IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV 2014-485-5698
[2014] NZHC 3138

BETWEEN	EARTHQUAKE COMMISSION Plaintiff
AND	INSURANCE COUNCIL OF NEW ZEALAND INCORPORATED First Defendant
	CHRISTCHURCH CITY COUNCIL Second Defendant
	SOUTHERN RESPONSE EARTHQUAKE SERVICES LTD Third Defendant

Hearing:	28, 29, 30 and 31 October 2014 (at Christchurch)
Court:	Heath, Kós and Gilbert JJ
Counsel:	J E Hodder QC, B A Scott, T D Smith and G K Rippingale for Plaintiff D J Goddard QC, J D Every-Palmer and S K Swinerd for First Defendant D A Ward for Second Defendant D J Friar and M Powell for Third Defendant D A Webb and S Goodwin for Flockton Cluster Group (Intervener) G D R Shand and J A Glucina for Ms D Culf (Intervener) T C Weston QC and K L Clark QC, amici curiae
Judgment:	10 December 2014

JUDGMENT OF THE COURT

This judgment was delivered by me on 10 December 2014 at 9.30am pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar

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PART 1: INTRODUCTION

The proceeding

[1] In New Zealand, insurance for natural disaster damage is provided by a statutory regime. It is administered by the Earthquake Commission (the Commission) under the terms of the Earthquake Commission Act 1993 (the Act).[1]

[2] This proceeding concerns damage to residential land[2] that was caused by a series of earthquakes that struck in the Canterbury region, in 2010 and 2011.[3] In particular, it relates to (what has been called) Increased Flooding Vulnerability; a phenomenon when, as a result of a natural disaster (in this case an earthquake) there have been changes to land levels, which have left the land more prone to flooding than it was beforehand.[4] The Commission seeks declarations to give effect to a policy it has developed (the Policy), by which it contends such claims should be resolved. A number of declarations are sought. Some are anticipatory in nature.

[3] The questions raised include:

(a) Is the Commission liable for damage to residential land that results in Increased Flooding Vulnerability?

(b) If so, how may the Commission settle claims?

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1 Earthquake Commission Act 1993, s 4.
2 The term "residential land" is defined by s 2(1) of the Earthquake Commission Act 1993, and is set out at para [17] below.
3 See paras [22]–[26] below.
4 See paras [27] and [28] below.

(c) Can a claimant challenge the Commission's determination through court proceedings as an ordinary action or an application for judicial review?

(d) Can the Commission use standardised methodologies to calculate the appropriate settlement, provided the methodologies comply with the Act and public law principles?

[4] Assuming the above questions are resolved in the Commission's favour, it seeks an advance sanction of its Policy to declare its lawfulness, so as to avoid public law challenges to its implementation. Further, it seeks a declaration that claims that it has already settled pursuant to it are lawful.

[5] The Commission joined the Insurance Council, Christchurch City Council (the City Council) and Southern Response Earthquake Services Ltd (Southern Response) as defendants to the proceeding. The Insurance Council represents the interests of private insurance companies in New Zealand. The City Council is a territorial authority with responsibility for much of the area affected by the earthquakes. Southern Response is a Crown-owned company which formerly carried on business as a private insurer, under the name of AMI Insurance Ltd. Many affected properties were insured under private insurance policies with that company.

[6] Two parties were given leave to intervene. Both Ms Byrne and Ms McMeeking represent what is known as the Flockton Cluster Group. It comprises many homeowners in the Flockton Basin who contend that they have an Increased Flooding Vulnerability as a result of the earthquakes. The other is Ms D M Culf. She continues to live in an affected property in the Red Zone.[5] Those properties are subject to Increased Flooding Vulnerability. In addition, they are prone to Increased Liquefaction Vulnerability, a topic with which we deal separately at the request of the Insurance Council.[6]

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5 See paras [32] and [33] below.
6 See para [9] below.

[7] Kós J was responsible for pre-trial case management. He appointed two amici curiae:

(a) Mr Weston QC was appointed to represent homeowners affected by the earthquakes, to ensure that issues relevant to them were ventilated before the Court. While some of those people had chosen to remain living within the Red Zone, Mr Weston advised us that "the vast majority of [Red Zone] properties … have been acquired by the Crown reserving rights against private insurers".[7]

(b) Ms Clark QC was appointed as a contradictor, in relation to questions about whether this Court could properly invoke its declaratory jurisdiction in the circumstances of this case and whether Increased Flooding Vulnerability and Increased Liquefaction Vulnerability constitutes "natural disaster damage", as that term is defined in s 2(1) of the Act.[8]

[8] Initially, the City Council also counterclaimed, seeking independent declarations. While shortly before the hearing, the City Council discontinued, it was represented at the hearing by counsel, on a "watching brief". That caused one problem in relation to a declaration it had sought that Increased Flooding Vulnerability was a form of "natural disaster damage" that applied not only to residential land,[9] but also residential buildings.[10] As a result of debate during the hearing, the Commission subsequently elected to seek a declaration that Increased Flooding Vulnerability was not natural disaster damage in respect of residential buildings.

[9] The Insurance Council filed a counterclaim to seek declarations in respect of a separate (but related) phenomenon; namely, Increased Liquefaction Vulnerability.[11]

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7 See para [32] and [33] below.
8 The definition of "natural disaster damage" is set out at para [15] below.
9 Residential land is defined in s 2(1) of the Earthquake Commission Act 1993 and set out at para [17] below.
10 Ibid.
11 See para [29] below.

In the same way that movements in the land create a greater vulnerability to flooding, so it is said that vulnerability to liquefaction damage is also increased.

[10] Although the proceeding was filed in the Wellington Registry of this Court, the hearing took place in Christchurch. That change in venue enabled local residents who will be affected by the outcome of the proceeding to attend. Many did. We acknowledge their presence at the hearing.

The scheme of the Earthquake Commission Act 1993

[11] The Earthquake and War Damage Act 1944 was the first statute to provide a statutory insurance regime to respond to earthquake damage. At that time, private contracts of fire insurance were coupled with compulsory public cover for earthquake and war damage.[12] The 1944 Act applied to both residential and commercial properties.[13] The statutory insurance scheme was funded by a fire levy imposed under the predecessor of the Fire Service Act 1975.[14]

[12] In 1951, amendments were made to the 1944 Act to recognise the distinction between indemnity insurance and replacement cover. The need for replacement cover arose out of changes within the private insurance market. In *Farmers Mutual Insurance Co Ltd v Bay Milk Products Ltd*, Richardson J, delivering the judgment of the Court of Appeal said:[15]

> The 1944 Act was the first statutory provision with respect to the insurance of property against earthquake damage. Only those property owners with fire insurance policies are covered. A premium calculated on indemnity value is paid by the holder of a fire Policy and the insurer is responsible for passing the statutory premium on to the Commission. Initially the statutory cover reflected the practice of the insurance industry to cover a property for indemnity value only. The development of replacement risk insurance led to amending legislation in 1951 allowing for the provision by private insurers of a replacement cover in excess of the Commission's statutory liability.

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12 Earthquake and War Damage Act 1944, s 14.

13 The s 2(1) definition of property was "any real or personal property in New Zealand".

14 For a description of this funding mechanism, see *New Zealand Fire Service Commission v Insurance Brokers Association of NZ Inc* [2014] NZCA 179, [2014] 3 NZLR 541.

15 *Farmers Mutual Insurance Co Ltd v Bay Milk Products Ltd* [1989] 3 NZLR 647 (CA) at 652–653.

[13] In 1993, the Act repealed and replaced the 1944 Act. Cover for commercial properties was terminated. A "humanitarian" approach was adopted.[16] The focus of the Act was on three types of "natural disaster damage" that could occur to residential properties:

(a) residential buildings;[17]

(b) residential land;[18] and

(c) personal property.[19]

[14] The Commission is a Crown entity, to which the Crown Entities Act 2004 applies.[20] The Commission is charged with administering the insurance against natural disaster damage provided by the Act, to collect premiums payable for that insurance, to administer the Natural Disaster Fund,[21] to protect the value of the Fund and to obtain reinsurance in respect of the whole or part of the insurance offered.[22]

[15] The term "natural disaster damage" is defined by s 2(1) of the Act:

> **2 Interpretation**
>
> (1) In this Act, unless the context otherwise requires,—
>
> …
>
> **natural disaster damage** means, in relation to property,—
>
> (a) any physical loss or damage to the property occurring as the direct result of a natural disaster; or
>
> (b) any physical loss or damage to the property occurring (whether accidentally or not) as a direct result of measures taken under proper authority to avoid the spreading of, or otherwise to mitigate the consequences of, any natural disaster, but does not include any physical loss or damage to

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16 See para [75] below. See also *Morley v Earthquake Commission* [2013] NZHC 230 at paras [27]–[32].
17 Earthquake Commission Act 1993, s 18.
18 Ibid, s 19.
19 Ibid, s 20.
20 Ibid, s 4A.
21 The nature of the Natural Disaster Fund is described in s 13 of the Act.
22 Earthquake Commission Act 1993, s 5(1)(d).

the property for which compensation is payable under any other enactment

[16] A "natural disaster" includes an earthquake and, in the case only of residential land, a flood.[23]

[17] The terms "residential building" and "residential land" capture only those parts of the land on which the dwelling is situated, and an area of land appurtenant to it:[24]

> **residential building** means—
>
> (a) any building, or part of a building, or other structure (whether or not fixed to land or to another building, part, or structure) in New Zealand which comprises or includes one or more dwellings, if the area of the dwelling or dwellings constitutes 50 % or more of the total area of the building, part, or structure:
>
> (b) any building or part of a building (whether or not fixed to land, or to another building, part, or structure) in New Zealand which provides long-term accommodation for the elderly, if the area of the building which provides long-term accommodation for the elderly constitutes 50 % or more of the total area of the building, part, or structure:
>
> (c) every building or structure appurtenant to a dwelling referred to in paragraph (a), or a building or part of a building referred to in paragraph (b), of this definition and that is used for the purposes of the household of the occupier of the dwelling or for the purposes of the residents of the building or part:
>
> (d) all water supply, drainage, sewerage, gas, electrical, and telephone services, and structures appurtenant thereto—
>
> (i) serving a dwelling referred to in paragraph (a), or a building or part of a building referred to in paragraph (b), of this definition or surrounding land; and
>
> (ii) situated within 60 metres, in a horizontal line, of the dwelling or building or part; and
>
> (iii) owned by the owner of the dwelling or building or part, or by the owner of the land on which the dwelling or building or part is situated:
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> **residential land** means, in relation to any residential building, the following property situated within the land holding on which the residential building is lawfully situated:

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23 Ibid, s 2(1) definition of "natural disaster".

24 Ibid, s 2(1) definitions of "residential building" and "residential land".

(a) the land on which the building is situated; and

(b) all land within 8 metres in a horizontal line of the building; and

(c) that part of the land holding which—

(i) is within 60 metres, in a horizontal line, of the building; and

(ii) constitutes the main access way or part of the main access way to the building from the boundary of the land holding or is land supporting such access way or part; and

(d) all bridges and culverts situated within any area specified in paragraphs (a) to (c) of this definition; and

(e) all retaining walls and their support systems within 60 metres, in a horizontal line, of the building which are necessary for the support or protection of the building or of any property referred to in any of paragraphs (a) to (c) of this definition.

[18] Section 19 of the Act deals with claims in relation to "residential land". It states:

19 Residential land

Subject to any regulations made under this Act and to Schedule 3 to this Act, where a residential building is deemed to be insured under this Act against natural disaster damage, the residential land on which that building is situated shall, while that insurance of the residential building is in force, be deemed to be insured under this Act against natural disaster damage to the amount (exclusive of goods and services tax) which is the sum of, in the case of any particular damage,—

(a) The value, at the site of the damage, of—

(i) If there is a district plan operative in respect of the residential land, an area of land equal to the minimum area allowable under the district plan for land used for the same purpose that the residential land was being used at the time of the damage; or

(ii) An area of land of 4000 square metres; or

(iii) The area of land that is actually lost or damaged—

whichever is the smallest; and

(b) The indemnity value of any property referred to in paragraphs (d) and (e) of the definition of the term

"residential land" in section 2(1) of this Act that is lost or damaged.

[19] Schedule 3 to the Act (to which s 19 refers) sets out various conditions of the statutory insurance provided by the Act. Clause 3 of that Schedule specifies the circumstances in which the Commission may decline to accept (in whole or in part) "a claim made under any insurance of property under [the] Act".

[20] Section 29 of the Act deals with the settlement of claims. It states:

> **29 Settlement of claims**
>
> (1) Subject to any regulations made under this Act—
>
> (a) a claim may be made in respect of any insurance under this Act only by a person who has an insurable interest in the property concerned; and
>
> (b) without limiting section 31 of this Act, where more than one person has such an insurable interest, the Commission shall in settling any claim have due regard to the respective insurable interests.
>
> (2) Subject to any regulations made under this Act and, where a contract has been entered into under section 22 of this Act, to the provisions of that contract, if, during the period for which any property is insured under this Act, the property suffers natural disaster damage, the Commission shall settle any claim (by payment, replacement, or reinstatement, at the option of the Commission) to the extent to which it is liable under this Act.
>
> (3) Where any property is insured under this Act for its replacement value and the Commission is satisfied that goods and services tax has been paid or will be payable by an insured in the course of replacing or reinstating the property, the amount of any payment under subsection (2) of this section shall be increased by the amount of goods and services tax paid or payable by the insured.
>
> (4) Subject to any regulations made under this Act and without limiting the liability of the Commission under this Act, any payments or expenditure for which the Commission may be liable under this section shall be made as soon as reasonably practicable, and in any event not later than 1 year after the amount of the damage has been duly determined (which determination shall be made as soon as reasonably practicable).
>
> (5) The Commission may make ex gratia payments in respect of natural disaster damage to property that is not insured under this Act where a premium has been paid under this Act in respect of that property in the belief that the property was insured under this Act.

[21] The cover provided by the Act is akin to that offered by private insurers. The conditions set out in Schedule 3 are the equivalent of the terms of a private insurance policy. A claim only arises where there has been "natural disaster damage" caused by a "natural disaster" from which damage or loss has resulted in respect of a "residential building", "residential land" or "personal property". To avoid any problems arising out of "double insurance", an ability to insure privately, in addition to the statutory cover, is conferred by s 30 of the Act.[25]

Agreed facts

(a) The Canterbury earthquakes

[22] On 4 September 2010, a major earthquake, with a magnitude of 7.1,[26] occurred near Darfield, a community based some 40 kilometres west of Christchurch. The earthquake struck at a depth of 10 kilometres. Considerable damage was caused to land and buildings, both on the Canterbury Plains and in the city.

[23] On 22 February 2011, a more devastating earthquake struck, causing the tragic loss of 185 lives, as well as significant damage in the central business district and land and buildings situated on both the Canterbury Plains and the Port Hills. While of a lesser magnitude than the September 2010 event, its impact was much more severe. The epicentre of this earthquake was near the port of Lyttelton, 10 kilometres south east of Christchurch. It had a depth of five kilometres and a magnitude of 6.2.

