IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHI ROHE

CIV-2024-409-165
[2024] NZHC 623

UNDER	the Canterbury Earthquakes Insurance Tribunal Act 2019
IN THE MATTER	of a referred question of law
BETWEEN	JOHN PEARCE AND ANOTHER Applicants
AND	TOKA TŪ AKE NATURAL HAZARDS COMMISSION First Respondent
AND	MEDICAL INSURANCE SOCIETY LIMITED Second Respondent

Hearing: 13 August 2024

Counsel: E J Walton and R J Hargreaves for Applicants
L Clark and M Jury for First Respondent
D J Cooper KC, N R Frith and C M Hoeft for Second Respondent

Judgment: 24 March 2025

JUDGMENT OF OSBORNE J

Introduction

[1] This proceeding relates to a case being heard in the Canterbury Earthquakes Insurance Tribunal (the Tribunal). At the request of the parties, the Tribunal referred questions of law to this Court pursuant to s 53 Canterbury Earthquakes Insurance Tribunal Act 2019 (the Act).

Factual background

Introduction

[2] John Pearce and Glenda Ryan (the homeowners) in relation to their Christchurch residential property (property) held with Medical Insurance Society Ltd (MIS) an "MAS Goldshield Policy" (Policy) at the time of the Canterbury Earthquake Sequence.

[3] The property was damaged in the Canterbury Earthquake Sequence. The Toka Tū Ake Natural Hazards Commission (NHC), formerly known as the Earthquake Commission (EQC), was the Crown entity administering insurance against natural disaster damage provided under the then Earthquake Commission Act 1993 (EQC Act).[1]

[4] An engineering consultancy, Beca Group Ltd (Beca), provided support to MIS in 2011. A service, then known as the Greater Christchurch Claims Resolution Service (GCCRS), provided support service to the homeowners in 2021.[2]

[5] The homeowners filed an application in the Tribunal in 2023. They assert MIS breached its obligations under the Policy by:

(a) wrongly declining their claim as time-barred; and

(b) failing to pay the homeowners' valid claim within a reasonable time.

[6] To date the Tribunal has not made factual findings in relation to the homeowners' claim. The Tribunal accepted a submission of the parties that an agreed chronology of the events and provision of the relevant insurance policy would provide the relevant context for this Court's consideration of the referred questions.

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1 See Earthquake Commission Act 1993 and Natural Hazards Insurance Act 2023.

2 The GCCRS was replaced in February 2023 by the New Zealand Claims Resolution Service.

Chronology of events

[7] The parties' agreed chronology of events is set out in Table 1.

TABLE 1

Date	Event
13 August 2010	Start of insurance cover period under Policy.
4 September 2010	First Canterbury Earthquake Event.
19 September 2010	Homeowners lodge claim for the 4 September 2010 event with EQC (CLM/2010/064784).
17 February 2011	EQC undertake site visit and full assessment of the dwelling, land and external.
22 February 2011	Second Canterbury Earthquake Event.
3 March 2011	Homeowners lodge claims for the 22 February 2011 event with EQC (CLM/2011/059864) and MIS (553420).
24 March 2011	MIS and Beca undertake site visit and damage assessment.
6 May 2011	MIS write to the homeowners enclosing the Beca preliminary damage assessment, and stating, *"The damage has been assessed as repairable, which means that your property will be repaired. This cost is expected to exceed the EQC cap of $100,000 plus GST."*
7 September 2011	Email from Beca to homeowners stating, *"As advised by [MIS], your house has been categorised as over the $100,000 EQC cap and repairable."*
14 June 2012	EQC and MIS conduct a joint review site visit and full inspection of the dwelling. EQC Scope of Works dated 9 October 2012.
18 February 2013	MIS call homeowners informing them that EQC considers the claim undercap.
31 October 2014	EQC conducts site visit to reassess dwelling. Scope of Works dated 19 November 2014 created.
26 November 2014	First EQC dwelling settlement advice letter (estimated repair cost $71,999.40 less excess).
18 December 2014	MIS conduct site visit and assessment for external works damage.
31 March 2015	MIS conduct second site visit and assessment for external works damage.
10 December 2015	MIS make first external works discharge offer of $10,783.88. The homeowners did not respond to this offer.
11 February 2019	EQC conduct a site visit and land reassessment.
19 March 2019	MIS make second external works discharge offer of $24,137.90. The homeowners accept this offer on 24 March 2019.
26 March 2019	MIS receive signed discharge from homeowners for external works claim.
2 April 2019	Homeowners receive payment from MIS for external works.
2 April 2019	Second land payment by EQC for land damage of $8,676.13 received by homeowners.

29 September 2021	EQC conduct a site visit for dwelling reassessment (Homeowners were present).
13 December 2021	Homeowners (via GCCRS) email MIS and state *"let me know if EQC has been in contact with you? They now believe the claim is over cap but the apportionment process has been very slow."*
15 December 2021	MIS email to GCCRS saying that EQC's advice is that "*they haven't finished their review of costs so can't confirm its cap status at this stage. It is MAS preference not to get involved until EQC confirm their findings but once confirmed we can look to arrange a site visit to keep the process going"*.
25 February 2022	MIS email to EQC stating the limitation period for the private insurance claim has expired.
16 March 2022	Letter from Community Law for the homeowners to MinterEllisonRuddWatts for MIS asking how MIS has come to the view that the limitation period has expired.
12 April 2022	Letter from MinterEllisonRuddWatts for MIS to Community Law for the homeowners stating any claims against MIS are time-barred.
28 July 2022	EQC provide second dwelling settlement advice letter - dwelling repair recosted at $139,401.78 less excess and previous payment. EQC to make second dwelling payment of $66,841.44.
8 August 2022	Letter from Community Law for the homeowners to MinterEllisonRuddWatts for MIS advising the homeowners maintain the ongoing claim regarding earthquake damage to the property is not timebarred.
10 October 2022	Structural Engineer (SJGD Ltd) produces initial Residential Damage Report and Repair Strategy for the homeowners.
25 November 2022	EQC advise homeowners and MIS that claim is overcap. Third dwelling settlement advice letter to homeowners from EQC stating dwelling repairs scoped so far have been re-costed at $244,159.67, less excess and previous payment. EQC makes third dwelling payment of $38,191.01 (to cap).
2 December 2022	Letter from MinterEllisonRuddWatts for MIS to Community Law for the homeowners reiterating any claims against MIS are time-barred.
24 November 2023	Homeowners file application with the Tribunal.

