IN THE SUPREME COURT OF NEW ZEALAND SC 57/2014

[2014] NZSC Trans 28

BETWEEN **NEW ZEALAND FIRE SERVICE COMMISSION**
Appellant

AND **INSURANCE BROKERS ASSOCIATION OF NEW ZEALAND INC**
First Respondent

AND **VERO INSURANCE LTD**
Second Respondent

Hearing: 15 December 2014

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

Appearances: F M R Cooke QC, A L Holloway and N D Chapman for the Appellant
R G Simpson and D J Friar for the Respondents

CIVIL APPEAL

MR COOKE QC:

May it please the Court, I appear with Mr Holloway and Mr Chapman for the appellants.

McGRATH J:

Thank you Mr Cooke, Mr Holloway, and Mr Chapman.

MR SIMPSON:

May it please Your Honour, my name is Simpson and I appear with Mr Friar for the respondents.

McGRATH J:

Mr Simpson and Mr Friar.

MR COOKE QC:

Your Honours, this is obviously not the first time when the legislative provisions setting the levy for the Fire Service or the Earthquake and War Damage Commission have been put in issue, and it's good to finish the year on a nice technical case.

On this occasion, the matter is before the Courts because the respondents, on behalf of the insurance industry, have brought proceedings seeking declarations to effectively approve the structures that have been developed which are designed to minimise the levy for their clients. There are two key structures in issue. The first structure is what we call portfolio insurance. That is insurance that covers a portfolio of buildings where that portfolio is covered by two policies. A policy that is said to be for indemnity value insurance usually set by reference to the most valuable building in the portfolio, and then a second excess of indemnity insurance providing further cover including up to the full reinstatement cost, or usually up to the full reinstatement cost of the most valuable building.

The insurance industry say that the levy struck on the indemnity value insurance policy alone, even though that is well below the indemnity value of their whole portfolio and that the property is further insured by the so-called excess of indemnity value insurance. By that technique, the levies are paid on an amount that is less than what it is insured for and only a fraction of the true indemnity value of the properties. That is the first structure in issue.

The second structure involves a kind of variation of the first. It has an additional dimension. That additional dimension is that the portfolio of buildings involves a collection of properties owned by different owners, sometimes around the country, and in the example that is before the Court that involves the eight New Zealand port companies. By this technique, the levy is paid for all of them on the indemnity value in the indemnity value contract of which they are all parties.

Now, the Court of Appeal upheld the High Court and issued declarations effectively endorsing the efficacy of these structures to significantly reduce the levy that would otherwise be payable. The Court of Appeal observed the section was at breaking point but that the solution to that problem involved legislative action rather than judicial interpretation, and Your Honours will appreciate the Fire Service disagrees and says that whilst section 48 of the Act in which the argument is really centrally focused, whilst that section is not a complex provision, it nevertheless addresses the nuances of the industry's structures in a perfectly adequate way, and does so in quite a straightforward way when the text of the enactment is interpreted in light of its purpose, and for that reason, the appellants say, that neither structure is effective to reduce the levy as the industry contend.

What I intend to do in terms of the structure of the submissions is address the first structure first, that's portfolio insurance with a split tier cover, and then deal with the additional element of the pooling of groups of owners to deal with those sorts of structures.

Before going into the argument on the first issue, that is, portfolio insurance with split tier cover, there are probably two preliminary points that are worth mentioning. The first is that the stance taken by the industry in its submissions, in my submission, narrows the key differences between us in a reasonably helpful way in the sense of what is in dispute is now more condensed than perhaps it was before the written submissions were filed, and when I go through the argument I will explain why I make that submission.

The second preliminary point is arising from the comparative paucity of facts that we have before the Court in terms of how section 48 applies to these structures. We only actually have one actual policy before the Court, and that is the ports' collective contract, and I don't intend to take Your Honours to it but the reference for that is in volume 3C of the bundle at 825, and that's a Vero policy, and then in addition to that we have what has been called sample policies. These are policies which are actually not actual policies but just illustrations of the kind of policies that insurers hold and again I don't intend to take Your Honours to it, but we have a policy at 3A 220 and the excess 3A 236.

Now, because we have only one actual policy and then three sample policies that does raise the question about the appropriateness of direct declarations, particularly declarations that are centred upon how the section is applied to particular arrangements if we get to the point where the facts of the case are important, and we will in argument attempt to identify the point at which the actual factual circumstances will become important to how section 48 should be applied, and therefore the limits that are appropriately observed in terms of the application of section 48, so those are my two preliminary points and against that background I want to address the first question that is the portfolio insurance with split tier arrangements and to begin that –

O'REGAN J:

Is your case that we shouldn't be addressing?

MR COOKE QC:

My case will be that there are things that the Court can properly address by way of interpretation of the provisions, but there is a point at which the facts ultimately will be decisive so what the Court should probably do in this situation is identify where we can get to as a matter of abstract interpretation and then to the extent it goes through them and then declarations wouldn't be appropriate and I'll be submitting that the declarations that have been made in the lower Courts are not appropriate as a matter of interpretation of the provisions but I'm conscious that that ultimately will depend on this question of where the facts bite, if I can put it that way.

O'REGAN J:

But you're not taking the point that there should be just no declarations because there is not a contest about the rights of real parties to real contracts.

MR COOKE QC:

No.

WILLIAM YOUNG J:

It's probably got past that point, hasn't it?

MR COOKE QC:

Yes, it has, because there are genuine issues of interpretation about the application of section 48 that are properly addressed.

McGRATH J:

But wasn't there a High Court judgment on that point?

MR COOKE QC:

There was.

McGRATH J:

Which was not appealed?

MR COOKE QC:

That's correct. But the Court of Appeal observed, when it was dealing with the matter, that there was this question about how far it was appropriate to go, if I can put it that way, and my submission is that you just have to be careful about how far is appropriate to go in dealing with declarations.

So can I invite Your Honours to go to the Act, which is in our bundle of authorities. We have extracts of the relevant provision of the Act. In terms of the overall scheme of the Act, there isn't a lot that is relevant but that which is apparent does have some significance. I begin by the long title of the Act to see what the focus of that Act is, it's the Act to establish the New Zealand Fire Service and to consolidate and amend the law relating to the protection of life and property from fire and certain other emergency services, so it's all to do with the protection of not just life but property, and is setting up a system by which that is achieved. Part 4 of the Act deals with the financial provisions of that intent, how that protection is attended to, and part 4 begins on page 75 of the Act and is headed "Financial provisions" and just generally you can see that section 44 regulates the expenditure that can be expended by the Fire Service Commission. It sets up, as you go through the section, section 46 through to 46A, B, C, certain – and D, certain elements of the services and it goes right through the various lettered 46s, through to section 47. Section 47 deals with the income of the Commission and how it gets its money and as we have indicated in paragraph 15 of the written submissions, 97% of the income of the Commission comes from the levy.

And then after that with the income of the provision we turn to section 48 which is the key provision in issue and just going through section 48 to see the scheme of that section, you'll see from section 48(1) there's an obligation on the insurance company to pay the levy to the Commission and then in subsection (2) the Governor-General seeks by Order in Council the levy, seen at (2)(a), on cars, it's on a uniform rate per car, and then under (b) on all other property (i) the amount for which the property is insured for the period of the contract of insurance, and then (ii) the period of the contract of fire insurance. So the key aspect of that that's relevant to this appeal is the amount for which the property is insured that is the key touchstone for the levy setting.

Of course the section then goes on to elaborate onto how that is done in relation to particular categories of property, but their fundamental point is the amount for which the property is insured. Your Honours will see subsection (3) that the Minister is to annually review the levy and in doing that under (4) there are certain considerations that the Minister is obliged to have regard to and, "(4)(a) the total amount for which all properties in respect of which the levy is payable… at the latest available date, and the likelihood of any increase or decrease in that total amount." So it's looking at the total in relation to all the properties. Then in (b) there is the needs of the Commission, is it sufficient to meet the Rural Fire Fighting Fund in (i) and then the actual net expenditure of the Commission in (ii) and then in (4)(c) the desirability of having an overall level of stability in terms of the levy. So that's the overall structure of the provisions that regulate how the levy is set and that has at the forefront is the needs of the Commission which dovetails back into the purposes of the Act which is to enable the protection of property from fire.

Subsection (6) is the one along with subsection (7) that the most attention is directed to in this case and in subsection (6) Your Honours will see that for residential buildings the amount for which the building is insured under the Earthquake Commission Act is the relevant amount for the purposes of the levy and then in (b) again for a personal property it is the amount for which that property is insured under section 20 of the Earthquake Commission Act.

WILLIAM YOUNG J:
So in terms of residential buildings, what's happening?

MR COOKE QC:
It really just means the amount of the insurance.

WILLIAM YOUNG J:

So it just means $100,000?

MR COOKE QC:
No –

WILLIAM YOUNG J:
Well you said, in the case of the residential building the amount which that building is insured pursuant to section 18 of that Act. Is that the $100,000 that the EQC is liable for?

MR COOKE QC:
I don't think that's right. I think it's the actual insurance of the contract but I'll have that checked. I thought it was the actual value of the insurance policy in relation –

WILLIAM YOUNG J:
They're not normally identified. They didn't used to be identified separately. They just used to be –

MR COOKE QC:
It might be the 100,000, I'll get that checked.

McGRATH J:
So in that case complications of indemnity, value and replacement value don't come into it?

MR COOKE QC:
I don't think so, no. that complication arises in terms of where we are here which is under subsection (6)(c), which is other property which includes the commercial property, and subsection (c) will, we say, be quite an important series of provisions in terms of the overall purpose and scheme of this legislation because whilst there is recognition of the sum insured as being a key component of the levy setting process, there is also a recognition that when the insurance is in excess of the indemnity value, or where there's no sum insured, there's then the detailed machinery in subsection (6)(c) onwards to identify what in a generalised way can be described as a fair and reasonable indemnity value of that property and (c)(i) can arise from a declaration by the owner that a particular value is a fair and reasonable indemnity value and that can be contested, if I can put it that way, by the Commission under

subsection (6)(b) when the Commission is of the view that that really isn't a fair and reasonable indemnity value. I mean there's a quite detailed machinery for working out what is a fair and reasonable indemnity value.

In addition to the declaration the alternative is a valuation certificate, I'm looking back at (6)(c)(ii) and the type of people that can give that certificate reflect the type of expertise that's necessary for setting an indemnity value. It could be a valuer, that's a market valuer, it could be an engineer if we're talking about depreciated replacement cost, or a quantity surveyor, or a valuer of plant and machinery, if we're talking about plant and machinery, so the expertise for that is there and the object of that exercise is in (6)(c)(ii)(B) in establishing the indemnity value for the purposes of the levy, which is a slightly unusual expression but again I think it's directed in a fair and reasonable indemnity value as a matter of holistic interpretation.

McGRATH J:
The apt phrase is "fair and reasonable indemnity value in relation to the replacement value" isn't it?

MR COOKE QC:
Yes, so it's relative, that's true.

ARNOLD J:
If the replacement policy identifies an indemnity value, as they sometimes do, under (c) you still go through this process?

MR COOKE QC:
That depends. That depends on whether the stated indemnity value is, whether the replacement value is in excess of the true indemnity value of that property.

ARNOLD J:
Let's assume that it is so you've got an indemnity value and the – but the policy provides replacement cover to a higher figure.

MR COOKE QC:
Yes. So that's when (c) is triggered, because you've got an excess of indemnity value.

ARNOLD J:

Exactly, so in those circumstances the fact that the policy identifies an indemnity value is not the end of the story. The owner still has to declare that the indemnity value bears a reasonable relationship to the replacement value.

MR COOKE QC:

Yes, or directly that it has to be a fair and reasonable indemnity value.

ARNOLD J:

Yes.

WILLIAM YOUNG J:

But by which, you mean, it's reasonably close to the replacement value?

MR COOKE QC:

Well it indemnifies, I think it indemnifies the –

WILLIAM YOUNG J:

Yes.

MR COOKE QC:

– when we get into these issues about what indemnity means in an insurance contract have their complications about it but it is the amount that indemnifies the insured for their loss. Now that might be the depreciated replacement cost of the building. It might be the market value of the building, that depends, and that's why the subsections refer to different sort of expertise to assess that, because it's not necessarily a straightforward exercise of what is the proper indemnification of the person. For a residential building, and I know we're not talking about that, you would normally pay the depreciated replacement cost because that's what needs – the owner needs to rebuild their home. For a commercial property, that depends. If they were holding the building for sale it may be the market value of the building, so it does depend on the circumstances, why there is the need for elaborate machinery to identify a fair and reasonable indemnity value and the existence of subsection (6) is quite important because my learned friend's arguments really focus in on subsection (7) and say that the excess of indemnity policy is excluded from the reach of the section altogether, but you can't read subsection (7) in isolation. You've got to read subsection (7) and (6) together because subsection (6) gives you the machinery for working out what is the indemnity value component and what is the excess of indemnity value component and then you exclude from the levy the true excess value component.

McGRATH J:
So the phrase “excess over the indemnity value” in subsection (7) means the difference between indemnity value and the replacement value back in (c)(1)?

MR COOKE QC:
That's right. There are slightly different expressions used to describe the concept but what (7) is referring to, this excess, is the same as what (6)(c), the beginning part of (6)(c)(i) is talking about, where the contract of fire insurance provides for the settlement of any claim for damage or destruction of the property on any basis more favourable to the insured person than its indemnity value, so that’s referring to the same concept as is in subsection (6).

WILLIAM YOUNG J:
This is quite a dense section.

MR COOKE QC:
You can say that again.

WILLIAM YOUNG J:
Section 48(6)(c), that doesn’t apply where it’s a simple indemnity policy? Because it says in the case of other property, where the contract of fire insurance provides the settlement of any claim for damage on other basis more favourable than its indemnity value.

MR COOKE QC:
Yes, so a simple indemnity policy would either be the stated sum or if its stated sum was greater than its actual indemnity value when you go back to the first bit, because it’s either a stated sum or if it’s in excess then you have to go through the machinery, but a simply indemnification policy would be set on any value.

So just going through the scheme of this, I haven’t yet –

WILLIAM YOUNG J:

Why does the owner have to give a declaration under subsection 6(c)(i) that the indemnity value declared is fair in relation to the replacement value? Why wouldn't it just be assessed on whatever the value of the policy is?

MR COOKE QC:
I think all that Parliament is achieving by saying – by the expression "in relation to the replacement value" is just identifying giving a legislative clue as to what indemnification is intended to mean for property, so you are identifying what truly indemnifies the property owner in light of the full replacement value of the property.

WILLIAM YOUNG J:
I see, okay. So this may be a case where there is no sum insured and then you're saying this is where there is an indemnity value declared.

MR COOKE QC:
There could be no sum insured or there could be a sum insured but there's also additional insurance as we have here.

WILLIAM YOUNG J:
Okay, I understand.

MR COOKE QC:
At the moment I hadn't planned to make the argument. I'm just going through the scheme of the Act but it is foreshadowing, I guess, where we get to.

So going back to where I was, and to respond to another observation Justice Young made, this is one of those cases where it is a really dense section and what I will submit in terms of this case is although it's said that this section isn't, in effect, clever enough to respond to the structures that have been devised, actually although it's dense it does have some pretty fundamental and simple ways in which it applies, and once you realise the simplicity of the section it's clever enough, if I can call it that, to respond to the schemes in an effective way and what I say about subsection (6), it demonstrates a clear legislative intention to focus in on and identify a fair indemnity value for the purposes of the levy so that you don't get levied more than that, and that is an elaborate procedure for making sure it is just a fair indemnity value on which the levy is set.

Just carrying on through the scheme of the section, subsection (8), what that provides is that the amount in question becomes a debt due by the insurance company to the Commission and then subsection (9) effectively allows the insurance company to recover that amount from the insured person and at the end of subsection (9) it says that where two or more persons are liable for any amount under this section they're liable joint and several and then the rest of the provisions in section 48 are largely mechanical, a series of subsections dealing with release statements of account, how the money received by the Commission is treated, then it's worth just noting the further provisions from section 49, 49A, B, which are all to deal with complications in terms of the location of the insurance company or the broker or the owner overseas, so 49 liability for levy were agents of owners of property negotiate contracts of fire insurance, not carrying on business in New Zealand and that's what 49, 49A and B are those types of scenarios.

Then section 50 deals with the payment of the levy and then section 51 deals with the ability for audits to be conducted in relation to the levy.

So that's generally the scheme of things. I don't think I need to highlight any other provisions. I don't think they are necessarily material to the argument.

One thing that I accept immediately is that Parliament, by focusing in on the levy being collected in association with the payment of insurance premiums, is that those who don't insure don't pay a Fire Service levy and in the same way, those that underinsure, take out only very little indemnity insurance, also will reduce their Fire Service levy. Now, I say that that arises for essentially pragmatic reasons, that is, that Parliament has decided to fund the Fire Service by attaching two insurance premiums, and for that reason those who don't insure or underinsure it's too difficult to devise a system to collect the levy from them. It's for pragmatic reasons rather than there being a legislative endorsement of that concept. It's just simply the fact of the matter, but once you've decided to collect levies that way, then that is the way in which those implications simply follow from that.

O'REGAN J:

But it does indicate a tolerance of a degree of free riding.

MR COOKE QC:

It accepts that it's inevitable that it accepts a degree of free riding, but not because it's blessed, if I can put it that way, just from pragmatic reasons. That's the way the levy is.

McGRATH J:
Simplicity of administration is preferred over absolute recovery of every person who your policy might be directed.

MR COOKE QC:
Yes.

Now, I mentioned in my two preliminary points at the beginning that there was some concentration of issues arising from the submissions and if, when I begin these submissions about section 48, this case really hinges on at least the industry's argument on 48 subsection (7) and what is important about this if you look at subsection (7), this section shall not apply to any contract of fire insurance that is limited to an excess over the indemnity value of a property or to any portion thereof which is in excess of the indemnity value. The key point about that is that we're talking about the actual indemnity value of the property, not the sum insured in the contract, and that is a very important point and it is part of the industry submissions of which we now have no disagreement with.

So, I don't know if Your Honours have a copy of my learned friend's written submissions, but if I could invite Your Honours to look at proposition 5 on page 5 of their submissions and you'll see that is, "It follows that, to qualify for the exemption under 48(7), excess of indemnity insurance must be limited to cover for that part of the value of insured property that exceeds its fair and reasonable indemnity value, not merely a sum insured." And again that is repeated in 4.9(b) of the submissions. So 4.9(b), "The respondent's agree that the FSA is to be applied to the true character of the contract, and not by reference to labels. Therefore, if insurance labelled 'excess of indemnity insurance' in truth provides an element of indemnity cover, then s 48(7) does not exempt it from levies."

Now that's a very important acceptance and that affects the proper application of these provisions to the structures that are in issue because if we go back to 48(7) what appears to be the real difference between the parties is this. Remember we're dealing with portfolio insurance here, so the property in issue is the entire portfolio, not a particular building in the portfolio that might be the subject of a later claim. So back to 48(7), "This section shall not apply to any contract of fire insurance that is limited to an excess over the indemnity value of the property," it's all the property that is insured, not just a property that may later be subject to a claim, and that follows from section 48 generally, because section 48 is attempting to set the levy by reference to the property that is insured.

GLAZEBROOK J:
Is that an Act's interpretation, the singular includes the plural submission or is it more subtle than that?

MR COOKE QC:
Well I think it's more subtle than that because the word "property" encompasses a collection of buildings –

GLAZEBROOK J:
You're saying whatever is under the insurance company is the property in those circumstances, is that –

MR COOKE QC:
Yes, it's whatever is insured is the relevant property for the purposes of the application of this subsection.

WILLIAM YOUNG J:
What's the purpose of subsection (7)? What does indemnity value mean there, does it mean replacement value or does it mean indemnity value as ordinarily understood and thus addresses, for instance, loss of business cover or something?

MR COOKE QC:
It's indemnity value as is commonly understood. In relation to buildings it's therefore the indemnity value of the building but to understand – but you can't look at subsection (7) in isolation. You always need to go back to (6) to understand what is in and what is out. So subsection (6) gives you the machinery for working out what is in excess and what is not.

WILLIAM YOUNG J:

Is it a simple case of I have a building insured say for replacement value, but unusually no liability limits there. I'm under subsection (6)(c).

MR COOKE QC:
Yes.

WILLIAM YOUNG J:
So I have to produce a declaration as to the indemnity value but it must be a fair and reasonable indemnity value in relation to the replacement value of the policy?

MR COOKE QC:
If there's no sum insured –

WILLIAM YOUNG J:
So if the replacement value is five million and the indemnity value is two million, what do I declare, five million?

MR COOKE QC:
Yes. If it's a true and fair indemnity value.

WILLIAM YOUNG J:
So then the policy is written on that basis but then why doesn't subsection (7) apply?

MR COOKE QC:
Well it will, subsection (7) will apply because you will exclude the $2 million through that process. It's just a process by which you get there.

WILLIAM YOUNG J:
Okay.

GLAZEBROOK J:
So what was the $2 million? I just missed that.

WILLIAM YOUNG J:
For the indemnity value. So I declare replacement value but then –

MR COOKE QC:

No, no, you declare indemnity value.

GLAZEBROOK J:

With indemnity value do you mean really depreciated replacement cost rather than betterment? Because the terminology is slightly odd because replacement value policies are usually understood as being policies that give you an as-new replacement rather than an as is replacement. Are you saying that in this context it means as is replacement, rather than betterment replacement if we can, which, of course, is the normal –

MR COOKE QC:

It probably will be depreciated replacement cost, so the difference between reinstatement insurance and indemnity insurance is likely to be the deprecation. But that won't be the case in every situation.

WILLIAM YOUNG J:

Well there's also increases in building costs, compliance with more stringent building regulations and so on.

MR COOKE QC:

Yes.

GLAZEBROOK J:

That was a shorthand I was using.

MR COOKE QC:

Yes.

GLAZEBROOK J:

So betterment over and above whatever you might need to replace as is and that might mean betterment because you can't actually build what you've got.

MR COOKE QC:

And what the section is seeking to do is saying, look, you only need to pay your levy on what, on the indemnity component of your insurance cover. That you've chosen better than indemnity insurance shouldn't be held against you and you just have to pay your levy on the fair indemnity value of the policy and that will usually be, it's over simplification I know, so you've got to take into account depreciation. But this, what's important about this is what property are we talking about.

WILLIAM YOUNG J:

It's really envisaging, isn't it, it's presupposing that an indemnity value will be depreciated replacement value.

MR COOKE QC:

Is it necessarily doing that –

WILLIAM YOUNG J:

If you look at the, what the valuation certificate exercises are, it suggests that, doesn't it?

MR COOKE QC:

Well this is descending into the issues of – are emerging in the earthquake litigation, but whether it's depreciated, if it's depreciated replacement cost you wouldn't necessarily go to a builder to work – a valuer to work that out because they wouldn't be an expert on what it costs to rebuild the building. You would go to an engineer or a quantity surveyor who are also mentioned in subsection (6). Some say that indemnity value, and these are issues that are being argued about Christchurch, but some say indemnity value means market value. So it's the market value of the building that'd destroyed, for example, rather than its depreciated replacement cost, and these are the issues that are –

WILLIAM YOUNG J:

They might be similar, might be the same though. You'd expect them to be similar?

MR COOKE QC:

I'm not sure about that. The facts in Christchurch demonstrates there might be a big difference between market value and depreciated replacement cost. I mean for example this building it's depreciated replacement costs would probably be higher than its market value because there aren't many people in the market to buy Court buildings, but to rebuild it will be quite expensive and the depreciation won't be very high because it hasn't been around for very long. Whereas its market value might be a lot less than its depreciated replacement cost.

GLAZEBROOK J:

Perhaps you put it the other way. You don't get the improvement over indemnity value, whatever that is, so you don't get the as-new component –

MR COOKE QC:

For the purposes of a levy, yes.

GLAZEBROOK J:

– levy, yes, that might be an easier way of putting it without presupposing what indemnity value would be.

MR COOKE QC:

Yes, and having an argument about what it would mean in a particular case draws me into something that's not going to be heavily fact specific.

GLAZEBROOK J:

Yes.

MR COOKE QC:

I think it probably –

GLAZEBROOK J:

Yes, obviously.

MR COOKE QC:

It may well be likely to be – there's a decision in the Court of Appeal called a number of things, *Marriott*, *Wild South v QBE* recently with Justice Miller for the Court outlining what indemnity value meant in a material damage policy for the purpose of the earthquake litigation and said it's usually depreciated replacement cost but where the person was holding the building for sale it might be market value, or where the person was holding it for a commercial use, that could be done in an equally, in an equivalent new building, it might be the cost of the equivalent new building rather than rebuilding the old building, but I don't think we need to get into any of those complexities in terms of this section because the section seems to me to be recognising a more simple point that with these commercial buildings you only need to pay levy of what your insurance cover is that indemnifies you, not for the additional cover that you choose to take to reinstate your building.

Going back to where I was, though, it's important for the purposes of subsection (7) that the property that we are talking about there is all the insured property. So that means it's the indemnity value of the entire portfolio of buildings, not the indemnity value of one building, the most expensive building, or the indemnity value that might be the subject of a claim and again I think my learned friends and I are at one when we say that the levy is set not on a claims-made basis but of the insured property basis and that's actually proposition 1 on page 4 of the submissions. I don't need to take Your Honours there if you don't – but that's what my learned friends have said, that it's an insured property basis, not a claims-made basis.

Now, given that 48(7) only excludes insurance that is in excess of the indemnity value of the entire portfolio, that is where the industry's scheme comes unstuck because their scheme involves a portfolio of buildings with an indemnity insurance struck by the indemnity value of one building with an excess of insurance for the cover of that building usually up to its reinstatement value, that total package that the excess of indemnity insurance is likely to be less than the indemnity value of the whole portfolio, so that is where the scheme comes unstuck from the industry's point of view.

Now, we don't actually have evidence before the Court of a range of insurance policies where we can see the evidence of the value of the properties that are in the portfolio, so it's difficult for us to go any further than, say, under section 48(7) it's the indemnity value of the entire portfolio. That is critical. Then the question of whether it is in the excess of the value of the entire portfolio that is only excluded, but my submission that is a fundamental problem with the case as it lies and it's reflected in the declarations that have been made and I can go to the declarations in volume 1 on the case of appeal. The Court of Appeal's judgment is behind tab 5 and I want to take Your Honours to page 59. You see declaration 3 there, no levy on excess of indemnity value contract. If a contract or any portion of a contract of fire insurance provides for the settlement of any claim for damage or to the destruction of any item of insured property limited to that part of its value in excess of its indemnity value then pursuant to 48(7) of the Act no fire service levy is payable on that contract or portion thereof, so that's a fundamental problem with the declaration. It's interesting the declarations are being made here. They seem to be a slight rewording of the section 48(7) but have fundamentally changed its meaning by referring to any item of insured property rather than the insured property per se. So in my submission that declaration cannot be appropriate.