[24] On 13 June 2011, two earthquakes occurred in quick succession. They were centred about 10 kilometres south east of Christchurch City, to the east of where the February 2011 earthquake had struck. Their magnitudes were 5.6 and 6 respectively. The ground motions were larger than those of September 2010. More damage was caused to land on the Plains and on the Port Hills, though generally less than what had occurred in February 2011.

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[25] Section 30 was discussed recently by the Supreme Court in *Firm P 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147.

[26] All measurements of this type are referable to the Richter scale.

[25] On 23 December 2011, there were two further earthquakes. They occurred within a period of 90 minutes. They were of magnitude 5.8 and 5.9 respectively. The epicentre was approximately 8 kilometres off the coast of New Brighton, to the east of Christchurch City.

[26] We have described the most significant of the land damaging events that occurred in the period between 4 September 2010 and 23 December 2011. Including significant aftershocks that occurred after 23 December 2011, the greater Christchurch area has experienced over 10,000 earthquakes since 4 September 2010. Of those, about 4,000 were of magnitude 3 or greater; over 60 were greater than magnitude 5.

(b) The relevant land

[27] The land in issue was, before the first major earthquake, at risk of some flooding from the three principal rivers that flow through Christchurch; the Styx, to the north; the Avon, through the middle; and the Heathcote, to the south. As a result of one (or more) of the earthquakes some land has subsided. That land is now more prone to flooding than it was beforehand.

[28] Christchurch and its surrounding areas have a history of flood events, of various severity. These floods have tended to occur in areas adjacent to the rivers, their tributaries, and the coast. The City Council has dealt with that natural hazard risk through Flood Management Areas, ponding areas and basins, for which allowance has been made in various planning documents. Those measures were designed to mitigate the effects of flooding through the imposition of controls on development within those areas. They were in place before the September 2010 earthquake.

[29] Much of the land affected by the earthquakes has suffered damage through the effects of liquefaction. That is the process by which liquefied soil is ejected from the ground and spreads outwards. This is caused by ground movement of the tectonic plates. Although, before the earthquake sequence, the risk of liquefaction was recorded on land information memoranda maintained by the City Council, there

was minimal public awareness of the nature and extent of the problems that might arise.

[30] Widespread land damage was caused by the earthquakes. There are approximately 169,000 separately insured residential properties in Canterbury. As a result of one or more of the earthquakes, the Commission has received 468,881 claims. Some have been settled. Many await resolution. In respect of those that have been resolved, building repairs and property reinstatement is continuing.

(c) Land classification in Christchurch since the earthquakes

[31] Following the February 2011 earthquake, Parliament enacted the Canterbury Earthquake Recovery Act 2011, by which the Canterbury Earthquake Recovery Authority (CERA) was established. Its primary role is to lead planning for the recovery of the Canterbury region. CERA has undertaken assessments of the areas most affected by the earthquakes and made recommendations to government about the suitability of the land for residential occupation, in the short to medium term. In general terms, the use of land for residential purposes is now subject to two classifications, known as the Red Zone and the Green Zone.

[32] Land within the Red Zone was so badly damaged by the earthquakes that it is unlikely any rebuilding can be undertaken in the foreseeable future. The Crown made an offer to owners of Red Zone residential properties to purchase them at 2007 rating valuations. There were two different purchase options, both of which had the effect of subrogating the Crown to the rights of the previous owners under statutory or private insurance. That being so, the largest claimant on the statutory insurance regime for Red Zone properties will be the Crown, on whose behalf CERA is acting.

[33] Owners of Red Zone properties were not compelled to accept the Crown's offers to purchase. While, from a legal (as opposed to practical) point of view, there is no impediment to the repair or rebuilding of residential dwellings in the Red Zone, the increased engineering requirements for foundations, and the associated costs of repair and rebuilding, act as a disincentive. For homeowners who continue to live in Red Zone properties (such as Ms Culf), construction of new services is unlikely in

the foreseeable future, and the maintenance of existing services is likely to decrease as the number of people living in an area dwindles.

[34] Although Green Zone properties are regarded as suitable for residential occupation, some parts require further geotechnical investigation. In a number of cases, particular types of foundations will be required to minimise the risk of future liquefaction damage. Investigations were undertaken by the Department of Building and Housing,[27] to provide guidance on the types of foundations that would be required for particular types of land within the Green Zone.[28] On 28 October 2011, three technical categories were established:

(a) TC 1 applies when liquefaction damage is unlikely in future large earthquakes. Standard residential foundation assessments and construction remains appropriate.

(b) TC 2 applies when liquefaction damage is possible in future large earthquakes but standard enhanced foundation repair and rebuild options are suitable to mitigate against that possibility.

(c) TC 3 applies when liquefaction damage is possible in future large earthquakes, but the land is such as to require an individual engineering assessment to select the most appropriate foundation repair or rebuild option.

(d) Flooding Vulnerability

[35] Three mechanisms that cause flooding have been identified as having been affected by changes to land as a result of the earthquakes.

[36] The first involves the paths through which water can flow over land. Pluvial flooding is caused by run-off that is in excess of the capacity of the stormwater systems and causes excess water to flow over land. This can be exacerbated in

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27 Now part of the Ministry of Business, Innovation and Employment.

28 Ministry of Business, Innovation and Employment *Guidance on repairing and rebuilding houses affected by the Canterbury earthquake sequence* available at www.dbh.govt.nz/guidance_on_repairs_after_earthquake.

situations where subsidence of land settlement has occurred, as that can change overland flow paths or reduce hydraulic gradients to both rivers and streams.

[37] The second is river flooding. Fluvial flooding is caused by a flowing of water in rivers and streams that exceeds the capacity of a particular channel and floods adjacent land. Lateral spreading, caused by the earthquakes, has reduced the capacity of some such waterways by reducing widths and increasing riverbed levels. Ground subsidence, particularly along stream banks, can increase the overflow from such waterways onto surrounding land.

[38] The third involves tidal flooding. Tidal flooding is caused by extreme sea levels in coastal areas and lower rivers that flood adjacent land. When land settles to a level below extreme tide levels that is not protected, it can become more prone to tidal flooding.

The Commission's Increased Flooding Vulnerability Policy

(a) Development of the Policy

[39] When developing its Policy, the Commission gained information from two primary sources to determine what changes in the land had resulted from the earthquakes. While Mr Hodder QC, for the Commission, accepts that the base data from which the Policy was developed is imperfect, what has been used by the Commission is all that is presently available.

[40] One source of information is aerial LiDAR surveys. One was undertaken in 2003; the others were after each of the four major earthquake events. There are problems in comparing the 2003 pre-earthquakes data with results from survey conducted after they had occurred. The 2003 survey was conducted with less accurate equipment and significantly fewer returns. The post September 2010 surveys did not cover all of the river catchments and the post December 2011 survey did not cover all of Christchurch.

[41] Data from LiDAR surveys were used to create (what are known as) bare earth Digital Elevation Models of Christchurch both before and after the September 2010

earthquake; and, after each of the 2011 events to which we have referred.[29] That information forms the basis on which land elevation changes are considered for the purpose of managing the risk of flooding.

[42] The Commission also obtained information, after each of the four major earthquakes, from some 400 engineers about land damage across Christchurch. An index of land damage severity was created from that information. That has enabled relevant observations to be captured on maps.

[43] As well as those primary sources of information, the Commission sought expert advice from groups of engineers and valuers:

(a) Engineers were asked to develop a methodology to assess, for each individual property, whether there had been a physical change to the residential land caused by an earthquake that had increased the vulnerability of the land to flooding; and, the extent of any increase. The outcome of their deliberations was reviewed by an expert panel of three engineers from outside New Zealand. This methodology is designed to determine whether "natural disaster damage", as defined in the Act, has occurred.

(b) Valuers were instructed to develop a methodology to assess, for each individual property, whether any increase in vulnerability of the land to flooding adversely affected the use and amenities that could otherwise be associated with the land, and its effect on the value of the insured property. The valuers crafted a methodology by which a relevant diminution in value could be calculated. This work has been peer reviewed by four other valuers who were nominated for that purpose by professional valuation institutes within New Zealand.

[44] The work undertaken by the engineers and valuers has formed the basis of the Policy. An amended version of the Policy (dated September 2014) was finalised after input from experts engaged by other parties to this proceeding.

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[29] See paras [22]–[26] above.

(b) The Policy in outline

[45] The Commission's Policy contains a number of component parts. In summary: [30]

(a) It recognises "Increased Flooding Vulnerability" as a form of "natural disaster damage" to which the statutory insurance will respond.

(b) From an engineering perspective, three threshold tests have been developed to determine whether land has suffered an increase in flooding vulnerability and, if so, to what extent.[31]

(c) From a valuation perspective, a model has been developed to enable an assessment to be made of whether any change in flooding vulnerability to the land has adversely impacted on the uses and amenities of the land.

(d) The Commission has proposed a "claim review process" that is designed to provide a private dispute resolution mechanism into which owners of affected properties may opt to participate.

(c) Assessment of Increased Flooding Vulnerability

[46] The Commission's Policy identifies four thresholds that must be crossed in order for a claim to be recognised under the Increased Flooding Vulnerability category of natural disaster damage:

> 15 In order for residential land to qualify as having Increased Flooding Vulnerability, the residential land must satisfy the following:
>
> *Threshold 1*: The exacerbated flood depth on the residential land has increased by 0.2 m or more as a result of the Canterbury earthquake sequence.[32]

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30 For a discussion of the status of the Commission's Policy, in the context of the anticipatory judicial review and declaratory judgment claims, see paras [140]–[159] below.

31 See para [46] below.

32 The term is defined in the Policy as the series of earthquakes experienced by the Canterbury region between 4 September 2010 and 23 December 2011.

Threshold 2: The exacerbated flood depth on the residential land has increased by 0.1 m or more as a result of a single earthquake event.

Threshold 3: The residential land has suffered observable land damage as a result of the Canterbury earthquake sequence.

Threshold 4: The change in flooding vulnerability to the residential land has caused the value of the property to decrease.

[47] The Commission's view is that these thresholds will permit robust assessment of "the significant majority of properties in the Canterbury region". Nevertheless, it has identified "a limited number of instances … for which an exception should be made":

16.1 *Event exception*: properties with 0.2 m or greater exacerbated flood depth over the Canterbury earthquake sequence and that have suffered observable land damage, but which have not suffered 0.1 m or greater exacerbated flood depth in any one event; and

16.2 *Uplift exception*: properties in specified areas of tectonic uplift for which there is evidence that differential subsidence has increased their flood vulnerability;

16.3 *Land damage exception*: properties with 0.2 m or greater exacerbated flood depth over the Canterbury earthquake sequence, and 0.1 m or greater exacerbated flood depth in any one event, but which have not suffered recorded observable land damage.

[48] Assessments in relation to all thresholds and exceptions are to be made by Tonkin & Taylor, the Commission's engineers, "on the basis of automated processing of flood modelling data and manual engineering review with site-specific inspections to determine whether the property has suffered potential Increased Flooding Vulnerability". After that initial assessment, a review is to be undertaken by a senior engineer to determine whether any application of that criteria may have been wrong.[33]

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[33] The technical application of those steps is described in a report by Tonkin & Taylor Ltd, *Canterbury Earthquake Sequence – Increased Flooding Vulnerability Assessment Methodology* (April 2014).

(d) Settlement of Increased Flooding Vulnerability claims

[49] The Policy envisages settlement of claims based on Increased Flooding Vulnerability by payment of a fixed sum, rather than reinstatement. That payment is to be computed by reference either to the cost of repair (or reinstatement) of the land, or the diminution in market value caused by the natural disaster damage. The Commission has identified four relevant factors, in determining whether to make a payment in lieu of a repair (or reinstatement) cost, or to pay an amount assessed as the diminution in market value:

> 24.1 If the residential building requires to be removed in order to enable repairs to the land to address the Increased Flooding Vulnerability, [the Commission] will settle based on the Diminution of Value;
>
> 24.2 If resource consent is required under the Resource Management Act 1991 in order to enable repairs to the land to address the Increased Flooding Vulnerability, [the Commission] will settle based on the Diminution of Value unless the claimant demonstrates that he or she can obtain resource consent and will effect the repairs;
>
> 24.3 If the residential land has been sold by the claimant after the earthquake event recognised as causing Increased Flooding Vulnerability, [the Commission] will settle based on the Diminution of Value;
>
> 24.4 In all other cases, [the Commission] will pay the repair cost unless that cost is disproportionate to the Diminution of Value, having regard to the circumstances of the claimant (including his or her stated intentions in relation to repair of the land).

[50] A separate part of the Policy deals with the assessment of diminution in value. This is to be done by independent valuers, on the basis that the diminution will:[34]

> 27.1 be the discount from the price that would have been paid for a property (the residential land and residential buildings combined) on the day prior to the earthquake that would be agreed between a willing buyer and a willing seller because of the specified physical change to the land, with full knowledge about that change and its impact on the vulnerability of the land to flooding, the cost of repair options, and advice from competent and reasonable advisors.

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[34] Further detail on the assessment of diminution in value is set out in a paper entitled *Diminution of Value Methodology for Increased Flooding Vulnerability* (April 2014) which has been endorsed by an Expert Valuation Panel nominated by the New Zealand Institute of Valuers and the Property Institute of New Zealand to undertake an independent peer review of work carried out by valuers instructed by the Commission.

27.2 not take into account:

(a) any change in value to the property resulting from external changes or effects, whether from the earthquakes or otherwise (including regulatory changes);

(b) any general stigma arising from the earthquakes;

(c) any changes in value to non-insured residential land and buildings.

(e) A proposed claims review process

[51] The claims review process is designed to establish a means by which a claimant can challenge any decision made by the Commission to refuse cover. It:

(a) entitles a claimant to provide additional information to the Commission,

(b) assures claimants of a dispassionate internal review of the claim; and

(c) offers a mediation process as a last resort before a claimant might issue proceedings in a Court of competent jurisdiction.

[52] As it is not open to the Commission to compel a claimant to go through that process, the claims review procedure will be something into which a claimant may opt to participate, should he or she consider that process appropriate.

PART 2: THE PROPOSED DECLARATIONS

[53] Before, during and after the hearing, counsel helpfully conferred with a view to refining the nature of the declarations sought. On 5 November 2014, following directions given at the conclusion of the hearing, Mr Hodder filed a memorandum reflecting the terms of the directions sought, both by the Commission and the Insurance Council, on the latter's counterclaim. The memorandum incorporated comments from other counsel on the terms of the directions sought.

[54] The Commission seeks declarations in the following terms:[35]

[35] For ease of reference when we deal with the declarations sought, we have provided our own

(a) **A1:** In relation to "residential land", "natural disaster damage" under the Act may include circumstances where one or more earthquakes have caused physical changes to any such land and such changes have adversely affected the uses and amenities that could otherwise be associated with the land by increasing the vulnerability of that land to flooding events (Increased Flooding Vulnerability).