The Policy

[8] MIS's primary obligation to the homeowners is set out in the insuring clause which provides:

> Our Undertaking
>
> The Society undertakes that if, during any period for which the premium has been paid, any unintended and unforeseen physical loss or damage occurs or costs or losses arise which have been provided for by the Policy, its Schedule

> or any Renewal Advice, *then the Society will compensate you* in the manner and to the extent described.
>
> (emphasis added)

[9] The homeowners insured for replacement value cover. That type of cover is described in the Policy thus:

> A. Dwelling
>
> 1) **Dwelling/Holiday Home – Replacement Value –** applies to permanently owner/occupied dwellings and holiday homes (i.e., not tenanted) and, when selected, means that the Society *will cover the cost* of rebuilding or restoring the dwelling to a condition substantially the same as, when new, so far as modern materials allow, and including any additional costs which may be necessary to comply with any statutory requirements or Territorial Authority by-laws. There is no maximum sum insured but the liability of the Society shall not be greater than the reasonable cost to rebuild or restore the dwelling based on a floor area no greater than that declared in the proposal and specified in the Schedule.
>
> …
>
> In any case, if you elect not to rebuild or restore the building, we will make a cash settlement not exceeding the indemnity value as assessed by a qualified Valuer.
>
> (emphasis added)

[10] The Policy contains exclusions. In particular, the Policy excludes loss or damage caused by earthquake (as defined in the EQC Act) with an exception providing:

> This exclusion does not apply to Type of Cover c) Disaster Cover Excess of EQ Cover.

[11] The Type of Cover clause referred to provides:

> C. Disaster Cover Excess of EQCover
>
> This cover extends the Policy to include loss or damage by earthquake, natural landslip (as defined in the Earthquake Commission Act 1993 (Act)), volcanic eruption, hydrothermal activity, tsunami or fire following any of them as follows:
>
> - Where the Insured Property is covered under the Act then, *to the extent that the loss or damage exceeds the liability of the Commission under the Act, the Society will pay the difference between that liability and the*

maximum amount payable under this Policy. The Society will not pay the excess under the Act.

- Where the Insured Property is not covered under the Act the Society will pay for the loss or damage in accordance with the terms of this Policy.

("Policy Clause C")

(emphasis added)

[12] Policy Clause C provides for "top-up" insurance as permitted under s 30(2) of the EQC Act.

The EQC Act

[13] The statutory scheme under the EQC Act (from which "top-up" insurance applies once EQC's "statutory cap" of $100,000 is exceeded) was explained by Elias CJ (delivering the judgment of herself and William Young J) in the Supreme Court's decision in *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* (*Zurich*):[3]

> [5] … By s 18 [of the EQC Act], residential buildings insured for fire are deemed to be insured under the Act against natural disaster damage (including earthquake damage). The statutory insurance is for replacement value limited to whichever is the least of the amount of fire insurance taken or the amount arrived at by multiplying the number of dwellings in a building by $100,000.
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> …
>
> [6] Against that statutory background, s 30 provides what is to happen where property is also insured "otherwise than under this Act":
>
> **30 Insurance otherwise than under this Act**
>
> (1) Where on the occurrence to any property of natural disaster damage against which it is insured under any of sections 18 to 20, or section 22, the property is also insured against that damage under any contract or contracts made otherwise than under this Act, the insurance of the property under this Act (to the amount to which it is so insured) shall be deemed to be in respect of so much of that natural disaster damage as exceeds the sum of—
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> (a) the total amount payable under that contract or those contracts in respect of that natural disaster damage; and

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[3] *Firm PI 1 Limited v Zurich Australian Insurance Limited T/A Zurich New Zealand* [2014] NZSC 147, [2015] 1 NZLR 432 [*Zurich*].

(b) the proportion of the natural disaster damage to be borne by the insured person under the conditions applying to the insurance of the property under this Act.

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

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

[7] The effect of these provisions seems to be as follows:

(a) Subsection (3) counters clauses, common in insurance contracts (and included in the policy here), that there must be recourse first to other insurance before a claim is made under the policy. Because of such provisions, s 30(3) is necessary to ensure the efficacy of subs (1). Notwithstanding such contractual provision, s 30(3) provides that the other insurance contract is to have effect as if the property were not insured under the Act.

(b) Subsection (1) establishes the general statutory rule that, where property is insured against natural disaster damage privately, the statutory insurance is available only for any excess not covered by the private insurance and then only up to the proportion the insured is required to meet himself under the compulsory insurance provisions: that is to say, the excess available is limited to a total of $100,000 per dwelling in the context of this case (or to such lesser limit contained in s 18).

(c) Subsection (2) permits what is "top-up insurance", *that is to say insurance which is not an overlapping obligation to pay for the same natural disaster damage* (and in respect of which ss 30(1) and (2) establish priorities by statute, favouring the Commission), *but insurance structured to cover the additional loss not covered because of the cap on the statutory insurance by the Commission*. There is no statutory policy in preventing insurance to cover that excess. The equivalent to s 30(2) was first adopted by amendment to the Earthquake and War Damage Act 1944 when the statutory compensation was limited to indemnity value and policies for replacement value

> became available. It now applies to permit private cover above the statutory cap since the move to replacement value in the statute.