Going, then, back to the scenario we are dealing with here, that is, with a portfolio of buildings with an indemnity policy and an excess of indemnity policy how, then, is the levy to be struck? My submission would be well, first, you don't simply exclude the second policy because it's labelled in excess of indemnity, because it's only excluded from the reach of the provision if it's truly an amount greater than the indemnity value of the insured property.

So we need, then, to go to subsection (6)(c) to work out how the levy is struck. When we go to (6)(c) there are two possible answers. First, we have two policies and there may well be an insured sum in combination across those two policies. I say may well be. This is one of the difficulties with dealing with a case without the factual substratum. But if there is an insured sum in those two policies, then under 48(6)(c) that will be a sum insured in the contract. That will be the figure on which the levy is struck unless the other proviso applies, that is, where even though there's a sum insured it provides for the settlement of the claim for destruction of the property on a basis more favourable than its indemnity value, so it's possible you have a sum insured but it gives you better than indemnity cover, so then you go into the machinery we've seen in subsections (6)(c) for identifying the true and fair indemnity value of the property and setting the levy on that basis.

So that's how I say these provisions work and why, first, the declaration made by the Court of Appeal can't be right and why the portfolio insurance arrangement with split tier do not work to exclude the levy being set on the fair indemnity value of the property.

WILLIAM YOUNG J:
So in a simple case where I have buildings in Christchurch, Wellington, and Auckland, and I say I don't think I'm going to have three fires or three earthquakes in the same place at once so I'm just going to seek indemnity cover for the buildings by reference to the most valuable building, which is in Auckland, and there's no second policy. Now, what would you say about that?

MR COOKE QC:

I have to accept that that is effective in the levy being set on the single indemnity value insurance.

GLAZEBROOK J:

What say there's a reinstatement after a claim, because in that case if you don't have three fires at the same time but if there's a reinstatement clause you have them immediately – you might have them the next day and nevertheless have actually indemnity insurance for all three buildings, so the only time you're taking a risk is if it all happens simultaneously.

MR COOKE QC:

Well, that might be an avenue which could be explored to see if actually it was more than just the indemnity value. We do have to bear in mind that the section 48 is talking about an amount for which the property is insured for the period of the contract of insurance. That will depend on whether it reinstates as a new period of contract of insurance or it's still under the old contract. If it was still under the old contract, then it may well be the reinstatement would mean that you have to look more broadly than just the indemnity value of the first loss, if I can put it that way, and that's the potential way – there's a potential for subsection (6) to be applied. But I do – to follow on from Your Honour Justice Young's point, I have to accept that it may well be that the section doesn't prevent people not insuring or underinsuring and if they get together and have simple indemnity insurance for a portfolio and have an indemnity sum that's a small sum that this ends because they spread the loss in different buildings –

WILLIAM YOUNG J:

Probably self insuring I suppose?

MR COOKE QC:

They are. I mean the risk may only be hypothetical rather than really real but it's effective, I have to accept, to say that the levy maybe struck on the indemnity value. The problem for, emerges when this structure gives you additional cover and that's what, they're taking it one step further, they're saying, well we're going, not only just have indemnity cover, we're going to have additional cover, and when you get additional cover, that's where these other sections bite. Subsection (6)(c) and (7) when read together bite to say well when you have got more insurance than just indemnity insurance, we have legislative machinery for working out what that fair and reasonable indemnity value is.

ARNOLD J:
So in this case we've got –

McGRATH J:
You say that's got to be, sorry.

ARNOLD J:
We've got two contracts, one for the indemnity, I'm using this example that's attached to the Court of Appeal judgment, so you've got indemnity value of 600 million, insurance contract via indemnity value 300 million, and a separate contract for excess for indemnity of 400 million.

MR COOKE QC:
Yes.

ARNOLD J:
And is it critical that those are split into two contracts?

MR COOKE QC:
I don't think it makes any difference that it's in one contract or two. Certainly for the purpose of the section, because the section is just looking at the insurance over the –

ARNOLD J:
Which part of the section, when you say "the section" what are you talking about?

MR COOKE QC:
Section 48.

ARNOLD J:
Yes, I know, which part of it?

MR COOKE QC:

Well probably 48, let's start with 48(2), because it's talking about 48(2)(b)(i) it's the amount for which the property is insured. It doesn't matter if it's in one contract or two.

ARNOLD J:

Well let's assume for the sake of argument it's in, we've got exactly this structure in one contract.

MR COOKE QC:

Yes.

ARNOLD J:

So if we look at 48(6)(c) we've got a contract fire insurance providing for settlement of a claim on a basis more favourable than indemnity.

MR COOKE QC:

Yes. And it doesn't make any difference if you put those in separate contracts, you've still got –

ARNOLD J:

So there has to be a declaration then that the indemnity value is re-discussed.

MR COOKE QC:

Yes, or put another way, that the section then applies to work out what the fair and reasonable indemnity value is. Even though you might have stated it's, you've got indemnity cover for X and labelled a second in excess of indemnity, because you've got, if you've got insurance that is more, is better than it's indemnity value then you just pay the insurance on the indemnity value and not on the component that's in excess of that and that's what the machinery is subsection (6)(c) does.

ARNOLD J:

What I'm trying to understand is does it really depend on sort of reinterpreting the excess over indemnity is really indemnity cover. I mean if that structure is within the same contract, if section 48(6)(c) works as you say it works, the indemnity value in the policy, the limit, is not the decisive factor.

MR COOKE QC:

That's right.

ARNOLD J:
The decisive factor is the indemnity value that's declared, being a fair and reasonable relationship.

MR COOKE QC:
Yes, or more importantly, I suppose, well this may not be more importantly, but when the provision before those, before subsection (1) talks about where the insurance provides for the settlement of any claim for damage to or destruction of property upon any basis more favourable to the insured person than its indemnity value. The expression "indemnity value" is meaning its true indemnity value, not the total sum.

Now this is, I'm afraid this is a very wet towel around the head case in some ways. What I've said so far arises from my learned friend's acceptance that for the purposes of subsection (7) the concept of excess of indemnity value means excess of the true indemnity value, not of the stated sum, and I say well that must be so of also subsection (6) which talks about more favourable to the person than its indemnity value. It means the same thing in the same section. It can't mean different things. So that's why I say my learned friend's acceptance, that's that what (7) means is quite important. But is also an interesting concession, if I can call it that, because it's not what the Court of Appeal said in the *AMP Fire and General Insurance Co (NZ) Ltd v Earthquake and War Damage Commission* (1983) 2 ANZ Insurance Cases 60-529 (CA) case which in a sense was the springboard for the structures. That is actually not what Justice Heath said in the High Court in this case. He read indemnity value in subsection (7) as being a stated sum, not the actual indemnity value of the property.

There is a danger in going back to those old cases because the legislative provisions are different, and the circumstances are different, but it maybe that I should take Your Honours to what the Court of Appeal said in *AMP* so you can see how they reached that conclusion. That is in the appellant's authorities, volume 1, tab 12, and the passages I want to bring Your Honours' attention to begin at 78021. On 78021 it begins on the far left-hand column at the bottom paragraph and it's referring to a circular of the Commission and Mr Keesing's argument, "Throughout all his submissions concern was reflected that an interpretation of section 14 might be adopted whereby the Commission might be bound to provide earthquake and war damage insurance up to the amount of indemnity value but might be entitled to premiums only on some lower figure nominated by the policy holder in his fire insurance policy." And then you go over to the next column, the Court noted that the expression 'indemnity value' hadn't been defined, and it still isn't –

McGRATH J:

Sorry, where are you at right now?

MR COOKE QC:

I'm at the top of 78021, the first full paragraph, "Not only has the expression –

McGRATH J:

Thank you.

MR COOKE QC:

– indemnity value been left undefined by Parliament, but… any established usage in the insurance industry giving a fixed meaning to the," there's no evidence of that, "that being so the Court is free to and should place on 'indemnity value' in the section the meaning that best gives effect of the apparent intention of Parliament." And then there's the long quote from *Halsbury's*, that I won't read out to Your Honours, about the meaning of indemnity, and then the conclusion of the Court on the following page, 78022, "against that background we think that the appellants are right in a submission which was among those adopted by all their counsel. As previously mentioned we are not attracted by their arguments based on a two-contract approach," and Your Honour Justice Arnold will remember you asked, or at least I answered whether it matters if it's one contract or two, that was one of the things argued by all sides in this case. The Court was saying it doesn't matter. One contract or two. "But one of their other submissions was to the effect that indemnity value means the indemnity value up to a maximum of the figure, if any, nominated by the fire insurance contract. Putting it in another way, the expression means the value of the loss form which indemnity is provided by the contract. We hold that this interpretation is correct. It produces a workable result in accord with the purposes of the legislation and the general law of insurance." So what the Court is saying there is, in a sense, indemnity value can mean agreed indemnity value.

And then it's appropriate to pick up the bottom of that column on page 78022, the last full paragraph, and just note the choice of language in this paragraph. "The reasons pointing to this interpretation are further strengthened by the following considerations. "If the interpretation suggested and feared by counsel for the Commission were correct, there could be cases where property is under-insured in an indemnity policy – that is to say, in his suggested terminology, the indemnity 'sum' would be less than the indemnity 'value' – but where separate replacement policies cover the difference between the indemnity sum and the replacement cost." So it's, in a sense, foreshadowing the kind of thing we had in here. On the same interpretation in the replacement policy would not be limited to an excess of indemnity value, so they would not be excluded from the section by section 14(2)(b). It seems unlikely that Parliament would have intended this complication. It also seems unlikely that they would all commonly be issued a separate replacement policy, leaving the insurer to bear the difference between the value of the property destroyed, the limit on his indemnity policy and the actual property destroyed or damaged. The kind of contract which Parliament meant to take altogether out of the scope of the section by 14(2)(b) is much more likely to have been simply a contract purporting to give cover in the excess of the amount of indemnity insurance.

Now, that is why it is interesting that my learned friends now say that it actually not the stated indemnity value. It is actually the actual indemnity value that subsection (7) is directed to so that is interesting because in a way this decision was the springboard for the simple portfolio insurance policies. As long as you have a portfolio of buildings you have a stated indemnity value and that is what the levy is struck on.

My learned friends have departed from that in advocating the efficacy of the portfolio insurance with split tier arrangements and the reason why they have done that is because since this decision subsection (6) was substituted for what was in the section, and again we're talking about the old earthquake and war legislation here, so there's not complete comparative enactments, but subsection (6) has since been introduced so if we go back to the section 48(6) what Parliament has done since the Court of Appeal's decision has actually done two things. It's enacted the machinery for identifying the true and fair indemnity value so one can no longer read (7) without looking at (6) because (6) provides the machinery for working out how (7) applies and the other thing that's different from what has happened, different from the section that was before the Court of Appeal is that in the present subsection (7) it doesn't just exclude a policy that is in excess of indemnity value of the property, but it's added the following words, "Or any portion thereof which is in excess of the indemnity value."

So again what the machinery in subsection (6) and the change to subsection (7) demonstrate is a clear Parliamentary intention to focus in on the true indemnity value of the property that's insured and to exclude contracts that are for excess of that or parts of contract that are for more than the indemnity value of the policy.

So what that means in terms of the interpretation that I advocate that is this and it's slightly different from the one Your Honour Justice Arnold put to me earlier, but in a situation where you have a property, where properties have indemnity value of $10 million, a contract is taken out for indemnity value insurance of $5 million but then also insurance is taken out for so-called excess of indemnity value insurance for a further $5 million, taking it to $15 million, looking at section 7 and 6 together, you've got a situation where you've got cut-off for an excess of the indemnity value, therefore you apply section 6 and work out the true indemnity value of the property, which is $10 million, so a person who has taken out a contract for indemnity cover of $10 million should be treated no differently from a person who takes out two contracts, one for $5 million called indemnity and one for an additional $5 million for access of indemnity because both those amounts are less than the actual indemnity value of the property that's covered, and that will be the case whether the property we're talking about is a portfolio of buildings or a single building, and the section is not a sophisticated section that divides up in any complicated way. It's a simple section that's directed to fundamental concepts of what is appropriate in the circumstances and fair and reasonable indemnity value governs it, with the only complexity about how we get to that, what is the true and fair indemnity value? That's why it's got the machinery in subsection (6) for working out what that is.

So in response to my learned friend's idea that what Parliament was contemplating in subsection (7) is this kind of gap, that there's a gap between the indemnity insurance and the excess of indemnity insurance and what Parliament was endorsing was the gap, so to borrow an expression that the Court used it's unlikely that Parliament intended that complication, that this section is applied simply in its terms. It's directed to identifying the fair indemnity value of insurance for assessing the fair levy to be paid and it does that because the purpose of this section overall is to look at all of the property that benefits from Fire Service's services so all residential properties, motor vehicles, commercial properties, all benefit from having a fire service to protect life and property, as the purpose of the Act said. So the system setting the levy is working out what amount do we need to cover the cost of that service and it's a section that is trying to equitably distribute the value of the service amongst those who benefit from it and that is why the section is focusing on what's the fair value of your property that is at stake should there be a fire? Here's the machinery for working that out. That's the basis upon which your levy should be struck, so that's why in my submission there is, I say, a straightforward answer to the slightly technical contentions that my learned friends have advanced in terms of how the section operates, and it is a straightforward application of the section and its terms.

That is all I wanted to say on the first issue, unless Your Honours wanted me to develop any further points on it.

WILLIAM YOUNG J:
What's the sort of commercial driver? What is the practical risk the owner is trying to address with this type of policy? Is it that there will be an earthquake and there are a number of buildings in one city or what?

MR COOKE QC:
Again, the difficulty with answering the question is we don't have much by way of factual material before us but I think the real answer to that question is they're simply seeking to derive a structure that reduces both their insurance premiums and their levies but which in real terms doesn't reduce their risk, so property owners want, in effect, to be fully insured.

WILLIAM YOUNG J:
Well, their insurers may want them to be, I guess.

MR COOKE QC:
That might be a mutual objective by this technique of pooling your portfolio of buildings and having split tier you in effect get full cover but you only pay levies on a much smaller amount.

WILLIAM YOUNG J:
It's just the additional risk probably isn't that substantial, is it?

GLAZEBROOK J:
Especially if there's reinstatement in some manner.

MR COOKE QC:

Yes.

WILLIAM YOUNG J:

Although the policy in the sample policy was that it was a sum insured for any one loss and all losses in the aggregate.

GLAZEBROOK J:

Yes.

WILLIAM YOUNG J:

So in this sample policy there wouldn't be.

MR COOKE QC:

Especially when you look at it in fire terms. The prospect of spontaneous fires in all buildings is pretty low. I guess the Canterbury earthquakes have taught us that you might have several buildings in one city and have them destroyed or damaged by one event, but if you've got buildings in different cities, and if it really was a bad natural disaster, so I have to accept there is some risk that someone might be taking if they were all in Wellington, with a group of 20 buildings in Wellington, took out one of these policies, subject to the point about automatic reinstatement which might be a complexity, again we don't have the policies before us to know the answer. There's no real increase in risk but there's a real reduction in payment of levy and it might, you know, what is said is, well this section is anachronistic, it's not clever enough to cover the circumstances, the solution is legislative not interpretive, but with respect it's difficult to see why that is so. The section here is simplistic in one level but it's pretty obvious the way it applies. It is directed to whether you got better insurance than indemnity insurance, there's a machinery to work out what the correct indemnity value is, and to set the levy accordingly. It's only if you can read subsection (7) in a way that's divorced from subsection (6)(c), that you can exclude it. But you can't read (7) divorced from (6), because (6) provides the machinery for (7) and it, you know, and it may well be that (6) was added to the section after (7) was in existence. There's a degree of patchworkness about the, if that's a word, about how the section has evolved, but – and the Court often has to interpret legislation that's in, like a, in its historic design, but that's grist to the mill really. We've got to look at the sections together. We've got to look at the purpose of the Act overall. We've got to look at the purpose of the provisions and work out what this is really driving at and in my submission you look at those two sections together and you see how it operates, without any of the technical complexities that my learned friends contend, that Parliament must have had a mind when enacting these provisions.

So that brings me to the second issue. So it's where we have portfolio insurance with the split tier, two contracts, one said to be indemnity, one said to be in excess of indemnity, but we have multiple owners.

WILLIAM YOUNG J:
What happened to the three tier programme. Is that no longer an issue? It's referred to in the affidavit.

MR COOKE QC:
Well there's , in terms of the evidence we've got before us, the Ports company is, as I understand it, a two tier programme. My learned friend says it's a three tier programme but that maybe a complexity that I'm not fully –

MR SIMPSON:
I'll interrupt and help there. The three tier includes a non-fire policy and all the parties agree that's just not relevant here because it's not a contract of fire insurance, if that makes sense.

WILLIAM YOUNG J:
Okay, thank you.

MR COOKE QC:
So this complexity of the multiple owners issue. This question has been argued and been determined based on the common law jurisprudence on whether composite policies are one contract or two contracts, and I make two points about that. The first is that this issue is not determined by the application of the common law cases on whether there is one contract or two. It's determined as a question of statutory interpretation again. I say the answer to this question is ascertained by looking at section 48 and the surrounding sections in terms of what was contemplated in terms of what – whether it was multiple owners was in contemplation.

Secondly, if it is to be answered in the context of the common law cases, those cases make it clear that whether an insurance contract is treated as one contract or two, or as a composite contract that is severable, in terms of the particular interests of the insured person, depends on why you are asking that question. There are a lot of cases about that question but the reason why the Court is being asked, and the question is this one contract or two, or is it a composite policy that can be severable, is if you address why the Court is asking that question, you can understand why the Courts have given the answers that they have in those cases, because it all depends on why you're asking the question, and why we're asking the question here is to work out, in the context of the legislative scheme for setting levies including particularly section 48, what did Parliament have in mind in determining whether there is a separately identifiable separate interest for separate property owners.

Before the adjournment it may be appropriate if I, by going back to *AMP*, and an observation of that Court about the significance of asking the question, "Is it one contract or two." Again that's tab 12 of the first bundle of authorities, and I'm on page 78020. I'm beginning in the middle of the right-hand column on 78020, "As already indicated, the basic purpose of the amendments made in 1951 were clearly to ensure that the automatic statutory cover would be limited to indemnity insurance and that the premiums for it would be calculated accordingly. Provided that this purpose is achieved, it cannot matter in administering the legislation whether a policy holder who has taken out against for both indemnity insurance and replacement insurance with an insurance company has done so under one contract or tort. In most cases where there is a single composite policy there is probably only one contract, the total premium payable to the company being higher on account of the replacement cover. Nevertheless, when an indemnity sum is named and there is provision in certain circumstances for extra replacement insurance above that, there is not likely to be any difficulty in treating the provision of that extra cover as an identifiable and distinct part of the policy, although no doubt usually including many terms common to it and the indemnity part. Nor was any instance of difficulty in the case of such a policy drawn to attention in argument." And then there's a reference, "In ordinary speech a reference to a contract may often naturally be made as including part of a contract.' And then there's an illustration. There's a reference in the following paragraph to the reference to the meaning of contract and then just after that definition, "That definition is consistent with the approach that within one overall insurance contract there may be a number of parts or covers, which may be treated separately for the purposes of the Act." And that's what I say is relevant here.

We ask the question, whether there is one contract or two, or whether there are severable parts of a contract to determine whether, as in the words of the

Court of Appeal in *AMP*, "Whether there are a number of parts or covers, which may be treated separately for the purposes of the Act."

WILLIAM YOUNG J:

Are you saying it's effectively eight times 250? Or eight times 500, or is it both because it's got the split tier component?

MR COOKE QC:

We'd then have to go through the subsection (6) machinery for working out – it's eight indemnity covers what the appropriate indemnity value for each of the Port companies is, depends on the application of subsection (6).

WILLIAM YOUNG J:

The commercial driver of this is plainly the geographical square of the port companies, presumably, and the lack of likelihood that they're all going to have a catastrophe at the same time?

MR COOKE QC:

Yes. The commercial driver is to reduce costs.

WILLIAM YOUNG J:

Yes, but on the risk assessment side of it –

MR COOKE QC:

Yes.

WILLIAM YOUNG J:

It's the, well we're up and down the country, we're not all clustered around a single fault line or whatever.

MR COOKE QC:

Right, that's right. So there was no risk to them in the portfolio arrangements but consider we're outside in terms of the ability to say well you've just got one contract and one indemnity value, one levy, but what I will submit after the adjournment is that looking at section 48 and how it applies actually it is on a per owner or per insured basis and that you then have to apply subsection (6) to work out what is the fair levy struck on their fair and reasonable indemnity value.

COURT ADJOURNS: 11.30 AM
COURT RESUMES 11.46 AM

MR COOKE QC:
Your Honours, I'm dealing with this question of multiple owners and as I foreshadowed before the adjournment really on two levels one is just looking at the provisions of the Act in themselves and seeing if they provide us the answer to the question, and then stepping away from the provisions and seeing how the common law would approach it in light of what is in the sections, so dealing first with section 48, and if I could take Your Honours back to the provisions, what the submission is, is that the section makes it plain that the levy is payable basically on a per owner or per insured basis. If you go first to section 48 you see that it's the insurance company upon which the levy attaches, but we then see from the balance of the provisions the relationship with the owner of the property and once again that is most evident from the very provisions that we've been focusing on this morning. If you look at 48(6)(c) you'll see where we were dealing with identifying the proper indemnity (6)(c)(i) a declaration signed by the owner to the effect that the indemnity value declared by the owner for the purpose of the levy is a fair and reasonable indemnity value and if there is a contest about that you go to (6B) over the page where the Commission considers that the indemnity value declared in respect of any property by the owner is not a true indemnity value according to the procedure set out in terms of how that is dealt with, including, for example, in (6B) the Commission notifies the owner in writing of its determination and the owner's right of objection, and there is a definition of "owner". If you go back to section 47B, you see the definition is a broad one, includes any company, corporation, partnership or person who is entitled to legal benefit or short beneficial ownership of or entitled to any form of tenure, possession, or right to any such property and shall also include any company, corporation, partnership or person whether resident in New Zealand or not who is entitled to any indemnity or benefit under the contract of fire insurance, whether or not such company, corporation, partnership or person is entitled to any form of legal or beneficial ownership to or form of tender, so it's a broad definition and refers to those who have rights in relation to the property and a sufficient interest in the insured property to become responsible for the levy indirectly under these provisions.

If we then go back to section 48, Your Honours will see after the machinery we went through previously you go through to section 48(9). Perhaps first, section 48(8), you'll see that what happens is that the amount that is due becomes a debt due by the insurance company to the Commission and then under subsection (9) the amount of the levy for which an insurance company at any time becomes liable in respect of any contract of fire insurance shall thereupon become a debt due by the insured person to the insurance company and may be recoverable by the company accordingly. At the very end of that you'll see it says where two or more persons are liable for any amount under the subsection, their liability shall be jointly and severable.

O'REGAN J:
It doesn't say "owner" there, though.

MR COOKE QC:
It does say "insured person" there but I don't think that the enactment was seeking to make a different point there, insured person and owner because the definition of "owner" are treated synonymously in the sections. So I don't think Parliament was choosing a particular expression to identify a different category of person. We're still looking at the people who have the ownership, the insured interest in the property. Then if you follow through the other sections in the Act, beginning at section 49, you may recall we went through those before, these also focus on owners so 49 heading liability of levy where agents of owners of property negotiate contracts and if you look at 49(1), for the purpose of this Act where any company, partnership, corporation, or person in New Zealand in the course of business negotiates directly with a broker or otherwise any contract or foreign insurance between any owner of property and any insurance company.

That is reflected in the further subsections 49A and 49B, again, dealing with particular overseas dimensions that refer to the owner of the property. Then through to section 50, there's 51 is the amount of the levy. The amount of the levy for which any insurance company or agent or owner of property becomes liable shall be received by the Commission, so again referring back to the owners of property, and then in 51 there's the provisions for audit to enable the thing to be investigated and Your Honours will see again with fond reference to the owner of 51(3) where any owner of property is liable for payment of the levy.

So I accept there is that nuance Justice O'Regan identified that in one of those provisions it talks about the insured person, not the owner, but nevertheless if you look at the scheme in totality it's identifying the levy in relation to the owners of property, those who hold the insured interest in the property, so in my submission that means that the levy is struck on a per owner basis, not on the basis of a per insurance contract basis.

So what would that mean for a body such as the group of companies in New Zealand? The difficulty with answering that question is the comparative lack of evidence we have about what the indemnity value of each of the port companies actually is or was at the time, but we do have some evidence that might be helpful on that in volume 2 on the case on appeal behind tab 9. There's the affidavit in reply from Mark Rankin, who is an insurance broker, and you will see on page 138 of the case on appeal, paragraph 10 of his affidavit, he at least provides some information that may assist in identifying how this would apply, because he describes in his paragraph 10 just before that table the total value of all properties owned by each of the port companies was approximately as follows. Now, there's one doubt about that because you'll see the box on the right-hand side is headed up "reinstatement value". So this may not be an indemnity value. I am not sure. But I am taking these amounts to be a possible indication of what the true indemnity value of the properties held by each of the companies was.

Now, in this case, we have a situation where they have stated indemnity value, insurance of $250 million. If you take the first company, if they have a stated amount of $29 million, nevertheless in terms of subsection (6) they have insurance for greater than indemnity value so you go into this section 6 machinery for working out what their proper indemnity value payment is and it would be, I'm assuming here, 29 million-odd and that's what they would pay their levy on and that sort of approach would apply for similar companies that are in the situation there that have a true indemnity value of less than the stated indemnity value.

The exceptions down the list then are Lyttelton and Port of Napier, who both have stated values of 342 million-odd and then 292 million so that would be a situation where their stated value was in excess of their indemnity value, so again you would follow the process of working out the true and fair value for the purposes of setting the levy.

The two interesting ones there at the end are Centreport and Port of Auckland who have 542 million and 696 million of value of buildings, and you remember the insurance cover here is 250 million so-called indemnity and then a further 250 million in excess of that, although some of that will be in the third tier as my learned friend Mr Simpson clarified, so in their case it may well be that their indemnity insurance will be struck on 500 million because they have a sum for which they are insured which is less than the indemnity value of the insurance, so they then, on that approach, would be to pay the levy on the stated amount of 500 million because the provisos in section 6 aren't triggered. So that's how it would work and that's what I say is a straightforward application of the section because it focuses in on a per owner of building basis.

