IN THE COURT OF APPEAL OF NEW ZEALAND

CA393/2013
[2013] NZCA 560

BETWEEN	ZURICH AUSTRALIAN INSURANCE LIMITED T/A ZURICH NEW ZEALAND Appellant
AND	BODY CORPORATE 398983 First Respondent
	FIRM PI 1 LIMITED Second Respondent

Hearing:	12 September 2013
Court:	Ellen France, White and Miller JJ
Counsel:	A R Galbraith QC and W A Holden for Appellant L G Cox for First Respondent M G Ring QC and C R Langstone for Second Respondent
Judgment:	13 November 2013 at 3.00 pm

JUDGMENT OF THE COURT

A **The appeal is allowed. The question stated is answered as follows: the Sum Insured for buildings under the material damage section of the Zurich policy included all sums payable to the Body Corporate by EQC for natural disaster damage to the Salisbury Park Apartments buildings from the 22 February 2011 earthquake.**

B **The second respondent must pay Zurich costs for a standard appeal on a band A basis and usual disbursements. We certify for two counsel.**

REASONS OF THE COURT

(Given by Miller J)

Introduction

[1] The Salisbury Park Apartments complex at 226–242 Salisbury Street, Christchurch, was badly damaged in the earthquake of 22 February 2011. It was just three years old. The complex comprised two buildings one of which has been demolished and the other, pleads the Body Corporate, is a constructive total loss. Reinstatement would cost about $25m.[1]

[2] Zurich Australian Insurance Ltd insured the complex under a material damage policy which capped replacement cover at a sum insured of $12.95m. That sum was an estimate, given by a valuer commissioned by the Body Corporate's agent, of the complex's full replacement cost including allowances for demolition and inflation.

[3] As dwellings, the apartments were also covered under the Earthquake Commission Act 1993. The Earthquake Commission (EQC) has paid the Body Corporate $6.8m, representing the maximum statutory cover of $100,000 for each of the 68 apartments.

[4] Zurich says that the EQC payments must be deducted from the sum insured, meaning that the Body Corporate would receive $12.95m in total, of which Zurich would pay $6.1m. Firm PI 1 Ltd (formerly ACM, and still known as such), the broker which arranged the policy, says that Zurich must pay the sum insured in addition to the EQC payments, which would result in the Body Corporate receiving $19.75m from all sources. The dispute turns on cl MD15 in the Zurich policy, which provided that where the statutory cover applied, then "the Insurers liability will be limited to the amount of loss in excess of" the statutory cover.

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[1] Figures used in this judgment exclude GST, and some are estimates.

[5] The Body Corporate sued Zurich and ACM.[2] A separate question was stated.[3] A Full Court of the High Court (Heath and Courtney JJ) answered it in the Body Corporate's favour: the sum insured excluded all sums payable by EQC to the Body Corporate.[4] Zurich now appeals. As a matter of pleading the Body Corporate adopts ACM's position, but in this Court, as in the High Court, it appeared only to abide.

Matters of context

[6] The issue is one of construction of the policy, the relevant parts of which are outlined at [17]–[22] below. Before examining it, we summarise the statutory and factual context. We record that the facts were before the High Court in the form of affidavits,[5] parts of which were deleted by agreement or ruling, and the Court heard no cross-examination on what remained.

Double insurance and the Earthquake Commission Act

[7] We begin with s 30 of the 1993 Act, which deals with the relationship between the statutory cover for natural disaster damage and a private insurance policy covering the same subject matter and risk. As the High Court explained, insurers routinely try to regulate double insurance via "other insurance" clauses:

> [7] Where two policies respond to the same loss there arises an equitable right of contribution between the insurers. However, insurers typically include in their policies "other insurance" clauses. These clauses may either relieve the insurer of liability if there is another policy that responds to the loss or, alternatively, limit the insurer's liability to the amount in excess of the cover provided by the other policy. Where both policies contain such

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2 The principal issue for trial is whether ACM and Zurich had negotiated a replacement value cover limit of $100m. ACM admits it. Zurich denies it. The subject of this appeal will determine Zurich's liability under a separate and alternative cause of action, for breach of undisputed terms of the contract.

