



## Gleneagles Conference Liquidated Damages

... Testing the limits of insurability -  
or ...Analysis of an autopsy

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Charles Taylor adjusting

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## Program

1. Intro – **learning not promoting**
2. Historical development
3. LD Cover concept
4. Wembley case facts coverage
5. Some “as if portfolio” results
6. Loss adjustments
7. Conclusions



## LD – Intro

- *Engineering Contingency (EC)* insurance is a broad term that encompasses insurance covers like
  - *Liquidated Damages (LD);*
  - *Force Majeure (FM);*
  - *Reliability, Availability and Maintainability (RAM) or short Efficacy;*
  - *and Cost Overrun.*



## LD in CAR / EAR – Historical development

- Engineering contingency insurance in the form written today dates back to 1983.
- Limited number of policies
- Due diligence process required
- LD contrasted with some underwriting rules
  - fortuitousness and that material damage.
  - Border line to others products



## LD Cover concept

- > *Late Completion*

- Indemnifies the Contractor for their contractual liabilities to pay Liquidated Damages
- LD is defined as “the sum to which party to contract agrees to pay if he breaks some promise and, which having arrived at by good faith effort to estimate actual damage that will probably ensue from breach, is recoverable as agreed damages if breach occurs ”



## Underwriting case

- What extent these damages are indemnifiable under the Builder's Risk Delay provisions
- When do delay damages commence ?
- What is the "time safety margin" contained within the construction schedule?
- What is the contracted date for achievement of the performance criteria?