There is the other way of looking at it, which is based on the common law cases. As I suggested before the adjournment, my submission is that to see the value in these cases you've got to understand why it was that the Court was asking the relevant question. When you look at why the Court was asking the question, it becomes apparent why the Court gave the answer that it did. So one of the main cases that has been focused on is the first page of this table and you'll see from the factual background in the table what happened in that case was that the family entered into a lease rent agreement for a vehicle. The policy would favour not just the family but also the lessor and the Judge has recorded, for reasons unexplained, the father had sought to unilaterally cancel the insurance policy and then there was an accident, that he had an accident and a claim was made and the question is, well was the contract validly cancelled. So if you look at my third column there, why was the Court asking the question. It was asking the question to determine whether the cancellation by one of the parties was effective in cancelling the whole contract. And what the Court held is that they treated this as a composite policy where both parties had to indicate intention to cancel the contract and because they both hadn't, it hadn't been validly cancelled. So the reason why the Court was asking the question, is this composite, or is this one policy, is for the purposes of cancellation.

Looking at a case that determined the opposite conclusion, if you go over the page to *Maulder v National Insurance Company of New Zealand Ltd* [1993] 2 NZLR 351 (HC), it's on the second page of this table, that was a case where – dealt with by the Chief Justice, where a husband and wife insured a home as joint tenants. The husband deliberately set fire to the house and killed himself in the process and the question was did the wife, was the wife able to make a claim given the principle that you shouldn't be able to benefit from wrongdoing. So again if you look at why the Court was asking the question column, the question was responsibility for unlawful acts, and in that case the Chief Justice held that if the policy was composite and not severable, that would mean the innocent wife would be deprived of the ability to claim under the insurance arrangements and in that case the Chief Justice held that the wife had a distinct separate interest in the property, notwithstanding her husband's wrongdoing, so in a sense it was a composite policy but for the purposes of the application of the principle of unlawful acts, you could regard the interests of the two insured people as separate.

In one of the other cases that has been focused on, which is the *American Motorists Insurance Co (AMICO) v Cellstar Corp* [2003] 2 CLC 599 (EWCA) case, which is a reasonable complicated international arbitration case. That's the first on the list of, of my list. What was happening here was there was a multinational insurance policy and it was in relation to the activity of stealing telephone activities, and each of the parties was taking a stance and the question in the case was, which was the applicable law to these arrangements, and is often the case the American insurance company was contending the applicable law was the law of the United Kingdom. The relevant UK company as contending the relevant law was the law of Texas, and the Court ultimately concluded that the relevant applicable law was the law of Texas. And so they were asking – and part of the argument was were separate parts of the contract governed by separate laws. So the reason why they were asking the question, about separate contracts or the severability of contracts, was for the purpose of answering the proper law question, and this is where the case, where my learned friend gets his scissors analogy, and I might just take Your Honours to that case, that's in the bundle 2 of the appellants' authorities, behind tab 21. No, not tab 21, tab 11. Sorry that's in volume 1, tab 11. And I'm taking Your Honours through to page 305 of the decision in the judgment of Lord Justice Mance, as he then was, and to paragraph 21 of the judgment.

WILLIAM YOUNG J:

Sorry what paragraph?

MR COOKE QC:

Paragraph 21 and you'll see His Lordship says, "Under the Rome Convention I do not consider that this would be a real problem. Article 3(1) provides for 'a contract' to be governed by the law chosen by the parties. The parties by choice can select the law applicable to the whole or a part only of the contract. However, I have no doubt that the present composite policy would fall to be regarded as a single, probably multi-partite, contract. Neither the parties nor the Rome Convention could sensibly be taken to have intended to scissor up the policy negotiated and issued in Houston and to subject different aspects of it to different governing laws. The potential problems arising on such an approach do not need emphasis. I will only instance the problems that would arise if different countries had different principles or remedies governing non-disclosure or breach of warranty." So why was the Court looking at this question, is this a one contract or two, or whether it's a severable contract for this question of applicable law.

Similarly in the *General Accident, Fire and Life Assurance Corporation Ltd v Midland Bank Ltd* [1940] 2 KB 388 (CA) case, over on the second page of my table, what had happened in that case is that there were three parties who were insured; the building owner, the owner of plant and machinery in the building, and the bank who had security over both the other two. The plant and machinery owner had made a fraudulent under the insurance policy and had then gone into liquidation and what happened was the insurance company sought to get restitution of the amounts that had been paid out under the claim, from the other two. And so again the question in that case, what I've put in my column is, why was the Court asking the question, was asking the question is were the innocent co-insured liable to restitute the insurance company, having been paid out because of the fraudulent actions of the third, and if it was regarded as a non-severable part it would've been, they would've been obliged to but the Court said, in terms of the applicable principles that the innocent parties were sufficiently distinct and didn't have to provide restitution.

That is also the similar sort of approach taken in the final case in that second page, *New Hampshire Insurance Co v MGN Ltd* [1997] Lloyd's Rep IR 24 (EWCA), and this was an insurance policy covering the acts of employees of a larger [inaudible 12:07:31] group of companies, it was the Maxwell Group, and the insurer sought to avoid all of the cover because of the certain dishonest acts of some of the employees when cover was originally obtained. So the question there was, when you have material misrepresentation or material non-disclosure by one of the parties and one of – in this insurance policy they have multiple companies benefiting under its terms – did the innocent other companies, were they infected by the dishonesty and misrepresentation of the particular employees, and again the finding of the Court was well the innocent parties can severe their interests in insurance policy from the interests of the guilty who had materially misrepresented the position in obtaining the cover.

So I haven't gone through every one of those cases to go through a detailed analysis of each of them. The point I'm trying to make is each of those cases you can understand the answer to the question, the Court is giving to the relevant question, given what, the reason why the question is being asked, and what we're dealing with here in the present case is important, and that's really going back to what the Court of Appeal in *AMP* said. We're asking the question for the purpose of determining whether owners can get together and pick out one insurance contract covering all of their property and have only a joint interest that is not regarded as separate for the purposes of setting the levy. And my submission would be even if Your Honours didn't accept, looking at the terms of section 48 itself, that it is a per owner scheme, but if there's nothing definitive about that, you can nevertheless see from the section more generally that it is attempting to identify the appropriate levy for people who insured under contract of insurance and are looking at it in the category of insured property by insured property for each of the owners or with the owners in question. So if you look at the factors that are relevant to the coming together here. Rather than the fact that they all are responsible for the premium being a decisive factor in treating this as a single non-severable contract, with respect, that isn't the critical factor for the purposes of the application of the levy provision. What is important for the purposes of the levy provision is that each of the companies has a separate and distinct property holding and each of those companies doesn't have an interest in the other company's property in any way. They are separate companies. They actually are competitors, the various port companies. They have their own property interests. The other seven have no interest in the property of the eighth at all. Their only so-called interests in the property of the eighth is created by the very insurance contract so they have no actual common link for the purposes of looking at what section 48 is directed to, and as I say, they are competitors so in my submission on that basis applying the common law principles why are you asking the question to see in terms of the application of the levy provisions what's the appropriate answer in terms of whether they have distinctive or only common interests for the purposes of the levy I say is a distinct interest.

O'REGAN J:

How many of these cases in your table are cases where the insurance is covering property in which – the same property in which the different parties just have different insurable interests and how many of them are dealing with completely separately-owned property?

MR COOKE QC:
It's hard to say where the dividing line falls on that. For example, that case I talked about where there was the owner of the building, the owner of the plant, and the bank, and they had the security interests, you could say that the plant was separate property from the building, although in the real world the plant and the building are essentially in the same collection of property, if you can put it that way. It makes sense to regard it as one property and the bank's secured interest would be treated as that as well. Otherwise I believe that the answer is that it is the same property, which is why I make – I'm just saying that from recollection and I'm trying to think if any of those cases actually have different property.

GLAZEBROOK J:
Presumably the group of companies, that last one, had different properties.

MR COOKE QC:
Well, the insurance there was not a –

GLAZEBROOK J:
Oh, it's not their property, though, is it? It's not property. It's different interest, though.

MR COOKE QC:
Yes, well, it depends on what the interest pays you, define the interest. On one way it's the same interest because it's the acts of the employees which is putting it that way is rather like me saying that the plant is the same as the building but in these cases there is a commonality and the interesting thing about that is that although it's really dealing with the same common insured interests the Courts have nevertheless sometimes said they're severable and sometimes said they're not, depending on why they're asking the question, which is why I come back to why that's quite important here, why we're asking this question. It's not for some esoteric determination. This Court shouldn't decide definitively the common law rule for deciding when insurance contracts are one contract or two or, if they're one contract, when a contract has severable interests. This could should simply be asking the question for the purposes of the application of the levy provision and the Fire Service Act, when

two companies get together and have one insurance policy does the Act seek to identify the levy on a per owner basis or on a per policy basis. I say it's on a per owner basis because this section is obviously directed to the indemnity value of the policy for which the person is insured, and that's the key point about this.

So that's all I wanted to say, actually, on the second question as well. Either route gets you to the same position and if there's something I wanted to say about both of these arguments one of the things that has been suggested is that the stance of the Fire Service Commission is inconsistent with the Court of Appeal's decision in *AMP*, and Your Honours will recall I took you to that decision. With respect, I don't think that is a correct construction of what the Court said in *AMP*. What the Court actually did in *AMP* was eschew the kind of technical approach that had been advanced in submissions. So it eschewed the idea of one contract or two being determinative. It eschewed the more complex submissions that were made about how particular types of insurance were excluded and what it did was adopt a practical, businesslike interpretation of the section to give effect to it in the way that Parliament must have intended, and really that's what I'm advancing on both of the issues in this case. People can criticise this section for being overly simplistic, but nevertheless in its simplicity it has a coherence that makes it work simply in a way that's predictable, and that is that it's focused in on more assessment on the extent the cover you have and the payment of the levy accordingly so that everybody can benefit from the Fire Service in a fair and equitable way.

In terms of the approach to statutory interpretation, that's the one I advance in this Court that indicates that when you're interpreting provisions in taxation of levying statutes you just adopt the same line of purpose you do in every other case and the absence of an anti-avoidance provision makes no difference. It just means you approach the task of statutory interpretation in the same way as you would any other statute, so I say text in the light of purpose, see what Parliament was intending to do, and you apply that to both the issues arising in this appeal.

So unless Your Honours have any questions, those are my submissions.

McGRATH J:
Thank you, Mr Cooke. Mr Simpson.

MR SIMPSON:

Parliament has placed this Act on its legislative agenda for review in change including the levy provisions, so I'll come back to that.

We've divided the submission up between myself and Mr Friar. I'll deal with the Act and the first course of action dealing with split tier policies. Mr Friar will deal with the collective multiple insured policies.

The structure of my roadmap is to deal first with the Commission's objection to the declaration sought and then look at the provisions of the Fire Service Act that my learned friend has taken you through. There are some additional observations I wish to make. Touch briefly on the approach to interpretation, respond to the Commission's submissions, apply it briefly to the split tier policy. That shouldn't take long. And then a few concluding remarks on reform.

Now, as to the first course of action, the declarations under appeal set out in paragraph 45 of the judgment are purely rulings of law. There are no mixed issues of fact and law and in my submission the Court of Appeal, despite the reservations it expressed, was able to deal with those questions of law without difficulty. That approach reflects the same approach as was taken by the Court of Appeal in *AMP*. I'll take you to *AMP* once and once only, I hope, so we'll come back to that and I'll show you the background of how the case arose. It's a similar situation where sample policies were put before the Court and then declarations sought on questions of law.

In relation to the second course of action, those declarations of mixed fact in law but they're based around a particular policy on which full discovery was provided and on which evidence was provided, so the only difference between that course of action and the various claims or cases that have existed in the past where either the Fire Service Commission or the earthquake and war damage commission has brought proceedings is that in this case it is the insurance industry that has initiated the action rather than the regulator, but there's been complete discovery and full evidence. The parties elected not to call witnesses for cross-examination. It was decided on affidavits alone. But you have everything that should be needed to determine the questions of fact and law in that case and, of course, the questions of law that arise in the second course of action include those that arise under the first.

I also note that there's no other practical means available to the insurance industry to determine the matters at issue. There seems to be some criticism of this proceedings in the appellant's submissions, that there's something improper or untoward about this type of proceeding. But we don't have a rulings procedure in the Fire Service Act as we do in the income tax legislation so the only option available to the insurance industry to try and get some certainty around this area is by seeking guidance from the Court.

GLAZEBROOK J:
Well, in the income tax area before there was a ruling and you had an objection you just either paid up in full or you didn't pay up in full at the time you were allowed to pay a part so I'm not sure that that's an answer to the allegation you didn't go for declarations as to the meaning of income tax provisions. You just either paid up or you didn't and took the consequences.

MR SIMPSON:
Well, here we don't even have that option, so if you don't pay up you face pretty horrendous penalties. We don't have the comparatively more sophisticated penalty regime that we have in the income tax legislation depending on the level of culpability and discounts for first offences. Here you pay pretty close to 40% interest on unpaid levies, nor is there a provision –

WILLIAM YOUNG J:
Sorry, I thought it was one and a half percent a month.

MR SIMPSON:
No, there's also a 10% compounding every six months so it's pretty chunky, and similarly there's no provision in the Act to pay under objection and then sue for it back and then if you were to pay and then sue you would effectively be suing for declarations so you'd be in the same situation you are here, so this is the only option.

GLAZEBROOK J:
But with full facts on the particular policy and the particular circumstances of the levy, though.

MR SIMPSON:

But if those factual issues are important to the determination of these declarations, then Your Honours will refuse to make the declarations. You'll reverse what the Court of Appeal has done. Our case is that when you look at the issues and the particular declarations made by the Court of Appeal in paragraph 45 in relation to split tier policies, they are all there and they can be determined without determining facts, and second you've got all the facts in the second course of action so either way if you need the facts they're in a second course of action. If you don't need the facts, you can determine the first course of action in the same way the Court of Appeal did.

ARNOLD J:
Is there a danger with this, though, Justice Glazebrook raised the issue of a reinstatement clause, for example, and isn't it possible that particular clauses could make a difference?

MR SIMPSON:
It being three cases involving reinstatement clauses? All of them have really held that it made no difference and I will take you to those cases a little later on but the – if there needed to be an exception for reinstatement clause that could be a supplement to the declarations but I can tell you this, that notwithstanding the successes in the cases about reinstatement clauses, none of these policies have an automatic reinstatement clause in the fire policy and the insurance industry is determined to keep it that way. We just do not have reinstatement clauses in these indemnity fire policies, but we can deal with that as we go.

I think it's helpful if we just clear up some terminology issues, as well, and I try and identify the real differences between the parties. Unfortunately we have words like "composite" and "reinstatement" used to mean different things in different contexts so a reinstatement, we've got automatic reinstatement cover clauses which reinstate a cover once a claim is made as opposed to reinstatement cover covering it as-new replacement value, so in my submissions, if you don't mind, I'll try and use the word "replacement" for full as-new reinstatement cover and "automatic reinstatement clauses" for that. We also have two uses of the word "composite", so in a split tier context we use the word "composite" to mean one policy document with several parts in it as opposed to a situation where we've got two or three separate policies or contracts of insurance and also, of course, we've got the composite context in terms of the second course of action so I will try and keep those terms separately marked out but the concern I have that came out of my friend's submissions today is he talked about the split tier having an indemnity policy and a reinstatement policy and that is not the case. We have an indemnity policy and an excess of indemnity policy and they are quite different. So a replacement policy or reinstatement policy covers the as-new value of the property. An excess of indemnity policy only covers that part of a loss between the full indemnity value of a property and its as-new value, so it covers the depreciation.

GLAZEBROOK J:
Sorry, you're going to have to go through that again, slower.

MR SIMPSON:
What I'll do is, I'll take –

GLAZEBROOK J:
It would be really helpful if you gave that definition again. You've got an indemnity policy and an excess of indemnity policy. What did you say the excess of indemnity policy covers?

MR SIMPSON:
It effectively covers the depreciation. I can show this best in the diagram to our submissions. If you go to appendix A –

GLAZEBROOK J:
What's the difference between that and as-new, is what I want to ask.

MR SIMPSON:
It is the top-up from where indemnity cover – it's the depreciation, it's the extra cost of replacing the building to its as-new condition above its depreciated condition.

GLAZEBROOK J:
But I thought your friend accepted that that wasn't covered, but he said if you've got an indemnity policy and an excess of indemnity policy where the indemnity policy doesn't cover the true indemnity value, then you can slice off part of the so-called excess of indemnity and put it back as the indemnity policy.

MR SIMPSON:

No, no, I don't think he did accept that and that is not the situation with which we're concerned here. That's an AMP-type policy and maybe I'll walk you through these diagrams first and I hope that will clarify your question. If we look at appendix A, this is our case. So if we start at the left-hand side we have a portfolio of property or it could be a single property portfolio. It doesn't matter.

WILLIAM YOUNG J:
Single property?

MR SIMPSON:
Single property. It's got replacement value to its as-new condition of one billion dollars. It's got an indemnity value of 600 million and an excess of indemnity of 400 so the 600 represents its depreciated value or its as market value as today. The 400 million is the cost of building – it's the cost of the depreciation or the difference between its depreciated or market value on the one hand and its brand spanking new value on the other. Now, what we have in these policies that are the subject of this declaration is indemnity insurance not up to the 600 but capped off at 300 and that's, just to be clear, an aggregate sum insured for all claims in the policy period, not any one loss.

We then have an uninsured exposure for another 300 million in the white box and that is uninsured, so if there are indemnity claims during the policy period for 400 million indemnity losses, you'll get your 300 and you'll be uninsured for 100. You then have excess of indemnity policy that only covers the 400 million above the indemnity value, so if this is a single property and it's destroyed by a fire, you'll get 300 from the indemnity policy, you'll get 400 from the excess of indemnity policy, and you'll be uninsured for the difference.

WILLIAM YOUNG J:
But what your friend would say is you get $700 million for a property that's got an indemnity value of 600.

MR SIMPSON:
Yes, but let's assume partial damage for a minute. So let's assume that the indemnity value of the loss, so say three-quarters of the building is destroyed by fire so there's still a quarter standing which can be used again so the indemnity losses, the depreciated value losses, are 500 million and the excess of indemnity value

losses are 200 million. In that case, you'll get 300 out of the indemnity policy. You'll lose 200 for the indemnity value losses. They're irrecoverable and the last 200 out of the excess of indemnity losses will be covered, so although your losses in that example will be 700 million, you'll only get 500 million out of the policy.

GLAZEBROOK J:
But do we mind about that because isn't the Fire Service levy just levied on indemnity value so it doesn't care about partial losses.

MR SIMPSON:
No it's not and that's the problem with the appellant's submissions. Throughout their submissions they keep talking about indemnity value. It's not, it's the amount for which the property is insured against fire, excluding any excess of indemnity cover and by that I accept its true excess of indemnity cover. If the excess of indemnity cover dropped down to cover any shortfall indemnity cover, it's not excess of indemnity cover. That's window dressing, it's just a label.

GLAZEBROOK J:
This looks like window dressing too to me frankly.

MR SIMPSON:
Why is that Your Honour?

GLAZEBROOK J:
Well just because you call it excessive indemnity cover, doesn't make it excessive indemnity cover. All the Fire Service levy is interested in is how much you get if the building is totally destroyed and here how much you get on your example is 700 million. That's in excess of indemnity cover by 100.

MR SIMPSON:
Well that completely ignores subsection 7.

GLAZEBROOK J:
No it doesn't. It says if you get more than the indemnity cover, 100 million, we ignore that.

MR SIMPSON:

No, no, it doesn't. It maybe –

GLAZEBROOK J:

It's a technical distinction –

MR SIMPSON:

No, it's not Your Honour, it's absolutely not, and I will take you through the provisions, I'll take you through the policy documents itself, which for the excess of indemnity policy it says, to be clear, this doesn't provide any element of indemnity cover. In particular it does not drop down and provide any shortfall indemnity cover because of the existence of the sum insured in the indemnity value policy.

O'REGAN J:

But that's just between the insured and the insurer, that's not what we're interested in. We're interested in what does section 48 cover.

MR SIMPSON:

Yes, I appreciate that, but 48 applies – 48 says you pay levies on indemnity, on the amount for which the property is insured, effectively for its indemnity value only. Let me walk you through the sections but let me finish the diagrams first. This is a dense section despite its short nature but just bear with me.

Can I turn over the page to appendix B. You'll see the *AMP* case. Now that is different. That is an example where what was called excess of indemnity insurance did drop down. It dropped down to the sum insured and effectively, therefore, provided an element of indemnity cover. Nevertheless, Justice Cooke, as he then was, held that it was a still exempt, and I'll take you through what happened to both the Fire Service Act and the EQC Act that legislative – endorsed part of what he did there and then you'll see what the Commission's done in appendix C. So we've got the same sort of policy but the difference between us is that they say the exemption in subsection (7) does not apply unless you've got enough cover that equals the full indemnity value of the property.

WILLIAM YOUNG J:

Well to put it another way they say it's only the top 100 million that's truly excess of indemnity.

MR SIMPSON:

Can I just ask Your Honour, when you say "excess of indemnity" what do you mean?

WILLIAM YOUNG J:

I'm just looking at this before me. I suspect that if Mr Cooke rewrote it, he would put a circle around there and put those words in that top box.

MR SIMPSON:

Yes, but when it talks about the excess of indemnity it's talking about the excess of indemnity of the value of the property.

GLAZEBROOK J:

The value is 600 and the excess is 100. It's simple. It's just maths.

MR SIMPSON:

Yes, but that's all the policy bites on. The excess –

GLAZEBROOK J:

Well it's –

MR SIMPSON:

– above the 600. It doesn't cover the three to 600.

GLAZEBROOK J:

But your money that you get in your hand is 700 million which is 100 million more than the indemnity value.

MR SIMPSON:

No, no –

GLAZEBROOK J:

That's what you get in pure maths.

MR SIMPSON:

No it doesn't and remember the example I took you through earlier. If we had a partial damage –

GLAZEBROOK J:

But that, does not care about partial damage, does it?

ARNOLD J:

This is about what you're insured for. If you're building is insured, what will you get paid by the insurance company.

MR SIMPSON:

In this case you will get 700.

ARNOLD J:

Which is more than the indemnity value.

MR SIMPSON:

Yes.

ARNOLD J:

So you're covered for the full indemnity value of the building?

MR SIMPSON:

No. you are not covered for $400 million of the indemnity value of the building. Let's get into the section. I think, I hope it will come clear. So if we go to volume 1 of the appellant's authorities, let me take you through section 48 and following again. So we've seen that subsection (1) imposes the levy and subsection (2) the basis upon which it's to be applied. My friend noted that there's motor vehicle cover. If his interpretation is correct, and we don't give 48(7) the meaning that I say it should mean, if you have a fleet of vehicles covered under this type of policy, with indemnity and an excess of indemnity policy, instead of paying one levy per vehicle, you will pay two. That's not intended by Parliament. If you have a residential property –

WILLIAM YOUNG J:

Maybe you'll have to explain that to me.

GLAZEBROOK J:

Yes.

MR SIMPSON:

Okay, so if you look at subsection (2), it's applying a levy, a uniform levy, on any contract of fire insurance. So we take the indemnity policy and, of course, as expected, and I'll take you to the Fire Service levy order, there is a lump sum levy payable on each vehicle. We also have an excess of indemnity policy. Now if we apply subsection (7) the way I say, this section doesn't apply to it, so only one levy has been paid. But it's still a contract of fire insurance so if you don't apply subsection (7) in the way that I say, but rather the way the Commission says, you've now got to pay another levy, because it's a contract of fire insurance that is subject to this Act. So you've got two contracts of fire insurance and therefore two levies per vehicle.

O'REGAN J:
But do you have that for motor vehicles. You don't have that –

GLAZEBROOK J:
You pay it on every motor vehicle that's insured at a uniform rate.

O'REGAN J:
Unless you're stupid, you'd only have one policy, so you'd only pay once.

MR SIMPSON:
Well not really. If you have a fleet of vehicles you may well have a contract of insurance of indemnity and excess of indemnity insurance, and if we look at, for example, residential properties, where the same problem arises. You take Housing New Zealand. They will have a massive portfolio of properties. They may well have, in fact I know something about their insurances, separate indemnity and excess of indemnity insurance, and now there'll be two lots of levies paid on 100,000 of statutory cover –

GLAZEBROOK J:
But I don't.

MR SIMPSON:
– when Parliament only ever intended there would be one.

O'REGAN J:
But you just have one policy.

MR SIMPSON:

But you don't.

O'REGAN J:

I mean it's just putting up a straw man.

MR SIMPSON:

No it's not, it's not a straw man. It's what happens in the marketplace.

O'REGAN J:

But it wouldn't happen if you had to pay two levies as a result.

MR SIMPSON:

Well that depends on what, on what –

O'REGAN J:

Are you saying that the Housing Corporation would voluntarily pay twice as much fire levy as it has to?

MR SIMPSON:

Well I didn't think the Housing Corporation ever appreciated that someone would come asking for two levies, but that's what this interpretation –

GLAZEBROOK J:

But why are they asking for two levies –

MR SIMPSON:

Because there's a levy –

GLAZEBROOK J:

Well, but I –

MR SIMPSON:

– per contract of insurance.

GLAZEBROOK J:

Well where does it say that?

MR SIMPSON:

In subsection (1), every insurance company with –

GLAZEBROOK J:

I thought what Mr Cooke's argument was is that you take the two of them together so when you're looking at what the indemnity value is you don't just look at the first contract you put them together and say well do you get more under both contracts than the indemnity value, not that you look at that one and say, oh that's under, you pay one on that; and then you pay one on the other because you pretend that the indemnity value doesn't exist. That was not my understanding of his argument at all. In fact, I might be wrong, but I thought he said you aggregate what's there under both policies and then take the aggregate. In your example you take your 300 million and your 400 million and get 700 million and then your excess is 100 million.

MR SIMPSON:

Well that may well be the submissions but it's not what the Act says. The Act says every contract of insurance you pay a separate levy, and that's contrary to what Justice Cooke said in *AMP*, that you treat separate parts of one contract of insurance separately, for applying for the purpose of the Court, and that part of his judgment was endorsed in the subsequent amendment to subsection (7). So you may well be right, that might be the Commission's submission, but that's not what the section says. It clearly says every contract of insurance, a different levy.

WILLIAM YOUNG J:

What's the problem anyway. If it's referable, presumably it's referable to the, – I mean it's not a sliding scale, it would be a direct relationship to the amount involved I take it.

MR SIMPSON:

No it's, for motor vehicles and cars –

WILLIAM YOUNG J:

No, sorry, I meant for houses. Say, for instance, the commercial buildings, the buildings.

MR SIMPSON:

Commercial buildings it's sliding – it's a percentage, 7.6 cents per $100 of cover.

