IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV 2013-409-990
[2014] NZHC 919

UNDER	the Declaratory Judgments Act 1908
BETWEEN	HELEN KRAAL and BRUCE ROBERTSON IRVINE Plaintiffs
AND	THE EARTHQUAKE COMMISSION First Defendant
	ALLIANZ NEW ZEALAND LIMITED Second Defendant

Hearing:	11-13 November 2013
Counsel:	C R Johnstone and G H Nation for the Plaintiffs J Knight and N Bruce-Smith for the First Defendant I Thain and K Pengelly for the Second Defendant
Judgment:	30 April 2014
Reasons:	6 May 2014

REASONS OF MALLON J

Contents

Introduction

[1] This case concerns whether there is cover under the Earthquake Commission Act 1993 (the Act), and in turn insurance cover, for a homeowner's loss of the right to occupy their home. This is a test case in that there are at least two other proceedings at the interlocutory stage which raise the same issue. The case arises out of the catastrophic earthquakes in Christchurch in 2010 and 2011. The homeowners (the plaintiffs) are prevented from occupying the home, not because of earthquake damage to the structure of the home itself, but because of the risk that rocks on a cliff face above the property will dislodge and cause injury or death to persons in the property. The risk of rockfall has increased because of the earthquakes and aftershocks. It is not anticipated to reduce to pre-earthquake levels until 2021. As a result of the risk of injury or death to persons in the property from rockfall the Christchurch City Council (the Council) has issued a notice which prohibits the homeowners from using or occupying the home.

[2] Whether there is cover for this kind of loss depends on the meaning of "physical loss or damage to the property" under the Act. This is relevant to both whether there is cover under the Act (EQC cover) but also whether there is insurance cover under the homeowner's insurance policy. That is because EQC cover is a pre-requisite for insurance cover. If the loss is "physical loss or damage to the property" there are additional issues specific to the insurance cover question. The homeowners' position is that "physical loss or damage to the property" includes not just loss or damage to the structure of a house, but also loss of possession and use of the house. The EQC and the insurer say that this is not "physical" loss.

[3] The plaintiffs' house is "red zoned" meaning that they, like other property owners with properties which have similarly been categorised post the earthquakes, have received an offer from the Crown. One of the options under that offer is for the Crown to buy their property at the 2010 capital rating valuation. However, as I understand it, that valuation is materially less than the replacement value of their house under their insurance policy. It is therefore important that the plaintiffs know whether they have replacement cover under their insurance policy before they make a decision whether to accept the Crown offer.

Background

[4] The home at issue is at 119 Wakefield Avenue, Sumner.[1] Wakefield Avenue provides access to Lyttleton to the south and to Sumner village to the north. Residential properties are on both the eastern and western sides of Wakefield Avenue. The house at 119 is on the eastern side. Ms Kraal (one of the plaintiffs) has lived there for 18 years. She has lived there with her partner Mr Prior for ten years. They carried out improvements to the property over the years and planned to retire there.

[5] The first of the Christchurch earthquakes occurred on 4 September 2010.[2] 119 Wakefield Avenue suffered some property damage from the shaking effects of that earthquake. The second of the major Christchurch earthquakes occurred on 22 February 2011.[3] 119 Wakefield Avenue suffered further property damage from the shaking effects. There is structural damage and damage to the foundations of the house from the earthquakes. It is accepted that this damage is reparable.[4]

[6] The issue with the property arises from the risk of rockfall. A portion of Wakefield Avenue that includes 119 sits below an area of unbroken rocks on a cliff face of Richmond Hill which is part of the Port Hills. Prior to the Christchurch earthquakes of 2010/11 the risk of rockfall from the cliff face was not viewed as an impediment to road users or the occupation of properties along Wakefield Avenue.

[7] The earthquake on 22 February 2011 caused widespread rockfall in the Port Hills. Thousands of rocks or boulders dislodged and rolled down the hills. Five people died as a result of rockfalls and cliff collapse. One of these deaths was on Wakefield Avenue near to Sumner Village. The cliff face above 119 was one of the areas from where rocks and boulders dislodged.

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1 The plaintiffs are trustees of the Helen Kraal Family Trust and are the registered proprietors of 119 Wakefield Avenue.

2 It occurred on the Greendale Fault and was magnitude 7.1.

3 It occurred on the Port Hills Fault and was magnitude 6.3.

4 Repair has not been carried out because of a notice which has been issued under s 124 of the Building Act 2004 (discussed at [12] to [16]). The plaintiffs say the building was also damaged in the June 2011 earthquake. EQC does not agree that there was further damage in June but nothing presently turns on that point.

[8] In total almost 70 boulders landed in the vicinity of 119 (from about 92 Wakefield Avenue to 107 Wakefield Avenue (just past Duncan Street)).[5] No boulders landed on the property at 119, but six boulders of reasonable size landed on the roadway and verge outside 119.[6] Some rocks landed on the roofs of the properties at 92 and 94 Wakefield Avenue (across the road from 119 and on the western/Port Hills side of Wakefield Avenue). Rocks also landed on the grounds of the property at 2 Truro Street (a retirement village on the corner of Wakefield Avenue and Duncan Street).[7]

[9] In the immediate aftermath of the February earthquake Civil Defence handled the assessment of risk and the evacuation of homes. As a result of the rockfalls, and the perceived risks of further rockfalls from seismic activity, 119 Wakefield Avenue was one of a number of properties "red carded" under Civil Defence emergency powers.[8] Occupants of red carded homes were required to leave them. Shipping containers were placed along Wakefield Avenue to protect motorists and pedestrians.[9]

[10] Subsequently, in July 2011, the Council appointed a Port Hills Geotechnical Group (PHGG) to carry out a review of all Port Hills properties with civil defence red cards. The PHGG made recommendations to the Council about the need, or otherwise, for a notice under s 124 of the Building Act 2004. That section empowers a territorial authority to give notice that (amongst other things)[10] "warns people not to approach the building"[11] if it is satisfied that a building is "dangerous".[12]

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5 A map produced at the hearing depicted the location and size of the boulders in this area. It appears that around 50 boulders were less than or equal to 0.5m^3, 11 boulders were greater than 0.5m^3 but less than or equal to 1.0m^3, four boulders were greater than 1.0m^3 but less than or equal to 2.0m^3, and two boulders were greater than 2.0m^3. The maximum size of these boulders was 8.8 m^3.

6 On 4 March 2011 Craig Prior took photographs from just outside 119 Wakefield Avenue. These photographs show six large boulders on the roadway and verge.

7 At the plaintiffs' request I, together with counsel, took "a view" of the area during the hearing.

8 Civil Defence Emergency Management Act 2002, Part 5.

9 Initially, in late March 2011, they were placed against the kerbside of the eastern (southbound) lane, immediately outside the plaintiffs' property. They were later moved to the western kerbside (northbound lane). At the time of the hearing the containers remained in place.

10 Section 124(1)(a) and (c) contain other powers.

11 Section 124(1)(b).

12 "Dangerous" is defined in s 121 of the Building Act 2004. In the wake of the earthquakes there has been a succession of Orders in Council modifying the power under s 124. These have included extensions to the definition of "dangerous" to more explicitly address rockfall risk (amongst other things).

The present definition of "dangerous" includes the position where:[13]

> … there is a risk that adjacent, adjoining, or nearby buildings or land could collapse (including collapse by way of rockfall, landslip, cliff collapse, or subsidence) or otherwise cause injury or death to any person in the building …

[11] As explained by Mr Stetson, the Council manager responsible for s 124 notices at that time, the PHGG undertook site specific assessments in recommending whether a s 124 notice should be issued. On the basis of the PHGG's "findings and opinion about the imminent risks to that property, they would make a recommendation" as to whether a s 124 notice needed to be issued. The PHGG's advice was internally peer reviewed.