3 The full question stated is as follows: is the Sum Insured for buildings under the material damage section of the contract of insurance between the plaintiff and the first defendant in respect of the Salisbury Apartments inclusive or exclusive of all amounts payable to the plaintiff from the Earthquake Commission on Natural Disaster Damage cover under the Earthquake Commission Act 1993 for Natural Disaster Damage to the buildings from the 22 February 2011 earthquake?

4 *Body Corporate 398983 v Zurich Australian Insurance Limited* [2013] NZHC 1109 [High Court decision].

5 Zurich and ACM each filed four affidavits; the deponents included insurance experts. ACM's evidence included one affidavit from a representative of the Body Corporate's manager.

> clauses the law requires both to contribute so as to avoid the situation of neither policy responding.
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> (Footnotes omitted.)

[8] Section 30(1) pre-empts such provisions by providing, as the High Court succinctly put it, that where the statutory cover and a contract of insurance both respond to natural disaster damage "the statutory cover is deemed to be in respect of so much of the damage as exceeds the cover under the contract of insurance and any deductible."[6] The subsection provides:

> **30 Insurance otherwise than under this Act**
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> (1) Where on the occurrence to any property of natural disaster damage against which it is insured under any of [the residential and personal property provisions], of this Act, the property is also insured against that damage under any contract or contracts made otherwise than under this Act, the insurance of the property under this Act (to the amount to which it is so insured) shall be deemed to be in respect of so much of that natural disaster damage as exceeds the sum of—
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> (a) the total amount payable under that contract or those contracts in respect of that natural disaster damage; and
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> (b) the proportion of the natural disaster damage to be borne by the insured person under the conditions applying to the insurance of the property under this Act.

[9] This provision must be read with s 30(3), which states that where the statutory cover and a contract both apply the contract is to respond as if the property was not covered under the Act and never had been:

> (3) Notwithstanding anything to the contrary in any contract whereby any property is insured against natural disaster damage otherwise than under this Act, where the property is or has at any time also been insured against that natural disaster damage under any of sections 18 to 20, or section 22, the contract shall have effect in all respects as if the property were not and had never been insured under this Act.

[10] These provisions can be traced to the Earthquake and War Damage Act 1944. Although they survive in the 1993 Act, it has qualified them substantially by allowing insurers the alternative of providing top-up cover. Section 30(2) provides

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6 At [8].

that s 30(1) applies "only to the extent that the contract provides for cover in excess of" the amount of cover provided under the Act:

> (2) Subsection (1) of this section shall not apply with respect to any contract of insurance made otherwise than under this Act to the extent that the contract provides for cover in excess of the amount to which cover is provided under this Act.

[11] The High Court explained that subsection (2) appears to have been inserted to address concerns expressed by the Insurance Council, which observed that many homes would cost more than the statutory cap, $100,000, to replace and argued that the Earthquake Commission Bill, which had initially adopted the wording of the 1944 Act, could preclude homeowners from arranging top-up cover, so exposing many of them to under-insurance.[7] The subsection allows an insurer to provide by contract that its cover will respond after the statutory cover, so altering the priority otherwise imposed by s 30(1). This is known as earthquake top-up cover. It has become the norm in New Zealand. Indeed, it seems that Zurich does not offer any alternative to top-up cover where the statutory cover is available.

[12] The parties agree that cl MD15 of the Zurich policy triggers s 30(2), meaning that the statutory cover responds first. It need not follow, however, that Zurich's maximum liability is calculated by deducting EQC payments from the sum insured. The High Court expressed the issue in this way:

> [15] MD15 was incorporated into the policy specifically to trigger s 30(2) and overcome the effect of s 30(1) and (3). In the absence of s 30(2) and MD15 the Zurich policy would respond first: Zurich would be liable to pay the entire sum insured of $12.95m. Because the total cost of reinstatement is $25m, the EQC would then be liable to pay the maximum statutory cover of $6.8m. So if s 30(2) did not apply, the Body Corporate would receive a total of $19.75m. It is common ground however, that s 30(2) does apply. The question is whether the total amount to which the Body Corporate is entitled from all sources is the same if s 30(2) applies (as the Body Corporate contends) or less (as Zurich contends).