WILLIAM YOUNG J:

Yes, so it doesn't really matter whether it's on two policies or one, does it, providing that the ultimate figure –

MR SIMPSON:

Sorry, Your Honour's moved on, what I'm trying to say, if we give subsection (7) the interpretation that my friend says, we're going to have two car levies and two house levies –

GLAZEBROOK J:

Well I don't see how you can –

MR SIMPSON:

– and that was never Parliament's intention.

GLAZEBROOK J:

– because subsection (2)(a) says you just do it on every motor vehicle. So if you had two contracts on one motor vehicle, it's just per motor vehicle.

MR SIMPSON:

No, it goes on to say which is insured in terms of any contract of fire insurance.

GLAZEBROOK J:

No, but it's not, you're not going to interpret that as saying you've got it on every motor vehicle and you pay it double.

MR SIMPSON:

I'm only reading the words Your Honour and that's what subsection –

GLAZEBROOK J:

Well so am I –

MR SIMPSON:

– (1) says.

GLAZEBROOK J:

Well so am I, every motor vehicle means you pay one levy on every motor vehicle at a uniform rate.

MR SIMPSON:

Yes, because there might be a contract of insurance that insures more than one vehicle so you pay a uniform rate for every vehicle insured under each contract.

McGRATH J:

Mr Simpson, the problem maybe that under different heads of this statutory provision you can't achieve absolute consistency. It's an Act that's coming under somewhat some pressure plainly but you are very strong on consistency in respect of two separate items. I'm not sure we have to –

MR SIMPSON:

Well all I'm doing is giving the language the simple and – unambiguous language it's literal meaning and without difficulty. With respect I think the Court's creating, trying to read into something that's just not in the language.

O'REGAN J:

If it was that easy you wouldn't be asking for declarations, would you.

MR SIMPSON:

I appreciate that. Right let's then move to subsection (6). So the purposes of (2)(b), "The amount for which the property is insured for the… contract of fire insurance," and you can ignore, I think we've dealt with the first (a) and (b), but let's deal with (c) "in the case of other property, where the contract of fire insurance provides for the settlement of any claim for damage to or destruction of the property upon any basis more favourable to the insured person than its indemnity value or where there is no sum insured in the contract, be computed on the basis of the indemnity value." Now we say in relation to the indemnity policies they are not more favourable and they have a sum insured So for those two reasons subsection (c) has no application.

ARNOLD J:

Just to stop there. I asked Mr Cooke if it was significant that there were two contracts. Do you say it's critical?

MR SIMPSON:

No, I say it doesn't matter, but for the opposite reason. So in *AMP* Justice Cooke said it doesn't matter whether it's in one contract or two, you look at subsection (c) for each part separately. So you first, you have to give, I know it's in a different, it's in reverse order, but subsection (7) says if there's a discrete excess of indemnity component you take that out, you ignore it. What's left, I've got an indemnity component –

ARNOLD J:

No, when you're looking at (c), it says where the contract and fire insurance provides for settlement on any basis more favourable than indemnity –

MR SIMPSON:

Yes.

ARNOLD J:

– that's the starting point. You can't ignore the reinstatement component of the policy for that purpose, can you?

MR SIMPSON:

Yes you can. That's what subsection (7) says.

ARNOLD J:

What. How can it possibly be?

MR SIMPSON:

Well let me give you examples. I'll tell you what subsection (c) is really directed at. It's directed at replacement cover because with replacement cover there's no separation of the indemnity and the excess of indemnity component. It just says, this policy provides for the reinstatement of these properties to their value as-new. Now whether or not there's a sum insured, it's one homogenous piece of cover that responds and replaces the property to its as-new value. So you cannot chop it up and say, well we're only interested in imposing the levies on the indemnity insurance, just on, by looking at the terms. So that's why this subsection has that machinery provision to say, well, because it's one homogenous replacement cover, we need to find the dividing line where the indemnity cover begins and ends, so that's why we need declaration certificates. But where you have, where you have indemnity and excess of indemnity cover separately quantified in the policy, in separate parts, so you can say this 400 million is excess of indemnity cover, and this 300 is indemnity cover, you don't need those declarations anymore, you just say, well subsection (7) knocks this out, I pay levies on the 300 million, easy.

ARNOLD J:

The other way of looking at it would be to say in that sort of situation the indemnity value is subject, if declared in the policy, we're talking about a single policy for the moment, with the two separate elements, it's exactly why you would have paragraph 1. Trying to keep that indemnity value properly pitched.

MR SIMPSON:

But if I have – let's just start simply.

ARNOLD J:

But you've given a big explanation which is based on a particular approach to replacement policies. Now you expanded, to my mind considerably, on the language of subsection (c). Subsection (c) simply says, if it provides for settlement on any basis more favourable than indemnity value.

MR SIMPSON:

Subject to subsection (7), though. I want to give subsection (7) effect. I want to give Justice Cooke effect in *AMP*.

ARNOLD J:

So your – you have to develop this sort of theory of what a replacement – a particular form of replacement policy which you say is what is contemplated by paragraph (c).

MR SIMPSON:

Well, subsection (7) does not neatly have any application to a simple replacement policy because there's no part you can break out and take off. So that replacement policy is homogenous cover that will respond to whatever claims arise, so if I have 10 properties and one of them is destroyed, if I need more indemnity cover than in a different claim, more indemnity cover will cover that out of that policy if I need more. Excess of indemnity, more excess will come out. It's just a homogenous lump of cover that respond to whatever claims arise and will provide both an amalgam of indemnity and excess of indemnity cover, so I can't simply apply subsection (7) to knock out the excess of indemnity component of that cover. But when I come to a policy that's split tiered, either in separate contracts or separate parts of one contract, subsection (7) neatly comes in and says the true excess of indemnity cover is out, what have I got left? And I don't need to go through this provision any more, particularly because I've got a sum insured in the indemnity policy, otherwise I'm back into subsection (6)(c) anyway because it's either more favourable or you don't have a sum insured, so I've got to have a sum insured in my indemnity policy. Why now do I need to go through the declaration route?

WILLIAM YOUNG J:
Well, say you treat the words "contract of fire insurance" in subsection (c) as including contracts of fire insurance and if you look at the two policies in conjunction, treat them on the basis of a singular includes the plural, after you're left with a policy that doesn't have a sum insured.

MR SIMPSON:
No, because the sum insured is always attaching only to the indemnity cover.

WILLIAM YOUNG J:
No, no, but you've got one – you mean you can't really make a difference if you divide cover and the two policies. Say there was one policy and it said we'll give you indemnity cover up to $600 million and we will provide you with excess of indemnity in relation to reinstatement losses that occur which, depending on the contingencies, may get you over the figure. Now, wouldn't you say in that case that this was a policy that doesn't have a sum insured?

MR SIMPSON:
So in your hypothetical is it a replacement policy or an indemnity and excess of indemnity?

WILLIAM YOUNG J:
It's a single policy but contains everything that your double policy does.

MR SIMPSON:
But in two parts.

WILLIAM YOUNG J:

Yes but just one policy.

MR SIMPSON:

Yes.

WILLIAM YOUNG J:

We promise to pay in the event of a loss.

MR SIMPSON:

But to answer your question, I need to know whether the indemnity cover and excess of indemnity cover is separately quantified.

WILLIAM YOUNG J:

Well, the excess of indemnity cover won't be quantified with a limit, will it, other than the replacement value of the property?

MR SIMPSON:

You see, if I can't say there's only X dollars of indemnity cover in this then I agree (6)(c) applies. But if I can say I've got 600 of this type of cover, indemnity cover, and 300 of this type of cover, excess of indemnity cover, and the Courts have recognised they're different types of insurance, they cover different things, then I can just say ignore that, that's what subsection (7) says, and because I've got a sum insured in this part I don't even need to go through (6)(c) because I just pay the levy on the sum insured. It doesn't matter what the indemnity value is. Now, if the indemnity value happens to be lower than the sum insured, and I can't imagine why that would be but let's just assume that for the moment, then I might want to take advantage of (6)(c), provide declarations, and pay a lower levy. But if I don't do so, then subsection (2) says I pay on the amount of insurance. That's the number, 600 million is the amount of indemnity insurance, and I pay the levy on that.

WILLIAM YOUNG J:

Why are they split up into two policies, then?

MR SIMPSON:

Because I didn't want to face this argument. When these policy structures were developed, the Commission was – this was back in the '90s, the Commission was taking a very aggressive stance and running arguments, no matter how technical, and the insurance industry wanted something that was at bulletproof as it could be, so that's why we didn't follow the *AMP* approach and we excluded any indemnity cover out of the excess indemnity policy. We put a sum insured and we kept them separate contracts, separate policy documents, separate premiums, separate cover notes, everything separate to maintain the separation of these two contracts into different, separate contracts not capable of being rolled up into one, which is why I reject – and you'll see this in my submission – that I made any concession to the Court of Appeal that it didn't matter whether – that they were in fact one contract of insurance, but I do agree that based on *AMP* it shouldn't make any difference and based on subsection (7) it shouldn't make any difference.

Let's look at – let's finish off the subsections first and then I'll come back to the questions you've asked. So subsection (d) says that where the indemnity value can't be established under subsection (c) the levy is computed on the sum insured, if there is such a sum insured, or where the contract does not specify the sum insured, the matter is determined by the Commission. So occasionally we're getting examples of a client or an insurance company doesn't tender valuation certificates on time and in that case the general approach of the Fire Service has been to say you're too late, we're not putting one in. Well, if you've got a sum insured in those circumstances, then that's the number that's got to be applied and that makes it clear from (d).

And then for the same reasons I've said that subsection (6)(c) doesn't apply to excess of indemnity insurance, nor does (6A) nor does (6)(b), because they only bite where you've got indemnity cover. They only apply to indemnity cover, and that's obvious because why would you need (6)(b) and (6)(a) for excess of indemnity insurance? Makes no sense. We've looked at subsection (7). There's a few other sections I want to refer you to. We'll come to the relevance of these a bit later. But 49 and 49A and B are effectively a form of anti-avoidance but a specific type. They govern situations in 49 and 49A where parties were insuring offshore so this Act only applied to New Zealand insurance companies, so people were insuring offshore to avoid the Act and these provisions were then incorporated to deal with that.

49B effectively deals with a captive-type situation. 50 covers the payment of the levy, so you've got to pay the levy on the 15^{th} day of the second month following the month in which the contract is entered into, which means you have to know how much to pay on a levy at about the time you enter into the contract.

Then you've got 53, which is the interest if you pay late, 1.5% per month, simple interest, and then 53A you've got a compounding penalty surcharge of another 10% per six months compounding.

So if we then go to the Fire Service levy order, so if you look at the respondent's bundle for that under tab 1, so again back to Justice Glazebrook, if you look at clause 2 of the levy in A, dealing with motor vehicles, for each motor vehicle where the period of the contract of insurance is one year, a uniform rate of $6.08 whether or not the contract of insurance specifies the sum insured or not, so again it's a per contract levy, not a per vehicle levy.

GLAZEBROOK J:
Well, why does it say for each motor vehicle?

MR SIMPSON:
Because you might have more than one vehicle.

GLAZEBROOK J:
I understand that but I don't see how you could say that that means for each motor vehicle and if there are two contracts of insurance twice per motor vehicle. I can't see how you can read that sensibly into the words of that levy, and if you did I think you'd get very short shrift if the Commission tried to say that was the case. I can't imagine anyone would say oh yes that must mean you pay the levy twice over when it says for each motor vehicle.

MR SIMPSON:
Yes but interestingly when commercial properties double insured they want two levies.

GLAZEBROOK J:
Well, maybe it doesn't say for each commercial property but it certainly quite clearly says for each motor vehicle.

MR SIMPSON:
Yes, but it also says under each contract of insurance –

WILLIAM YOUNG J:

But isn't that right because it's by reference to the sum insured, the indemnity value?

MR SIMPSON:

The difficulty to get two levies on motor vehicles or to get two levies on residential properties all you need is two contracts of insurance and not apply subsection (7) in the way I say it should be to knock out the second contract of insurance from the levy provisions.

WILLIAM YOUNG J:

Yes, but the different things, the levy on cars is per car irrespective of the amount of insurance.

MR SIMPSON:

Yes. I don't think that makes any difference. It's not actually just on per car. It's per car per contract of insurance. It's like property is.

WILLIAM YOUNG J:

Well, maybe but that's not an obvious interpretation. But in the case of buildings, it's on the amount that's insured.

MR SIMPSON:

I don't want to bog down on this issue because it's merely an illustration of why subsection (7) as interpreted by the Commission creates other problems but all I can say, if you look at subsection (1) and (2) and you look at the Fire Service levy order provisions, you will see they apply a levy on each contract of insurance and if there's a contract for more than one vehicle it's on each vehicle within that contract, but it clearly applies on a per contract basis. That's what the language says. That's my submission. I can't take it any further.

Now, when we get to all other property in clause (2)(b), you'll see for all other property where the period of contract of insurance is a year, it's 7.6 cents for every $100 of the amount for which the property is insured for the purpose of the contract of fire insurance, and there's a pro rata proportion if it's more or less than a year.

Just for completeness, turn over to the next tab, which is the regs. There was something of a weakly-put submission that somehow the regulations assist the

Commission because it refers to a requirement to provide indemnity values but if you look at the forms next to the regulations and then the footnotes you'll see there – so let's take form 1 footnote 1 to determine the – page 13 and go over the page to the notes. If the levy is calculated on the indemnity value of the property attach a copy of the declaration or valuation and that pretty much is echoed in each of the form notes so you can see that the reference to indemnity value and its relevance only arises if that's the basis for which the property is insured. If that is the amount for which the property is insured that is the difference between us, at least in our written submissions. We say levies on the amount for which the property is insured. The Commission says it's the indemnity value and we say it's only the indemnity value if that is the amount for which the property is insured.

O'REGAN J:
When you go back to the order, that doesn't talk about indemnity value, does it? It just says for every $100 off the amount for which the property is insured and that's a very vague terminology, isn't it? That's very equivocal as to what you're talking about.

MR SIMPSON:
That's because you've got section 48(6) and 48(7) and 48(2) telling you what that is, so for most cases a simple – remember, this is 75 Acts for a simple contract of insurance indemnity cover only with a sum insured is pretty easy. That's the sum insured. That's the amount for which the property is insured. You pay the levy on that. If you've got replacement cover, full replacement cover in a single policy, then again a simple situation you apply 48(6)(c), you provide your valuation declarations, you pay it on the indemnity value because 48(6)(c) says that in those circumstances you just pay it on indemnity value. That is the deemed sum insured or the amount for which the property insured, even though you've got cover above that.

We say for excess of indemnity cover 48(7) says the Act doesn't apply so I never need to look at the levy provisions or the levy order.

Now, what this all means is that, as my learned friend says, those who don't insure at all don't pay any levy, and those that underinsure pay reduced levies. Now, my learned friend says that's just for administrative convenience. Well, that's true in relation to no insurance but absolutely not true for underinsurance because for as long as I'm buying insurance I can pay whatever levy Parliament wants to impose on me, so there's no administrative intervention or issue there that means that it's only practicable for Parliament to impose some levy and in fact what we have here is an Act that originally cannibalised the provisions of the Earthquake and War Damage Act 1944 which only provided indemnity earthquake cover and so levies were only imposed on the maximum earthquake cover and when you had excess of indemnity cover the EQC Act said you don't have to pay levies on that because we're not insuring you for excess of indemnity cover and that has been a policy that has been retained in the Fire Service as it's been amended and then separated from the Earthquake and War Damage Act. There's still this policy of, we don't charge levies on excess of indemnity cover. We never did. We never will. It's just not – you can't say that there's something immoral or untoward or it's not a fair amount, as the Commission attempts to say. Because the reality is most fire services spends time cutting people out of motor vehicles, not putting fires out. So you can't say, as the Commission attempts to do, well, everyone should pay their fair share. You've got to look at what does the provision actually say? The policy of this legislation is, we impose levies on the amount for which it's insured for its indemnity cover, and the things that chop out excess of indemnity cover is first 48(6)(c) in itself because if you've got more favourable cover then you only pay it on the indemnity value component and if you've excess of indemnity cover that drops out and there is no levy, and that's the policy. You don't pay cover on excess of indemnity cover. You don't pay levies.

O'REGAN J:
But in the case of the earthquake Commission, you don't pay it because you don't get cover for it, or you didn't get cover for it.

MR SIMPSON:
Yes.

O'REGAN J:
Whereas whether you've got it or not doesn't make any difference to your need or absence of need for the Fire Service.

MR SIMPSON:
No, but the Fire Service levy – I mean, let's be frank about that. It's not a levy that's quantified by reference to your Fire Service needs.

WILLIAM YOUNG J:
Or closely calibrated to it.

MR SIMPSON:
Not at all, it's a mile away. So if I run a fire trap building that creates fireworks and it's just a disaster and uninsurable, I'm the one that most needs fire cover and I get nothing. If I run an airport, I have my own fire service. I don't need the Wellington Fire Service to turn up and I'll pay a full levy. So what Parliament said back in '75 is we're going to base this on the earthquake premiums. That's all about indemnity cover. It might have been for historical reasons as well because back in 1944 we didn't have excess of indemnity cover, but that policy has continued through the changes to the EQC Act and then into the Fire Service Act.

WILLIAM YOUNG J:
But before 1975 there was a local – the fire service authorities were a locally-based – but they were funded by reference to fire insurance, weren't they?

MR SIMPSON:
Pre-'75 I'm sorry, Your Honour, I don't know.

McGRATH J:
Is that a good time, then, to take the adjournment? Are we making reasonable time, Mr Simpson?

MR SIMPSON:
I am hopeful we will finish at four.

McGRATH J:
We'll come back at two.

COURT ADJOURNS 1.03 PM
COURT RESUMES 1.59 PM

McGRATH J:
Mr Simpson.

MR SIMPSON:

Just before we carry on, I know we talked about motor vehicles and I'm not going back to that, but can we just look briefly at residential property? The position might be a bit clearer there. So if we look at 48(6)(a), it says, "For the purposes of subsection (2)(b) the amount for which the property is insured for the contract of fire insurance shall be in the case of residential property the amount for which that property is insured pursuant to section 18." So my point there is, again, if we have, like Housing New Zealand or Ministry of Education or any large residential property owner where they adopt a scheme like this, they will effectively be paying two lots of levies on the $100,000, even though in my submission at least it's clear that the policy of the legislation was that only one levy on the EQC cover of 100,000 would be applicable, but if we don't apply subsection (7) to take the excess policy out of the scope of 48, then that's the outcome.

WILLIAM YOUNG J:

So why is that? Why would there be two lots of levies of 100,000?

MR SIMPSON:

Because the excess of indemnity contract of insurance is still a contract of fire insurance and if we adopt the Commission's approach and say well, because there's a gap in the indemnity cover under the underlying indemnity policy we're also going to treat the excess of indemnity policy as being subject to this piece of legislation and therefore we've got another levy on the second lot of 100.

GLAZEBROOK J:

Does that apply to the Earthquake Act, earthquake commission? Because the way I read this is you just pay a levy on what it's insured for, for earthquake, and if it's not insured for earthquake for the double amount then it won't be insured for earthquake for the double amount under this either.

MR SIMPSON:

It would be helpful if we had section 18 in front of us, I guess. I will try to get that over a break.

GLAZEBROOK J:

Well, if you have to pay twice for earthquake then I imagine you'd have to pay twice for fire as well but I actually don't think you do have to pay twice for earthquake because I think they're not going to give you double the covers. It will only give you one amount of cover.

MR SIMPSON:
Yes, but unfortunately the excess of indemnity policy is now, according to the Commission's approach, being treated as somewhat of an indemnity policy as well and not an exempt policy, so it will still be called …

GLAZEBROOK J:
Well, only if the two of them together equal indemnity or part of the second policy is, in fact, an indemnity policy in number terms. I know you say it's not because there's a gap.

MR SIMPSON:
Yes, well, that's the problem because I don't think that's – in my submission that wasn't the intention of Parliament.

So then picking up at paragraph 5 of my roadmap, just summarising where we've got to, we say that levies are to be computed on the lower sum of the sum insured or indemnity value.

WILLIAM YOUNG J:
I've looked at section 18. The problem is entirely cured if you read the singular as including the plural where any person enters into contracts for fire insurance with an insurance company.

ARNOLD J:
The cover under section 18 is for replacement value. It's just that the limit of it is $100,000, which is very low.

MR SIMPSON:
That's right. Yes. Let me think about that as we carry on.

So 48(6)(c), (d), (6A) and (6B) only apply where the insurance provides cover more favourable than the indemnity value or there's no sum insured. Indemnity value is only relevant to the quantification of levies when it's the relevant measure of the amount for which the property is insured. That is full indemnity cover and no sum insured, or cover more favourable than indemnity value subject in both cases to the provision of certificates and declarations. Third, if indemnity value is the relevant measure of levies, we have always accepted that it must be a fair and reasonable indemnity value in relation to replacement value. We've never suggested otherwise and, in fact, when Justice Heath adopted the different approach to the particular excess indemnity policy in the *AMP* case, we filed a notice to support the judgment on other grounds.

Finally, (d), sums insured are at the discretion of the insured. Now, let's then turn to the wording of subsection (7). It says, "The section shall not apply to any contract of fire insurance that is limited to an excess over the indemnity value of the property or to any portion thereof which is in excess of the indemnity value," and those last words have been held to mean any portion of a policy which is in excess, and that'll come out of *AMP* and I'll walk you through the legislative history shortly, but the words that are critical there is any contract that is limited to an excess over the indemnity value of the property and we say that the excess of indemnity insurance that's the subject of this proceeding precisely fits the literal meaning of those words. It's a policy for the excess over the indemnity value of the property and indeed we say that if the Fire Service Commission's interpretation of subsections (6) and (7) is correct then subsection (7) appears to be completely redundant. It doesn't do anything because what will happen is you will – let's walk through some examples, but if we can look at volume 2 on the case on appeal at tab 8, it's an affidavit by Brett Warwick for the Commission, and I think it's page 119, page 11 of the affidavit.

So what we see over the next four pages are examples of a cover in the Commission's view as to how the Act is to apply. So first up, very simple, a typical policy covering a single building for full replacement and no sums insured so it's 10 million of replacement cover and you'll pay levies because assuming you will provide declaration certificates you'll pay levies on the six million, so you don't need subsection (7) in that example to knock out levies on the excess of indemnity cover because (6)(c) does all the work for you.

Go over the page and we then have what's called a first loss policy where we have, say, 10 properties in a portfolio, replacement value of 105, IV of 63, and first loss cover limit of 15 million. By first loss it means an aggregate limit on the sum insured for all of those properties, so this would set the example of a straight, single replacement policy, no division between excess of indemnity and indemnity cover, but a sum insured of 15 million. In some respects, this policy, as simple as it is, achieves everything that the policies under this proceeding do. You insure a portfolio. You put in a sum insured well below the aggregate indemnity value of the portfolio as a whole. You still have excess of indemnity cover. You put your sum insured in and the Commission says, well, in that event you pay levies on the 15 million and again there's no need to rely on subsection (7) because subsection (6) does all the work. It's how much is the property insured for, it's insured for 15 million. That's the sum insured. That's what you pay your levies on.

48(6)(c) doesn't change that outcome. You don't need to provide valuation certificates and if you don't do it then 48(d) will say you put it on the sum insured. So there's my first, I guess, rhetorical question. If this is permitted under the Act, what policy decision creates a difference just because you break up the indemnity cover from the excess indemnity cover so they're either in different contracts or they're in different parts of one contract but separately identify here that it's homogenous cover.

WILLIAM YOUNG J:
Because you've got more cover. This is the level one cover that is involved in this case, isn't it?

MR SIMPSON:
No, level one is only indemnity cover. This is full replacement cover.

WILLIAM YOUNG J:
Oh, I see.

MR SIMPSON:
So then we go over the page and now we have something closely approximating what we've got here.

GLAZEBROOK J:
I'm not sure that Mr Cooke would agree with these on what he was saying earlier, that he would agree with this, would he?

MR SIMPSON:
It's his affidavit or his client's affidavit.

GLAZEBROOK J:
Well, yes, but you don't have to – you can have an affidavit but this is an interpretation issue.

MR SIMPSON:
Well, that makes it pretty hard for us, Your Honour. If they're walking away from their own evidence at the last stage of the three-stage hearing.

WILLIAM YOUNG J:
Well just wait a minute. Why is it – I see. So there's one building which has a replacement value of 15 million, damage to any one building, other building would be fully covered, obviously.

MR SIMPSON:
Yes, all of them, even the 15 million. They're all fully insured because assuming –

WILLIAM YOUNG J:
Okay so it's indemnity, it's treated as indemnity value because there's more than one policy involved? Well more than one building involved.

MR SIMPSON:
Sorry, you've lost me Your Honour, sorry.

WILLIAM YOUNG J:
What I'm trying to see is why isn't it – it's not indemnity because – sorry. I'm trying to get my head around why the indemnity value isn't 9 million.

MR SIMPSON:
The indemnity value of what?

WILLIAM YOUNG J:
Sorry, the indemnity value on which the policy is rated is it 9 million?

MR SIMPSON:
Oh, no, it's basically the sum insured. So you're ignoring the indemnity values here because you're saying, I put an aggregate sum insured of 15, so that's the amount –

WILLIAM YOUNG J:

And that covers all buildings?

MR SIMPSON:

For all of the buildings.

WILLIAM YOUNG J:

Okay.

MR SIMPSON:

So that's the amount for which the entire portfolio is insured against all claims.

GLAZEBROOK J:

Well in that case I don't think he would be saying anything different because it's an under-insurance issue.

MR SIMPSON:

It is an under-insurance, yes, absolutely.

GLAZEBROOK J:

I must say I don't really understand what the policy was there.

MR SIMPSON:

Sorry –

GLAZEBROOK J:

I didn't understand the –

MR SIMPSON:

Oh, but you do now.

GLAZEBROOK J:

– the policy.

MR SIMPSON:

So then the third one is a little closer to what we've got now because you've got, those two previous examples were replacement cover, which is why I keep emphasising the difference between replacement and then indemnity, excess of indemnity, so scenario 3 on the next page is a single property where you've got indemnity and separate excess of indemnity cover, but it's just on one property. Here the indemnity cover is only 70 million, but the indemnity value is 90 million, so you've got 20 million of uninsured indemnity risk. And then you've got excess of indemnity cover above the 90, not above the 70, for another 60. So you've got 70 of indemnity cover, 20 of uninsured indemnity value risk, and then 60 million of excess of indemnity cover. And again we are in agreement that levies, we and the Commission, are payable on the 70 million of indemnity cover, and again subsection (7) has no role to play in that particular example. So we've been through three scenarios and still 48(6) does all the work and we haven't yet got to subsection (7).