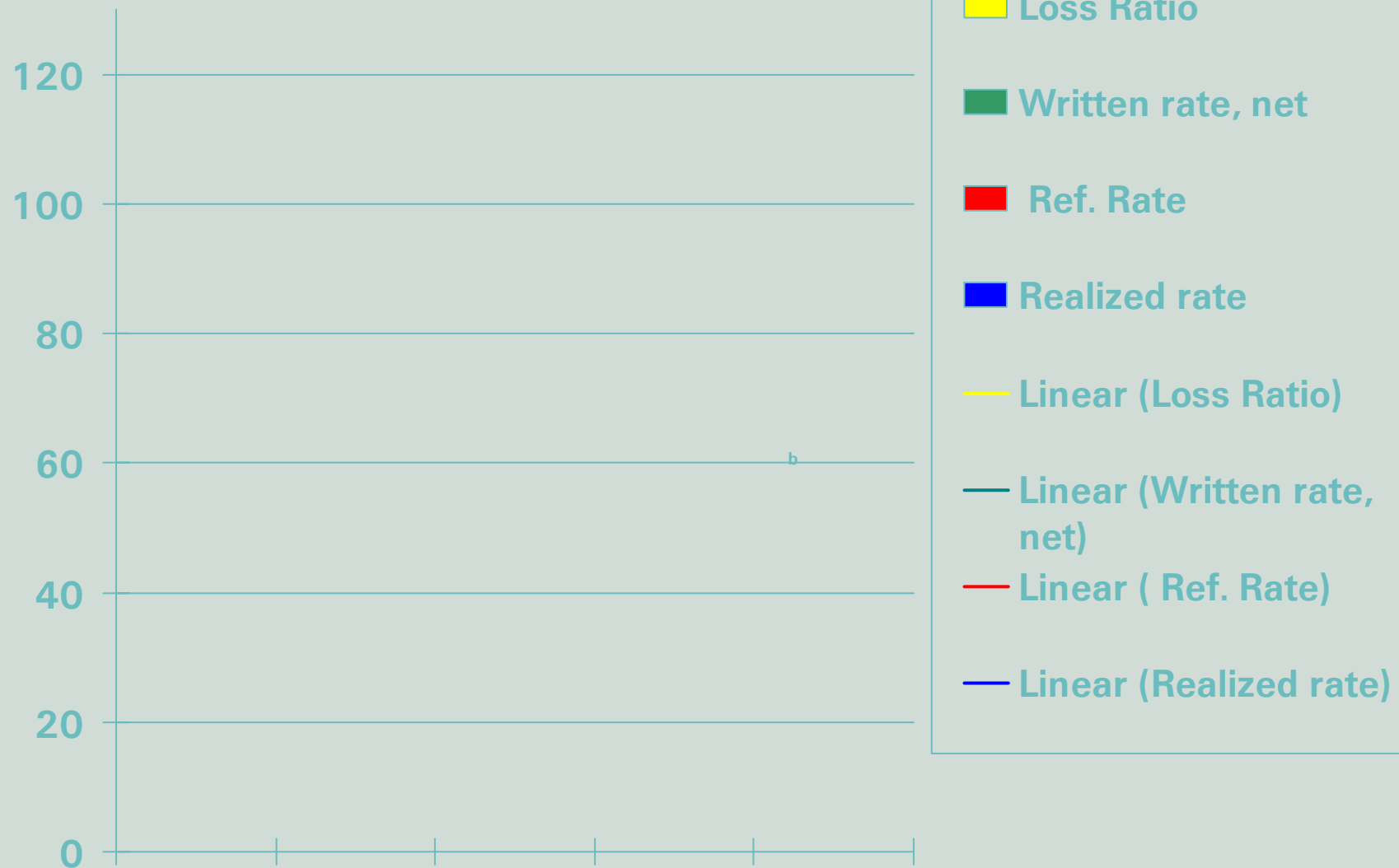
## Wembley case Facts coverage

- Insured Mutiplex
- Structure :
  - NP with 2 layers (delay insurance and XS delay)
- Original XS over 10 weeks
- Coinsurance to be borne by the insured
- Daily amount for both layers ....
- Limits per each layers .... # of days



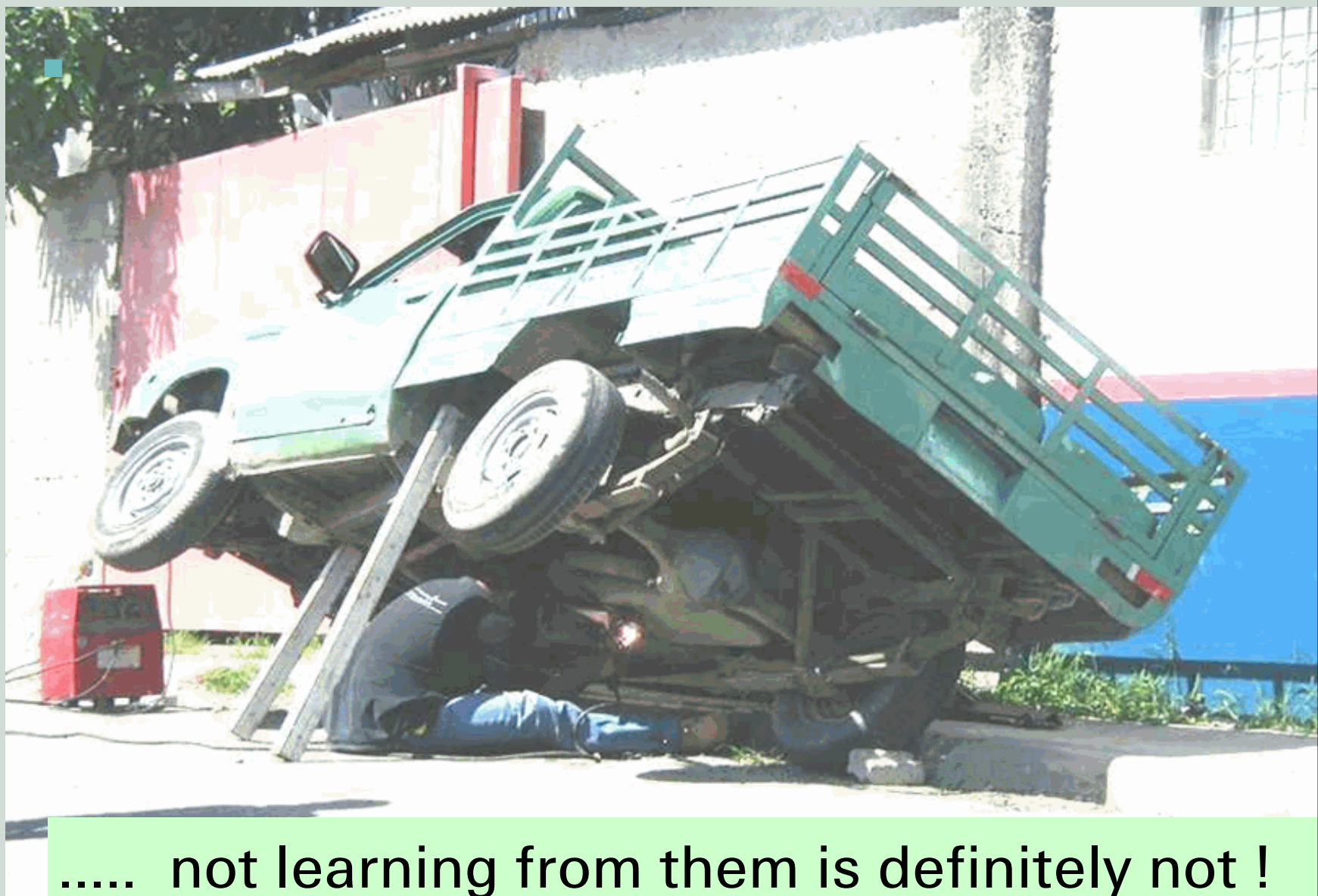
# Some statistics ...As if portfolio basis