The premium calculation assumed the sum insured was inclusive of EQC cover

[13] The Body Corporate engaged a firm called Boutique Body Corporates Ltd (BBCL) to arrange material damage cover for natural disaster and fire. For the

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[7] At [12].

policy year commencing 13 August 2010 BBCL commissioned the valuation which produced the replacement cost estimate of $12.95m, and it instructed ACM to seek quotes based on that figure. ACM did so using its own Brokernet policy wording. Brokernet is a group of independent brokers which included ACM. Larger brokers sometimes write a policy and invite insurers to cover their clients using it, but independent brokers lack sufficient scale to induce insurers to negotiate policy language with them. To overcome that commercial disadvantage Brokernet drafted this policy for its members.

[14] Zurich, which had not previously insured the complex, won the business. Four components comprised the premium calculation for the policy: the company premium, which Zurich charged for covering insured losses excluding natural disaster perils; the company earthquake premium, which Zurich charged for natural disaster cover including earthquakes; the EQC levy; and the fire service levy. The company earthquake cover was also described as "top-up EQ". Zurich notified ACM of the premium rates for the first two components.[8] ACM then calculated the premium using these rates and its own premium calculation template, doing so on the basis that for earthquake risk Zurich would cover the difference between the statutory cover and the sum insured; that is, $6.1m. The High Court explained how the parties went about it:

> [52] Using the rates quoted, ACM calculated the fire, company earthquake, statutory earthquake levy and fire levy. It had its own premium calculation template which allowed for the various relevant inputs. When it calculated the company earthquake premium it did so using the sum of $6.1m, the difference between the statutory cover and the sum insured.
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> [53] ACM did not revert to Zurich with its calculation at that point and nor did Zurich require it to. ACM simply provided BBCL with a total figure as being the Zurich quote. BBCL obtained instructions from the Body Corporate to place the cover with Zurich. It conveyed those instructions to ACM, which forwarded a closing advice and premium calculation sheet to Zurich. At the same time it sent an invoice to the Body Corporate care of BBCL.

[15] The total premium paid for the 2010–2011 policy year was $17,730.32 plus GST. Earthquake and other risks were priced separately. Zurich's premium for reinstatement apart from earthquake was $8,048.44. The EQC premium was $3,420,

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[8] It was not necessary to advise on the latter two components as the rates for these levies are fixed pursuant to statute.

and Zurich's company premium for earthquake cover was $1,083.88. The balance comprised fire service levies.

[16] The High Court found that ACM knew, based on its market experience, that the premium had been calculated on a "net" liability basis for natural disaster cover. If confirmation were needed, ACM's own commission was calculated on the same basis. The Court also held that the Body Corporate was fixed with ACM's knowledge,[9] reasoning that ACM was not relevantly Zurich's agent but was an "agent to know", meaning that the Body Corporate engaged ACM for its own knowledge.[10] These important conclusions are not now in dispute. It follows that Zurich and the Body Corporate must be taken to have agreed that Zurich would provide $6.1m of natural disaster cover.

The policy

[17] We turn to the policy. The insuring clause provided that:

> The Insurer agrees to cover the Insured for all Loss or Damage to the Property Insured during the Period of Cover due to an Event.
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> Provided that the liability of the Insurer, for any one Loss or Damage under this section, shall not exceed the Sum Insured….

[18] The policy set out that, when required by Zurich, the Body Corporate would supply a valuation when insurance commenced, and prescribed that the Body Corporate could not insure for less than the valuation estimate.

[19] Unlike many policies in use in New Zealand, the Brokernet policy did not first exclude earthquake cover then add it through an optional extension. Rather, it was integral to the policy's cover. An Event (capitalised terms received a definition) relevantly meant a happening that caused Loss or Damage, which in turn meant accidental "physical loss or damage" to the Property Insured. Natural Disaster Damage had the meaning given to it in the 1993 Act, which relevantly defines it as

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9 The evidence of Craig Leishman, for the Body Corporate, was that it has never known how premiums are structured in fact.

10 High Court decision, above n 4, at [68].

"physical loss or damage" to an insured property occurring as the direct result of natural disaster.[11]

[20] The basis of settlement was reinstatement. The Sum Insured meant "the limit of" Zurich's liability, and the actual sum insured was specified in an annual Brokernet Policy Certificate which was deemed to form part of the policy. The certificate for the policy year which began on 13 August 2010 specified a sum insured of $12.95m.