And then we get to the example that we're dealing with in scenario 4, which we're dealing with here, and the only difference between scenario 3 and 4 is that one's a portfolio and one's a single property and again rhetorically what is the language of the Act, what is the policy reason why you have a portfolio situation as opposed to a single property, you apply a different approach and levy the excess of indemnity policy when you don't with a single property, that's under-insured for indemnity risk, and why is it that when you have a split tier policy for a portfolio, you levy the excess of indemnity cover, when you don't do that with full replacement cover on a portfolio. So in other words, why is 4 different from 3, why is 4 different from 2, and I don't think there's any policy reason that would justify a difference.

WILLIAM YOUNG J:
Yes but in fact – sorry, you're running certain things past us and my slow mind is taking longer to absorb.

MR SIMPSON:
Sorry, sorry.

WILLIAM YOUNG J:
But isn't the difference between scenario 2 and scenario 4 that on your interpretation the levy isn't computed on the top, on the last six million on scenario 4?

MR SIMPSON:

Yes, so we would say that in scenario –

WILLIAM YOUNG J:

So that's why the Commission is agitated about it?

MR SIMPSON:

Yes. But what I'm saying is, when we went to scenario 2, which was another portfolio, we stopped the, we just impose a levy on the indemnity cover, or on the sum insured, and we let the, we – yes, so we're not trying to impose levies on excess of indemnity cover, we just impose it on the sum insured, and it's the same with scenario 3, which is just a single property policy where we both agree that in that case you just impose a levy on the sum insured for indemnity cover, you don't try and drag in, or impose a levy on the excess of indemnity cover, and what I say is –

WILLIAM YOUNG J:

Well in scenario 3 there is no excess indemnity cover.

MR SIMPSON:

Yes there is.

WILLIAM YOUNG J:

Oh I see, so someone, you're assuming someone's paid for 60, the top 60 million?

MR SIMPSON:

Yes.

WILLIAM YOUNG J:

Well I'm not sure that the levy – that's not 100% clear to me from that document. I'd assume that there wasn't insurance.

MR SIMPSON:

Well let's assume there is. You're still only imposing levies on the 70 million.

WILLIAM YOUNG J:

Yes. But say there was excess of indemnity cover for the top 60 million, I would've thought that Mr Cooke's argument would apply to it.

MR SIMPSON:

Well that's not been the position of the Commission today. So that's a change. They've always said if it's just a single property with under-insurance in the indemnity cover, the excess cover is still exempt. All of his argument was around portfolios.

WILLIAM YOUNG J:

But that's what the declaration was sought for, wasn't it?

MR SIMPSON:

Yes.

WILLIAM YOUNG J:

I mean at least for the moment, assuming that in this scenario 3 it is envisaged that there would be excess cover for the top 60 million.

MR SIMPSON:

Yes.

WILLIAM YOUNG J:

I would have thought his argument would apply to 20 million of that.

MR SIMPSON:

Well that doesn't accord with subsection (7)'s wording in my submission because that cover is limited to the excess of the indemnity value of the property. There's nothing in subsection (7) which says you have to have full indemnity cover. It just says, if all your policy does is provide cover for the excess over the indemnity value –

WILLIAM YOUNG J:

No, I truly understand that argument, it's just that I don't think, I didn't understand this situation to be outside the scope of the Commission's argument.

MR SIMPSON:

All right, well certainly all the way through the lower Courts there has not been an issue over a single property policy and they've accepted that levies would correctly be limited to the 70 million on the indemnity cover.

GLAZEBROOK J:

Why would they have done that, because isn't that just a subsection (6) absolutely clear indication that you look at what the fair indemnity value is and if it should have been 90 then it becomes 90, because you've got cover that's more than the indemnity cost.

MR SIMPSON:
Yes but could I ask Your Honour what then is subsection (7) doing.

GLAZEBROOK J:
Well for the avoidance of doubt or whatever but to me it's not to allow people to monkey around with the numbers.

MR SIMPSON:
But that's the thing. It's not, it's a very pejorative description and it's not accurate and doesn't reflect the substance of the deal, of the insurance arrangements, because if we start with the proposition, as I did before lunch, that the EQC Act was only ever wanting to impose levies on indemnity insurance, and if we accept that this excess of indemnity insurance is true excess, and we truly have an uninsured indemnity value exposure, then there's no monkeying around. it's like saying, if we have, if we just forget excess of indemnity cover, if we just have a sub limit on your indemnity cover, and that's all we've got, the most simple policy of indemnity cover, a sum insured that happens to be lower than the indemnity value of the property, nobody's claiming that's monkeying around. If we have full indemnity cover, and then we bought separate excess of indemnity cover, again no monkeying around, we agree the excess of cover is exempt, why is it that when you combine the two, so you now have an uninsured indemnity value exposure, it now become some sort of immoral or illegal or unlawful transaction. It's just what the legislation provides for. Both (6)(c) and subsection (7), as we interpret them, just on the literal reading of them, are saying excess of indemnity cover doesn't incur a levy, it never has under the previous legislation, it doesn't under this one. That's what we say the policy is.

WILLIAM YOUNG J:
It depends really on whether excess, what's – excess of indemnity cover depends on what the parties label it or –

MR SIMPSON:
No, never that.

WILLIAM YOUNG J:
Or whether there is cover that, in fact, may go beyond – that ensures that in most circumstances indemnity will be provided by one means or another.

MR SIMPSON:
We've always said – and the policies I will take you to shortly make it absolutely clear – that excess of indemnity cover never provides any element of indemnity cover to make up the shortfall, and if it does, I agree.

WILLIAM YOUNG J:
But it must do sometimes.

MR SIMPSON:
It never does.

WILLIAM YOUNG J:
If there's only one pot of money and the labels sort of on the little pockets within it don't matter because on the example you gave before lunch where someone gets someone $700,000 back and the indemnity value is only – 700 million back and the indemnity value is only 600 million they have, in fact, got indemnity cover viewed in terms of what they get as against what the indemnity value of the property was.

MR SIMPSON:
So remember the example I gave you was, which I think if we go to appendix A of my submissions, so I think these numbers were right. We said that the building is largely destroyed but not completely.

WILLIAM YOUNG J:
No, the one I'm talking about is where it's completely destroyed and they get, for a building worth 600 million, $300 million so-called indemnity insurance and $400 million so-called excess of indemnity insurance, a total of 700 million, $100 million more than the indemnity value.

MR SIMPSON:
Yes, but that's only coincidentally because the indemnity policy covered the entire indemnity loss. But if the indemnity value loss, the depreciated value of the building,

that loss exceeds the sum insured, then you've got an uninsured exposure and you don't recover that money.

GLAZEBROOK J:

Well, you recover the money, ie you recover 700 million which is more than the 600 million, so what you're saying is that you have to put it at the top of the tree so you say that's exceed rather than adding it to the bottom of the tree, because in money terms you get 700 million and in terms of replacement cost 400 out of pocket. You say the 400 out of pocket has to be – or 300, whatever it is – has to be down the bottom rather than up the top just because of the label that's put on it by the parties.

MR SIMPSON:

No, not because of the label, because of the express terms of the policy and Your Honour will be aware that most replacement policies or excess of indemnity policies say if you do not repair, if you do not rebuild, you lose your ability to claim under the excess policy and all you get to claim is the indemnity cover, so in that example if, instead of rebuilding, I say just pay me out and I'll walk away, just give me a cash payment, I only get the indemnity so I only get the 300. I won't even get the excess of indemnity policy because of the particular way I've asked the policy to respond to my claim.

GLAZEBROOK J:

So it's a literal wording that you're arguing for. What policy reason is there behind that that's a sensible policy reason? Or is it just historical?

MR SIMPSON:

It's – well, two reasons. Historical because all this was heavily tied to the EQC legislation and when the tie was cut the same policy provisions prevailed, so there was no major shift away from imposing levies on the amount of insurance and, in particular, the amount of indemnity insurance if that represents the appropriate measure.

Now, the other reason is, as we talked about before, the tie between the levy and the quantum you pay and your demand on the Fire Service is pretty loose, and so all Parliament said is, well, we're going to tie it to insurance because it's a good means of collection. It's one cost-effective means as opposed to out of a tax take or out of rates and we have to pose it on something and traditionally we've always done this on indemnity. Some are insured up to indemnity. That's what we are going to do here. Excess of indemnity has always been exempt and it will remain so, and that was in the EQC legislation. There was a specific provision in section 14(2B) and it was enacted into the Fire Service Act right from the outset, as well.

Shall we take a look at that legislative history and *AMP* as part of that? So first can we look at tab 8 of the appellant's bundle, volume 1. This is section 14 of the EQC Act. 14(1), "Subject to the provisions of the Act and any regulations, where in respect of any period of the commencement of this Act any property is insured to any amount to any contract of insurance made in New Zealand with insurance company after the commencement of this Act, property shall at all times be deemed to be insured under the Act for the same amount against earthquake and war damage."

Then (2A), "Where the contract provides for settlement of any claim for damage to or destruction of the property upon a basis more favourable to the insured than its indemnity value, a property deemed to be insured under the section for the amount of the indemnity value of earthquake or war damage premium in respect of each period shall be computed on the amount of the indemnity value of the property as proved by the Commission after being certified by the valuer," et cetera.

In (2B), "This section shall not apply with respect to any contract of insurance that is limited to an excess over the indemnity value of the property." Now, if I take the example that Justice Arnold gave before, we treat two policies as one, or we take my learned friend's interpretation of (2B). It has no work to do because (B) does it all, so if I take two policies, slam them together, say, oh, well, now I've got indemnity and excess of indemnity providing cover on a basis more favourable than indemnity, this says I pay levies on the indemnity, then on that basis there is no need for subsection (2B) because it's not being charged on the excess of indemnity cover.

So that's what the provision looked like when we start with the Fire Service Act, so it's at tab 2, which is the 1975 edition, and subsection (5) of 48 originally read where any contract to fire insurance provides a settlement of any claim for damage to or destruction of a property upon a basis more favourable to the insured person in its indemnity value the levy shall be computed on the amount for which the property is deemed to be insured against earthquake and war damage under the EQC Act. The section shall not apply to any contract of insurance that is limited to an excess over the indemnity value of a property, so almost identical wording to the EQC provisions.

Then we've got the 1982 version which is at tab 3, and I'll move through these quite quickly. Subsection (3), the Minister declares the rate which is computed on the amount for which the property is insured against fire in the period of contract insurance. Subsection (5), where any contract provides for settlement of any claim for any damage to or destruction of the property on a basis more favoured to the insured, the levy at the rate payable under subsection (3) shall be computed on the amount for which the premium payable to the earthquake and war damage commission under the EQC Act is computed, and again, you've got subsection (6), very similar to the previous version.

We then go to tab 12, which is *AMP*. So this is the version that existed when *AMP* was decided, and because I'm only going through this once I do want to take you through a number of parts of the judgment because they are relevant in a number of ways.

So if we start at the beginning of the judgment of Justice Cooke, these appeals heard together are from a decision of the High Court on six originating summons taken out by different insurance companies relating to some 28 different forms of insurance policy.

The next paragraph down, "1951 amendments were made to section 14, the key section, a lot of the practice of issuing fire insurance policies providing for not merely an indemnity for the property destroyed or damaged or the cost of replacing or reinstating that property. The amendments make it clear that the automatic insurance against EQC damage is the amount of the indemnity value only," and then about six lines down, "The amendments include a specific statement that section 14 shall not apply with respect to any contract or insurance that is limited to an excess over the indemnity value of the property. As to contracts to which section 14 does apply, there is a provision in some circumstances for ascertaining the indemnity value by valuation certificates and approval by the Commission and calculation of the earthquake and war damage premium accordingly. That procedure is not convenient either to the insurance companies or the Commission. One question to be decided in this case is in what circumstances it is necessary. The question is linked with the main issue which concerns fire policy providing within the same document two types of cover, namely, indemnity insurance and replacement insurance over and above that. Until 1980, the Commission had accepted that there was no reason why indemnity and excess of indemnity contracts should be incorporated within one policy of fire insurance when no earthquake or war damage premium being chargeable in the excess of indemnity part, but in December 1980 in a circular to all insurers, the Commission announced a change in attitude and stated that it received a legal opinion with the effect that because there is only one proposal the party’s risk and period of insurance are the same and there will be only one premium payable, although perhaps with different components, a Court is likely to hold that the division of the two sections does not convert the policy into two contracts, therefore the circular goes on. The earthquake and war damage premium is charged at the full amount of the insurance, ie indemnity and excess of indemnity under these policies.”

Now, one thing I do want to say in passing here is it’s been said by the respondents in reply in the Court of Appeal and found by the Court of Appeal that the arrangements under here are cutting edge, they’re new, Parliament didn't contemplate them, and I take issue with that because that’s what subsection (7) is all about. It’s recognising that there are – that there will be split tiers of indemnity and excess of indemnity and full replacement, all three types of policies, and it separately addresses each one of them. So it can’t be said that Parliament had no idea that these split tier arrangements would exist and this is an example of a split tier arrangement. It’s different here in one respect and one respect only. In this policy, the excess of indemnity insurance is only a label. It wasn’t real excessive indemnity insurance because it actually started where the sum insured in the indemnity policy stopped. So you remember the diagram I showed you in appendix C of my submissions. The excess of indemnity policy really was a combined indemnity and excess of indemnity policy over a given sum insured in the underlying indemnity cover. That’s the only difference in the type of cover we are looking at here. Ours is real excess of indemnity cover. This was not.

Now, I’m down to the next paragraph, half way down. “Further, insurance companies which had not collected from policy holders on that basic might nevertheless owe large sums of money to the Commission, although for all practical purposes until now to recover the extra premiums on the past policy holders.” Now, that is also an issue we have here. You’ll have seen from my submissions that while for years the Commission has never really been happy about split tier arrangements the contest has always been about whether a sum insured in an indemnity insurance or in a replacement policy limits the levies to that sum. There was never a suggestion that you pay levies on an excess of indemnity insurance, and that’s been the position for nearly two decades. So insurance companies who are mere collecting agents, they get no reward for this, just risk, they've gone to their clients and said well, we know the Commission has never asked for levies on excess of indemnity insurance, only on indemnity insurance and they seem to now accept that if you've got a sum insured that's the sum you pay on it and that's as a consequence of the decisions I took you to decided in the '90s, and now we're facing a situation where frankly by stealth and by accident I discovered in another matter that they had begun changing their policy in 2010 and were now looking to impose levies on excess of indemnity insurance. They never made an announcement to the market. There was no circular. There was nothing and I knew it because I was involved in an arbitration and that's why this test case has been brought and in my submission that's exactly the sort of concern that Justice Cooke had, that you just can't change the law or the way you do things and you've done it for 20 years and impose the consequences on insurance companies that have now got to go back to their insurers and try and collect the money, some of which will no longer exist, plus you've got the exposure to interest and penalties.

Carrying on, "In this situation, the appellant companies wish to contest the Commission's new interpretation. They applied to the Court for declarations relating to various policies. The wording of the declarations varies but in general is to the effect that the indemnity portion of a certain policy constitutes a contract of insurance within section 14 and that the excess over indemnity portion is not within the section."

Now, the next part goes on with this declarations issue. I won't take you through it but just in that first column on that page of 78019 Justice Jefferies declined to make the declarations. Justice Cooke thought that was the wrong approach and he said that the declaration should have been made and that's what he did, and from my perspective there is no material difference between the *AMP* approach and what we've done here and in fact it was *AMP* that caused me to bring this proceeding because I thought it was a helpful and useful precedent.

Now, then the question comes, do we have one contract or more than one contract? That gets picked up on 78020. Most of the policy specified an originating summons is take the form of provider indemnity insurance up to a known sum and replacement insurance in excess of that sum if certain conditions are satisfied. So there's the difference between us.

That sum of certain conditions is such as completion of reinstatement within a reasonable time and the actual incurring of such costs. During the earlier stages of the hearing in this Court, counsel focused their attention on whether such policies constituted one contract or two. This preoccupation was no doubt due to the way in which the Commission's 1980 circular put the matter. With all respect to the legal opinion, we think and indicated our view to counsel that it is an unnecessarily narrow approach and consistent with the obvious intent of the 1951 Amendment Act. As already indicated, the basic purpose of the amendments in 1951 was to clearly ensure that the automatic statutory cover would be limited to indemnity insurance and the premiums for it would be calculated accordingly. Provided this purpose is achieved, it cannot matter in administering the legislation whether a policy holder is taken out against fire both indemnity insurance and replacement insurance with insurance companies has done so under one contract or two. I think there again replacement is a bit of a misnomer, but in most cases where there is a single composite policy there is probably only one contract, the total premium payable to the company being the higher on account of the replacement cover. Now, in our case, of course, as I've mentioned earlier, we'll have separate premiums for the indemnity and excess of indemnity covers.

Nevertheless, when an indemnity sum is named and there is provision in certain circumstances for extra replacement insurance above that, there is not likely to be any difficulty in treating the provision of that extra cover as an identifiable and distinct part of the policy although no doubt usually including many terms common to it and the indemnity part, nor was any instance of difficulty in the case of such policy drawn to attention in argument, so Justice Arnold, that's why I say that you cannot slam the two together and then apply 46C. This judgment, as we will see, I think gets some form of legislative endorsement and subsequent amendments but certainly this got passed several years before amendments to the EQC and Fire Service Act and there was no attempt to undo this.

GLAZEBROOK J:
Why do you – I don't think I've quite understood why this answers the question.

MR SIMPSON:
It answers the question that you apply bits of the Act separately and why you apply 48(7) to the excess of indemnity policy and then take it out of the running before you then go back to 48(6), otherwise what does subsection (7) actually do?

GLAZEBROOK J:

So where did you get that from here?

MR SIMPSON:

Well, here he is saying you treat –

GLAZEBROOK J:

Where exactly? Point me to the words that you say say that.

MR SIMPSON:

I'm still coming to it. This is saying you treat it in different parts whether it's in one contract or not. The application of that principle to what we're about to talk to I'm just about to come to.

GLAZEBROOK J:

I thought you said that there was particular words here that showed Justice Arnold's interpretation was wrong or that what he'd put to you was wrong but you're coming to why that is.

MR SIMPSON:

So just carrying on from that last line, in ordinary speech, a reference to a contract may often naturally be made as including part of a contract. One may say, for instance, that a hire is a contract for the supply of a TV set although that same document gives them the right to repairs as well, in certain circumstances. Then we go down to the next paragraph. This definition of contract insurance is consistent with the approach that within one overall insurance contract there may be a number of parts or covers which may be treated separately for purposes of the Act, so we conclude without difficulty that in section 14(2B) the words "any contract of insurance" including any part of such contract, in other words, section 14 does not apply with respect to any contract of insurance including any part of any such contract that is limited to an excess over the indemnity value of the property. So that certainly is something that I rely on to answer that.

Then we get this issue of the sum insured, "There then arises a further issue not specifically mentioned in the Commission's 1980 circular but put prominently before this Court by Mr Keesing on behalf of the Commission. Throughout all his submissions concern was reflected that an interpretation of section 14 might be adopted whereby the Commission might be bound to provide earthquake and war damage insurance, up to the amount of indemnity value but might be entitled to premiums only on some lower figure nominated by the policy holder in his fire insurance policy. Mr Keesing referred to this hypothetical lower figure as an indemnity sum – an expression nowhere used in the Act. He drew a distinction between it and indemnity value, an expression used in the 1951 amendments to the section, but not there defined. Not only has the expression 'indemnity value' been undefined by Parliament but there is no evidence before the Court as to any established usage in the insurance industry giving a fixed meaning to the expression." He goes on and refers to [inaudible 14:40:44] I certainly agree with my learned friend that indemnity value means depreciated value if it's, if the property is being held for us, and if it's on the market for sale it might be the depreciated, the current market value, and I don't think it really matters for present purposes.

Now then we got to 78022 and the second paragraph beginning, "Against that background," but drop six lines. "But one of their other submissions was to the effect that indemnity value means the indemnity value up to a maximum of the figure, if any, nominated in the fire insurance contract. Putting it in another way, the expression means the value of the loss for which indemnity is provided by the contract. We hold that this interpretation is correct. It produces a workable result in accord with the purposes of the legislation and the general law of insurance. That result is that in the case of a fire insurance policy giving indemnity up to a named sum, that sum will be the upper limit of the indemnity value and will correspondingly be the amount up to which the property will be automatically insured against earthquake and war damage under section 14. The earthquake and war damage premium will accordingly fall to be computed on what that amount at the rate prescribed by regulations," on that sum. "Any contract or part of a contract limited to an excess over that amount will be altogether outside the scope of section 14 by virtue of 14(2B). the concern voiced by council on behalf of the Commission will thus be disposed of."

Now I would say the same in relation to here. If there is a policy element that if you have any indemnity insurance, that's what you pay your levy on, which is our position, then I don't think you can get around that by calling something an excess of indemnity policy as in this case, which in truth provides indemnity cover. So I agree there. But our policies, the ones we're going to look at shortly, make it abundantly clear that just cannot happen under these policies and we save levies by having an uninsured indemnity value exposure.

Now carrying on with that, "The reasons pointing to this interpretation are further strengthened by the following considerations. If the interpretation suggested and feared by counsel for the Commission were correct, there could be cases where property is under-insured in an indemnity policy – that is to say, in his suggested terminology, the indemnity 'sum' would be less than the indemnity 'value' – but where separate replacement policies cover the difference between the indemnity sum and the replacement cost. On the same interpretation the replacement policies would not be limited to an excess over the indemnity value, so they would not be excluded from the section by section 14(2B)," or our 48(7). "It seems unlikely Parliament would have intended this complication. It also seems unlikely that there would at all commonly be issued a separate replacement policy leaving the insured to bear the difference."

Now that's exactly what we do have here and so there is this distinction but I say a fortiori this case, and these principles, must apply to our case because what we are looking at in our declaration proceeding is true excess of indemnity cover, both in label and in substance. You can just mark, I won't take you to the last paragraph on that page, the result is not unfair, but perhaps just mark that for your reading.

So we say that the Commission's attempt to distinguish *AMP* is erroneous. That's at the top of the second page of my road map. The judgment applies a fortiori to the excess of indemnity insurance which is the subject of the proceedings. Our interpretation of 48(7) is consistent with Justice Cooke's interpretation of 14(2B) in *AMP*, and the language of 14(2B) matches 48(7) and there is a strong historical link between the two statutes. And that's where the Court of Appeal got to in paragraphs 41 and 42 of its judgment.

Now then we go to the 1986 amendment, which is tab 4, so this is where amendments were made to the Fire Service Act after, and in my submission in a lighter vein, so the first one I refer you to is in subsection (7) on the first page of tab 4, and you'll see that the words "or to any portion thereof which is in excess of the indemnity value" have been added, and there is no Parliamentary debate which makes this clear, but having regard to the close proximity between this amendment and Justice Cooke's judgment, and the use of those words which are very close to the words he uses in his judgment, I think we can reasonably take it, as the Court of Appeal accepted, that this is a legislative endorsement of Justice Cooke.

WILLIAM YOUNG J:

So this is subsection (7)?

MR SIMPSON:

Yes. So the words that have been added are "or to any portion thereof which is in excess of the indemnity value" and the Court of Appeal and Justice Heath interpreted that as, or to any portion of the contract of the fire insurance which is in excess of the indemnity value.

Now there's references being made to the 1992 edition of section 48 of the Act in the Parliamentary debates and the Finance Bill but I'll just refer you to my submissions on that. My friend hasn't referred to the Finance Bill provision but it's not of much assistance, it was just a high level note in the Bill itself, in the commentary of the Bill, in the explanatory note and in fact the section that was actually enacted differed from the Bill anyway, so I just don't think you can take anything much from it.

So then turning to subsection, sorry paragraph 7 of my submissions. There are no anti-avoidance provisions that are relevant here. There is no general anti-avoidance, but there are those penal consequences I referred to earlier, the interest in the penalty surcharge in the absence of safeguards so I'll move on from that. There are six propositions in my submissions that I have added just some qualifications or provisos to, which I think are, we're just looking at briefly, so they're on page 4. So proposition 1, levies are on the amount of for which the property is insured, not the value of the property. We've accepted that, and never suggest that levies are not quantified on the value of fire insurance claims made, I don't know where the claims made argument came from but it wasn't one made by us.

GLAZEBROOK J:

Sorry, whereabouts are you?

MR SIMPSON:

My written submissions. Page 4, 2.1(a). Proposition 2, the Act allows parties to limit their levies by reducing the amount for which the property is insured by incorporating a sum insured in the aggregate. We accept the *Earthquake and War Damage*

Commission v Waitaki International Limited [1992] 1 NZLR 513 (PC) case. Now *Waitaki* went to the Privy Council. It was the second case to be decided under either, this one was under the EQC Act. In that case there was a sum insured in a policy but it was a sum insured for any one loss, not in the aggregate. The Court of Appeal held that that was still an effective limit. The Privy Council disagreed. I agree with *Waitaki,* there's no issue there. So if you've got a sum insured it has to be an aggregate for all claims during the policy period.

The Fire Service Act includes concessions. There's a number of them, for example, the third schedule of the Act carves out certain forms of property from being subject to levies. I note in (i) of my proposition 3, if excess if indemnity insurance is a contiguous part of a replacement policy you can provide indemnity declarations and then limit your levies to the indemnity cover or the indemnity value because that is the indemnity cover, and if you provide excess of indemnity insurance, which is separately quantifiable because it's in a separate policy, or part of a policy, again it's exempt.

Four, we'd always accept that indemnity value is objectively quantifiable, that's clear by section 48(6)(b) and have never suggested otherwise. Proposition 5 I've covered off. If excess of indemnity cover and closing element of indemnity cover then it's caught in section – subsection (7) doesn't apply and I've already covered off proposition 6.

In terms of the correct approach, I really think that my submissions on this point are fairly covered in the written submissions, so unless Your Honours want me to take you to that part of the submissions I'm happy to take it as read.

McGRATH J:
Fine.

MR SIMPSON:
What I will do to cover *Waitaki*, I've already covered *Waitaki*, but just cover *New Zealand Fire Service Commission v Terrace insurances Limited* HC Auckland CL43/94, 25 February 1997 and *Earthquake Commission v Cigna Insurance New Zealand Ltd* HC Auckland CP460/94, 15 October 1998 in the most expedient way is again take my large written submissions and turn to appendix D and E and I'll walk you through those cases. So the first involved the Fletcher Challenge Group. So the

Fletcher Challenge Group is a parent company with a multitude of subsidiaries. They all own their separate property. So in one sense that was a type of multiple owner policy just like Mr Friar's going to deal with when he deals with the second course of action, and that is something to bear in mind, that these multiple owner policies manifest themselves most frequently when you've got a group of companies insuring under one policy. But in this case, they had non-fire indemnity insurance and the aim was to put this cap of 250 million on all claims.