Loss Ratio : %0  
 Ref. Rate : %0  
 Realized rate : %0  
 Average commission: %





Mistakes may be tolerated...



..... not learning from them is definitely not !

Charles Taylor  
adjusting

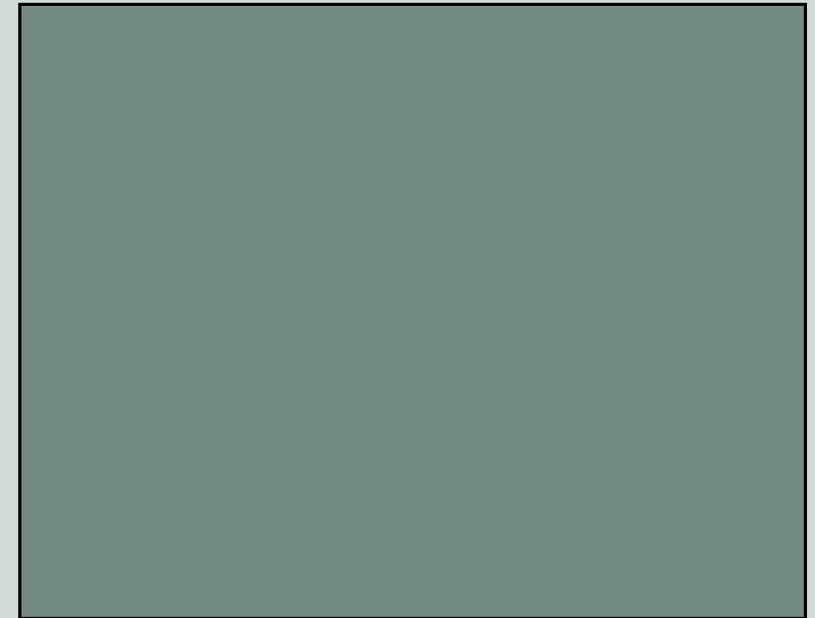
Wembley Stadium

Delay Insurance Aspects of adjusting loss



## Tense atmosphere

- Years of problems/disputes
- Strained relations
- Client competence?
- Legal actions
- Pressure for quick completion
- UK Government interest



# Wrangle could stall Wembley until 2010

Opening date drifts as Wembley battles on

Safety fears slow down Wembley's retractable roof

Mott MacDonald ~~faces~~ demands for more Wembley documents

Multiplex accused of illegality

Multiplex faces defeat in High Court battle



Multiplex blames Wembley client for new delays

Wembley "mismanaged" claims Cleveland Bridge

Wembley judgement "lets contractors screw subbies"

Cleveland bridge denies threat to delay Wembley arch lift

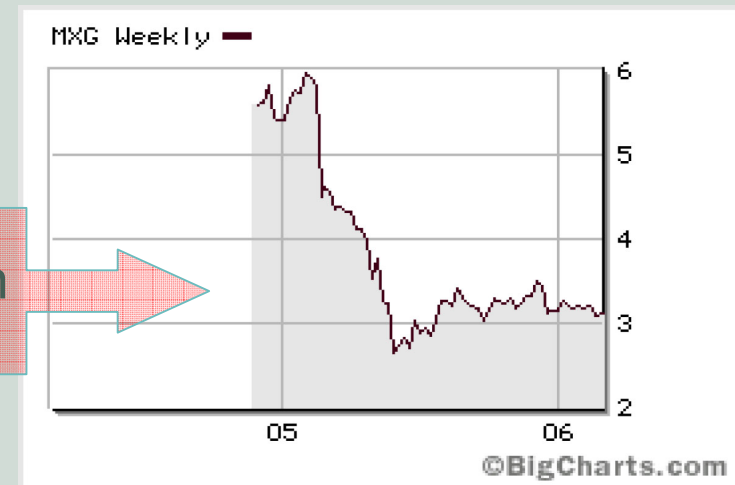
Multiplex shot through the heart by Bon Jovi over Wembley mess

