

**IN THE HIGH COURT OF NEW ZEALAND  
WELLINGTON REGISTRY**

**CIV-2011-485-1137**

UNDER the Declaratory Judgments Act 1908

BETWEEN EARTHQUAKE COMMISSION  
First Applicant

AND THE INSURANCE COUNCIL OF NEW  
ZEALAND INCORPORATED  
Second Applicant

AND VERO INSURANCE NEW ZEALAND  
LIMITED  
Third Applicant

AND IAG NEW ZEALAND LIMITED  
Fourth Applicant

**CIV-2011-485-1116**

AND BETWEEN TOWER INSURANCE LIMITED  
Plaintiff

AND EARTHQUAKE COMMISSION  
Defendant

Hearing: 4 and 5 August 2011

Court: Winkelmann J  
MacKenzie J  
Miller J

Counsel: J E Hodder SC, J A Knight and N S Wood for EQC  
D J Goddard QC and M R Burrowes for ICNZ  
D J Goddard QC and G J Jones for Vero  
D J Goddard QC for IAG  
M A Gilbert SC for Tower  
T C Weston QC Amicus

Judgment: 2 September 2011

We direct the Registrar to endorse this judgment with a delivery time of 4pm on the 2<sup>nd</sup> day of September 2011.

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## JUDGMENT OF THE COURT

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### **Introduction**

[1] A series of earthquakes which have struck the Canterbury region since 4 September 2010 have caused damage on a scale not previously experienced in New Zealand for any natural disaster. No fewer than 13 of the earthquakes have exceeded magnitude 5 on the Richter scale and been recognised by the Earthquake Commission (EQC) as sufficiently powerful to cause natural disaster damage covered under the Earthquake Commission Act 1993 (the Act). EQC had, at the end of June 2011, received 368,000 claims arising from the earthquakes. The great majority, 313,000, arise from the two largest earthquakes on 4 September 2010 and 22 February 2011, divided almost equally between those two events. Many properties have suffered damage in more than one earthquake. EQC has calculated that 110,000 properties have multiple claims. It has paid over \$1 billion towards settlement or partial settlement of the claims. Many more are still to be settled.

[2] These proceedings involve EQC, the Insurance Council of New Zealand (ICNZ) which represents fire and general insurers in New Zealand insuring approximately 98 per cent of insured residential buildings in the earthquake-affected area, and three ICNZ members, Vero Insurance New Zealand Ltd, IAG New Zealand Ltd, and Tower Insurance Ltd. They seek declarations under the Declaratory Judgments Act 1908 to resolve an important issue about the extent of cover available to homeowners.

[3] Because of the importance and urgency of this issue, the parties have cooperated in having the proceedings readied for hearing as quickly as possible, having regard to the complexity of the issues. The Court has been able to cooperate in arranging an early fixture, before a full bench. We are grateful to counsel for their assistance.

[4] In form and substance the proceeding is between EQC and the insurers. Where a homeowner has full replacement value cover under the insurance policy, the answer to the question will be of primary concern to EQC and the insurer, rather than the homeowner. In such cases, EQC cover will effectively operate as a “first layer”, with an upper layer covered by the insurer. This judgment is likely in such cases to determine the extent of the respective liabilities of EQC and the insurer to the homeowner. However, we agree with counsel that for purposes of the statutory analysis it is both necessary and appropriate to analyse the issues as between EQC and homeowners. We should add that we were not asked to examine examples of the insurance policies that are in use. We do observe that the evidence identifies a possibility that the answer may have significant practical effects for some homeowners in certain circumstances, notably where a policy is contingent in some way upon EQC cover. While we have borne that possibility in mind we are not able to say to what extent, if any, it will come to pass.

[5] To ensure that any separate perspective on behalf of homeowners could be put before the Court, Mr Weston was appointed as amicus. He has presented helpful submissions, and his presence has assisted in ensuring that the crucial importance of these issues to homeowners, as well as to their insurers, is not overlooked. He also emphasises that the immediate concern for many homeowners is the uncertainty that they face while their claims are resolved.