(emphasis added)

(footnotes omitted)

[14] Elias CJ went on to further explain the provisions in s 30 of the EQC Act:

> [53] Section 30 of the EQC Act deals with the situation where an insured has cover for natural disaster damage both under the statute and through private insurance. Section 30(1) sets out the basic rule where there is double insurance, namely that the statutory cover responds after the private cover (including any deductible) has been exhausted. …
>
> [54] Section 30(1) must be read with section 30(3). That provides that where there is double insurance, the private cover is to respond as if the property was not covered under the EQC Act. Presumably this is to prevent any double insurance provision in the private insurance policy from taking effect. …
>
> [55] These two subsections can be traced back to s 18 of the Earthquake and War Damage Act 1944. They must be read, however, in light of s 30(2), which provides:
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> > Subsection (1) shall not apply with respect to any contract of insurance made otherwise than under this Act to the extent that the contract provides for cover in excess of the amount to which cover is provided under this Act.
>
> The effect of this subsection is that where an insured purchases cover from a private insurer for loss resulting from natural disaster in excess of that compensated for under the statutory cover, the insured will be entitled to call on the statutory cover before calling on the private cover. …

The Limitation Act 2010

[15] MIS invokes the defence, provided by s 11(1) Limitation Act 2010, to a money claim filed after the applicable period.

[16] It is common ground the homeowners' claim is a "money claim" as defined in s 12 Limitation Act.[4]

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[4] The claim being, in terms of s 12(1) Limitation Act 2010, "a claim for monetary relief at common law."

[17] The relevant limitation period in this case is the six-year period defined by s 11(1), which provides:

> **Part 2**
> **Defence to money claims**
>
> **11 Defence to money claim filed after applicable period**
>
> (1) It is a defence to a money claim if the defendant proves that the date on which the claim is filed is at least 6 years after the date of the act or omission on which the claim is based (the claim's **primary period**).

[18] Pursuant to s 4 Limitation Act, a "claim" includes any claim that may be made in a court or tribunal (other than in a criminal or disciplinary proceeding).

[19] The expression "date of the act or omission" used in s 11(1) is not defined in the Act. That lack of definition gives rise to Question One, as referred by the Tribunal and set out in the following paragraph.

The questions

[20] In a decision dated 26 March 2024, Mr C D Boys, Chair of the Tribunal, referred the following questions to this Court:

> Question One:
>
> In the case of a property insurance claim for natural disaster damage against a private insurer, where the insurance policy provides "top-up" cover for damage which exceeds the statutory cap in s18 of the Earthquake Commission Act 1993, does the primary period under section 11 of the Limitation Act 2010 begin on:
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> a) the occurrence of the insured peril?
>
> b) the date the claim has been assessed and confirmed as exceeding the statutory cap? Or
>
> c) the date on which the insurer allegedly breaches its obligations under the policy?
>
> Question Two:
>
> Can an insurer's duty of utmost good faith act as a brake upon or barrier to that insurer's reliance on the defence available to it under the Limitation Act 2010?

[21] The parties agree the relevant statutory cap is that which applied under s 18 of the Earthquake Commission Act 1993 (Act).[5]

[22] I will consider the two sets of questions separately.

Preliminary issue — the questions referred

The regulatory regime

[23] Section 53 of the Canterbury Earthquakes Insurance Tribunal Act 2019 sets out the process whereby the Tribunal may refer a question to this Court for its opinion. The section provides:

> **Questions of law may be referred to High Court**
>
> (1) If a question of law arises during any case management process under this Act or at the hearing of a claim, the tribunal—
>
> (a) may (if a member is acting as the tribunal, with the written approval of the chairperson) refer the question to the High Court for its opinion; and
>
> (b) may delay the hearing until it receives the court's opinion.
>
> (2) The tribunal must give the parties a reasonable opportunity to comment on whether the question should be referred to the High Court.
>
> (3) The High Court must give the tribunal its opinion on the question, following which the tribunal must continue the hearing of the claim in accordance with the opinion.

[24] The rules contained in Part 21 of the High Court Rules 2016 in relation to cases stated apply not only to appeals to this Court by way of case stated. They also apply, by r 21.1(b), to other references to the Court under any Act by way of case stated for a decision on a question of law or fact (or both). They therefore apply to this case stated.

[25] Consequently, r 21.9 (as to contents of case) applies, of which r 21.9(1) is most relevant:

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[5] From 1 July 2024 the statutory cap under the Natural Hazards Insurance Act 2023 will cap NHC's natural hazard cover.

(1) A case must state concisely—

(a) the circumstances relating to the matter leading to the statement of the case; and

(b) the relevant facts as determined by the tribunal (attaching copies of documents, if any) necessary to enable the court to decide the questions; and

(c) where appropriate, the respective contentions of the parties with reference to the questions; and

(d) the questions on which the opinion of the court is sought.

[26] Part 21 also deals with amendment of a case, r 21.12 providing:

(1) The court may send a case back to the tribunal for amendment—

(a) to clarify the question of law or fact (or both) on which the opinion of the court is sought; or

(b) to provide any further information necessary to enable the court to dispose of the questions in the case stated.

(2) The court may amend the case at the hearing.

[27] In relation to cases stated generally, this Court in *Commerce Commission v Harmoney Ltd* recognised the case stated procedure will be inappropriate where the facts relied on by the tribunal below are incomplete for the purposes of answering the questions and ought to be regarded as disputed.[6] The same was found to apply in *Evans v IAG New Zealand Ltd* where the (Canterbury Earthquakes Insurance) Tribunal had stated a case when facts on which it was premised were disputed.[7]

[28] These authorities assumed some significance at this hearing because aspects of the written submissions filed for the homeowners would have required a consideration of factual matters yet to be considered or determined by the Tribunal. One matter so raised was the factual proposition that MIS made an acknowledgement of liability, activating provisions contained in ss 43 and 47 Limitation Act. A second related aspect of the homeowners' submissions involved the proposition there had been a part-payment, again activating s 47 of the Act.

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6 *Commerce Commission v Harmoney Ltd* [2017] NZHC 1167, (2017) 23 PRNZ 644 at [28].
7 *Evans v IAG New Zealand Ltd* [2020] NZHC 1326 at [51], [54] and [68].

[29] As submitted by Mr Cooper KC for MIS, such matters are for the Tribunal to determine in the first instance. This Court's function is to answer the questions of law specifically referred to it. In relation to the two matters referred to in the previous paragraph, it would be inappropriate to consider the power to amend a question under r 21.12(2). Ms Walton for the homeowners did not seek such an amendment. The matters identified at [28] above are appropriately matters for the Tribunal when it has heard the evidence, and not for case stated beforehand.