Death threat for Multiplex crane drivers for \$50m ransom

## Tense atmosphere

- Disputes outside project
- Complex project
- Design problems
- Workforce problems
- Prices rising
- Multiplex flotation problems

Flotation



Multiplex share price AUD

## Insurance programme

- Contractors All Risks
- Delay in Start Up
- Professional Indemnity
- Delay Policy – covering Liquidated Damages
- Policy layers & different interests



## Relevant Conditions

- Duty to notify changes
- Duty to act diligently
- Non-contribution (Delay policy in excess only of project CAR/DSU and PI cover)
- Recoveries reduce loss prior to Delay Cover (Multiple actions against subcontractors & consultants)
- Onus of Proof on Insured

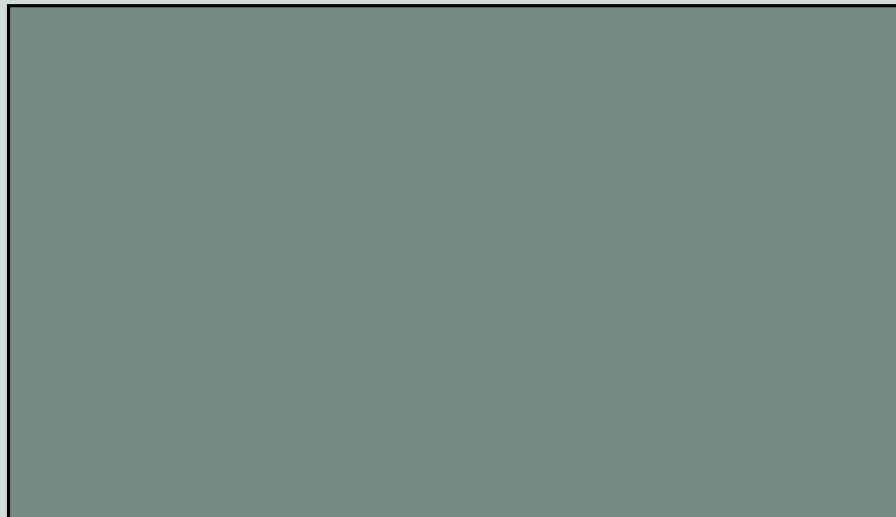
## Exclusions

- Delay from Wilful deliberate or intentional failures to comply with contract or to obtain relief or excuse under contract
- Delay from Strikes and labour disputes (Crane drivers)
- Delay from Insolvency or default (covered subcontractors including Cleveland Bridge)
- Delay from Engineering design/construction management not by Insured (Structure design & wrong concrete)



## Exclusions

- Delay from Failure to obtain permits/approvals/permissions (Planning permission Pedway)
- Delay from physical loss or damage (Drain damage & water ingress)
- Delay from an instruction from authorised body