### **The issues**

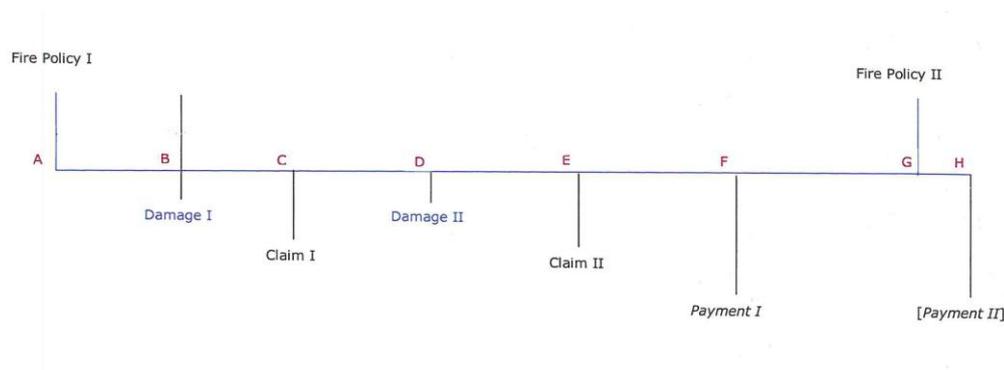
[6] All residential buildings and household contents in New Zealand which are insured under a contract of fire insurance enjoy cover under the Act for natural disaster damage. The cover is described in ss 18 and 20 of the Act. It is for the replacement value of the property to a maximum of (generally speaking) \$100,000 for a residential building and \$20,000 for its contents.

[7] The question is how EQC cover responds to homeowners who have made more than one claim for damage suffered in more than one earthquake where such damage exceeds, in aggregate, \$100,000 (or \$20,000). The question for decision may be posed in these terms:

Where there are multiple events causing natural disaster damage to the same residential or personal property during the term of the underlying contract of fire insurance, and EQC has not, at the time of subsequent natural disaster damage, made any payment in respect of previous natural disaster damage, is EQC liable to pay:

- (1) Up to the amount of \$100,000 (or \$20,000) in respect of each occurrence of natural disaster damage to that residential building (or that personal property); or
- (2) No more than \$100,000 (or \$20,000) in total for the aggregate of all natural disaster damage caused by multiple events to that residential building (or personal property), until EQC cover is reinstated on payment of a claim or by entry into a new or renewed fire insurance contract?

[8] The timeline below helpfully illustrates the hypothesis upon which we are asked to make a declaration about the effect of the cover:



[9] The period between Fire Policy I and Fire Policy II will typically be a period of one year, commencing on the inception or renewal of a fire insurance policy covering a residential building, and ending on the expiry or renewal of that policy. The dates of Damage I and Damage II will typically be two of the major earthquakes; for example, 4 September 2010 for Damage I and 22 February 2011 for Damage II. The dates of Claim I and Claim II will be the dates on which a claim for the relevant damage is lodged with EQC, generally required to be within three

months after the occurrence of the damage. The dates of Payment I and Payment II are the dates on which EQC makes a payment for Claim I and Claim II respectively. We were told that, in practice, the date of payment is ordinarily treated as the date on which EQC logs the claim with the project management office which has been established to manage and coordinate repairs to damaged properties. At that date, we understand, EQC assumes an obligation to pay at least the project manager's fee. That will not be so in every case, as we were told that some homeowners elect to manage repairs themselves. Presumably, payment is made directly to the homeowner in those cases.

[10] This sequence of natural disaster damage and claims is unique in the history of EQC, which has not previously been required to consider the question posed at [7]. Mr David Middleton, who was the Chief Executive of EQC from the inception of the Act in 1993 until early 2010, said in his affidavit that during his time EQC was not called upon to respond to any natural disaster events in which property was damaged on multiple occasions in excess of the \$100,000 limit.

### **The legislation**

[11] The cover provided is set out in ss 18 and 20 of the Act:

#### **18 Residential buildings**

- (1) Subject to any regulations made under this Act and to the Third Schedule to this Act, where a person enters into a contract of fire insurance with an insurance company in respect of any residential building situated in New Zealand, the 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 (exclusive of goods and services tax) which is the least of—
  - (a) If the contract of fire insurance specifies a replacement sum insured for which the building is insured against fire under that contract, the amount of that sum insured;
  - (b) If the contract of fire insurance does not specify such a replacement sum insured but does specify an amount to which the building is to be insured under this Act, that amount;
  - (c) The amount arrived at by multiplying the number of dwellings in the building (being the number determined in

accordance with subsection (3) of this section) by \$100,000 or such higher amount as may be fixed from time to time for the purposes of this paragraph by regulations made under this Act.

