IN THE SUPREME COURT OF NEW ZEALAND

SC 57/2014
[2015] NZSC 59

BETWEEN	NEW ZEALAND FIRE SERVICE COMMISSION Appellant
AND	INSURANCE BROKERS ASSOCIATION OF NEW ZEALAND INCORPORATED First Respondent
	VERO INSURANCE NEW ZEALAND LIMITED Second Respondent

Hearing:	15 December 2014
Court:	McGrath, William Young, Glazebrook, Arnold and O'Regan JJ
Counsel:	F M R Cooke QC, A L Holloway and N D Chapman for Appellant R G Simpson and D J Friar for First and Second Respondents
Judgment:	13 May 2015

JUDGMENT OF THE COURT

A The appeal is allowed.

B The declaration made in the High Court and upheld with amendments by the Court of Appeal in relation to split tier policies is set aside.

C The declaration made in the High Court and upheld in the Court of Appeal in relation to the New Zealand Ports Collective policy is also set aside.

D We make no order for costs.

REASONS
(Given by O'Regan J)

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Computation of fire service levy

[1] This appeal raises two issues relating to the method of calculation of the fire service levy under s 48 of the Fire Service Act 1975.[1] Section 48 provides for the imposition of a levy on fire insurance policies as a way of providing funding for the operation of the New Zealand Fire Service Commission. Almost all of the Commission's funding comes from these levies.

Split tier policies

[2] The first issue relates to "split tier" policies. In this situation the insured has cover for both a nominated indemnity value of the insured property and, in addition, excess of indemnity cover, which provides cover for the difference between the true indemnity value of the property and the replacement value of the property. As the nominated indemnity cover does not extend to the true indemnity value of the assets the insured party assumes the risk in relation to the uninsured portion, at least in theory. The respondents argue that the levy payable under s 48 should be calculated only on the insured portion of the indemnity value, and that the excess of indemnity cover should be ignored for the purposes of this calculation. They were successful in both the High Court[2] and in the Court of Appeal.[3]

[3] The High Court made a declaration in their favour and this was upheld, with some amendments, by the Court of Appeal. The declaration made by the Court of Appeal provides:[4]

> 1. *Levy computed on sum insured*: If a contract of fire insurance provides for the settlement of any claim for damage to or the destruction of the property upon a basis no more favourable to the insured person than its indemnity value, and specifies a sum insured for all claims during the period of the contract of fire insurance that is lower than its indemnity value, the fire service levy payable under s 48(1) of the Act is to be computed on the sum insured.

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1 We will refer to this as the levy. We will refer to the Fire Service Act as "the 1975 Act".

2 *Insurance Brokers Association of New Zealand Incorporated v New Zealand Fire Service Commission* [2012] NZHC 3437, (2012) 17 ANZ Ins Cas 61-969 (Heath J) [*NZ Fire Service* (HC)].

3 *New Zealand Fire Service Commission v Insurance Brokers Association of New Zealand Incorporated* [2014] NZCA 179, [2014] 3 NZLR 541 (Ellen France, Wild and White JJ) [*NZ Fire Service* (CA)].

4 At [45].

2. *Levy computed on indemnity value if sum insured higher*: For a policy that:

(a) provides cover for the indemnity value of the property; and

(b) contains a capped sum insured,

the maximum levy is that computed on the sum insured. However, if the sum insured exceeds the indemnity value of the property, and the insured provides compliant declarations or valuations under s 48(6)(c), the levy is payable on the indemnity value.

3. *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 to or the destruction of any item of insured property limited to that part of its value in excess of its indemnity value, then pursuant to s 48(7) of the Act, no fire service levy is payable on that contract or portion thereof.

4. *Application of s 48(7)*: To be exempt under s 48(7) it is not necessary that the insured hold a policy that insures all or any part of the indemnity value of the property. It is sufficient if the excess of indemnity policy only insures part or all of the difference between the "as new" replacement value and the indemnity value of the property.

[4] The Commission argues that the levy should be calculated on the combined level of insurance under the indemnity cover and excess of indemnity cover, up to the actual indemnity value of the insured property. It argues that the declaration should not therefore have been made and should be set aside.[5]

New Zealand Ports Collective policy

[5] The second issue relates to a material damage and business interruption policy entered into in 2008 by the New Zealand Ports Collective (NZPC) comprising eight port companies under which they obtain cover for losses incurred "by all Insureds collectively" in relation to fire damage. The leading underwriter was the second respondent.

[6] The respondents argue that the NZPC policy is a single, composite policy on which a single premium is payable, and that the levy is therefore appropriately calculated under s 48 on the basis of the indemnity sum insured. Again, they

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5 In the High Court, it sought an alternative declaration: *NZ Fire Service* (HC), above n 2, at [24]. It did not pursue that before us.

succeeded in both the High Court and Court of Appeal. The declaration issued in the High Court and upheld in the Court of Appeal was as follows:[6]

> … only one fire service levy is payable in respect of the New Zealand Ports Collective policy, which levy is to be quantified on the Sum Insured in Section 1 of the New Zealand Ports Collective policy.

[7] The Commission argues that there are, in fact, separate polices for each of the eight port companies, and that each should be required to pay a levy calculated under s 48(6) reflecting its individual position.[7] It also argues that the Act supports applying the levy on a 'per owner' basis. As the NZPC policy was a split tier policy, the decision on the first issue applies to it also.

Leave

[8] Leave to appeal was granted on the question:[8]

> [W]hether the Court of Appeal was correct to affirm the declarations made by the High Court.

[9] Both of the issues outlined above require a close analysis of the scheme of the Act and the language and purpose of s 48. We propose to undertake that analysis before turning to the specific issues raised by the appeal.

The statutory scheme

[10] The appeal turns on the construction of s 48 of the 1975 Act. The relevant provisions are s 48(1), (2), (6), (6B) and (7). For convenience we set these out in full:

> **48 Levy**
>
> (1) Subject to this Act, every insurance company with which any property is insured against fire under any contract of fire insurance made in New Zealand in respect of any period commencing on or after 1 July 1986 shall pay a levy to the Commission.
>
> (2) The Governor-General may from time to time, by Order in Council, prescribe—

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6 *NZ Fire Service* (CA), above n 3, at [49].

7 The position of each port company would vary, as explained below at [100].

8 *New Zealand Fire Service Commission v Insurance Brokers Association of New Zealand Incorporated* [2014] NZSC 113.

(a) the rate of the levy that shall be computed at a uniform rate per annum on every motor vehicle which is insured in terms of any contract of fire insurance, whether or not the contract specifies the sum insured; and

(b) the rate of the levy that shall be computed on all other property on—

(i) the amount for which the property is insured for the period of the contract of fire insurance; and

(ii) the period of the contract of fire insurance:

provided that where the period of the contract is in respect of any period other than a complete year, the levy shall be calculated as a pro rata proportion of the levy for a complete year.

…

(6) For the purposes of subsection (2)(b), the amount for which the property is insured for the contract of fire insurance shall be—

(a) in the case of residential building as defined in section 2(1) of the Earthquake Commission Act 1993, the amount for which that building is insured pursuant to section 18 of that Act:

(b) in the case of personal property as defined in section 2(1) of the Earthquake Commission Act 1993, the amount for which that property is insured pursuant to section 20 of that Act:

(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 of the property as stated by either of the following:

(i) a declaration signed by the owner to the effect that the indemnity value declared by the owner for the purposes of the levy is a fair and reasonable indemnity value in relation to the replacement value of the property:

(ii) a valuation certificate—

(A) given by a registered architect, a valuer registered under the Valuers Act 1948, an engineer with qualifications suitable for the purposes of this Act, or a quantity surveyor possessing qualifications and experience suitable for the purposes of this Act, or a plant and machinery valuer possessing

qualifications and experience suitable for the purposes of this Act, being in any case a person who is competent to give such a valuation; and

(B) establishing clearly the indemnity value of the property for the purposes of the levy:

(d) in any case where the indemnity value cannot be established under paragraph (c), be computed—

(i) where the contract specifies the sum insured, on that sum:

(ii) where the contract does not specify the sum insured, in the manner determined by the Fire Service Commission.

…

(6B) Where the Commission considers that the indemnity value declared in respect of any property by the owner under subsection (6) is not a fair and reasonable indemnity value in relation to the replacement value of the property, the following provisions shall apply:

(a) the Commission shall, before the expiry of the contract, determine a fair and reasonable indemnity value and, subject to paragraph (d), the levy shall be computed on the basis of that determination:

(b) the Commission shall notify the owner in writing of—

(i) its determination; and

(ii) the owner's right of objection under paragraph (c):

(c) within 28 days after receiving the notice under paragraph (b), the owner may object in writing to the Commission's determination; and every such objection shall be supported by a valuation certificate that complies with subsection (6)(c)(ii):

(d) if the owner furnishes a valuation certificate under paragraph (c), the Commission shall be liable to pay 50% of the costs incurred in obtaining the valuation, and the levy shall be computed on the basis of that valuation.

(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 or to any portion thereof which is in excess of the indemnity value.

[11] The levy is payable by the insurer, but the insured party thereupon becomes liable to pay the same amount to the insurer.[9] So the practical position is that insurance companies are required to act as collection agencies for the levy. There are substantial penalties for non-payment or under-payment,[10] so insurance companies understandably seek certainty about their obligations.

Approach to interpretation

[12] Section 5(1) of the Interpretation Act 1999 requires that the text of a statutory provision is to be construed in light of its purpose. The fact that a provision provides for the collection of revenue and therefore has the characteristics of a taxing statute does not change this.[11]

[13] There is no anti-avoidance provision in the 1975 Act. But the significance of that should not be overstated. As this Court observed in *Terminals (NZ) Ltd v Comptroller of Customs*:[12]

> [40] The fact that there is no general anti-avoidance provision in the Customs and Excise Act does not change the principles of interpretation that are to be applied. The majority of this Court in *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue* held that there are two inquiries to be carried out when interpreting statutes which include a general anti-avoidance provision. The first inquiry is to assess whether the legal substance of the relevant arrangement comes within the specific provisions of the statute construed purposively. It is only after the arrangement in question has been held to come within the specific provisions construed purposively, that the question of whether that arrangement contravenes the general anti-avoidance provision is considered.
>
> [41] The only relevance of there being no general anti-avoidance provision in the Customs and Excise Act therefore is that the analysis stops at the first stage of *Ben Nevis* with a purposive interpretation of the specific provision in question; in this case with a purposive interpretation of the definition of manufacture.

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9 Fire Service Act 1975, s 48(8) and (9).
10 See ss 53–53A.
11 *Terminals (NZ) Ltd v Comptroller of Customs* [2013] NZSC 139, [2014] 1 NZLR 121 at [39].
12 *Terminals (NZ) Ltd v Comptroller of Customs*, above n 11 (footnotes omitted).

Legislative history

Alignment with earthquake insurance premiums

[14] Until the passing of the Fire Services Amendment Act 1993, the levy was payable pursuant to the terms of the Earthquake and War Damage Act 1944.[13] Under the 1944 Act, the Earthquake and War Damage Commission provided earthquake cover on all property, including commercial property, that was insured under a contract of fire insurance. As the level of earthquake cover was limited to the indemnity value of the property for the purposes of the contract of fire insurance, the premium payable to the Earthquake and War Damage Commission was calculated only on the indemnity value for which the relevant property was covered under the fire insurance contract.[14] There was an obvious logic to that position: in effect the commercial property owner got the level of earthquake cover for which it paid.