[30] At this hearing, Mr Cooper suggested on reflection that the three-part multi-choice structure of Question One (above at [20]) may not have been appropriate, as this Court may come to the view that the primary period commences at a time slightly different to one of the three identified in the question. The point is well made in relation to questions raised by way of case stated generally — this Court's opinion is best sought in the form of an open question, which avoids the potential for this Court finding that none of a listed group of possible answers is correct.

The meaning of the contract

Introduction

[31] In raising a limitation defence, MIS submits the limitation period will generally (though depending always on the terms of the insurance contract) commence on the date of the insured peril (i.e. the insured property damage) because that is the date from which the insurer incurs an unsatisfied liability to indemnify.

[32] This overarching submission on Question One recognises the central importance, including for limitation purposes, of the terms of the insurance contract. The time at which the insurer's obligation to pay is triggered may be stated *expressly*, as identified in *Zurich*.[8] Or, as identified by the Court of Appeal in *Doig v Tower Insurance Ltd* (*Doig*), it may be *implicit* in the policy terms.[9]

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8 *Zurich*, above n 3, at [14] per Elias CJ (but accepted implicitly by the majority also). See also *Jarden v Lumley General Insurance (NZ) Ltd* [2016] NZCA 193, (2016) 19 ANZ Insurance Cases 62–104 [*Jarden (CA)*] at [22].

9 *Doig v Tower Insurance Ltd* [2019] NZCA 107, [2021] 2 NZLR 127 [*Doig*] at [51].

The Policy

[33] The language of provisions in the Policy must be read in the context of the whole contract.[10]

[34] The context of the provisions for compensation for disaster cover lies in the provisions of the EQC Act. MIS's Type of Cover clause (above at [11]) expressly provided cover for the five types of natural disaster identified in the EQC Act before identifying what MIS would pay for covered damage. Section 30 EQC Act governs the relationship between coverage under contracts of insurance and coverage under the Act itself. MIS's policy adopts the statutory formula of coverage "to the extent that the loss or damage exceeds the liability of the Commission under the [EQC] Act." This is directly parallel to the wording of s 30(2) EQC Act whereby coverage under the EQC Act does not apply "to the extent that the contract provides for cover in excess of the amount to which cover is provided under this Act." As discussed by Elias CJ in *Zurich*, above at [13], the arrangement with private insurers permitted under s 30(2) EQC Act is for "top-up insurance". The expression "top-up" cover has been used in contra-distinction to "ground up" cover, where an insurance company pays for all natural disaster damage within the terms of its policy and EQC covers the balance (within the scope of the EQC cover up to the limits specified in the EQC Act).[11]

[35] Mr Cooper observed that "top-up" cover does not have a specialised meaning—this is confirmed in the judgment of the majority in *Zurich*, delivered by Arnold J.[12]

[36] The fact that "top-up" cover does not have a specialised meaning does not detract from the fact the term neatly encapsulates how such a policy is intended to operate under s 30(2) EQC Act. In *Zurich*, the insurer contended (unsuccessfully) that "top-up" cover had an established meaning, whereby the insurer only pays the difference between EQC payments and the sum insured. It was that specialised

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10 *Zurich*, above n 3, at [68] per McGrath, Glazebrook and Arnold JJ.

11 See EQC's current explanation in EQcover Insurer's Guide (Toku Tū Ake EQC, October 2022, version 2.0) <www.naturalhazards.govt.nz>. See also, *Zurich*, above n 3, at n 65, per McGrath, Glazebrook and Arnold JJ (setting out the explanation in the September 2012 version of the Guide).

12 *Zurich*, above n 3, at [84]–[87].

meaning of "top-up" cover that the Supreme Court rejected. That does not detract from the accuracy of the term "top-up" insurance as identified by Elias CJ (above at [13]) to indicate the insurance is not an overlapping obligation to pay for the same natural disaster damage. Instead, it is insurance structured to cover the additional loss not covered because of the statutory cap. This is the context in which, under the Policy, MIS insured the homeowners for "excess of EQCover".

[37] I turn then to the express wording of the Policy.

[38] The primary obligation of MIS under the heading "Our Undertaking" (above at [8]) is to *compensate* the homeowners for specified loss or damage that occurs.

[39] In other words, on its plain wording, MIS agreed with the homeowners it would provide compensation for damage that occurred, not that it would "hold harmless" the homeowners, in the sense of preventing such damage or loss from occurring. I will return to discuss a line of authority involving what has been identified as the "legal fiction" (I will refer to it as the "*Fanti* fiction"), from [47] below, that an insurer's primary obligation is to "hold the indemnified person harmless against a specified loss or expense" or, in other words, to prevent the insured-against event from happening.[13]

[40] What the express use of the word "compensate" in the insuring clause indicates in this case is the parties did not intend by the Policy to require MIS to prevent the insured damage or loss from occurring.

[41] I then turn to consider whether the wording of the Policy identifies the time at which the payment of compensation is required. That time is not expressly identified in the Policy. That said, the timing is implied through the Type of Cover clause, for disaster cover (above at [11]). Under that provision of the Policy, MIS undertook (I repeat for convenience):

> *…to the extent that the loss or damage exceeds the liability of the Commission under the Act, the Society will pay the difference between that liability and the maximum amount payable under this Policy.*

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13 *Firma C-Trade SA v Newcastle Protection and Indemnity Association (The Fanti)* [1991] 2 AC 1, [*Firma C-Trade*] per Lord Goff at 35.

[42] Implicitly, the parties through the provisions of the Policy recognise there would be, because of the regime of the EQC Act, a need to first establish the extent of EQC's liability before MIS would be in a position to *compensate* the homeowners for the difference between EQC's liability and MIS's liability under the Policy.

[43] Adopting the terminology employed by the Court of Appeal in *Doig*, MIS's obligation to pay was not triggered until EQC made the full extent of its payment. Until that point, MIS's liability was contingent only.[14]

[44] I accordingly conclude the time MIS's obligation to pay was triggered under the Policy was, at the earliest, on 25 November 2022. That was when, as indicated in Table 1 above at [7], EQC notified the homeowners and MIS of its determination that the claim was over cap and brought its payment to the homeowners up to cap.