[12] On 13 July 2011 the Council issued a s 124 notice in respect of 119 Wakefield Avenue.[14] Since then there has been a succession of s 124 notices affixed to the house. The last such notice was affixed on 26 October 2011. That notice:[15]

(a) stated in bold "DO NOT APPROACH OR ENTER THIS BUILDING";

(b) stated that the building "is a dangerous building" under ss 121 and 124 of the Building Act 2004 and the Canterbury Earthquake (Building Act) Order 2011 "due to risk from rockfall, cliff collapse and/or other hazards";

(c) stated that "no entry is permitted" and that "using or occupying this building is an offence pursuant to s 128 of the Building Act 2004"; and

(d) provided contact details at the Council for further information or approval of any proposed action to remedy the damage.

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13 Canterbury Earthquake (Building Act) Order 2011, cl 7.

14 The red cards issued under the Civil Defence emergency powers expired on 11 July 2011. The s 124 notices replaced them.

15 The earlier notices were to the same effect.

[13] The Council subsequently carried out reassessments of properties subject to s 124. GNS Science (GNS) developed a "life risk model". The GNS risk assessment quantified the risk to life of individual residents in the Port Hills from all rockfall, including rockfall triggered by earthquake shaking. The risk was quantified as a probability of a resident being killed measured as a number of lives per year. All properties subject to a s 124 notice were rechecked by the PHGG using the GNS model. In some cases reassessments verified the Council's earlier decision to place a s 124 notice on the property. In other cases the s 124 notices were removed. And in other cases properties not earlier subject to s 124 notices became subject to them.

[14] On 15 February 2012 119 Wakefield Avenue was assessed by the PHGG using the GNS model:

(a) The form used for such assessments put dwellings on a range of riskiness in four groups: "10^{-2} to 10^{-3}", "10^{-3} to 10^{-4}", "10^{-4} to 10^{-5}" and "less than 10^{-5}". 119 Wakefield Avenue was marked as being in either of the first two groups, being at the most risky end of the four groups.

(b) The form also asked whether the rockfall source varied significantly from the suburb average and whether the risk was greater than that assumed by GNS. 119 Wakefield Avenue was marked as a "yes" on these two matters. It was also marked as having a "continuous outcrop" (rather than a "gap in outcrop") and a further note "much larger bluff uphill" was also made.

(c) The form also asked whether "[b]ased on observations of the site, [it is] possible to assess whether the site risk is the same, greater or less than the GNS suburb-scale value". For 119 Wakefield Avenue this was answered "yes" and the risk was marked as being "the same" as the GNS suburb-scale value.

[15] A second PHGG form for 119 Wakefield Avenue recorded that a s 124 notice was required because rocks fell on an adjacent property, there are obvious sources for further rockfall and there is no effective natural or man-made protection.

[16] The assessment on 15 February 2012 of 119 Wakefield Avenue was followed by a PHGG hazard verification report on 19 April 2012. This report recorded that the property was "at risk of rockfall hazards, which could be triggered by a significant aftershock, another large seismic event or as a result of weathering." The report also noted that a significant amount of boulder hazards had fallen opposite 119 during and subsequent to the earthquakes which had caused damage to properties, that a future source of rockfall lay within the continuous outcrops on the steep slopes above the property and that a s 124 notice remained a requirement.

[17] On 17 August 2012 Ms Kraal received a letter from the Canterbury Earthquake Recovery Authority (CERA) advising her that:

(a) 119 Wakefield Avenue was "zoned red";[16]

(b) the property was at risk of rockfall and "unlikely to reach an acceptable annual individual fatality risk" in a timeframe extending beyond 2016 (when the present s 124 notice will expire);

(c) CERA and the Council had taken expert advice and considered the potential to put in place protective structures "such as earth bunds or rock roll fences, or works to reduce the risk at the rock source" and concluded that these were not practicable for 119 Wakefield Avenue;

(d) the Government would be offering to purchase the property with two options: (1) an offer to purchase at the September 2010 capital rating value; or (2) an offer to purchase at the September 2010 land rating value with Ms Kraal able to continue to deal with her insurer about her house.

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[16] See [51] of this judgment referring to *O'Loughlin v Tower Insurance Ltd* [2013] NZHC 670, [2013] 3 NZLR 275 at [27] and [28].

[18] The Government's offer to purchase the property was made by letter dated 24 September 2012. Originally the offer was to expire on 31 August 2013. That deadline has since been extended.

[19] As a result of the initial red carding of their home followed by the succession of s 124 notices Ms Kraal and Mr Prior have not lived in the house.[17] They have abandoned any hope of moving back into it and have since purchased another home (settlement took place on 30 August 2013). The house at 119 Wakefield Avenue remains damaged and unrepaired and is deteriorating without repairs and maintenance. More generally in Wakefield Avenue there is now a line of abandoned houses and some vacant sections.

[20] The s 124 notice does not necessarily prevent repairs to the house being carried out. That is because temporary access can be granted to property owners and their agents and contractors. The Council's website contains information about this. A formal application must be made. The applicant must provide information on the applicant's safety plan (that is, the ability to quickly evacuate the building in the event of an earthquake). However there is no point in carrying out repairs if the s 124 notice is to remain in place.

[21] The Council will remove a s 124 notice if it is satisfied that there is no longer a risk. One of the ways this could occur is if there is a change in the seismic profile of the site. The evidence is that the risk from rockfall is likely to decline as the aftershock sequence is likely to reduce with time. To make a tangible difference to the life risk probability measure on which the notice has been based, however, the earthquake hazard would have to change considerably.[18] GNS has recommended that it be re-evaluated in 2022.

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[17] Ms Kraal and Mr Prior lived with friends and rented accommodation. They received an insurance payment for rental costs, although not under their house insurance policy with Allianz (the second defendant). After the rental insurance payment had run out Ms Kraal and Mr Prior moved back into their house for a period, partly because they had nowhere else to go and partly because they did not fully comprehend the risk. With further information about the rock fall risk they moved out.

[18] Barry McDowell provides some detail about this. The risk of rock fall over the eastern Port Hills was approximately 2 to 2.5 times greater in 2012 than pre-September 2010. By 2016 the risk will be about 15 per cent higher than pre-September 2010 and by 2021 the risk will be similar to pre-September 2010.

[22] The Council does not have a general plan to reassess existing s 124 notices (119 Wakefield Avenue has not been reassessed since April 2012). Most of these notices are on buildings that are on land which is zoned "red" and where many owners have accepted the Crown offer.[19] Notices issued under these powers have expiry dates. The notice in respect of 119 Wakefield Avenue expires on 18 April 2016.[20] However, because the risk of rockfall is not anticipated to dissipate to pre-earthquake levels until 2021, if the plaintiffs continue to own the house, there is the potential for a further s 124 notice to be issued.

[23] It is open to the plaintiffs to challenge the notice through the process provided in the Building Act 2004. Some property owners have done so. Ms Kraal made an application under that process. She did not progress the application and she withdrew it. Matthew Howard, an engineering geologist engaged by the plaintiffs, investigated the appropriateness of the s 124 notice. He concluded that the s 124 notice was appropriate for 119 Wakefield Avenue as a dangerous building due to the rockfall hazard.[21]

[24] Barry McDowell, an engineering geologist, was instructed by EQC to give evidence on the nature of the rockfall risk at 119 Wakefield Avenue. He says that, if a detailed site specific assessment of the rockfall hazard is carried out for the property, it is possible that it will show that the risk is materially lower than predicted by the average data.[22] He says that the level of risk of the building being damaged by a boulder is "unlikely" to "rare" or equating to an annual probability of 1 in 10,000 (10^{-4}). He says that this would not generally call for any engineering

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19 The Crown offer to purchase property on red zoned land gives homeowners two options. Under option 1 the purchase price is set by the most recent rating valuation of the land, buildings and other improvements. Under option 2 the purchase price is the higher of either the most recent rating valuation of the land, or the amount that the Crown eventually settles with EQC for the land claim. The value of all options is less any specified deductions.