[15] Under the 1975 Act as first enacted, the levy was calculated on the amount for which the relevant property was insured against earthquake under the 1944 Act. This meant that the levy, which is a payment in the nature of a tax, was calculated on the same basis as the premium for earthquake insurance, which was more in the nature of an insurance premium. This led to some oddities. In relation to earthquake cover, under-insurance for fire led to lower cover for earthquake. But in relation to the levy, under-insurance for fire did not change the level of service provided by the fire service to the insured party. Similarly, failure to insure against fire meant that the property owner had no earthquake insurance. But failure to insure against fire did not change the availability of the fire service in the event that the property caught fire. This meant that an uninsured or under-insured property owner did not make a fair contribution to the costs of the fire service. There was, and still is, a "free rider" problem.

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[13] Earthquake and War Damage Act 1944, s 14. We will refer to this Act as "the 1944 Act".

[14] The 1944 Act was amended in 1951 to provide for this outcome: see the Earthquake and War Damage Amendment Act 1951, s 2. The reason for this is explained in *AMP Fire and General Insurance Co (NZ) Ltd v The Earthquake and War Damage Commission* (1983) 2 ANZ Ins Cas 60–529 (CA) [the *AMP* case] at 78,020 and *Farmers Mutual Insurance Co Ltd v Bay Milk Products Ltd* [1989] 3 NZLR 647 (CA) at 652–653 per Richardson J.

The AMP case

[16] The respondents' position in relation to split tier policies relied in part on observations made by Cooke J in *AMP Fire and General Insurance Co (NZ) Ltd v Earthquake and War Damage Commission*, a case concerning the interpretation of s 14 of the 1944 Act.[15] Section 14 set out the basis on which premiums payable to the Earthquake and War Commission were calculated and, as noted above, was from 1975 to 1993 the basis on which the levy was calculated under the 1975 Act. Section 48 of the 1975 Act is closely based on s 14 of the 1944 Act.

[17] In the *AMP* case, certain insurers sought declarations on aspects of s 14. The Court of Appeal determined a number of issues in favour of the insurers and made declarations in their favour. Some of these are now reflected in the wording of s 48, but it is not necessary to deal with them in the context of the issues now before us.

[18] Cooke J did, however, make an observation about policies having similar characteristics to the split tier policies under consideration in the present case. We will set out that observation and assess its impact on the case before us later in this judgment.[16]

1993 changes

[19] The Earthquake Commission Act 1993 reflected a change in the policy towards the provision of earthquake cover by the Earthquake Commission (as the Earthquake and War Damage Commission was renamed). Earthquake cover by the Earthquake Commission applied only to residential properties, so that commercial property owners were required to obtain earthquake cover from private insurers. This meant that the regime for the calculation of the levy contained in s 48 of the 1975 Act had to be amended to remove the tie to the level of cover under the 1944 Act.

[20] Section 48 of the 1975 Act was amended to include new subsections (6), (6A) and (6B), which broadly conform with the provisions that currently appear in the

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15 The *AMP* case, above n 14.
16 Below at [57].

1975 Act as amended in 1993. Thus, while there is no longer any direct tie between the level of cover under the relevant earthquake legislation and the levy, provisions of the 1944 Act and decisions made interpreting s 14 of the 1944 Act are important background to the interpretation of the current s 48 of the 1975 Act. The new provisions included in s 48 in 1993 maintained the general policy that the levy should be calculated on the indemnity value of the insured property or the indemnity sum insured, if lower, and that where an insured party had replacement cover, there should be no levy payable in respect of the difference between the indemnity value of the insured property and the replacement value for which it was insured. Section 48(7) of the Act, which was the focus of much of the discussion before this Court, has been included in the Act since 1975 and remained unchanged when these new provisions were added in 1993.

Statutory purpose

[21] Counsel for the Commission, Mr Cooke QC, argued before us that the purpose of s 48 is to calculate a fair contribution to the costs of the fire service for each insured person.

[22] It is important to see the levy raised under s 48 in the context of the Act as a whole. Under s 17O(a) of the 1975 Act, the National Commander of the Fire Service must "make provision in every Fire District for the prevention of fire, the suppression and extinction of fires, and the safety of persons and property endangered by fire". Section 47C allows the Commission to charge for any service or function "other than those provided for in section 17O(a)". So the Fire Service has a statutory obligation to provide certain services to the public, for which it cannot charge. Levies under s 48 are the only method provided by the statute for funding the performance of that obligation. We were told that 97 percent of the Commission's income comes from those levies.

[23] Given the universality of the service provided by the Commission, one would expect a funding mechanism that requires all property owners that benefit from the service to contribute to its cost. But, as Mr Simpson for the respondents pointed out, that is not the case because the policy choice of calculating the levy on the indemnity

value for which fire cover is held tolerates lower levels of contribution to the costs of the running the fire service from under-insured property owners,[17] and no contribution at all from uninsured property owners.

[24] Mr Simpson said it was wrong to proceed on the basis that s 48 determined a fair or reasonable basis for the calculation of the levy. Rather, it allowed an insured party to reduce its exposure to the levy by either under-insuring or failing to insure at all. We agree with Mr Simpson that the tolerance of non-insurance and under-insurance in s 48 means that the levy does not reflect the universality of the service provided by the Commission. However, we think the nature of the levy as a charge for a universally available service is an important feature of s 48. The interpretation of the words of the section must be undertaken having regard to the fact that this section imposes a levy, in the nature of a tax, for the purpose of funding a public service. This is a strong indication that to the extent s 48 can be interpreted to enhance the universality of the levy, that interpretation should be adopted. So read, the section contemplates that the levy will reflect in broad terms the level of fire insurance cover held by the property owner, subject to the qualification that indemnity value is a maximum where the property is insured for more than that.

Reform

[25] The Court of Appeal observed that s 48 had not kept pace with developments in New Zealand in the structuring of fire insurance policies covering commercial properties.[18] It said s 48 was now at "breaking point". It suggested that a legislative response was required.[19] Counsel for the respondent, Mr Simpson, endorsed that view. He noted that the recent report of the Fire Review Panel had recommended a new method of calculating the levy for commercial property, based on the policy premium rather than the amount for which the property is insured.[20] It also

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17 As noted by Cooke J (in the context of a case concerning earthquake insurance under the 1944 Act) in the *AMP* case, above n 14, at 78,022–78,023.

18 *NZ Fire Service* (CA), above n 3, at [7].

19 *NZ Fire Service* (CA), above n 3, at [9].

20 *Report of the Fire Review Panel* (Department of Internal Affairs, Wellington, 11 December 2012) at 77 ("Recommendation 42"). The panel was precluded from considering funding through general taxation as an option: see at 91 ("Appendix 1: Terms of Reference for the Fire Review Panel").

recommended that the levy be payable on all material damage policies, not just fire policies.[21]

[26] Mr Simpson said the imminence of reform meant there was no call for the Courts to bring about change to the status quo in relation to the issues before us. While we agree with the Court of Appeal that reform is necessary, we do not see the fact that changes to the legislation are under consideration as a relevant factor in determining the meaning of the current provision. As Cooke J observed in the *AMP* case:[22]

> In principle the prospect of amending legislation is not necessarily a good reason for refusing to declare the existing law.

[27] The respondents have sought declarations as to the application of the current law to the policies in issue. Having done so, they must expect the Courts will apply the law as they find it to be.

Impact of adverse result on insurers

[28] Mr Simpson said there would be significant practical problems for insurers if the declarations sought in this proceeding were not granted. He said insurers have relied on the position previously adopted by the Commission in not seeking to impose levies on excess of indemnity policies. If the Commission's current position is upheld by this Court, insurers could become liable for levies and penalties in circumstances where they may not be able to recover these sums from insured parties. He said this was a consideration expressly acknowledged by Cooke J in the *AMP* case.[23]

[29] We do not think the Commission's past practice can be a factor in determining the correct meaning of s 48. In any event, as noted by the Court of Appeal, the Commission has indicated that it will not seek to apply payment of levies for policies entered into before any decision that is favourable to it. It will treat any decision as prospective.[24] We see that as answering Mr Simpson's concern.

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21 At 77 ("Recommendation 43").
22 The *AMP* case, above n 14, at 78,019.
23 The *AMP* case, above n 14, at 78,018.
24 *NZ Fire Service* (CA), above n 3, at [6].

Split tier policies

Declaratory relief?

[30] The policies in evidence were standard forms in which the spaces for the specification of the level of cover had not been completed. There was some issue in both the High Court and Court of Appeal as to whether the issues raised in respect of these policies were suitable for declaratory relief. Heath J found they were.[25] There was no appeal against that finding, but the Court of Appeal expressed some concerns and said that, had it been considering the matter at the first instance, it would probably have declined to make declarations in relation to the split tier policies.[26]

[31] In this Court, Mr Cooke did not challenge the finding that declaratory relief was suitable in the circumstances. He did, however, argue that it may be inappropriate to make declarations that would depend on particular facts in circumstances where the policies before the Court were sample policies only. We share the concerns of the Court of Appeal and record that we have found the absence of an example of an actual policy has made it more difficult to deal with the issues relating to split tier policies. The assistance we gained from an understanding of the facts surrounding the NZPC policy demonstrates how significant factual details can be. However, on our approach to the case it is not necessary for us to do more than note that concern. Mr Cooke accepted that there were matters of interpretation on which rulings should be made and we do not consider that there is any insurmountable impediment to our dealing with the arguments that were put to us on these interpretation issues.

Policy terms

[32] The statement of claim filed by the respondents described split tier policies in the following terms:[27]

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25 *NZ Fire Service* (HC), above n 2, at [5].
26 *NZ Fire Service* (CA), above n 3, at [11]–[15].
27 Emphasis in original.

(a) A two tier programme (**Two Tier Programme**) comprising:

(i) a contract of insurance providing material damage insurance cover for all perils for the indemnity value of the insured property, subject to a limit on the sum insured for all claims in the aggregate during the period of insurance (**Indemnity Policy**); and

(ii) a contract of insurance providing material damage insurance cover for all perils for the excess over the indemnity value of the insured property, with or without a limit on the sum insured for all claims in the aggregate during the period of insurance (**Excess of Indemnity Policy**).

…

(c) A composite programme comprising a composite contract of insurance that is subdivided into two … parts, substantially similar to the Two Tier … Programmes, albeit combined in a single contract of insurance (**Composite Programme**).

[33] The statement of claim also described a three tier programme, where the third tier was non-fire insurance for the balance of the indemnity value of the property. However, it was accepted that the Court's decision in relation to the two tier programme would apply equally to the three tier programme. We will not therefore deal any further with the three tier programme, other than to note that the three tier policies highlight that the purpose of such insurance arrangements is simply to reduce the fire service levy that would otherwise be payable.

[34] The sample policies were a Fire (Indemnity) Insurance Policy and a Fire (Excess of Indemnity) Insurance Policy prepared by Aon New Zealand, an insurance broker. We will refer to these as the Aon policies. The terms of these policies were such that either both are in effect or neither is. A clause headed "Underlying Policy" in the excess of indemnity policy made it clear that it is "subject to the same terms, clauses, conditions, and exceptions as [the indemnity policy] other than as varied herein".