(b) **A2:** The settlement of claims compliant with the Act for natural disaster damage to residential land involving Increased Flooding Vulnerability may be approached on the basis of the Commission indemnifying the claimant against his or her financial loss by an appropriate payment, including by payment of the costs of relevant and appropriate repair or reinstatement activities or, in appropriate circumstances, by payment of the loss of market value of the insured land together with any associated residential buildings (or, at the option of the Commission, by undertaking relevant and appropriate repair or reinstatement activities).

(c) **A3:** In calculating payments to settle claims for natural disaster damage to residential land involving Increased Flooding Vulnerability, the Commission is entitled to prepare and apply standardised policies and methodologies, including materiality thresholds, exclusions and discounts, provided that (i) such policies and methodologies are relevant and rational and consistent with the Act, (ii) any claimant is entitled to provide further information (or an alternative interpretation of existing information) and ask the Commission to reconsider whether the payment calculated in accordance with such policies provides an appropriate and full settlement consistent with the

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alpha-numeric listing of the declarations sought by both the Commission and the Insurance Council. We have also amended the terms of the declarations sought to reflect the way in which we have described the various participants and statutes.

Act, and (iii) any claimant is entitled to pursue appropriate court challenge.

(d) **A4:** On the evidence before the Court, the Policy, amended in September 2014, adopted by the Commission incorporates policies and methodologies which are appropriate and rational and consistent with the contemporaneous Declarations A1, A2 and A3 of this Court in this proceeding.

(e) **A5:** On the evidence before the Court, any payments to insured persons by the Commission in relation to claims for natural disaster damage to residential land involving Increased Flooding Vulnerability that the Commission has admitted in accordance with its Policy (as amended in September 2014, or in an essentially similar form) and with the Act, are lawful payments in respect of insurance under section 19 of the Act and, together with all expenditure in connection with such claims, constitute lawful expenditure from the National Disaster Fund.

(f) **A6:** In determining claims made in respect of insurance under sections 18, 19 or 20 of the Act, the Commission is exercising statutory powers of decision necessary to administer both the insurance provided under the Act and the National Disaster Fund, and such determinations may involve judgements on issues of evaluation or discretion and are subject to legal challenge only by way of an application for judicial review or under the Declaratory Judgments Act 1908.

(g) **A7:** In relation to "residential buildings", "natural disaster damage" insurance under section 18 of the Act does not include, of itself, circumstances where one or more earthquakes have caused physical changes to land and such changes have (i) caused the residential building to reduce in

height relative to a remote datum and (ii) adversely affected the uses and amenities that could otherwise be associated with the residential building by increasing the vulnerability of that building to flooding events.

[55] By way of counterclaim, the Insurance Council seeks the following directions:

(a) **B1:** In relation to "residential land", "natural disaster damage" under the Act may include circumstances where one or more earthquakes have caused physical changes to any such land and such changes have adversely affected the uses and amenities that could otherwise be associated with the land by increasing the vulnerability of that land to liquefaction damage in future earthquake events (Increased Liquefaction Vulnerability).

(b) **B2:** The settlement of claims compliant with the Act for natural disaster damage to residential land involving Increased Liquefaction Vulnerability may be approached on the basis of the Commission indemnifying the claimant by undertaking appropriate repairs or reinstatement, or by an appropriate payment including, in appropriate circumstances, by payment of the loss of market value of the insured land together with any associated residential buildings.

(c) **B3:** In calculating payments to settle claims for natural disaster damage to residential land involving Increased Liquefaction Vulnerability, the Commission is entitled to prepare and apply standardised policies and methodologies, including materiality thresholds, exclusions and discounts, provided that (i) such policies and methodologies are relevant and rational and consistent with the Act, (ii) any claimant is entitled to provide further information (or an alternative interpretation of existing

information) and ask the Commission to reconsider eligibility and/or entitlement consistently with the Act, and (iii) any claimant is entitled to pursue appropriate court challenge.

(d) **B4:** The Commission should finalise its proposed Liquefaction Policy as soon as reasonably practicable.

(e) **B5:** Leave is reserved to the Commission or to any other party to this proceeding to apply, once the Commission has finalised its proposed Liquefaction Policy, for a declaration in relation to the consistency of that Policy with the Act.

[56] The declarations can be grouped into three distinct issues:

(a) The first raises questions of statutory interpretation. Declarations A1 and B1 consider whether "natural disaster damage" includes Increased Flooding Vulnerability and Increased Liquefaction Vulnerability. Declaration A7 considers when that damage extends to residential buildings. Declarations A2 and B2 consider how the Commission can settle claims.

(b) The second involves a consideration of the circumstances in which this Court may grant anticipatory relief, either by way of judicial review or under the Declaratory Judgments Act 1908. Declaration A4 seeks to validate the Policy, while Declaration A5 seeks to validate payments made pursuant to it. Declarations A3 and B3 address the question whether the Commission is entitled to develop standardised methodologies for calculating the payment of settlements. Declarations B4 and B5 relate to the expediency with which a policy for Increased Liquefaction Vulnerability should be developed and whether it can also be challenged in Court.

(c) The third concerns the question of enforcement. Declaration A6 requires the Court to determine what kinds of proceedings are

available to a claimant who seeks to sue the Commission for an erroneous determination.

[57] We deal with the issues raised in that sequence:

(a) First, in Part 3, we deal with questions of statutory interpretation. These involve whether Increased Flooding Vulnerability and Increased Liquefaction Vulnerability constitute "natural disaster damage" to residential land and (in the case of Increased Flooding Vulnerability) residential buildings.[36] We also consider the way in which indemnity value should be assessed under the Act.[37]

(b) Second, in Part 4, we consider the scope of the Court's powers to provide anticipatory relief, and the circumstances in which it is appropriate to grant a remedy of that type.[38] Part 4 addresses Declarations A4 and A5 which seek confirmation of the legitimacy of the Policy, and payments made under it.[39]

(c) Third, in Part 5, we discuss the way in which individual claimants may, as a matter of law, enforce the Commission's statutory obligation to meet lawful claims. In particular, we consider whether a claimant is permitted to bring ordinary proceedings in a Court of civil jurisdiction to enforce that obligation.[40]

PART 3: INTERPRETATION

Is Increased Flooding Vulnerability natural disaster damage to residential land?

(a) Background

[58] Many areas of residential land in the Canterbury region are at a lower level than before the earthquakes and have an increased vulnerability to flooding as a

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36 See paras [58]–[93] below.
37 See paras [94]–[125] below.
38 See paras [126]–[139] below.
39 See paras [140]–[162] below.
40 See paras [163]–[199] below.

result. Before analysing whether this constitutes natural disaster damage to the land for the purpose of the Act, it is helpful to give a brief explanation of the geological processes that caused this change. These processes included:

(a) tectonic ground movement associated with fault displacement; and

(b) liquefaction causing the ejection of silt, sand and water,[41] soil densification and lateral spreading.[42]

[59] During the main earthquakes, the bedrock on one side of the fault moved relative to the other, causing parts to slip several metres in some locations. This slip in the bedrock caused folding of the overlying soil deposits resulting in both subsidence and uplift of the ground surface near the fault trace, as well as horizontal movement. Tectonic ground surface movements resulted in subsidence of approximately 150 mm to the east of the central business district and an uplift of approximately 450 mm at the Avon-Heathcote estuary. Horizontal displacement ranged up to approximately 500 mm. The ground displacement from tectonic effects is relatively uniform over large areas with smooth and gradual transitions between areas of greater and lesser change in elevation.

[60] Soil liquefaction is caused by the ground shaking during an earthquake and typically occurs in loose, saturated, fine-grained soils, such as silts and sands often found adjacent to rivers and streams. Liquefaction also occurs in poorly compacted man-made fills. During the liquefaction process, the soil behaves more like a liquid than a soil. The soil particles are rearranged and compacted, resulting in decreased volume. Ground surface displacement from liquefaction can vary significantly across short distances due to the geological variability of the near-surface soils and depending on the proximity to rivers which can affect lateral spreading.

[61] The damage caused by liquefaction was severe in a number of Christchurch suburbs. It took the form of ground deformation, principally subsidence resulting

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41 Some 500,000 tonnes of silt and sand was ejected during the earthquakes and subsequently removed from land in the Canterbury region.

42 Lateral spreading is the sideways movement of land, typically towards watercourses. Blocks of the earth's crust move sideways over liquefied soils towards a lower area. Surface damage can include minor or major cracks in the land and tilting of ground crust blocks.

from the ejection of liquefied soil, but also from differential settlement and lateral spreading. In the September 2010 earthquake, liquefaction was mainly concentrated along the Avon River and local streams, but it was much more widespread in the February 2011 earthquake.

[62] The Commission undertook an extensive programme of geotechnical observation, measurement and assessment to evaluate damage to residential land insured under the Act. Land damage was also assessed by inspections carried out at some 65,000 properties. The Commission obtained data from ground elevation surveys undertaken before and after the earthquakes. It used this information in conjunction with data obtained from the geotechnical assessment programme and aerial photographs to assess how physical changes to the land have affected its vulnerability to flooding. Preliminary results of flood modelling work show that there are up to 13,500 low lying residential properties in the Christchurch area that may now be materially more susceptible to flooding as a result of the reduced land levels.

(b) Analysis

[63] In 2012, the Commission announced that it would recognise Increased Flooding Vulnerability as natural disaster damage for the purposes of the Act. The Commission has defined Increased Flooding Vulnerability as a physical change to residential land as a result of an earthquake which adversely affects the uses and amenities that could otherwise be associated with the land by increasing the vulnerability of that land to flooding events. The physical change to the land is the reduction in the height or level of the land relative to sea level or, in some cases, relative to nearby land, directly resulting from one or more of the earthquakes.

[64] One of the principal issues the Court has been asked to determine is whether Increased Flooding Vulnerability comes within the meaning of "natural disaster damage" in terms of the Act.

[65] "Natural disaster" is defined to mean: [43]

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[43] "Natural disaster damage" is defined in s 2(1) of the Act, and is set out at para [15] above.

(a) An earthquake, natural landslip, volcanic eruption, hydrothermal activity, or tsunami; or

(b) Natural disaster fire; or

(c) In the case only of residential land, a storm or flood.

[66] There is no dispute that physical changes to residential land have been caused by a natural disaster; namely, one or more of the earthquakes. These physical changes have resulted in the reduction in height of many areas of residential land. The critical question is whether these physical changes are properly characterised as physical loss or damage to the property for the purposes of the Act.

[67] The definition states that "physical loss or damage, in relation to property, includes any physical loss or damage to the property that (in the opinion of the Commission) is imminent as the direct result of a natural disaster which has occurred".[44] The meaning of "physical loss or damage" is not otherwise defined in the Act but it is a commonly used expression in the context of material damage insurance.

[68] The meaning of these words in a house insurance policy was considered recently in *O'Loughlin v Tower Insurance*.[45] Asher J held that the word "physical" means "of or concerning the body".[46] He observed that in English law, "damage" usually refers to a "changed physical state".[47] Therefore, in the context of house insurance, "physical damage" would require some type of disturbance of the physical integrity of the materials and structures that constitute the body of the house.[48] Asher J referred to the authorities showing that the word "loss" in the context of building insurance generally means physical loss, not economic loss.[49]

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44 Physical loss or damage is defined in s 2(1) of the Act.
45 *O'Loughlin v Tower Insurance* [2013] NZHC 670, [2013] 3 NZLR 275.
46 Ibid, at para [43].
47 Ibid, at para [46].
48 Ibid, at paras [43] and [44].
49 Ibid, at para [52].

[69] The meaning of "natural disaster damage" under the Act was also considered in *Kraal v Earthquake Commission*.[50] Mallon J applied the reasoning in *O'Loughlin* and concluded that "loss" in the context of the Act means loss to the physical materials or structure of the building and does not include purely economic loss.[51]

[70] With the need for clarification of one aspect of *Kraal*, we adopt the analysis in these cases. It is supported by the authorities to which they refer. Natural disaster damage to residential land for the purposes of the Act requires a physical change or loss to the body of the land that has occurred, or is imminent, as the direct result of the earthquakes, and which affects the use or amenity of the land.

[71] The need for clarification arises out of Mallon J's observation in *Kraal* that:

> [39] The requirement for a "physical loss" means that economic loss is not covered. [The Commission] submits that the loss of the right to inhabit a house is an economic loss. All other things being equal, it is certainly likely that there will be a loss in the market value of a property which can no longer be occupied. I agree that if the plaintiffs were seeking cover for the loss in market value of the property that would be an economic loss and therefore not covered.

[72] Mallon J was dealing with the concept of "physical loss", in the context of para (a) of the definition of "natural disaster damage".[52] She was not suggesting that economic losses caused by physical damage to residential land could not be claimed. In *Kraal* the land was physically unchanged. The likely reduction in the property's value was due to a non-imminent off-site danger from rock fall.[53] That meant it was unsuitable for residential purposes.

[73] In this case we are dealing with instances where there has been physical damage to residential land that has been caused by a natural disaster; an earthquake. Thus, the qualifying criterion of "physical … damage" is met and a loss in market value consequent on that damage is covered.

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50 *Kraal v Earthquake Commission* [2014] NZHC 919, [2014] 3 NZLR 42.
51 Ibid, at paras [39] and [68]. *O'Loughlin* is discussed at paras [51]–[57] above.
52 See para [15] above.
53 See the definition of "physical loss or damage" in s 2(1) of the Earthquake Commission Act.

[74] The limitations on losses that might be claimed are set out in cl 2 of Schedule 3 to the Act. That clause refers to "consequential losses", not "economic losses". The consequential losses that cannot be claimed include loss of profits or business interruption. That is consistent with the primary object of the legislation being to protect homeowners. The calculation of loss caused by physical damage to the land by reference to its diminution in value is not of the same character as the consequential losses to which cl 2 refers.

[75] Ms Clark tested the argument that Increased Flooding Vulnerability amounts to natural disaster damage. Ms Clark submits that the meaning of these words must be considered in the light of the underlying philosophy and purpose of the Act. She drew attention to a statement made by the Associate Minister of Finance when introducing the Earthquake Commission Bill at the time of its third reading in 1992:[54]

> [T]he Government's prime concern in the aftermath of a major disaster is a humanitarian concern. Thus the priority should be the provision of basic, adequate housing and other amenities, and the re-establishment of a basic infrastructure ...

[76] Ms Clark submits that the underlying humanitarian focus of the legislation suggests that Parliament intended a narrow construction of the words "natural disaster damage". While she acknowledges that the land has undergone physical changes as a direct result of the earthquakes, she contends that these changes do not constitute present physical loss or damage. Rather, they increase the vulnerability of the land to sustain such loss or damage in a future natural disaster, namely a flood. Ms Clark argues that this vulnerability, which may cause physical loss or damage covered by the Act in a future flooding event, does not qualify as present physical loss or damage occurring as the direct result of the earthquakes.

[77] Ms Clark submits that her interpretation is supported by the requirement that the physical loss or damage to the property must be the *direct* result of the natural disaster. Prospective loss or damage is only brought within the definition of physical loss or damage if it is imminent.[55] She argues that physical loss or damage that may

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[54] (15 December 1992) 532 NZPD 13188.

