that as a separate application of the premium rate to the inflationary provision but at a, subject to a discount – a 30 percent discount, a 70 percent multiplier because it didn't expect to be on risk for that for the whole of the year, it would happen as costs crept up.

And then you've the fire service levy in there as well. And that all then gets calculated out, split out between the various recipients and so it goes. I – so, so you've got – and I should point out that if you add up that 4.8, threatening 575 and the 775 you get to the famous 6.15 million. So it's very clear that the way the price has been set and both parties knew this, was to take the rates, apply the non-EQ rate to 12.95 million, made up of these three components and apply the top-up EQC rate to a reduced reinstatement estimate achieved by subtracting the EQC amount, RE less EQ, why would you do that unless it had some relevance to some correlation as the Courts – well I put it to the amount of cover being provided and then to the inflationary provision and demolition estimate.

GLAZEBROOK J:
Can you just take me through that again because this is a premium for everything, isn't it, including fire –

MR GODDARD QC:
And EQC's earthquake cover and Zurich's earthquake cover, it's everything.

GLAZEBROOK J:

Well yes I understand that so, but where do they split out earthquake cover?

MR GODDARD QC:

So you’ve got –

GLAZEBROOK J:

I can see the “Less EQC” but –

MR GODDARD QC:

So you’ve Earthquake Commission 6.8 million?

GLAZEBROOK J:

Well, well I understand, yes I understand that.

MR GODDARD QC:

And then the next line is, “RE less EQC,” so that’s achieved by taking the real estate estimate of 11.6 and subtracting the Earthquake Commission amount of 6.8 and that gives you 4.8.

GLAZEBROOK J:

So they’re adding on earthquake to it effectively?

MR GODDARD QC:

Yes. They’re adding another 4.8 million.

GLAZEBROOK J:

So effectively the first three are only for fire, is that the –

MR GODDARD QC:

And all perils that are not natural.

GLAZEBROOK J:

I mean, how would I know, but is that what the submission is, that the first three are only for fire and not for earthquake?

MR GODDARD QC:

They're for risks other than natural disaster and we see that in the way that this rate was quoted which was as non-EQ –

GLAZEBROOK J:

Well that's assuming that we look back at an offer of acceptance rather than contract?

MR GODDARD QC:

I'm not aware of any authority that suggests that the way in which the price was calculated, if it's known to both parties, is not relevant context. I think that must be just about the most fundamental –

GLAZEBROOK J:

Put it the other, where's the authority that it is relevant context. How the price was calculated, because that strikes me as negotiation, the price could have been calculated by a back and forward in terms of, well I think it should be X and I think it should be that. I don't think you've got the calculation right, I think it should be something else.

MR GODDARD QC:

It could be, but what we know is that in this contract, from the evidence, it wasn't that there was a method of turning rates into a total price which was known both to Zurich and to the Body Corporate's agent and that as a result all Zurich needed to do was advise two rates to the broker and the broker could, by this process of analysis, turn that into a total price to be paid. So that wasn't the subject, how it would be turned, how the rates which could be negotiated, would be turned into a price, was not the subject of a negotiation. We know that was a matter of fact. We know that there was a template which both used in the same way to generate a price from a rate and that's common background. It would have been impossible for – put it another way, if they hadn't shared an understanding of how to turn rates into a price, there would have been no way in which ACM could pass on Zurich's pricing, and the other insurer's pricing, to its client in a way that was comprehensible to the client. This is about as clear an example of a private dictionary but it's a – as one can get.

GLAZEBROOK J:

It might be clear to you. I'm not entirely sure it's clear in terms of – so the first three are pricing other than in the statement and the second is the extent to earthquake extension that's the –

MR GODDARD QC:

The first three used the rate that was quoted for non-EQ …

WILLIAM YOUNG J:

So that's five cents in every 100?

MR GODDARD QC:

No, sorry Your Honour, that's 6.25 cents. The reinstatement estimate inflationary provision and demolition estimate.

GLAZEBROOK J:

That goes back to your offer letter, is that right?

MR GODDARD QC:

That's right.

WILLIAM YOUNG J:

Right.

GLAZEBROOK J:

So your offer letter, where is it again sorry?

MR GODDARD QC:

For the first year, we're now in 2010, so the letter advising the rates for 2010 is in fact at tab 12 –

GLAZEBROOK J:

Page 36?

MR GODDARD QC:

Yes, the original one is at page 36 Your Honour.

ELIAS CJ:

So page 36 is the covering letter for 61 is it?

GLAZEBROOK J:

Yes, that has something different though.

MR GODDARD QC:

Yes so I'm looking, so this was for the –

GLAZEBROOK J:

So page 36, the rates don't correlate to this page 61 list?

MR GODDARD QC:

No that's because it's the – that's because it's a different Your Honour, I was just going to that.

GLAZEBROOK J:

Well I can understand that but they seem to be totally different, don't they?

MR GODDARD QC:

No it's the same – so what we, there was a quote. There was a calculation which we see under tab 7 which used that .05 rate for the non-EQ cover but as the evidence explains there was a negotiation to reduce the top-up rate down from two cents to 1.83 cents.

GLAZEBROOK J:

So do we find that at 96 for this year, for this particular year that relates to page 36, is that…

MR GODDARD QC:

Yes, 96 correlates.

GLAZEBROOK J:

So we've already got a negotiation reducing the page 36 phase?

MR GODDARD QC:

Reducing the rate which was then applied in an agreed way which was never the subject of a negotiation to produce a price. So – and this is explained in the evidence and it's uncontroversial. Everyone knew how these rates would be used. They had the same understanding of how the rates would be used to produce a number of dollars, $21,000-odd for that year. So – and then what I was taking Your Honour to was we've been looking at the 2010 premium calculation because that's the year to which the claim relates and if I take Your Honour to tab 12, how was the new price negotiated for the following year. We see this under tab 12, page 52. The Zurich writes back to ACM to say like another Body Corporate the sum insured has come down. With this one, Salisbury, there were a couple of claims last year so our terms will increase from .05 to .0625. So that's for the non-earthquake, because there were a couple of claims, and if we go to the premium calculation what we then see is ACM knowing what to do with that. Knowing without being told more than what they need to do is drop that .0625 number into the first three rows of the calculation on page 61.

So this really is a, it's a shared spreadsheet, which is a form of shared dictionary. What do you do when you're told a rate is going to go from .05 to .0625? You drop that into these three rows, which produces a price for non-earthquake cover, then we see the row, which is the Earthquake Commission's cover of 6.8. Then what are the next three rows doing? The next three rows begin with a straight subtraction. It's the figure that's arrived at by subtracting the Earthquake Commission figure from the reinstatement estimate four rows up of 11.6. You get 4.8.

ELIAS CJ:

Sorry, where are we now?

MR GODDARD QC:

Sorry Your Honour. I'm on page 61.

ELIAS CJ:

61 still?

MR GODDARD QC:

I'm on page –

ELIAS CJ:

And where's the – which are the…

MR GODDARD QC:

So we're in the, "Sum insured" column.

ELIAS CJ:

Yes, I see.

MR GODDARD QC:

And after the Earthquake Commission row, which is the 68 lots of 100,000, so 6.8 million, we then have an RE less EQC. It's described as that subtraction and that's what it is: you take the reinstatement estimate, you back off the EQC cover and you get another number, and then you carry forward the inflationary provision for the year and the demolition estimate. To all of those you apply a different rate, the rate for top-up EQC. So the rate for top-up EQC is applied to those three figures, which total 6.15 million. So there was no negotiation about how you did this calculation, no uncertainty on the part of either party about how it was to be done. There is room for negotiation about what rate you're going to charge for these different levels of cover but what you do with them is understood. And that's then worked through in terms of who gets the various amounts of money, whether it's the insurer or EQC or the fire service getting the fire service levy. All of that drops out of there. But what this meant was that you could say to someone 0.0625 and that meant a certain number of thousands of dollars. So it's a classic example of a shared translation tool, a shared dictionary. It's how you translate a rate into a price. And there's no suggestion that that be negotiated. It was something which was used again and again for all contracts of this kind. That's what the evidence explains.

ARNOLD J:

So when the broker went to the market to get the quotes originally, were all the quotes in this format? In other words, they were just given five cents?

MR GODDARD QC:

I think that's right. I –

ARNOLD J:

Well, because the evidence –

MR GODDARD QC:
From of the evidence. I'd have to check in the evidence. I think that that's right. It's certainly the case that Zurich's was only provided in that form.

ARNOLD J:
Right.

MR GODDARD QC:
There was no other way of understanding what Zurich's quote meant except by dropping it into this pre-existing shared calculation framework. And there's evidence about how after the event, after the deal was done, it would be sent to Zurich for checking, but Zurich would often, you know, be already on cover, on risk by that stage.

So – I was just responding to Your Honour's question about whether the 0.05 turned up somewhere and that's where it turns up.

So you have conveniently on one page all the different things that have been for and the assumptions that underpin how much you pay for them.

And then I think we can turn to section 30, insurance otherwise than under this Act. Subsection (1) needs to be read more carefully, more slowly than my friend did this morning. it begins by saying, "Where on the occurrence to any property of natural disaster damage against which it is insured" let's take section 18, under section 18, so that's where you've got natural disaster damage to which property is insured under section 18, so that's up to 100,000. If we take one dwelling, let's assume just one dwelling. Let's put – got one dwelling. Where you've got the occurrence of natural disaster damage against which the dwelling is insured, so that's damage up to 100,000, "The property is also ensured the property is also insured against that damage", that's the damage within that window, "under any contract or contracts made otherwise than under this Act, the insurance of the property under this Act (to the amount to which it is so insured)", so that's within that 100,000 still, "shall be deemed to be in respect of so much of that natural disaster damage" again we're still talking about the natural disaster damage within the cap, "as exceeds the sum of— (a) the amount payable under the contract".

So all this is saying is if you've got damage to a dwelling within that first 100,000 and you're also insured against that first 100,000 under a contract of insurance, the contract will respond first and the insurance of the property under the Act to the amount which is so ensured, ie, to that 100,000, is in respect of so much of that damage, that damage within the cap we're referring to, that exceeds what's available under the contract. It's no more than that. And that's to ensure that the Act never does more than provide the owner with enough to rebuild a modest dwelling. If you've already got that from somewhere else the Act's not interested in you.

WILLIAM YOUNG J:
So let's assume that the house is worth $100,000. It's ensured for earthquake damage for $50,000.

MR GODDARD QC:
Under a private contract.

WILLIAM YOUNG J:
Yes, under a private contract. You say –

MR GODDARD QC:
That's not written as top-up cover.

WILLIAM YOUNG J:
No, not written as top-up cover. So section 30(1) applies. You say that –a slightly bigger figure.

MR GODDARD QC:
That one works well.

WILLIAM YOUNG J:
Yes. Then the first $50,000 is paid for by the insurer –

MR GODDARD QC:
Yes.

WILLIAM YOUNG J:
– and then –

MR GODDARD QC:

Then you ask how much of the damage covered by section 18 remains. 50 of that. You get 50 through EQC.

GLAZEBROOK J:

Well there you are paying twice, aren't you?

MR GODDARD QC:

And that’s why no one offers it and no one buys it. It’s not an accident. And this is the primary argument in relation to this, is that Zurich does not offer, the market does not offer, cover other than under subsection (2) because, yes, you’d be paying twice and there’s just no point in doing that.

GLAZEBROOK J:

Well that’s assuming that your interpretation of section 30(1) is the accurate one, which it hasn’t been interpreted that way and neither does it seem to have been the understanding of Parliament, as far as I can make out.

MR GODDARD QC:

There are three things in that. I think the first is, no, it doesn’t depend on my interpretation of section 35. My natural disaster damage –

GLAZEBROOK J:

Well it does really because, “Where on the occurrence to any property of natural disaster damage … the property is also insured against that damage”, if you read, “damage” as being the 500,000 damage that it has it’s not also insured under it is it? I mean you’re limiting it to the 100,000 because you say that’s the cover, but it’s actually talking about damage, not cover.

MR GODDARD QC:

I don't think there’s any difference between the parties –

GLAZEBROOK J:

Well…

MR GODDARD QC:

– about the fact that if you've got ground up natural disaster cover then EQC won't respond for the first hundred even though you've paid a premium.