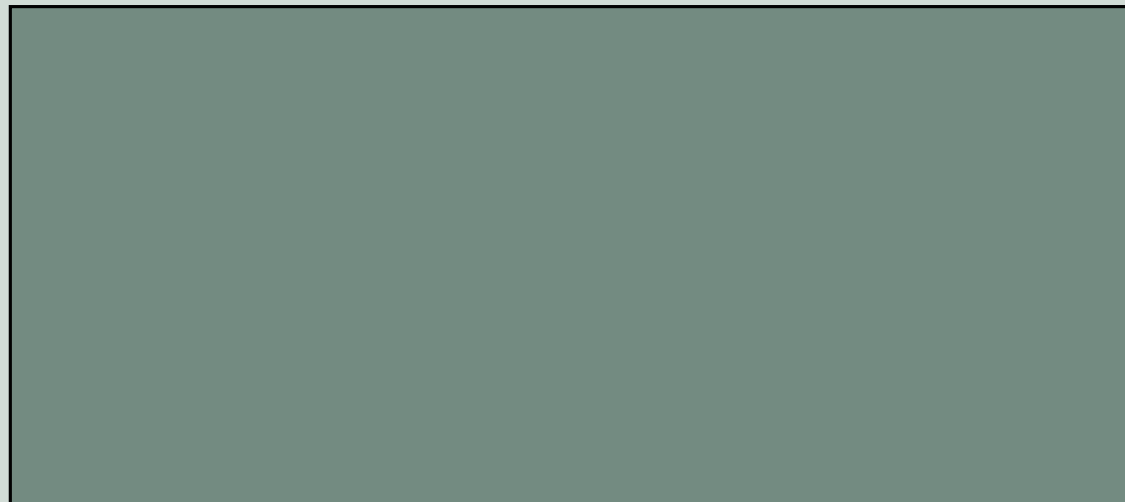
## Extensions of Time

- Major claims by Multiplex for extensions of time from client – more than 50 claims – each producing potentially excluded delay



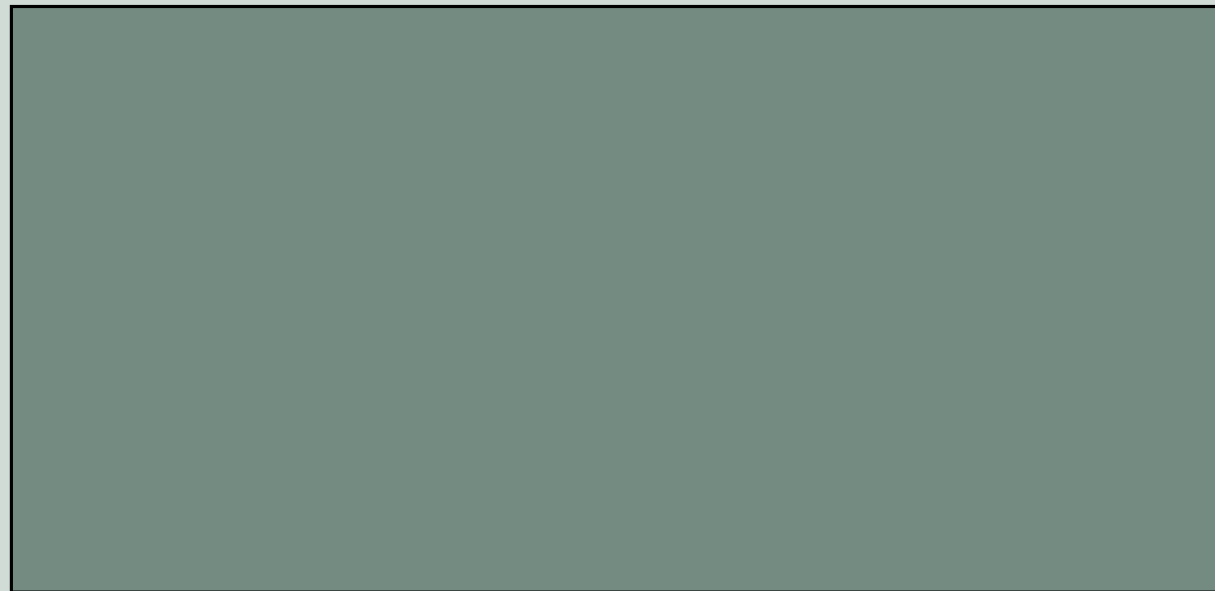
## Complex settlement negotiations

- Uncertainty about policy responses
- Uncertainty about legal actions
- Lack of information
- Heavy costs of analysing programmes & legal fees
- Commercial considerations/interests in other policies



## Conclusions for loss settlement

- Technical adjustment not possible (in a reasonable time)
- Compromise to save cost and eliminate future uncertainty
- A confidential settlement was reached





# LD Limit of insurability – Conclusions

- A higher attachment point is not the solution
  - still offer a solution for transferring the risk
  - we are not in an area of low losses/ high frequency but rather low frequency / high losses,
- The high degree of entrepreneurial risk and antiselection outweighs any expected profit potential.
- The law of large numbers does not apply.
- If we choose a more limited scope, we get further away from the law of large numbers and concentrate the moral hazard.



# LD Limit of insurability – Conclusions

- LD claims handling will always be extremely difficult and cost intensive.
- Information dissymmetry
  - We are “competing” against engineers / financiers / actuaries working for the sole interest of the insured. They know their own risks much better.
  - They therefore decide to transfer it only if the economics based on their modelling is favourable



Profitability of Liquidated damages  
is very similar to ... Nessie ...

...Some have looked for it !



Thank you very much for your attention  
– Q & A