[21] Clause MD15 was one of a number of "standard policy extensions" the language of which prevailed over the rest of the policy in case of conflict. The policy contemplated that a standard policy extension might specify a separate sum insured that would limit Zurich's liability for the particular risk concerned, but no separate sum insured was specified for natural disaster damage. Rather, cl MD15 provided:

> **MD15 NATURAL DISASTER DAMAGE**
> In the event of the Insured having insured residential property for which compulsory Natural Disaster Damage cover under the Earthquake Commission Act 1993 applies then in the event of such property suffering Natural Disaster Damage during the Period of Cover and covered by Natural Disaster Damage cover, then the Insurers liability will be limited to the amount of loss in excess of the Natural Disaster Damage cover.

[22] We observe that the policy included a section comprising general definitions, conditions and exclusions. One of them, cl GC09, was an "other insurance" clause. This provision does not apply directly: we quote it here to highlight the drafter's choice of language in cl MD15:

> **GC09 OTHER INSURANCE**
> If at the time of any Loss or Damage happening to any Property Insured, there be any other insurance or any cover effected by the Insured or by any other person, covering the same property or the Insured's interest therein, the insurance under this policy shall not apply until the full amount of cover under such other insurance has been exhausted in respect of the Insured's Loss or Damage.

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[11] Section 2. Natural disasters are not confined to earthquakes; they include natural landslip, volcanic eruption, hydrothermal activity, tsunami, storm and flood (for residential land only), and natural disaster fire resulting from another natural disaster.

The High Court decision

[23] Since the High Court's approach to interpretation of the contract is challenged on appeal, we begin by recording how the Court went about it:

> [4] The interpretation of a contract is a search for the meaning intended by the parties to that contract. It is, however, a search undertaken on an objective basis, tested by reference to what a reasonable and properly informed third party would consider that the parties intended. The inquiry is to be conducted against the commercial background in which the parties were operating, taking into account the background knowledge that would reasonably have been available to the parties at the time. The plain and ordinary meaning of a contract can be displaced once that context is taken into account. There must, however, be a strong case to persuade the Court that something has gone wrong with the contractual language used to justify this course. A bad bargain is not, in itself, sufficient. These well established rules of contractual interpretation apply equally to an insurance policy as to any other type of contract.
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> (Footnotes omitted.)

[24] Beginning with the plain meaning of the policy, the Court identified the central question as the meaning of "loss" in MD15:

> [20] Section 30(2) merely qualifies the effect of s 30(1) "to the extent" that the contract of insurance provides cover "in excess of the amount to which cover is provided under this Act". What that figure is must be determined by reference to MD15 itself with the question: to what extent does the policy provide cover in excess of the statutory cover? The answer is that under MD15 the policy provides cover in excess of the statutory cover to the extent of "the amount of loss in excess of the natural disaster damage cover" (subject of course to the limit of indemnity represented by the sum insured). So the meaning of MD15 turns on what "loss" means. In short, s 30(2) changes the point at which the insurance commences but has no effect on the point at which it finishes.

[25] The Court held that "loss" in MD15 is not a defined term and bears its ordinary meaning: the person who suffers loss has been deprived of something or had possessions diminished. The Body Corporate has suffered a loss of $25m:

> [24] The word "loss" is defined in the policy. It is part of the phrase "Loss or Damage" and bears the defined meaning of "physical loss of or damage to the Property Insured that is unintended or unforeseen by the Insured." The definition is not qualified by reference to the sum insured. It simply identifies the type of loss or damage to which the policy responds. As is usual, when reference is made to loss in the defined sense, it appears in the policy with an upper case "L".

> [25] "Loss" as it appears in MD15, however, appears with a lower case "l". It is common ground that "loss" in MD15 does not bear a defined meaning. It is also common ground that it refers to the Body Corporate's loss in dollar terms.
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> [26] Had "loss" been intended to be qualified in the way Zurich contends, it is likely to have been defined in that way. It would be an unusual result for the parties, who have gone to the trouble of defining many of the words used in the policy to have intended an undefined word to bear a meaning so much more restrictive than its ordinary meaning. In our view "loss" bears its ordinary meaning of being deprived of something or of the diminution of possessions resulting from a change in conditions. In this case, that would mean the Body Corporate's actual loss, which is $25m.
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> (Footnotes omitted.)