Now, in the judgment, Justice Tompkins held that, in fact, the introduction of that 250 million aggregate limit was conditional on the insurers getting an indemnity and because that didn't happen until after the policy had expired it was too late so the Court held that this scheme failed because the 250 million limit didn't exist. But they went on to deal with if it had existed then what would have been the answer so this is obiter alone, but they said that because the pink section is non-fire excess of indemnity cover, you don't need to worry about – that's excess of indemnity cover so that's not subject to the regime but the indemnity insurance, because it was limited $250 million, that's what the levy would have been paid on, so it is an example of where the Court held that levies would have been payable on the 250 so it shows how the sum insured in an indemnity policy limits the levies and then over the page we have the Cigna case which is only involving the Fire Service as opposed to both regulators and in that case –

WILLIAM YOUNG J:
Was there the second tier of insurance or not?

MR SIMPSON:
Yes, there was. That's the pink.

WILLIAM YOUNG J:
So where is that? Whereabouts in the judgment?

MR SIMPSON:
It doesn't get mentioned. The main thing was about the 250 and to address Justice Glazebrook, there was an automatic reinstatement cover clause in here and the Court held that didn't make any difference and the same outcome with the Cigna case. I don't know if we really need to – I don't really want to go into the impact of an automatic reinstatement clause because all of the policies before you don't have

them, but to the extent you were curious about that, *Terrace* and *Cigna* held that they don't increase levies beyond the aggregate sum insured because at any one time, to ask the question, "How much is the property insured for?" the answer is "250 million" and also if you have a claim there's an opportunity for reinstatement and therefore a new cover coming into existence, a new premium payable to the insurer, a new levy payable to the Fire Service Commission, obviously if you go right through your period of insurance and there are no claims, then the amount of insurance you actually have is still only the 250 million and therefore an automatic reinstatement of clause will not create additional obligations from levies on day 1 but only if claims are made and reinstatement occurs.

But the *Cigna* case is interesting because it's an example of a replacement policy with a sum insured of 50 and the Court holding that levies were only payable on the 50 and that's where I say 48(6)(c) does all the work and there's – you get an exemption for the rest of the cover and I say why is it that if I have it in a replacement policy I can limit my levies to the 50 but if I break out the excess of indemnity policy to a separately identifiable cover I now have to pay levies on that. That makes no policy sense whatsoever.

GLAZEBROOK J:

What is the indemnity amount in *Cigna*? 50?

MR SIMPSON:

Yes.

GLAZEBROOK J:

Well, if you put it in separate covers –

MR SIMPSON:

No, sorry, 50 is for every type of cover, both indemnity and excess of indemnity cover. So this was a property, a portfolio worth 140 million replacement. They just took out a single policy providing homogenous, as-new replacement cover. Didn't break it up between indemnity and excess, and included an aggregate sum insured of 50 and the Court said well, that's what you pay your levies on, and that's the position the Commission accepts and what I say is, well, how is it that if I break out the excess of indemnity and put it in a separate part or separate policy that part now becomes subject to levies? It makes no sense.

GLAZEBROOK J:

Perhaps just check whether that is accepted.

ARNOLD J:

While we are waiting, can I just ask one thing? Section 48(6)(c) on your interpretation of it really only needs to read, "In the case of other property where the contract fire insurance does not state an indemnity sum insured then you go through this process."

MR SIMPSON:

No, no. If you had a normal vanilla replacement policy with a sum insured, 48(6)(c) doesn't apply but if there is no sum insured then you need to go through this process.

ARNOLD J:

No, replacement sum insured.

MR SIMPSON:

If I just have a replacement policy, so it's more favourable to indemnity but there's no sum insured in it, I would still need to go through the declaration exercise if I wanted to limit my levies to indemnity value so that's probably about the most basic form of cover available in the market. We've probably all got full replacement cover over our houses with no sum insured limit. That's pretty much what everyone's got in a residential context. In those circumstances if you want the concession available by 48(6)(c) you still have to provide valuation certificates, so corporate can either say, "I'm happy to provide the valuation certificates and limit my levies to indemnity value," or, "That's a big fuss and I don't want to do that every year, so instead I'll put a sum insured in which I'll approximate as my indemnity value and just pay levies on that," but the danger is – and this is exactly what's happened in Christchurch – by the time you have a massive national disaster costs of repair have gone through the roof and what you thought was an adequate sum insured is no longer and you're underinsured but that's the risk, the tension that you offset and you remember when I read from *AMP* that Justice Cooke said both the insurance market and the Commission weren't all that excited about these declarations and they quite liked the idea of having a sum insured because it made life easy.

ARNOLD J:

Let me put the question another way. Whatever form of policy it is, if it's got a stated indemnity sum then the process in (c) you don't go through, on your argument.

MR SIMPSON:

No, I still have to for that replacement policy. Remember it's an "or" in 48(6)(c) so do I have no sum insured? You go through the process. Or I have a sum insured but it's more favourable than indemnity value. I still have to go through the process.

ARNOLD J:

But the examples I'm positing to you are that the indemnity value is stated in the policy and what I am now unclear about, I thought you were saying that subsection (c) mechanisms didn't come into play in those circumstances.

MR SIMPSON:

Can I just ask, in the example where there is a sum insured, what sort of policy are we talking about?

ARNOLD J:

It doesn't matter. If the policy's got an indemnity sum insured, an indemnity component as far as you're concerned brings it out of (c), doesn't it?

MR SIMPSON:

No, no. So the only thing I say is completely outside (c) is a pure excess of indemnity policy. If it's a reinstatement policy with no separate – sorry, let me just repeat that. When I say "excess of indemnity insurance policy" or a part of, that forms part of a composite policy. It's got to be separate, separately quantifiable, that's the excess of indemnity cover, that only covers that, and that is outside 48(6)(c) and never comes near it because of 48(7) but if I've got a policy that provides, if I've got a policy that has no sum insured in it, that has indemnity cover, then 48(6)(c) applies, and if it has a sum insured, but it provides cover on a basis more favourable than indemnity, like replacement cover, then also it has to go through 48(6)(c), because what you're trying to do is find out where the declarations are.

GLAZEBROOK J:

Does your argument always require there to be an uninsured portion?

MR SIMPSON:

Yes. That's why you make a saving.

GLAZEBROOK J:

That had been my understanding of it so it has to be, so the excess of cover has to be excess above the indemnity value and there has to either be an uninsured portion or alternatively the – if it's a composite, the indemnity cover has to be up to full indemnity cover.

MR SIMPSON:

Um –

GLAZEBROOK J:

Ie, if there's no gap then it has, the indemnity portion has to be full indemnity.

MR SIMPSON:

Yes, yes. So if there's no gap, both of us are at one, because they've got all the levies they want, and if there is a gap then I say we get a saving and they say they don't.

Right, I think now just briefly responding to the Commission's submissions. I think I just wanted to start by saying that the Act doesn't support the existence Commission of the stated purpose. So let me just go to paragraph 4 of their submissions. So they say, "The evident purpose of section 48 is to ensure that the Fire Service levy is calculated on a fair basis as between property owners who benefit from the Fire Service." Well that's straying into impermissible methods of interpretation but, "In the case of commercial property owners, that is established by the indemnity value of the insured property as this is the amount that covers the insured for the loss than can result from fire." Well it's not if there's a sum insured. "The purpose of the detailed provisions in section 48 is to ensure that only that fair value is used to calculate the levy. It accordingly excludes insurance cover that exceeds that value."

And then at 29 and 31 they say this, "That flows through to the levy that is struck by the section. To be fair, the levy is only struck on the insured's actual prospective loss, and accordingly what is actually at stake in the event of a fire – that is the indemnity value. It is unfair to disadvantage an insured if they elect to insure on a more generous basis. With reinstatement insurance a building may be destroyed by a fire, but the insured is entitled to b paid out on the basis that it will have the building rebuilt, even though it ends up with a new and better building than it did before the fire. Parliament accepts that in those circumstances the insured only needs to pay their Fire Service levy on the portion of their insurance that was to indemnify them for their loss – and they do not need to pay for the insurance cover that is in excess of that indemnification."

And then in 31 they say, over the page, "significantly subsection (7) excludes from the reach of the levy not only entire contracts that are for an amount in excess of the indemnification, but also 'any portion thereof which is in excess of the indemnity value'. That is not surprising because contracts of insurance for full reinstatement of a property will, in part, reflect the indemnification of the insured, and then an additional amount to allow for reinstatement."

So what these provisions are saying is that you have to pay a fair levy, and a fair levy is the amount of cover that you've got your indemnifiable loss, as opposed to the excess of indemnifiable loss, that is the amount you get, you're [inaudible 15:04:30] for, to reflect the as-new value. That additional part that covers off the inflation or the new regulatory requirements or whatever. So they can see that you shouldn't have to pay levies on that, that's unfair, but you have to pay levies on the amount of insurance you've got for the part of the loss that represents the indemnifiable loss that traditional insurance has captured, and what I'm saying is well, yes, we agree because where we've got a gap, an uninsured gap because there's a sum insured, then that part of our indemnifiable loss is not covered anyway, so we shouldn't have to pay levies on that, as we don't pay levies on a straight indemnity policy with a lower sum insured in them. So, with respect, I don't think their submission meets the – their policy criteria really confronts and conflicts with our interpretation of the section.

I note 48(6)(b) does not mandate full indemnity cover, or levies on indemnity values. It fails to account for the exemptions for cover in excess of the indemnity value. The Commission's submission misapplies *AMP* and the Commission and the Court of Appeal did – this is one point I do have to note, at 26 of the judgment the Court of Appeal suggests that I made a concession, and I just do need to address that because I did not, and this will only take a minute. So if we turn to the judgment in tab 5 of volume 1 in the case, paragraph 26 at page 52 of the case, it says there, "Because the policies operate in tandem or not at all, we consider they are part of the same contract of fire insurance. We think Mr Simpson accepted that. He certainly submitted that it mattered not whether there was one or two more policies providing for the different tiers of cover." Now I certainly agree I made the second concession, absolutely, and –

WILLIAM YOUNG J:
Sorry, what paragraph?

MR SIMPSON:
Paragraph 26.

O'REGAN J:
So you didn't accept that where the policies operate in tandem they can be treated as one policy?

MR SIMPSON:
No, and I think you can see that in the language where they think Mr Simpson accepted that, it's certainly they're not certain about it, but I mean how could I make that concession. That is a factual finding. You've got to look at how were the contracts brought into being. Were there separate premiums, separate covenants, placing slips, were there even different parties, like different layers of insurance and so on, that's got to be determined on a fact by fact basis. But I did concede that it really doesn't matter, based on *AMP* whether they're two contracts or one contract with different parts, you apply the Act to the different parts, and that's what subsection (7) in *AMP* said.

GLAZEBROOK J:
Can I just, just so I'm totally clear, say there's an indemnity policy for 100 and an excess of cover policy, separate excess of cover policy that comes in for 900, going back to your example, immediately upon the cessation of the 100 you, do you accept in those circumstances if the indemnity value, which I've forgotten, 600 was it, if the indemnity value was 600, that the levy would be 600?

MR SIMPSON:
So I've got a building –

GLAZEBROOK J:

No gap.

MR SIMPSON:

Yes.

GLAZEBROOK J:

You've got a building with one billion.

MR SIMPSON:

Yes.

GLAZEBROOK J:

You've got one policy that says indemnity value 100, which it isn't because it's 600 in your example –

MR SIMPSON:

Yes, I accept that's –

GLAZEBROOK J:

– and then an immediate kicking in of the so-called excess of indemnity value of 900, but in fact you would do it on the 600?

MR SIMPSON:

Yes.

GLAZEBROOK J:

Despite there being two contracts?

MR SIMPSON:

Yes.

GLAZEBROOK J:

And despite the label on the second one?

MR SIMPSON:

Yes.

WILLIAM YOUNG J:

And even if the second one left the obligation of the insurer to pay out as dependent on reinstatement occurring.

MR SIMPSON:

Well if it's really providing cover for the indemnity part of the loss, it's indemnity insurance, so it doesn't fit within the corners of 48(7), because it's not limited to the excess of indemnity value of the property. Because the excess of indemnity value of the property in that case is from 600 to a billion and if you creep down below that 600 limit, then you're providing indemnity cover and it's caught by 48(6)(c).

Paragraph 11 of my road map, hopefully I'm on the home straight, in relation to 48(7) we say, just on the language of 48(7), it's not dependent on the existence of full indemnity insurance. The levy saving arises because the owner assumes an uninsured risk, the point we've just been talking about. the Commission's interpretation, on the other hand, is not supported by the statutory language or the policy. So the first point I want to make is at 48(7) refers to a type of cover, not its amount, so indemnity insurance and excess of indemnity insurance aren't the same thing. They're covering different things. So indemnity insurance is covering the depreciated value of the building. The excess of indemnity cover is covering additional cost to building as-new building and meet regulatory requirements, and in my submissions I refer to *AMP*, *Farmers Mutual Insurance Co Ltd v Bay Milk Products Ltd* [1989] 3 NZLR 647 (CA) and *Michalik v Earthquake Commission* [2014] NZHC 2238, and those cases all accept that excess of indemnity cover is a different type of insurance. It's covering different things and I it's why, I think, in response to Justice Young's comments, you can't say, oh, well, you know, you got a big payout so the parties are just going to manipulate how they use that money because what is going to happen is the insurer is going to say, I have to give you indemnity payout on day 1. As soon as you make a claim the indemnity cover is due and payable, but the excess of indemnity cover is not payable until you actually incurred a cost of the as-new part of it. So you're going to have to send the invoices and then I'll pay you out, and I mean we've seen already out of Christchurch all the disputes about what's covered by indemnity, and what's covered by excess of indemnity, and who's responsible for what, and when excess of indemnity cover is payable or not payable. In fact I took it from one of the cases we heard this morning that that was again one of the issues. So they're not homogenous, they're not the same, they're different covers.

WILLIAM YOUNG J:

Isn't – I should know this but I don't, is indemnity cover ever offered on the basis that it's only repayable, it's only payable by way of reimbursement for reinstatement?

MR SIMPSON:

I haven't seen that. I have seen a case involving another Christchurch thing, it settled before it went to Court, but in that case we dealt with an Australia judgment, I'll try and get it from you, and an Australian industrial risk policy, and certainly the view we took based on those, and I'm not going to go as far as saying the case provided clear authority for this proposition but it got pretty close, was that the obligation to make the indemnity payment was immediate once the loss was incurred, but all policies that I've certainly seen for reinstatement cover – sorry, for the excess of indemnity part, only get payable when those costs have –

WILLIAM YOUNG J:

Some expenditure is incurred.

MR SIMPSON:

– been incurred, yes, and if you take the option of just taking the money and run, as opposed to rebuilding, most policies I've seen say well you've disentitled yourselves to the excess indemnity cover. I think I can –

GLAZEBROOK J:

What's the point being made in respect of that? It's just that I'm having a slight – you started at the beginning saying there was a difference between a reinstatement policy, or a replacement policy, and an excess. What is the difference there because it seems to me that a reinstatement policy, at least in respect of the excess above indemnity cost, is exactly the same as you say an excess of indemnity policy is.

MR SIMPSON:

Your Honour's exactly the difference. So replacement policy starts on dollar one and finishes at the as-new replacement value. So it's just one homogenous lot of cover, and it doesn't separately break it up.

WILLIAM YOUNG J:

Well it does.

GLAZEBROOK J:

Well it does, often does because it'll have an indemnity value –

MR SIMPSON:

But if it does then –

GLAZEBROOK J:

– and then it will break up the excess, so that's what I'm actually talking about, and if you accept the proposition I had about the 100 million and the 900 million then it's exactly the same argument, isn't it?

MR SIMPSON:

So probably –

GLAZEBROOK J:

Ie in two separate policies.

MR SIMPSON:

Yes, probably I illustrate this best by looking at scenario 4 on page 14 of the volume 2 of the case on appeal. So tab 8 is that affidavit with those diagrams that I took you to before.

GLAZEBROOK J:

Just give me a moment.

MR SIMPSON:

Volume 2, tab 8.

GLAZEBROOK J:

Yes.

MR SIMPSON:

And page 122. I hope this will help. So just to illustrate the point. I think we've got 10 properties here. We've got indemnity cover of nine million and excess of indemnity cover of six, so let's assume that in the same event two of the small buildings got destroyed completely. So, yes, this will work. So as I read this, each of those buildings had an indemnity value of six million and an excess of indemnity value of four. So when we look at the indemnity value loss, because we've got nine million of cover, we're only going to get nine million paid, so the insured incurs a loss of three million. When we come to the excess of indemnity part, we've got a loss of eight million and we've got cover of six, so we've got a loss of two million. But because these are discrete indemnity and excess of indemnity insurances, it's not quite going to work, but one, the excess of indemnity policy can't contribute to a shortfall in the indemnity loss, and the indemnity policy can't contribute to a shortfall in the excess of indemnity loss, but if we look at it differently, if we said rather than these two separate types of cover we just had replacement cover, then it would respond to wherever it's needed, and it's a pity my example, if I'd halved the value of one of those it would have been better, but if we, if we'd had a situation where we still had some excess of indemnity cover left over, but all the indemnity cover was gone, and there was an uninsured indemnity loss, the excess of indemnity policy can't drop down and make it up. But if you've just got a single replacement policy then it'll go wherever it's needed and as long as there's some additional cover left, it can go to the excess loss or the indemnity loss, wherever it's needed, and that's the slight difference between them. That's –

GLAZEBROOK J:

But you're assuming a gap rather than – I'm not assuming a gap. I'm just assuming a replacement cost with no gap, and an indemnity one and an excess with no gap, and I can't see the difference. The excess with no gap is exactly the same as a replacement with no gap assuming the, assuming no gap and assuming the indemnity is set correctly –

MR SIMPSON:

Yes, but the indemnity, the excess of indemnity policy, that's the problem, doesn't provide any cover for the indemnity part of the loss. So forget the gap –

GLAZEBROOK J:

But I understand that, but I'm just saying I don't see there's any difference conceptually between the two unless there's a gap.

MR SIMPSON:

But if I said to you an example I've given –

GLAZEBROOK J:

But there there's a gap.

MR SIMPSON:

Forget the gap. Let's assume there's no gap for the moment. We're on day 1 of the policy, there's been no insurance – no loss. I've said to you, how much excess of indemnity cover have we got. You would say six million and we would agree. If I said –

GLAZEBROOK J:

I'm not actually sure I would agree on this because I'm not sure I totally understand what this is. I think there's an aggregate amount of six million only, is that the –

MR SIMPSON:

Mmm, let's just take a single property, I'll try and illustrate it by that. We've got –

GLAZEBROOK J:

Well, no, the total cover is an aggregate of 15. Isn't the argument there that that's what the levy is calculated on because the indemnity value of all of these properties is less, is greater than 15?

MR SIMPSON:

Well then we haven't paid levies on the amount of the – for which the property is insured. We've paid it –

GLAZEBROOK J:

Well you've paid, no, because it is only, I thought it was only insured for an aggregate of 15? So you've paid levies on 15 which is what it's insured for.

MR SIMPSON:

Yes, okay, so –

GLAZEBROOK J:

Because you can't get any more no matter what.

MR SIMPSON:

Let me try and answer your first question. If we have an indemnity policy for nine, and a separate excess of indemnity policy for six, then when I say how much excess of indemnity insurance have you got, the answer is six. But if instead we got rid of those and just had a replacement policy for 15, and I said well how much excess of indemnity policy cover is there, you would say, well I don't know yet because – I know you've got indemnity and excess of indemnity cover of 15, but it's not broken between them, and so there is a difference because excess of indemnity cover doesn't provide indemnity cover, whereas replacement cover provides both, and that's the difference between them. Replacement cover provides everything. Excess of indemnity cover only provides excess of indemnity cover, not indemnity cover.

GLAZEBROOK J:

Well then why doesn't my example of having 100 and 900 mean the 900 is free under subsection (7) because it's excess of indemnity.

MR SIMPSON:

Because the different sections apply to the different types of policies. So when you have a replacement policy, so it's just 15 million of cover covering both indemnity and excess of indemnity you can't say – I'm assuming there's no breakup between them – you can't say, oh, let's apply 48(7) which says you take out a separate contract of excess of indemnity insurance or part of a contract of excess of indemnity insurance because the answer is, well, we don't know what part that is. It's not a part – it's merged with the indemnity cover so I can't apply 48(7). That's why I say that's what 48(6) is for. You go and say, is there a sum insured? No, there's not. Is it more favourable to the insurer than the indemnity value? Yes, it is. Right, well, if you want the concession you've got to put declarations in and tell us what the indemnity value is. Now the Fire Service with the indemnity number can say, well, I can now break this cover in two because I know the indemnity value of the property is nine million so of the 15 only nine can be indemnity cover and the six drops out, so that's what you do with replacement cover. You go through the doorway of 48(6) but if they were broken into separate parts I don't need to go through 48(6). I say all right I'll put a sum insured in the indemnity value so that's what I pay on the excess of indemnity. You get out on 48(7).

GLAZEBROOK J:

But why did you accept my proposition that you’ve got 100 under an indemnity policy and 900 under an excess of indemnity policy and the actual indemnity value is 600 that you would pay the levy on 600 because on your argument that you’ve just put that would not be the case because the 900 wouldn't be available even though it kicks in straight away to make up.

MR SIMPSON:

No, quite the reverse. Because that 900 cover you and I both know how some element of indemnity cover in it it’s not what 48(7) is directed to. It’s not a policy for the excess of an indemnity value because the excess is 600.

GLAZEBROOK J:

So you’ve got to have a gap, is that the argument, or the indemnity policy has to be full indemnity. Is that the argument?

MR SIMPSON:

You have to have a gap to make a levy saving. You could have an indemnity policy for its full indemnity value and an excess of indemnity policy for the full excess of indemnity. (7) knocks out that one. This one you would just pay levies on the indemnity value. There would be no levy saving. The reason we make a levy saving has got nothing to do with the excess of indemnity policy. It’s because we’ve put a sum insured into the indemnity policy and reduced that amount of insurance. So if I only ever bought indemnity insurance with a sum insured in it, these people would say, the Commission would say, we agree you only pay levies on that sum insured and what I’m saying is why is it that I don’t buy any more indemnity insurance but I start buying excess of indemnity insurance which the Act has always exempted. I now have to start paying levies again. It makes no sense.

GLAZEBROOK J:

Is there anything in the declarations of the Court of Appeal that bring this gap into the type of emphasis that it now seems to have in the argument?

MR SIMPSON:

I think so.

GLAZEBROOK J:

I say that because I must say I hadn’t quite appreciated the gap argument.

MR SIMPSON:

Okay, so in the declarations on page 45 and tab 5 of volume 1. It's page 58 of that case. So I can answer – I think we get there but I think you have to look at an amalgam of these declarations so the first thing it says there is that if you've got an indemnity policy or something no better than indemnity and it specifies the sum insured then you pay it on a sum insured, so if the sum insured is less than the indemnity value then you're going to create a levy saving there. If the levy is computed – then it says if the policy provides cover for the indemnity value of the property and it contains a capped sum insured the maximum levy is that on the sum insured so that's the point I've just made. If the sum insured exceeds the indemnity value and the insured provides compliant declarations than the levies paid on the indemnity value. 3 says there's no levy on the excess of indemnity value contract, so if it provides a contract insurance provides for the settlement of a claim limited to that part of its value in excess of its indemnity value, no file levy is payable and to be exempt under section 48(7) it's not necessary that you hold full underlying indemnity cover, so what effectively (2) and (3) are saying is, if you've got a sum insured that's lower than the indemnity value you'll make a levy saving in the indemnity policy and it's saying you're not paying a levy on the excess of indemnity policy. So you've got to have the gap in indemnity cover created by the inclusion of a sum insured that's lower than indemnity value, and that's the outcome of *Terrace* and *Cigna*. It's clear the Privy Council was of the view that if it had been an aggregate limit rather than any one loss limit that also would have been successful in reducing levies. They say that very early on in the judgment.

This is an opportune time for us to look at paragraph 11(b)(iii) of my roadmap because what I say there is that the Commission's interpretations are logical and it requires levies to be imposed on excess of indemnity insurance but qualified on the indemnity value of the property for which it provides no cover. It imposes levies on excess of indemnity insurance dependent on whether there exists indemnity insurance, which may be in a separate contract between separate parties. Now, that might sound a bit fanciful but if you look at footnote 44 to my submissions there are cases in which properties have been doubled insured. Maybe one policy is taken out by the mortgagor and another by the mortgagee and an issue of double insurance arose and one of those policies had a double insurance clause which says this policy doesn't respond. If there's another insurance until the other insurance has been exhausted that's a fairly common situation, and the other interesting thing about that case is that neither of the insurers knew about the other and you have this situation where effectively one would be treated as excess over another and yet there are different insured, mortgagor versus mortgagee, different insurers, different amounts, slightly different terms but they're both providing material damage over the cover and in two of the three cases I refer to, as I say, one insurer didn't know about the other and bearing in mind Justice Heath's comments that this Act has got to be predictable and simple so that people know what they've got to do because they've got to pay levies within 15 days of the second month of the contracting and then they get whacked with levies and penalties if they don't. It's got to be predictable and it just can't be the case that you're imposing levies for an excess layer when you don't know – you may not know what's happening on the underlying policy.

When stripped to its core, really what the fuss is here is not so much with the excess of indemnity insurance.

GLAZEBROOK J:
Can I just say in your example both insurers if they didn't know about each other would have to pay levies on the indemnity value, wouldn't they, even if they might turn out to be an excess one because otherwise they don't know there's another insurance company so it's fairly predictable for them and they just pay the levy, don't they?

MR SIMPSON:
Well, one of them is not liable to pay it, though.

GLAZEBROOK J:
Well, maybe not but when they find out they're not liable they'll go to the Commission and say, "Please give it back."

MR SIMPSON:
How are they going to find out?

GLAZEBROOK J:
Well, if they don't – the point is you were saying it has to be predictable but if you don't know that you're in excess and not liable to pay because you don't know there's another insurer then you would be very ill-advised to say, well, on the off-chance there's another insurer and I might be an excess insurer only I don't think I'll bother.

MR SIMPSON:
Yes, I think that's fair. But the real point I'm making here is how is it that I as an excess of indemnity insurer have to work out whether or not I have to pay a levy based on a different contract that I may or may not be a party to? I may be but surely that contract should incur levies on its own and I should incur levies on my own. I shouldn't have to be looking at this policy to work out what additional amount I should be paying, particularly when the problem that the Commission is really objecting to here is that I've underinsured in my indemnity cover. That's the real issue. If I didn't underinsure on my indemnity cover they wouldn't be looking at this policy for levies and it just seems to me a little perverse and I mean it's not a killer argument on its own, of course, but it does reveal the inherent illogical nature of this argument where I can't determine what levies I have to pay on this policy without looking at that one because that one is really the one that makes the difference.