20 Pursuant to the Canterbury Earthquake (Building Act) Order 2013, cl 3.

21 He notes that the GNS simulation shows that it is possible for boulders to reach 119 Wakefield Avenue. He says this is particularly supported by the presence of boulders up to $1m^3$ on a property three houses to the north. He says that, given the numerous variables in possible rockfall boulder trajectory, it is reasonable to conclude that 119 Wakefield Avenue is vulnerable to rockfall impact possibly resulting in loss of life.

22 Mr McDowell notes that the 10 boulders lying on Wakefield Avenue as shown in the photographs taken by Mr Prior all lie on flat ground within 25 m of the toe of the hill slope. He says that the run out distance is similar to the boulders located on reserve land to the west of 119 Wakefield Avenue. He says that the dwelling at 119 Wakefield Avenue is about 50 to 60 m from the toe of the slope.

protection of the building if it was assessed as a new build property. Be that as it may, the Council has lawfully exercised its power to issue a s 124 notice in respect of the property following a careful and proper process involving the site assessments discussed above and the plaintiffs have taken expert advice from Mr Howard who says that the notice was appropriate. In these circumstances it is not unreasonable for the plaintiffs to have abandoned the challenge process.

[25] That leaves whether the risk of rockfall could be reduced to an acceptable level if protection measures on or off the site were put in place. The shipping containers placed along Wakefield Avenue are not regarded as a sufficient protection measure for this purpose. They have been put in place to protect road users. They enable Wakefield Avenue, which post the earthquakes is regarded by the Council as a "lifeline road" and "key route" to Lyttleton Port, to continue to be used despite the risk of rockfall. The shipping containers are regarded as a very good temporary measure[23] to protect road users but the life risk assessments used for road users are different from residential property users. The shipping containers are not in place to protect the houses although they provide some (unquantified) measure of protection to them. The Council does not consider these an effective barrier for occupants of houses in the area.[24] Therefore, as Mr Stetson says, the shipping containers have no impact on a s 124 notice.

[26] The Council has erected two fences in Wakefield Avenue, neither of which provides adequate protection in respect of 119 Wakefield Avenue. One fence was installed in early July 2011. This was erected as a temporary rock catch fence to try and intercept boulders during emergency works. This fence was subsequently damaged. It has been left in place as it is thought that it may reduce the energy of falling boulders. The other fence has been erected between Wiggins and Arnold Streets. This is adjacent to the footpath and has replaced the shipping containers in

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[23] The Council issued a media release on 16 August 2013 advising that the shipping containers on Wakefield Avenue between Paisley Street and Arnold Street (which includes 119 Wakefield Avenue) would remain in place as risk of rockfall and cliff collapse in this area "remains high". The Council also advised that it was working on removing the containers in the area between Wiggins Street and Arnold Street (which does not include 119 Wakefield Avenue) and replacing them with a wire mesh fence

[24] Hence s 124 notices are in place even though the shipping containers are there. Mr McDowell says that the dwelling theoretically could be occupied with the containers in place. However the containers would not be suitable medium to long term protection for occupied dwellings but would be suitable to enable works to be carried out at the property.

this area. Mr Stetson says that this is not a rock catch structure. Its purpose is to keep people out of the area. It has no impact on a s 124 notice.

[27] That leaves only the possibility of a site specific protection measure. There is no current proposal with the Council for the removal of the s 124 notice from 119 Wakefield Avenue. Evidence was given at the hearing of what protection measures might be undertaken. Mr McDowell says that one option would be a trench and bund barrier on the Council owned reserve (in the area where the shipping containers are currently in place). Mr Stetson says that the Council would consider allowing a rockfall protection structure, for example a bund, to be built on the reserve land. He says that this would require resolution of responsibilities for on-going maintenance. Mr McDowell does not regard that as insurmountable. He estimates the cost of this measure at $70,000 with a $20,000 (30 per cent) contingency.

[28] Mr Howard says that a barrier in front of the property would be most suitable because installing support on land owned by others is difficult (requiring agreement with the land owner(s), creation of easements and arrangements to address liability issues). He says that a barrier in the form of a bund (rather than a dynamic rockfall fence for which there is insufficient room) would be most appropriate. It would need to comply with the Council's "Technical Guideline for Rockfall Protection Structures" which requires that the bund withstand more than two impacts of the 95th percentile boulder for the site without significant loss of capacity or height. Construction of the bund would involve removal of the boundary fence, decking, paths and vegetation. It would be 1.8 metres high and nearly 2 metres wide. The estimated cost of such a bund is $205,000 plus or minus 30 per cent. Mr Prier, who is a real estate agent, gave evidence that such a bund would have a "devastating effect" on the value of the property. As Ms Kraal says, it would be "an eye-sore", take out most of the outdoor space and cut off the afternoon sunlight.

[29] Mr McDowell says that Mr Howard's design would be an acceptable option for protection from rockfall but is not the most practical or appropriate solution. He also says that Mr Howard's estimated cost is at the high end. Mr McDowell considers that the cost could be $160,000. He says that an alternative is a barrier fence on the property itself. He says that a medium energy barrier fence would fit on

the property and cost $100,000 plus or minus 30 per cent. This fence would have a kinematic energy of less than 1000kJ and would not meet the current Council requirements. Its installation would therefore depend on persuading the Council that it provided appropriate protection.

[30] In light of this evidence I conclude that occupation of 119 Wakefield Avenue will not be permitted for the foreseeable future. The seismic profile is not anticipated to reduce to pre-earthquake levels until 2021 (by which time Ms Kraal and Mr Prior will have been out of the house for ten years). Even when the seismic profile is anticipated to reduce to pre-earthquake levels, the risk of rockfall will remain of the same order of magnitude and so it is possible that the Council will continue to regard the life risk to occupants as unacceptable.[25] The protection measures put forward by EQC's expert are at best uncertain. As the offer from CERA records, on the basis of expert advice CERA and the Council concluded that protective measures are not practicable.[26] The only protection measure which the plaintiffs' expert considers to be viable would have an unreasonable impact on the property. I proceed to consider whether the plaintiffs have suffered a loss covered by the Act and their insurance policy given that they will be deprived of inhabiting the home at 119 Wakefield Avenue for the foreseeable future.

Cover under the Earthquake Commission Act 1993

The Act

[31] EQC's submissions set out a comprehensive summary of the Act. For present purposes the key points are:

(a) Residential buildings are insured under that Act against "natural disaster damage".[27]

(b) "Natural disaster damage" is defined to mean:[28]

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25 This relates to the estimated confidence levels (margin of error) in the risk assessments and the degree of shift in risk required to move the property out of the 10^{-4} category.
26 Refer [17](c) above.
27 Section 18.
28 Section 2.

> (a) any physical loss or damage to the property occurring as the direct result of a natural disaster; or
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> (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 the property for which compensation is payable under any other enactment.

(c) "Physical loss or damage" is deemed to include:[29]

> … 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.

(d) A "natural disaster" means an earthquake, natural landslip, volcanic eruption, hydrothermal activity, tsunami, natural disaster fire, and (in the case of only residential land) a storm or flood.[30]

(e) A residential building is insured for its "replacement value" (that is, the cost of replacing or reinstating the building to the prescribed standards)[31] and EQC may settle the claim by payment, replacement or reinstatement at EQC's option.[32]

(f) The insurance under the Act has monetary limits which for present purposes is $100,000 (exclusive of GST).[33]

(g) A precondition to insurance under the Act is that there is a contract of fire insurance in force in respect of the residential building.[34] The contract of insurance may provide cover in excess of the $100,000 limit under the Act.[35]

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29 Section 2.
30 Section 2.
31 Section 2.
32 Section 29; sch 3, cl 9.
33 Section 18.
34 Section 18.
35 Section 30.