[55] See the definition in s 2(1) and above at para [67].

be caused in a future flooding event is not imminent and is therefore not included. Although Ms Clark advanced an argument that the Act does not respond to economic loss, we disagree with that proposition for the reasons previously given.[56]

[78] We accept Ms Clark's submission that it is necessary to differentiate between the physical loss or damage to the insured land that has occurred as a direct result of the earthquakes and the physical loss or damage that may occur in the future as a result of a flood. Only the former can amount to natural disaster damage caused by the earthquakes. While a later flood may cause natural disaster damage to residential land,[57] the physical damage that it may cause is attributable to that subsequent event.

[79] As a direct result of the earthquakes, there has been a disturbance to the physical integrity of the land, reducing it in volume and leaving the body of the land in a changed physical state. This changed physical state has resulted in the land being more vulnerable to flooding, thereby adversely affecting its use and amenity. The primary use of residential land is as a platform for building. Land that is materially more prone to flooding is plainly less suitable for this purpose and is less habitable. The criteria for physical loss or damage are satisfied. We conclude that Increased Flooding Vulnerability constitutes natural disaster damage to insured residential land for the purposes of the Act.

(c) Declaration

[80] Having regard to these conclusions, we make a declaration in the form of Declaration A1,[58] namely:

> In relation to "residential land", "natural disaster damage" under the Act may include circumstances where one or more earthquakes have caused physical changes to any such land and such changes have adversely affected the uses and amenities that could otherwise be associated with the land by increasing the vulnerability of that land to flooding events (Increased Flooding Vulnerability).

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56 See para [72] above.
57 Earthquake Commission Act 1993, s 2(1) definition of "natural disaster"; see para [16] above.
58 See para [54](a) above.

Is Increased Flooding Vulnerability natural disaster damage to residential buildings?

(a) Background

[81] We have been asked to determine whether a residential building, which is more vulnerable to damage from a future flooding event because of a reduction in its height relative to sea level (or other relevant datum) as a result of the earthquakes, has sustained natural disaster damage even if there has been no change or disturbance to the physical integrity of its materials and structure. The example given is that of a house that has simply "ridden down" with the land as a result of the earthquakes, but has sustained no other physical damage.

(b) Analysis

[82] The Commission, the Insurance Council and Southern Response submit that the residential building has not suffered natural disaster damage in these circumstances because there has been no physical change to the materials or structure of the building and no damage to its physical integrity. Mr Webb and Mr Shand disagree. Mr Webb submits that the residential building has nonetheless sustained natural disaster damage because it has an increased vulnerability to flooding as a direct result of the earthquakes. Mr Weston supports this submission.

[83] Mr Webb submits that a building that has moved down relative to its surroundings has undergone a physical change. This physical change, being the change in its location, has resulted in the building being more susceptible to flooding.

[84] Mr Webb referred to *Hughes v Potomac Insurance Company*,[59] in support of his submission. That case concerned an insured's entitlement to recover under a policy insuring against physical loss of and damage to a "dwelling" in circumstances where the land forming the backyard of the house slipped into a creek leaving the house perched on the edge of a newly created 30 foot cliff, but otherwise undamaged. The insurer declined the claim on the basis that the house had suffered

[59] *Hughes v Potomac Insurance Company* 199 Cal App 2d 239 (Cal Dist Ct App 1962).

no direct physical loss. The Court interpreted the word "dwelling" in the policy, which was defined to include lawns but not trees, shrubs or plants, as including the underlying land and curtilage. It was therefore not necessary for the Court to determine whether the relevant damage was to the land or to the building; both came within the definition of "dwelling" under the policy. For this reason, the case does not assist in determining the present issue, which is whether the damage should be regarded as damage to the residential building or the residential land, or both.

[85] Mr Webb also referred to *Snapp v State Farm Fire & Casualty Company.*[60] That case concerned a policy insuring against all risks of physical loss to the insured premises. Because the insured's house had been built on unstable fill, it moved laterally following a period of unusually heavy rainfall, causing damage to the structure of the house and its foundations. There was no dispute that the dwelling was damaged; the only issue was the extent of the insurer's obligation to repair. The Court found that the insurer's liability included the costs of repairing the house with adequate foundations to prevent further damage. The Court did not need to determine whether the policy covered the underlying land or whether the damage was to the land or to the building. For these reasons, this case does not assist us.

[86] The Act deals separately with the insurance against natural disaster damage of residential buildings, residential land and personal property. There are separate insuring provisions for each, set out in ss 18, 19 and 20 respectively. The terms of insurance differ for each category of insured property. Different excesses apply and there are different limits of indemnity.[61] There is cover for flood and storm damage to residential land, but not for residential buildings.[62] All of this emphasises the need to differentiate between physical loss or damage to a residential building and physical loss or damage to the residential land on which it is erected.

[87] Where there has been physical damage to land resulting in subsidence, but there has been no change to the physical state or integrity of the structure or

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60 *Snapp v State Farm Fire & Casualty Company* 206 Cal App 2d 827 (Cal Dist Ct App 1962).

61 Excesses and premiums are calculated under the Earthquake Commission Regulations 1993, regs 3 and 4.

62 Natural disaster is defined in s 2(1) of the Act to include a storm or flood, but only in the case of residential land.

materials that comprise the body of the house erected on the land including its foundations, we consider that this should be regarded as damage to the residential land, not to the residential building. We consider that this fits with the scheme of the Act which is unusual, if not unique, in providing separate cover for residential land and for residential buildings.[63]

(c) Declaration

[88] For those reasons, we make a declaration in similar terms to Declaration A7,[64] namely:

> In relation to "residential buildings", "natural disaster damage" under the Act does not include circumstances where one or more earthquakes have caused physical changes to the land only and such changes have:
>
> (i) caused the residential building to reduce in height relative to a remote datum; and
>
> (ii) adversely affected the uses and amenities that could otherwise be associated with the residential building by increasing the vulnerability of that building to flooding events.

Is Increased Liquefaction Vulnerability natural disaster damage?

(a) Background

[89] Following the earthquakes, some areas of residential land have become more vulnerable to liquefaction damage from future earthquakes. This is broadly because the affected land now has a thinner "crust", being the non-liquefiable layer of earth between the ground surface and the water table. This reduction in the thickness and quality of the crust renders the land more prone to liquefaction damage and less able to support a house in the event of a future earthquake.

[90] Because of the large number of residential properties affected by Increased Liquefaction Vulnerability as a result of the earthquakes, the Commission proposes to formulate a policy to enable such claims to be assessed and dealt with appropriately and consistently. As the Increased Liquefaction Vulnerability policy is

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63 The Commission understands that the statutory insurance of land, as distinct from buildings, is unique.

64 See para [54](g) above.

not yet fully developed, the Commission does not seek any declarations in relation to Increased Liquefaction Vulnerability at this stage. However, the Insurance Council seeks declarations in relation to Increased Liquefaction Vulnerability, including a declaration that Increased Liquefaction Vulnerability is natural disaster damage under the Act.

(b) Analysis

[91] Our analysis of whether Increased Flooding Vulnerability constitutes natural disaster damage under the Act is equally applicable in relation to Increased Liquefaction Vulnerability. All counsel agree that if Increased Flooding Vulnerability qualifies as natural disaster damage, as we are satisfied it does, it must follow that so too must Increased Liquefaction Vulnerability.

[92] We conclude that residential land that is materially more prone to liquefaction damage in a future earthquake because of changes to its physical state as the direct result of one or more of the earthquakes in the Canterbury earthquake sequence, has sustained natural disaster damage in terms of the Act. These physical changes have reduced the use and amenity of the land such that it is now less suitable for use as a building platform and for the other purposes usually associated with residential land.

(c) Declaration

[93] As a result, in terms of Declaration B1,[65] we declare that:

> In relation to "residential land", "natural disaster damage" under the Act may include circumstances where one or more earthquakes have caused physical changes to any such land and such changes have adversely affected the uses and amenities that could otherwise be associated with the land by increasing the vulnerability of that land to liquefaction damage in future earthquake events.

Assessment of indemnity value

(a) Background

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[65] See para [55](a) above.

[94] Residential land is insured on an indemnity basis.[66] The issue raised by Declarations A2[67] and B2[68] is how that value should be assessed.

[95] The most obvious way of remediating land that has sustained Increased Flooding Vulnerability is to raise it to its pre-earthquake level by overlaying it with compacted soil. However, this will often not be feasible. In many cases it would require removing the house, any other structures, and trees and gardens. Further, placing significant quantities of fill on land can create geotechnical problems affecting its stability, including by increasing its vulnerability to lateral spreading and settlement in the event of a further earthquake causing liquefaction of the underlying soil. This is obviously a serious issue with land that is already prone to liquefaction, as is the case with many of the affected properties.

[96] There is the added complication that raising the land may adversely affect surface drainage patterns and increase the risk of inundation on neighbouring properties. For this reason, there are limitations on the amount of fill that can be imported, particularly in designated flood management areas where many of the affected properties are located. The earthworks required to repair most affected properties in these flood management areas will exceed the permitted maximum of 0.3 m in height and 10 m^3 in volume. Resource consent would also be required for all properties outside the flood management areas if there is a need to raise the land by more than 0.3 m, as is the case with approximately half of the affected properties in these areas. These difficulties are compounded by the fact that the insured residential land comprises only the footprint of the house and the surrounding eight metres of land.[69]

[97] For all of these reasons, Tonkin & Taylor considers that in most cases it will not be possible to obtain resource consent to remediate the land, even if it were technically feasible to do so.

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66 See para [105] below.
67 See para [54]above.
68 See para [55] above.
69 The full description of "residential land" is set out in s 2(1) of the Act. See para [17] above.

[98] The Commission's Policy contemplates that many Increased Flooding Vulnerability claims will need to be settled by way of a payment. This is expressly authorised by s 29(2) of the Act which provides that the Commission "shall settle any claim (by payment, replacement, or reinstatement, at the option of the Commission) to the extent to which it is liable under this Act".[70]

[99] The Commission's option to settle claims by paying the amount of the damage is also confirmed in Schedule 3 to the Act which sets out the conditions applying to the insurance. Clause 9(1) of Schedule 3 relevantly states: "The Commission may at its option replace or reinstate any property that suffers natural disaster damage, or any part thereof, instead of paying the amount of the damage".

(b) Issue

[100] The Commission's proposed Increased Flooding Vulnerability Policy is to pay the repair cost where repairs are technically feasible, can lawfully be undertaken, are not disproportionately expensive, and are likely to be carried out by the claimant. In all other cases, the Policy provides for payment of the loss of market value of the insured property as the result of the natural disaster damage. The Commission seeks a declaration that it may settle such claims on the basis of this diminution of value in appropriate cases in accordance with its Policy.

[101] The Commission's proposed approach is based on its contention that residential land is insured under the Act on an indemnity basis and that the amount payable is to be determined by assessing the amount of money required to restore the claimant to the position he or she would have been in if the damage had not occurred. In the case of indemnity insurance, the emphasis is on the actual loss suffered by the claimant as a result of the insured fortuity. The Commission's Policy is designed to achieve this objective.

[102] The Insurance Council concurs with the Commission's position that residential land is insured under the Act on an indemnity basis. Mr Weston agrees

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70 Set out at para [20] above.

and considers that the Commission's proposed Policy appropriately gives primacy to repair options. However, he submits that any declaration should reflect this.

[103] Mr Webb, supported by Mr Shand, submits that land is insured under the Act on a reinstatement basis, not merely for any loss of value. The Act's equivalent of an insuring clause for residential land is set out in s 19 which provides that residential land is insured against natural disaster damage *to the amount* which is the sum of the value of the area of land calculated in accordance with s 19(a) and the indemnity value of any bridges, culverts and retaining walls that come within the definition of "residential land" in s 2. Mr Webb submits that the plain and ordinary meaning of s 19 is that the residential land is insured up to the value of the land lost or damaged whereas he contends that the Commission's interpretation would require the section to be read as only providing compensation for *the loss of value* of the land at the site of the damage.

[104] Mr Webb submits that the modes of settlement of claims set out in s 29(2), being "payment, replacement or reinstatement", are "expressed as equivalences". He argues that the Commission is therefore required to pay the cost of reinstating the land up to the limit of indemnity, being the value of the land. He submits that the Commission is not justified in paying the diminution in value of the land as a result of the natural disaster damage which he describes as falling "woefully short" of the insured's reinstatement entitlement.

(c) Analysis

[105] Section 19 sets a limit of indemnity based on the value of the residential land, calculated in the prescribed manner, plus the indemnity value of any associated retaining walls, bridges and culverts. [71] The words "to the amount" make clear that this is the limit of the Commission's liability for such damage. Whereas residential land is insured for its indemnity value, residential buildings and personal property are separately insured against natural disaster damage, under ss 18 and 20 respectively, for replacement value.

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[71] Set out at para [18] above.

[106] "Replacement value" is defined in s 2 of the Act with reference to residential buildings and personal property but there is no comparable provision for residential land, including retaining walls, bridges and culverts. These provisions show that Parliament drew a distinction between the indemnity available under the Act in respect of residential land and that provided for residential buildings and personal property.

[107] The legislative history tends to confirm this. As originally drafted, the Earthquake Commission Bill provided for "residential property", which included both the residential building and the associated land, to be insured against natural disaster damage "to the amount which is the lesser of the replacement value of the property or the maximum amount [$100,000], plus the value of any land covered under this section suffering natural disaster damage".[72] In its submissions to the Select Committee, the Commission pointed out that the effect of these provisions would be to provide replacement cover for land as well as buildings, whereas this was not intended and was not previously provided:[73]

> It is not intended that cover for land be on a replacement basis. Instead, the aim is to continue the existing level of land cover. In a number of respects the Bill fails to do this.
>
> Perhaps most fundamentally, the consequence of including land associated with a building in the definition of "residential property" is that clauses 18 and 21 confer replacement cover for land as well as for buildings.

[108] For that reason, the Commission submitted to the Select Committee that "residential building" and "residential land" should be defined separately and that there should be separate insuring provisions for each. This submission appears to have been accepted. The Act separately defines residential buildings and residential land and these are insured under separate provisions. Further, the replacement cover expressly provided in the case of residential buildings and personal property is not referred to in the insuring provision for residential land. Nor does the definition of "replacement value" extend to residential land.[74] This supports the submissions

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72 Earthquake Commission Bill 1992 (210–1), cl 18.

73 Earthquake Commission "Submission of the Earthquake Commission on the Earthquake Commission Bill" at paras [4.7.1] and [4.7.2].

74 See the s 2(1) definition of residential land set out at para [18] above.

made by the Commission, the Insurance Council and Mr Weston that residential land is insured on an indemnity basis for its market value.