Can we just have a very quick look at some of these policies. I'll take you to one and maybe that might be enough. So it's 3a of the case on appeal. So we look at the Aon policy, it's an example of a separate policy and deals with it, so page 220 of that volume.

O'REGAN J:
Is this the one the Court of Appeal was ruling on?

MR SIMPSON:
Yes.

WILLIAM YOUNG J:
What page is it?

MR SIMPSON:
It's 220. The only reason why they all went in there was because the appellants thought it might be more efficient to just have one in there, and we agreed, but actually if you take the time to look at them all they're all pretty much the same, in fact, there's such a close linking of the wording between the key clauses here that I don't think anyone could seriously suggest that there's a material difference between them for the purpose of this hearing. So 222, this is the fire indemnity policy, so 222, "Policy provides insurance cover for the indemnity value of the property insured,

subject to the sum insured stated in the schedule." And it's only about fire, you can see there, including fire occasioned by or through other perils. Over the page, 223, "The sum insured for any one loss and all losses in the aggregate during the period of insurance, under both this policy and the excess indemnity policy."

GLAZEBROOK J:
Sorry, where are we?

MR SIMPSON:
Sorry, the sum insured, it's over the next page in the schedule. The key thing there is it's an aggregate sum insured, not an any one loss sum insured. And then 226, basis of settlement, is all indemnity subject to the sum insured which is (i) at the bottom there. And then (ii) "In respect of loss or damage caused by fire to individual items of property…the indemnity value of each item of property insured at the date of the occurrence." So that's that one. Then over to 239 is the excess of indemnity policy. So 239, "This policy provides insurance cover for the excess over the indemnity value of the property insured, subject to the sum insured stated in the schedule. The policy provides that part of the value of the property insured representing the reinstatement value as-new less its indemnity value. The policy will not provide any element of cover for the indemnity value of the property insured and in particular will not provide cover for any shortfall in the cover provided by the underlying indemnity value insurance policy due to the existence of a limit on the sum insured in that policy."

And you get that same concept echoed in 243, "The amount recoverable under clause 1.1 shall not include the amount paid by the insurers of the underlying policy, the indemnity value of the property." So you'll find that it's made absolutely clear all the way through those policies, there's no element of indemnity cover provided in that excess of indemnity policy, and it's effectively providing the difference between replacement cover and indemnity cover, and so it says the cost of reinstating to its as-new condition, less its indemnity value, so all the indemnity cover is gone.

I just note this in passing paragraph 12F of my road map, contrary to paragraph 6 and 7 of the notice of appeal, the policies do not cover all claims up to the indemnity value of a portfolio. They only cover it up to the sum insured in the indemnity policy.

I probably don't need to deal with 12.2. I cover in 12.3 the point I made earlier that I don't accept what the Court of Appeal said. Unfortunately it was a submission made to them in reply that I never got an opportunity to respond to but we don't accept that split tier policies are a relatively new phenomenon that post-date *AMP* and the '93 amendments. Both 48(7) in *AMP* concern split tier policies. So my conclusion in answer to these –

WILLIAM YOUNG J:
They're not split tier policies with a gap. I mean that's the question, not a proposition.

MR SIMPSON:
Well, certainly 48 contemplates there might be gap because it says if there's a sum insured you put it on a sum insured –

WILLIAM YOUNG J:
No, no, sorry, I was talking about practice.

MR SIMPSON:
Oh, I don't know. I mean I certainly didn't get involved in this until, I was in counsel on, one of the counsel on *Terrace* and the counsel on *Cigna*, that was in the 90s, so that's when I started in this area. I don't know what happened before that. But by then it was certainly alive and well. So the industry has relied on *AMP* for 30 years. Until 2010 the Commission accepted that excess of indemnity insurance was not subject to levies. As I said before it's changed its stance without signalling it.

GLAZEBROOK J:
Well that argument never got even off first base with income tax indications. So it didn't matter what the Commission had done or not done for a long time. It was a matter of following the law.

MR SIMPSON:
Yes, yes, but what this Court needs to decide is, we've got a Court of Appeal judgment, and whether I agree with it or not doesn't matter, it says that the Act's on the verge of breaking. We've got Parliament announcing they've done a review and they're about to change the law. You've got 30 years of applying the Act one way, and the question is, based on the arguments you've heard from both of us, do you wade in and try and reverse what's been done for that 30 years, or do you let

Parliament, who's about to have a go at it, have a go at it, and all I'm coming to here is saying, well the form is pending, it should be left to Parliament. We're going to create quite a mess if we now reverse this after two judgments and all the judgments that have preceded it, and in my submission that is the right thing to leave to Parliament.

O'REGAN J:
Isn't that a *Fitzgerald v Muldoon* argument though really?

MR SIMPSON:
A, sorry?

O'REGAN J:
A *Fitzgerald v Muldoon* argument. Parliament might change it so…

MR SIMPSON:
I like – well they've made it pretty clear they are and that's the article I've handed up that shows that but –

GLAZEBROOK J:
They passed the legislation, hadn't they, in *Fitzgerald v Muldoon*, so it was more than they might do it than actually passed.

MR SIMPSON:
I'd like to think I've given you more to think about than just this point but what I do say is if there is, if Your Honours feel that there's a bit of leeway in here somewhere then what I'm suggesting is let's get Parliament to have a look at it because there are a number of issues here. I think that report that got issued, the (inaudible 15:37:36) report did recognise that most of the Fire Service's work is in motor vehicles and maybe the whole basis for levies needs to change as the insurance industry has been lobbying for years. So I'm not sure about – if Your Honours consider something needs fixing in the law, and you can do it, I'm not sure it's going to have much of a tenure, and it was on that basis that I oppose the leave application.

I think that's all from me and I'll hand over to Mr Friar.

McGRATH J:

Thank you Mr Simpson. Can I just ask you how long you think you might be. We just wondered whether we might take a break at some stage.

MR FRIAR:

Yes Sir. It perhaps depends on the number of questions you have but perhaps 45 minutes or so.

McGRATH J:

We'll take a short break at 4 o'clock and we'll hold you to 45 minutes.

MR FRIAR:

Thank you Sir, I'll do my best. I also have a brief synopsis or outline of my submissions.

McGRATH J:

Thank you.

MR FRIAR:

Pleasingly it's only one page but unfortunately it's double sided. So really there are four parts to my submission. The first I want to go briefly to the insurance policy at issue in relation to the Ports Collective and just briefly go through the key terms. It appears from the arguments today that that's not really in dispute so I'll try and do that very briefly. Second, is the argument from my friend that section 48 applies on a per owner basis rather than on the basis of the contract of insurance. The third is really what I submit is the meat of the argument, that's the are we talking about a single contract here, or are we talking about eight separate contracts, and my submission is that there is one contract here with one sum insured for indemnity cover for fire, and then finally even if there are eight contracts, even if I'm wrong on that point, the submission that there's still only $250 million in cover for fire, and indemnity cover for fire, and so the levy can only be calculated on the $250 million. Now of course my submissions depend on the arguments from Mr Simpson that it is based on the indemnity sum insured and really go to the subsequent point that assuming that that is the case, can the Port companies come together and enter into a policy with the insurer or insurers of the nature that they have here. So if I can –

GLAZEBROOK J:

Can I just check, that last argument is Mr Simpson's argument, or is there something more to it? I know you're going to come to it.

MR FRIAR:

Yes, no, it's Mr Simpson's argument –

GLAZEBROOK J:

It's Mr Simpson's argument, that's fine.

MR FRIAR:

– so I don't have anything in addition to that, to Mr Simpson's argument. Simply that these eight Port companies can come together in one contract to agree on a sum insured of $250 million. That's as far as I take my particular argument.

So if I can start briefly with the policy and with the purpose of the policy and the Commission submits that one of the purposes was to minimise Fire Service levies and that's certainly true and the respondents accept that, but I did want to make the point that that's not the only reason why the Port companies entered into the policy and if I can take you briefly to Mr Rankin's affidavit, which is in the second volume of the case on appeal at tab 9, at page 136. So at paragraph 8(a), so the first reason mentioned by Mr Rankin was the potential – well was the ability to save premiums and he says that under the NZPC policy the port companies were able to save up to 20% of their existing premiums. Some were able to save 20%, some were able to save 12.5%. So actually saving premiums was one of the goals of entering into the policy. The second, over the page, that he refers to was being in a collective allowed the companies to obtain additional coverage, which they hadn't been able to obtain before, they hadn't obtained before. They had cover for terrorism, for an outbreak of infectious human disease, and for port blockages, and that cover hadn't been taken up before. Thirdly, in relation to various extensions the port companies were able to obtain higher limits on those extensions than they were able to when they're individually , and I won't take you to it, but he refers in his affidavit to an example which sets out a very detailed schedule of, for one of the ports, of the extensions and the limits that the port was able to get and what they were now able to get under the new policy.

There's also a reference to lower earthquake deductibles and then at subparagraph (e), this is the point about Fire Service levies, and I think this is the point Your Honour

Justice Young made earlier, was that because the ports were geographically isolated they were able to come together and cap the total indemnity cover for their assets in a way that allowed them to reduce the cost of the Fire Service levies. So that's more by way of background than anything else but I just wanted to have before the Court the reasons why the port companies entered into this particular policy. And in fact, I should just add as an aside, the port companies even considered entering into a general liability policy on a collective basis, they engaged Marsh to do that, they went out to market, and they got quotes and it turned out that the pricing difference wasn't sufficient to be justification to go into that separate policy, and that's a policy where they would obviously be no savings for Fire Service levies because that's a general liability policy. So they were looking more broadly than just in relation to Fire Service levies.

If I can turn then to the policy, which is in volume 3c, at page 825, and on the next page 826, there's the contents page and you'll see the insuring agreements there and there are four sections referred to. One is indemnity cover for fire, then the excess of indemnity cover. There's a non-fire cover and then there's the business interruption cover. So those are the four parts into which this policy is broken out. If I can turn to page 829, which is the schedule, and you'll see listed there all the – you'll see listed there the insured and that lists all eight port companies who were parties to the contract. Then a little bit below that, "This policy is interpreted as if the policy were issued separately to each of the insured for their respective rights and interests." That's the same phraseology that was used in the *General Accident* case that I'll come to, to make it clear that each port company is insured for their own interests. They weren't there getting a benefit for somebody else's interests.

Then if I can go to 835, which is the collective insurance clause, so this defines the word "the company" and it says, "The company is deemed to mean all underwriters participating in the policy as named below." And goes on to say, "The agreement and promises made by the underwriters… are made each for its own part and not for one another." And you'll see there are three insurers there who I'll list, Vero for 45% and then American Home and QBE as well.

Then over the page, the operative clause, so this is page 836, "In consideration of the insured having paid or promised to pay the required premium and subject to the terms of this policy the company agrees to indemnify the insured as set out in the sections of this policy." Then we go to the four sections that we've talked about. So in contrast to the collective insurance clause on the page before, this one doesn't set out any percentages by which the insured were to pay premiums. This is just a collective or a joint obligation on the part of all of the insured to pay the required premium, and there's evidence, I won't take you to the affidavits, but there's evidence from Mr Thomson who was a managing director of Vero, that the insurers regarded all eight port companies as jointly responsible for the premium. The premium here was $1.9 million and again the evidence is there were three separate invoices that were issued in relation to the three separate insurers, each for their insuring parts. There were not invoices issued by the insurers to each of the individual port companies. In fact there were three invoices for each of the individual insurers. They went to Marsh and then Marsh separately issued separate invoices to each of the port companies, but from the insurers.

WILLIAM YOUNG J:

What were the three invoices for? Fire indemnity, fire in excess of indemnity and other?

MR FRIAR:

No, it wasn't broken like that. It was broken down by insurer –

WILLIAM YOUNG J:

Oh, I see.

MR FRIAR:

– so it was for Vero's 45%, so 45% of $1.9 was the first invoice and then there was one in relation to QBE for its 30 or 25% and then one for American Home. So those were the three invoices in relation to the insurers. The Court of Appeal, in my submission, correctly concluded that the premium here was jointly, sorry, that the insureds were jointly responsible for the payment of the premium and I don't understand the Commission has taken any issue in relation to that, but it is an important point when it comes to understanding whether or not this is one contract or whether this is multiple contracts.

If we're still on page 836, and I can come down under the operative clause, the last paragraph, where it says, "Except where provided to the contrary the companies, that is the insurer's, liability will not exceed the sum insured, and if more than one item is included won't exceed in respect of each item the sum insured set against that item.

So that's the provision in relation to the sum insured and then we need to go back to the schedule to see what that is and that's at page 830, at the bottom of the page 830 if I can take you there. So the first point, in the very first sentence under sum insured, notwithstanding anything in this policy to the contrary, the sums insured apply to losses insured by all insureds collectively. So it's a collective sum insured. And so for section 1, which is the indemnity fire cover, there's $250 million of cover and then for sections 2, 3 and 4 combined, so that's excess of indemnity, non-fire and business interruption cover, 500 million, but that 500 million is reducing so if, you see the sentence just underneath where the loss is recoverable under more than one section, the sums insured will not be cumulative, so to that intent the sum insured under 2, 3 and 4 combined will be reduced if anything is paid out under section 1. So the maximum it can be, that can be claimed is 500 million in relation to the policy. Now both of those, and again I understand there's no dispute on this, but both of those amounts are aggregate limits, they're not limits per loss. If they were limits per loss we'd have the issue in *Waitaki* that it doesn't work for the purposes of the Fire Service levy but here these are aggregate limits.

Importantly, there's only $250 million if we're looking at section 1 for all of the port companies, so each port company is entitled to –

GLAZEBROOK J:

Where have we got these sections 2, 3 and 4 and section 1 where the operative sections describe where they are?

MR FRIAR:

Back on page 836. I just identified them in the table of contents but the actual insuring agreements, 836 section 1 material damage by fire indemnity.

WILLIAM YOUNG J:

There isn't necessarily a gap. It depends on what the assets of the company are.

MR FRIAR:

That's correct.

WILLIAM YOUNG J:

So for the Invercargill one there plainly isn't a gap for 29 million of assets or something.

MR FRIAR:

If that is what the number is. I don't recall it off the top of my head. That's fine. It depends on the assets of the individual company.

GLAZEBROOK J:

So what's the indemnity value defined as? I'm just trying to work out how this works. Let's have a fire. So Auckland loses 250 million in a fire.

MR FRIAR:

Yes, so it has a claim under section 1.

GLAZEBROOK J:

So a claim under section 1 and it eats up the whole of the 250 million. What happens to the next fire?

MR FRIAR:

So there's no cover, no more cover for fire. That's the limit of indemnity so under operative clause.

GLAZEBROOK J:

Under sections 2, 3 and 4 there's 500 million. Show me what section 1 says.

MR FRIAR:

So there's the insurance agreement.

GLAZEBROOK J:

Auckland has used it all up. What happens to the next fire? They get nothing for the next fire or they get something?

MR FRIAR:

They get nothing for the next fire.

GLAZEBROOK J:

So why is that? Show me in the policy.

MR FRIAR:

Under the operative clause, the fourth paragraph, except where it's provided to the contrary, the company's liability will not exceed the sum insured. So the insurer's liability under section 1 shall not exceed the sum insured and then you go to the sum insured on page 830 and it shows the section 1. Well, first of all there's that sentence, "Notwithstanding anything to the contrary, the sums insured apply to losses incurred by all insureds collectively. It's not an individual sum insured." Then section 1 the aggregate limit is $250 million.

GLAZEBROOK J:

Well, I understand they don't get anything under section 1. Why don't they get something under 2, 3 or 4 in that example?

MR FRIAR:

Well, sections 2, 3 and 4, well, section 2 is only for excess of indemnity cover so if there's another claim for a fire the next day there's no potential claim by any port for indemnity cover because that limit has been exhausted. There may be a potential claim for excess of indemnity cover in relation to another fire but there's no cover for indemnity.

GLAZEBROOK J:

But why is – what does excess of indemnity cover say? Because you can't claim it under 1 because that's gone. Where is it in the contract?

MR FRIAR:

So we come down to section 2, material damage by fire excess of indemnity. If the insured property is lost or damaged, and the insured suffers a loss in consequence, the cost of reinstatement exceeding indemnity value the company will pay only in respect of that loss the difference between the cost of reinstatement and that indemnity value. Then to make it clear that we're only talking about indemnity value, that's true indemnity value, there's the definition of indemnity value for the purposes of that section. The next paragraph says the amount that would be payable as indemnity under a contract of indemnity if the property were fully insured under that contract and the loss was not subject to any deductable.

WILLIAM YOUNG J:

There is perhaps an indication in the material in the event of a catastrophic loss in relation to one building or one port. The policy might be reinstated although there would be another premium payable which would be leviable.

MR FRIAR:
Well, there's no reinstatement provision for section 1.

WILLIAM YOUNG J:
There's nothing to stop them reinstated it but they would have to pay another premium.

MR FRIAR:
Well, they would have to take out another policy. I mean, there's no provision in here that gives them a right to reinstate under section 1. They would need to reach an agreement with the insurers in relation to that. Section 2 by contrast, 3 and 4 there is a reinstatement clause but there is no reinstatement clause in section 1 in relation to section 1 and that's the point that Mr Simpson was making before that insurance industry is very careful to ensure that there are no automatic reinstatement clauses in relation to fire insurance, particularly in light of that *Waitaki* decision.

So my submission in relation to $250 million worth of cover is that there is not $250 million of cover under section 1 for each port company. It's for any port company. So once that $250 million in indemnity cover is taken it's gone for indemnity value purposes. It's once the money has gone the common law rule is not available for anybody else, not available for any other port company to also make a further or additional claim for $250 million.

Just a couple more clauses if I can take you to in the policy, if I can take you to page 865, this relates to cancellation and the insured may cancel the policy at any time with immediate effect by giving notice. Then the insurers get to retain a pro rata proportion of the premium for the time during which the policy has been in force, so not pro rata for each insured, it's pro rata for the time period that the property is no longer insured. When you look at the underlying evidence in the affidavits, the point is that the insurers would not have entered into a policy with eight insureds if any one could suddenly leave at any time over the course of the period. They wanted eight insureds for administrative convenience for the amount of premiums they would get and that's on that basis that they were prepared to offer the discounts that they did.

So that cancellation clause is, in my submission, a joint clause and can be contrasted, in fact, to the fraud and the misrepresentation clauses, so if you come two-thirds of the way down the page you'll see the fraud clause, a pretty standard clause, if any insured makes a claim that's fraudulent then the benefiters forfeit. I just want to highlight the last sentence for the purpose of this condition. "Each insured if more than one will be treated as having been issued with a separate policy," which is to make the point that if one insured makes a fraudulent claim that doesn't prejudice the rights of any of the other seven, and there's a similar wording in relation to the misrepresentation clause at the top of page 41. Again, it's a standard or familiar clause. The policy is voidable in the event of misrepresentation or non-disclosure and then right down the very end again of that clause for the purpose of this condition each of the insured, if more than one, will be treated as having been issued with a separate policy, which is to say that the insurers don't have a right to void against one of the port companies for non-disclosure or misrepresentation and if they have that right it's only against that one port company, not against the remaining seven.

Finally, I just want to make the point that there's uncontradicted evidence from the insurers in this case. They weren't cross-examined on this. They saw the port collective policy as one contract and indeed they calculated the premium to be paid for this particular policy on the basis of one contract with a fire indemnity sum insured of $250 million in the additional sum insured for sections 2, 3 and 4.

That's all I wanted to go over in relation to the policy.

Let me address the issue that section 48 applies on a per owner basis rather than for each contract of insurance. I addressed this in my written submissions at 7.8 to 7.14 but I just want to take the Court to certain passages of the Act. So if I can take you to section 48, which is at tab 1 of the agreed bundle of authorities or the appellant's bundle of authorities, I just want to emphasise some points from the section that, in my submission, make it clear that the levy is calculated on the basis of a contract of insurance and not calculated on the basis of owners. In fact, the entire purpose was to create a system of levies that relate to contracts of insurance that don't relate to owners, because there are many owners who don't have contracts of insurance and don't face levies and that was the policy decision that was made so if I can start with subsection (1), every insurance company with which any property is insured against fire under any contract of fire insurance, so the focus here is under any contract of fire insurance, and every insurance company shall pay a levy to the Commission. So the focus there under any contract of fire insurance. Subsection (2B), the rate of levies shall be computed on all other property on the amount for which the property is insured for the period of the contract of fire insurance, again, a focus on the contract of fire insurance.

If I can turn over a couple of pages –

WILLIAM YOUNG J:
I suppose it's ambiguous but you could say we looked at each property and it's insured and we see how much it's insured for and it doesn't worry us if it's insured on an aggregate basis with other ones or we look at the policy but either way it's going to produce some rather rough edges, isn't it?

MR FRIAR:
Well, yes, but in my submission what this does is this says where's your contract of fire insurance because it's under the contract of fire insurance that an insurer can go off to an insured and obtain payment for the levies that the insurer has to pay, so we focus on the contract of fire insurance and under that contract of fire insurance we look at what property is insured and then it's on that property we look at the sum insured and then we say that's the basis on which we calculate the levy.

WILLIAM YOUNG J:
But I mean how do you calculate it for the purposes of the port collective? Do you divide the 250 million by the aggregate value of all the properties and then apportion that across each property?

MR FRIAR:
Well, no, the insurer is liable under the contract of fire insurance.

WILLIAM YOUNG J:
Or you just say can we just do it without breaking them down?

MR FRIAR:
That's right. When you see the invoices generated by the three insurers they had their own share of the total premium of the 1.9 million and then there's a share of the total Fire Service levy for each of the three insurance companies that need to get

paid to the Commission so there is no breakdown in the invoices as to the Fire Service levy, and then each of the three insurers –

GLAZEBROOK J:

Just calculated on the 250?

MR FRIAR:

On the 250, exactly. Then if I can take you to subsection (8), upon the making of any contract of fire insurance to which this section applies, so again the focus of the section is on the making of the contract on the fire insurance, not on the individual insured or the individual owner. Then down to subsection (9), the amount of the levy for which any insurance company at any time becomes liable under this section in respect of any contract of fire insurance, so again my submission is the liability is in respect of the contracted fire insurance, not in respect of the owner. Then if I can come to the last sentence on the next page, the last sentence of that subsection which Justice O'Regan had a question about, "Where two or more persons are liable for any amount under this subsection, their liability shall be joint or several," so this envisages in my submission the possibility that there is a policy, there is a contract of fire insurance, there is more than one insured. We're not separated it out by insureds or by owners. We have all of the insureds who are potentially liable under the contract of fire insurance and they are jointly and severally liable in relation to the levy. They're liable back to the insurance company which then is liable to the Commission, so in my submission the scheme of section 48 really focuses on the contract of fire insurance and it's in relation to the contracted fire insurance that levies are payable.

There's also – and this is just the final point I wish to make in relation to section 48 and whether it's on a per contract or a per owner basis, and that's that the evidence from the Commission in this case is that it's calculated on a per contract basis, so if I can take you back to volume 2 of the case on appeal at page 114 this is the affidavit of Mr Warwick from the Commission. "It is in the Commission's view also relevant that the computation of levy payable on a contract of fire insurance must be calculated at the time that the contract is made." So he's saying that the levy is payable on the contract of fire insurance and then later in that same paragraph, "Our view that the property that the levy shall be computed on is all of the property that is the subject of the contract of fire insurance," again, consistent but it's not a per owner basis. It's the contract of fire insurance.

And then finally at page 157 paragraph 3, in a further affidavit Mr Warwick says, "The fire service levy is computed on any contract of fire service under the Act." It's not computed on a per owner basis.

McGRATH J:
Does that conclude that point?

MR FRIAR:
Yes, it does, Sir.

McGRATH J:
Then let's adjourn for 15 minutes.

COURT ADJOURNS 4.05 PM

COURT RESUMES 4.19 PM

MR FRIAR:
Thank you, Sir. I want to address the issue as to whether or not the policy is a single contract or whether it can be scissored up into eight separate contracts. Just before I get to the points in my outline, I want to go to the *AMP* case. My friend referred to the comment in that case that there may be separate parts or separate covers that may be treated separately under the Act. That was Justice Cooke's comment. The submission is that that can be applied to different insureds as well, so apply to the eight different insureds here that there are separate parts to this collective policy, eight parts for each of the eight insureds.

My response to that is threefold. The first is that we're talking about different cover. He was talking about indemnity cover and excess of indemnity cover. He wasn't talking about different insureds so the context was certainly different. But the key passage in which Justice Cooke discussed this was at 78020. "When an indemnity sum is named and there is provision in certain circumstances for extra replacement insurance above that, there is not likely to be any difficulty in treating the provision for that extra cover as an identifiable and distinct part of the policy." So really the point was being made here that it was an identifiable and distinct part of the policy that was able to be treated differently for the purposes of the Act.

My submission here that there is no identifiable and distinct part of the policy in relation to each of the eight insureds, and that's because the premium that is payable here is joint, the sum insured is joint, there are various provisions such as the cancellation provision that is joint. You can't slice up or scissor up the policy into different parts, even if not different contracts into different parts. That's just not how the policy works. That's not how the policy is set up. I took you to those separate sections where the policy splits up the different types of cover but it simply doesn't do that for the purposes of the eight port companies.

Most importantly, the sum insured is not split up. There is no splitting up of the $250 million indemnity cover sum insured for each of the eight port companies. It's not an eighth of that for each company. There's not any other identifiable and distinct part of the policy that relates to each of the eight port companies, so that description in Justice Cooke's judgment in *AMP* may apply to different types of cover if the policy sets it up in that way, but it certainly doesn't apply to different insureds, as least how the policy is set up here.

So moving from separate parts to separate contracts, my learned friend handed up the table of the various cases and I do want to address those cases. The first thing I just want to note in relation to the table is it's important to bear in mind the distinction between whether various insureds under a policy have separate interests under the policy and whether there are separate contracts or multiple contracts under the policy. For my friend's argument to succeed on this point, he needs to show that there are multiple contracts under the policy, not simply that there are various insureds with separate interests under the policy. In that table that's been handed up some cases talks about separate interests and some cases talks about separate contracts. The key focus here for the purposes of this argument is whether or not there are separate contracts that are found by the Courts and therefore that there should be eight separate contracts for the purposes of the New Zealand port collective policy.