Summary of respective positions

[32] Under the Act there is cover if the plaintiffs' house has suffered natural disaster damage. As defined in the Act, natural disaster damage can be one of three things:

(a) physical loss or damage to the residential building which occurs as the direct result of a natural disaster;

(b) physical loss or damage to the residential building that (in the opinion of EQC) is imminent as the direct result of a natural disaster that has occurred; or

(c) physical loss or damage to the residential building (including physical loss or damage to the residential building that is imminent) that occurs 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 the property for which compensation is payable under any other enactment.

[33] The plaintiffs do not contend that physical loss or damage to their house is "imminent" (option (b) above). They contend that the statutory phrase "physical loss or damage to the property" should be read as "physical loss of or physical damage to the property". They say that it includes circumstances in which a house is rendered uninhabitable because of the direct physical threat from rockfall hazard created by a natural disaster event. They say that the house practically and legally cannot be physically used for the foreseeable future and this deprivation is a "physical loss". They say that this is a direct result of the earthquakes (option (a) above) or as a direct result of measures taken to avoid the spreading of or otherwise to mitigate consequences of the earthquakes (option (c) above).

[34] EQC says "physical loss or damage to the property" means physical destruction or damage to the materials or structure of the house. It says that the plaintiffs' deprivation of the use of their house is not physical loss or damage to the

house (options (a) and (c)) because this is an economic rather than physical loss. It says that there is no imminent threat to the house from rockfall (option (b)). It says that the insurance under the Act does not cover the consequences of a threat of future rockfall to the house that is not imminent. Nor does it cover any consequential action of the Council from deciding to place a s 124 notice on the property in March 2011 (or the subsequent renewals of that notice) as a result of a threat of rockfall which is not imminent. It says that it is these consequences and effects for which the plaintiffs seek cover.

Statutory interpretation

[35] In the case of EQC cover, the Court is concerned with a question of statutory interpretation.[36] The meaning of an enactment must be ascertained from its text and in the light of its purpose.[37]

The ordinary meaning of "physical loss or damage to the house"

[36] The plaintiffs submit that the natural, dictionary, meaning of "loss" is being deprived of something.[38] It is distinguishable from "damage" which has a natural, dictionary, meaning of harm done to a thing which impairs its value or usefulness.[39] "Physical" has a natural dictionary meaning of something material or tangible as opposed to mental or spiritual.[40] Together the plaintiffs submit that, on a natural

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36 *Re Earthquake Commission* [2011] 3 NZLR 695 (HC) at [26] and [38].

37 Interpretation Act 1999, s 5(1); *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [22]. See also *Re Earthquake Commission*, above n 36 at [27] noting that "[w]hen determining purpose the court must consider both the immediate and the general legislative context, including legislative history, and it may be relevant to consider the social, commercial or other objective of the statute."

38 William R Trumble, Lesley Brown and Angus Stevenson *Shorter Oxford English Dictionary* (5th ed, Oxford University Press, Oxford, 2002) Vol 1 at 1638, where "loss" is defined as "diminution of one's possessions or advantages; detriment or disadvantage involved in being deprived of something, or resulting from a change of conditions; an instance of this"; *Encarta Dictionary* (online ed) where "loss" is defined as "the fact of no longer having something or having less of something". (The online version of Encarta Dictionary on which the plaintiffs relied in their submission no longer appears to be available.)

39 Trumble, Brown and Stevenson, above n 38, at 596, where "damage" is defined as "loss of or detriment to one's property, reputation, harm done to a thing or person, especially physical injury impairing value or usefulness"; *Encarta Dictionary*, above n 38, where "damage" is defined as "physical injury that makes something less useful, valuable or able to function; a harmful effect on somebody or something".

40 Trumble, Brown and Stevenson, above n 38, Vol 2 at 2193, where "physical" is defined as "of or pertaining to matter, or the world as perceived by the senses, material as opposed to mental or spiritual"; *Encarta Dictionary*, above n 38, where "physical" is defined as "something existing in the real material world, rather than as an idea or notion, and able to be touched and seen"; "something relating to the body rather than the mind, the soul, or feelings".

meaning of "physical loss or damage," to be deprived of possession and occupation of a house is a physical loss. The plaintiffs submit that this is comparable to being deprived of possession of a chattel (for example losing a car, a wallet or jewellery).

[37] EQC agrees that the words "physical" and "damage" have the ordinary meanings on which the plaintiffs rely. It does not agree with the definition of "loss" adopted by the plaintiffs. It says that in context the relevant meaning is destruction.[41] It says that "physical loss or damage" in the context of a house means loss or damage which disturbs the physical integrity of the house. This is to be contrasted with non-physical effects on the house which may reduce its value or usefulness. Physical loss therefore means destruction of the house. Physical damage means some lesser harm to the physical integrity of the house.

[38] The plaintiffs submit that the defendants' interpretation gives no real meaning to "loss" as distinct from "damage", because a house that is totally destroyed is a house that is physically damaged. I agree that a totally destroyed house may be said to be "damaged". If "loss" was not included in the definition of "natural disaster damage" I consider that a destroyed house would be covered as having suffered physical damage. That said, where a house is totally destroyed, "loss" is probably a better description for what has occurred than "damage" because loss connotes something that has gone (that is, a deprivation of something) whereas damage connotes harm to something that is still there. Moreover some kinds of natural disaster may be more likely to cause "loss" than damage. For example a house could be permanently buried by a landslip or volcanic eruption, or swept away in a tsunami. In those cases the house might be better described as lost rather than damaged.

[39] In this case the house still exists and the plaintiffs remain owners of it. As owners they retain rights in respect of it (for example, the right to sell the house). The plaintiffs have, however, lost the right to use and enjoyment of the house. That is a loss of one of the important rights that make up the bundle of rights of an owner of an estate in land.[42] I accept that the plaintiffs' inability to occupy their house can

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41 Trumble, Brown and Stevenson, above n 38, at 596, where "loss" is defined as "[p]erdition, ruin, destruction; the state of fact of being destroyed or ruined."

42 George Hinde, Don McMorland and Neil Campbell *Land Law in New Zealand* (looseleaf ed, LexisNexis) at [3.001] and [3.008].

be described as a "loss". There are parallels with a house that is irretrievably buried by a landslip or volcanic eruption. The real question is whether the plaintiffs' loss is a "physical loss … to the property". The requirement for a "physical" loss means that economic loss is not covered. EQC 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.

[40] The plaintiffs say that they do not seek cover for the loss in market value of their house. They say that they have been deprived of their home and it is that loss for which they seek cover. They say it is a physical loss because they have been deprived of physical possession of the property because of a physical threat to the property. A difficulty with this interpretation on a natural and ordinary meaning in my view is that, if loss of the ability to occupy the property can be said to be a physical loss, then it is a loss "of" or "in respect of" the property rather than a loss "to" the property. It would therefore be necessary to read "physical loss or damage to the property" as "physical loss of or damage to the property" as the plaintiffs acknowledge.

[41] There are cases which have held that this is how those words should be read.[43] However in my view both the "physical" and the "to" in "physical loss … to the property" are important. They indicate on a natural and ordinary meaning a requirement that something physical has happened directly to the property. The property may have physically gone (for example, where it has been swept away by a tsunami) or its materials or structure may be physically harmed. Here that is not the kind of loss that is claimed. The loss claimed is a loss of the ability to exercise one of the legal rights that are part of ownership. A loss of a legal right is not naturally described as a physical loss even though the legal right is lost in relation to a physical thing. An analogy might be made with a building that is constructed in breach of building regulations as a result of which the owners are prohibited from

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[43] *Technology Holdings Limited v IAG New Zealand Limited* (2009) 15 ANZ Insurance Cases 61-786 (HC) at [28]; *EJ Hampson & Others Syndicate 1204 v Mining Technologies Australia Pty Ltd* [1999] QR 60, (1980) 10 ANZ Insurance Cases 61-389 at 74,118.

occupying the house. Were they to sue the builder of the house for negligent construction their loss is not for any physical damage to the property. Their loss would be the cost to bring the house into compliance with the regulations/the loss of market value of the house. As with defective foundation cases, this would be an economic loss rather than a physical loss.[44]

[42] I therefore consider that a natural and ordinary meaning of "physical loss or damage to the property" favours EQC's interpretation.