[35] The Aon policies did not contain details of the amount of insurance, but the respondents provided the Court with an example which we will adopt for the purposes of our analysis. The example assumes an insurance policy for a portfolio of properties (buildings) having a replacement value of $1 billion and an indemnity

value of $600 million. Under the indemnity policy, the indemnity sum insured is $300 million (that is, half of the actual indemnity value).

[36] We were told that the indemnity sum insured would normally be set at a level that is sufficient to cover the maximum probable loss – that is at a level at or above the actual indemnity value of the most valuable property in the portfolio of properties that are insured under the policy. Assuming the properties are geographically apart, the risk of more than one property in the portfolio being destroyed by fire at the same time is sufficiently remote that there is no practical risk to the insured party in not having cover for the remaining indemnity value of the portfolio given the ability of the insured party to reinstate cover for the undamaged properties after the fire.[28]

[37] The example assumed that the $300 million figure was the indemnity sum insured under the indemnity policy. But the Aon indemnity policy provided to us did not provide for an indemnity sum insured, but rather the following:

> The sum insured for any one loss and all losses in the aggregate during the Period of Insurance under both this and the Insured's Fire (Excess of Indemnity) Insurance Policy is $[ ].

[38] This seemingly anomalous position was the subject of a minute issued by the Court of Appeal after the hearing in that Court.[29] In response to this, the respondents advised that the sum insured clause in the indemnity policy was an unusual one, and that it is more common for the sum insured to be an indemnity sum insured.[30] As the example given by the respondents assumes an indemnity sum insured of $300 million, we will proceed on the basis that the policy in issue provides for this, even though the sample policy provided to us provides otherwise.

[39] The effect of the specification of an indemnity sum insured lower than the indemnity value of the properties is that there is a portion of the indemnity value of

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[28] The Aon policy does not provide for automatic reinstatement so new cover would need to be taken out. It was not clear to us whether such new cover would involve a new policy attracting a levy under s 48.

[29] *New Zealand Fire Service Commission v Insurance Brokers Association of New Zealand Incorporated* CA 56/2013, 5 February 2014.

[30] *NZ Fire Service* (CA), above n 3, at [35].

the properties (in the example, $300 million out of the indemnity value of $600 million) that is not insured.[31]

[40] The Aon excess of indemnity policy makes it clear that it provides cover only for the difference between the actual indemnity value of the properties and the specified replacement value (in this case, between the $600 million indemnity value and the $1 billion replacement value). The relevant clause provides as follows:

> This 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 [indemnity policy] due to the existence of a limit on the sum insured in that policy.

[41] Again, the sum insured clause in this policy is a combined clause (essentially mimicking the clause that appears in the indemnity policy reproduced above at [37]). However, we will adopt the position outlined in the respondents' example, namely that the excess of indemnity policy has an excess of indemnity sum insured of $400 million (being the difference between the $600 million indemnity value and the $1 billion replacement value).

[42] Bringing all this together, the position is that the indemnity policy provides for cover of $300 million, $300 million of the indemnity value is uninsured, and the excess of indemnity policy provides for cover of $400 million, but only to cover the difference between the indemnity value and the replacement value (that is, it provides no cover in respect of the $300 million uninsured portion of the indemnity value).

[43] As mentioned earlier, the statement of claim seeks declarations in respect of both composite policies (including sections dealing with indemnity cover and excess of indemnity cover) and separate policies for indemnity cover and excess of indemnity cover. Although the Aon policies were separate policies, it is convenient to begin the analysis on the assumption that there is a composite policy before turning to the position that would apply in the event that there are two separate policies.

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31 Subject to the practical reality described above at [36].

Computation of the levy on the facts in the example

[44] The levy is imposed on the insurer with whom a property is insured under a "contract of fire insurance".[32] The definition of that phrase in s 2 of the 1975 Act makes it clear that it encompasses fire policies of all types, whether providing indemnity cover, replacement cover or any other type of insurance cover against loss or damage from fire. Where the insured property is property other than a motor vehicle, the levy is computed on the "amount for which the property is insured".[33] In the example given by the respondents, this amount is $700 million. If there were no s 48(6) and no s 48(7), the levy would be calculated on that amount.

[45] More detail about the meaning of the phrase "amount for which the property is insured" is given in s 48(6). In relation to non-residential property, s 48(6)(c) and (d) provide detail of how to calculate the "amount for which the property is insured" in certain limited circumstances. Section 48(6)(c) applies in the following circumstances:

(a) Where the insurance contract provides for 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";

(b) Where there is no sum insured in the insurance contract.

[46] In either of those events, the "amount for which the property is insured" must be computed on the basis of the indemnity value of the property.

[47] There is no definition of "indemnity value" in the 1975 Act, but the Court of Appeal accepted the respondents' definition:[34]

> The term "indemnity value" means the depreciated replacement cost of insured property, or its current market value, depending on the nature of the property and the purpose for which it is held by the insured.

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32 Fire Service Act, s 48(8).

33 Section 48(2)(b)(i). Under cl 2(b)(i) of the Fire Service Levy Order 1993, the rate of the levy in relation to property other than motor vehicles is 7.6 cents for every $100 of the amount for which the property is insured under the contract of fire insurance.

34 *NZ Fire Service* (CA), above n 3, at [5].

[48] Mr Cooke did not contest this. He noted that it is a concept reflecting an insured party's actual loss if the insured property is destroyed. He said this was the basis of the calculation of the levy because it represented what was actually at stake in the event of a fire. It would be unfair to make an insured person pay a levy on any insurance above that level. Mr Cooke also stressed that for the purposes of s 48, indemnity value must be "fair and reasonable". Mr Simpson accepted that. We agree with the Court of Appeal's definition and adopt it.

[49] For the purposes of s 48(6)(c), the indemnity value is ascertained either by a declaration signed by the owner of the property to the effect that the declared value is "fair and reasonable", or a valuation certificate given by an appropriately qualified expert that establishes clearly the indemnity value of the property for the purposes of the levy. Section 48(6B) provides for the situation where the Commission does not accept the indemnity value declared by the owner as "fair and reasonable" and allows for a method of resolving disputes.

[50] Where the indemnity value cannot be established under s 48(6)(c), the "amount for which the property is insured" will be computed on the sum insured as specified on the contract or, if no such sum is specified, in a manner to be determined by the Commission.[35]

[51] The upshot of all this is that in respect of commonly available policies, the following computations of the levy will apply:

(a) Where the property is insured only under an indemnity policy that specifies a sum insured, the levy will be computed on the sum insured in the policy, even if that is below the true indemnity value of the insured property;

(b) Where the property is insured only under a policy that does not specify a sum insured, the levy will be computed on the indemnity value of the property determined under s 48(6)(c) (or s 48(6B) if the Commission disputes a declaration of value given under s 48(6)(c)(i));

[35] Fire Service Act, s 48(6)(d).

(c) Where the property is insured under a policy that provides for cover greater than the indemnity value, such as a replacement policy, the levy will be computed on the indemnity value determined under s 48(6) (and s 48(6B), if there is a disputed declaration); and

(d) However, if the insured person under a policy of the kind described in [51](c) does not provide a declaration or valuation certificate under s 48(6)(c), the levy will be computed on the sum insured in the policy, if there is one, or otherwise in a manner determined by the Commission. That creates an obvious incentive for the property owner to activate the mechanism in s 48(6)(c) to avoid having to pay the levy at too high a level.[36]

[52] In the present case, the respondents' case is that [51](a) above applies, because the Aon Fire (Indemnity) Insurance Policy alone is relevant for the purpose of s 48 and it is a policy of the type described in [51](a) above. The Commission's case is that, taken together, the Aon policies come within [51](c) above (because they provide for cover greater than the indemnity value) and so the levy should be calculated on the indemnity value of the insured property as determined under s 48(6)(c) (and s 48(6B)) or, if the insured does not provide a declaration or valuation as contemplated by s 48(6)(c), on the combined sums insured in the indemnity policy and the excess of indemnity policy.

[53] Section 48(7) is a key provision in the present dispute. As the Court of Appeal pointed out, there is an apparent ambiguity in the wording of the provision, because the words "or portion thereof" could refer back to the value of the property or to the contract of fire insurance.[37] Those words were inserted by a 1986 amendment to the 1975 Act. The Court of Appeal concluded that the words referred back to "contract of fire insurance". The Court came to that conclusion by making an inference that the words "or to any portion thereof which is in excess of the indemnity value" were added in consequence of the Court of Appeal's judgment in

[36] As noted in the *AMP* case, above n 14, at 78,022.
[37] *NZ Fire Service* (CA), above n 3, at [25].

the *AMP* case.[38] We agree with the Court of Appeal that s 48(7) should be read as if it provided:[39]

> This section shall not apply to any contract or to any part of a contract of fire insurance that is limited to an excess over the indemnity value of the property.

Scope and meaning of s 48(7)

[54] The parties to the appeal take diametrically opposed views about the scope and meaning of s 48(7). The area of disagreement between the parties arises in relation to the uninsured element of the indemnity value of the property. The difference between the parties is best expressed diagrammatically. Table A sets out the respondents' case, while Table B sets out the Commission's case. We will explain the difference between them by reference to those tables.

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[38] The *AMP* case, above n 14, at 78,021.

[39] *NZ Fire Service* (CA), above n 3, at [25].