GLAZEBROOK J:

No, it will respond afterwards if there's still damage left over. That's Mr Ring's argument on that.

MR GODDARD QC:

If there's a sum insured, which often there isn't in a dwelling policy. As His Honour Justice Young pointed out in that case it could never bite. So in the very common case – not universal, my friend's right about that – but the very common case pre-Christchurch earthquake, the sort of policies we all probably used to have until we've been made to go away and work out what sum insured we want, if you had replacement cover for your house with a private insurer and it applied ground up EQC cover would never be reached.

GLAZEBROOK J:

Yes, but people didn't necessarily have replacement cover. They might – they had fixed-sum insurance.

MR GODDARD QC:

Not mostly, Your Honour –

GLAZEBROOK J:

Well…

MR GODDARD QC:

– before Christchurch.

GLAZEBROOK J:

Well I don't know whether that's the case in Christchurch but certainly my experience is that a lot of people have had just sum insurance, not replacement cost.

MR GODDARD QC:

Some do.

GLAZEBROOK J:

Well in which case…

MR GODDARD QC:

But what I'm pointing out to Your Honour is that there are scenarios in which if 30(1) applies you would pay a premium to EQC but you would never get any cover from them, and it's common ground that that could happen. It would certainly be the case, you know, for all but the most severe…

GLAZEBROOK J:

Well I'm just looking really at your interpretation of section 30(1).

MR GODDARD QC:

That's what I'd like to come back to.

WILLIAM YOUNG J:

Can I just come back to what I think is a better example, because the maths works out better. Let's assume that the property, the house has got a replacement value of $200,000 and the section 30(1) insurance is $50,000.

MR GODDARD QC:

Sorry – right. So the house is worth 200.

WILLIAM YOUNG J:

Yes.

MR GODDARD QC:

Replacement value.

WILLIAM YOUNG J:

So there's a 50,000 –

MR GODDARD QC:

Private insurer.

WILLIAM YOUNG J:

– section – private insurer. House is written off.

MR GODDARD QC:

Yes.

WILLIAM YOUNG J:

You say that the $50,000 is private insurance is available plus only 50 from EQC?

MR GODDARD QC:

Yes.

WILLIAM YOUNG J:

And as I think Justice Glazebrook suggests, that means that the insured is wasted his time taking out $50,000 in cover and indeed will presumably have paid more than necessary for it.

MR GODDARD QC:

And that's why people don't do it.

WILLIAM YOUNG J:

But –

GLAZEBROOK J:

But they used to before the Act was changed.

MR GODDARD QC:

No they didn't Your Honour. People did not take out ground up natural disaster cover. They took out cover to which 30(2) applied.

GLAZEBROOK J:

Well but no there wasn't a 30(2) in there before the Insurance Council asked for it to be put in there?

MR GODDARD QC:

There was a lack of clarity about whether it worked in that way or not and it was clarified but if Your Honour looks back at the 1944 Act, that provided for cover to indemnity value. That was the position of the 1944 Act. You could write EQC provided cover to indemnity value but without a dollar limit and it was very common to have top-up cover above that and there was an exactly corresponding provision in the provisions that my friend on my behalf gave the Court. If Your Honour looks at section 18 of the old Act, subsection (1A) was the key provision, "Where the insurance under this Act is limited to the indemnity value of the property or any part of the indemnity value, subsection (1) – "

GLAZEBROOK J:

You'll have to let me find it. Where are you?

MR GODDARD QC:

It's a loose page, section 18 that I handed up earlier. Well my friend handed up that I provided. So section 18 is the old section 30 dealing with insurance otherwise and under this Act, the 1944 Act, and the way the 1944 Act worked was that it provided indemnity cover only. So if you insured your house against replacement value for fire you only got indemnity cover for earthquake from EQC so it was very common before the 1993 Act to have top-up cover from your insurer for the difference between indemnity and replacement and what subsection (1A) did was the exact equivalent of our subsection (2). Now these provisions were carried over into the Bill but there was some confusion about whether it was clear that you could have top-up cover and that was removed. It's reasonably clear –

WILLIAM YOUNG J:

Sorry, what was removed?

MR GODDARD QC:

The confusion was removed to make it absolutely clear you could have top-up cover over and above EQC. But that was the provision under the 1944 Act and the better view, but then I was the principal advisor of EQC in the process so I would say that, is that the Bill already enabled that back in 1993. Anyway, be that as it may, it was quite clear what the desired policy outcome was, which was the same policy outcome as pre-1993, that you could write –

WILLIAM YOUNG J:

Sorry, again, I must have missed something. Section 18 of the old Act is section 30(1) of the current Act?

MR GODDARD QC:

Subsection (1) is.

ELIAS CJ:

(1A) he's talking about.

MR GODDARD QC:

And then (1A), one capital A, has Your Honour got the one page hand-up, not the old one?

WILLIAM YOUNG J:

Yes. I've got that, sorry. So you're talking about (1A) is subsection (2).

MR GODDARD QC:

Yes Your Honour. My friend refers in his submissions to (1B) but I think he's got that wrong, it's the other way around. (1B) deals with the possibility of voluntary cover under the old Act for excess of indemnity which it was open to the Commission to write though in practice it didn't.

WILLIAM YOUNG J:

Okay well I haven't really got my head around subsection (1A).

GLAZEBROOK J:

What do you think subsection (1) means in the old Act then?

ELIAS CJ:

I thought you just said –

MR GODDARD QC:

The same as 30(1) –

ELIAS CJ:

– it was the same as the new Act.

GLAZEBROOK J:

Well I mean it's the same thing but how do you get cover from loss or damage?

MR GODDARD QC:
Sorry I'm not sure I understand Your Honour's question.

GLAZEBROOK J:
Well where on the occurrence to any property of any loss or damage against which it is insured under section 14, well it's insured against loss or damage under section 14, or that's the same in section 30, it's insured against that –

MR GODDARD QC:
No, yes, to a certain limit.

GLAZEBROOK J:
But it doesn't say loss or damage to the certain limit. You're insured against loss or damage. That's an absolute insurance against loss or damage –

MR GODDARD QC:
No, can I take Your Honour back to section 18, the whole point of section 18 is that it is to a certain amount. If we go –

GLAZEBROOK J:
I understand that but that's the same as this insurance. You're insured against loss or damage, and then there's a cap on liability, but that doesn't mean that you're not insured against the loss or damage.

MR GODDARD QC:
No I –

GLAZEBROOK J:
It's just that you only get the cap on liability.

MR GODDARD QC:
But you're only insured against loss or damage up to that cap, that's the way section 18 is drafted.

GLAZEBROOK J:
But –

ELIAS CJ:
But it's being put to you whether that is so.

GLAZEBROOK J:
That's what I don't understand. I mean I'm talking about section 18 of this one and section 30(1) of the other one.

MR GODDARD QC:
Yes I know, if we go to the current Act, section 18.

GLAZEBROOK J:
No, go to section 30 and tell me again why you have a limit there read in for what – because as I understand it, that's not how the Earthquake Commission interprets that.

MR GODDARD QC:
Now that, I wanted to come back to that, that's not right either. My friend has misunderstood the brochure which has not been handed up, but in any event I don't think –

ELIAS CJ:
Well it's only an opinion anyway.

MR GODDARD QC:
Yes, it doesn't take us anywhere, I was going to say that. I can't see how the Commission is – the only other case I've been involved with in relation to the Commission's interpretation of the Act, it was held to have it wrong, which is the Earthquake Commission. How the body interprets it now can't possibly shed light on what Parliament intended in 1993 but –

GLAZEBROOK J:
Yes well it might do if it had been interpreting it that way before the Act – before the 1993 Act was passed.

MR GODDARD QC:
But there's no suggestion of that.

GLAZEBROOK J:

Well I don't know, because I don't know there's any suggestion it's interpreting it the way you've suggested.

MR GODDARD QC:

But I'm not arguing that, Your Honour, I'm just saying if you read the language against the legislative history –

ELIAS CJ:

I should flag that I, too, have a problem with your reading in the cap so you will need to go into those.

MR GODDARD QC:

I will. I want to preface this by saying that this is not essential to my argument but I think it's a helpful clarification of the Act and I'm particularly concerned that the Court not say something about the way this Act works which is inconsistent with the policy that underpins the Act and that's what the – so I'm saying this more to be helpful, than because it's important to my argument, but I do want to do that.

ELIAS CJ:

Can you remind me, before you now go to section 30, why you say it's not important to your argument because it seems to me it's very important.

MR GODDARD QC:

The only relevance of it to my argument is that one of the reasons the High Court identified for preferring ACM's view, was that it thought there was an anomaly if the total amount of cover that you got was different depending on which policy answered first. The Court of Appeal, while accepting that that was how it worked, it didn't engage with this issue, didn't see that as sufficiently anomalous to outweigh the other textual and purpose of indications in the contract of how it was intended to work, and that's my primary argument is that even if the High Court were right about this, nonetheless, about how section 30 works, nonetheless the Court of Appeal was right, Justice Miller's analysis, supported by the rest of the Court, was right. In analysing what the contract was intended to do in terms of risk allocation in circumstances where, and this is common ground, it is top-up cover so 30(1) doesn't apply. We're talking about a hypothetical here and the question is, and it's a hypothetical that the

High Court put some weight on, but the Court of Appeal said this doesn't matter, and that's my argument.

ELIAS CJ:
Well when you go to section 30 now then why aren't they simply reverse sides of the coin?

MR GODDARD QC:
It's a coin which in the real world only has one side because only top-up cover was being written and what we need to understand is how this top-up cover was intended to work.

ELIAS CJ:
But there were two different ways that you could have top-up cover.

MR GODDARD QC:
No Your Honour, only one.

ELIAS CJ:
I suppose it depends what you mean by "top-up". Additional cover.

MR GODDARD QC:
It's common ground that if you wrote "cover" within, so ground up cover with a private insurer, you would end up paying more than you needed to for your natural disaster cover, because you would be paying EQC the premium it charges to provide cover for the first 6.8 million, and you'd be paying someone else a premium to provide cover for the first 6.8 million, and, at the risk of getting unduly technical, obviously even if you write cover of the same amount, you're going to charge less if it's further up the layers because it's less likely to be reached, so why would you pay EQC its first layer of 6.8 million cover, if you're getting a first layer from someone else.

WILLIAM YOUNG J:
But on your, I mean it's coming back to the facts of this case, but on your – no one would ever write cover, or take out cover of the kind contemplated in section 30(1) if it means what you say it means.

MR GODDARD QC:

Yes and the brochure that my friend refers to basically warns people not to do that because you're going to end up paying an EQC premium anyway and that's pointless. So it says it's important to write your policy as top-up.

GLAZEBROOK J:

Well it might say that but that might be for people whose houses were not actually going to be worth more than the 100,000 or so.

MR GODDARD QC:

It's addressed to insurers, so it's about how they write their policies, this particular brochure. There's different guidance for insurers. But I do really want to adopt what Her Honour the Chief Justice said about that and say I don't think we should spend too much time worrying about how EQC in a brochure interprets the Act.

GLAZEBROOK J:

Well you were the one who just brought it up then because you were the one who said in their brochure they warn you don't take that out. Though if you don't want to go to the brochure that's fine, but don't use it.

MR GODDARD QC:

Yes –

ELIAS CJ:

Go to section 30 perhaps.

MR GODDARD QC:

I want to go to section 30 via section 18 and I want to do that because I think it's important.

McGRATH J:

This is new. This is not –

MR GODDARD QC:

Let me – let's start at 30, because I think this is going to help.

McGRATH J:

This is not in your written submissions is it?

MR GODDARD QC:

It's in a footnote in my written submissions but I don't think there's any difference –

McGRATH J:

That's all right.

MR GODDARD QC:

– between the parties, based on my friend's paragraph 5.5 where I thought he was abandoning this particular argument. It didn't get developed in his. Anyway.