Context

[43] Under the Act "physical loss or damage to the property" is deemed to include physical loss or damage that is imminent. On a natural and ordinary meaning of that deeming provision, cover is intended to be available where a house has not yet been physically damaged or destroyed, but where such damage or destruction is considered to be imminent. In the present case there is a threat of physical loss or damage to the property and it is because of that threat that the plaintiffs are deprived of use of their house. If the loss of use of the house is covered, then there is cover under the Act even though it is accepted that the threat which has caused the loss is not imminent. In other words, the interpretation put forward by the plaintiffs has the effect of extending the deeming provision which is itself an extension of the meaning of "physical loss or damage". This counts against the plaintiffs' interpretation.

[44] The wider statutory context also provides some general (although not conclusive) support for EQC's interpretation. In particular:

(a) The Long Title of the Act refers to providing insurance against "damage" caused by natural disasters. There is no direct reference to "loss".

(b) The property is insured for its "replacement value", which in turn is defined as any costs reasonably incurred in demolition or removal of debris, replacing or reinstating the building to a condition

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[44] *Invercargill City Council v Hamlin* [1996] 1 NZLR 513 (PC) at 526. See also Stephen Todd and John Hughes *The Law of Torts in New Zealand* (5th ed, Brookers, Wellington, 2009) at [6.4.01].

substantially the same as its condition when new, complying with any applicable laws in relation to replacing or reinstating the building and other fees or costs payable in the course of replacing or reinstating the building. This does not naturally fit with cover for a loss of the right to occupy the house.

(c) The perils against which the insurance is provided (for example, earthquakes and landslips) all have the potential to cause physical harm.

(d) Consequential losses, including loss by theft, vandalism, loss of profits and business interruption, are expressly excluded.[45]

Legislative history

[45] The submissions before me set out a comprehensive discussion of the legislative history.[46] The key points are:

(a) The predecessors to the Act provided cover for property that was "destroyed or damaged".[47]

(b) Following a landslip disaster at Abbotsford affecting the stability of houses in that area, in November 1980 a Commission of Inquiry recommended that for the future there should be insurance cover where the Earthquake and War Damages Commission considered that it was certain that property was going to be damaged beyond repair by a landslip.

(c) The Earthquake and War Damage Regulations 1984 and the Earthquake and War Damage (Land Cover) Regulations 1984 were

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45 Schedule 3, cl 2.

46 Some of this includes references to submissions made to Select Committees. There are dangers in placing any reliance on such extrinsic materials: see *Simpson v Attorney-General* [1994] 3 NZLR 667 (CA) [*Baigent's Case*] at 707.

47 War Damage Act 1941, s 16(1); Earthquake Damage Emergency Regulations 1944, reg 5(1); Earthquake and War Damage Act 1944, s 16(1).

promulgated. Amongst other things, these introduced cover for "imminent" loss or damage caused by landslips.[48]

(d) Reform to the legislation was under consideration in the late 1980s and early 1990s. Amongst other things it was proposed that coverage of war risk and commercial buildings was to be discontinued and residential buildings were to be insured on a replacement basis up to a maximum of $100,000.

(e) When the Earthquake Commission Bill 1992 was introduced[49] "natural disaster damage" was defined as meaning:

> (a) Any loss or **destruction of**, or damage to, property occurring as the direct result of a natural disaster **or natural fire**:
>
> (b) Any loss or **destruction of**, or damage to, 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 **such loss, destruction, or damage; but does not include any loss, destruction, or damage** for which compensation is payable under any other enactment:[50]

(f) As introduced there was no extension to cover imminent loss. There were submissions to the Select Committee about cover for imminent loss from natural disasters. One submitter referred to a subdivision in Little Wanganui (in the Buller District), where the Council had warned residents to leave their homes because they were endangered by an unstable cliff face.[51]

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48 Regulations 2 and 14 and reg 5 respectively.

49 An earlier Bill (the Disaster Insurance Bill) was introduced into the House in 1989 but did not progress beyond the Select Committee stage.

50 The bolded words were not retained when enacted.

51 Note that the power to impose limits on the use of buildings in s 124 because of off-site hazards appears not to have been available to the Buller District Council in 1992 (depending on how the relevant provisions of the Building Act 1991 are interpreted). A power specifically in respect of off-site hazards was introduced in 2011. It therefore appears that the Buller District Council's options at that time were to give warnings and to change the District plan to deal with future developments.

(g) When the Bill was reported from the Select Committee stage the words in bold in the "natural disaster damage" definition above were amended to the present wording and "physical loss or damage" was extended to cover imminent physical loss or damage that is a direct result of a natural disaster which has occurred.

[46] This history shows that careful consideration was given to what "natural disaster damage" was to mean. A decision was made to move from the "loss or destruction of, or damage to" wording in the Bill to the "physical loss or damage to" wording as enacted. In legislation concerned with cover for natural disaster damage caused to the homes of New Zealanders up to a specified monetary limit, it cannot have been intended to provide that cover for a property that suffered loss or damage but not one that was destroyed. It must therefore be assumed that Parliament considered that "loss or damage" covered instances where a property was destroyed, so that the word "destruction" was unnecessary (being included within the meaning of either "loss" and/or "damage").

[47] It must also be assumed that the change from "destroyed or damaged" property in the predecessor legislation to "physical loss or damage to the property" was also deliberate. But it does not follow that the changed wording was intended to extend the cover to loss that was other than to the materials or structure of the house. The underlined words in "physical loss or damage to the property" seem intended to continue to ensure that the cover was related to the materials or structure of the house rather than to cover other kinds of loss relating to a house affected by a natural disaster. It may be, for example, that "physical loss or damage to the property" was more consistent with the wording of house insurance policies which were to provide top up cover above $100,000. I have not been provided with evidence as to the wording of house insurance policies at this time so this is no more than a thought. The point is that the wording did change but that does not mean that an extension in cover was intended.

[48] The legislative history also shows that a decision was made to include physical loss or damage that was imminent. That was against the background of two natural disasters (Abbotsford and Little Wanganui) where people's homes had

become unsafe to live in. Parliament intended to provide cover where physical loss or damage to a house was threatened but not all such threats were to be covered. Parliament intended the dividing line between cover and no cover was to be threats which were imminent.

[49] It seems that at that time there was no equivalent power to that now provided by s 124 of the Building Act 2004 specifically in relation to off-site hazards which threaten buildings.[52] That suggests, as EQC submits, that what has occurred in the present case was not expressly contemplated in the drafting of the Act. It may be that if the drafters had contemplated the present circumstances they may have wished to provide cover for it. It would be reasonable to think that the Act should provide cover to people who are disposed of their property (that is, forced to leave it and not permitted to occupy it) because of a natural disaster.[53] However what is reasonable and what the Act should cover is one thing. The words of the Act are another. It cannot be said with any confidence, on the words that Parliament has enacted, that it intended those words would cover the circumstances that have now arisen had those circumstances been anticipated at the time.

Case law

[50] No decision has been referred to me in which the meaning of "physical loss or damage to the property" as used in the Act has been considered in the context of a loss of the right to inhabit a house. There are some decisions which have considered that phrase in the context of insurance policies. Some of these cases are concerned with house insurance policies. Others are not. I start with the house insurance cases.

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[52] As noted above (footnote 13), following the earthquakes Orders in Council have modified the powers in the Building Act 2004. At the time of the earthquakes the Building Act 2004 permitted a territorial authority to issue a s 124 notice in respect of a "dangerous, "earthquake-prone", or "insanitary" building. The definition of "dangerous" was if "in the ordinary course of events (excluding the occurrence of an earthquake), the building is likely to cause…injury or death…to any persons in it or to persons on other property…or damage to other property" or if "in the event of fire, injury or death to any persons in the building or to persons on other property is likely". The definition of "earthquake prone" was directed at the building's "condition", the "ground on which it is built" and "its construction" and only applied to residential buildings that comprised two or more storeys and three or more household units. The Building Act 1991 included similar powers and definitions.