Table A
Respondents' case

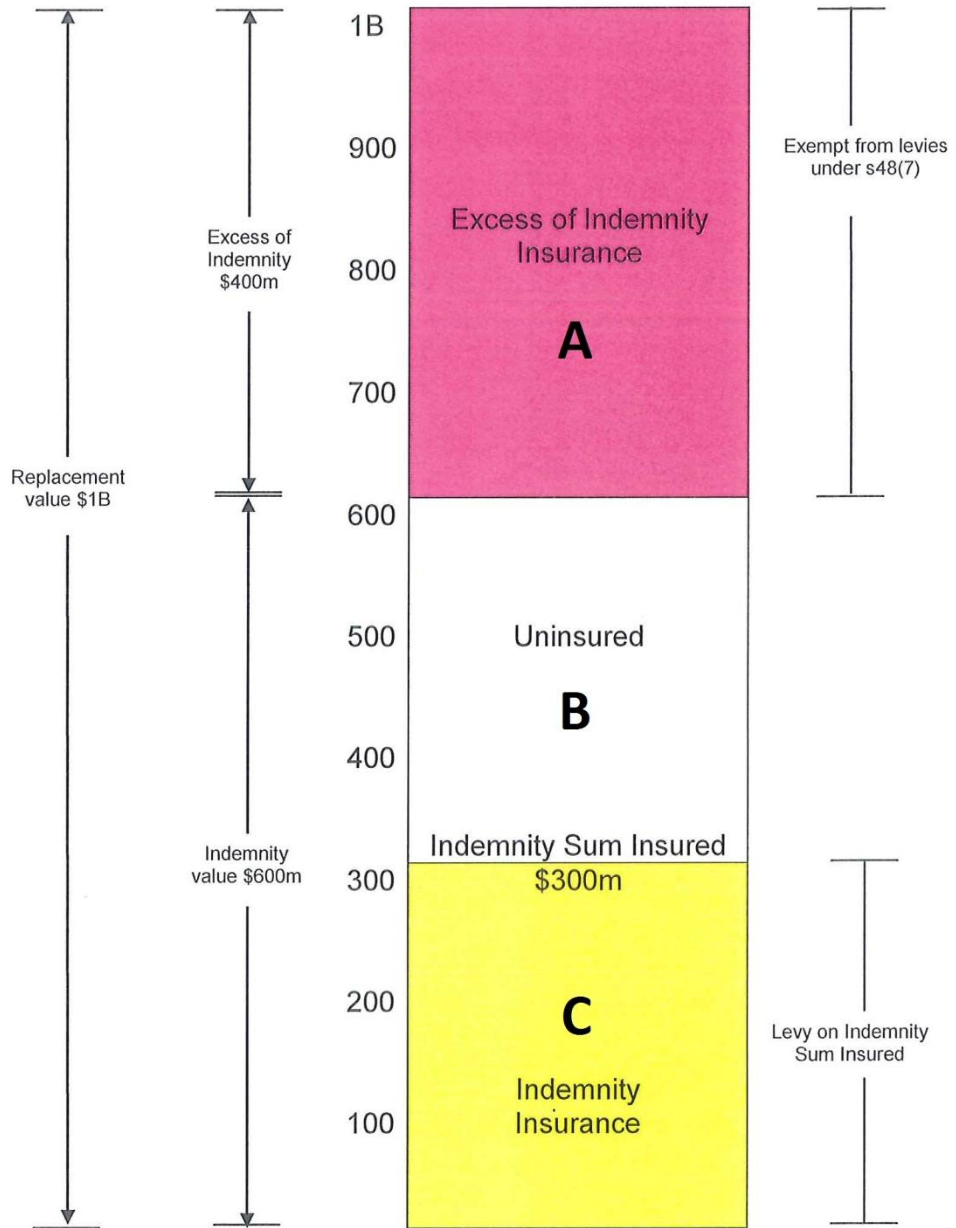
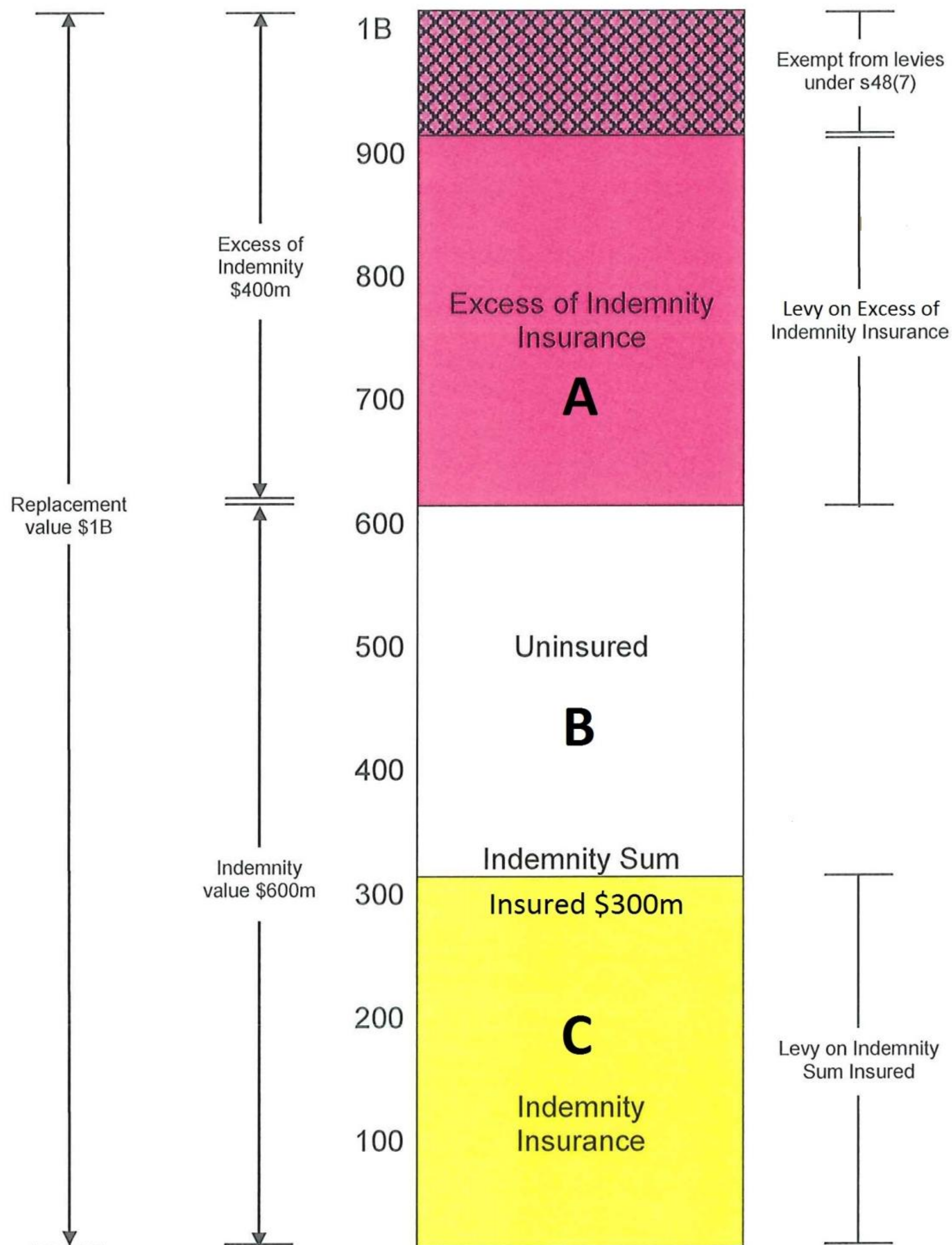


Table B
Commission's case



[55] The respondents say that the excess of indemnity cover (area A [pink] in the table) is, in the words of s 48(7), "limited to an excess over the [$600 million] indemnity value of the property" (both areas B and C [white and yellow] in the example). So, in the words of s 48(7), s 48 "shall not apply" and the excess of indemnity cover is irrelevant for the purposes of computing the levy.

[56] The Commission says the $300 million indemnity insurance (area C [yellow] in the tables) and the $400 million excess of indemnity insurance (area A [pink] in the tables) together provide for cover of $700 million, which exceeds the $600 million indemnity value of the property (areas B and C [white and yellow] in the tables) by only $100 million (the cross-hatched part of area A [pink] in table B). As the only portion of the contract of insurance that exceeds the indemnity value is $100 million, only the cover for that $100 million "shall not apply" under s 48(7). Thus the levy should be computed on the indemnity value of $600 million. This is because the combined effect of the indemnity policy and the excess of indemnity policy is that they provide "for the settlement of any claim for damage to or destruction of the property upon [a] basis more favourable to the insured person than its indemnity value" and thus the computation of the levy falls to be made under s 43(6)(c), and not under s 48(6)(d)(i). We will revert to this argument later.

[57] Mr Simpson relied on an obiter observation by Cooke J in the judgment of the Court of Appeal in the *AMP* case about the meaning of s 14(2B) of the 1944 Act, which was in similar form to s 48(7) of the 1975 Act. That observation was:[40]

> 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 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 sec. 14(2B). It seems unlikely that 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 between the limit in his indemnity policy and the actual value of the property destroyed or damaged. The kind of contract which Parliament meant to take altogether out of the scope of the section, by sec. 14(2B), is much more likely to have been simply a contract purporting to give cover in excess of the amount of indemnity insurance.

[58] As noted by the Court of Appeal in the present case, the "kind of contract" referred to by Cooke J is of the same kind as the Aon excess of indemnity policy.[41]

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40 The *AMP* case, above n 14, at 78,022.

41 *NZ Fire Service* (CA), above n 3, at [42].

[59] Cooke J's observation would, if correct, provide an even more favourable outcome for the respondents than they contend for in the present case. It would allow for a separate excess of indemnity policy that provides insurance for both the area B [white] and area A [pink] in the example to be excluded for the purpose of calculating the levy under s 48(7).

The respondents' propositions

[60] In support of the respondents' case (and consistently with the decision of the Court of Appeal), Mr Simpson put forward six propositions which, he said, substantiated the respondents' case. We will set these out and give our views on them.

[61] Proposition one is that the 1975 Act imposes a levy on the amount for which the property is insured under a contract of fire insurance, not the value of the property subject to the fire insurance contract. So, for example, if the only policy insuring a property worth $1 million against fire damage or destruction provides for an indemnity sum insured of $500,000, there would be no need to resort to s 48(6)(c) and the computation of the levy would be based on the sum insured, in accordance with s 48(6)(d)(i). Since the amount for which the property is insured is $500,000, that is the figure on which the levy would be computed. We agree.

[62] Mr Simpson said this was "the amount for which the property is insured" in terms of s 48(2)(b)(i) and cl 2(b)(i) of the Fire Service Levy Order 1993, which provides that the levy for commercial property will be 7.60 cents per $100 of "the amount for which the property is insured".

[63] Mr Simpson said that this is the situation that arises in the present case, because the contract of insurance under which indemnity cover is provided has neither of the features described in s 43(6)(c). If that were the only insurance in relation to the property, we would agree with that. As mentioned earlier, s 48 tolerates under-insurance, in that it does not seek to impose a levy based on the underlying value of the insured property but only on the amount for which it is insured.

[64] We did not understand Mr Cooke to disagree with any of this, but the difference between the parties arises once the excess of indemnity insurance is brought into play, as outlined above.

[65] Proposition two is that the 1975 Act allows a party to limit its liability for the levy by reducing the amount for which the property is insured, for example by incorporating a sum insured into the contracts of fire insurance which is an amount that is lower than the cumulative indemnity value of the insured property. As noted at [61] above, we accept that proposition.

[66] Proposition three is that the 1975 Act includes concessions that limit the liability for the levy to the quantum of indemnity value insurance, thereby removing any liability for the levy on excess of indemnity insurance. If the excess of indemnity insurance is in a separate policy or separate part of a policy, it is exempt from the levy by s 48(7). If not, s 48(6)(c) provides that a declaration or valuation must be provided to enable the quantum of indemnity value insurance to be separately quantified and the levy is then computed on the indemnity value, the remainder being exempt. We accept that the first sentence of this proposition is correct, assuming that the reference to quantum of indemnity value insurance refers to insurance for the true indemnity value. We accept that no levy is charged on excess of indemnity insurance to the extent that it provides cover over and above insurance for the true indemnity value, though that results as much from applying s 48(6)(c) as it does from s 48(7). We accept the third sentence is correct. So we agree with this proposition subject to the above qualifications. But it does not greatly assist the resolution of the matter at issue in this case, where a proportion of the indemnity value remains uninsured.

[67] Proposition four is that indemnity value is an objectively quantifiable value that cannot be limited by the property owner or insurer incorporating a sum insured into a contract for insurance. There was no dispute about this and we accept it is correct.

[68] Proposition five is that to qualify for the exemption in s 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 the indemnity sum insured in an indemnity policy. If excess of indemnity insurance in truth provides an element of indemnity cover, then to this extent the exclusion in s 48(7) does not apply and the levy is payable on that component of the cover. Again, there was no dispute that that is a correct statement.[42]

[69] Proposition six is that although in some circumstances the 1975 Act (and the Fire Service Regulations 2003) require that indemnity value declaration certificates or returns specify the indemnity value of the insured property, these provisions do not apply to the policies in issue in this case. Whether that proposition is correct depends on the answer to the essential issue in this appeal. We will now turn to that issue.