- (2) An amount specified for the purposes of subsection (1)(b) of this section shall not be less than the amount calculated by multiplying a sum of not less than \$1,000, or such higher sum as is fixed from time to time for the purposes of this subsection by regulations made under this Act, by the area in square metres of the residential building. Where a contract specifies a lesser amount, the amount specified is deemed to be \$1,000 or such higher sum as is fixed from time to time for the purposes of this subsection by regulations made under this Act, by the area in square metres of the residential building.
- (3) For the purposes of subsection (1)(c) of this section, a residential building is deemed to comprise one dwelling unless the existence of a higher number of dwellings in the building is disclosed to the insurance company at the time that the contract of fire insurance is entered into.

...

## **20 Personal property**

Subject to any regulations made under this Act and to the Third Schedule to this Act, where a person enters into a contract of fire insurance with an insurance company in respect of any personal property situated in New Zealand, the property shall, while that contract is in force, be deemed to be insured under this Act against natural disaster damage for its replacement value (or, if it is insured against fire on any less favourable basis, that basis) to the amount (exclusive of goods and services tax) which is the lesser of—

- (a) If the contract of fire insurance specifies a maximum amount to which property is insured against fire under the contract, that amount:
- (b) The sum of \$20,000 or such greater amount as may be fixed from time to time for the purposes of this section by regulations made under this Act.

[12] We are concerned with cover under both sections. However, as the issues which arise are essentially the same in both cases, we generally confine our discussion to s 18, for simplicity. Our reasoning applies equally to s 20. Also for simplicity, we refer to the limit of cover as \$100,000, since that is the figure usually applicable under the formula in subs (1). For a personal property claim, the figure is \$20,000.

[13] A levy of 5 cents per \$100 of the amount to which the property is insured under ss 18 or 20 is payable where the period of insurance is one year, pro-rated for

any other period of insurance. The conditions of insurance are specified in sch 3 of the Act. These include that EQC's liability is subject to an excess, and that claims must be reported within three months after the occurrence of natural disaster damage.

[14] A key provision for present purposes is cl 6 of sch 3. That provides:

**6 Reinstatement of insurance on payment of claim**

Subject to clauses 4 and 5 of this Schedule, on the payment by the Commission of any amount for any natural disaster damage to any property, the insurance under this Act shall continue to the same extent as before the natural disaster damage occurred, but the Commission shall be entitled to charge the insured person (or deduct from that payment) for the continuation of the insurance an amount calculated in accordance with regulations made under this Act.

[15] In our opinion neither cl 4 nor cl 5 (which provide for cancellation of insurance or limitation of EQC liability in certain circumstances) requires consideration in the situation with which we are concerned.

[16] The formula for calculation of the extra premium payable under cl 6 is contained in reg 5 of the Earthquake Commission Regulations 1993 which provides:

**5 Reinstatement of insurance on payment of claim**

For the purposes of clause 6 of the Third Schedule to the Act, the amount which the Commission is entitled to charge an insured person (or deduct from a payment to an insured person in respect of a claim under the Act) for the continuation of the insurance, after making a payment in respect of a claim, shall be calculated in accordance with the following formula:

$$\frac{a \times c \times d}{365 \times b}$$

where—

- a is the amount of that payment; and
- b is the maximum amount for which the property is insured under the Act; and
- c is the amount of premium paid for the insurance under the Act; and
- d is the number of days from the date of the claim to the date on which the insurance expires.

[17] The significance of the formula for our purposes is that the additional premium is calculated from the date of the claim, and not from the date on which EQC makes any payment towards settlement of the claim.

### **The options**

[18] All parties asserted or assumed in their submissions that the following options were open as potential answers to the question posed at [7]:

1. **“Continuing cover” or “immediate reinstatement of cover”**

Section 18 provides cover which continues at the \$100,000 level so as to provide continuing cover, so long as the contract of fire insurance is in force, for each event of natural disaster damage. Neither the occurrence of, nor the making of a claim for, an event of natural disaster damage reduces the amount of cover available for a subsequent event of natural disaster damage, at any time either prior to or on payment of a claim for the first event of natural disaster damage, but EQC has the right, on payment of that claim, to charge an additional levy for the period from the date of that first claim to the date of expiry of the policy.