[26] The Court rejected a submission that the words "will be limited to" required that "loss" be given a different meaning, namely loss within the sum insured.[12] Rather, the limiting words served the important purpose of emphasising that the cover was top-up cover, so triggering s 30(2).

[27] The Court next examined certain other terms of the policy, inquiring whether they displaced the plain meaning and finding that they did not.[13] We need not rehearse the Court's findings because counsel agree that the only relevant provisions are those mentioned above. It also considered the language of another Zurich policy, observing that it expressly limited the insurer's liability to the difference between the sum insured and the statutory cover. It rejected an argument that if Zurich must pay the full sum insured the Body Corporate would receive a windfall that violated the indemnity principle, pointing out that the total paid from all sources would not exceed the insured's loss.[14]

[28] As noted above, the Court found that the premium was calculated on the basis that Zurich's liability was net of statutory cover.[15] It recognised that this fact formed part of the factual matrix for interpretation purposes, and it drew the natural inference that parties to an insurance contract anticipate some correlation between the amounts of the premium and the cover. However, the Court rejected a submission that it was so commercially unrealistic to expect that Zurich would

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12 At [22].
13 At [30]–[37].
14 At [41].
15 See [16] above.

provide the extra cover for no extra premium as to justify the Court "rewriting" the bargain that Zurich entered into.[16] The Court considered that had Zurich's underwriters turned their minds to it the added exposure would not have been thought material, for they would not have found significant the actual risk of Zurich having to pay more than $6.1m.

[29] Counsel for Zurich pointed out that the "plain meaning" would result in different exposures for fire and earthquake. It is common ground that had the complex been destroyed by fire Zurich's maximum liability would be the sum insured, $12.95m. The Court acknowledged that this was a very unusual outcome:

> [72] ... We agree that different exposure for fire and earthquake risk would be a very unusual outcome. We are confident that it would not accord with the expectations of either insurers or the brokers and would never have been contemplated at the time the policy was arranged. Experience may have shown that there can be a difference in the amount required to reinstate following a total loss caused by earthquake as opposed to fire. But when this policy was written risks were assessed on the basis of the same reinstatement estimate.

[30] However, the Court reasoned, this in itself did not warrant departure from the plain meaning. Zurich's interpretation would also result in different exposures, depending on whether s 30(2) applied; if it did, Zurich would pay the net amount, but if not, Zurich would pay the full sum insured. The Court considered that "it would be a most unusual result if the amount to which the Body Corporate was entitled differed, depending on whether the statutory cover or the private insurance responded first."[17] That was especially so when the risk covered – earthquake – was the same. By contrast, fire and earthquake cover need not be identical, for these risks are assessed and priced separately, and an insurer will not normally be called on to respond to both in the same policy period.[18]

The appeal

[31] On appeal Mr Galbraith QC submitted that cl MD15 plainly modified Zurich's liability of $12.95m under the policy; it set a limit within a limit. "Loss" in

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16 At [82].
17 At [18].
18 At [73].

this setting meant "insured loss". The High Court erred by determining a "plain" meaning, then imposing a hurdle that contextual facts must surmount to displace it; a contract must always be interpreted in context. In fact ACM and Zurich acted in the mutual understanding that the earthquake premium was calculated on a net cover basis. The Court overlooked important matters of context; notably, the evidence did not justify the Court's assumption that Zurich would have offered anything other than top-up cover. The conclusion that the Body Corporate got cover of $19.75m for natural disaster despite paying no additional premium defied commercial common sense, and it was wrong to speculate that Zurich's underwriters would have entered into the policy without an increased premium had they appreciated the meaning that the Court would assign to cl MD15.

[32] Mr Ring QC generally supported the High Court's reasoning, although he conceded that the Court need not have speculated that Zurich would have written the cover as presented, with no additional premium. The Court did not err in its approach to interpretation; it followed the leading authority, *Vector Gas Ltd v Bay of Plenty Energy Ltd*.[19] It correctly interpreted cl MD15 as an "other insurance" clause which determined where Zurich's liability began but did not set any limit, as is shown by comparing the language of cl MD 15 to that of s 30: both speak of private cover "in excess of" the statutory cover. This construction finds support in the legislative history, for corresponding provisions in the 1944 Act employed similar language but plainly said nothing about the upper limit of a private insurer's liability. In cl MD 15 "loss" naturally meant the actual loss; it did not do the work of assigning that loss between insurer and insured. Nor did cl MD 15 set any upper limit on Zurich's liability, which was limited, but only by the sum insured of $12.95m.