[53] The Government has in fact responded with a form of "cover", outside the Act, by way of the offer to red-zoned property owners to purchase their properties.

[51] The first of those is the decision of the High Court in *O'Loughlin v Tower Insurance Limited.*[54] In that case the O'Loughlins owned land that was in the "red zone". Pursuant to the offers made to those with properties in the red zone, the O'Loughlins sold the land to the Crown. They claimed against their insurer in respect of the house. The issue was whether the insurer was required under the terms of the policy to pay the cost of repair of the house (as damaged by the earthquake) or the cost of rebuilding a new house (because the house would not be repaired given the red zone designation).

[52] As explained in the judgment, the red zone did not prohibit building or the granting of building consents in the area for repair, it did not prohibit residents from living in the area and it did not require residents to demolish or repair their houses.[55] Rather, the red zone created an area in which the Canterbury Earthquake Recovery Authority (CERA) would make offers to purchase the properties. Further, the red zone designation gave notice that the area had suffered significant damage; had buildings most of which were uneconomic to repair; was at high risk of further damage to land or buildings from shaking, flooding or spring tides; was in a condition where it was neither practical nor reasonable for the communities to stay there while solutions were sought; would not have new services installed by councils; might, if councils or utility providers reached the view that services were no longer feasible or practical, have services discontinued; was land where insurers might cancel or refuse to renew insurance policies; and might be subject to compulsory acquisition by the Crown at market value, which could be substantially lower than the amount of the CERA offer.[56]

[53] The O'Loughlins contended that the red zone designation was "accidental physical loss or damage" to the house. In rejecting this claim the Judge said:[57]

> [43] But can the event of the creation of the red zone after the earthquakes fall within the definition of sudden and unforeseen accidental physical loss or damage? The word "physical" means "of or concerning the body", and in the context of the insurance of a house from loss or damage from accident, plainly means loss or damage to the materials and structures

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54 *O'Loughlin v Tower Insurance Limited*, above n 16, per Asher J.
55 At [27].
56 At [28].
57 Citations omitted.

> that constitute the body of the house. In *Guardian Assurance Co Ltd v Underwood Constructions Pty Ltd*, the cost of remedial work by an insured fell within the definition of "damage to property", as "damage" was held to include disturbance of the "physical integrity" of the subject property. The red zone designation did not cause any damage to the physical integrity of the O'Loughlins' house. The creation of the red zone itself did not have any physical effect on anything; rather, it affected the way in which land and houses might be regarded in a particular area, and gave property owners in the zone an option to sell to the Crown.
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> …
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> [52] I turn to the meaning of the word "loss". It is a broad word and often is construed as meaning physical loss. I have not been referred to any cases that have determined that the word "loss" in a building insurance policy can mean economic loss. In the case of *Graham Evans & Co (Qld) Pty Ltd v Vanguard Insurance Co Ltd*, the insured agreed to erect a building. Before it was completed it was discovered that a number of significant errors had been made in the spacing and location of columns and walls. The policy insured against all risk of physical loss or damage. It was held that "physical loss" implied possession of property, followed by loss of possession. The word "loss" in the context of this policy can be seen as meaning the total destruction of a building as distinct from damage to the building. The total destruction is a physical injury. There still must be a physical event in relation to the building before there is a loss.
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> [53] The red zone measure did not cause the O'Loughlins' house to suffer in this sense. The house is not only physically unaffected, but it is not indirectly affected in the sense of being deprived of water or electricity or other services. The house remains exactly the same, has its services, and can be inhabited.
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> [54] I conclude that the red zone designation did not cause physical loss or damage to the O'Loughlins' house under the primary insurance clause.

[54] The second submission for the O'Loughlins was that the red zone designation was covered under the special benefits part of the insurance policy. That part of the policy provided cover for:[58]

> … loss or damage as a direct result of earthquake … and includes loss or damage occurring … as a direct result of measures taken under proper authority to … reduce the consequences of, an earthquake …

[55] The Judge accepted that the creation of the red zone and the Crown's offer to purchase the land were in combination a measure taken to reduce the consequences of the earthquakes. However he considered that in context "loss or damage" meant "physical loss or damage". So, for example, if an undamaged wall of a house was in danger of falling down because of an earthquake and was therefore required by a

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[58] At [57].

proper authority to be removed, there would be a physical effect on the house which would be covered.[59] The Judge considered that such loss or damage was to be distinguished from economic loss. He said:

> [80] Looking at the wider commercial context, it would be surprising if a public measure that caused no direct physical consequences to a house could be accepted as causing loss or damage to the house in an insurance context. All sorts of public measures can have economic consequences. A declaration following an earthquake that a particular type of cladding should be used no longer, or a regulation changing traffic flows, or a zoning announcement, could all have an economic effect on the value of a house. Such an interpretation would expose an insurer to claims that are not formally subject to house insurance cover, and which would be most difficult to quantify.

[56] The Judge went on to find that there was no evidence that the creation of the red zone caused the O'Loughlins loss in any event. That was because, with the red zone designation, came an offer to buy the house at the 2007 valuation. There was no evidence that this was less than the value of the house at the time of the earthquakes.[60]

[57] *O'Loughlin v Tower Insurance Limited* supports the EQC's position to the extent that the Judge's decision rests on his finding that in the context of insurance of a house "loss or damage from accident, plainly means loss or damage to the materials and structures that constitute the body of the house."[61] However the Judge did not have to consider the question that is before me, namely whether loss of the right to inhabit a house is "physical loss…to the property". That is because the red zone designation did not result in a loss of the ability to inhabit the house. If anything, it caused economic loss (that is, the property was worth less because of the red zone designation), although even that was not proven. In the present case the s 124 notice, or the circumstances which gave rise to its issue, may have caused economic loss (that is, a loss in the market value of the house), but the plaintiffs say that it is not that loss that is being claimed. Their claim is for the total value of the house on the basis that they no longer have possession of it.

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59 At [68].
60 At [85].
61 At [43].

[58] The only other decisions involving house insurance to which I have been referred are decisions from the United States. One of those is *Hughes v Potomac Insurance Company* which is a decision of the District Court of Appeal of California.[62] In that case a landside from heavy rain caused a house to move 30 feet so that it was left standing on the edge of and partially overhanging a newly formed 30 foot cliff. The insurance policy covered the homeowners for all risks of physical loss of and damage to the dwelling. An issue before the Court was whether the policy covered the soil underlying the dwelling. The Court concluded:[63]

> To accept appellant's interpretation of its policy would be to conclude that a building which has been overturned or which has been placed in such a position as to overhang a steep cliff has not been "damaged" so long as its paint remains intact and its walls still adhere to one another. Despite the fact that a "dwelling building" might be rendered completely useless to its owners, appellants would deny that any loss or damage occurred unless some tangible injury to the physical structure itself could be detected. Common sense requires that a policy should not be so interpreted in the absence of a provision specifically limiting coverage in this manner. Respondents correctly point out that a "dwelling" or "dwelling building" connotes a place fit for occupancy, a safe place in which to dwell or live. It goes without question that respondents' "dwelling building" suffered real and severe damage when the soil beneath it slid away and left it overhanging a 30-foot cliff. Until such damage was repaired and the land beneath the building structure stabilised, the structure could scarcely be considered a "dwelling building" in the sense that rational persons would be content to reside there. We conclude that the appellant's policy should and can be interpreted in such a manner as to cover the damage to respondents' "dwelling building" as a result of the landslide.