2. **“Prospective reinstatement”**

Section 18 provides an aggregate amount of insurance of \$100,000 for all natural disaster damage occurring during the period of insurance. On the occurrence of a first event of natural disaster damage, the amount of insurance available for a subsequent event of natural disaster damage is reduced by the amount payable on the claim for the first event. That reduction takes effect from the date of the first damage and continues at that level until the earlier of the date of renewal of the contract of fire insurance or the date of payment by EQC of any amount in respect of the first damage. From that date, the amount of insurance is reinstated to \$100,000 for any natural disaster damage occurring after that date.

3. **“Retrospective reinstatement”**

Section 18 provides an aggregate amount of insurance of \$100,000 for all natural disaster damage occurring during the period of insurance. On the occurrence of a first event of natural disaster damage, the amount of insurance available for a subsequent event of natural disaster damage is reduced by the amount payable on the claim for the first event. That reduction takes effect from the date of the first damage. On the payment by EQC of any amount in respect of the first damage, the amount of cover is reinstated to \$100,000. That reinstatement takes effect from either:

- (a) The date of the first damage; or
- (b) The date that the claim for the first damage was reported.

[19] The broad effect of Option 2 is that there is one sum of \$100,000 available for Damage I and Damage II, which sum is to be applied first to Claim I, and the balance (if any) to Claim II. The broad effect of each of the other options is that there is a separate limit of \$100,000 for each of Damage I and Damage II.

**Submissions**

[20] Mr Hodder submits that s 18 provides insurance to an aggregate amount of \$100,000 during the period of insurance, and does not provide for \$100,000 of insurance for each occurrence or event of natural disaster damage during the period of insurance. Using the example in the timeline in [8], and described in [9], when Damage I occurs, an inchoate and unquantified liability, which Mr Hodder described as akin to a chose in action, arises for EQC. It has the effect of “earmarking” part of the \$100,000 cap, so that, when Damage II occurs, the limit applicable to Damage II will be \$100,000 minus the unquantified liability for Damage I. When the liability for Damage I is later quantified and paid, then the limit of liability for any further damage happening during the policy period and after the date of payment is reinstated to \$100,000.

[21] Mr Hodder submits that that interpretation is the plain meaning of s 18 and cl 6 of sch 3. Section 18 contemplates that a qualifying residential building is

insured to an aggregate limit of \$100,000 for all natural disaster damage occurring “while that contract is in force” and “to the amount” of \$100,000, meaning that sum is the total amount of insurance available throughout the term of the contract. Clause 6 is redundant unless cover was reduced or lost until reinstated. He submits that cover reinstates with prospective effect when any payment is made (or a new contract of insurance entered into), relying on the heading to cl 6 “Reinstatement of insurance on payment of claim”. The phrase “on the payment by the Commission of any amount” in cl 6 is a temporal reference which plainly means that reinstatement occurs on the date of payment. Further, EQC’s interpretation is consistent with a settled approach to property insurance under which insurance of property specifying a particular sum insured is presumed to be on an aggregate basis and not on a per event basis, absent a contrary provision in the contract of insurance. He cites a number of leading insurance texts and cases in support of this last proposition.<sup>1</sup>

[22] Mr Hodder next points to the absence of factors suggesting that on a purposive approach to the relevant statutory provisions a “generous” interpretation or one favouring a more comprehensive extent of cover should be preferred. Far from it, he submits, the Act was designed to provide only a basic and limited level of insurance. He acknowledges that EQC’s approach produces anomalies as among homeowners depending on when claims are processed by EQC, but he submits that anomalies are both inevitable and essentially irrelevant.

[23] For the insurers he represents, Mr Goddard submits that s 18 provides that cover is available at the level specified in that provision at all times while a fire insurance policy is in force in respect of the building. He submits there is a latent ambiguity in references to the amount of cover under an insurance policy. He submits that:

- (a) In some contexts, such a reference is to the amount of cover in place at any particular time during the period of insurance. If and when a

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<sup>1</sup> John Hanson and Christopher Henley *All Risks Property Insurance* (2nd ed, LLP Professional Publishing, London, 1999) at 174; E R Hardy Ivamy *General Principles of Insurance Law* (6th ed, Butterworths, London, 1993) at 251; *Pauls v National Union Fire Insurance Co* [1932] 2 WWR 558 (SKKB); *Palilla v Saint Paul Fire and Marine Insurance Co* 322 So 2d 46 (Fla 1st Dist Ct App 1975).

loss occurs, the question is what is the amount of cover at the time of that loss. On this approach, which Mr Goddard asserts is that contended for by EQC, the level of cover reduces at the time of the loss, and that reduction will affect the cover available for a subsequent loss.