[33] Mr Ring further argued that no market practice informs construction of cl MD15; the only market practice that exists is that private insurers top up EQC cover. Other policies indicated that there is no standard language used, nor is there any convention about what the language of cl MD 15 means.

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[19] *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5, [2010] 2 NZLR 444 at [23] and [66].

[34] Finally, Mr Ring argued that the valuation estimate that generated the sum insured may have been too low in hindsight, but that did not alter Zurich's obligation to reinstate; the existence of that obligation explains why the policy envisaged that the Body Corporate would provide a valuation at commencement and insisted that the Body Corporate could not insure the property for less than the estimate. Put another way, Zurich assumed the risk of under-insurance. If Zurich is correct, it would pay more if half the complex was destroyed and the other half undamaged than it would pay on a total loss: in the former case the actual cost of reinstating half the complex would be $12.5m and EQC would pay $3.4m, leaving Zurich with the balance of $9.1m rather than the $6.1m for which it admits liability.

Did the High Court err in its approach to construction?

[35] At [23] above we have quoted what the High Court said about its approach to construction. We see no error of principle in that approach. The Court correctly recognised that context, background and circumstances are always relevant when interpreting a contract, and it paid close attention to those matters.[20] It recognised that an apparently plain meaning can be displaced when considered in its particular factual setting.[21] But it is usual to begin, as the Court did, with the contract's language, which may supply a provisional meaning, and the plainer the words the less likely it is that the parties intended them to mean something else.[22] If when read objectively the language will not bear the meaning for which a plaintiff contends, a remedy may be sought in rectification, as the High Court observed.[23]

[36] Zurich's real complaint is that the Court erred on the merits, to which we now turn.

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20 *Vector* at [4] per Blanchard J (with whom Gault J agreed at [151]), [23] per Tipping J, and [64] per McGrath J; *Trustees Executors Ltd v QBE Insurance (International) Ltd* [2010] NZCA 608, (2010) 16 ANZ Ins Cas 61-874 at [32].

21 *Vector* at [22] per Tipping J; and see at [66] per McGrath J.

22 *Vector* at [23] per Tipping J. *Trustees Executors* at [33].

23 High Court decision, above n 4, at [63]. Rectification was not sought in this case, and for purposes of the argument before us counsel disclaimed reliance upon it.

Did cl MD15 limit Zurich's liability for natural disaster damage to net top-up cover, within the sum insured?

Clause MD15

[37] It is not in dispute that cl MD15 was an "other insurance" clause which triggered s 30(2) of the 1993 Act, so ensuring that the statutory cover responded first and Zurich's cover responded to loss in excess of the statutory cover. Nor is it in dispute that Zurich's liability is limited by the sum insured of $12.95m. The question is whether cl MD15 served the additional purpose of further limiting Zurich's liability to top-up cover within the sum insured; that is, a net sum of $6.1m, being the sum insured less EQC payments.

[38] We begin by observing that s 30(2) speaks of "cover" rather than "loss", and says nothing about limits to the cover whose priority it orders. Clause GC09, which was a straightforward "other insurance" clause, also spoke in terms of "loss". If cl MD15 served only the purpose of postponing Zurich's cover under s 30(2) until the statutory cover was exhausted, it could have been expressed in essentially identical terms. We do not gain assistance from the different language and purpose of the 1944 Act.[24]

[39] Instead, cl MD15 provided that Zurich's "liability would be limited" to the "amount of loss" in excess of the statutory cover. This language indicates that the clause set a limit which differed from the sum insured that would otherwise cap Zurich's liability. If so, that limit can only have been the difference between the sum insured and the statutory cover.