So, 30(1). "Where on the occurrence to any property of natural disaster damage against which it is insured under" section 18. So we need to find out, what is the natural disaster damage against which the property is insured under section 18? So we go back to section 18 and what we see is that it is the residential building is, "deemed to be insured under this Act against natural disaster damage for its replacement value to the amount which is the least of". So an integral part of the description of the damage against which it is insured is the limit built into section 18. It doesn't sit somewhere else. It's part of the description of the damage against which it's insured. So my answer to –

GLAZEBROOK J:

Well, sorry, take us to where you say that, sorry?

MR GODDARD QC:

Sure. So we've got section 30(1). You've got to have natural disaster damage against which the property is insured under section 18. Then we go to section 18 to find out what the natural disaster damage against which it's insured is, and the answer is that it's insured against natural disaster damage for its replacement value to the amount which is the least of (a), (b), (c).

GLAZEBROOK J:

Isn't it just insured against natural disaster damage?

MR GODDARD QC:

No Your Honour.

GLAZEBROOK J:

Well but I don't say I'm insured against natural disaster damage, oh, by the way I've got a limit in the policy of X. That's – I'm insured against natural disaster damage.

MR GODDARD QC:

To a particular level.

GLAZEBROOK J:

Well so what?

MR GODDARD QC:

Let me go quickly to the – I am conscious of the passage of time and I do want to explain why this isn't central but I'm also, as I say, just trying –

WILLIAM YOUNG J:

I'm willing to give it away.

MR GODDARD QC:

Let me just go quickly to the legislative history material.

GLAZEBROOK J:

Well I have to say that I see there is an anomaly between the two, so it seems to me to be an important point.

MR GODDARD QC:

Let me – I took the Court to section 22, which limits the ability of the Commission to write cover beyond the section 18 to 20 levels. What Your Honour's suggested, my friend's suggested interpretation of section 30 would do is provide that where you've got ground up private cover, in fact the Act deems EQC to be providing the very top-up cover that section 22 prohibits it from writing. So that's a very –

GLAZEBROOK J:

Well no it's not. It's just providing the limit in the Act which is 100,000. That's all it's ever providing and sometimes it provides it later, sometimes in priority, and that's good for it of course because it mightn't have to provide it at all, and sometimes it doesn't.

MR GODDARD QC:

And in my submission that is not consistent with the policy apparent right from the text there but also the legislative history. let me go to the legislative history because I think that is, this is a case where it's helpful. So tab 3 of my authorities. We've got the introduction of the Bill.

ELIAS CJ:

And was it 5.5 of the appellant's submissions you were intending to refer to as having given away –

MR GODDARD QC:

Well my friend isn't giving it away so I don't think I can – this – the first bullet point, 5.5, what I understood the first bullet point to be saying is that what MD15 does is limit the starting-point of Zurich's liability by postponing this for the first dollar of the Body Corporate's loss. As a result if the Body Corporate's loss is within the EQC layer Zurich will have successfully limited it's liability to zero. Otherwise, and this is the passage, the sentence that I seem to have misunderstood, "Otherwise, pursuant to section 30(1), Zurich's liability will have started at zero and the EQC would have had no liability." So it's that comment that EQC would have had no liability, which is inconsistent with what the High Court assumed.

ELIAS CJ:

But – oh.

MR GODDARD QC:

The High Court said you have Zurich first then EQC second.

ELIAS CJ:

But isn't that only on the facts in this case?

MR GODDARD QC:

But even on the facts in this case on my friend's interpretation of 30(1) EQC comes in and pays after the 12.95 because the loss is 25 – it's more than the two added together. So this is not consistent with what my friend's saying today but my friend can adapt his argument. That's fine. It's just part of the reason why, again, it's not developed in detail is that I didn't think this was controversial. The argument about in the High Court judgment is nowhere set out or referred to in my friend's submissions and that sentence I thought was confirming that it had been given away, that's why I didn't deal with it in detail. But it's…

ELIAS CJ:
And which is the footnote that you…

MR GODDARD QC:
In fact there are two footnotes. There's on page 9 of my submissions footnote 19, and I also make the point that on page 5 in footnote 9, and I deliberately banished these to footnotes because it seemed to me that this was not an argument that was being pursued. It's not found in the body of my friend's submissions and indeed I thought it was being explicitly flagged away. But it seems that's not the case.

I do just want to look at the legislative history briefly. We've got the Associate Minister of Finance moving the introduction of the Bill. That's at tab 3. Minister notes that, "The Bill is part of a process that's gone on for some five years. To move some of the liability for the commercial property gradually away from the Crown domain." And then, three paragraphs down, the Minister says, "I will list the main features of the new regime and outline briefly the changes from current policy introduced in the Bill." No obligation for non-residential property to pay a levy. Second, transition away from providing cover for commercial –

GLAZEBROOK J:
Sorry, where are you?

MR GODDARD QC:
I'm under tab 3 of my authorities –

GLAZEBROOK J:
Right.

MR GODDARD QC:
In the Earthquake Commission Bill introduction –

GLAZEBROOK J:

In the first bit?

MR GODDARD QC:

There you go.

GLAZEBROOK J:

Sorry, I…

MR GODDARD QC:

No, no. I've been jumping about a bit. So the main features of the new regime being introduced, first no obligation for non-residential owners to pay a levy. Second, no voluntary cover after a transition period for non-residential and the withdrawal of the Commission from the non-residential market spread over a period of three years. Phase out, and fifthly, the last paragraph in the first column, "Owners of residential property purchased via insurance from a New Zealand insurer will continue to be required to pay a levy to the Commission for disaster insurance on their dwellings and the Commission will cover the full replacement value of residential property but only up to 100,000 exclusive of GST." Sixth, "owners of residential property will be free to seek top-up insurance from the private insurance industry if they consider the replacement value exceeds 100,000." And last, "Certain personal property – just picking up Your Honour's first question, it was always intended that the Bill permit top-up cover, there was just a question about the clarity of drafting.

And then there's an elaboration of how the reforms will affect homeowners. The third paragraph down a few. And then over the page – oh sorry, the very foot of page 13187 of Hansard, several reasons for the shift away from Government provision. "Increased sophistication and integration of insurance markets worldwide; secondly, the development of new products that are more suitable to the needs of individual New Zealanders; and, thirdly, the growing recognition of the potential overexposure of Government to its contingent liabilities.

"I would like to expand on the last point. The underlying objective of the Government in relation to natural disasters must be to reduce the distress that is caused, in so far as that is within the Government's capacity, and to reduce that distress in as effective and efficient a manner as possible. That involves both recognising and helping to meet the needs of those who suffer in such a disaster, and addressing the broader needs of the New Zealand economy and society. Whilst all New Zealanders would wish to help a stricken region, few would wish resources to be diverted to such an extent that living standards throughout 1he nation became depressed in the term. Faced with that constraint the Government's prime concern in the aftermath of a major disaster is a humanitarian concern. Thus the priority should be the provision of basic, adequate housing and other amenities, and the re-establishment of a basic infrastructure, rather than meeting extensive obligations to those homeowners who are better off, and to businesses."

So we only want to provide basic housing to people and we don't want to provide additional cover to wealthier homeowners, and we don't want to cover businesses, because the Government shouldn't be at risk. The Government, of course, are underwriting the EQC in the legislation. Then next, "The State does not automatically have an obligation to owners of commercial property to provide them with partial or complete replacement in the event of disaster. The Government would expect commercial property owners to assess the value of their property, and to make appropriate arrangements against risk, including natural disasters." So that's why no cover has been provided.

"One consequence of the reforms that I expect to see is a closer relationship between the price of disaster cover and the costs of providing it. Decisions about industry location will, for the first time, take into account the true costs of disaster cover." Then an important couple of paragraphs. "The appropriate role of Government in regard to disaster insurance for residential property is more difficult to address. In the event of a disaster, the State would wish to look after, and, if necessary, eventually to re-house those who were made homeless who could not look after themselves. Naturally, the more who were able to look after themselves the better it will be. However, those residential property owners who had not insured against disaster risk might expect the State or community to help them. To the extent that such help was forthcoming, they would not experience the full costs of their decisions not to insure. Consequently, the Government bears a partial contingent liability in respect to their property. I stress that that does not amount to a liability for the full replacement of housing that is lost, but rather for the eventual provision of housing to an adequate standard."

Then there's a discussion about the insurance market taking on cover and the next paragraph down, "In view of the above, and given the current concerns over the capacity of reinsurance markets, the decision not to require home owners to source disaster insurance from the private sector was, I believe, correct." So the thrust there is that if there wasn't widespread insurance against the earthquake, which was the case for them in Japan, and there's a disaster, and there are people who are left homeless, the Government will, in practice, have to step in and provide basic housing. What that means is that those people will not have borne the cost, in terms of paying premiums, of the benefit that they eventually receive. This legislation is essentially about managing that moral hazard. It's about ensuring that people who take our fire insurance, which is the majority of homeowners, pay a premium towards the cover the Government would always have to provide of getting people back into a basic house. But positively the Government wants to be out of the business of providing any cover above that level.

We see that theme come through again in the report of the select committee under tab 4, the chair, it reports it back, the point about top-up cover is dealt with over one leaf on page 16562, the second full paragraph on that page beginning, "The level of cover was also dealt with, and it is most important that this is understood. When the Bill was introduced the matter was explained, and it will be dealt with further at the select committee stage and in the second reading. The insurance afforded now for earthquake cover is pegged at a level of $100,000 for residential dwellings, or such lower sum for which the property may be insured against fire. Originally the Bill contained some ambiguity but that has now been clarified and the cover is clearly limited to a top level of $100,000 or such lesser amount as a property may be insured against for fire."

Then multiple dwellings. Then the next paragraph, "The insurance of personal property is limited to a pegged level, as are residential buildings. In the case of personal property it is pegged at $20,000, and such other matters were considered in relation to voluntary insurance against natural disaster damage. The committee recommended that the commission be empowered to offer voluntary insurance on personal property, and also recommended that the commission not be empowered to insure residential property above the set cap on cover. The concern throughout was to control and to limit the liability of the State under the very dangerous provision of cover for restoration of damage in the event of a natural disaster." So no desire to enable the Commission to offer any cover above the floor level.

Then finally, helpful on these issues, the second reading speech under tab 5, the Minister moving the second reading on page 16576, the fourth paragraph, "Another aspect of the legislation is the way in which domestic property will be protected in the future. The Earthquake Commission will continue to provide insurance protection for all domestic properties up to a value of $100,000, that is, $100,000 worth of damage caused by the earthquake. The Government accepted advice, which was based on advice given to the Government of the time, that that sum of money would re-establish a very adequate dwelling on a property." And then there's various other issues discussed.

But the basic rationale for the whole of this legislation is that if you don't have insurance against natural disaster, you have a natural disaster, the Government is going to have to stick it in and pick up the pieces. Because the Government doesn't want to be doing that without being paid something to assume that risk, it compels people to pay a premium for that cover when they insure against fire. But all that the Government is trying to do is to get people to pay for what is required to get them back into a basic dwelling on their land and not to incur any liabilities above that level.

GLAZEBROOK J:

Why would you leave 30(1) in there because you then end up with a whole pile of people paying twice for insurance, if they're not sophisticated enough to realise that they should have had top-up cover. Why not take 30(1) out all together?

MR GODDARD QC:

You have to deal with the scenario where you have double insurance. If you just don't have that provision then the possibility of both EQC cover applying, and the private cover applying, is unregulated and that leaves open two possibilities Your Honour. One is that the private cover contains a provision that says, where there's other cover that responds first. That's a very common response to double insurance. So you'd find that invariably EQC was paying and the private insurer, who'd accepted a premium to provide that cover, wouldn't be paying. That's seen as undesirable. Rather the policy was that if a private insurer has taken a premium to provide that cover they should provide it and EQC won't and that's why you've got both subsection (1) and –

GLAZEBROOK J:

So you pay double premiums for that. So you don't say if you're under 30(1) and you have adequate cover up to 100,000, you don't pay the EQC. You say you pay us too and you pay your insurance company.

MR GODDARD QC:

Because EQC cover is compulsory and it's not administratively workable to release people from cover because they're insured with someone else. In fact the policy was not to do that. There's a deliberate policy choice that even if you insure from the ground up with a private insurer you must pay the EQC premium. That's very clear from the structure of the Act. What that means is that you're effectively paying twice for the same cover.