Question 1: the commencement of the limitation period—"6 years after the date of the act or omission on which the claim is based"

Introduction

[45] I have set out above at [20] the questions as referred to this Court.

[46] In relation to Question One (dealing with the limitation period), MIS's position is close to Answer (a)—Mr Cooper submits generally (though depending always on the terms of the insurance contract) the limitation period will commence on the date of the insured peril (i.e. the insured property damage). For the homeowners, Ms Walton submits the limitation period commenced on one or other of two dates. Either, it commenced on 12 April 2022, when MIS declined any claim made on the basis it was time-barred. Or, alternatively, if the Court were to find (as I have) that MIS's obligation to pay was triggered at earliest on 25 November 2022 when EQC made its over-cap determination and final payment, the limitation period commences on that date.

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[14] *Doig*, above n 9, at [51].

The Fanti *fiction*

[47] In discussions as to when the limitation period commences in relation to an insurance contract, reference is frequently made to the "orthodox" position which ties the commencement of the limitation period to the occurrence of the peril. This is a reference to a unique position under insurance contract law in England and Wales and can be related back to the judgment of Lord Goff in *Firma C-Trade SA v Newcastle Protection and Indemnity Association (The Fanti)*.[15] In July 2014 the Law Commission (England and Wales) and the Scottish Law Commission presented a joint report which led to parliamentary reform in 2016. The Commissions explained the *Fanti* fiction (that the occurrence of the peril is a breach of contract) came about:

> **THE UNIQUE POSITION UNDER INSURANCE CONTRACT LAW IN ENGLAND AND WALES**
>
> **The "hold harmless" principle and insurance monies as damages**
>
> 25.8 In England and Wales, by virtue of a legal fiction, a policyholder under an insurance contract is not able to claim damages from an insurer who causes further loss as a result of wrongful, late or non-payment of an insurance claim. This is because the insurer's obligation under a contract of indemnity insurance is not, as one may expect, to pay insurance claims in return for payment of the premium. Rather, the English courts have held that the indemnity insurance contract is underpinned by the legal fiction that an insurer's primary obligation is to "hold the indemnified person harmless against a specified loss or expenses"; that is, to prevent the event which is insured against from happening.
>
> 25.9 In other words, an insurer's fundamental obligation is not to pay claims but to prevent the loss occurring in the first place. …
>
> (footnotes omitted)

[48] This position under the *Fanti* fiction meant English and Welsh insurers had no obligation to pay valid claims within a reasonable time, with damages flowing for breach, at least until parliamentary intervention in 2018.

[49] The *Fanti* fiction stood in contrast to the New Zealand position as identified by the Court of Appeal in *New Zealand Insurance Co Ltd v Harris* (*Harris*).[16] The insured was there identified as having an entitlement to consequential damages when

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15 *Firma C-Trade*, above n 13, at 35 per Lord Goff.

16 *New Zealand Insurance Co Ltd v Harris* [1990] 1 NZLR 10 (CA) [*Harris*] at 17.

"the insurer, in breach of its obligation, fails to pay the amount due at the proper time."[17] On the facts, it was held that NZI was in breach of a duty to pay the sum insured by 31 January 1983 following the destruction of the insured tractor on 15 December 1982.

[50] In the context of questions referred to this Court by the Tribunal, it is apposite to refer to a previous decision of Chair Boys in *L v Earthquake Commission* where the Tribunal rejected a limitation defence raised by Tower Insurance Ltd by reference to the date of the peril.[18] Chair Boys recorded:

> [34] Tower has argued where no claim has been made, the "orthodox view" referred to by [Paulsen] AJ in *Inicio v Tower* should prevail.[19] This is the doctrine applied in English and some Australian cases that, as an indemnity policy is a promise to hold harmless, the insurer is in breach of contract as soon as the insured event, alleged earthquake damage in this instance, occurs. This position has been criticised by a number of UK and Australian authors and Judges and, importantly, by Neil Campbell (as he then was) in *An Insured's Remedies for Breach*.[20] Mr Campbell's criticism is that characterising the promise to indemnify as one to "hold harmless" does not accurately reflect the shared intention behind the typical policy wording. Rather, as is the case in the policy, the promise is to make right damage by repair or replacement.[21]
>
> [35] Further to this analysis, the "hold harmless" doctrine is a legal fiction which runs contrary to principle and reality. The key principle underlying any indemnity policy is that the insurer promises to make right the damage or loss. The key clause in any insurance policy is the "insuring clause", the central promise which defines the policy's purpose. In the Tower policy the insuring clause is "your house is insured for … sudden and unforeseen accidental physical loss or damage". There are no words which suggest that Tower will "hold harmless" and prevent that damage or loss from occurring. To impose an impossible obligation on a party to a contract without clear words showing that was the intention of the parties is against settled principles of contract law. I see no grounds which justify such a term being implied.

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17 At 17. See also *State Insurance Ltd v Cedenco Foods Ltd* CA216/97, 6 August 1998; *Pegasus Group Ltd v QBE Insurance (International) Ltd* HC Auckland CIV-2006-404-6941, 1 December 2009 at [207] (appealed on different grounds *QBE v Insurance (International Ltd v Pegasus Group Ltd* [2011] NZCA 268, (2011) 16 ANZ Insurance Cases 61-894); .

18 *L v Earthquake Commission* CEIT-2019-0036, 30 November 2021.

19 *Inicio v Tower* [2020] NZHC 90 at [29].

20 See *Scott v Sovereign* [2011] NZCA 214 at [38]; and Neil Campbell *An Insured's Remedies for Breach* (1999) 5 NZBLQ 51.

21 At 2.2.

Submissions—MIS

[51] Mr Cooper KC for MIS commenced his submissions on Question One by suggesting there is no obvious answer to it—he accepted a conclusion contrary to MIS's position was "strongly arguable".

[52] Mr Cooper focused his submissions around six main points. First, Mr Cooper referred to the well-understood fact that the reference in s 11(1) Limitation Act 2010 to the "date of the act or omission" (above at [15]–[19]) was a significant change for claims in tort, where the cause of action did not accrue until the plaintiff suffered loss arising from the defendant's breach. But it was not intended to change the start date for claims of contract identified under the Limitation Act 1950 by reference to the date the cause of action accrued, which are therefore complete upon breach. They remain so under the 2010 Act.