[59] As the focus in that case was on whether the soil beneath the house was covered, the Court did not consider whether the structure of the building above it was "physically" damaged. It was regarded as common sense that soil should be covered as part of the dwelling because the effect of the movement of the soil was to render the building uninhabitable. This differs from the present case where it is an off-site hazard that renders the house uninhabitable. That was the situation that arose in *Murray v State Farm Fire and Casualty Company* which is a decision of the Supreme Court of Appeals of West Virginia.[64] In that case there was a high man-made wall at the rear of three houses. Several large boulders and rocks fell off the

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62 *Hughes v Potomac Insurance Company* 199 Cal App 2d 239 (CA 1962).
63 At 248 and 249.
64 *Murray v State Farm Fire & Casualty Co* 509 SE 2d 1 (WV 1998).

highwall causing damage to two of them. The third house was not damaged. However firemen compelled all three families to leave their homes. A subsequent examination by an engineer concluded that rocks would continue to fall, some with potentially disastrous results. As a result none of the families returned to their houses. One of the families' insurance policies provided cover for "sudden and accidental loss to the property". The other provided cover for "accidental direct physical loss to the property".[65]

[60] The Court held that direct physical loss required only that the property be injured, not destroyed and that direct physical loss may exist in the absence of structural damage to the insured property.[66] The properties insured were homes, that is buildings normally thought of as a safe place to live. The homes were damaged in that they had become unsafe for habitation because of the risk of further rockfall. In reaching this conclusion the Court did not focus on why a risk of rockfall rendering a house uninhabitable constituted "direct physical loss to the property" (the wording of one of the policies). Instead it cited a number of Californian decisions, including *Hughes v Potomac Insurance Company*, where landslides had caused some relatively minor cosmetic damage to houses, but which had more significantly caused them to become uninhabitable. The Court noted that in each of those cases the insurers were liable for the cost of making the properties liveable. It considered that the approach in those cases should be applied to the case before it.[67]

[61] The reasoning that a house connotes something that is habitable and that, where a house has been rendered uninhabitable because of a physical threat to it, the homeowners have suffered loss, has some attraction. From the homeowners' perspective they have "lost" their house because they can no longer live in it. As mentioned above it is a loss that homeowners reasonably might expect would be covered by the Act (and their insurance policy). There is a doctrine of "reasonable expectations" in insurance law in the United States that applies where an insurance

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65 One of the families whose house suffered direct damage from the rockfall did not continue with the claim.

66 At 17.

67 At 17.

contract is ambiguous. Although they did not say so explicitly,[68] these cases may have been influenced by that doctrine.[69]

[62] Be that as it may, the focus here must be on the words in the Act.[70] The legislature has determined that cover is to be provided for "physical loss or damage to the property" and where physical loss or damage to the property is imminent. The situations that arose in *Hughes v Potomac Insurance Company* and *Murray v State Farm Fire and Casualty Company* likely would be captured by the imminent threat cover provided by the Act had that wording been included in the policies at issue in those cases. To interpret the scope of cover provided by the Act to cover a loss of use of a house as a result of a non-imminent threat would be contrary to Parliament's intent to provide cover for only imminent threats.

[63] Moreover the approach in *Hughes v Potomac Insurance Company* and *Murray v State Farm and Casualty Company* is not the universal approach in the United States. For example, in *Fujii v State Farm Fire & Casualty Co* the Court of Appeals of Washington was concerned with a landslip which constituted a threat to the stability of a house.[71] The house had not sustained any direct physical damage although there was agreement that such damage was likely to occur in the near future unless preventative measures were taken. The Court concluded that under the "plain terms of the policy" cover was triggered only by direct physical loss to the dwelling and this had not occurred. There was therefore no cover available.[72]

[64] EQC referred to United Kingdom and Australian authorities which have considered whether defective property which is likely to cause physical damage to

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68 Compare with a further issue in *Murray v State Farm Fire and Casualty Company* that arose concerning whether an earth movement exclusion applied. On that issue that the Court explicitly considered whether the policy wording was ambiguous such that the doctrine of reasonable expectation might apply.

69 Asher J in *O'Loughlin v Tower Insurance Limited*, above n 16, at [49] declined to follow this line of authority as being of not much assistance in the New Zealand context.

70 Similarly in respect of an insurance policy, in *Arrow International v QBE Insurance (International) Ltd* [2009] 3 NZLR 650 (HC) at [48] it was noted that the words were to be "interpreted according to the intention of the parties, not influenced by the public policy considerations which might favour one interpretation over another."

71 *Fujii v State Farm Fire & Casualty Company* 71 Wn App 248, 857 P 2d 1051 (Wash 1993).

72 See also *The Western Fire Insurance Company v The First Presbyterian Church* 165 Colo 34, 437 P 2d 52 (Colo 1968) where a church building had become dangerous and unable to be used because of an accumulation of gasoline, and this was regarded as "direct physical loss" only because gasoline had actually infiltrated the building.

other property constitutes "physical injury".[73] These decisions are mainly concerned with liability in respect of defective products under liability policies. They therefore do not particularly assist except in that they give "physical damage" or "physical loss" their ordinary meaning, making a distinction between property that is liable to become damaged and property that is damaged.[74]

[65] The parties also referred to cases dealing with insurance for the loss of chattels:

(a) *Moore v Evans*:[75] In this case jewellery was insured for "loss of or damage to … property". Pearls were sent on consignment. Due to the outbreak of war it was unclear if the consignees had received the pearls and the insured was unable to recover them. The House of Lords (upholding the Court of Appeal) concluded that on the evidence loss had not been established. Of relevance to the present case is that in the Court of Appeal Bankes LJ considered that "loss" meant being deprived of the goods. He considered that while it was not necessary to show a certainty that the goods could never be recovered, nor was it sufficient if the deprivation was only temporary.[76]

(b) *Webster v General Accident Fire and Life Assurance Corporation Ltd*:[77] This case was concerned with insurance for "loss" of a motor vehicle. The insured had been "swindled" out of his car. It did not matter that the car still physically existed. Applying the approach of

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73 *Pilkington United Kingdom Limited v CGU Insurance Plc* [2004] EWCA Civ 23; *Promet Engineering (Singapore) Pte Ltd v Sturge (The "Nukia")* [1996] 1 Lloyd's LR 146 (CA); *Horbury Building Systems Limited v Hampden Insurance NV* [2004] EWCA Civ 418, [2007] 1 Lloyd's LR 237; and *AXA Global Risks (UK) Ltd v Hoskins Contractors Pty Ltd* [2004] NSWCA 138, (2004) 13 ANZ Insurance Cases 61-611.

74 See for example, *AXA Global Risks (UK)*, above n 73, at [52] and *The "Nukia"*, above n 73, at 157: "Imminence of loss or damage is not the same as damage: damage is physical damage that has occurred." Compare with *Eljer Manufacturing Incorporated v Liberty Mutual Insurance Co* 972 F 2d 805 (7th Cir 1992) where Judge Posner gives the example of a "ticking time bomb" which does not alter the structure in which it is placed until it explodes. Judge Posner concludes that "physical injury" in an insurance policy is not confined to a physical alteration in the thing insured. Rather rational parties to such a policy would intend that it cover where a potentially dangerous product is incorporated into the property and must be removed to prevent the danger from materialising.

75 *Moore v Evans* [1917] 1 LB 458 (CA); [1918] AC 185 (HL).

76 At 471.

77 *Webster v General Accident Fire and Life Assurance Corporation Ltd* [1953] 1 QB 520.