Application of s 48(6)

[70] Mr Cooke argued that the levy in the example had to be determined under s 48(6)(c), because the indemnity cover and excess of indemnity cover provide for the settlement of the claim for damage or destruction of a property on a basis that is more favourable than its indemnity value (that is, the combined cover of $700 million exceeds the indemnity value of $600 million). Accordingly, the mechanism for determining indemnity value under s 48(6)(c) and s 48(6B) must be applied. He said the respondents were wrong to say that the levy could be determined under s 48(6)(d)(i) on the indemnity sum provided for in the contract for indemnity insurance. He pointed out that s 48(6)(d) applied only "where the indemnity value cannot be established under paragraph (c)". That, he said, was not the case here, because paragraph (c) clearly applied. This, he said, was consistent with the general approach to the setting of the levy that it be calculated on a basis reflecting the indemnity value insured but not any greater amount.

[71] Mr Simpson argued that the Commission's approach was inconsistent with the Court of Appeal's decision in the *AMP* case. In that case, the Court of Appeal, in the course of interpreting s 14 of the 1944 Act, which was in similar form to the relevant provisions of s 48, accepted a submission on the part of AMP and other

[42] Though as mentioned above at [59], it is inconsistent with the *AMP* case, above n 14. It is also inconsistent with *NZ Fire Service* (HC), above n 2, at [51].

insurance companies that "indemnity value" meant "the indemnity value up to a maximum of the figure, if any, nominated in the fire insurance contract". The Court continued:[43]

> 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 sec. 14(1). The earthquake and war damage premium will accordingly fall to be computed on that amount … Any contract or part of a contract limited to an excess over that amount will be altogether outside the scope of sec. 14, by virtue of sec. 14(2B).

[72] Mr Simpson said that s 48(6)(c) did not apply to the policies at issue in this proceeding. Rather, that paragraph provided levy payers with a concession for contracts of fire insurance that provide cover on terms more favourable than indemnity insurance (such as replacement insurance) where there is no sum insured. In that event, the levy payer can limit its liability for the levy to the indemnity value by providing declarations or valuation certificates under s 48(6)(c). But it does not have to do this. An alternative course of action is to include a sum insured in the policy and pay the levy on that sum under s 48(6)(d)(i). In the present case, there are no valuation certificates or declarations, and the levy falls to be determined under s 48(6)(d)(i).

[73] Mr Simpson said that focus of the 1944 Act was on indemnity insurance and, in relation to the levy, on the levy being limited to the level of indemnity insurance against earthquake damage provided by the Earthquake and War Damage Commission. The levy was computed on the same basis, and the focus on indemnity insurance in s 48 remains to this day. Having regard to that, it was appropriate to treat s 48(7) as excluding excess of indemnity insurance from the levy calculation altogether and apply s 48(6) to the indemnity aspect of the fire insurance contract only.

[74] That argument proceeds on an assumption that s 48(7) essentially overrides the earlier subsections of s 48, so that all references in those earlier subsections to "contract of fire insurance" have to be read as "all contracts of fire insurance except

[43] The *AMP* case, above n 14, at 78,022.

contracts of fire insurance limited to an excess over the indemnity value of the property". Section 48(7) does not say it overrides those earlier subsections in that way and the earlier subsections do not say they are to be read subject to s 48(7).

[75] If one does not read s 48(6) as being subject to s 48(7) and the calculation of the levy is approached on the basis that the cover under both elements of the composite policy is included, then the "sum insured" under s 48(6)(d)(i) in the example amounts to $700 million, which is in excess of the indemnity value of $600 million.[44] The "concession" provided for in s 48(6)(c) would then come into play, reducing the amount on which the levy is computed to the fair and reasonable indemnity value of the property subject to the insurance policy, namely $600 million.

[76] The Court of Appeal accepted that this analysis would be correct, but for s 48(7).[45] However, it concluded that s 48(7) required that the excess of indemnity policy be ignored for the purposes of the calculation of the levy. Thus, it accepted that the "sum insured" referred to in s 48(6)(d)(i) had to be read as being limited to the sum insured specified in the indemnity policy only.[46]

[77] In our view, that analysis misunderstands the effect of s 48(6)(c). There is no doubt that a composite indemnity and excess of indemnity policy providing cover at the levels set out in the example provides for a settlement (of, in aggregate $700 million) on a basis more favourable than indemnity value ($600 million). Thus, on the plain meaning of the words of s 48(6)(c), that paragraph applies and the levy is calculated on $600 million. In contrast to that, s 48(6)(d) applies only where the indemnity value cannot be established under paragraph (c). As the indemnity value can be established under paragraph (c), paragraph (d) does not apply.

[78] In our view, that is the correct interpretation of s 48(6)(c). We do not consider that the interpretation is displaced by s 48(7). Section 48(7) applies only where the contract of insurance is limited to an excess over the indemnity value of the property. Since the term "indemnity value" mirrors the use of that term in

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44 As the Aon policies say: see above at [37] and [41].

45 *NZ Fire Service* (CA), above n 3, at [37]. The Court mistakenly said the levy would be computed on $700 million, but under s 48(6)(c) the levy would have been on the indemnity value ($600 million in the example).

46 At [39].

s 48(6)(c), it must be taken to have the same meaning as in that provision. In the example, the indemnity value as calculated in accordance with s 48(6)(c) is $600 million, and s 48(7) therefore engages only in respect of the excess over that amount (in our example, the difference between the $600 million indemnity amount and the total insurance under the two policies of $700 million). That is the "excess over the indemnity value" to which s 48(7) applies.

[79] Mr Simpson accepted in the respondents' proposition five that the term "indemnity value" in s 48(7) meant the actual indemnity value, that is the $600 million figure in the example. The relevant provisions of the Aon excess of indemnity policy make it clear that the policy covers only that excess. He argued that the Commission's interpretation effectively required the Court to read down s 48(7) so that it applied only where the insured party has indemnity insurance for the full indemnity amount when s 48(7) does not include such a requirement. That argument was accepted by the Court of Appeal, which said that the Commission's interpretation would effectively read into s 48(7) the words "provided the property is insured against fire for its full indemnity value". This, the Court said, would impermissibly re-write s 48(7).[47] The Court considered that the Court of Appeal judgment in the *AMP* case supported this interpretation.

[80] We do not think that concern is justified. The Commission's interpretation does not require reading words into s 48(7), but rather reflects that the calculation already made under s 48(6) has framed the interpretation of s 48(7). Once it is accepted that two elements of the policy taken together can trigger the liability to a levy calculated under s 48(6)(c), the only relevance of s 48(7) is to deal with the situation where the combined cover under the two elements of the policy exceeds the indemnity value that has been calculated under s 48(6).

[81] Nor do we see this case as controlled by the *AMP* case. As mentioned earlier, that was a case about earthquake insurance where the premium paid was matched by the level of cover obtained from the Earthquake and War Damage Commission. The Court of Appeal in that case contemplated a combination of policies of a kind now before the Court and expressed the view that it would be unlikely that such policies

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47 *NZ Fire Service* (CA), above n 3, at [40].

would be commonly issued.[48] It said that the kind of contract which was meant to be excluded from the scope of s 14 of the 1944 Act by s 14(2B) (the equivalent of s 48(7)) "is much more likely to have been simply a contract purporting to give cover in excess of the amount of the indemnity insurance".[49]

[82] Mr Simpson said the Commission's interpretation made s 48(7) redundant, because s 48(6) did all the work. We accept that applying s 48(6) as we have done provides an answer to the question "what levy is payable?" without the need to refer to s 48(7). But the converse is true. If Mr Simpson's approach is adopted, s 48(6) becomes effectively redundant because, if the excess of indemnity aspect of the insurance is omitted from the exercise, one is left with indemnity insurance only – and it is hard to imagine the indemnity insurance could be for more than the indemnity sum. Section 48(6)(c) would come into play only where there is replacement insurance with no differentiation of indemnity and excess of indemnity. The enactment of s 48(6) in 1993 notwithstanding the existence of s 48(7) lends weight to the conclusion that the former takes precedence over the latter. This also gives better recognition to the purpose of setting the levy on a basis reflecting the property owner's level of insurance cover, bearing in mind that the structure adopted in the example does not, in reality, provide a lower level of protection for the property owner.[50]

[83] To the extent that the *AMP* case supports the respondents' case, it is an obiter comment that predates the enactment of s 48(6)(c) and, in any event, is not binding on us. We consider that the interpretation we have set out above properly reflects the words of the section, and if anything the statutory history and the legislative purpose support this interpretation of those words.

[84] We also consider this interpretation best reflects the universality objective referred to earlier.[51] It provides for the levy to be computed on a basis that reflects the extent to which the property of the insured party is covered for loss or damage

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48 The *AMP* case, above n 14, at 78,022.
49 At 78,022.
50 See above at [36].
51 Above at [22]–[23].

from fire. It ensures that the free rider problem does not apply to the insured party under the Aon policies.

What if the sums insured do not exceed the indemnity value?

[85] We are aware that in many cases the sums insured under the indemnity policy and excess of indemnity policy do not exceed the indemnity value. Such cases differ from the example, where the combined sums insured ($700 million) do exceed the indemnity value ($600 million). We do not consider that any different analysis is required in such cases. If the combined sum (or sums) insured do not exceed the indemnity value, then s 48(6)(d)(i) will apply and the levy will be computed on the basis of the combined sum (or sums) insured.

What if there are separate indemnity and excess of indemnity policies?

[86] Our analysis so far has assumed that the indemnity cover and excess of indemnity cover is provided in a single policy. In some cases (including the Aon policies to which we have referred earlier), there are two separate policies for indemnity cover and excess of indemnity cover respectively. We now consider that situation.

[87] The Commission's argument requires that the indemnity policy and the (separate) excess of indemnity policy be treated as one contract of insurance for the purposes of s 48. The Court of Appeal said the respondents accepted that it was appropriate to do this.[52] Mr Simpson said that was not correct: the respondents' position was then, and remains, that this would depend on the facts of the particular case. However, Mr Simpson accepted that the resolution of the issue raised in the statement of claim would be the same whether there were two policies or one.

[88] Mr Simpson said there would be practical difficulties if the normal approach of "singular includes plural" were adopted in the present context.[53] These problems would arise in respect of policies covering motor vehicles of less than 3.5 tonnes

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[52] *NZ Fire Service* (CA), above n 3, at [26].

[53] Interpretation Act 1999, s 33.

weight, which are subject to a fixed levy.[54] Similar issues will arise in respect of policies covering residential buildings and personal property, where the levy will be computed on the amount for which the property is covered under the Earthquake Commission Act 1993.[55]

[89] He put forward the following example in relation to motor vehicles. If a vehicle fleet were insured under an indemnity policy with an indemnity sum insured, the levy is payable at a fixed rate on each vehicle subject to the policy. If the fleet owner also took out excess of indemnity cover under a separate policy, s 48(2)(a) would apply to that policy also, and another fixed levy on each vehicle subject to the policy would become payable. That consequence would be avoided if the respondents' approach to s 48(7) were adopted, because the excess of indemnity insurance would be ignored altogether.

[90] We do not find this convincing. The scenario ignores the fact that the problem is said to arise from treating references to a contract of fire insurance as including reference to two or more contracts of fire insurance. If that approach is taken to the interpretation of s 48(2)(a), the double levy problem does not arise: the levy is imposed on a per motor vehicle basis on any motor vehicle that is insured, whether it is insured under one policy or two.