[53] Mr Cooper rejected a proposition advanced for the applicants which suggested the "act or omission on which the proceedings are based" should be interpreted to mean the act or omission of the defendant. Mr Cooper submitted a focus on the occurrence of the peril itself (exactly the rationale of the English line of authority) accords with the scheme of the Limitation Acts, both 1950 and 2010.

[54] Secondly, Mr Cooper submitted the nature of the insurer's obligation under a property insurance policy which provides for "reinstatement" cover points to the "relevant act or omission" being the event that causes the insurer to be liable to pay the indemnity value (whether or not the insured incurs reinstatement costs). Mr Cooper identified this Court's position in *TJK (NZ) Ltd v Mitsui Sumitomo Insurance Co Ltd* as illustrating that principle.[22]

[55] Thirdly, Mr Cooper invoked what he referred to as the "orthodox position". He cited the line of authority that dates back to *The Firma C-Trade* in the United Kingdom and was adopted there (until the 2018 legislative reforms) and also in some Australian states. In short, Mr Cooper submitted the primary limitation period

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[22] *TJK (NZ) Ltd v Mitsui Sumitomo Insurance Co Ltd* [2013] NZHC 298 at [43]–[44]. See also *Marriot v Vero Insurance New Zealand Ltd* [2013] NZHC 3120 at [73].

commences on the date the insured peril occurs because the action for breach of contract arises on that date, subject only to a construction of the terms of the policy. Mr Cooper submitted by reference to cases decided under s 4 of the 1950 Act that the date on which the primary limitation period commenced was *not*:

(a) when the loss manifests;[23]

(b) when the insured incurs costs to repair the loss;[24]

(c) when the insured makes its claim to the insurer under the policy;[25] nor

(d) when the insurer declines the insured's claim or denies liability.[26]

[56] Mr Cooper submitted the same analysis should apply under the 2010 Act given breach of contract is the appropriate trigger under both the 1950 and the 2010 Acts.

[57] Fourthly, Mr Cooper submitted "time did not stand still pending the EQC process" under the Policy. Mr Cooper submitted, despite the common parlance reference to "top-up" cover, MIS's liability immediately arose upon the property being covered under the Act because (in terms of s 18 of the Act) a residential building had sustained natural disaster damage subject to a contract of fire insurance. At that point, Mr Cooper submitted, MIS was liable to indemnify the applicants for the difference between EQC's liability and the maximum amount payable under the Policy.

[58] Mr Cooper invited the Court to distinguish the cases of *Jarden v Lumley General Insurance (NZ) Ltd* (*Jarden (CA)*)[27] and *Doig v Tower Insurance Ltd* (*Doig*).[28] In those cases the Court of Appeal held that the insurer's obligations to the insured were contingent upon EQC making or agreeing to make payment.[29]

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23 *Rabadan v Gale* [1996] 3 NZLR 220 (HC) at 222.

24 *Seele Austria GmbH & Co KG v Tokio Marine Europe Insurance Ltd (No. 3)* [2009] EWHC 2066 (TCC) at [50].

25 *General Accident Fire & Life Insurance Co Ltd v Direct Fish Supplies Ltd* HC Napier M154/81, 29 June 1982 at 3–4.

26 Citing *Globe Church Inc v Allianz Australia Insurance Ltd* [2019] NSWCA 27, (2019) 99 NSWLR 470 at [213].

27 *Jarden (CA)*, above n 8.

28 *Doig*, above n 9.

29 *Jarden (CA)*, above n 8, at [25]–[26]; *Doig*, above n 9, at [51].

[59] Mr Cooper submitted the Policy, properly construed, is not such as to trigger MIS's obligation to pay only on EQC making payment.

[60] Fifthly, Mr Cooper responded to a submission of Ms Walton for the applicants in relation to s 43(b) of the 2010 Act.

[61] Section 43 relevantly provides:

> **Established defence bars relief, not underlying right**
>
> If the defendant establishes a defence under this Act against a claim, and no order under section 17, 35(5), 36(4), or 50 applies to the claim,—
>
> …
>
> (b) the establishment by the defendant of the defence does not extinguish, as against the defendant or any other person, any entitlement, interest, right, or title of the claimant on which the claim is based.

[62] Ms Walton submitted MIS had used the time bar to "attack" the applicants' valid claim under the Policy before court proceedings were issued (through MIS's lawyers' correspondence in early 2022 as identified in Table 1 above). Ms Walton's proposition was that it was unconscionable for MIS to refuse to honour its policy obligations simply because the obligations could not be enforced through a court, an outcome which Ms Walton submitted was plainly not what Parliament intended through enacting s 43(b).

[63] Mr Cooper submitted the applicants' arguments based on s 43(b) cannot assist them in relation to Question One, as the applicants have issued proceedings and the limitation defence has been pleaded.

[64] Sixthly, and finally in relation to Question One, Mr Cooper submitted there are policy considerations against the limitation period commencing later than the date of the peril. Mr Cooper referred to the recognition of Parliament in enacting the 1950 Act and the 2010 Act that the longer a plaintiff delays in commencing proceedings,

the greater the deterioration in the quality of evidence, the prejudice towards the defendant, and the difficulty for the courts in reaching a just decision.[30]

[65] Mr Cooper referred to the need for competing interests to be balanced. Therefore, while plaintiffs have the right to bring a well-founded claim to be answered by a defendant, plaintiffs must not sleep on that right as defendants have a legitimate interest in not being vexed by stale claims, and there is a wider public interest in there being an end to litigation.[31]

[66] Mr Cooper submitted it would be counter to the purpose of the limitations regime for the "date of the act or omission" to be controllable by the insured. Insurers could be left in the dark as to potential liability. Mr Cooper further submitted that if the proper (limitation) start date was the date when EQC determined the applicants' claim had exceeded the statutory cap, then an insurer would be at the mercy of EQC's internal processes and any accompanying delays.[32]

[67] Mr Cooper suggested the chronology in this case illustrates the difficulties that could arise if commencement of the primary period is "deferred"—after the applicants received (in November 2014) a significant initial settlement sum from EQC, the applicants took no steps to apply that sum to repairing the house but now seek to claim from MIS for top-up cover.