[109] However, the loss to the insured must be assessed as a question of fact in each case and will not necessarily be satisfied by a payment representing the loss in market value of the insured property. The reason for this in the case of insurance of real property was explained by Forbes J, in *Reynolds v Phoenix Insurance Co Ltd*:[75]

> [Y]ou are not to enrich or impoverish: the difficulty lies in deciding whether the award of a particular sum amounts to enrichment or impoverishment. This question cannot depend in my view on an automatic or inevitable assumption that market value is the appropriate measure of the loss. Indeed in many, perhaps most cases, market value seems singularly inept,[76] as its choice subsumes the proposition that the assured can be forced to go into the market (if there is one) and buy a replacement. But buildings are not like tonnes of coffee or bales of cloth or other commodities unless perhaps the owner is one who deals in real property. To force an owner who is not a property dealer to accept market value if he has no desire to go to market seems to me a conclusion to which one should not easily arrive. There must be many circumstances in which an assured should be entitled to say that he does not wish to go elsewhere and hence his indemnity is not complete unless he is paid the reasonable cost of rebuilding the premises in situ.

[110] The Act contemplates that the Commission may settle claims for natural disaster damage to residential land by meeting repair or reinstatement costs in appropriate cases. The Commission's option of replacing or reinstating damaged property, instead of paying the amount of the damage, applies to all insured property, including residential land.[77] The Commission also has the option of relocating a residential building to a different site where the existing site is unsuitable because of the damage it has sustained or is likely to sustain.[78]

[111] The Act's emphasis on repair or reinstatement, which will often be required to indemnify an insured for damage to real property, is reinforced by the conditions of insurance entitling the Commission to decline a claim, or cancel the insurance altogether, where payments for natural disaster damage to insured property have not been used in the repair, replacement or reinstatement of the property.[79]

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75 *Reynolds v Phoenix Insurance Co. Ltd* [1978] 2 Lloyd's Rep 440 (QB), at 451.
76 The judgment says "inept" but "inapt" may have been intended.
77 Earthquake Commission Act 1993, s 29(2) and Schedule 3, cl 9.
78 Schedule 3, cl 10.
79 Schedule 3, cls 3(a) and 4(1).

[112] However, for the reasons already discussed, repair or reinstatement will not always be an available or appropriate response, particularly with Increased Flooding Vulnerability claims in respect of residential land. The Commission has flexibility under the Act to tailor the indemnity response to meet the particular circumstances of any given case. Where, for example, a claimant has no intention of carrying out repair or reinstatement works to residential land suffering from Increased Flooding Vulnerability because this is neither technically feasible nor lawful, the claimant would be overcompensated if he or she received the estimated costs of such repairs to the extent that these exceed the diminution in value of the property.

[113] Similarly, where a claimant has sold the property without repairing the damage prior to settlement of the claim, he or she would receive a windfall benefit if the indemnity payment is calculated on the basis of repair or reinstatement costs to the extent that these exceed the diminution in value of the property. It cannot have been Parliament's intention that claimants would receive payments from the Natural Disaster Fund that exceed their actual loss and provide windfall benefits. That would be contrary to the purposes of the Act.

[114] For these reasons, we consider that the Commission's Policy providing for settlement of claims on a diminution of value basis in appropriate cases is consistent with its obligations under the Act.

[115] We now consider two specific criticisms by the Insurance Council of the Commission's approach to the assessment of indemnity value. First, the Insurance Council argues that alternative repair options, in particular, raising buildings to alleviate the adverse consequences of Increased Flooding Vulnerability, can be a legitimate approach in determining indemnity. Second, it contends that proportionality between cost of repair and diminution in value should not be used as a primary determinant of a claimant's loss.

[116] Mr Goddard submits that introducing fill to raise the land is not the only way of repairing Increased Flooding Vulnerability damage to land. He submits that where Increased Flooding Vulnerability damage to residential land affects its primary function as a building platform for residential occupation, the actual loss to the

insured can appropriately be indemnified by raising the height of the residential building. Mr Goddard referred to a number of authorities supporting the general proposition that in some cases a plaintiff's loss can be assessed with reference to the cost of modifying other property. For example, in *Bank of New Zealand v Greenwood*, the Court assessed damages in a nuisance case involving the reflection of sunlight from glass panels on to a neighbouring property on the basis of the cost of installing blinds.[80] In personal injury cases, permitted in jurisdictions without New Zealand's statutory bar, damages often include the cost of making modifications to property to lessen the impact of injury, such as by providing wheelchair access to a house. Mr Goddard referred to *Whiten v St George's Healthcare NHS Trust* as an example of such a case.[81]

[117] We do not consider that these authorities assist. The Act separately insures residential land and residential buildings against natural disaster damage. Where claims are to be met by repair or reinstatement, this must be repair or reinstatement of the insured property, in this case the residential land. Residential land is not repaired or reinstated if all that has happened is a modification to the residential building.

[118] As already noted, the Commission may decline a claim in circumstances where natural disaster damage was caused or exacerbated by earlier natural disaster damage for which the commission made payment and that payment was not used to repair the property. The Commission may also cancel the insurance if it pays the limit of indemnity in respect of insured property and that property is neither replaced nor reinstated to the satisfaction of the Commission. These provisions demonstrate Parliament's intention that payments from the Natural Disaster Fund to repair, replace or reinstate property should be used for these purposes, not for the purpose of modifying other property. However, there may be situations where the cost of raising a residential building may be reflected in the diminution of the market value of the underlying residential land. To that extent, the Commission's Policy allows for this to be taken into account.

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80 *Bank of New Zealand v Greenwood* [1984] 1 NZLR 525 (HC).
81 *Whiten v St George's Healthcare NHS Trust* [2011] EWHC 2066 (QB).

[119] The Insurance Council's second criticism is that the Policy states that repair costs may not be paid where these are disproportionate to the diminution in market value of the land. The Policy provides that the Commission will pay repair costs in all cases where the repairs do not require the removal of the residential building, any required resource consent can be obtained, and the claimant intends to carry out the repairs and has not sold the property. The Policy states:

> In all other cases, [the Commission] will pay the repair costs unless that cost is disproportionate to the Diminution of Value having regard to the circumstances of the claimant (including his or her stated intentions in relation to repair of the land).

[120] The Commission cannot be liable to meet the costs of repairing or reinstating residential land that has suffered natural disaster damage irrespective of how disproportionately high these costs may be in relation to the damage. A policy that takes no account of this factor would be defective and could lead to the Commission making unjustified payments from the Natural Disaster Fund.

[121] Mr Goddard accepts that the cost of repair relative to the diminution in market value is a relevant factor that the Commission should take into account. However, he submits that it should not be applied to exclude claims by people reasonably seeking to repair or reinstate damaged land. He argues that this factor should only operate in cases where a claimant could be said to be "eccentric or unreasonable" in seeking to carry out the repairs.

[122] The appropriate indemnity response will be a question of fact to be determined in the particular circumstances of each case. The claimant's intention to carry out repairs and the feasibility of these repairs will be relevant. There may be cases where repair costs are disproportionate and unreasonable in all of the circumstances. That question can only be judged on a case by case basis. We can go no further than to state that proportionality, and the consequent reasonableness of repair costs, will be a relevant consideration that the Commission should take into account.

[123] We conclude that the terms of the Policy are consistent with its obligations under the Act and appropriately identify the circumstances in which claims can be

met by paying an amount calculated as the diminution in value of the land as a result of the natural disaster damage.

[124] The same conclusion must follow for Increased Liquefaction Vulnerability, and for the same reasons.

(d) Declarations

[125] We make declarations in a form that is slightly modified from that submitted as Declarations A2[82] and B2;[83] namely:

> *Increased Flooding Vulnerability*
>
> The settlement of claims compliant with the Act for natural disaster damage to residential land involving Increased Flooding Vulnerability may be approached on the basis of the Commission:
>
> (a) indemnifying the claimant against his or her financial loss by an appropriate payment, including by payment of:
>
> (i) the costs of relevant and appropriate repair or reinstatement activities; or
>
> (ii) in appropriate circumstances, by payment of the loss of market value of the insured land together with any associated residential buildings; or
>
> (b) at the option of the Commission, by undertaking relevant and appropriate repair or reinstatement activities.
>
> *Increased Liquefaction Vulnerability*
>
> The settlement of claims compliant with the Act for natural disaster damage to residential land involving Increased Liquefaction Vulnerability may be approached on the basis of the Commission:
>
> (a) indemnifying the claimant against his or her financial loss by an appropriate payment, including by payment of:
>
> (i) the costs of relevant and appropriate repair or reinstatement activities; or
>
> (ii) in appropriate circumstances, by payment of the loss of market value of the insured land together with any associated residential buildings; or

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82 See para [54](b) above.
83 See para [55](b) above.

(b) at the option of the Commission, by undertaking relevant and appropriate repair or reinstatement activities.

PART 4: ANTICIPATORY RELIEF

Declaratory judgments: jurisdiction and discretion

(a) Is judicial review available?

[126] The Judicature Amendment Act 1972 specifies the circumstances in which an application for judicial review may be made. Section 4(1) of that Act enables an application for judicial review to be made to this Court "in relation to the … proposed … exercise by any person of a statutory power" to seek (among other things) relief in the form of a declaration against that person in any such proceeding.[84]

[127] The Commission was established by statute.[85] The Act imposes on the Commission particular functions, which include the administration of the statutory insurance scheme and the Natural Disaster Fund.[86] The Commission is also an entity to which the Crown Entities Act 2004 applies.[87] In those circumstances, the Commission is a public body against which relief could be obtained by judicial review.[88]

[128] Despite the fact that there is no application by a third party to review a decision of the Commission, the susceptibility of any decision that it may make in implementing the Policy is relevant to whether this Court should exercise any discretion to grant a declaration of the type sought. The Commission asks the Court to give a stamp of approval, so that its Policy can be carried into effect with little risk of subsequent challenge.

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84 Section 4(1) of the Judicature Amendment Act 1972 preserves the Court's ability to grant relief that could have been sought under the prerogative writs: see also s 4(2A).

85 Earthquake Commission Act 1993, s 4.

86 Ibid, s 5(1).

87 Ibid, s 4A. The responsible Minister may also give directions to the Commission: see s 12 of the Act.

88 See *Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd* [1994] 2 NZLR 385 (PC) at 388–390.

(b) The Declaratory Judgments Act 1908

[129] This Court has jurisdiction to grant declaratory judgments under the Declaratory Judgments Act 1908:

> **3 Declaratory orders on originating summons**
>
> Where any person … desires to do any act the validity, legality, or effect of which depends on the construction or validity of any statute, …
>
> …
>
> such person may apply to the High Court … for a declaratory order determining any question as to the construction or validity of such statute, … or of any part thereof.

[130] Section 3 makes it clear that the Court's power is not confined to declaring a legal position in respect of an historical event, but extends to cases in which confirmation of a particular legal state of affairs is required before an act is done.

[131] In *Mandic v Cornwall Park Trust Board*,[89] the Supreme Court considered the breadth of the declaratory judgment jurisdiction. Elias CJ, with whom other members of the Court agreed on this point,[90] held that the Court of Appeal's approach was in error:

> [5] The case came before the High Court on application by the lessees for declaratory judgment under s 3 of the Declaratory Judgments Act. The lessor, while opposing the interpretation contended for by the lessees, did not object to the form of the proceedings in the High Court or in the Court of Appeal. Despite that, and although it dealt with the substantive points of interpretation, the Court of Appeal prefaced its determination with observations about the scope of the jurisdiction under the Declaratory Judgments Act, suggesting that it was one of "limited availability". The Court of Appeal considered that an applicant for declaratory judgment would normally have to "establish the existence of a genuine dispute or a lis" and overcome the "threshold" of being able to point to "an actual controversy between the parties which cannot be more appropriately determined in another forum, such as by arbitration". Its subsequent separate discussion of discretion indicates that the Court was not simply emphasising the discretionary nature of the jurisdiction or that application for declaratory order is inappropriate when there are questions of fact to be determined (as is implicit in the terms of s 3). Rather, it seems to have been suggesting a narrower jurisdiction than is suggested by the language of s 3 of the Declaratory Judgments Act.

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89 *Mandic v Cornwall Park Trust Board* [2011] NZSC 135, [2012] 2 NZLR 194.

90 Ibid, at para [82], per Blanchard, Tipping, McGrath and William Young JJ.

…

> [8] Declaratory judgments are available to make "binding declarations of right" whether or not "any consequential relief is or could be claimed". The effect of a declaratory order is to the same effect "as the like declaration in a judgment in an action". It is binding "on the person making the application and on all persons on whom the summons has been served, and on all other persons who would have been bound by the said declaration if the proceedings wherein the declaration is made had been an action". *A declaratory judgment may be given "by way of anticipation with respect to any act not yet done or any event which has not yet happened"*. The High Court may direct service of the summons on such persons as it thinks fit, to ensure that any person affected has notice and may take part in the determination.
>
> [9] *The jurisdiction under the Declaratory Judgments Act enables anyone whose conduct or rights depend on the effect or meaning of an instrument,* including an agreement, *to obtain an authoritative ruling*. …. *Access to the jurisdiction does not depend on there being an existing dispute. Nor is it necessary that there be a lis*. It is desirable to express this disagreement with the reasons of the Court of Appeal although, in the event, the approach it adopted is not material to the determination of the appeal.
>
> (Emphasis added; footnotes omitted)

[132] While accepting the extent of the jurisdiction recognised in *Mandic*, Ms Clark pointed to discretionary factors that, she submitted, militated against the grant of the relief sought.[91] Ms Clark submitted that while the Supreme Court had confirmed the existence of a broad power to make declarations, *Mandic* had not circumscribed the discretionary factors that ought to be taken into account.

[133] The types of situation in which discretionary relief will normally be refused include cases in which the subject matter of the proposed declaration can be characterised as "theoretical", "academic", "hypothetical" and "abstract".[92] Those terms, while to some degree interchangeable, provide a useful benchmark for cases in which declaratory relief may not be appropriate. All involve cases where there is an absence of concrete facts.[93]

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91 For example, see *Telecom New Zealand Ltd v Commerce Commission* [2012] NZCA 278 at para [313]–[337] and Lord Woolf and Jeremy Woolf (eds) *Zamir and Woolf, The Declaratory Judgment* (4th ed Sweet & Maxwell, London, 2011) from 4-01.

92 Lord Woolf and Jeremy Woolf (eds) *Zamir and Woolf, The Declaratory Judgment* (4th ed Sweet & Maxwell, London, 2011) at 4–57 to 4–59.

93 Ibid, at 4–59. See also, *Mandic v Cornwall Park Trust Board* [2011] NZSC 135, [2012] 2 NZLR 194, *Peters v Davison* [1998] NZAR 309 (HC), *R v Sloan* [1990] 1 NZLR 474 (HC) and *New Zealand Insurance Co Ltd v Prudential Assurance Co Ltd* [1976] 1 NZLR 84 (CA).

[134] Ms Clark submits that while there are some agreed facts, there remain areas of disagreement among experts on topics such as modelled estimates of exacerbated flood depth, degrees of subsidence estimates, application of thresholds, variable prospects of flooding across Canterbury and statistically derived thresholds based on incomplete data. She observes that the declarations have been sought, in part, because "the very existence and extent of [Increased Flooding Vulnerability] is compounded by imperfect information".