- (b) In other contexts, a reference to the amount of cover is to the total aggregate amount potentially payable by the insurer for all claims under the policy. Mr Goddard submits that on this approach, the amount of the insurance is reduced not by the occurrence of damage, but by the making of a payment. It is not relevant to ask what was the amount of cover when the second loss occurs. Rather, the question is what amount is available for payment when the second claim comes to be paid.

[24] Mr Goddard submits that the language and purpose of the Act support the second approach. On its face, the section provides for the same level of cover to be available throughout the term. No provision in the Act provides for a reduction in the level of cover available under s 18 because natural disaster damage has occurred, or because a claim has been made. That would be antithetical to the purpose of the legislation. He emphasises that cl 6 of sch 3 provides for insurance under the Act to “*continue* to the same extent as before the natural disaster damage occurred”. That is consistent with cover remaining throughout at that level; it would make no sense to refer to cover continuing at that level if it was reduced to a different level or excluded entirely for the period from damage to payment. Lastly, the reference to insurance cover continuing “on the payment by the Commission of any amount for any natural disaster damage” is best understood as a reference to what happens *in the event that* such a payment occurs, rather than *from the time of* such a payment.

[25] Mr Gilbert, for Tower, challenges EQC’s reliance upon “to the amount” used in s 18 and says that the Court’s primary focus should be upon the words appearing earlier in the section, “... the residential building shall, while that contract is in force, be deemed to be insured under this Act against natural disaster damage ...”. Both

Tower and the other insurers explain cl 6 by reference to earlier regulations and point to striking anomalies that arise if EQC's interpretation is adopted.

[26] Mr Weston, in his role as amicus, presents a careful review of the submissions of the parties. He submits that although the legislation uses language which is familiar from insurance law, care needs to be taken not to reason backward from insurance cases to the statute. The Court is concerned with a question of statutory interpretation, not the construction of a contract of insurance. There are difficulties with EQC's interpretation of the statute, and he agrees with the insurance companies that it produces anomalies which the Court should recognise as warning signs.

### **Principles of statutory interpretation**

[27] The relevant principles are not in issue. The court interprets the legislation from its text and in the light of its purpose.<sup>2</sup> As the Supreme Court held in *Commerce Commission v Fonterra Co-Operative Group Ltd*, meaning should always be cross checked against purpose to observe the dual requirements of s 5.<sup>3</sup> When determining purpose the court must consider both the immediate and the general legislative context, including legislative history, and it may be relevant to consider the social, commercial or other objective of the statute.

[28] We add that section headings are amongst the indications that the court may examine when interpreting the statute.<sup>4</sup> And regulations may be a reliable guide to the meaning of an Act where "the Act provides a framework built on by contemporaneously prepared regulations".<sup>5</sup>

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<sup>2</sup> Interpretation Act 1999, s 5(1).

<sup>3</sup> *Commerce Commission v Fonterra Co-Operative Group Ltd* [2007] NZSC 36; [2007] 3 NZLR 767 at [22].

<sup>4</sup> Interpretation Act, s 5(3).

<sup>5</sup> *Hanlon v Law Society* [1981] AC 124 (HL) at 194. See also *Interfreight Ltd v Police* [1997] 3 NZLR 688 (CA) at 692; *Quilter v Attorney General* [1998] 1 NZLR 523 (CA) at 581; J F Burrows and R I Carter *Statute Law in New Zealand* (4th ed, LexisNexis, Wellington, 2009) at 250-251.

## Analysing the options

[29] We begin with the text of s 18. The section deems the property “to be insured under this Act against natural disaster damage” to a limit of \$100,000 while the contract is in force. “Natural disaster damage” means any physical loss or damage to the property occurring as a result of “a natural disaster”.<sup>6</sup> “Natural disaster” is in turn defined in terms of specific events, such as “an earthquake”.<sup>7</sup> There is nothing in the language of s 18 which suggests that cover reduces when damage occurs as the result of a specific event, or when a claim is made for such damage. On its face, the property remains insured, while the contract is in force, for damage resulting from a second event of natural disaster.

