

BETWEEN

LOCAL GOVERNMENT MUTUAL FUNDS
TRUSTEE LIMITED

Appellant

AND

NAPIER CITY COUNCIL

Respondent

OUTLINE OF ORAL ARGUMENT FOR RESPONDENT
27 APRIL 2023

Counsel for the respondent certify that this outline of oral argument is suitable for publication and contains no suppressed material.

W I L S O N ■ H A R L E

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OUTLINE OF ORAL ARGUMENT FOR RESPONDENT:

Introduction

1. The fundamental difference between the parties is that:
 - NCC says that the exclusion does not cover NWT liabilities because the subject matter of the exclusion is limited to WT liabilities.
 - Riskpool's interpretation of the exclusion is unnatural, focuses heavily on the definition of "Claim" but out of context and seeks to ignore words which run counter to its argument (particularly "*liability for Claims*") and ignores the different usages of the word "Claims" throughout the policy.
2. The PW does not itself suggest the interpretation advocated by Riskpool (*Firm PI* at [89]), but in any case its interpretation is demonstrably untenable because of the commercially absurd results that it would produce [6.24]-[6.26].
3. Riskpool's answer to this "telling" argument (CA at [79] **101.0181**) is a de minimis theory, now revised by Riskpool "to treat this solely as a matter of proper interpretation of the exclusion in its PW and wider context" ([6.17]). But it remains subject to the same problems of uncertainty (and lack of authority) as the CA identified [6.29]-[6.34].
4. *Wayne Tank* does not help Riskpool's case. It is relevant only to cases where there is a single loss which has two equivalent causes, so the loss cannot be apportioned between them. In such a case (not this case), if one of the causes is excluded and one is not, the loss is excluded [5.40-5.48].
5. Riskpool's reliance on extrinsic evidence is misplaced (as the CA pointed out, a heading to an earlier version of the exclusion using the word "involving" (CA at [16]-[17] **101.0163**)). "Involving" is not used in the exclusion itself or in the applicable Protection Wording (and is in any case ambiguous). The word is relied on by Riskpool in an attempt to give another phrase ("weathertightness claims") a special meaning [6.13-6.15].

6. No resort is necessary to contra proferentem as the CA held (but if ambiguity is perceived by this Court - then it must be resolved in NCC's favour).

Background

7. The Riskpool scheme and Protection Wording **[2.1-2.4]**.
8. The Waterfront proceedings **[2.5-2.7]**:
 - Proceedings brought against NCC by Body Corporate and many unit owners named in Sched. 1, 7th ASoC **[303.0485/303.0512]**.
 - A single cause of action in negligence by all plaintiffs against NCC **[303.0502]** resulting in the defects in [54](a)/Sched. 3 **[303.0503/303.0521]**.
 - Some defects caused by WT breaches of building code (non-compliance with E2). Other defects had no relationship whatsoever to moisture (e.g. non-compliance with structural and fire safety regulations).
9. CA accepted Riskpool's contention that each plaintiff made one "claim" against NCC but a "very important point" was that they were "mixed claims" including separate and divisible liabilities caused by WT and non-WT **[2.13]**. Exclusion 13(a) contemplated divisibility of claims based on the "real nature" of the Council's liability **[2.14]**. CA applied orthodox textual analysis **[2.15]**, followed by cross-check to commercial purpose **[2.16]**.

Riskpool's argument and the Court of Appeal's reasoning

10. Exclusion 13, read literally with the definition of "Claim" provides:

This Section... does not cover liability for Claims [the demand[s] for compensation made by a third party against the Member] alleging or arising [etc] out of... the failure of any building or structure... to conform to the [weathertightness requirements of the Building Code].
11. Riskpool says the definition of "Claim" aggregates the WP into one indivisible "Claim", and Exclusion 13(a) removes cover for the "Claim" entirely as soon as a WT defect is alleged in the same proceeding **[2.17-2.19]**. The effect of Riskpool's interpretation is that the form of a third party's demands for compensation determines the scope of the exclusion **[2.19-2.20]**.
12. CA correct at [60]-[61] **101.0175** about this being a case of "mixed claims".

The Protection Wording and Exclusion 13(a)

13. Exclusion 13(a) does not refer to risks other than WT [5.1]. The notional reader would:
 - Not follow the convoluted interpretative exercise advanced by Riskpool to exclude liability not causally related to the subject-matter of the text [5.2].
 - Instead focus on the purpose of the exclusion ascertained from the words in the exclusion overall (liability for WT) [5.3].
14. Contrary indications to Riskpool's interpretation:
 - No support in the authorities [5.18-5.22].
 - The wider policy context including other usages of "Claim" [5.5-5.15]/CA strike out decision, 101.0015 [31]-[37].
 - "Damage is the gist of an action in negligence" (*Quintano*) [5.23]. NCC was alleged to be liable for separate and divisible loss arising from WT and NWT breaches of the Building Code [5.24].
 - Exclusion applies to "liability for Claims" not "Claims" [5.26-5.27 / 4.1].
 - Divisibility of "claims" is orthodox [5.30, 5.32-5.33] - "for insurance purposes a third party's demand for compensation may be aggregated or divided" (CA at [67] 101.0158/101.0178).
 - Riskpool's contention that "alleging" and "in respect of" do not contemplate a causative link between "liability for Claims" and WT is contrary to principle and authority ([5.35]-[5.39])
15. *Wayne Tank* is irrelevant [5.40-5.42].
16. The extrinsic evidence is of no probative value relative to the Protection Wording itself and does not establish a special meaning for words used in the exclusion [6.4-6.7, 6.16].
17. Riskpool's interpretation has absurd consequences that cannot have been intended and cannot be cured.
 - CA's interpretation is orthodox [6.18-6.23]; e.g. *Nautilus*; *Arrow International*;
 - Extreme consequences illustrate that Riskpool's interpretation does not "work" in other feasible fact settings [6.24-6.26] – e.g. Southland Stadium collapse. Riskpool posits various solutions that are unprincipled and incompatible with objective certainty - implied *de minimis* term, a subjective "materiality threshold", or existence of an discretion outside of the contract.