[135] Notwithstanding Ms Clark's submissions on this point, we are satisfied that if an appropriate evidential foundation were available to enable a legal question to be determined, the High Court may provide anticipatory relief on questions of statutory interpretation. As *Mandic* confirms, the jurisdiction conferred by s 3 of the Declaratory Judgments Act is not otherwise constrained. The reservations expressed by the Court of Appeal in the later decision in *New Zealand Fire Service Commission v Insurance Brokers Association of NZ Inc,* were premised on the need for a sufficient evidential foundation on which any declaration can be based. [94]

[136] Mr Hodder referred us to *Oxfordshire County Council v Oxford City Council*, a decision of the House of Lords in which a lower Court had been asked to determine, in advance of any dispute, whether particular rights or statutory obligations would limit the landowners' ability to use the land.[95] The House of Lords upheld the ability to give a remedy but emphasised the need for an adequate factual foundation on which to base a decision.

[137] In so doing, members of the House expressed some diffidence about a Court embarking upon an application of this type:

(a) Lord Hoffmann expressed concern about the possibility of (the specific declarations sought) being seen as amounting to the "equivalent of a planning policy statement from the Office of the

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[94] *New Zealand Fire Service Commission v Insurance Brokers Association of NZ Inc* [2014] NZCA 179, [2014] 3 NZLR 541 at para [12]–[14] can be explained by the Court's reluctance to embark upon a declaratory judgment jurisdiction on the basis of sample policies of insurance, rather than ones actually in existence at the time the application to the High Court was made.

[95] *Oxfordshire County Council v Oxford City Council* [2006] UKHL 25, [2006] 2 AC 674.

Deputy Prime Minister".[96] The danger, His Lordship suggested, was the possibility of guidance offered by the Court being "inevitably … construed as if it were a supplementary statute".[97]

(b) Lord Scott, quoting from Lord Diplock's speech in *Gouriet v Union of Post Office Workers*,[98] endorsed the view that "the jurisdiction of the court is not to declare the law generally or to give advisory opinions; it is confined to declaring contested legal rights, subsisting or future, of the parties represented in the litigation before it and not those of anyone else".[99] Nevertheless, he accepted "that if there is an issue of law that needs to be decided before a decision can be made [in the context of the particular case before the House], on a registration, or deregistration, application the registration authority can refer the issue of law to the court for a ruling". At that stage, "the court may, if in its discretion it thinks right to do so, make a declaration accordingly".[100] Lord Rodger had similar reservations.[101]

(c) Baroness Hale expressed the strongest views on that topic, saying: "I share [Lord Scott's] misgivings about the propriety of our being asked, still less of our answering, some of the questions on the examination paper. These are private law proceedings, not an application for judicial review in which a declaration is sought as to the legality of the actions of a public body".[102]

[138] We do not consider it is necessary to refer to further authority. Both the New Zealand authorities and the House of Lords reach a common position, as to the circumstances in which declaratory relief of the type sought may properly be granted. The answer depends upon whether there is a sufficient evidential foundation to provide relief, in the context of a public law proceeding.

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96 Ibid, at para [68].
97 Ibid, at para [68].
98 *Gouriet v Union of Post Office Workers* [1978] AC 435 (HL) at 501.
99 *Oxfordshire County Council v Oxford City Council* [2006] UKHL 25, [2006] 2 AC 674 at para [93].
100 Ibid, at para [97].
101 Ibid, at para [114].
102 Ibid, at para [131].

[139] In this case, there is no doubt that the proceeding is based on public law. The Commission is a public body that exercises statutory powers of decision. The declaratory relief arises out of what Mr Hodder has properly characterised as anticipatory judicial review proceedings. We are satisfied that, while this Court should be reluctant to deal with academic questions, or applications that do no more than to ask the Court to provide an advisory opinion, there is a sufficient evidential foundation on which appropriate declarations could be granted.

The legitimacy of the Commission's Policy

(a) The Commission's statutory obligations

[140] Up to 13,500 individual properties may have suffered Increased Flooding Vulnerability as a result of the earthquake events. The Commission faces, therefore, a plethora of claims in widely divergent factual circumstances where the claimants enjoy a statutory entitlement to payment, and much of that payment may have to be found from public money.

[141] The Commission says the Policy was developed to assist the Commission to reach a credible and informed judgment on the existence and extent of relevant natural disaster damage, and the monetary entitlements flowing from that. That perspective is understandable. The Commission has a statutory obligation to meet qualifying claims and a public law obligation to treat claimants consistently, in accordance with their entitlements.

(b) Consultation on the terms of the Policy

[142] The Policy has had constructive input from other parties and interested persons. As Mr Weston submitted, considerable work was done by the Commission to consult on the terms of the Policy. He was supportive of the Commission developing a policy to address the complex questions arising in relation to coverage of Increased Flooding Vulnerability and Increased Liquefaction Vulnerability.

[143] The result was further revision of the Policy between its form (published in May 2014) at the time of the commencement of these proceedings to an amended

(September 2014) Policy which the Court was instead invited to consider. Importantly, the changes include a provision for a final engineering review to reconsider properties excluded under the Policy's indicative threshold, to be undertaken by the Commission's geotechnical engineers. The Commission also developed a claims review framework in response to a request from Mr Weston.

(c) Issue

[144] There is widespread acceptance by the parties, which we share, that it is appropriate for the Commission to formulate, have and apply a Policy to manage claims for contestable statutory entitlements by so large and diverse a potential claimant pool. We accept that the Commission, in these particular circumstances, has a public law obligation to treat like cases alike, as Mr Goddard put it. A policy framework, incorporating a decision tree, will assist the Commission do that. There is nothing unusual about that. Private insurers have claims handling manuals, which they rely on in the processing of claims. But, of course, private insurers do not and cannot obtain any kind of pre-emptive judicial declaration approving the content of such a manual.

[145] Section 29(2) of the Act provides that the Commission:

> … shall settle any claim (by payment, replacement, or reinstatement, at the option of the Commission) to the extent to which it is liable under this Act.

We accept the submission for the Insurance Council that the statute provides for statutory insurance cover. The Commission has an obligation, therefore, to identify the amount payable in respect of a claim made, based on relevant information provided or available to it. It also has an obligation to pay the amount for which it is liable if it does not replace or reinstate the damaged property. Although assessing claims necessarily will involve questions of judgment, that does not mean that the Commission is exercising a discretion as to the amount to be paid. A qualifying claimant enjoys an entitlement. That is a matter of right, rather than discretion.

[146] The concerns expressed by counsel were not with the Commission formulating, having and applying a Policy. Rather the concern was with the Court approving that Policy in what Mr Hodder called an "anticipatory judicial review".

(d) Is the Policy legally valid?

[147] We begin our analysis on these issues by recalling the nature of the relief sought. While the relief sought is anticipatory in nature, the question whether we can declare that the Policy is valid must be determined in the same way as if the issue had arisen retrospectively. The Commission submits that focus is on the reasonableness of the Policy, and whether all relevant facts have been taken into account in its development, and all irrelevant considerations excluded.

[148] Mr Goddard submitted that the Policy cannot operate as a substitute for the statutory framework. Its adoption must, therefore, be subject to a proviso that any claimant is entitled to establish that eligibility, the measure of compensation or the payment determined in accordance with the Policy do not provide an appropriate and full settlement consistent with the Act.

[149] Ms Clark expressed concern about the possibility of the terms of the Policy being applied mechanically. To similar effect, Mr Weston submitted that there is a risk that "so-called policies will become entrenched as absolute rules". The risk is that, while senior executives of the Commission no doubt expect the Policy to be applied on a case by case basis, those responsible for dealing with multiple claims, at an operational level, might be tempted to use the guidance as a template.

[150] Mr Webb for the Flockton Cluster Group, submitted there was a real danger that if the Court were to exercise its discretion to declare the Policy consistent with the Commission's public law obligations then, no matter how cautiously couched, "this would be seen as the approval of a framework which cannot possible capture the huge variety of possible factual scenarios that are presented in reality". He submitted that the consequence would be a failure on the Commission's part to properly meet its obligations under the Act, and for individual land owners to be denied proper settlement of claims.

[151] Mr Webb accepted that the Commission was entitled to have an internal Policy. But, he contended, anything more would amount to "judicial legislation," with the effect that the Policy may include materiality thresholds, exclusions and discounts divergent from the entitlement. That would then be relied on "binding law" when dealing with the question of coverage and settlement on an individual basis.

(e) Can declarations be made?

[152] In supporting his proposed Declarations A4 and A5, Mr Hodder relied on four well-known authorities regarding the legitimacy of a general policy not necessarily fettering a discretion: *British Oxygen Co Ltd v Minister of Technology,*[103] *Van Gorkom v Attorney General,*[104] *R (Alconbury Ltd) v Secretary for the Environment*[105] and *Criminal Bar Association of New Zealand v Attorney General.*[106]

[153] On this topic, these authorities say much the same thing. It will suffice to cite from just one of them, from the speech of Lord Clyde in *Alconbury*:[107]

> The formulation of policies is a perfectly proper course for the provision of guidance in the exercise of an administrative discretion. Indeed policies are an essential element in securing the coherent and consistent performance of administrative functions. There are advantages both to the public and the administrators in having such policies. Of course there are limits to be observed in the way policies are applied. Blanket decisions which leave no room for particular circumstances may be unreasonable. What is crucial is that the policy must not fetter the exercise of the discretion. The particular circumstances always require to be considered. Provided that the policy is not regarded as binding and the authority still retains a free exercise of discretion the policy may serve the useful purpose of giving a reasonable guidance both to applicants and decision makers.

[154] That is fine so far as it goes, but the distinguishing feature of the present case is that the Commission is not dealing with a discretion, but rather a statutory entitlement.

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103 *British Oxygen Co Ltd v Minister of Technology* [1971] AC 610 (HL).
104 *Van Gorkom v Attorney General* [1978] 2 NZLR 387 (CA).
105 *R (Alconbury Ltd) v Secretary for the Environment* [2001] UKHL 23, [2003] 2 AC 295.
106 *Criminal Bar Association of New Zealand Inc v Attorney General* [2013] NZCA 176, [2013] NZAR 1409.
107 Ibid, at para [143].

[155] The Commission must, in the first instance, make an internal decision as to whether, on the balance of probabilities, the claimant's property has suffered damage (so that the Commission is liable to repair, reinstate or pay in cash). If it opts for the latter course, it must decide, again in the first instance on the balance of probabilities, the quantum of loss suffered by the claimant. We agree with Mr Goddard that there is no scope here for the Commission to adopt a "conservative approach", so it will pay claims only if they meet its Policy, or if otherwise it is quite clear that the Commission is liable. The former would convert the Policy into a substitute for the statute. The latter would be to misstate the standard of proof.

[156] We agree with the submission from the Insurance Council that the Policy must not produce "wrong answers". It must not lead to rejection of claims which are on the balance of probabilities well-founded. It must not, in the event of acceptance of a claim, result in payment of less than the amount which on the balance of probabilities is the amount payable. It must incorporate sufficient flexibility to ensure marginal cases that meet entitlement to payment are indeed met. These are not matters of discretion. The outcomes of the Commission's claims management process must correctly meet its statutory insurance obligations, as a matter of law.

[157] We believe that these issues can be addressed adequately by ensuring that any declarations that we make state (what would otherwise be regarded as) self-evident propositions that flow from the nature of the Commission's statutory obligations.

[158] What is required is a good faith determination, based on all relevant considerations, that will fairly address an individual claim in a timely fashion, subject to rights of challenge to particular decisions made by the Commission by individual claimants. Such an approach will address all of the concerns identified by Mr Goddard, Mr Webb and Ms Clark.

[159] In these circumstances we are satisfied that this Court can go only part of the way to the Commission's Declaration A4. We consider that the Commission is entitled to develop and publish guidelines identifying factors it will take into account in assessing whether a valid claim has been made for natural disaster damage based on Increased Flooding Vulnerability or Increased Liquefaction Vulnerability,

provided those guidelines inform a good faith determination about whether there has been such natural disaster damage, are not applied mechanically, do not exclude from consideration other factors that are relevant in any particular case, and enable the Commission's assessment to be challenged in a Court of competent jurisdiction.

(f) Declarations

[160] We make declarations, based on Declarations A4[108] and A5[109] that:

> The Commission is entitled to develop and publish guidelines identifying factors it will take into account in assessing the validity of a claim for "natural disaster damage" based on Increased Flooding Vulnerability and/or Increased Liquefaction Vulnerability provided the guidelines:
>
> (a) require the Commission to act in good faith; and
>
> (b) are not applied mechanically; and
>
> (c) do not exclude consideration of factors that are relevant to any particular case; and
>
> (d) do not prevent claimants challenging the decision in a court of competent jurisdiction by way of an ordinary proceeding, judicial review or both.
>
> Any payments to insured persons by the Commission in relation to claims for natural disaster damage to residential land involving Increased Flooding Vulnerability that the Commission has admitted in accordance with its Policy and with the Act are lawful payments from the National Disaster Fund.

[161] We also acknowledge the desirability of developing a Policy (and one to deal with Increased Liquefaction Vulnerability) and therefore we make declarations that are substantially in terms of Declarations A3[110] and B3:[111]

> *Increased Flooding Vulnerability*
>
> In calculating payments to settle claims for natural disaster damage to residential land involving Increased Flooding Vulnerability, the Commission is entitled to prepare and apply standardised policies and methodologies, including materiality thresholds, exclusions and discounts, provided that:
>
> (a) such policies and methodologies are relevant and rational and consistent with the Act;

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108 See para [54](d) above.
109 See para [54](e) above.
110 See para [54](c) above.
111 See para [55](c) above.

(b) any claimant is entitled to provide further information (or an alternative interpretation of existing information) and ask the Commission to reconsider whether the payment calculated in accordance with such policies provides an appropriate and full settlement consistent with the Act; and

(c) any claimant is entitled to pursue appropriate court challenge by way of an ordinary proceeding, judicial review or both.

Increased Liquefaction Vulnerability

In calculating payments to settle claims for natural disaster damage to residential land involving Increased Liquefaction Vulnerability, the Commission is entitled to prepare and apply standardised policies and methodologies, including materiality thresholds, exclusions and discounts, provided that:

(a) such policies and methodologies are relevant and rational and consistent with the Act;

(b) any claimant is entitled to provide further information (or an alternative interpretation of existing information) and ask the Commission to reconsider whether the payment calculated in accordance with such policies provides an appropriate and full settlement consistent with the Act; and

(c) any claimant is entitled to pursue appropriate court challenge by way of an ordinary proceeding, judicial review or both.

[162] We are not prepared to make Declaration B4 in relation to the development of a parallel policy to deal with Increased Liquefaction because we see no need for one. We are satisfied that the Commission will give that work the priority it deserves.

PART 5: ENFORCEMENT

Enforcement of the Commission's statutory obligations

(a) The issue

[163] Is there an ordinary private law right action available to an "insured person" against the Commission concerning an unresolved claim of insurance under ss 18, 19 or 20 of the Act? Or, is that person's recourse confined to judicial review?