I also want to make one other point in relation to the table, and my learned friend's submission on all of these cases was this. It just depends on what the question you're asking is. In my submission, that cannot be the case. It cannot be the case that this policy is eight separate contracts for some purposes and one contract for other purposes. There was either one contract or there are eight contracts.

Now, of course, the question as to how many contracts there might be arises in different factual scenarios in different cases. But the answer as to whether it's one contract or eight is a matter of general principle. It's a matter of principle as to how many contracts we have here and then we apply that principle to the different factual scenarios. It can't be that I come to the Court seeking to avoid the policy and the Court says there's eight separate contracts and I come to the Court seeking to cancel the policy or seeking to enforce payment of premium and the Court says it's just one contract. The number of contracts that exist can't depend on the particular issue that's been brought before the Court.

Indeed, the cases don't distinguish between these different contexts on which the issues have arisen so, for example, the Mirror Group case cites the general accident case so all of the cases all cite each other for these propositions so it's not as if these are all independent lines of authority that bear no relationship with each other, so my submission in relation to this is it cannot depend on the question asked. There is a right answer to the question is there one contract or other eight contracts here.

So with that, if I can turn briefly to general accident, and I was going to take you through a number of passages. You'll be pleased to know that I don't think I need to do that. I just want to very briefly address the facts of the case and just take out a number of salient points.

So the company that owned part of the building and the leased part caught fire and the landlord, the tenant and the mortgagee were all insured for that separate interest. One is the owner, one is the lessee of the leased premises, and it also insured its separate stock as well that nobody else had an interest in, so totally separate property that only the lessee owned and the bank is mortgagee over all of that property.

Now, the claim for £30,000 for loss resulting from the fire which, even in the 1940s, was a significant amount of money and it turns out that that claim was fraudulent but before that was discovered the insurers paid out in a cheque payable to all three insured the amount of the claim. Then the claim was discovered to be fraudulent. The claimant went into liquidation, and the insurer therefore sought to recover the amount of the payment that was made from the other two insureds. Now, the other two insureds had just endorsed the cheques so the brothers got the benefit of all the money and the insurer said it may have got the benefit but you're also on the hook here so we want to recover the money back from you, and if that was a joint policy that was likely to be the case that the insurer could likely recover the funds from all three because all three had a joint interest, but he said in the famous passage and it's quoted in the written submissions that this is a composite policy insuring the insureds for their own separate interest.

Now, in the schedule that my friend handed up on page 2, he says the finding no joint interest of risk of contract was severable. That is simply not the case. There was no finding in the case that there was multiple contracts, no finding that the contract was severable. There was simply a finding that it was a composite policy issued for separate interests in the property, therefore because there were separate interests the claims that were payable by the insurer were payable to that particular insured only and so any mistaken payment by the insurer could only be recovered from that insurer only and could not be recovered from someone else who had a separate interest under the policy. That's as far as the case went. It certainly didn't reach the conclusion that this was a case involving multiple contracts of insurance, let alone severe the contract into multiple contracts.

The Commission also says that there is a restriction on entering into composite policies as to whether or not the parties entered into the policy based on genuine considerations. There's a passage in the case where the Court says something along the lines of, "Well, the parties obviously for their own genuine and commercial reasons entered into this particular composite policy and the submission, at least the written submissions of my friend, is that as a result here with the port companies there was no genuine commercial consideration for entering into the policy, therefore there could be no composite policy, therefore they must be insured for eight policies. Well, in my submission, that's not what Sir Wilfred Green was looking to do in this case. He wasn't applying a threshold or requiring the Court to measure or weigh the reasons why parties enter into contracts.

But in any event, and this is the reason why I went through the reasons for entering into the policy at the start of my submissions, there were good commercial reasons for the ports to come together to enter into a composite policy along the lines that they did, in fact, enter into.

The other point that came up in oral argument today was in relation to separate property, so the Commission appears to suggest that if property is owned separately then perhaps parties aren't able to enter into composite policies, and so the facts of general accident – and I went through the facts to highlight the point that there was a landlord who owned the building, there was a tenant, and then there was separately-owned stock by the tenant that no one else had an interest in, so that was a case in which there was separately-owned property and there are other cases, they're noted in my written submissions, where parties enter into composite policies and yet they have a separate interest in property.

Mr Simpson mentioned this point but the Commission accepts that groups of related companies can enter into composite policies with only one levy on the sum insured subject, of course, to the arguments today. Those companies, a parent and a subsidiary, will typically separately own their property. Now, the Act draws no distinction between related and unrelated companies and so if the Commission's submissions are right on this point and there's a restriction on parties entering into composite policies that separately ensure property, then that will require subsidiary companies to each obtain that separate insurance. That's a highly impractical outcome, in my submission. Again, that's addressed more fully in my written submissions so I'm happy to leave that point there.

Then I guess the critical submission in relation to whether or not there's one contract or multiple contracts is that this is a composite policy and it's a policy that contains joint and several obligations and so it's a single contract, and I've pointed out the joint obligations as we went through the contract, the premium, the termination, the sum insured applies collectively. That's the critical point in the key passage in the bundle of authorities tab 17. Her Honour was saying as long as there's one joint obligation in the policy and there was an obligation to jointly pay the premium, then it must be a one contract. It cannot be multiple contracts. So that's also consistent with the reasoning in the majority's judgment. The High Court of Australia again unanimously said it is impossible to break up the policy into more than one contract if there is at least one joint obligation.

If I can turn briefly to the English approach, in my submission there's only one first instance English case that actually scissors up a composite policy into multiple contracts and the English Court of Appeal has ruled that a composite policy shouldn't be scissored up and has found it unnecessary to decide the point.

The Mirror Group case is the one I want to focus on most importantly out of the English case. Mr Maxwell, of course, owned the *Daily Mirror*. He was found dead after falling off his yacht somewhere off the Canary Islands overnight in 1991. It turned out that he had fraudulently used hundreds of millions of pounds from his pension companies to prop up the *Daily Mirror*. Now, in that case, and again it's cited in my submissions so I won't take Your Honours to it but in that case the Court explicitly said we don't need to decide whether or not there's one contract or multiple contracts in this particular case because as a principle from the House of Lords which says that if one person has acted wilfully then that wilful misconduct shouldn't be attributed to anybody else, so the Court in that case didn't find it necessary to decide whether there was one contract or multiple contracts and in the Commission's written submissions they accept that point, that the Mirror Group case doesn't find it necessary to decide whether there's one or multiple contracts.

There is one point, though, that I do want to take the Court to which is in relation to the sum insured. The High Court had found that there were multiple contracts and the Court of Appeal said no we don't need to address that, and it's a question of what happens to the sum insured if there are multiple contracts, so if I can take the Court to the appellant's bundle of authorities 2 tab 23, page 49, this is the report of the High Court decision. The High Court and the Court of Appeal reported together in the Lloyd's reports and as I said the High Court had found that there was multiple contracts. The Court of Appeal decided it didn't need to go there so page 49 half way down in italics, the table of limits of liability and then the second sentence, "In relation to ensuring agreement one, which was at issue, a limit of one million pounds to be inserted in type together with an asterisk any one loss." So that's different from what we have here because we have an aggregate policy rather than any one loss.

But then there's a little clause, a little proviso, right down the very bottom of that column which is called sentence 3 in a very prosaic way. "The liability of a company for loss sustained by any or all of the insured shall not exceed the amount for which the company would be liable, had all such losses been sustained by any one of the insured." So it's effectively providing an aggregate limit in the limited circumstances of one million pounds in the circumstances where there's more than one act causing loss to more than one insured.

Then if we go directly to the rights at the right-hand column down the bottom, the answer to question 1, "Given the insurance is composite, then the effect is to create a separate contract of insurance with each insured under which the policy limits apply separately to each company insured." Now, of course, that's the point that the Court of Appeal didn't feel the need to go to in its judgment and that's because there's really a limit for any one loss, not the aggregate, so that point is consistent with the policy but then sentence 3 then comes in, so the Court says, "There is an important proviso that where an employee has committed a number of fraudulent or dishonest acts which cause damage not just to one company but to other insured companies, the collected loss recoverable shall not exceed the amount for which the insurers would be liable, had all such loss been sustained by one insured, namely, one million pounds."

So that really goes to my last point in my roadmap which is even if there are multiple contracts here, even if that argument is accepted, it doesn't mean you can scissor up an aggregate sum insured of whatever the amount is. Here there's an aggregate sum insured of one million pounds and the Court said, well, even if we're dividing this up into multiple contracts there's still only one sum insured of one million pounds that would apply across all of those contracts, and so the same argument in my submission applies here to the ports' collective policy. Even if you scissor this up into eight separate contracts, there is for section 1 of the policy only $250 million in indemnity cover. That is the sum insured and we can't simply scissor that up between the insureds or more as my friend seeks to do multiple it by eight so we have 250 million times eight equals $2 billion worth of cover. I mean, that's not what was paid for. That's not what was insured. That's not the bargain between the port companies and the insurer.

I accept that the Arab Bank case does scissor the policies in that case into various or multiple contracts and in my submission that's the only case that does so, and moreover when you read the case, and again this is in my written submissions, the Judge seems to be applying the MGM case and saying well, that's what happened in the Mirror Group case, the Court of Appeal said that there are multiple contracts.

Really that is not what the Court said in the Mirror Group at all. When you read the decision in the Arab Bank case, it's clear that he's trying to bridge the gap, to use his words, that in my submission is not correct and that's the only case where a Court has held that there are multiple contracts.

In the written submissions, my friend says that that is a case that applies the same approach that was applied in Arab Bank and scissors up the contract. Well, I'm not going to take the Court to the facts but it's clear that in that case the English Court of Appeal didn't even refer to the Arab Bank case and at no stage in that case did the Court of Appeal even consider whether there is one contract or two contracts. It's simply not an issue in that case. My friend took you to one passage but there's one additional passage that I want to take you to in volume 1 tab 11 page 301 at paragraph 6 which sets out the name insured and then in capital letters, "In return for your payment of the premium and subject to the policy we agree to provide the insurance as stated in the policy," so that's almost identical wording to the wording that we have in the New Zealand Ports Collective policy.

Then if I can turn the page to page 302 on the right-hand side about one-third of the way down, just under the words "contract rights of third parties act" assuming in the absence of any contrary evidence that whatever the law is governing the policy it adopts the same approach as English law, then the policy is a composite policy under which the different interests of sell and its subsidiaries are insured as and when they're at risk in respect of shipments then it cites general accident. That does not mean, however, that the policy is severable under the series of separate policies or insurances. The subsidiaries that were party to the contract are, on the face of it, jointly responsible for the premium. Again, that's the interpretation that I placed on the policy here. So again, cannot separate into individual contracts, that's the English Court of Appeal from 2003 subsequent to the Arab Bank case.

3.7 of my roadmap, in my submission that case simply does not address the Arab Bank distinction. That's the difficult case of where you have a husband and wife who have a joint interest in property although in that case the wife had some individually-owned property as well. That's the case where in a situation like that and the husband burns down the house and it's a joint policy is the wife subject to the same actions of the husband and therefore can't claim under the policy? Traditionally it would be seen, given that they had joint interest in at least the house, it would be a joint insurance and as a result of that the wife's not able to claim under the policy for the actions of her joint insured. Well, Chief Justice Eichelbaum said that's not very fair and applied the American approach of saying well actually there's probably a composite policy and we'll interpret the policy in such a way that effectively the insureds are insured separately, even in relation to their joint interests in the property where he says it's one contract, not multiple contracts, but there is certainly no decision by the Chief Justice in that case that this is multiple contracts rather than just one contract.

At 3.8 I've listed two academic articles with stringent criticism of the Arab Bank case. The Court of Appeal relied on those articles in its judgment and I've referred to them in my written submissions so I don't feel that I need to take the Court to those passages.

My final submission, and this is the submission that I made in relation to the Mirror Group case as well, that even though they spent a lot of time talking about whether there is one contract or eight, which seems like a fairly esoteric argument close to Christmas, but even if there are eight contracts, there is still only one sum insured under section 1 and that's the $250 million. There is not 250 times eight equals $2 billion worth of cover under the collective policy.

Unless the Court has any questions, those are my submissions.

McGRATH J:
Thank you, Mr Friar. Mr Cooke.

MR COOKE QC:
Thank you, Your Honours.

I do intend to be reasonably concise in the way I respond to the arguments and dealing first with the arguments that have been made about the interpretation of subsection (6) and (7) of section 48 in my learned friend Mr Simpson's argument, and then deal with the subsequent point about the multiple owners.

In essence, my response to the argument my learned friend Mr Simpson has adopted in terms of the meaning to be given to subsections (6) and (7) of 48 is that if you just looked at the section and interpret the text in light of its purpose it would be a very difficult argument to make. He only gets anywhere on making the argument by going back to look at a bit of the history of these provisions but it's not inappropriate to start with the wording of the enactment interpreted in light of its purpose because one of the difficulties in the argument he has developed is actually the plain wording of particularly section 48(6) because as I understand his argument it is that section

48(6)(c) effectively deals with the full replacement insurance situations and therefore needs Parliament recognises the need to unravel the indemnity bit of a full replacement insurance but that's not what section 7 is directed to. Actually, subsection (7) is directed to his gap policies where there's an indemnity policy and then an excess of indemnity policy and that's just a straight application of (7).

Of course, one of the difficulties about this is that the new structures with a gap is the more recent phenomenon and section (7) has always been in – or versions of it has always been in these provisions. It's not the most recent element. It's actually subsection (6) that's been the more recently evolved part of this provision, but it's very difficult just to see on the wording of subsections (6) and (7) where you find the different treatment of a full replacement insurance on the one hand or a couple of contracts with a gap on the other, and just looking at the wording of subsection (6)(c) we have to interpret the words where the contract of fire insurance provides for a settlement of any claim for damage or destruction of the property on any basis more favourable to the insured person. That is indemnity value, and that is the case with not only full replacement policies but also his gap insurance arrangements which have the indemnity part and the excess of indemnity part. They just have within them the settlement of a claim for insurance more favourable to the insured person than its indemnity value, so on the plain wording of the provision it applies, and then when you look further in that provision you'll see that the object of the provision is to identify the fair and reasonable indemnity value to be the basis for the levy by the more elaborate procedures regulated by that clause, so rather than (6)(c) and (7) dealing with very different types of policy and rather than suggesting that this legislature has devised these provisions with two very different types of technical structures in mind, they're addressed to the same essential thing, that is, to try to identify where there is an insurance arrangement where you do get more beneficial cover than the indemnity value, how you separate out the proper indemnity value for the purpose of the levy.

GLAZEBROOK J:
Can you just deal with the argument that section (7) then becomes redundant because you only pay the levy on the sum insured and subsection (6)(c) says how you calculate that and then what does that leave for subsection (7) to do?

MR COOKE QC:

I accept it has a degree of redundancy about it in that when the more elaborate procedures in section (6) were enacted it would have made better sense if subsection (7) had just been made part of subsection (6) and so concluding with subsection (6) saying that the section had no application in relation to the amount in excess of indemnity insurance but there is often untidiness in the complete purity of legislative provisions in this way. We don't always expect the legislature to get it completely right in terms of neatness in that way. With respect, I don't see any significance in the fact that the work is primarily done by (6) and (7) stands for the principle which the mechanics of (6) work through.

ARNOLD J:
It's probably actually the addition of words or part because before they had that reference to part of the contract in subsection (7) it just said if the contract is only a contract and that's just making it clear that it doesn't even fall within (6) at all. It's completely different, so if there was a bit of carelessness about drafting it.

MR COOKE QC:
I can see that point but I always think that when you try to make legislative interpretation arguments on the basis of what they haven't done or subsections that could have been expressed in different ways. You've got to interpret the words that are there and the meaning of the words in light of their purpose rather than trying to take them, for instance, from the fact that subsection (7) doesn't have much work to do any more, given the machinery in subsection (6).

My learned friend only gets a real basis to argue about this because of the background and in particular because of the *AMP* decision. If it weren't for the *AMP* decision there really wouldn't be anything to advance but you do have to remember it's rather like these cases about the reason why the Court asked the question are there one or more contracts or are the bits severable you've got to understand why the Court was giving the answers it was in the *AMP* decision and you do have to remember that the *AMP* case was dealing with earthquake and war damage cover because there's a critical passage that my learned friends did address but which explain why the Court of Appeal reached the conclusion that it did in *AMP*. That's the passage at 78022 on the left-hand side in the middle of that column where Justice Cooke says this, "That result is that in the case of a fire insurance policy giving indemnity up to a named sum that sum will be the upper limit of the indemnity value and will correspondingly be the amount up to which the property will be automatically insured against earthquake and war damage under section 14(1). The earthquake and war damage premium will accordingly fall to be computed on that amount at the rate prescribed by the regulations. Any contract or part of a contract limited to an excess over that amount will be altogether outside the scope of section 14 by virtue of section 14(2)(b). The concern voiced by counsel on the part of the Commission will thus be disposed of."

The point of that is it was the stated indemnity value sum that determined the extent of the earthquake and war damage cover. All the Court was doing was bringing together most sensibly the extent of the cover with the extent of the obligation to pay the levy. That is the explanation why the Court was content with that approach to those provisions under the Earthquake and War Damage Act, because it brought together the cover and the levy.

That is not the phenomenon we have now. In fact, my learned friends have to depart somewhat from the reasoning of *AMP* to get to where they do because they accept that section 48(7) is not simply applicable to an amount in excess of a stated sum, which would be the approach you would adopt if you adopted *AMP* word-for-word. They say no, it's not the stated sum, it's the actual indemnity value, so they've departed from the reasoning of *AMP* anyway, but my point is you can't just plonk *AMP* into the Fire Service levy context. You've got to apply the words of the Fire Service levy provision in light of its purpose and you don't have the corresponding link between the stated indemnity sum and cover as we did in the earthquake and war damage context, so that explains a lot of the reason why the Court of Appeal reached the conclusion it did in *AMP* and why it's different and why you have to look at the purpose of these provisions and the wording of these provisions in this context.

WILLIAM YOUNG J:
But the last bit you cited which is on the top right-hand side of that page does provide support for your argument anyway.

GLAZEBROOK J:
I must admit, I'd also say this case is supporting the appellant's argument than the respondent's.

WILLIAM YOUNG J:

It's the bit that starts it also seems unlikely that there would at all commonly be issued a separate replacement policy, leaving the insured to bear the difference between the limit and its indemnity policy and the actual value of the property destroyed or damaged and then the next bit seems to suggest that a policy of the kind postulated is not within the extension of what is now in our context section 48(7).

MR COOKE QC:

Yes. I'm not saying *AMP* is irrelevant and there is a lot in the decision that helps me, but what I am saying is that the way in which my learned friend has tried to say that there is this acceptance of this arrangement in *AMP*, all I am saying is that that is explained by the correlation between cover and stated indemnity sum.

WILLIAM YOUNG J:

And there was no gap?

MR COOKE QC:

And there was no gap.

Just finally on this question of that (7) is directed to the gap policies and not the replacement policies, that actually is completely the opposite of what has been taken to have been the reason for (7) in the first place. The reason for (7) in the first place was taken to actually be replacement policies, not these new gap policies, and that's demonstrated in volume 2 of the authorities behind tab 16. At page 653, perhaps starting off at the bottom of the page 652, the 1944 Act was the first provision with respect to the insurance of property against earthquake damage. Only those property owners with fire insurance policies that covered a premium calculated indemnity value as paid by the holder of a fire policy and insurers responsible for passing the statutory premium on to the Commission. Initially the statutory cover reflected the practice of the insurance cover of property for indemnity value only. The development of replacement risk insurance led to the amending legislation 1951, allowing for the provision of private insurance of replacement cover in excess of the Commission's statutory liability, so it was actually replacement insurance that was the origin of (7) and then as that evolved we then got the mechanics in section (6) as to how you unravel the true indemnity value from the excess of indemnity value component.

So my learned friend says now it's subsection (6) deals with the replacement and section (7) deals with his gap policies. They deal with the same issue, and the same issue has derived out of full replacement insurance.

I should deal briefly with my learned friend took the Court to the various tables that were attached to the affidavit of Mr Warwick in volume 2 tab 8 of the case on appeal and particularly took Your Honours through to scenario 3. There is a degree of ambiguity whether scenario 3 has this indemnity and excess of indemnity insurance but my learned friends are quite right. If the Court accepts my primary argument, the answer would be that the levy would be computed on $90 million, not $70 million. That would be a consequence of the argument. Now, this simple arrangement is not what was actually in issue in this case, because what was in issue in this case was this portfolio of properties were split tier arrangements, but if, as a consequence of the Court's interpretation of the provisions, the implication is, as I say it is, that this figure will be 90 million and that's what the section says and that's the proper interpretation of it. So it's not directly an issue but it could well be the natural consequence of the Court accepting the argument and the argument has always been alive in this case.

Just in that context, I don't know how far it's really necessary to respond to this but the idea that Parliament is in the process of considering these provisions, whether they will or not is really, as far as we understand, up in the air and I don't think, with respect, it's appropriate for the Court not to answer the questions because there is a possibility of legislative reform. In fact, if anything that's even more important that the Court give a decision on the meaning of the provision so that the need for any reform could be identified and maybe the Court were to come down on the Commission's argument my learned friends would have an opportunity to persuade Parliament that their favoured approach should be adopted of amending legislation. With respect, it doesn't really change the interpretation of the legislation.

So that is all I want to say about the first argument unless Your Honours have any questions from me, and then I'll deal with the second multiple owners.

WILLIAM YOUNG J:

In the case of the first argument, you accepted that the problem is the second tier of insurance but I think that most people who own a number of buildings probably own them through separate companies.

MR COOKE QC:
Possibly, yes.

WILLIAM YOUNG J:
Wouldn't this example or the split portfolio normally involve exactly the same situation as the ports company, that is, a group of companies albeit of common ownership insuring a number of buildings? I suppose we don't know because there's no evidence.

MR COOKE QC:
No. Isn't Your Honour's question more directed to the second question rather than the first?

WILLIAM YOUNG J:
It is but I did sort of wonder how much difference there was between the second question and the first question because one would assume – at least on common experience – that buildings seem to be held in separate companies.

MR COOKE QC:
In answer to the second question, rather than the first, it seems to me that the more likely way that Parliament would have approached it is that the parent company of the different subsidiaries who owned different buildings would be regarded as the owner for the purposes of the application of the levy but it's hard to know at times but hard to answer that question on a hypothetical basis.

On the second issue, one of the key submissions my learned friend made was that the Commission needs to demonstrate that these are separate contracts. In fact, that is exactly the opposite of what we contend. My submission is that question is a very erudite and somewhat irrelevant question for the key question in the case, which is as demonstrated by all the cases, why are you asking the question? We're asking the question whether the different property owners brought together in this single policy are appropriate treated separately for the purposes of setting the levy. That's a different question from the hypothetical question of whether there is one contract or two because the cases not only ask that question, is there one contract or two, but they then ask another question, if it is a composite policy, are the relevant interests appropriately severable for the purposes of us addressing the issue? For example, if we go back to volume 2 tab 23, what the Court was saying there about the question of whether it's really one contract or two is irrelevant, so if you go through to page 57 of the decision beginning on the right-hand side at the very bottom of the page, Lord Justice Staunton, "In light of our conclusion on issue F, the answer to this question is, in our judgement, no. Technically one ought to inquire whether, for each layer of each year, there was one contract or as many contracts as there were companies insured, and if the former contract can be avoided for non-disclosure as against one or some of the insured but not against the others, we feel that we are relieved from the need to answer those questions by the authority of the House of Lords that it was not a case of non-disclosure but of wilful misconduct but one of two persons insured, but in our opinion the principle that the innocent party could still recover if it isn't separate insurance must equally apply. So what they were saying there is, the erudite question of whether there is one contract or two doesn't really answer the question. The question is in that case whether the misconduct of one affected the others, so equally the question here is not is there one contract or two contracts. The question is for the purposes of applying the levy is it Parliament's intention that each of the separate properties held by separate owners can be separately levied in accordance for the purposes of the provision, not the question of whether common law or the law of insurance is one contract or two.

WILLIAM YOUNG J:
In a way, is the critical language that in section 48(2)(b) the amount for which the property is insured? The levy is set against the amount for which the property is insured.

MR COOKE QC:
Yes.

WILLIAM YOUNG J:
Now, that would just pose the question. It wouldn't answer it because you can either say, well, this wharf is insured for $250 million but its indemnity value, in fact, is $500 million and it's therefore insured for that amount, or you could say we're looking at property collectively and therefore we're just going to look at all the property that's covered by the policy and the policy is therefore $250 million. There may be something in the point that's been advanced that the insurance company has to be able to do the breakdown itself, perhaps with assistance with a declaration by the insured.

GLAZEBROOK J:

Or do you say under section 48(6) that the properties are insured for more than they – are they insured for more than the indemnity value, they are, then you work out what the indemnity value of all of the properties is and then you work out the excess, is that your argument?

MR COOKE QC:

Yes, so that's how these two points, in a way, come together because we don't say it's $250 million for each of the port companies. We say you have to apply subsection (6) to work out what the proper indemnity value is and I took Your Honours earlier through that table of apparent values and we saw that for one of the port companies was $26 million-odd so they would apply section (6). That would be the amount at which they were to pay the levy, so it does come together. The question isn't solved by saying the insurance is set on a contract of insurance. We know it's set on a contract of insurance. The whole system is set up by that, but then we go into the machinery to see how you calculate what is due and then who you collect it from.

GLAZEBROOK J:

Do you even have to do that? Don't you have to say what's insured under this contract is a whole pile of properties? Their aggregate indemnity value is X. There is an excess of that because they've got an excess over that and you then work out the amount?

MR COOKE QC:

That's another way of doing it, yes.

GLAZEBROOK J:

So it's just properties? It may not be in excess of indemnity values, I suppose, because it might actually in aggregate just be indemnity value.

MR COOKE QC:

I think that probably the more likely intent of Parliament is to do it property by property so that the port company deep in the South Island has $26 million worth of property insured gets that amount of insurance levy.

WILLIAM YOUNG J:

What about the port company that's got 500 million? Do you look at that port company's property portfolio property by property or do you aggregate it?

MR COOKE QC:

Well, you aggregate it to that extent that it's all the properties they own and then you – if it's 500 million that would be in excess, or if they've got $500 million worth of insurance so in the end you can look at these cases and read them carefully for an analysis of when one contract or two contracts or whether you've got severable bits of each contract but again you're asking the question why are we asking this question. We're asking this question to determine their fair and reasonable indemnity value in relation to properties owned by particular property owners, and that's the way, with respect, you should approach it.

That is all I wanted to say on that second point unless Your Honours have any further questions of me.

McGRATH J:

Thank you Mr Cooke and thank you to all counsel for helpful submissions on this tricky statute. We will reserve our decision.

COURT ADJOURNS 5.09 PM