[30] Clause 6 reinforces this interpretation. The phrase “on the payment by the Commission of any amount for any natural disaster damage” nominates the event which determines whether or not cl 6 applies. Mr Hodder argued that “on” serves here as a preposition, meaning “when”, citing the Concise Oxford English Dictionary for that proposition.<sup>8</sup> Accordingly, he submits, the insurers’ construction is inconsistent with the plain meaning of cl 6. But “on” can also serve as an adverb, meaning “on the happening of something”. In this context we consider that the words “on the payment” are an adverbial phrase, signifying that it is the act of payment which triggers the operation of cl 6. They mean “in the event of payment”, rather than “with effect from the date of payment”. That being so, they do not limit cl 6 to the time subsequent to the date of payment.

[31] Payment is the appropriate triggering event because until there is payment for some natural disaster damage, the amount of cover continues undiminished. There has been no payment to reduce the cover available. Conversely, until the damage is repaired, there has been no addition to or improvement of the insured property such as to raise the need for additional cover. Clause 6 declares that the insurance “shall continue to the same extent as before the natural disaster damage occurred”. The verb “continues” indicates that both before and after the natural disaster damage for

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<sup>6</sup> Section 2(1).

<sup>7</sup> Section 2(1).

<sup>8</sup> Judy Pearsall (ed) *Concise Oxford English Dictionary* (10th (revised) ed, Oxford University Press, Oxford, 2001) at 994.

which payment has now been made there was cover to the full amount of \$100,000.

That is the plain meaning of the operative words. As Mr Goddard submits:

... Continuity is the necessary result, where something continues. Cover cannot continue unless cover is continuous throughout the period. And if cover is continuous to the same extent as before the damage occurred, then it cannot have been absent (or set at a lower level) for some intervening period.

[32] We acknowledge that the heading uses the word “reinstatement”, but while the heading is an aid to interpretation it cannot displace the plain meaning of the provision itself. Nowhere in the operative words is reinstatement mentioned. The heading to cl 6 is explicable by the legislative history, which we will briefly outline.

[33] Cover was first provided for in the War Damage Act 1941 (and its associated regulations) for war damage. The scheme established by that Act was substantially expanded in scope and altered by the Earthquake and War Damage Act 1944 (“the 1944 Act”). That scheme was in turn substantially altered by the 1993 legislation.

[34] The 1944 Act applied to any real or personal property which was insured under a contract of fire insurance. The property was deemed to be also insured against earthquake damage (later extended to other forms of natural disaster damage) and war damage. The insurance cover was specified in s 14(1) which provided:

**14 Property insurance against fire deemed to be insured against earthquake and war damage**

(1) Subject to the provisions of this Act and of any regulations made thereunder, where in respect of any period after the commencement of this Act any property is insured to any amount under any contract of fire insurance made in New Zealand with an insurance company after the commencement of this Act, the property shall at all times during that period be deemed to be insured under this Act to the same amount against earthquake damage and war damage.

[35] The 1951 amendments to the Earthquake and War Damage Regulations 1944 inserted the following regulation:

**4A Reduction of insurance on payment of partial claim.**

On the payment by the Commission of any amount on account of any loss or damage to any of the insured property, the amount of the insurance shall be

deemed to be reduced by the amount so paid for the unexpired term of the insurance.

This regulation was retained in that form up until the current Act and Regulations were passed.<sup>9</sup>

[36] It will be seen that the pre-1993 regime made specific provision for the statutory cover to reduce from the date of payment by the amount paid. Under the current Act, by contrast, cover continues as before, with EQC acquiring the right under cl 6 to levy an additional premium at that point. That, in our opinion, is why the legislature chose in cl 6 to declare that cover continues. Against that background, the heading may be seen to use “reinstatement” to signal that, in contrast to the previous regime, cover does not reduce from payment. We also accept Mr Goddard’s submission that the term “reinstatement” does not necessarily point to a temporal gap in cover in any event, since insurance policies may provide for automatic reinstatement on the happening of a given event, such as loss.