Analysis — Question One

[68] It was common ground between the parties that the statutory limitation period for claims in contract is always subject to the terms of the contract in question. Those terms, as noted at [32], may be either express as in *Zurich* or may be implicit as in *Doig*.[33] For the reasons I have identified (from [33] to [44] above) I find the time at which MIS's obligation to pay was triggered under the Policy was, at the earliest, on 25 November 2022.

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30 (4 August 2009) 656 NZPD 5381. See also (24 August 2010) 666 NZPD 13559; and Limitation Bill 2009 (33-2) (select committee report) at 1.

31 Citing the purpose of the 2010 Act, expressed in s 3; also (4 August 2009) 656 NZPD 5379; (4 August 2009) 656 NZPD 5381, 5383 and 5389; and (24 August 2010) 666 NZPD 13559, 13569, 13579 and 13588.

32 *Harris*, above n 16.

33 *Zurich*, above n 3; *Doig*, above n 9.

[69] For that reason, the line of authority in the United Kingdom and in some Australian states stemming from the *Fanti* fiction does not assist MIS—the parties by their contract agreed the relevant event triggering an obligation to pay would be when (in the circumstances of this case) EQC made the full extent of its payment.

[70] Had I not made that finding in relation to the terms of this Policy, I would have reached the same conclusion by finding the United Kingdom and Australian authorities invoked for MIS have no application in New Zealand. Despite the description ("orthodox") that has been given to those authorities, they do not represent orthodoxy in New Zealand. They stem from a legal fiction which has no place in New Zealand as illustrated by the Court of Appeal's decision in *Harris* (above at [49]). As that case indicates, the insurer will generally breach its obligation when it fails to pay the amount due "at the proper time".[34] While the timing at which the insured peril occurs is likely to be relevant to the determination of that proper time, the peril itself is not the "act or omission".

[71] This outcome is not to ignore the consideration of policy issues raised by Mr Cooper on behalf of MIS. It is fundamentally important that the Policy was viewed and construed in the context of the Act and, in particular, as an insurance policy providing "top-up" insurance under s 30(2) EQC Act. All insured taking out such cover were entitled to understand their insurance was structured to cover the additional loss not covered because of the statutory cap, up to which level EQC was responsible for covering.

[72] The policy considerations that might arise, as suggested by Mr Cooper, if time did not run under this Policy until a claim was made by the insured do not arise in this case. A claim was made, of which MIS had notice from March 2011 at latest. MIS maintained (through Mr Cooper) that it would be placed "at the mercy of EQC's internal processes and any accompanying delays" if the claim's primary period commences when EQC determined the claim had exceeded the statutory cap. However, that has no significance as a valid policy consideration given MIS's decision to offer policies under s 30(2) EQC Act.

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[34] *Harris*, above n 16, at 17.

[73] Consistently with the Court of Appeal's approach in *Harris*,[35] I conclude Question One is correctly answered by an amendment to Answer (c) (above at [20]) to read:

> The primary period under section 11 of the Limitation Act 2010 begins on the date, following EQC's advice that the applicants' claim was over cap (25 November 2022), that represents the reasonable period for MIS to have assessed the applicants' overcap claim and to have made payment of the amount due.

Question 2: the duty of good faith as a "brake"

Introduction

[74] I have set out above at [20] the questions as referred to this Court. It is the homeowners' submission that an insurer's duty of upmost good faith can act as a brake upon or barrier to that insurer's reliance on the defence available to it under the Limitation Act.

[75] Ms Walton identified this question was raised by Member Emily Flaszynski in her decision, as a member of the Tribunal, in *MA and HA as Trustees of the AFT v Tower Insurance Ltd*.[36] There, Member Flaszynski raised this question and provided her answer:

> [41] A further matter I encourage consideration of, is whether the duty of good faith can affect an affirmative defence from being claimed?
>
> [42] A contractual duty of good faith is implied into every insurance contract and is a duty that flows both ways. The duty requires both parties to act reasonably, fairly, and transparently when observing and honouring the policy terms. It applies to the initial formation of the contract, actions taken during the contract term and after the lodgement and dealings of a claim. An insurer must process a claim in a reasonable time. What is reasonable will depend on the circumstances. The conduct of the insurer and the policyholder will be relevant when deciding whether the duty of good faith has been breached.
>
> [43] Can the duty of good faith act as a brake upon or a barrier to an insurer's reliance on the defence available to it under the Limitation Act 2010? Determination of this question will be contextual and will depend on the conduct of the parties.

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35 *Harris*, above n 16.

36 *MA and HA as Trustees of the AFT v Tower Insurance Ltd*, CEIT-001-2022, 18 July 2022.

[76] Ms Walton explained that, in relation to this case, the heart of the question is whether MIS complied with its duty of upmost good faith in:

(a) reversing its initial assessment the claim was over-cap in 2012 following a joint review with EQC; or

(b) wrongfully declining the homeowners' otherwise valid over-cap claim because MIS believed a limitation defence was available to it.

Homeowners' submissions

[77] For the existence of a reciprocal duty of good faith, Ms Walton referred to *Young v Tower Insurance Ltd* (*Young*).[37] There, Gendall J referred to a number of authorities which recognised the possibility of a general duty of good faith by an insurer, together with academic commentary and responsibilities under the "Fair Insurance Code 2016", by which Tower had agreed to be bound, undertaking (amongst other things) to "settle all valid claims quickly and fairly".[38]

[78] Gendall J found the insurer had a duty of good faith which included a duty to process the claim in a reasonable time:

> [163] With all these matters in mind, I therefore find that a duty of good faith on the part of the insurer is implied in every insurance contract. It must, as I see it, be a necessary incident of these contracts (long said to be contracts of utmost good faith) and an obligation that flows both ways. To suggest otherwise would make no sense. And in my view, this duty extends beyond a mere obligation on the insurer and the insured of continued disclosure. While the full scope and limits of the duty can be left for another day, I find, as a bare minimum, that the duty requires the insurer to:
>
> (a) disclose all material information that the insurer knows or ought to have known, including, but not limited to, the initial formation of the contract and during and after the lodgement of a claim;
>
> (b) act reasonably, fairly and transparently, including but not limited to the initial formation of the contract and during and after the lodgement of a claim; and
>
> (c) process the claim in a reasonable time.