Bankes LJ in *Moore v Evans* it was held that here was a "loss" under the policy because, having taken all reasonable steps, recovery of the car remained uncertain.[78]

(c) *Kuwait Airways Corporation v Kuwait Insurance Co SAC*:[79] This case was concerned with a policy which covered loss of or damage to aircraft caused by war (amongst other things). In this case, at the time that Iraq invaded Kuwait, 15 airplanes belonging to the plaintiffs were on the ground at Kuwait airport. The Iraqis took possession of the planes and flew them out of the airport. It was held that there was a "loss". In contrast with the pearls that were the subject of consideration in *Moore v Evans*, here the aircraft were out of the owner's possession and control by the action of enemies whose intent was to exercise dominion over them and to make them permanently their own.[80]

(d) *EJ Hampson & Others Syndicate 1204 v Mining Technologies Australia Pty Ltd*:[81] This case was concerned with the collapse of a tunnel roof of a mine which caused specialised mine equipment to be trapped. The equipment not able to be recovered was accepted to be "loss" covered by the policy.[82]

[66] The plaintiffs rely on these cases to support their submission that where a person is deprived of the use of their property that is a "loss". They say that a house is not necessarily distinguishable from chattels. They give the example of a theft of part of a house (for example, a glasshouse). They say that, as with chattels, that would be a physical loss of part of the house. They say that this is not the only way a person can be deprived of the use of some or all of their house. They say that where homeowners are prevented from using their house that is comparable, for example, to the mining equipment trapped in the mine.

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78 At 532.

79 *Kuwait Airways Corporation v Kuwait Insurance Co SAC* [1996] 1 Lloyd's LR 664.

80 At 689.

81 *EJ Hampson & Others Syndicate 1204 v Mining Technologies Australia Pty Ltd*, above n 43.

82 The issue in that case was whether the equipment which had been retrieved at considerable expense was also covered as loss.

[67] In my view a physical loss of personal property is not necessarily the same as a physical loss to real property. The glasshouse example provides a situation where they are comparable. A physical part of the house has gone. In the context of natural disaster cover, a comparable situation would be a tsunami that sweeps the house away. Something physical has happened to the structure of the house. Similarly, if the house was inaccessible because it was trapped beneath a landslide in circumstances where recovery was unreasonable or unlikely, then the homeowners would be deprived of their house because something physical had occurred directly to the materials or structure of the house. However the present situation is different. The house still exists. The loss is not of or to the materials or structure of the house. It is a loss of the ability to exercise a legal right. In my view that is not "physical loss … to the property" under the Act.

Conclusion

[68] In this case the loss suffered is loss of the ability to exercise a legal right that is part of the bundle of rights comprising the fee simple estate. It is not "physical loss … to the property". Loss in the context of the Act means loss to the physical materials or structure of the building. That interpretation is consistent with the natural and ordinary meaning of those words in the context of the Act. The legislative history does not suggest otherwise. To the extent that case law in the United States in respect of house insurance supports a different interpretation that case law is limited and should not be followed here. Case law in respect of other kinds of policies is of limited assistance but also does not support the interpretation advanced by the plaintiffs.

The Allianz cover

The policy

[69] The plaintiffs' house insurance policy with the second defendant (Allianz) is divided into a number of headings. Under the heading "Important Information for Policy Holders" there are a number of definitions (amongst other things). "House" is defined as meaning the "building or buildings primarily used as a place of residence" and extends to other specific things such as a garage, fences and the

driveway. "Accidental" is defined as meaning "a sudden and unexpected event which is not intended" and "sudden" means "manifesting within a 24 hour period."

[70] Under the heading "Section 1 – You are insured for" there are a number of sub-headings:

(a) Under the sub-heading "House Cover" the policy provides: "We will cover Your House against Accidental physical loss or damage unless the loss or damage is excluded by this policy." At Allianz's option, payment can be the cost to repair, rebuild or replace the house.

(b) Under the subheading "Natural Disaster" the policy provides that "If Your House is damaged by … earthquake …" Allianz will pay the difference between the cost of repairing or rebuilding the house and the amount received from EQC up to the sum insured, provided that EQC has accepted liability under the Act.

[71] Under the heading "General Exclusions" it is provided that "[t]his policy does not cover loss, damage, injury or liability caused by, or arising from":

> …
>
> k. earthquake, natural landslip, volcanic eruption, hydro-thermal activity or tsunami as defined in the Earthquake Commission Act 1993, except as provided under 'Natural Disaster' in Section 1 on page 4;[83]
>
> …
>
> m. confiscation, nationalisation or requisition by the order of Government or Local Authority but We will pay for loss or damage as a result of such an order if it is to prevent fire or other loss or damage covered by this policy;
>
> …

[72] Under the heading "General Conditions" the policy provides that Allianz may decline any claim and/or recover any payment already made if the insured does not

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[83] This refers back to the cover as referred to in [71] (b) above.

take all steps which Allianz "consider reasonable to prevent further loss or damage and see that any repair or rebuild work is carried out promptly".

Summary of respective positions

[73] The plaintiffs submit that cover is not provided under the "House Cover" sub-heading, since accidental physical loss or damage caused by earthquakes is excluded except as provided under the "Natural Disaster" sub-heading of the policy. It says that there is cover under the "Natural Disaster" sub-heading if the house is "damaged" as defined in s 2 of the Act. This means that cover is not restricted to actual physical damage to the house. Rather, if there is cover under the Act then there is top up cover (that is above the statutory limit of $100,000) under the policy and Allianz's liability is triggered by EQC confirming cover under the Act. It says that there is cover under the Act because its loss of use of the house is "physical loss or damage to the house" under the Act.

[74] Allianz does not accept that the policy covers all forms of "natural disaster damage" covered under the Act. It says that what is covered by the policy is a separate question from what is covered by the Act. It says that the word "damaged" in the Natural Disaster cover under the policy is shorthand for "accidental physical loss or damage" of the kind covered by the main House Cover provision in the policy. It supports EQC's submission on what is meant by "physical loss or damage". It further says that there is no obligation on Allianz to provide top up cover simply if EQC determines that there is cover under the Act.

Assessment

[75] The plaintiffs' claim is put on the basis that "damage" means "natural disaster damage" as defined in the Act. Because it is accepted that physical loss or damage from rockfall is not imminent and because I have found that the plaintiffs' loss is not "physical loss or damage to the property" as defined in the Act there is no cover under the policy on the basis on which it is advanced. Even if "damage" in the Natural Disaster section of the policy does not mean "natural disaster damage" as defined in the Act, I would have concluded that the deprivation of use that has occurred is not "damage". I consider that in the context of the policy that means

physical harm to the materials or structure of the building (and possibly imminent threats of such harm if the plaintiffs' argument that "damage" means "natural disaster damage" as defined in the Act is accepted). There is nothing to suggest that "damage" in this context should be given anything other than its natural and ordinary meaning. It is unnecessary to consider the alternative submissions made on behalf of Allianz as to why there would not be cover under the policy even if the loss claimed by the plaintiffs qualified as "damage" under the policy.

Result

[76] As set out in the result judgment delivered:

> The plaintiffs seek declarations that in the circumstances of the direct and continuing threat of further physical damage or destruction from rockfall hazards on Richmond Hill, and pursuant to the s 124 notice issued and affixed by the Christchurch City Council to the plaintiffs' house, which deprives the plaintiffs of the possession and use for residential purposes of their house and insured property at 119 Wakefield Avenue, Sumner, such loss constitutes:
>
> (a) 'natural disaster damage' under s 18 of the Earthquake Commission Act 1993, for which the first defendant is liable to pay to the plaintiffs the replacement value of the insured 'residential buildings', to the extent of the statutory limit, or limits, applying for the 2011 earthquake events; and
>
> (b) 'damage' for which the second defendant is liable to pay to the plaintiffs, the difference between the EQC payments made or payable, in respect of the 2011 earthquakes, and the costs of rebuilding the insured property at 119 Wakefield Avenue, Sumner.

[77] It is for the above reasons that I declined to grant the declarations sought. That the plaintiffs have been deprived of the use of their house because of the threat of rockfall and the Council's response to that threat is not "physical loss … to the property" under the Act nor "damage" under the Natural Disaster cover in the policy. As also set out in my results judgment if there are any issues as to costs, the parties are to submit brief memoranda (confined to the issues in dispute) for my consideration. Such memoranda should be submitted within one month of today's date.

Mallon J