ELIAS CJ:

Well is that, that's to finance the EQC.

MR GODDARD QC:

Yes. In a workable way.

ELIAS CJ:

So why are we so worried about people paying twice because they're going to, it's the scheme.

MR GODDARD QC:

No, well people aren't going to because what we've got also is the provision carried forward from the old Act which says, but if you expressly write the private cover as top-up cover, there's no paying twice, there's no problem. So 30(1) is not expected to be of practical importance. It deals with a situation which if everyone behaves sensibly, practically, commercially, and this is essentially – well certainly a commercial context that we're looking at here, with a large policy being written through a sophisticated broker, then –

GLAZEBROOK J:

This is consumer protection type legislation. It's not assuming brokers are involved is it? These are people that go along and pay premiums.

MR GODDARD QC:

It's directed primarily, these provisions, to insurance companies, the liabilities the premiums imposed on them but they can then recover it back. You'd expect the process of competition then to ensure that they're not imposing unnecessary costs.

GLAZEBROOK J:

Well one expects that quite often, doesn't one?

MR GODDARD QC:

And it has worked in this context because there is not, in fact, cover other than top-up from private insurers in the market. So it has worked. And 30(1) and 30 – subsection –

GLAZEBROOK J:

Well it makes sense for them only to offer top-up cover though because then they don't have to pay the first 100,000.

MR GODDARD QC:

Well in circumstances…

GLAZEBROOK J:

It doesn't make sense for them actually to pay it from the ground up, does it, so it's not –

MR GODDARD QC:

No.

GLAZEBROOK J:

It's not that they're looking after the consumer, it's they're looking after themselves, and there's nothing wrong with that because they're allowed to.

MR GODDARD QC:

No they're – because, Your Honour, they could charge a premium for that. They're in the business of accepting risk in exchange for charging a premium so an insurance company like Zurich could say, we will charge you a premium of X percent, to provide ground up cover for the first 100,000. The problem is that the person would also have to pay EQC and they're not going to want to do that. So you'll end up charging your person more than the next door insurer who says, I won't provide that base layer of cover, I'll only provide top-up.

WILLIAM YOUNG J:
I suppose there maybe a limit to what you say about this section but at least if it's construed as Mr Ring would construe it, there would be insurance policies, perhaps, to which it might apply. I mean it could be describing a situation in which the insured is getting value for the premium.

MR GODDARD:
Double insurance is a problem that never arises as a result of – well, it always involves a measure of inefficiency, it always means by definition that the same risk has been laid off for the same person's benefit twice and two premiums paid in ignorance of each other, usually. And so you're then trying to regulate the consequences of that in various clauses. We see it in private policies –

WILLIAM YOUNG J:
But there's not double insurance under section 30(1) on either view.

MR GODDARD:
No, 30(1) is dealing with double insurance because it's –

WILLIAM YOUNG J:
Well it avoids double insurance.

MR GODDARD:
Yes. So that's what – that's exactly what double insurance clauses do. They say, well if you've got a situation where in principle you'd be able to look to insurer A or insurer B, then we'll regulate how that works, and what Parliament can do, which no private insurer could do, is regulate it in a way which trumps every contract. So in particular section 30(3), which says any provision in an insurance contract which is designed to regulate double cover doesn't apply to EQC cover. This Act will apply as if that provision wasn't there. That's why GC09 is, I agree with my friend, irrelevant, because vis-à-vis Earthquake Commission cover, section 30(3) provides that you must always disregard such clauses.

ELIAS CJ:

Mr Goddard, what's the policy, though, of the legislature in – if section 30(2) is to be construed to – as you contend?

MR GODDARD:

Well I don't think there's any difference between the parties in relation to how 30(2) works. We agree what section 30(2) says is that where a contract of insurance with a private insurer provides for cover in excess of the amount to which cover is provided under this Act everything works. You look to EQC first and to the extent that it pays first and then you look to the private insurer. So we agree absolutely on how subsection (2) works and that's the one that's actually relevant here, because why I say 30(1) is a hypothetical scenario about a type of cover not found in the market in relation to which there's actually a difference of views and in my submission the view expressed by the High Court is wrong. I thought that was common ground. But –

McGRATH J:

So is it stating a rule? Is 30(1) stating a rule so that 30(2) can displace it?

MR GODDARD:

Yes. It's as simple as that.

GLAZEBROOK J:

I'm all right about – can I just come back to your section 18?

MR GODDARD:

Yes.

GLAZEBROOK J:

Because I don't think it actually reverses the priority. The reversing of priority must be new, isn't it? Because up to the indemnity value it doesn't reverse priority does it? Your little section 18(1A), or have I misread it?

MR GODDARD:

Which section 18 are we on?

WILLIAM YOUNG J:

The old Act.

MR GODDARD:

The old one.

GLAZEBROOK J:

I'm sorry, I thought we'd finished on everything we could say –

MR GODDARD:

Yes.

GLAZEBROOK J:

– on section 30.

MR GODDARD:

I think so.

GLAZEBROOK J:

But I don't think (1A) actually reverses priority, does it? Because it's, because (1) – 18(1) still applies to the indemnity value.

MR GODDARD:

But if –

GLAZEBROOK J:

So it probably allows top-up between indemnity and replacement.

MR GODDARD:

Yes, that was my submission.

GLAZEBROOK J:

But that's not the same as what we're talking about now because now you can have top-up on anything and you get priority. Because you were never going to get priority under (1A) because it was only ever indemnity value and that was always referral to section 18(1).

MR GODDARD:

And exactly the same structure applies under the current section 30. The only change is that what the old Act used to do –

GLAZEBROOK J:

No, well see, doesn't – just, can I just finish? I thought subsection (2) reversed the priorities.

MR GODDARD:

No. It says that if the contract provides that it's top-up cover then you give effect to it. It doesn't reverse anything.

GLAZEBROOK J:

Well it reverses section 30(1) –

MR GODDARD:

Yes.

GLAZEBROOK J:

– where insurer would go first, earthquake next.

MR GODDARD:

And –

GLAZEBROOK J:

All I'm saying to you is that that wasn't the case under section 18 as I read the section. That you always had insurer first, earthquake next –

MR GODDARD:

No Your –

GLAZEBROOK J:

– except in respect of something that wasn't actually insured by the Earthquake Commission which was replacement value over and above indemnity value. I'm not sure whether I've misread it.

MR GODDARD QC:

The relationship between the old 18(1) and (1A) is exactly the same as the relationship between 30(1) and (2) with one exception, and that is that under the old Act the way that the cover provided by the Act worked was that it was cover up to your indemnity value, whatever that was. It could be, you know, a million dollars for a valuable house, but never beyond indemnity, unless the Commission wrote voluntary cover above indemnity, which it could, but didn't. What the cut-off is under the new Act is the cap on –

GLAZEBROOK J:

No, but then what would happen is that if you had private insurance up to the indemnity value, then EQC had no liability under subsection (1).

MR GODDARD QC:

Yes –

GLAZEBROOK J:

Because the private insurer paid out first.

MR GODDARD QC:

The private insurer paid out first and then what my friend would say is that if there was still – I mean this wouldn't apply if you had private cover to full indemnity value. It would apply if you had indemnity cover with a sum insured in exactly the same way which often happens.

GLAZEBROOK J:

Well say you had – well say it was worth 10,000 and you had private insurance to eight, then EQC would only pay two?

MR GODDARD QC:

Yes. And I say that the new one works in exactly the same way.

WILLIAM YOUNG J:

Can I just give you the, some different figures? If you assume an indemnity value of 250, and insurance up to 150 for indemnity, but with a cap of 150, then if the property is destroyed the insurer pays 150 and EQC would pay nothing under section 18(1A).

MR GODDARD QC:

So the property has been destroyed –

WILLIAM YOUNG J:

Yes, but it's only insured for indemnity but it's insured for a higher indemnity. Now the difficulty on that basis is that the insured is paid twice for the first $100,000. He only gets 150.

MR GODDARD QC:

Yes, that's right. That was always how the Act worked.

WILLIAM YOUNG J:

But that, this is – but that's under what is the equivalent of section, what you say is the equivalent of section 30(2).

MR GODDARD QC:

Yes I think I'm with Your Honour.

WILLIAM YOUNG J:

Well what I'm saying is, let's say someone, in 1980 someone says, oh, I haven't got enough cover under EQC so I'll up the indemnity value to 150 and get cover for that.

MR GODDARD QC:

Well under EQC you're insured for whatever the indemnity –

WILLIAM YOUNG J:

Yes, I know, let's assume it's 100,000, there's a cap of 100,000, it will have been different –

MR GODDARD QC:

There was no cap.

WILLIAM YOUNG J:

Was there not a cap at all?

MR GODDARD QC:

No. That's the point. There was no cap.

WILLIAM YOUNG J:

So there's no cap until 1993?

MR GODDARD QC:

That's right Your Honour. There's no dollar cap. That's what changed –

ARNOLD J:

Just covered indemnity value of the property.

MR GODDARD QC:

Whatever that was –

WILLIAM YOUNG J:

So no insurer would ever, would then ever write insurance for indemnity,

MR GODDARD QC:

Exactly Your Honour. So that's what I was trying to say and what changed is it went from indemnity value, but uncapped in dollar amount, to replacement value, which is a more generous measure, but with a dollar cap, and that's because of the policy that was – the concern before was that if you pay indemnity value people wouldn't have enough money to rebuild their house so the Government would be on the hook. What the Government wanted to do was provide replacement cover so you could actually rebuild your house but only for modest houses, only to meet its humanitarian obligations post-disaster. It wasn't interested in building houses for QCs that were destroyed by earthquakes or landslides assuming that, you know, QCs, quite often live in houses that cost more than 100,000 to build.

WILLIAM YOUNG J:

So when by exclusion section 18(1A) is really, is addressed to replacement value policies?

MR GODDARD QC:

Yes.

WILLIAM YOUNG J:

Because it makes no sense from an indemnity value –

MR GODDARD QC:

This issue wasn't dealt with at all in the original 1944 Act because there was only indemnity cover in the market. What happened then was that replacement policies became more common and what was introduced is what Your Honour will see in the handout that I will soon hand up, subsections (2A) and (2B) of section 14 which dealt with how section 14, the old section 18, worked where you had a policy providing cover more generous than indemnity and it made it clear that what EQC provided was only indemnity cover in such circumstances and it dealt with how you worked out the premium.

ARNOLD J:

A big driver behind this change was simply the huge contingent liability that the Government was carrying because of, I mean some indemnity values were still very high.

MR GODDARD QC:

There were two problems. The first – there were three problems. One was the Government was writing cover for commercial property. A huge contingent liability there. Didn't want to be in that business at all, phase it out. Second, residential. There were some very high indemnity values and the Government had no interest in indemnifying successful lawyers and business people against the loss of their houses in full. It only wanted to be protecting people with basic houses because that was what it would have to provide. But, and this is the flip side of this, it was also concerned, and we see this come through in all the debates, that paying indemnity value to people with basic houses actually doesn't get them back into the houses because there's often such a gap between indemnity value and what it costs to rebuild a house. So there was a twin policy. It was, we're going to do this humanitarian thing, disaster recovery, properly by paying replacement value but we're only going to replace modest homes and if you've got a fancier house, and you want more cover, then you can buy it by way of top-up and that was always the intention and we saw that explained in the Minister's introduction speech. There were some concerns about whether the drafting achieved that and that was fixed.

McGRATH J:

Since the scheme began has it always – the EQC system began, has it always operated through insurance companies? In other words are the premiums paid to EQC by insurance companies?

MR GODDARD QC:

Certainly since 1944.

McGRATH J:

Yes, well that's what I meant.

MR GODDARD QC:

It's always been triggered by taking out fire cover and the idea then was that the insurance company had to pay the premium. So there's a whole lot of provisions in the Act, both in the 1944 Act, and in the current Act, to enable the Commission to go into insurers and audit their books to see what cover they're writing. It was how you made it work because it's impossible to make it work individual by individual and go and impose the obligation directly on individuals. It's just an administrative mechanism for –

McGRATH J:

So that the EQC gets companies to collect money for it and all it has to do is to check their books –

MR GODDARD QC:

Yes.

McGRATH J:

– to see if it's, appropriate amounts have been collected and paid.