[164] The Commission seeks a declaration to confirm its view that a disappointed claimant may only bring judicial review proceedings in the High Court to enforce

any obligation owed by the Commission to it.[112] Mr Hodder submits that judicial review is the appropriate procedure where an allegation is made that the Commission has misinterpreted the Act, and is liable to pay a sum to an insured person. Judicial review would then provide a mandatory order for payment of a liquidated sum, or for the assessment of the sum payable.[113] Mr Hodder submits, also, that a claim in tort – breach of statutory duty – is inappropriate.

[165] In *Earthquake Commission v Disputes Tribunal* Eichelbaum CJ held that a claim under the predecessor Earthquake and War Damage Act 1944 was neither contractual nor tortious.[114] No party in this case contended for recovery of payments under the present Act pursuant to tort. Mr Hodder submitted that, as in *X (Minors) v Bedfordshire County Council* and *Wool Board Disestablishment Co Ltd v Saxmere Co Ltd,* a parliamentary intention to confer a private law right of action of this kind could not be inferred here.[115] Mr Hodder recognised the prospect of a private law action *in debt* – in the narrow circumstance where the Commission had concluded (in accordance with the Act) that a particular sum should be paid to an insured person, but then failed to do so.[116]

[166] In contrast, the Insurance Council submits that an ordinary action lies to enforce money payable under a statute, as much as it does a contractual right. It relies on decisions of this Court in *Earthquake Commission v Disputes Tribunal* and *Maryville Courts Trust Board v Earthquake Commission.*[117] It relies also on the decision of the House of Lords in *Roy v Kensington and Chelsea and Westminster Family Practitioner Committee* and in *Steed v Home Secretary* and of the Court of Appeal in *Trustees of Dennis Rye Pension Fund v Sheffield City Council.*[118]

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112 See Declaration A6, set out at para [54] above.

113 Relying on *R v Lord Leigh* [1897] 1 QB 132 (CA) at 145 per A L Smith LJ, *R v Corby District Court ex parte McLean* [1975] 1 WLR 735 (QB) and *Commissioner of State Revenue (Victoria) v Royal Insurance of Australia Ltd* [1994] HCA 61, (1994) 182 CLR 51.

114 *Earthquake Commission v Disputes Tribunal* [1997] NZAR 115 (HC) at 116–117.

115 *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 (HL) at 728 and *Wool Board Disestablishment Co Ltd v Saxmere Co Ltd* [2010] NZCA 513, [2011] 2 NZLR 442 at paras [188]–[193].

116 *Shepherd v Hills* (1855) 11 Exch 55, 156 ER 743 (Exch); *Richardson v Willis* (1873) LR 8 Exch 69 (Exch); *Lloyd v Burrup* (1868) LR 4 Exch 63 (Exch).

117 *Earthquake Commission v Disputes Tribunal* [1997] NZAR 115 (HC) and *Maryville Courts Trust Board v Earthquake Commission* [2013] NZHC 1575.

118 *Roy v Kensington and Chelsea and Westminster Family Practitioner Committee* [1992] 1 AC 624 (HL); *Steed v Home Secretary* [2000] 1 WLR 1169 (HL); *Trustees of Dennis Rye Pension*

[167] According to Mr Goddard, the entitlement of insured persons under the Act is neither contractual nor tortious. It is an ordinary action for a sum payable under statute. In a contractual insurance context, the claim would be for a sum payable under the contract. In neither case is it a claim for damages for some wrong on the part of the insurer. Mr Goddard submits that judicial review is neither compulsory nor sufficient to vindicate potential claimants' rights under the Act. The standard will not always be appropriate to resolve differences (importing soft edged considerations such as rationality), the summary procedure adopted in judicial review cases is inappropriate, and the nature of relief (including the fact that it is discretionary) is inappropriate.

[168] These submissions were supported by Mr Weston and by counsel for both interveners.

(b) Analysis

[169] We begin by making three general observations.

[170] First, statutory obligations to pay sums of money are ubiquitous. In some circumstances, the obligation is cast on a public body to pay a private person. In others, on a private person to pay a public body. Alternatively, of course, the obligation may lie as between persons or bodies of like classification. In many instances, such as in the revenue and accident compensation legislation, the Act establishes a mechanism for dispute resolution and enforcement. In fact the present legislation, from 1941 to 1993, contained a compulsory obligation to arbitrate. Between 1941 and 1951, and again from 1984 to 1993, the obligation to arbitrate was confined to quantum. Between 1951 and 1984 cl 18 in the Schedule to the Earthquake and War Damage Regulations 1944 provided:[119]

> If any difference arises out of the insurance between the Commission and the insured person, the difference shall be referred to one arbitrator if the parties can agree upon one, and otherwise to two arbitrators, one to be appointed by the Commission and one by the insured person, under the Arbitration Act

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Fund v Sheffield City Council [1998] 1 WLR 840 (CA).

[119] The 1944 Regulations were repealed by the Earthquake and War Damage Regulations 1956. The same provision was incorporated in cl 19 of the Schedule to the 1956 Regulations. See *Low v Earthquake and War Damage Commission* [1959] NZLR 1198 (HC) at 1204.

> 1908, and the obtaining of an award shall be a condition precedent to any right of action against the Commission.

[171] Second, it is clear to us that the Act creates rights, or entitlements, pursuant to a "scheme of statutory insurance". That was how the scheme was described by the Privy Council in *Earthquake and War Damage Commission v Waitaki International Limited.*[120] The Commission's statutory obligation to make good or make payment under s 29(2) in particular creates entitlements on the part of the counterparties. That is reinforced in this case by the fact consideration has been paid by the insured person – albeit the relationship between them is not contractual. It is, nonetheless, an arrangement of insurance. In *AMP Fire and General Insurance Co (NZ) Ltd v Earthquake and War Damage Commission* the Court of Appeal made clear that ordinary principles of insurance law and practice apply to the Commission's scheme, except so far as clearly indicated otherwise by the Act and regulations made under it.[121] The Commission's obligations under s 29(2) are definite, not discretionary (other than as to which of the three options given is to be effected). The same may be said of the insuring provisions: ss 18, 19 and 20.

[172] Thirdly, the Act is silent as to how such entitlements (or rights) may be enforced. Parliament must be taken to have intended them to be enforceable. It follows that the common law has both remedial responsibility, and flexibility: where there is a right there is a remedy.[122] As Lord Tenterden CJ said in *Doe v Bridges:*[123]

> [W]here an Act creates an obligation, and enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner. If an obligation is created, but no mode of enforcing its performance is ordained, the common law may, in general, find a mode suited to the particular nature of the case.

[173] The New Zealand authorities on the means of enforcement of the Commission's statutory obligation to make good or pay are not entirely satisfactory. In *Earthquake Commission v Disputes Tribunal* insured persons had been unable to

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120 *Earthquake and War Damage Commission v Waitaki International Limited* [1992] 1 NZLR 513 (PC) at 514.

121 *AMP Fire and General Insurance Co (NZ) Ltd v Earthquake and War Damage Commission* (1983) 2 ANZ Insurance Cases 78,016 (CA).

122 Reflected in the Latin maxim *ubi jus ibi remedium*.

123 *Doe v Bridges* (1831) 1 B & Ad 847 at 859, 109 ER 1001 (KB) at 1006.

reach agreement with the Commission as to the amount payable to them.[124] They lodged a claim in the Disputes Tribunal. The jurisdiction of the Disputes Tribunal is limited by its statute. The only potentially applicable jurisdictional basis was a claim in contract. Eichelbaum CJ held that the relationship between the insured persons and the Commission was not one of contract. It was (as the Privy Council had held in *Waitaki International*) "a scheme of statutory insurance". Its enforcement therefore lay beyond the realm of the Disputes Tribunal. Eichelbaum CJ said:[125]

> It seems a pity that claims of the present kinds of magnitude should be excluded from the jurisdiction of the Disputes Tribunal; realistically, that is the only remedy available, and people like the Wiblins should not be excluded from access to justice, but that is a matter for the Legislature.

The legislature was unmoved by Eichelbaum CJ's observation. But that observation should not be seen to exclude the less constrained statutory jurisdiction of the District Court to hear such claims.[126]

[174] The next New Zealand case is *Doyle v Earthquake Commission*.[127] In that case Mr Doyle issued proceedings in the High Court incorporating both a claim for indemnity under the Act and for judicial review. The latter was based on alleged consideration of irrelevant considerations. The judicial review cause of action was dismissed. A declaration of limited indemnity was made under the other cause of action. The issue of jurisdiction was not specifically adverted to.

[175] The third New Zealand case is *Maryville Courts Trust Board v Earthquake Commission*.[128] The claim there was based on the plaintiff's allegation that the Commission's loss adjustor had determined the quantum payable by the Commission. The matter came before an Associate Judge on an application for summary judgment. Following the decision of Eichelbaum CJ in *Earthquake Commission v Disputes Tribunal*, Associate Judge Osborne held that:[129]

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124 *Earthquake Commission v Disputes Tribunal* [1997] NZAR 115 (HC).

125 At 117.

126 There are currently approximately 40 actions in the District Court Canterbury Earthquake List. Many seek a monetary sum or orders that the Commission make a "proper assessment" of loss as precursor to an eventual monetary remedy.

127 *Doyle v Earthquake Commission* [2009] NZRMA 546 (HC).

128 *Maryville Courts Trust Board v Earthquake Commission* [2013] NZHC 1575.

129 Ibid, at para [14] (footnotes omitted).

> The liability of EQC in a given case is not generally contractual. Nor is it tortious. EQC's settlement obligations derived from the statute, which provides a scheme of statutory insurance.

An insured person's cause of action is therefore not in contract or tort, but is a "claim for breach of a duty to pay insurance pursuant to a statutory scheme".[130] In its own terms that appears to be a recognition of the right to bring an ordinary action for payment. Although the application for summary judgment was unsuccessful, there was no suggestion that the claim was otherwise an abuse of process. There was no application for strike-out for instance.[131]

[176] None of the New Zealand cases clearly articulate the nature of this Court's jurisdiction to entertain an ordinary action to enforce payment for a sum of money pursuant to a statutory obligation.

[177] Until the liberating decision of the House of Lords in *Roy v Kensington Chelsea and Westminster Family Practitioner Committee* there were two conventional but constrained forms of action to enforce a statutory obligation to pay a sum of money.[132]

[178] The first of these was the writ of mandamus. This writ had its modern origins in the 17th century, and is said to have reached its zenith in the 18th century.[133] Although it is now seen to be an exclusively public law remedy, its reach ran originally, and until recently, right across the common law. It could be engaged to compel the performance of any legal duty of a public or private nature.[134] It was available, said Lord Mansfield "upon all occasions where the law has established no specific remedy, and where in justice and good government there ought to be one".[135]

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130 Ibid, at para [15].

131 The *Maryville* proceeding was due to go to trial on 15 June 2014, but was discontinued (presumably as a result of settlement) being agreed on 7 May 2014.

132 *Roy v Kensington Chelsea and Westminster Family Practitioner Committee* [1992] 1 AC 624 (HL).

133 Wade and Forsyth *Administrative Law* (11th ed, Oxford University Press, Oxford, 2014) at 520; Henderson *Foundations of English Administrative Law: Certiorari & Mandamus in the Seventeenth Century* (Harvard University Press, Cambridge, 1963) at 80.

134 Ibid. Wade and Forsyth give, for instance, the examples of it being used in the 18th and 19th centuries to enforce duties under trust deeds, copyhold, and the non-statutory duties of a university visitor at 522–523.

135 *R v Barker* (1762) 3 Burr 1256 (KB) at 1267, 97 ER 823 at 824.

[179] There are numerous examples of mandamus issuing to enforce a statutory obligation to pay; in favour of a retired chief constable whose statutory pension had not been paid (there being an argument about his alleged failure to submit to medical examination); [136] to the London County Council against the Poplar Borough Council for non-payment of county rates,[137] and to the owner of a post war experimental aluminium bungalow who was entitled to a "home loss payment" when corrosion necessitated the demolition of his house by the local authority.[138] Mandamus also had the advantage of lying outside the short limitation period generally permitted for claims for money payable under statute.[139]

[180] The second procedural mechanism was an action for debt. In his submissions Mr Hodder quoted the following passage from the 1954 third edition of *Halsbury's Laws of England*:[140]

> Where an Act of Parliament creates an obligation on any person to pay a sum of money to any other person, the amount due can be recovered as a debt by action where no other remedy is provided but where no provision to the contrary is contained in the Act.

[181] An action for debt lay where the obligation to pay a liquidated sum was unconditional. Such actions lay on records (such as judgments), specialities (such as bills, bonds, leases and mortgages), simple contracts and generally whenever the action of *indebitatus assumpsit* was appropriate. The latter effectively made the action of debt obsolete, although it was not formally abolished until 1852.[141] However despite the abolition of the *form* of action for debt, a *cause* of action in debt may still be brought, as the judgment of Wylie J in *Prendergrast v Chapman* makes clear.[142] But the essence of that claim remained an obligation "to pay a sum certain on a day certain".[143] It was unavailable where the extent of the payment obligation, if any, was uncertain.

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136 *R v Leigh* [1897] 1 QB 132 (CA).
137 *R v Poplar Metropolitan Borough Council ex parte London County Council (No 1)* [1922] 1 KB 72 (CA).
138 *R v Corby District Council ex parte McLean* [1975] 1 WLR 735 (DC).
139 *Commissioner of State Revenue (Victoria) v Royal Insurance of Australia Ltd* [1994] HCA 61, (1994) 182 CLR 51.
140 *Halsbury's Laws of England* (3rd ed, 1954), vol 8 Contract at para [448].
141 Windeyer *Lectures on Legal History* (2nd ed, Law Book Co, Sydney, 1957) at 108.
142 *Prendergrast v Chapman* [1988] 2 NZLR 177 (HC) at 190-192.
143 Ibid, at 186.

[182] The argument now advanced by Mr Hodder has something of an echo of the speech of Lord Diplock in *O'Reilly v Mackman.*[144] A consequence of that decision was that, as Wade and Forsyth put it:[145]

> Judicial review by declaration and injunction in an ordinary action, which the Courts had encouraged with great success for many years, was suddenly held to be an abuse of the process of the courts.

That case concerned the validity of punishments imposed by prison authorities. It was commenced as an ordinary action because the plaintiffs anticipated significant disputes of fact, and wished to call oral evidence. In the House of Lords it was held that no such action now lay, following the introduction of Order 53 of the Rules of the Supreme Court in 1977. The only available procedure was an application for judicial review. What, then, was the implication of that decision for claims for money sums payable by virtue of statute?

[183] In *Roy v Kensington and Chelsea and Westminster Family Practitioner Committee*, Dr Roy, a general practitioner, issued an ordinary proceeding in the Queens Bench Division against the defendant committee which had withheld part of his National Health Service basic practice allowance.[146] It did so on the basis that Dr Roy had failed to devote a substantial amount of time to general practice, as required by regulations.[147] The claim, which Dr Roy appears to have drafted himself, sought "repayment" of the amounts withheld by the committee, together with a declaration that they were not entitled to abate his allowance. The committee applied to strike out the proceeding. It said it was an abuse of process: the claim was founded on an alleged breach of the committee's public duty, and should be mounted by way of judicial review.[148] Dr Roy by now had retained counsel. In the Queen's Bench Division, Judge White[149] held that the relationship between doctor and the committee had "contractual echoes", but the "rights and duties of those within the

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144 *O'Reilly v Mackman* [1983] 2 AC 237 (HL).