[91] We do not see any reason to displace the maxim that the singular includes the plural when interpreting s 48. We note that s 48(7) refers to a contract or portion of a contract: that appears to be providing a regime for excess of indemnity cover whether included in a policy also providing indemnity cover or in a separate excess of indemnity policy. We consider that the s 48 levy will be the same whether the overall indemnity/excess of indemnity insurance package is contained in one policy or two. We see that approach as consistent with that adopted by the Court of Appeal in the *AMP* case.[56]

[92] The Aon policies were clearly interlinked and so this approach would not have given rise to any difficulty for the insurer in calculating the levy. We

[54] Fire Service Act, s 48(2)(a).
[55] Section 48(6)(a) and (b).
[56] The *AMP* case, above n 14, at 78,020.

acknowledge there could be some practical problems if the insurer under the indemnity policy was a different entity from the insurer under the excess of indemnity policy. We doubt that this would arise often, given the clear link between the two policies and the consequent likelihood that the same insurer or insurance broker will be involved in the arranging of the insurance package.

Conclusion: split tier policies

[93] We conclude therefore that the declaration in the form issued by the Court of Appeal ought not to have been made, and we therefore set it aside. The Commission did not seek any alternative declaration and none is required.

New Zealand Ports Collective policy

Policy terms

[94] The essential features of the NZPC policy were:

(a) The policy was an indemnity/excess of indemnity policy, similar to the Aon policies discussed earlier (except that the cover for indemnity and excess of indemnity was provided in the same policy).[57]

(b) The policy provided cover of $250 million for fire damage (indemnity) and $500 million for fire damage (excess of indemnity). The policy provided that the sum insured in the excess of indemnity section of the policy was reduced by the amount payable under the indemnity section so the total liability of the underwriters did not exceed $500 million per event. The sums insured applied to losses incurred by "all Insureds collectively". The sections of the policy dealing with damage by fire (excess of indemnity) and damage other than by fire provide for automatic reinstatement of cover after an event of loss. There was no such provision in the section dealing with damage by fire (indemnity).

[57] It also included non-fire cover and business interruption cover but it was not accepted by the parties that these have no relevance to the issue in dispute.

(c) The names of the eight port companies appeared under the heading "the Insured".[58] It was also specified that "Each Insured" included any subsidiary of a named Insured that was majority owned or controlled by the Insured.

(d) Immediately after the list of the eight port companies (and the wording including their respective subsidiaries) was set out, the following clause appeared: "This Policy is to be interpreted as if the Policy were issued separately to each of the Insured for their respective rights and interests".

(e) The definition of "The Business" was "All business of whatever kind conducted by the Insured". As NZPC had no business and there was no business that was collectively owned by the port companies, it is clear that this reference to "the Insured" in this provision is a reference to an individual port company, building on the wording mentioned at (d) above.

(f) There were differing indemnity periods for each Insured (some 18 months and some two years).

(g) Some additional clauses applied to individually named port companies only.

(h) The operative clause began: "In consideration of the Insured having paid or promised to pay the required premium … the [Insurer] agrees to indemnify the Insured …". As NZPC had no insurable assets, the second reference to "the Insured" must be taken as a reference to each named Insured separately, again applying the wording mentioned at (d) above. The term "required premium" is not defined.

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58 South Port New Zealand Ltd, Eastland Port Ltd, Lyttelton Port Company Ltd, Port of Napier Ltd, Port Nelson Ltd, Port Marlborough New Zealand Ltd, CentrePort Ltd and Ports of Auckland Ltd.

(i) The evidence was that the premium was calculated by the second respondent as the lead underwriter by taking the premium payable by each individual port company in the period before the NZPC arrangement was implemented and applying a discount of 20 per cent for some port companies and 12.5 per cent for others.[59] In the case of three port companies, there were adjustments to the premium allocated to them because they chose to purchase some extensions to the cover otherwise provided under the policy. These individual premiums were then aggregated into a total premium, which was invoiced as a lump sum by the broker acting for the NZPC to "The Port Collective". The broker simultaneously issued eight separate invoices to the port companies for each port company's share of the total premium, being the amount attributable to that port company in the premium calculation as outlined above. Obviously the broker was not demanding payment of the premium twice and, given "The Port Collective" had no resources, it can be inferred that the separate invoices to each port company were the invoices in respect of which actual payment was sought.

(j) Although the policy was expressed to be a single policy, a special protection was included in relation to fraud, misrepresentation and the clause making performance by the Insured of its obligations under the policy a condition precedent to the liability of the insurer. In essence, the fraud provision provided that any benefit obtained under the policy by fraud would be forfeited, but for the purpose of this provision "each of the Insured … will be treated as having been issued with a separate policy". This made it clear beyond argument that fraud by one port company did not affect any other port company, though given the generic wording mentioned at (d) above, that would appear to have been the case anyway. The misrepresentation and condition precedent clauses had similar wording.

[59] The lower discount applied to those port companies that opted for lower deductibles for non-fire cover than those initially offered by the second respondent.

(k) The cancellation clause provided for cancellation by the Insured as follows: "The Insured may cancel this Policy … by giving written notice to the [insurer]".

[95] There was no evidence as to the aggregate indemnity value of the assets of all eight port companies, but it is clear that it is substantially greater than the limit of indemnity cover under the policy.[60]

Issues

[96] The declaration issued in the High Court and confirmed in the Court of Appeal deals with two separate issues in relation to the NZPC policy. The first is whether one levy is payable in respect of the policy, or eight separate levies. The second is whether any levy that is paid is calculated on the indemnity sum insured or some other basis.

[97] In relation to that second issue, the conclusion we have reached in relation to split tier policies applies equally to the NZPC policy.

[98] That leaves the question of the number of levies payable in relation to this policy. The Commission's position is that each port company is separately insured and therefore is required to pay a levy in accordance with s 48.

[99] If each port company is required to pay a levy, the question that would then need to be answered would be the basis on which that levy would be calculated. The Commission's position in the High Court and the Court of Appeal appeared to be that each port company would have to pay a levy based on the indemnity sum insured of $250 million.[61] That was rejected by both Courts and was not pursued in this Court.

[100] The Commission's position now is that a calculation would be required in relation to each port company. Those with insured property having an indemnity

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60 A schedule attached to the placing slip for the policy gave a replacement value for the assets of $2.3 billion.

61 *NZ Fire Service* (CA), above n 3, at [77].

value of less than $250 million (the indemnity sum insured) would pay a levy based on the indemnity value under s 48(6)(c). Those with insured property having an indemnity value of between $250 million and $500 million would also pay a levy based on the indemnity value, on the basis outlined earlier in this judgment. Those with insured property having an indemnity value of greater than $500 million would pay a levy based on the sum insured ($500 million) under s 48(6)(d)(i).

[101] The Commission argues that each port company is liable to pay a levy on alternative bases:

(a) The Commission says s 48 requires that the levy be paid on a per owner basis, rather than a per contract of insurance basis;

(b) In the alternative, the Commission argues that the NZPC policy is not a single composite policy but, rather, eight separate policies, each attracting the liability to pay the levy under s 48.

Levy on a per owner basis?

[102] Mr Cooke argued that s 48 imposes the obligation to pay the levy on an owner by owner basis. He pointed to the fact that the term "owner" is expressly used in s 48(6)(c)(i), 48(6B), 48(6B)(b) and 48(6B)(c). He argued that this interpretation corresponds with the purpose of s 48, namely the seeking of a fair contribution to the Fire Service through the levy as between owners of properties benefiting from those services. In support of this argument Mr Cooke also referred to other provisions of the Act. In particular:

(a) sections 49–49B deal with the situation where the owner of the property is based overseas;

(b) section 50 then prescribes the date when the owner of the property must pay the levy; and

(c) section 51 provides that the Commission may audit the owner's books.

[103] For the respondents, Mr Friar argued that it is clear from s 48(1) and 48(2)(b)(i) that the levy under s 48 is calculated in relation to property insured under a contract of fire insurance. So the levy regime requires the levy to be paid for each contract of insurance, rather than each owner of property. He noted that the definition of "contract of fire insurance" in s 2 of the 1975 Act simply refers to "an agreement whereby any property is insured against loss or damage from fire …", and does not limit this concept to a single owner.

[104] Mr Friar argued that the references to "owner" in ss 49–51 are of no assistance because those sections are dealing with the levy that is payable by an owner, whereas the levy under s 48 is payable by the insurance company, and then recovered from the "insured person" under s 48(9). It is notable that s 48(9) which is the provision that imposes the ultimate liability on the customer of the relevant insurance company, does not use the term "owner", but instead refers to "the insured person".

[105] We agree with Mr Friar that the scheme of s 48 is to impose an obligation on the insurance company under any contract of fire insurance to pay the levy to the Commission. The levy that is payable is computed under the following provisions of s 48 but the general scheme is that the levy is computed on the amount for which the property is insured for the period of the contract of fire insurance. This indicates that the levy is payable in respect of the fire insurance contract (or contracts) under which the property is insured, rather than in respect of each owner. We accept that s 48(6)(c) and (6B) refer to "owner", but we do not see that as indicating that the levy is a "per owner" levy.

[106] We accept Mr Friar's submission that the levy payable under s 48 is a levy payable in respect of the contract or contracts of insurance under which property is covered, and not a "per owner" levy. That leads us to the key issue in relation to this aspect of the case: should the NZPC policy be regarded as a single contract for the purposes of s 48 or as separate contracts for each of the eight port companies?

Is there more than one insurance contract?

[107] The argument about this aspect of the case requires us to address whether the NZPC policy is a single policy or a series of separate policies that have been included in a single document. It was accepted by both parties that the insurance for the eight port companies, each having separate insurable interests in its own property, was contained in a single policy document under which each port company was insured for its individual losses. The dispute centres on whether that policy is, in truth, a single, composite policy or a series of separate policies.

[108] The term composite policy derives from the judgment of Sir Wilfrid Greene MR in *General Accident Fire and Life Assurance Corp Ltd v Midland Bank Ltd*.[62] He contrasted a policy under which joint owners of a property obtain insurance cover for that property with a policy under which a number of persons with different interests in the insured property obtain insurance for their separate interests in the property. The former is joint insurance. The latter he described as follows:[63]

> Such a policy, in my judgment, may be more accurately described as a composite policy, because it comprises, for reasons of obvious convenience, in one piece of paper the interests of a number of persons whose connection with the subject matter of the insurance makes it natural and reasonable that the whole matter should be dealt with in one policy.

[109] The question of whether a composite policy comprises a single contract or a number of separate contracts was not addressed in *General Accident*. But it was addressed by Gaudron J in *Federation Insurance Ltd v Wasson*.[64] She contrasted a contract involving separate obligations owed to and by different persons, which she said involved several different contracts, and such a contract where some promises are joint and other promises in the same contract are several, in respect of which she said “there is but one contract”.[65]

[110] Following that approach means there are three categories of insurance contracts. These are joint policies, composite policies and separate policies. The

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62 *General Accident Fire and Life Assurance Corp Ltd v Midland Bank Ltd* [1940] 2 KB 388 (CA).
63 At 405.
64 *Federation Insurance Ltd v Wasson* (1987) 163 CLR 303.
65 At 319.

issue on this aspect of the case is whether the NZPC policy is in the second or third category, that is whether it is a single composite policy or a series of separate policies contained in a single policy document, and what the consequences of such categorisation are.