MR GODDARD QC:

And they're given a statutory right to recover the premium from their customer but if they don't it's their problem.

McGRATH J:

And the way they achieve the policy, you say, of insuring even at the modest level, this replacement value, is again by making people work through insurance companies, I presume because –

MR GODDARD QC:

Yes.

McGRATH J:

– you've got the 100,000, but by that mechanism whatever top-up is needed, the insurance company will provide for.

MR GODDARD QC:

Can if people want to take it out and –

McGRATH J:

Yes, if they, yes.

MR GODDARD QC:

And you can choose not to of course –

McGRATH J:

But the Government wants them to take it out, doesn't it, isn't the policy, the legislation is that replacement cover –

MR GODDARD QC:

The Government wants to make –

McGRATH J:

– will be provided.

MR GODDARD QC:

Wants to make it possible but hasn't compelled it. It's left it to people's judgement because the Government has made a policy decision that it would not itself come under an obligation to replace fancier houses, more expensive houses.

McGRATH J:
Yes.

MR GODDARD QC:
So it's not worried about the moral hazard, the uncompensated cost to the Crown of that if I want to fail to take out top-up cover for my house with the, in relation to natural disaster, with the result that if there's an earthquake in my house and it slides down the Northland hill into the harbour, quite a big slide, then the Government will say well you've got your EQC cover of 100,000, go and build yourself something smaller Mr Goddard, to the extent that you're unhappy about that that's your problem, your imprudence is not ours.

WILLIAM YOUNG J:
When did replacement policies become common?

MR GODDARD QC:
I'd have to look –

WILLIAM YOUNG J:
I think there's a Canadian case that discusses it –

MR GODDARD QC:
It's, and there's quite a good article, it's the sort of 60s, 70s, yes, and so the legislation, Your Honour will see that subsections (2A) and (2B) of the old section 14 were added in 1983. What I can't quite remember is whether that was the first attempt to deal with what had become a very common phenomenon or whether there was –

WILLIAM YOUNG J:
Well (1A) of section 18, that's introduced in 1951, which I would have thought preceded replacement value policies.

MR GODDARD QC:
I actually thought that that was part of the package which dealt with (2A) and (2B) and I know those were tinkered with but I'd have to check the legislative history. I'm sorry, I'm not sure.

WILLIAM YOUNG J:
Right.

MR GODDARD QC:
But certainly, this has been very much an evolving piece of legislation. It began life as the War Damage Act, of course, and then in 1944 it became the Earthquake and War Damage Act, but working on an indemnity basis, and that was all that was in the market in the 1940s and then as the cover and the market changed, that produced a host of practical problems, not least what premium to collect. That was regulated and then the policy difficulties that that caused, which became apparent in a number of earthquakes, and a concern to manage the contingent liability of the Crown, led to the 1993 Act. And that policy framework is very clearly spelled out in what was essentially, in the House, in the public, and this was essentially by partisan legislation. The Government, the White Paper that foreshadowed many of these changes, was introduced under, let me get this right, a Labour, so under a National Government and then was carried forward under a Labour Government. I think I've got that round the right way.

ELIAS CJ:
So the contract, you have to move to.

MR GODDARD QC:
I do want to deal with the contract because that's actually what is central to my argument. I should say that I did make –

ELIAS CJ:
That's been helpful though because the Act was bothering me and all you're saying is that it's not under 30(1) and section 30(2) is neutral in terms of the argument that you're running. We just have to look at the contract?

MR GODDARD QC:
That's exactly right. It's common ground that the contract was intended to trigger 30(2) to provide top-up cover as it was described, you know, from –

ELIAS CJ:
Well except nothing is really triggered by section 30(2), it's just that the limitation in 30(1) doesn't apply.

MR GODDARD QC:

Yes, it makes clear that 30(1) doesn't apply. It makes clear that the Commission will pay first, as long as you use words which are reflected to invoke 30(2) and then the private insurer will pay and the question of how much the private insurer will pay is a matter for the policy on which the Act is silent.

ELIAS CJ:

Sorry –

McGRATH J:

And section 30(1) is really just reflecting the other insurance practices that will develop if it's not, if it's not some form of regulation –

MR GODDARD QC:

The combination of subsection (1) and (3) is designed to prevent private insurers taking a premium for cover and then shifting the risk all back to EQC.

ELIAS CJ:

So, sorry, why, I'm sorry if this is terribly tedious, but why, quickly, do you say that section 30(2) provides that EQC goes first?

MR GODDARD QC:

Because it disapplies subsection (1).

WILLIAM YOUNG J:

It doesn't explicitly say, because it leaves, there's a bit of a void, I suppose.

GLAZEBROOK J:

In practice it probably would because you'd have another insurance clause in the insurance policies, I suppose, which, seeing it hasn't been overridden by section 30(1) would then put the insurer second.

MR GODDARD QC:

Yes, exactly Your Honour.

ELIAS CJ:

And does that happen in this policy, I can't remember?

MR GODDARD QC:

Yes, there's another insurance policy GC09.

ELIAS CJ:

I see.

MR GODDARD QC:

Almost every policy –

ELIAS CJ:

Which would apply to, yes.

MR GODDARD QC:

Almost every policy contains either a provision that says if you've got other insurance, we'll go last, because that's every insurer's preference, or a rateable proportion clause which says if you've got other insurance it will be divided in proportion to, you know.

ELIAS CJ:

Yes.

McGRATH J:

Is that a common practice in other countries, some form of legislation that involves rateable apportionment? Presumably there has to be some form of regulation in other countries to?

MR GODDARD QC:

It's not regulated in other countries –

McGRATH J:

It's not regulated?

MR GODDARD QC:

– because it's not statutory cover and there are quite a few decisions that deal with – we've just got double insurance and no provisions in policies, you've got all the contribution rules.

McGRATH J:

Yes.

MR GODDARD QC:

Where you have provisions to policies each of which says we'll go second thank you –

McGRATH J:

Yes.

MR GODDARD QC:

– the Courts have had to deal with that. That's not statutory regulation. The Court's have said we'll disregard both. We've got a rateable proportion clause in one policy and a, we won't pay if you're insured with someone else policy, the issues are harder and the Courts have grappled with that in England and Canada and elsewhere. But happily, because one of these forms of cover, well two reasons why we don't have to deal with that particular nightmare, one is that one of these forms of cover is statutory and Parliament gets to trump all contracts.

McGRATH J:

Yes, yes.

MR GODDARD QC:

And that's what subsections 30(1) and (3) together do but also Parliament has left open the possibility of writing cover in a way that deliberately has EQC go first and the private insurer "topping up", in the words of the Minister and the words used to provide the quote in this case and where that happens there's no conflict.

McGRATH J:

Yes.

MR GODDARD QC:
And it’s common ground that there is no conflict between what's provided under the Act. And that’s why EQC has been able to pay out because EQC accepts that the maximum cover available under the Act was triggered here. It accepts that 30(1) doesn’t apply, quite rightly, because of the way this policy works.

McGRATH J:
Mmm.

MR GODDARD QC:
And so it’s written a cheque for 6.8 million plus GST, less an excess as my friend said. So now where EQC having paid, we’re at the point of having to work out –

GLAZEBROOK J:
Can you just – if there were two private insurers who had those clauses in or no clause in and you had 100,000 worth of damage and 50,000 limits in both of the insurance clause contracts, what would they each pay?

MR GODDARD QC:
I haven't been able to find anything helpful on that.

GLAZEBROOK J:
Because I would have thought they might just land up paying 100,000 rather than 25,000 each.

MR GODDARD QC:
And –

GLAZEBROOK J:
Which is all that I thought section 31 did, ie say you pay first, you pay second, up to whatever your limits are. So if the insurance company’s limit is 12 and yours is 100, as long as the damage is more than whatever I’ve done.

MR GODDARD QC:
Yes I’m lost too I’m sorry, Your Honour.

GLAZEBROOK J:

Well look – but as long as the –

MR GODDARD QC:

I understand what Your Honour is saying.

GLAZEBROOK J:

If you've got 100,000 worth of damage, you've got 50,000 from one insurer or 50,000 from the other, they both pay or don't they? Because they've only paid up to the 50,000 that someone's paid for. The damage is 100,000 and I thought that was all that Mr Ring was asking section 30(1) to do, that if the damage was more than the private insurer, then in coughed the 100,000 from the ECQ, in the same way that you would do in any sort of conflict clause, that is, that's the reason I asked the question, because that is if the conflict clauses would work out that way or the double insurance would work out that way.

MR GODDARD QC:

And I was also interested in that question and was unable to find anything, any cases that clarified that. There's an awful lot of debate about how double insurance works in the texts. A lot of it says, we find repeatedly people saying practice matters as much as the law in this area and what insurers actually do but it was very hard to pin that down. I also wondered in the end how helpful that particular, pursuit of that particular hare was that I had embarked on because of the fact –

GLAZEBROOK J:

Well you say the only reason it's in there is to trump any double insurance clause, so, and because it's statutory it does trump rather than merely putting everything into a pot but I mean you could do the same thing by saying, I always come second if there's something and you have somebody who has… So it's a bit like a clause that says, I always come second, and another clause which says nothing.

MR GODDARD QC:

Yes and my submission –

GLAZEBROOK J:

Because 30(1) makes you say nothing and it's an, I always come second.

MR GODDARD QC:

My submission on that was twofold. It was firstly that you also see clauses in private cover that say, if you have other insurance we won't pay at all.

GLAZEBROOK J:

Oh no I understand that.

MR GODDARD QC:

And my submission is first that actually on the language of section 30, because they're referenced back to 18, that's how that works. Now Your Honour is not especially attracted by that, at least on the first reading.

GLAZEBROOK J:

No, no, I just –

MR GODDARD QC:

But that's one possibility. The other point, the other reason why I say that section 30 doesn't do that, what you'd expect to see in the contractual sphere is what we've actually got here is a statute with particular policy drivers and this is where my submission that all it is concerned about is that you get 100,000 from somewhere comes in and that if you've got that from a private insurer then the Act, in my submission, doesn't respond at all because its policy is not to provide any cover above that level and that's a theme that's apparent, not only in the legislative history but also in the way that the ability to write voluntary cover is restricted.

GLAZEBROOK J:

Well you'd have to say that's why we should read it with the reference back to section 18 because we can't sort of say that's the policy so therefore it must mean that. It would have to be a submission that said you read it.

MR GODDARD QC:

Yes, yes that's what I say.

GLAZEBROOK J:

That's why you read those statutory –

MR GODDARD QC:

I think that's why you read it in that way, is that why you treat section 18 as very focussed on that first 100,000, not just 100,000 somewhere. That's probably the best way of putting it. What I say is that what you can take from the scheme of the Act as a whole and its legislative history, is that what the Act is concerned to provide is a basic layer of insurance to get people back into a house. It's not interested in providing any cover anywhere else in the layered world and so when you read 30(1), it's referring back to 18, you're referring to that basic layer.

GLAZEBROOK J:

Although they are assuming that there is an extra layer in section 18, aren't they? They're assuming someone has an extra layer aren't they?

MR GODDARD QC:

In?

GLAZEBROOK J:

Because, well you've got fire insurance, so you're likely to have more than 100,000 aren't you?

MR GODDARD QC:

But you may not have bought any natural disaster insurance from that insurer.

GLAZEBROOK J:

No, no but – oh well I'm not sure, I'm just not sure I get out of section 18 what you say there's in it because it does contemplate you will have insurance above that.

MR GODDARD QC:

No Your Honour.

GLAZEBROOK J:

No not for natural disaster but -

MR GODDARD QC:

But not even necessarily for fire.

GLAZEBROOK J:

Well not necessarily.

MR GODDARD QC:

And that's why you've got paragraph A, which says that if you've got less than that in terms of fire cover, you only get up to your fire cover amount. So EQC cover can never – yes –

GLAZEBROOK J:

No I understand that as well but all right, it's wording rather than – but I'm not sure that it's – it's not productive to debate it at this stage I don't think.