[37] Clause 6 expressly provides that EQC may charge the insured person, for the continuation of the insurance, an amount calculated in accordance with regulations made under the Act. We have referred to reg 5, which provides that EQC may levy a premium calculated by reference to the number of days from the date of claim to the date on which the insurance expires. As Mr Goddard put it, this would be an arbitrary and inexplicable formula to use if cover was lost or reduced from the date of damage to the date of payment, which could come many months after the claim. It appears from the date of the regulations that they were prepared contemporaneously with the Act, and cl 6 expressly anticipates them. Accordingly, we accept that reg 5 may be relied upon when interpreting the Act.

[38] We have considered the texts and authorities which Mr Hodder cites, but they do not help much. They turn on the language of particular policies and do not, in our opinion, establish that the language used in s 18 has a settled meaning in insurance law. In particular, they do not suggest that prospective reinstatement is conventional. The inclusion of cl 6 is explained, as we have outlined, by the legislative history.<sup>10</sup>

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<sup>9</sup> Earthquake and War Damage Regulations 1984, reg 5.

<sup>10</sup> Compare *Earthquake and War Damage Commission v Waitaki* [1992] 1 NZLR 513 (PC).

Even on EQC's approach there is no doubt that cover continues under the Act; the question is how it does so. The answer depends on the text and purpose of the legislation.

[39] Nor have we gained much assistance from policy materials preceding the current Act,<sup>11</sup> or Parliamentary discussion of the Disaster Insurance Bill 1989 and the Earthquake Commission Bill 1992.<sup>12</sup> We readily accept that the legislature sought both to provide more comprehensive compensation for natural disasters and to limit the State's exposure by requiring homeowners to insure for losses exceeding limits set under the Act. But we are here concerned with the Act's treatment of successive events each of which qualifies as a discrete natural disaster. As to that, the legislation itself evidences a clear change of policy, as we have already explained, and nothing in the materials to which we were referred is of much assistance.

[40] We turn briefly to Option 2, for which EQC contends. Under this option, continuity of cover is not achieved. It requires that cover be retrospectively set at a lower level, perhaps nil, in the period between the accrual of the inchoate and unquantified liability which Mr Hodder submits arises from Claim I, and the date of payment. For the reasons given above, we find that inconsistent with the plain words of both s 18 and cl 6 and we find nothing in the scheme and purpose of the Act to require a departure from that meaning. EQC's interpretation means that the cover does not, as cl 6 provides, "continue to the same extent as before the natural disaster damage occurred" but reduces or is extinguished at the time when Damage I occurs, and is reinstated when EQC pays any amount towards either Claim I or Claim II (presumably Claim I, as EQC's liability for Claim II cannot be quantified before Claim I is quantified). Where Damage I exceeded \$100,000 there would be no cover for Damage II. That outcome is not consonant with a scheme which is intended to provide cover for all natural disaster damage to residential property covered by a fire policy. If cover diminishes on the happening of Damage I, to an

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<sup>11</sup> *A Review of Earthquake Insurance: Public Discussion Paper* (New Zealand Government, Wellington, 1988); *Disaster Insurance Policy: A White Paper* (New Zealand Government, Wellington, 1989); Doug Kidd *The Government's Role and Responsibilities in Disaster Insurance* (Office of Associate Minister of Finance, Wellington, 1991).

<sup>12</sup> (30 November 1989) 503 NZPD 13922; (15 December 1992) 532 NZPD 13186; (20 July 1993) 536 NZPD 16561.

extent which is unquantified at that stage, it is impossible to know the extent of cover available at any point between Damage I and Payment I.

[41] It is common ground among counsel that EQC's approach produces anomalies. However, Mr Hodder argues that anomalies are an inevitable consequence of limiting cover and must arise on any view of the legislation. He gives the following examples:

... on EQC's approach, two neighbouring properties that suffer identical natural disaster damage in two events may receive a different EQC payment for the claims, depending on the date of renewal of their respective qualifying contracts of fire insurance or on whether EQC has made a payment in respect of the first occurrence of natural disaster damage before the second occurrence.

... on the insurers' approach, a property that sustains \$300,000 of natural disaster damage in one earthquake receives \$100,000 of insurance under the Act, whereas an identical property that suffers the same overall damage but which happens to be caused by three separate earthquakes receives up to \$300,000 of insurance under the Act ... .