[40] It is true that cl MD15 did not use the defined term "Loss or Damage", meaning "physical loss or damage" to the insured property, but we differ from the High Court in the conclusions we draw from that. We agree that the drafter's decision not to use the defined term matters; it suggests that the drafter meant "loss"

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[24] Section 14(2B) of the Earthquake and War Damage Act 1944 provided that the statutory cover did not apply where a contract of insurance was "limited to an excess over" the "indemnity value" of the property, so ensuring that the private cover responded first. As noted earlier, the 1993 Act allowed insurers the option of providing top-up cover. The phrase "limited to an excess over" value also appears in the 1993 Act; in s 41(8), but that is a transitional provision.

to have a different meaning. But we do not think that the drafter can have intended the ordinary or dictionary meaning, for that adds nothing of relevance: the policy defines loss as loss, qualifying it only by insisting that the loss be physical in nature. Further, as the High Court acknowledged, the drafter cannot have intended that Zurich's liability would be quantified using the Body Corporate's actual loss, which is $25m.

[41] For these reasons we respectfully differ from the High Court's opinion that on its true construction cl MD15 plainly did no more than postpone Zurich's cover until the statutory cover had been exhausted. We do not find that a plain and unambiguous meaning of the sort from which a court will depart only on strong evidence.[25] In particular, we do not agree that the words "liability will be limited to" served only to emphasise that this was top-up cover.

Commercial context

[42] The commercial context establishes that the parties intended to limit Zurich's liability for natural disaster cover to a net sum comprising the difference between the statutory cover and the Body Corporate's estimate of full replacement value. Indeed, it is not now in dispute that through ACM the Body Corporate sought, and Zurich offered, natural disaster cover on that exact basis.

[43] The High Court found anomalous the notion that the Body Corporate's entitlement under the policy varied depending on whether the statutory cover or the contract responded first.[26] But this is to overlook the evidence that no alternative to top-up cover was on offer. And as the Court acknowledged, ACM's competing interpretation produces an anomaly of its own. It would result in the Body Corporate receiving different sums for total loss caused by fire damage and natural disaster damage; this in circumstances where the Body Corporate had sought the same replacement cover for both risks, and its valuation estimate, $12.95m, included allowances for inflation and demolition. There was no reason for the Body Corporate to seek more from any source, still less any reason why it would want

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25 *Vector* at [66].
26 As noted above at [30].

extra-compensatory cover for one catastrophic risk but not another, or why it would choose a total sum insured of $19.75m rather than any other figure.

[44] Mr Galbraith also reiterated that it is commercially unrealistic to suppose Zurich would have charged nothing for an additional layer of cover. In circumstances where the additional cover would have seemed redundant, this argument is not self-evidently correct. As the High Court said, the less likely the risk that Zurich would be called on to pay, the weaker its commercial imperative to charge an additional premium.[27] We prefer not to speculate on what the parties would have done had additional cover been requested. What matters is that they agreed Zurich would provide net natural disaster cover of $6.1m and the premium was set accordingly.

[45] We accept that the Body Corporate sought insurance which would provide it with full replacement cover from all sources. We express no view about the valuation estimate upon which it relied, but we can say that its present troubles appear to stem from the disparity between the valuation estimate, which became the sum insured, and its actual loss, which is nearly twice the estimate. As noted above, Mr Ring met this difficulty by pointing to provisions under which Zurich could insist on a valuation and require that the Body Corporate insure for the valuer's estimate. We accept that Zurich might have insisted on these things, but it does not follow that Zurich bore the risk of under-insurance. On the contrary, the policy expressly assigned to the Body Corporate the risk that its loss from any one event would exceed the sum insured.

[46] We accordingly differ, with regret, from the Full Court. We consider that when construed with appropriate regard for the commercial context in which the policy was agreed, cl MD15 limited Zurich's liability for natural disaster damage from a single event to the difference between the maximum statutory cover, $6.8m, and the sum insured, $12.95m.

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[27] At [73].

Decision

[47] The appeal is allowed. We answer the question as follows: the Sum Insured for buildings under the material damage section of the Zurich policy included all sums payable to the Body Corporate by EQC for natural disaster damage to the Salisbury Park Apartments buildings from the 22 February 2011 earthquake.

[48] Costs should follow the event. The second respondent must pay Zurich costs for a standard appeal on a band A basis and usual disbursements. We certify for two counsel.

Solicitors:
DAC Beachcroft NZ Ltd, Auckland for Appellant
Morgan Coakle, Auckland for First Respondent
Jones Fee, Auckland for Second Respondent