MR GODDARD QC:

So the policy, which is what it's all about. The, and perhaps it's easiest to do this by reference to both the policy which is volume C, tab 1 and my submissions beginning on page 9, section 7, the interpretation process and I do, at the risk of stating the obvious, want to emphasise the importance of context and in particular principle 4 of Lord Hoffmann's in *Investor's Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 (HL) which is that what we're concerned with is interpretation of the instrument, of the whole document. We're interested in the meaning of the document as a whole, not the meaning of words and there's that wonderful phrase about the meaning of words as a matter of dictionaries and grammars but that's not what we're doing when we interpret a contract, we're interested in the meaning of the instrument as a whole and how the whole of the party's language would appear to a reasonable observer with the same background knowledge at the time the contract was entered into.

And what we have, as my friend said, is the material damage section, which begins on page 4 of the bundle. "An agreement by the insurer to cover the insurance for all loss or damage to the property insured during the period of cover due to an event, provided the liability won't exceed the sum insured." And the way that works with replacement cover, MD25 was also touched on by my friend. Now in the absence of any earthquake legislation, if that was simply repealed tomorrow, the way this would work is that Zurich would be providing a first layer of 12.95 million and the risk of loss above 12.95 would be with the Body Corporate for all perils. What is common ground, even with that Act in place, is that that's how this policy works for every peril except natural disaster. So fire, flood, anything like that. If the buildings are destroyed and if it's going to cost $14 million to rebuild them, then Zurich will pay 12.95 million and the Body Corporate will bear the cost of the rest. What we're trying to work out is how the policy is modified in its operation in relation to natural disaster damage to respond to the presence of the statutory cover because, I mean again just to state something which I think is obvious but which, and which I don't think my friend takes issue with, there's been no suggestion that in the absence of the statutory cover this Body Corporate would have gone out into the market to buy a different amount of cover against natural disaster and against other perils. There's no reason to think that the building will cost more to rebuild from the ground up.

GLAZEBROOK J:
I think you've already made these points, haven't you, earlier?

MR GODDARD QC:
Yes.

WILLIAM YOUNG J:
Doesn't – because whatever the position was with Zurich, the insured does seem to have thought or had a basis for thinking that there was a sort of long stop cover of 100 million.

MR GODDARD QC:
But this argument is proceeding on the basis that's not the case.

WILLIAM YOUNG J:
No well it's not proceeding on the basis that that's not what they thought but it's proceeding on the basis that there wasn't such cover.

MR GODDARD QC:
That it wasn't agreed and positively that there was agreement to a sum insured of 12.95.

WILLIAM YOUNG J:
Yes but I mean the documents the insured has suggests, would suggest that the cover that had been arranged extended to 100 million.

MR GODDARD QC:

But this argument is proceeding on the basis that there wasn't such an understanding with the insurer.

WILLIAM YOUNG J:

I know, totally understand, but what you're saying is that no sensible insured would want to get more cover than what the value of the building was assessed to be.

MR GODDARD QC:

They certainly wouldn't want to pay for it.

WILLIAM YOUNG J:

But it's thinking, on the face of it, on the basis of the documents that it had, at least had a basis for thinking that it was getting a lot more cover than that and was paying for it. Well it was paying for cover that extended to 100 million.

MR GODDARD QC:

Yes. Whether it actually thought that and how that came to pass is something that will be explored at the other trial but what we're trying to ascertain here is what the position would be in the absence of a shared understanding to the effect that was the cover being provided.

WILLIAM YOUNG J:

Yes I know it's not a shared understanding, I just really responded to your suggestion that only a lunatic would insure for more than the building's worth.

MR GODDARD QC:

My primary submission – no I don't think that's right because the structure here actually built in a margin. They thought – they built in a margin over what it was worth at the time of cover but my main submission here is that if you were going to insure for more than the building was worth, you would expect to insure for the same amount against all perils. You wouldn't have a differential concern.

WILLIAM YOUNG J:

No well that doesn't – I mean it's probably – it's a difficult part of the case because on one view of the facts this whole issue is just hypothetical.

MR GODDARD QC:
Yes but it's not the view of the facts that the Courts have been asked to proceed on here.

WILLIAM YOUNG J:
Yes.

MR GODDARD QC:
But I do want to – so if – it would be perfectly rational to build in a margin of safety in setting your sum insured under your insurance policy because you might well be conscious that valuers get things wrong. I don't think there are many litigators who don't think that after a few years in commercial practice. We've all cross-examined valuers, often with great pleasure, about the surprising things they do. I was doing that in Auckland just a month ago. So you might well think that sort of valuer is telling me I'd better build in a margin of two million because I think my house is going to cost two million more to fix than the two million they've told me. I can be 100% out. But the thing, my submission is that you would do that for all risks. You wouldn't think I'd better build that margin in.

WILLIAM YOUNG J:
I understand that but there is actually $100 million cover, then that -

MR GODDARD QC:
Would've been the same for both.

WILLIAM YOUNG J:
- sort erases all problems like that doesn't it?

MR GODDARD QC:
It does but it –

WILLIAM YOUNG J:
Well it's hard to see how it fits into the policy, I agree.

MR GODDARD QC:
It's rather hard and it's not the working assumption for today and the points that the Court of Appeal made which in my submission are unanswerable when it comes to

making sense of this, are first that if you were worried about the adequacy of your 12.95, you would take your cover to a different level for everything that might destroy your house and second, that if you were going to allow a margin for error, then there would be no rational reason to pick the figure of 19.75 million as the level of cover that you would buy because that has absolutely no rational connection with the estimated value. It's not the estimated value plus, you know, a one million margin or plus a 20% margin or anything like that. The only way that happens to appear is by adding the EQC number to the estimated value. That's completely arbitrary in terms of a desired level of cover. If our officious bystander friend had said to the Body Corporate, why do you want $19.75 million worth of cover against natural disaster, the Body Corporate would have said, we don't.

WILLIAM YOUNG J:

Well they may do. They may say well because we want as much cover as we can get for as little as we can pay.

MR GODDARD QC:

But if they –

WILLIAM YOUNG J:

And if the insurer is silly enough to give us that, then that's great, we'll take it.

MR GODDARD QC:

But at the stage where you're going out into the market and asking for it, they say why do you want this amount of cover, they couldn't explain that amount. They – and they certainly – so they couldn't explain why it would be differential, they couldn't explain why it would be that amount, and that's because it makes no commercial sense. There are all sorts of good reasons to insure for more than the property is worth but not in this way.

So you've got the material damage section, you've got the insuring clause. My friend made something over on page 5 of the heading, "Standard policy extensions" and said well that means that the clauses which follow must extend cover but in fact there are a number of clauses that don't operate as extensions. Let me first just flag those. Probably the best example is MD29 on page 10, the stock declaration condition. What this does is deal with premium adjustment. It says we've charged you a premium for stock based on 75% of the full premium payable for the sum insured.

ELIAS CJ:

Sorry, where is this?

MR GODDARD QC:

We're at page 10, clause MD29. It says we've charged you a premium for the stock based on 75% of the premium payable for the sum insured and then there's a mechanism for monthly reporting of the value of your stock which leads to an adjustment one way or another of the premium including a premium adjustment upwards. So it's nothing to do with the level of cover. It's all to do with the premium to be paid. And it makes no sense, really, to describe that as an extension.

MD31 down on that page is another example. That deals with what loss or damage is treated as a single event and it says, "Any loss or damage arising from one event or a series of events arising from one cause during any one period of 72 consecutive hours is deemed a single event and therefore constitutes one event with regard to the excess provided for in the Brokernet policy." So if you get several events with one cause during 72 hours you only get one sum insured, you don't get a reinstatement, and you only have one excess, so it's actually limiting what you can get in those circumstances while also correspondingly limiting the excess.

So when me come back to MD15 the reason that this is found in the list of extensions, because I accept that headings are an indication, but they're only an indication, it is almost certainly the common structure of policies of this kind that my friend described under which normally natural disaster damage is carved out and then what happens is that in an extension you add it back in. Someone has taken a policy that worked in that way and modified its drafting which is why it's still in here but it's not adding natural disaster back in, it's wrapped up in the main insuring clause, and that's a perfectly sensible explanation for where we find it.

If we read it now carefully, "In the event of the insured having insured residential property for which compulsory natural disaster damage cover applies, then in the event of such property suffering natural disaster damage during the period of cover and covered by natural disaster damage cover, then the insurer's liability will be limited to the amount of loss in excess of the natural disaster damage cover."

So what this clause does on its face is limit the insurer's liability. It's not drafted as an extension like, say, MD14 immediately above it, or MD13, the policy extends to, extends to. It's drafted as a limit. A limit on the insurer's liability. To know what the insurer's liability is, we have to look to the rest of the policy. We don't know what it is unless we look elsewhere.

ELIAS CJ:

Unless loss is not the insurer's liability. It's important to your argument that it is.

MR GODDARD QC:

I think there are a number of ways that this can be read which led to the conclusion that I suggest. One is that you read loss as insured loss but you can also simply say the insurer's liability, what liability, the liability under the other provisions of this policy, that's what it must mean. There is no liability, no freestanding liability apart, you know, under this clause. It doesn't say "the insurer will be liable for" what it – and this is I think important, it's not as my friend accepts, creating liability for natural disaster, rather what it does is assume liability for natural disaster cover because the definition of "event" is broad enough to include a natural disaster.

WILLIAM YOUNG J:

But there's no definition of "insured loss".

MR GODDARD QC:

No.

WILLIAM YOUNG J:

There's loss or damage which this can't mean because that really refers to the physical damage –

MR GODDARD QC:

Yes.

WILLIAM YOUNG J:

- not the economic consequences of it.

MR GODDARD QC:

Yes.

WILLIAM YOUNG J:

And this must refer to economic consequences.

MR GODDARD QC:

Sorry?

ELIAS CJ:

Sorry?

WILLIAM YOUNG J:

This must refer to economic consequences.

MR GODDARD QC:

I think –

WILLIAM YOUNG J:

It's the loss in the pocket of the insured, isn't it?

MR GODDARD QC:

And the question is whether it's referring to all loss or to insured loss and that's what we're trying to read.

WILLIAM YOUNG J:

No but there isn't a definition of "insured loss".

MR GODDARD QC:

But there doesn't –

WILLIAM YOUNG J:

Sorry I thought that's what you meant.

MR GODDARD QC:

No I'm not referring to a definition of "insured loss" but –

ELIAS CJ:

You're saying you read loss as the insured loss?

MR GODDARD QC:

I'm saying one way of reading this, which is a perfectly sensible way, is to read loss as insured loss but actually I think the most natural way to read is by saying then the insurer's liability will be limited. Now to find out what the insurer's liability is –

GLAZEBROOK J:

Well isn't the insurer's liability to pay the replacement cost up to 12.95 million? If you look at the rest of the policy.

MR GODDARD QC:

It's, in my submission it is, as long as one understands that by that it's the 12, first 12.95 million up to the point at which the Body Corporate agreed to be on risk.

WILLIAM YOUNG J:

Yes but it's quite hard to read that in there. I mean the most – if you didn't look at how the premium had been calculated, you would think that the limitation, that they don't have to pay the first $6.8 million. That's the natural reading of it, will be limited to the economic consequences of the event but on the basis the first $6.8 million is paid by EQC.

MR GODDARD QC:

That's not, in my submission, how one would normally set out to draft that consequence, which is a postponement of the layer, what you'd say then the insurance liability –

WILLIAM YOUNG J:

I mean you wouldn't say - this isn't the way you'd set out to draft a clause that had your –

MR GODDARD QC:

No it's not a very well drafted clause either way and so what we're trying to work out is what a rather clumsily expressed clause does and my submission –

GLAZEBROOK J:

Well isn't it that if the damage is 7.8, then the insurer's liability which would normally be 7.8 is limited to the one, which is in excess of the 6.8 paid by the EQC. It seems a perfectly natural English way of drafting that.

MR GODDARD QC:

For that scenario it's very easy.

GLAZEBROOK J:

Well but that's what they were thinking probably in most cases because people aren't – are drafting this for all of the situations where you might have a claim. They wouldn't normally think of claims, especially given the history of earthquakes in New Zealand, apart from the Napier one that would have such a devastating consequence over such a large area, would they? So they'd be thinking of those sort of claims where something happened to one of the walls and you had to put it back up again and they didn't have to pay for that because EQC would pay for that and if it happened to be 7.8 instead of 6.8, then their liability would be limited to the one.