[111] Both the High Court and Court of Appeal accepted the respondents' submission that the NZPC policy was a single composite policy, not eight separate policies. The factors which counted in favour of that outcome in the Court of Appeal's judgment were the fact that there was a joint obligation to pay a single premium and the fact that the policy could not be cancelled except by all eight insured port companies acting together.[66] The Court acknowledged that the fraud clause which imposed separate obligations on each of the eight insured port companies was a factor in favour of the argument that there were separate contracts,[67] but the Court did not consider this was sufficient to tip the balance.

[112] Having analysed the relevant case law, the Court considered that the preponderance of authority supported the proposition that the NZPC policy was a single, composite policy.[68] The Court accepted that most of the case law involved multiple interests in the same insured property, whereas in the NZPC case the port companies had no interest in each other's property and no right to indemnity in respect of each other's property.[69] That distinction did not dissuade the Court from finding that there was a single composite policy in this case.[70]

Approach

[113] The issue must be considered in its commercial and legislative context. That requires consideration in light of the wording and purpose of s 48.[71] The question that must be addressed is whether the NZPC policy attracts a single levy under s 48 or several levies. The cases cited to us must be considered in that context.

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[66] *NZ Fire Service* (CA), above n 3, at [53]–[55].
[67] At [56].
[68] At [56]–[71].
[69] At [72].
[70] At [72]–[76].
[71] See above at [21]–[24].

[114] Mr Cooke put it to us that the practical realities and commercial expectations suggest that the NZPC policy is a collection of separate policies that have been put together to avoid the scheme of the 1975 Act. He criticised the Court of Appeal for its analysis and application of the authorities cited in argument. He said each of the authorities must be considered in its context because the determination as to whether a policy was a single contract or multiple contracts depended on the reason that the issue fell for determination in each particular case. We propose to consider the authorities ourselves, bearing in mind this submission on behalf of the Commission. We will also consider whether there is any indication in the authorities that for a policy to be interpreted as a single policy, it is necessary that each insured party has an insurable interest in all of the insured property.

General Accident Fire and Life Assurance Corp Ltd v Midland Bank Ltd

[115] This case concerned an insurance policy covering the separate interests of a building owner, a bank with a floating charge granted by the building owner and a separate owner of the plant and stock stored in the building.[72] One of the insured, the owner of the plant and stock, made a fraudulent claim. After that entity had gone into liquidation, the insurer sought to recover the money paid in response to the fraudulent claim from the building owner and the bank.

[116] Giving the judgment of the Court of Appeal, Sir Wilfrid Greene MR noted that there was no joint risk, no joint interest in the property and that the measure of loss suffered by the parties would be different, calling for different measures of indemnity. He described this as "no joint element about the thing at all".[73] Having regard to those factors he concluded that the policy was a composite policy, for the reasons described above.[74]

[117] He did not, however, explain whether the composite policy was a number of separate policies grouped together for convenience or a single policy. The case is therefore of limited assistance to the main issue in this case.

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72 *General Accident,* above n 62.
73 At 405.
74 Above at [108].

[118] However, Mr Cooke argued that *General Accident* is authority for the proposition that it is a prerequisite for a finding that a policy is a composite policy that there must be a relationship between the insureds or the subject matter of the insurance. We do not read the judgment as imposing such a requirement. In fact, the building owner in that case had no interest in the plant and stock of the tenant and it was quite possible that damage to the building, which would affect the insurable interests of the building owner and the bank would cause no damage to the plant and stock of the tenant. That can be seen as having at least some elements in common with the situation of the port companies where the damage to the property on one would not have any effect on the property of another.

[119] Mr Cooke also argued that the Court's analysis was essential to its finding that the innocent co-insured were not required to refund the proceeds of a fraudulent claim paid to an insolvent co-insured. He said the result was affected by that factor. We accept that that is a fair summation of the context of the case.

Federation Insurance Ltd v Wasson

[120] The case which carried the most weight with the Court of Appeal was the decision of the High Court of Australia in *Federation Insurance Ltd v Wasson*.[75] In that case, Gaudron J said in a judgment concurring with the majority judgment of Mason CJ, Wilson, Dawson and Toohey JJ:[76]

> In the present case, it is clear that the obligation by the insured to pay the specified premium was a joint obligation: the premium was specified as a total sum without specification of proportions referable to the interests of the insured parties; it was payable by all or any of the parties, in the sense that payment by one constituted performance by all. The joint obligation as to payment of the premium constituted the policy a single contract although it effected separated insurances, and in that sense constituted a "composite policy" or "composite contract" as explained in the judgment of Mason CJ, Wilson, Dawson and Toohey JJ.

[121] In *Wasson*, the policy indemnified both the Wasson family as lessee of a motor vehicle and the lessor/owner for loss or damage to their respective rights and

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75 *Wasson*, above n 64.

76 At 319. A similar statement was made, though as obiter dictum, by the plurality of the High Court of Australia in *Advance (NSW) Insurance Agencies Pty Ltd v Matthews* (1989) 166 CLR 606 at 619.

interests in the vehicle. Mr Wasson sought to cancel the policy unilaterally without obtaining the consent of the lessor. The Court found that as the policy was a composite policy, and there was no clear provision allowing one party to terminate without the consent of the other, the termination was ineffective.

[122] The Court of Appeal saw this case as strongly supporting the respondents' position, because it is considered that, under the terms of the NZPC policy, the liability for the premium is a joint liability of the eight port companies. It also considered that the NZPC policy provided that termination could be effected only by all eight port companies.[77] This was a feature that was not expressly stated in *Wasson*, which the Court saw as supporting the respondents' position. We will revert to these points later.

[123] *Wasson* was a case involving different parties having insurable interests in the same insured property, and in that respect differs from the NZPC policy. The decision does not say that a common interest in the insurable property is a prerequisite for the finding that there is a composite policy, but that was a significant feature of the case that is not a feature of the NZPC policy. It is also notable that, as mentioned in the extract from the judgment of Gaudron J quoted above, there was a single premium with no specification of how the proportions of it could be broken down between the parties. This was a strong factor in the finding that there was joint liability for the premium. This can be contrasted with the present case, a point we will develop later.[78]

[124] Mr Cooke said the result in *Wasson* could be attributed to the fact that the finding that the policy was a composite policy was a necessary element of the Court's conclusion that the lessee's attempt to cancel the insurance was ineffective, thus allowing the lessor to pursue a claim. While we agree with that analysis, we do not think it is relevant to the significance of the decision in *Wasson* to the issue before us.

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[77] *NZ Fire Service* (CA), above n 3, at [53].
[78] See below at [146].

New Hampshire Insurance Co v MGN Ltd

[125] *New Hampshire Insurance Co v MGN Ltd*[79] is a significant case because it was a case involving a single policy (fidelity insurance for acts of employees) under which a number of companies in the same group were insured. The group of companies involved was the Maxwell group. The question before the Court of Appeal was whether fraud by the principal behind the group, Mr Robert Maxwell, and some of his associates at the time the cover was taken out defeated the interests of the other companies in the group and associated entities that were insured under the policy. The Court of Appeal upheld the finding made by the High Court[80] that the innocent members of the group were not precluded from recovering under the policy by the fraudulent acts of others.

[126] The finding in the High Court that the policy was composite in nature was made notwithstanding that the members of the group had no insurable interest in each other's assets. The High Court Judge, Potter J, had highlighted the practical reasons for composite insurance policies: saving of premiums through increased bargaining power and more efficient management through a shared management team.[81] However, his finding was that each company in the Maxwell group was separately insured. It was not a joint policy.[82] He did not go on to decide whether there was a single contract or multiple contracts in a composite document, which is the inquiry of significance in the present case. He did, however, indicate that his finding may signify that there are multiple contracts. When discussing the effect of non-disclosure, he said:[83]

> While it is common to speak in terms of avoiding a policy of insurance, the right to avoid for non-disclosure relates to the contract of insurance made with the individual assured of which there were a number in this case.

[127] Mr Cooke said the background to the decision was that, if the Court had not found that there was a composite policy under which each Maxwell-associated entity was separately insured, the dishonest acts of some insured parties at the time the

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79 *New Hampshire Insurance Co v MGN Ltd* [1996] CLC 1692 (CA) at 1728 [*MGN* (CA)].
80 *New Hampshire Insurance Co v MGN Ltd* [1996] CLC 1692 (QB) [*MGN* (QB)]. The two decisions are reported together.
81 At 1710.
82 At 1716.
83 At 1716.

cover was obtained would have precluded innocent insured parties from recovering under the policy. The Court believed this construction of the contract was the best reflection of the intention of all parties, including the insurer, and held the insurer to that bargain. And it was significant also that, although the insured parties had separate insurable interests, they were all either members of the Maxwell group of companies or entities associated with it, so there was a community of interest in that sense.

Arab Bank plc v Zurich Insurance Co

[128] The case on which Mr Cooke put most reliance was the decision of Rix J in *Arab Bank plc v Zurich Insurance Co.*[84] That case concerned a policy covering the fraudulent acts of directors. The managing director of a valuation company had made a number of fraudulent valuations in the name of the company. The policy listed the company and the directors as separate insureds, each for their own interests. The question was whether the fraudulent act of the managing director meant that the policy as a whole was voided. Rix J referred to the earlier decision of the Court of Appeal of England and Wales in *MGN* and summarised that decision as follows:[85]

> It seems to me that the Court of Appeal were saying that in the typical case of a composite policy where there are several assureds with separate interests, the single policy is indeed a bundle of separate contracts. That is the prima facie position under a composite policy, without any need for a meticulous examination, for instance, to see whether separate premiums have been agreed for the various interests. Indeed, one can well understand that on a practical level it would be unrealistic to expect the separate interests to be divided out and severally assessed.

[129] We accept that this formulation strongly supports the position of the Commission. But we accept Mr Friar's submission that *MGN* is not, in fact, authority for the proposition set out by Rix J, because the point he says decided in *MGN* was, in fact, left undecided by the Court of Appeal in that case.[86]

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[84] *Arab Bank plc v Zurich Insurance Co* [1998] CLC 1351 (QB).
[85] At 1368.
[86] The mischaracterisation of *MGN* (CA), above n 79, by Rix J in *Arab Bank* was highlighted in the article J R Birds "Fraud and Composite Insurance" (1999) JBL 151.

[130] What the Court of Appeal said in *MGN* was:[87]

> Technically one ought to enquire whether for each layer in each year there was one contract, or as many contracts as there were companies insured. And if the former, can a contract be avoided from 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 in the passage already quoted from *P Samuel & Co Ltd v Dumas*. That, it is true, was not a case of non-disclosure but of wilful misconduct by one of the two persons insured. But in our opinion the principle that the innocent party can still recover if it is a separate insurance must equally apply.

[131] In *Dumas*, the House of Lords was dealing with a policy under which a ship was insured for the benefit of both the ship owner and the mortgagees.[88] The ship was destroyed by the master and crew with the connivance of the owner, but without any complicity of the mortgagees. Their Lordships held that where there are separate interests, one insured is not affected by the misconduct of the other. But they did not find it necessary to consider the general question as to whether separate interests were contained in a single contract or whether the separate interests meant there were a number of separate contracts bundled together.

[132] Where all this leads is to a conclusion that the decision in *Arab Bank* is based on a mischaracterisation of the decision in *MGN*, which left undecided the issue that now falls for decision before us. Rix J set out in his judgment the extract from *MGN* that we have quoted above, so he did not overlook the point. The fact that *MGN* did not determine the point does not mean Rix J's conclusion is necessarily wrong. There is nothing in *MGN* that is contrary to the proposition that, at least in some circumstances, a composite policy can be characterised as a bundle of separate contracts.