[42] We prefer Mr Weston's view that anomalies arising from a particular interpretation invite closer analysis. When that is done, it can be seen that the anomalies that Mr Hodder identifies in the insurers' approach flow from the application of the statutory cap on cover, but the anomalies that he identifies in EQC's approach flow from the timing of EQC's administrative acts or the timing of a policy renewal. The consequences for homeowners, on EQC's approach, depend in many cases upon the timing of payment, but the Act affords EQC substantial latitude as to the timing of payments, which as counsel pointed out may be delayed for more than a year after the damage. With the best will in the world, the payment of claims may be significantly delayed because of the sheer number of them. We are not concerned, in this proceeding, with how EQC manages its payments.

[43] Further, EQC accepts that reinstatement occurs when it logs a claim in its project management system, reasoning that at that point EQC incurs a liability to pay the project manager. Alternatively, Mr Weston submitted, the cover may reinstate on the making of an emergency payment by EQC. This seems an arbitrary basis on which to determine whether reinstatement has occurred.

[44] For these reasons, we reject Option 2. We will briefly consider Options 1 and 3. Each would lead to the same practical result in the hypothetical scenario with which we are concerned. On the making of Payment I, the amount available for any subsequent claim payment will be \$100,000. That will be so whether the damage to which the second payment relates happened before or after the date of the first payment.

[45] For the reasons we have given as to the interrelationship between s 18 and cl 6, we consider that the better option is Option 1 as that captures, better than Option 3, the continuing nature of the reinstatement which cl 6 effects. When cl 6 is triggered by payment of a claim, then, by the operation of that clause, the full limit of \$100,000 will be available to meet any natural disaster damage for which payment is made after the payment which triggered cl 6. That will be so whether that natural disaster damage occurred before or after the triggering event of payment.

[46] However, Option 1 is framed in a way which does not refer to cl 6. As we have noted earlier, the question posed at [7] concerns cases in which cl 6 has been triggered. For that reason, we think it better to amend Option 1 by adding after the words “s 18” the words “and cl 6 of sch 3”. With that alteration, we consider that Option 1 is to be preferred in the circumstances which we are addressing. We therefore determine that Option 1, with that alteration, is applicable.

[47] We think it necessary to record that there may be many and varied fact situations to which the Act must be applied but among which we have not been asked to distinguish. For example, in some cases a home which was damaged but repairable after the first earthquake may have suffered damage so as to be a total loss after a second earthquake. In other cases, a home which has suffered partial damage in the first earthquake may have suffered further partial damage to the same part of the house. In such cases, the repairs may need to take into account the physical state of the building after the second earthquake, and the damage from the first earthquake might in effect be subsumed by the subsequent damage. Where, for example, Claim II causes a total loss, the work required to effect replacement is likely to comprise the removal of the building and the erection of a new dwelling. In such a situation Claim I might effectively be rendered redundant. On the other hand, there

may be other cases where part of a building is damaged in the first earthquake, and a quite separate part of the building is damaged in the second earthquake such that the total damage is repairable, and in such a way that the repairs necessary to remedy the first damage are essentially unaffected by the subsequent damage.

[48] We have no information about the way claims are being assessed, or the myriad of practical difficulties that we are sure must attend a claims settlement process of this magnitude and complexity. We put to counsel for EQC in the course of argument the possibility that in situations such as we have described, Damage I may be essentially subsumed with Damage II, so that a single claim payment for Damage I and Damage II might be appropriate. Mr Hodder expressly disavowed that possibility. It was not pursued further in argument. That approach may be attributable to EQC's reinsurance arrangements, under which it is liable for the first \$1.5 billion of claims but then has reinsurance of \$2.5 billion for each "loss occurrence", a term defined as all individual losses arising out of and directly occasioned by one "catastrophe". For earthquakes, a catastrophe is defined to include all earthquakes occurring within 720 consecutive hours (30 days) and a 250 kilometre radius of the original earthquake. Of course the reinsurance arrangements cannot affect the correct construction of the legislation. We simply record that the question posed at [7] does not require us to consider how cover under the Act is to respond in circumstances other than those put before us in the options examined in argument. Each of those options proceeds on the premise that Claim I and Claim II must be separately assessed, quantified and paid. We have adopted that premise when addressing the interpretation of the relevant legislative provisions.

[49] The parties were agreed that the form of declaration to be made should be reserved for further consideration following delivery of this judgment. The parties should confer with a view to settling on a form of declaration for us to consider.

[50] No costs are sought by any party.

**“Winkelmann J”**

**“A D MacKenzie J”**

**“F Miller J”**

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