MR GODDARD QC:

Yes.

GLAZEBROOK J:

Because the loss was 7.8, the insurance liability will be limited to the amount of loss in excess of the natural damage cover. So the loss is 7.8, natural damage cover is 6.8, insurers are limited to one.

MR GODDARD QC:

Yes I agree with that Your Honour but that's the easy case. The question is -

GLAZEBROOK J:

But how can it be read differently in an easy case as against a hard one?

MR GODDARD QC:

But I'm not suggesting reading it differently, I'm suggesting that what we're reading there is that the insurer's liability that would otherwise exist for 7.8 is limited to the amount of that loss in excess of the natural disaster damage cover. So it's one of the 7.8.

GLAZEBROOK J:

Well, so in this case the damage is 25 million and the –

MR GODDARD QC:

Insurer's liability.

GLAZEBROOK J:

- insurer's liability is limited to 25 million, less 6.8 million but of course subject to the cap under the insurance policy of 12.9.

MR GODDARD QC:

And that's where it depends where you read the cap as coming into play because –

GLAZEBROOK J:

Well it does but I just want – you need to tell me, if you can, how it comes into MD15.

MR GODDARD QC:

Because when you see a reference to insurer's liability, that's a reference to liability up to $12.95 million of damage.

GLAZEBROOK J:

Well that's right –

MR GODDARD QC:

And only –

GLAZEBROOK J:

So it's limited to the amount of loss in excess – well just tell me how – I mean I understand your, I understand loss, that you have to read loss as meaning not actual loss but something else.

MR GODDARD QC:

Well I don't have to if insurer's liability means what I say it means which is –

GLAZEBROOK J:

So, all right, can I just –

MR GODDARD QC:
Sure.

GLAZEBROOK J:
I don't understand it, sorry.

MR GODDARD QC:
So it really goes back to that picture that I handed up earlier. If we start with the left-hand column.

GLAZEBROOK J:
I'd rather not a picture.

MR GODDARD QC:
Okay.

GLAZEBROOK J:
I want the words that you say it means.

MR GODDARD QC:
Insurer's liability means the liability that would arise in respect of damage if it wasn't natural disaster damage. The liability, the core liability that's provided for under this policy.

WILLIAM YOUNG J:
I understand that's what you mean but it's quite hard – is there, there's no textual way you can get that, is there? I mean what you're saying, the insurer's liability, by which we mean the liability to pay the first $12.95 million –

MR GODDARD QC:
Because that's what –

WILLIAM YOUNG J:
– of loss –

MR GODDARD QC:

– this policy relates to, yes.

WILLIAM YOUNG J:

Well it doesn't because the insurance liability, the cap is the maximum amount the insurer has to pay.

MR GODDARD QC:

But on the basis of an understanding that after that point risk remains with the insured. That's my key submission –

WILLIAM YOUNG J:

Yes I understand that but I'm not sure, I can't, for the moment anyway, see how you can get there on the language.

MR GODDARD QC:

By reading insurer's liability is a reference back to the material damage section and –

WILLIAM YOUNG J:

Just, can you, I mean the more words that are required the less plausible it becomes so how many words are required?

MR GODDARD QC:

Well again I think I'd respectfully suggest that you don't measure, in Lord Hoffmann's phrase, the amount of red ink required, or even necessarily come up with specific words to modify a clause, that's the wrong way to go –

GLAZEBROOK J:

So it's the vibe?

MR GODDARD QC:

– about working out what's happened to the language.

GLAZEBROOK J:

It's the vibe, is it?

MR GODDARD QC:

It's not the vibe, it's the commercial logic and general structure to use Lord Walker's –

GLAZEBROOK J:

Well I don't really think that's what Lord Hoffmann was saying, and I don't think there's any suggestion that you can divorce yourself from the words and rewrite a contract to what would have been commercial sense if the party were commercially sensible. You have to ground whatever interpretation there is in the words.

MR GODDARD QC:

Not – two things. First, I don't think I need to go this far, but second I think Lord Hoffmann did go that far when he said firstly that it's not a matter of coming up with alternative forms of words or talking about doing violence to the words. That – a famous example of reading 12 February as 13 February or vice versa which can't be 12 is 13 but clearly something had gone wrong, the *Mannai Investments Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] 2 WLR 945 case I think it was, where you had to read in a different date to make commercial sense of it, and ICCS really required quite a different set of words versus compensation required quite a different set of words to be adopted. *Chartbrook* was just hopelessly ambiguous, it was just a matter of where you put brackets, and a very confusing phrase. So I think you can, with respect, go that far and it's the Lord Diplock point that, "If detailed semantic and syntactical analysis of words is going to lead to a conclusion that flouts business common sense it must be able to yield to business common sense," and that can involve quite a lot of yielding. But here it is not necessary to do a great deal of rewriting. All one has to do is say that MD15 is designed to be a limit within a limit, to use the phrase that was picked up by the Court of Appeal. You already have the limit of 12.95 million in the event of damage and then this imposes a further limit which you don't start paying until the EQC cover has been exhausted. That's what it's designed to do.

ELIAS CJ:

It's a deduction from the limit though. That's how you're inviting us to read it?

MR GODDARD QC:

Yes. So that the liability that would exist if this damage had been caused by some other peril, of 12.95, is limited by only starting to pay after you've exhausted what's been done by the EQC. So in other words you hold the top constant and you limit how much you pay from zero to that figure up to but not more than 12.95. You limit that by moving the base up to correspond with what EQC will pay and that's a textually available reading and it certainly accords with the commercial logic of the deal. I deal in some detail with that in my section 8 but I've covered a lot of it and it is 4 o'clock.

ELIAS CJ:
I just realised we are going to have to sit a bit later. I think we should take a short adjournment, 10 minutes or so.

MR GODDARD QC:
Yes Your Honour. I think I'm pretty much done.

COURT ADJOURNS:4.01 PM

COURT RESUMES: 4.21 PM

MR GODDARD QC:
Your Honour, four short points, at least I hope they're short. There are certainly four of them. First, if one were to focus on the text of MD15, then I think it's important to focus on the words "limited to" and ask what they're doing because my friend's reading of it would follow, even if one just put a line through those words, if what this said is the natural disaster damage, the insurer's liability will be the amount of loss in excess of the natural disaster damage cover, you'd get to where he wants to go and then you'd have the sum insured limits operating separately.

His reading fails to give the words "limited to" anything to do, in my submission, what they clearly signal as a matter of textual reading. "Clearly signal" is strong, what they signal is a matter of textured interpretation, read properly is that this is indeed a limit within a limit. It's a further limit on the limit that existed apart from this clause. So that's a textual indication but, and I want to pick up what I said to Your Honour Justice Glazebrook earlier, about the approach to interpretation. It is, in my submission, helpful to bear in mind what Lord Hoffman had to say in *Chartbrook* and in particular paragraphs 20 through 26 of *Chartbrook* which is under tab 7 in my authorities and perhaps just to go to two brief extracts, the first in paragraph 21, His Lordship said, "I do not think that it is necessary to undertake the exercise of comparing this language, the language that Lord Justice Laurence Collins had used in the Court of Appeal, with that of the definition, in order to see how much use of red ink is involved. When the language used in an instrument give rise to difficulties of construction, the process of interpretation does not require one to formulate some alternative form of words which approximates as closely as possible to that of the parties, it is to decide what a reasonable person would have understood the parties to have meant by using the language which they did. The fact that the Court might have to express that meaning in language quite different from that used by the parties", and His Lordship then gives a couple of examples, "is no reason for not giving effect to what they appear to have meant."

And then again down at paragraph 25, and this is what I particularly had in mind earlier, "What is clear from these cases is that there is not, so to speak, a limit to the amount of red ink or verbal rearrangement or correction which the Court is allowed. Al that is required is that it should be clear that something has gone wrong with the language and that it should be clear what a reasonable person would have understood the parties to have meant. In my opinion both of these requirements are satisfied." So I do want to emphasise that commercial logic, the general structure of the bargain, which was Lord Walker's phrase a little further on in this decision, actually at 95 it is worth, after going through some rather gruesome textual analysis, His Lordship says at 95, "That brings me back to what I said earlier about the need, in the midst of a thicket of rather confusing definitions, to keep in mind the general structure of the bargain and the risks that were intended to be allocated." That brings me onto my third point, which is that –

WILLIAM YOUNG J:

Does this presuppose, I know it raises quite a deep issue, but presuppose there has to be something wrong with the document on its face? If you can just look at it and say, you know, crikey they can't have meant that because it doesn't make sense as –

MR GODDARD QC:

No it doesn't. And in *Chartbrook* they got to this conclusion by looking at the basic commercial drivers of the deal and identifying, for example, as one of the helpful points in relation to our 19.75, let me find the passage I had in mind.

WILLIAM YOUNG J:

I was really looking at what Lord Hoffman said in para 21 of *Charbrook*, "Where the language used in an instrument gives risk to difficulties of construction" and is that – I mean you look at the context to see whether there's a difficulty with construction. I mean obviously there's the clearest of words can be obviously wrong and I mean I accept that.

MR GODDARD QC:

Just in the instrument but His Lordship was going outside this and saying what was the architecture of the deal. So for example, one possibility that was suggested for the formula working in the way that *Chartbrook* contended for, was that the clause was designed to provide for a catastrophic fall in the housing market, here a catastrophic increase in building costs and at paragraph 19, what his Lordship said responding to that was, oh 18 first of all deals with the fact this is described as a contingency but the approach removes contingency, that's a bit like risk allocation. Then at 19, "My Lords I cannot believe any rational parties who make provision for such a catastrophic fall in the housing market, so an unlikely assumption, would have adopted so precise a sum to represent their estimate of what might happen. Why £53,438? What is was, was described. How could that figure have been appropriate as a minimum expected sale price of the entire flat at some future date? If the parties were wanting to guess at some extraordinary fall in the market against which *Chartbrook* was to be protected, why that number? Why not 50,000 or 60,000 or £100,000? A figure chosen to represent someone's fears about a possible collapse in the market could only have been based upon wild speculation, not the kind of calculation which produces a figure like so and so. That figure cannot have been meant to play in the part in the calculation which *Chartbrook's* construction assigns to it. It must have been intended to function as a minimum land value, not a minimum sale price. To compare it with the realised sale price would not be comparing like with like." So it's not just looking at the language, it's saying what does this do in practice in various contingencies? Is it sensible to treat it as performing the function that one party, *Chartbrook*, is contending for? And here I say that to treat the 12.95 as a top up over and above the EQC cover to give a total level of cover of 19.75 million is equally like that. It's just arbitrary.

GLAZEBROOK J:

I think if you look at paragraph 14, it puts some context, those comments later because it says that, "We don't easily accept that they have made linguistic mistakes. In some cases the context and background drive a Court to the conclusion that something must have gone wrong and it requires a strong case that something must have gone wrong with the language." And I think somewhere else it says it must be also absolutely clear what the language would mean. So it's a high standard, it's not anything that seems a bit dodgy commercially that drives you to that.

MR GODDARD QC:
I don't think there's a requirement that you have to know what the language would've meant. It can just be a muddle and you can –

GLAZEBROOK J:
Well I think, well no you have to know what the – clear what the intention was, so it couldn't be – so something must have gone wrong and you must know what it is they wanted to do.

MR GODDARD QC:
Well you've got two competing interpretations and you compare which of them makes sense in terms of the commercial framework for the bargain. That's what His Lordship very carefully goes through here, so –

GLAZEBROOK J:
Well first of all, well I think that's not exactly what they say there because they say something must have gone wrong and therefore you don't impute the intention because if you have an ambiguity you've first of all got to find the ambiguity.

MR GODDARD QC:
No that's exactly what the Court is rejecting here. It says, "Even in the absence of an ambiguity."

GLAZEBROOK J:
Well no I understand that but you were saying if you've got two conflicting interpretations, you just choose one but where does the second interpretation come from, if it can't be found in the words, unless you say something must have gone wrong with the language.

MR GODDARD QC:
Yes.