American Motorists Insurance Co v Cellstar Corp (AMICO)

[133] In *American Motorists Insurance Co v Cellstar Corp* (*AMICO*) the Court of Appeal of England and Wales found that a policy insuring Cellstar, a corporation based in Texas, and its subsidiaries in a number of jurisdictions was a composite

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87 *MGN* (CA), above n 79, at 1737.

88 *P Samuel & Co Ltd v Dumas* [1924] AC 431 (HL).

policy and could not be regarded as severable into a series of separate contracts.[89] Mance LJ noted that Cellstar and its subsidiaries had separate insurable interests, but said there was a significant composite element which makes the policy incapable of severance.[90] A significant factor in that decision was the fact that Cellstar and its subsidiaries were jointly responsible for the premium payable under the policy.[91]

[134] The context of the decision was a dispute about the jurisdiction of the English courts to deal with a dispute between AMICO and a UK subsidiary of Cellstar. The effect of the decision was that the policy was considered to be a single contract governed by Texas law and so the argument by Cellstar that English law applied to the dispute failed. Mance LJ said the parties to the insurance contract could not be taken to have intended to scissor the contract up and subject different parts of it to different governing laws.[92]

Maulder v National Insurance Co of New Zealand Ltd

[135] A New Zealand authority to which we were referred was *Maulder v National Insurance Co of New Zealand Ltd*.[93] In that case Mr and Mrs Maulder were the insured under policies covering a house and its contents, some of which were owned separately. The husband set fire to the house and the house and contents were destroyed. Mrs Maulder claimed under the policy and the insurer declined to pay on the basis that the loss was deliberately caused by an act of the insured. Eichelbaum CJ found that each policy was a composite policy, severally insuring Mr and Mrs Maulder for their respective interests in the insured property. He did not find there were multiple contracts, however. But the outcome of the finding that Mr and Mrs Maulder were separately insured under each policy was that Mrs Maulder was not precluded from recovering due to the deliberate acts of her husband.

[136] Mr Cooke said that this decision was explicable by the reason for the result, namely allowing the innocent wife to recover notwithstanding her husband's wrong

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89 *American Motorists Insurance Co v Cellstar Corp* [2003] EWCA Civ 206, [2003] Lloyd's Rep IR 295.
90 At [36].
91 At [13].
92 At [21].
93 *Maulder v National Insurance Co of New Zealand Ltd* [1993] 2 NZLR 351 (HC).

doing. While that is true, we do not think it compromises the significance of the decision in this context. Mr Cooke also pointed out that in this case the husband and wife had an identical interest in the insurable property. We accept that that is true, at least in relation to the house property, and that that feature is a significant distinction from the present case.

Evaluation of the cases

[137] This brief summary of the cases reveals diverging approaches and a lack of consistency of outcome. We agree with Mr Cooke that the analysis in each case is influenced by the issue before the Court, particularly where the issue has concerned the position of an innocent insured party when a co-insured has done or omitted something that potentially affects the validity of the policy and exposes the innocent party to loss of cover. The cases concerning innocent co-insured parties have addressed whether the policy is a joint policy (in which case the actions of the defaulting insured could invalidate the cover of the innocent insured) or not. They have not focused on the distinction between a single composite policy and a bundle of contracts, because the issue before them has not required that that issue be resolved.

[138] The approach of treating a policy insuring a particular asset for the benefit of different parties having distinct interests in it, such as tenants and landlords or owners and mortgagees, as a single, composite policy, as in *Wasson*, achieves the protection of the innocent insured and makes commercial sense. It is not entirely clear that *General Accident* also evidences this approach but, assuming it did, it is notable that the reason given for doing so was that it was “natural and reasonable” to do so.[94]

[139] Where the insured parties do not have an insurable interest in the same property, it is not so obviously natural and reasonable to take the single, composite policy approach. The England and Wales Court of Appeal did not do so in *MGN*, deciding that the issue before them could be resolved without determining whether the policy was a single contract or multiple contracts. *Arab Bank* took the multiple

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[94] *General Accident*, above n 62, at 405.

contract approach in the context of a dispute about whether the insurer under a professional indemnity policy can rely on the dishonesty of one insured to deny cover to another. *AMICO* rejected the multiple contract approach but in a context where the issue was whether differing governing laws applied to the construction of the policy terms vis-à-vis different insureds in different jurisdictions. The single contract approach was the obviously "natural and reasonable" outcome in that context.

[140] This leads us to conclude that support for either party's position can be drawn from the cases. None deals with the situation before us, where the individual insureds have no corporate association with one another and no interest, insurable or otherwise, in each other's insured property. None deals with the situation where the choice of a collective approach is principally driven not by issues of insurance and risk management but by minimisation of a statutory levy.

Our approach: is there more than one contract?

[141] The Court of Appeal saw the case as governed by *Wasson* because some obligations under the Policy were joint obligations. It attributed particular significance to what it saw as the joint obligation to pay the premium (a factor that was also important in *AMICO*) and the requirement that cancellation could be effected by all Insureds jointly (though the latter is a right rather than an obligation).[95]

[142] Mr Friar supported the Court of Appeal's analysis: he said the joint liability for the premium, the requirement that cancellation be effected only by all insureds collectively and the shared indemnity sum all pointed towards a finding that the NZPC policy was a single composite policy, in accordance with *Wasson*.

[143] We turn now to the terms relating to the premium and to cancellation.

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[95] *NZ Fire Service* (CA), above n 3, at [53]–[56].

[144] The only reference to the premium in the Policy is in the operative clause[96]. The material before us relating to the premium shows the attribution of shares of the total sum to individual port companies, but that is not reflected in the policy itself. There is nothing in the policy to say that liability of each Insured is limited to its share of the premium. Nor is there anything to say that a failure by one to pay the amount attributable to it triggered an obligation on the others to pay that share. The evidence of Mr Thomson of Vero was that Vero and the other insurers under the policy invoiced the broker for their respective shares of the premium and "the insurers regarded all eight port companies as jointly responsible for the premium". Vero's subjective view is of no great significance, however. There was no evidence that the port companies had agreed to assume responsibility for any default by one of them in payment of the relevant portion of the premium.

[145] Mr Thomson said Vero was prepared to offer the discounted premium on the basis that all eight port companies purchased their material damage cover under the NZPC policy. That reflects the fact that the NZPC was a vehicle for a bulk purchase in exchange for a discount. But that does not require joint responsibility for the payment of the premium, nor that there be a single policy.

[146] We do not think it is clear that liability for the premium was joint, in the sense that there was a contractual commitment by the eight port companies to take responsibility for any shortfall in payment of premiums by others in the NZPC collective. Having regard to the requirement that the policy must be interpreted as if it were issued separately to each Insured,[97] it is at least arguable that the obligation in respect of the premium was not joint.

[147] That possibility is supported by a number of other indicators. The premium was an aggregation of separately calculated premiums for each port company. This calculation was the basis of the agreement between Vero and each port company as to the quantum of the premium. Each port company was invoiced for its share of the premium by the broker for NZPC at exactly the same time as the overall premium

96 See above at [94](h). There are other references to premiums in the context of adjustments or additional premiums. The operative clause is the only reference to the obligation for the initial premium.

97 See [94](d) above.

was invoiced by the broker. It is arguable therefore that the "required premium" referred to in the operative clause of the NZPC policy was, in respect of each insured, the amount for which it was separately invoiced. No party considered the possibility of a default by any of the port companies in payment of its share of the premium and did not provide for that possibility in the contract terms.[98] In particular, there was no provision to the effect that if one port company defaulted in the payment of the premium for which it was invoiced, no cover would be provided to any of the other insureds.

[148] Similar comments can be made about the cancellation right. Although notice of cancellation must be given by "the Insured" (suggesting notice from all eight port companies), it is problematic as to how that applies to individual port companies, given the requirement to interpret the policy as if it were issued to each port company separately.

[149] We do not therefore agree with the Court of Appeal that the clauses relating to the payment of the premium and cancellation are decisive.

[150] It is significant that, under s 48(9), it is the "insured person" that has the obligation to reimburse the insurance company for the levy paid by the insurance company. That term is not defined but, in its context, means a person that is covered under a contract for fire insurance. That, in turn, assumes the person has an insurable interest in the property covered under the contract for fire insurance.

[151] The respondents' case requires that we treat the policy as a single policy under which the collective of eight port companies is the insured person. That is hard to reconcile with the requirement to interpret the policy as if it were issued to each port company separately for their respective rights and interests. In this case, each port company's interest in its insured property is entirely distinct from that of the other port companies.[99] Each port company is an insured person under the NZPC policy, but the collective group of port companies is not. Whether our doubts about

[98] A provision in an earlier draft dealing with that possibility was omitted from the policy.
[99] Mr Friar said the wording of the policy was based on wording appearing in the policy at issue in *General Accident*, above n 62. It is true that policy referred to the respective rights and interests of the named insureds in the insured property. But it does not require the policy to be interpreted as if it were issued to each insured separately as the NZPC policy does.

the joint nature of the premium obligation are well-founded or not, the reality is that each port company paid a premium calculated in relation to its individual position in response to an invoice for that amount that it received from the broker. It thereby obtained cover up to the maximum amounts specified in the NZPC policy over its own property. This was subject to the possibility of claims by other port companies exhausting some of this cover, but with provision for automatic reinstatement of the cover, except in relation to the fire damage (indemnity) section of the NZPC policy.

[152] Interpreting s 48 in a manner that enhances the universality of the levy leads us to conclude that, for the purposes of s 48, the NZPC policy should be regarded as a contract of fire insurance for each of the eight port companies, not one composite policy. That accords with the term of the policy document requiring that it be interpreted as if it were issued separately to each port company. We do not see the cases cited to us as contrary to this conclusion and none is binding on us in any event. It is consistent with *Arab Bank* and is not inconsistent with *MGN*, the case that has the closest similarity to the facts of this case. We do not see the cases dealing with separate interests in the same insured property as assisting the analysis of the very different factual situation in this case in the context of s 48.

[153] We accept this gives primacy to substance over form, but we think that is the appropriate approach to take in relation to a provision such as s 48. To use the term adopted by Sir Wilfrid Greene MR in *General Accident*, it is a matter of business and commonsense.[100] As Mr Cooke pointed out, the analysis of each of the cases cited to us reflects the context in which the case was decided and reflects the justice of the situation before the court and what the court perceived as best representing the commercial outcome. In the present case, the benefits to the port companies of jointly purchasing insurance do not require a single contract. There are no "reasons of obvious convenience" (to use the words of Sir Wilfrid Greene MR again)[101] to treat the arrangement between the second respondent and the eight port companies as a single contract.

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[100] *General Accident,* above n 62, at 409.
[101] At 405.

Conclusion: NZPC policy

[154] We conclude that the NZPC policy should be regarded as eight separate policies for the purposes of s 48. The declaration made in the High Court and upheld in the Court of Appeal should not have been made.

Result

[155] The appeal is allowed.

[156] The declarations made by the High Court at [45] of its judgment and upheld with amendments by the Court of Appeal in relation to split tier policies are set aside.

[157] The declaration made in the High Court and upheld in the Court of Appeal in relation to the NZPC policy is also set aside.

Costs

[158] No order of costs was made in the High Court, and the Court of Appeal also declined to make any award of costs, on the basis that the proceeding was a test case. We were not asked to make a costs order and therefore do not do so.

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