145 Wade and Forsyth Administrative Law (11th ed, Oxford University Press, Oxford, 2014) at 569.

146 *Roy v Kensington and Chelsea and Westminster Family Practitioner Committee* [1992] 1 AC 624 (HL).

147 Ibid, at 631. Dr Roy appeared to have developed wanderlust: between 1979 and 1987 he had been absent from his practice between one third and one half of each year (his absences being covered by a locum) albeit without patient complaint.

148 *Roy v Kensington and Chelsea and Westminster Family Practitioner Committee* [1989] 1 Med LR 10 (QB) at 12 as quoted in. *Roy v Kensington and Chelsea and Westminster Family Practitioner Committee* [1992] 1 AC 624 (HL) at 633.

149 Sitting as a Judge of the Queen's Bench Division.

scheme stem from and were entirely dependent on statute and regulation", and were not contractual. The Judge went on:[150]

> The rights and duties are no less real or effective for the individual practitioner. Private law rights flow from the statutory provisions and are enforceable, as such, in the courts, but no contractual relations come into existence.

That decision was reversed in the Court of Appeal, but restored in the House of Lords.

[184] Bearing in mind Mr Hodder's submission to us that the case should be "readily viewed as essentially contractual", it should be noted that that was not the view of the House of Lords. They took the same view as the Judge at first instance. Lord Bridge said:[151]

> I do not think the issue in the appeal turns on whether the doctor provides services pursuant to a contract with the [Committee]. I doubt if he does and am content to assume that there is no contract.

Lord Lowry, who gave the principal speech, said that he could not altogether accept the reasoning which led the Court of Appeal to conclude the existence of a contract, and that he was not satisfied that there was a contract for services.[152] The decision therefore proceeds on the premise that the relationship was not a contractual one.

[185] The important thing is that the House of Lords unanimously took the view that it did not matter. As Lord Bridge put it:[153]

> … it seems to me that the statutory terms are just as effective as they would be if they were contractual to confer upon the doctor an enforceable right in private law to receive the remuneration to which the terms entitle him. It must follow, in my view, that in any case of dispute the doctor is entitled to claim and recover in an action commenced by writ the amount of remuneration which he is able to prove as being due to him. Whatever remuneration he is entitled to under the statement is remuneration he has duly earned by the services he has rendered. The circumstance that the quantum of that remuneration, in the case of a particular dispute, is affected by a discretionary decision made by the committee cannot deny the doctor

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150 *Roy v Kensington and Chelsea and Westminster Family Practitioner Committee* [1992] 1 AC 624 (HL), at 633.
151 Ibid, at 630.
152 Ibid, at 649.
153 Ibid, at 630.

> his private law right of recovery or subject him to the constraints which the necessity to seek judicial review would impose upon that right.

[186] Lord Lowry was of the same view:[154]

> But the actual or possible absence of a contract is not decisive against Dr Roy. He has in my opinion a bundle of rights which should be regarded as his individual private law rights against the committee, arising from the statute and regulations and including the very important private law right to be paid for the work that he has done.

Lord Lowry went on to say:[155]

> If the committee's argument prevails, the doctor must in all these cases go by judicial review, even when the facts are not clear. I scarcely think that this can be the right answer.

[187] At the conclusion of his speech, Lord Lowry set out a series of principles, some of which we repeat:[156]

> (1) Dr Roy has either a contractual or statutory private law right to his remuneration in accordance with his statutory terms of service.
>
> (2) Although he seeks to enforce performance of a public law duty under paragraph 12.1, his private law rights dominate the proceedings.
>
> (3) The type of claim and other claims for remuneration (although not this particular claim) may involve disputed issues of fact.
>
> (4) The order sought (for the payment of money due) could not be granted on judicial review.
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> …
>
> (7) The action should be allowed to proceed unless it is plainly an abuse of process.
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> …

[188] *Roy* was followed by the Court of Appeal in *Trustees of Dennis Rye Pension Fund v Sheffield City Council.*[157] That case concerned the refusal by a local authority to pay improvement grants after repairs were performed by a landlord

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154 Ibid, at 649-650.
155 Ibid, at 650.
156 Ibid, at 654.
157 *Trustees of Dennis Rye Pension Fund v Sheffield City Council* [1998] 1 WLR 840 (CA).

given notice under the Housing Act to effect repairs to make premises fit for human habitation. Lord Woolf MR observed (with some evident asperity):[158]

> In this situation I can see no reason why the landlord cannot bring an ordinary action to recover the amount of the grant which is unpaid as an ordinary debt. Notwithstanding the statutory code, it would be disproportionate to seek a remedy of, say, mandamus or a declaration by way of judicial review to enforce payment. Any suggestion that there had been any abuse of process involved in bringing an ordinary action in the High Court or country court would be totally misconceived. Judicial review was not intended to be used for debt collecting.

This was a case where there was a factual dispute as to whether the pre-conditions for payment had been met. It was not, therefore, suitable for summary process judicial review in any event.

[189] It is also worth quoting from the judgment of Pill LJ:[159]

> In present circumstances, a refusal to approve an application for a grant gives rise to no right to damages. Discretions are also involved, for example section 115 (discretionary approval) and section 118 (determining a specification). However, once an application is approved a duty to pay it arises upon compliance by the applicant with the statutory requirements and the duty is in my view enforceable by an ordinary money claim.

We do not see that passage as suggesting that the existence of unresolved discretions would have compelled judicial review only. The proper exercise of discretion is capable of being assessed in an ordinary proceeding, and frequently is.[160] It is not the exclusive preserve of judicial review.

[190] A third English case to the same effect is *Hutchings v Islington London Borough Council.*[161] In that case a retired council caretaker was in dispute with his former employer over the measure of his pension. He brought a claim in the County Court for sums allegedly owed in respect of past pension payments, and a declaration as to the amount of his future pension entitlements. The case turned, primarily, on the limits of the County Court's jurisdiction. If the claim was based on statute rather than "founded on contract", the County Court could not hear it.

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158 Ibid, at 845 to 846.

159 Ibid, at 851.

160 See for example *BOS International (Australia) Ltd v Strategic Nominees Ltd (in rec)* [2013] NZCA 643 at para [70].

161 *Hutchings v Islington London Borough Council* [1998] 1 WLR 1629 (CA).

Evans LJ (with whom Ward LJ agreed)[162] concluded that the regulations gave Mr Hutchings "a private law statutory right to receive a pension in accordance with the scheme". But for the purposes of the County Court's jurisdiction, those rights could still be said to be "founded on" contract. The existence of a contractual relationship of employment was necessary to trigger the statutory rights.[163]

[191] A fourth English case of importance is *Steed v Home Secretary.*[164] In that case legislation required the plaintiff to surrender high calibre handguns and ammunition. It also created a right to compensation for guns surrendered in accordance with the legislation. Mr Steed surrendered his guns in July 1997. In October 1997 he issued a County Court summons for £3,298 because of alleged "inordinate delay" in settling his compensation claims. The Home Secretary contended that there was no inordinate delay, no statutory duty to pay, and that only judicial review lay in which to contend otherwise. The latter contention was unsuccessful in the County Court, the Court of Appeal and the House of Lords. Delivering the sole speech in the Lords, Lord Slynn said:[165]

> In the present case, if there had been, e.g., a general challenge to the vires of the scheme – a question as to whether it complies with the statutory intention – it would no doubt be right to begin by an application for judicial review. But here essentially this claimant says that money was due to him; it was not paid when it was due; he has accordingly suffered damage (valued in terms of interest) because of the delay. I do not see that any of the questions which might arise here cannot be dealt with by a judge on the hearing of the summons or that answering such questions usurps the province of the administration where a discretionary decision is reserved to the administration.

[192] Against this background, we reach the following conclusions.

[193] First, we repeat our preliminary general observations.[166] In summary, the Commission's statutory obligations to make good or make payment, under s 29(2), create entitlements and rights in insured persons. Those rights, along with the insurance provided in ss 18, 19 and 20, create definite obligations. Those obligations

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162 Ibid, at 1643.
163 Ibid, at 1639.
164 *Steed v Home Secretary* [2000] 1 WLR 1169 (HL).
165 Ibid, at 1175.
166 See, paras [170]–[172] above.

are enforceable by ordinary action, notwithstanding that they arise under statute, and that the Commission exercises statutory powers.

[194] Second, modern civil procedure provides an ordinary right of action against a person or body obligated to pay a sum of money pursuant to a statute. That right of action arises under statute, unless expressly or necessarily excluded by statute. It is an ordinary (or "private law") action, regardless of whether the defendant is a private or public body. It is not necessarily confined to a claim in debt. There would be little point either resurrecting that form of action or in limiting claims to debt in its conventional sense. An ordinary action for payment is (and should be) available where the factual basis for payment is in dispute.

[195] Third, exclusion of an ordinary right of action to enforce payment would, in our view, require clear expression by Parliament. In *Hutchings v Islington London Borough Council* both Evans and Ward LJJ took the view that an ordinary action could be brought as of right, unless the statute expressly provided otherwise. We agree with the way Evans LJ put it:[167]

> The question in the present case therefore is whether there is a "positive prescription of law, by statute or by statutory rules" which prohibits the plaintiff from enforcing his right to receive pension benefits by action against the council.

Some criticism was made of that approach by Mr Hodder, but we consider it correct. It is important here not to confuse what the Courts have said about a right to bring an action in the ordinary way, with cases concerning whether a tortious cause of action (breach of statutory duty) may be inferred at all. The former exists as of right, unless necessarily excluded. The latter exists only if Parliamentary intent that it should be available can be inferred.

[196] Fourth, New Zealand has resisted the imposition of procedural exclusivity for judicial review, in the manner embraced in England in *O'Reilly v Mackman.*[168] That

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167 *Hutchings v Islington London Borough Council* [1998] 1 WLR 1629 (CA) at 1636 quoting Lord Wilberforce in *Davy v Spelthorne Borough Council* [1984] AC 262 (HL) at 276.

168 *O'Reilly v Mackman* [1983] 2 AC 237 (HL). See *Siemer v Solicitor-General* [2013] NZSC 68, [2013] 3 NZLR 441 at para [74]; *Attorney-General v P F Sugrue Ltd* [2004] 1 NZLR 207 (CA), at para [49].

decision, the consequence of which we have described earlier,[169] was driven by the introduction of leave requirements in Order 53 of the Rules of the Supreme Court. Judicial review via an ordinary action would avert those limits. In New Zealand no such limits attend judicial review. The procedure in the Judicature Amendment Act 1972 is non-exclusive, as ss 6 and 7 make clear.[170] Challenge to the actions of a statutory body for non-payment of moneys required to be paid by statute may be mounted by judicial review under the 1972 Act, judicial review apart from that Act, or by ordinary action.

[197] Fifth, judicial review is not generally an appropriate mechanism to determine entitlement to payment under a statute where the obligation is of a definite nature. That is particularly so in this case:

(a) The legislation creates a statutory scheme of insurance parallel to, and with many features common to private contractual insurance. The discretion as to make good or make payment, provided for in s 29(2), is not unusual in private insurance. The Commission has a discretion as between the choices expressed in s 29(2).

(b) Where distinct insurance rights are in issue, the remedies available should be direct and definite, and not discretionary. Where entitlement exists, relief should not be qualified by discretion.

(c) Nothing in the legislative scheme suggests that Parliament intended the Commission's claims disputes to be resolved by judicial review. Judicial review is not expressly or necessarily to be inferred as the exclusive, or even primary, method of resolving claims disputes.[171]

(d) It is difficult to comprehend why Parliament would have intended that all such proceedings as a matter of course must be commenced in the High Court (which will be a consequence of insisting upon judicial

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169 See para [182] above.

170 See, for example, Joseph *Constitutional & Administrative Law in New Zealand* (4th ed, Brookers, Wellington, 2014) at 861 and 1207–1208.

171 Section 15(a) of the Act refers to "claims admitted or sustained against the Commission" – an odd description of judicial review.

review). Given the Commission's capped monetary liability,[172] we would have thought most claims against it would best be addressed in the District Court.

(e) Such claims and disputes will often involve factual issues, requiring oral evidence.[173] Judicial review is ill-suited to factual disputes, as the plaintiffs in *O'Reilly v Mackman* recognised. The same point was made by Lord Lowry, in *Roy*.[174]

(f) In cases where there is no material factual dispute, summary judgment ought to be open to the insured plaintiff, whether in the District or High Court, as was attempted at least in *Maryville*.

[198] Finally where, as Lord Lowry put it in *Roy*, the insured person's "private law rights dominate the proceedings", an ordinary action is entirely appropriate.[175] Where, however, they do not dominate the proceedings (because the primary thrust of the proceeding is to challenge the exercise of a discretion, for example on the basis that a policy or its implementation is unlawful on other conventional judicial review grounds), judicial review may be the more appropriate course of action. None of that of course prevents a combined proceeding involving ordinary and judicial review claims, as was done in *Doyle.*

[199] For these reasons we consider that it is inappropriate to make Declaration A6,[176] as sought by the Commission. Claims in respect of insurance under ss 18-20 and 29 of the Act are not confined to judicial review proceedings.

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172 $113,850 per event, in accordance with s 18(1) of the Act and reg 4 of the Earthquake Commission Regulations 1993.
173 As, for instance, in *Doyle v Earthquake Commission* [2009] NZRMA 546 (HC).
174 See para [186] above.
175 See para [187] above.
176 See para [54](f) above.

PART 6: OUTCOME

Costs

[200] The parties and interveners requested that we reserve costs for further submissions. Submissions in support of any claim for costs shall be filed and served on or before 16 January 2015. Submissions in opposition shall be filed and served on or before 13 February 2015. Unless any party requests an oral hearing, the Registrar shall refer the submissions to us on receipt and we will make decisions on the papers. In the event that a request for an oral hearing is made, a telephone conference will be arranged to enable the Court to determine whether that is necessary.

[201] We order that the reasonable costs and disbursements incurred by both Mr Weston and Ms Clark, as amici curiae, each be paid out of public funds appropriated for the purpose. Should any unforeseen difficulties arise as to quantum, the Registrar shall refer them to Kós J, as an Earthquake List Judge, for further directions.

Result

[202] We make the declarations set out at paras [80], [88], [93], [125], [160] and [161] above, to give effect to the conclusions we have reached. We are not prepared to make the remaining declarations sought.

[203] So far as the reservation of leave is concerned in relation to a policy for Increased Liquefaction Vulnerability, we consider it is better for any issues arising out of that policy to be addressed specifically in another proceeding, if necessary. Much of what we have said will apply equally to that form of natural disaster damage.

[204] Questions of costs shall be dealt with in accordance with the directions set out in paras [200] and [201] above.

[205] We thank counsel for their considerable assistance.

P R Heath J
For the Court

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