GLAZEBROOK J:
But that's what they're saying in *Chartbroook.*

MR GODDARD QC:
Absolutely, I agree with Your Honour. So my primary submission is that the language is – can sensibly be read in the way I'm suggesting but if Your Honour considered that was not right, then that could only be because something had gone wrong with the language because the reading contended for by my friend produces such commercially inexplicable results and there are two reasons why their commercially inexplicable, the first is the, depends how one counts, maybe three reasons. The first is the change, the difference in risk allocation of underinsurance as between non-natural disaster perils and other perils. That makes no sense. The second is the arbitrary figure one would get for the total level of cover which just comes from nowhere. That makes no sense. And the third is the disconnect with the way in which the amount payable by the insured was calculated by the insured's agent using an agreed procedure and that was the next thing I wanted to go to, was to just come back to those 2010 premium calculations under tab 15, page 61 and just emphasise that what we see here is a rate quoted for non-EQ being applied to the amount for which Zurich was at risk in respect of fire and other non-natural disaster perils, 12.95 and then we see the rate that's quoted for top up EQC applied to figures –

ELIAS CJ:
Sorry is this 61?

MR GODDARD QC:
It is Your Honour. And we see top up EQC rate being applied to figures which total 6.15 million, a figure arrived at by subtracting the Earthquake Commission cover from the other cover. Now my friend is right that there are theoretical scenarios in which, on my preferred interpretation, Zurich could still end up writing a cheque for more than $6.15 million and my friend went through some of those. The way I would put it is not that this is a maximum liability but that this is the expected liability in the event of a total loss, the maximum liability in the event of a total loss and that as both Courts below said, the parties would expect some correlation between the premium paid and the level of risk assumed by Zurich and what we see here is the difference between the two numbers being used as the shared basis for calculating how much will be paid for top up EQC. So if we're trying to understand what the party's commercial expectation of what topping up was going on, what we see is a topping up for premium payment purposes from the 6.8 to 12.95 and a closely related point,

my interpretation produces the result that the risk of underinsurance, the risk of the Body Corporate's chosen valuer getting their value wrong, which we all agree rests with the Body Corporate in relation to non-natural disaster situations, remains there in the natural disaster context. The risk allocation in respect of underinsurance, the risk allocation in respect of valuer error stays in the same place regardless of the peril and that is consistent with again the price that was paid, it's consistent with the basic architecture of the deal and the commercial logic of the deal. So –

ELIAS CJ:
What about the humanitarian, I know this is going back into the statute, but the humanitarian policy of the statute?

MR GODDARD QC:
That's met by the payment by EQC. And I think it's quite clear, the Act has done its work. The maximum amount that anyone can get under the statute to address the humanitarian concern is payable and is paid.

WILLIAM YOUNG J:
It's sort of, I mean there are two ways of looking at it, you say that limits on the liability of EQC and the insurers should be treated not just as limits on their liability but as on – as limits on the ability of an insured to recover.

MR GODDARD QC:
A policy can be written either way but in my submission both these policies do work in this way as a matter of commercial risk allocation, yes. You can go out and write policies which are deliberately layered, in which case what insurers do –

WILLIAM YOUNG J:
Yes, I mean I understand but in a sense it's not an obvious way of doing it.

MR GODDARD QC:
It is though, consistent with the basic commercial logic of insurance which is that you are paying someone else to assume certain risks.

WILLIAM YOUNG J:
Yes.

MR GODDARD QC:

And you have got to understand what risks you are paying them to assume and in my submission while it's quite clear that the Body Corporate was not willing to pay Zurich to assume in relation to fire, was the risk that their valuer had got in wrong. In relation to fire the Body Corporate, it's common ground, did not pay Zurich to take on the risk of the valuer getting it wrong. Why suddenly in the natural disaster context is Zurich taking on that risk and why is it doing so on the basis of a calculation, at least on its face, doesn't involve any amount of premium attributable to the possibility of a recovery above the 12.95 million level.

We see in the premium schedule, that where you have got a contingent extra exposure you can, for example, apply a fraction, 70% for the inflation amount of your standard rate. If Zurich thought it was taking on 6.15 million of risk in the total loss scenario, if the valuers and right and some unknown amount, some millions, with diminishing likelihood as that number got bigger, if the valuers had got it wrong why wouldn't there be some allowance for that?

Now it is certainly true that there is always scope for a straightforward commercial haggle in the context of insurance cover and we see that in the evidence here, there were a couple of extra benefits referred to by my friend in his submissions that were negotiated as add-ons without charge in order for Zurich to get the business but in relation to this basic risk allocation structure, there's no suggestion of any request of that kind, of any engagement on that issue, of any analysis by anyone reflecting an expectation that that would happen and again these are contracts that are all about risk. You have got to be able to say something sensible about what risks are being sold and what risks are being retained and what, in my submission, is not sensible at all, is to say, oh in relation to some things that could knock our building down, we want to see the risk of our valuer getting it wrong but in relation to others we don't. Because if your building's gone, your building's gone, you face the cost of rebuilding, why would that risk end up in different places. It is commercially illogical. It is not something that's explained by any evidence, it's not something that's explained by any submission. My friend, who is richly creative in these matters, has not managed to come up with a plausible commercial reason why one might set out to obtain that outcome or why an insurer dealing with the insured might think they were trying to obtain that outcome. Certainly stepping into the right shoes and avoiding the risk of subjectivity, our reasonable observer, watching these parties with the background knowledge, would not have any reason to think that the risk of the valuer getting it wrong was being assigned differently, depending on which peril matured. Zurich didn’t choose the valuer, Body Corporate or the –

WILLIAM YOUNG J:
Had to approve it.

MR GODDARD QC:
Sorry Your Honour?

WILLIAM YOUNG J:
Zurich had to approve the valuer, isn't that right?

MR GODDARD QC:
I think it had to be someone acceptable to Zurich.

WILLIAM YOUNG J:
Yes.

MR GODDARD QC:
But they weren’t choosing the valuer and then taking the risk on them getting it right and that’s very clear in relation to most of the perils covered. Unless there’s anything that I can assist the Court further on.

ELIAS CJ:
No thank you Mr Goddard.

MR RING QC:
Your Honour, I’ll also try and keep myself brief. First, MD15, my learned friend’s high point, with respect, seemed to be that the words “limited to” would have no work to do on our interpretation. I think the point to be made here is that this is not a competition for economy where you look at the words and say well how could this have been expressed in fewer words or as fewer words as possible? On that approach you could similarly look at some of the wording of MD15 and say well you could delete a few of those words and you could still have my learned friend’s interpretation or you could delete more of the words and still have my interpretation. The point is the words have been used and with respect I don’t think this is like an

exercise in statutory interpretation where you have to desperately struggle to give new and different meaning to every single word that is there.

What you are looking for is the sense of what is expressed and what is expressed is that the liability will be limited to the amount in excess of the cover and if you take my learned friend's chart and you looked at the one on the end, which is our interpretation and you asked a sort of common sense, basic sort of question, where does the Zurich cover sit? The answer would be, well it's in excess of the EQC's cover. And if you asked in the one, in relation to the middle one, where does Zurich's cover sit? You would say it's the difference between the sum insured and the EQC's cover. And that reflects exactly the two wordings that are in the marketplace.

Section 30, subsection (1), my learned friend seeks to read a lot more into the triggering terms of section 30, subsection (1) than are there. Just as the reference in section 30, subsection (1), introduction to the property also being insured against the contract of insurance, a private contract of insurance carries with it no element of the sum insured under the private insurance, so the preceding words which refer to the existence, not the amount but the existence of statutory cover, carry with it no additional meaning as to the amount of that statutory cover.

If you break down the purpose of the clause from its wording, the introductory words say where there's an earthquake and there's statutory cover and there's private cover. So the introduction is talking about the existence of those three things and then it goes on to deal with amounts and it goes on to layer the amounts between the statutory cover and the private cover. And there is nothing in Hansard that my learned friend has been able to point to which suggest that Parliament intended that you could be forced to pay a premium because you've got a house that's worth more than 100,000 or insured for more than 100,000, you can be forced to pay the statutory premium but never have a hope of ever getting any benefit out of it.

In relation to the premium calculation, there's been almost an elevation of the words "top up" to being as if they appeared in the policy itself and yet they never do. Top up of course was, as I'm sure Your Honours are aware, was the way it was described under the old Act as well because then it was top up. You had indemnity value and then you topped up to replacement value. So the expression "top up" is a carryover from that old regime and it's not part of a shared dictionary, as my learned friend would suggest, because it's not in the policy. The practical reality of what happened here was that ACM asked Zurich to quote premium rate to insure on the broken net policy terms. So it gave the terms, it gave the wording to Zurich and said, "Okay Zurich how much?" It was for Zurich to look at that policy wording and to make an assessment of its various exposures under it and to decide commercially, for all the reasons that it needed to protect itself and to make a profit, and to secure the business and to balance all of those things, how much was it going to charge.

Zurich assessed its maximum risk for earthquake under that wording at 6.15 million. That can be the only explanation for the premium calculation.

ARNOLD J:
But that premium calculation was done by the broker.

MR RING QC:
Well it's done by the broker on a template given to it or on a calculation sheet that's given to it by the insurer. That's the evidence, that what the insurer provides or what the broker uses is a sort of standard kind of template which has all these things on it.

WILLIAM YOUNG J:
So is it not particular to this form of contract?

MR RING QC:
Well I don't think it was particular. When you say "the form of contract", I don't think it was particular to this policy.

GLAZEBROOK J:
Where does the evidence say that because that's – if we are going to look at the schedule, it's quite nice to know who actually did prepare it and when. Not the figures because we know who put those in.

MR RING QC:
My learned friend's referring to paragraph, well booklet B, tab 5, page 29 and it starts at page 28, "ACM has an internal premium calculation template which sets out various inputs.

ARNOLD J:
So who is this witness?

MR RING QC:

This is ACM.

ARNOLD J:

This is ACM, okay, right thanks.

MR RING QC:

Yes. "We don't determine premium rates we just process", it says at the top, "We have no knowledge of or input into how insurers choose to calculate their risk, that's a matter for them. Premiums calculated in an internal system are indicative premiums." And then I think –

ARNOLD J:

So does that mean they just put in the .050 or .0625?

MR RING QC:

Correct. And you'll also find at tab 2 of the same booklet at page 10, paragraph 19, Zurich's side of things.

WILLIAM YOUNG J:

It rather suggests, I mean it may not matter, it rather suggests the spreadsheet was prepared, was initially prepared by ACM.

MR RING QC:

Yes.

ELIAS CJ:

And whose witness is this?

MR RING QC:

This is Zurich at – that last reference was a Zurich witness, Mr Barrett. But it just can't be and even Zurich has pulled away from the proposition that its maximum exposure for earthquake was 6.15 million. So once you accept or once Zurich accepts that proposition then what it really wants to say is that it had a sum insured of earthquake of 6.15 million for some purposes but not for others.

ARNOLD J:

But we've already discussed that's exactly the same position with somebody who had a clause that does achieve the effect that the insurer in this case says has achieved because EQC can refuse to cover.

MR RING QC:

Well indeed or there could be a partial loss in which you would be paying more than the 6.15 million. So it just can't be that Zurich went into this – well Zurich may well have gone into this thinking that its maximum exposure was 6.15 million but that can't drive the policy wording. Work the other way round, Zurich had the policy wording, it made an assessment of its risks by reference to the policy wording and then it chose the premium that it wanted to charge and how it then calculates that premium individually or cumulatively to get a total number doesn't then change what the words mean in the policy. It's a different matter altogether.

ELIAS CJ:

And if they thought it had that maximum,that was based on the valuation presumably?

MR RING QC:

It was based on two errors. First, the valuation, the factual error that the valuation was accurate and second, the error that it could never be called upon even if the valuation was accurate, never be called upon to pay more than 6.15 million for earthquake, when as we know there are a number of different ways in which it could have been called upon to pay more than 6.15 million for earthquake. So what it wants to do is to use that to say well we agreed we never would pay more than 6.15 million for earthquake but only in this situation. Your Honours that's all I wanted to say in reply, unless you have any queries those are our submissions.

ELIAS CJ:

Okay thank you. Thank you counsel for you help. We will reserve our decision on this matter.

COURT ADJOURNS:4.53 PM