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37 *Young v Tower Insurance Ltd* [2016] NZHC 2956, [2018] 2 NZLR 291.
38 At [157]–[162].

[79] Turning to the facts of this case, Ms Walton noted that (as reflected in Table 1 above at [7]) MIS, on 12 April 2022 having learned that EQC intended to put the homeowners' claim over-cap, informed the homeowners that any claims against MIS were time-barred.

[80] It was at this point Ms Walton developed a submission based on s 43(b) of the 2010 Act to which Mr Cooper replied also in the context of the first question. Ms Walton's submission in that regard is summarised above at [61]–[62]. In relation to the limitation period, Ms Walton emphasised that under s 43(b) the availability of the statutory limitation defence does not extinguish the homeowners' claim under the policy and the insurer retains its contractual top up obligation, irrespective of its right to plead a limitation defence if proceedings are issued. Ms Walton submitted MIS breached the duty of good faith recognised in *Young* by declining the homeowners' over-cap claim on the grounds the homeowners could not enforce that obligation through a court proceeding. She submitted the duty of upmost good faith therefore can bar the insurer from relying on a limitation defence to decline a claim.

[81] Ms Walton submitted this approach was consistent with what Winkelmann J recognised in *Pegasus Group Ltd v QBE Insurance (International) Ltd* (*Pegasus*).[39] There this Court recognised the parties (in that case to an insurance contract) could not fairly be fettered with implied equitable or contractual obligations to each other once proceedings have been issued.[40] But, in Ms Walton's submission, an insurer's right to rely on a limitation period may still be lost through the insurer's own conduct. By way of example, Ms Walton referred to academic commentary identifying that the position under the 2010 Act will be the same as the position under the 1950 Act, whereby the right to rely upon a limitation period could be lost by waiver.[41]

[82] Ms Walton then, taking the issue beyond the question of law posed to the events of this case, submitted that on the facts MIS had waived its right to rely on a limitation defence through making its 19 March 2019 payment for external works

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39 *Pegasus Group Ltd v QBE Insurance (International) Ltd*, above n 17.
40 At [280].
41 Rob Merkin and Chris Nicoll (eds) *Insurance — A to Z of New Zealand Law, Limitation of Actions* (online ed, ThomsonReuters) at [7.4.3].

(above Table 1) after the expiry of what MIS asserts to be the primarily limitation period.

MIS submissions

[83] Mr Cooper first observed that all the matters identified by Gendall J in *Young* as aspects of an insurer's duty of good faith (disclosure of all material information; acting reasonably, fairly and transparently; and processing the claim in a reasonable time) were matters relating to the insurer's claim-handling process. Mr Cooper noted the same applies to this Court's decision in *Sadat v Tower Insurance Ltd*, where the Court suggested there is potential for implied duties to admit liability and to pay promptly.[42]

[84] Beyond that, Mr Cooper submitted the extent and conceptual basis and scope of the insurer's duty of good faith remains unclear in New Zealand. He referred to the Court of Appeal's observations in *Southern Response Earthquake Service Ltd v Dodds*;[43]

> ... it does not follow from the fact that a contract of insurance can be described as a contract of good faith that there is an implied term of good faith in every insurance contract, that applies across the board to all aspects of the parties' dealings in connection with the contract. To the contrary, the authorities suggest that the obligations that one party owes the other are context-specific.

[85] Specifically in relation to the insurer's right to dispute a claim, Mr Cooper referred to this Court's recent decision in *IAG New Zealand Ltd v Degen*.[44] There Hinton J referred to *Young* and held the duty of good faith does not prevent an insurer from disputing a claim:

> [30] I note the observations in *Young* that what is reasonable will depend on all the relevant circumstances, including whether the insurer shows that reasonable grounds exist for disputing the claim. An insurer does not breach the implied term merely by failing to pay while the dispute is continuing. But the conduct of the insurer in handling a claim may be a relevant factor in deciding whether that good faith duty was breached.
>
> …

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42 *Sadat v Tower Insurance Ltd* [2017] NZHC 1550 at [309].

43 *Southern Response Earthquake Service Ltd v Dodds* [2020] NZCA 395, [2020] 3 NZLR 383 at [194].

44 *IAG New Zealand Ltd v Degen* [2024] NZHC 397.

> [32] IAG says all that can be taken from *Young* is that an insurer is under an implied good faith obligation to process valid claims within a reasonable timeframe and they will not be in breach of that obligation if there are reasonable grounds for disputing the claim. I agree.

[86] Mr Cooper submitted these authorities, together with the observations of Winkelmann J in *Pegasus*, indicate if the insurer has a statutory defence under the 2010 Act it is free to advance that defence if litigation is issued, and to identify its intention to rely on the defence before any litigation is issued.

Discussion

[87] For the reasons advanced by Mr Cooper, Question Two must be answered in the negative. Without more, the insurer's duty of upmost good faith of itself cannot limit the insurer's reliance on a limitation defence, whether signalled before any proceedings are issued or pleaded after the event. As in the waiver example invoked by Ms Walton, it will be circumstances other than the mere existence of a duty of upmost good faith that would limit or debar an insurer from pleading its statutory defence.

Outcome

Question 1

[88] Question 1 is answered:

> By an amendment to Answer (c) (above at [20]) to read:
>
> > The primary period under section 11 of the Limitation Act 2010 begins on the date, following EQC's advice that the applicants' claim was over cap (25 November 2022), that represents the reasonable period for MIS to have assessed the applicants' overcap claim and to have made payment of the amount due.

Question 2

[89] Question 2 is answered:

No.

Costs

[90] I reserve questions of costs and disbursements ("costs"). In the event the parties do not reach agreement on matters relating to costs, costs will be determined on the papers on the basis of memoranda filed (with five page limit, excluding schedules of calculations), with memoranda to be filed and served by applicant for costs by 24 April 2025 and by respondent to application by 9 May 2025.

Osborne J

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