IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 103/2022
[2023] NZSC 97

BETWEEN	LOCAL GOVERNMENT MUTUAL FUNDS TRUSTEE LIMITED Appellant
AND	NAPIER CITY COUNCIL Respondent

Hearing:	27 April 2023
Court:	Winkelmann CJ, O'Regan, Ellen France, Williams and Kós JJ
Counsel:	M G Ring KC, C J Hlavac and M E Gall for Appellant D H McLellan KC and G N M Tompkins for Respondent
Judgment:	1 August 2023

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant must pay the respondent costs of $25,000 plus usual disbursements. We allow for second counsel.

REASONS
(Given by Ellen France J)

Table of Contents

Introduction

[1] In 2013 the owners of the Waterfront Apartment complex in Napier sued the Napier City Council (the Council) and others over building defects. They said the Council had been negligent during 2006 and 2007 in issuing building consents, ensuring adequate inspections, and issuing code compliance certificates. Some of the building defects related to weathertightness, concerning alleged non-compliance with cl E2 of the Building Code. But others, for example, those relating to fire risk, did not relate to weathertightness and concerned alleged breaches of other parts of the Code.

[2] The Council settled the claim by the owners for about $12 million. The settlement sum did not make any apportionment between the weathertightness and other defects. However, expert evidence that had been prepared calculated that some of the cost of remediation was attributable to the weathertightness defects. The Council made a claim from its insurer, Local Government Mutual Funds Trustee Ltd (RiskPool), for the portion of remediation costs unrelated to weathertightness.

[3] RiskPool declined to cover the claim on the basis of an exclusion clause, Exclusion 13(a), relating to weathertightness. The exclusion clause, which we will discuss in detail below, stated that the insurance contract did "not cover liability for Claims alleging or arising directly or indirectly out of, or in respect of" weathertightness defects. RiskPool said this clause meant the claim could not be divided into separate parts and the insurer was liable neither for weathertightness defects nor for the unrelated defects. In other words, because the apartment owners' demand for compensation included weathertightness claims, insurance cover was entirely excluded.

[4] The Council subsequently sued for part of the settlement amount from RiskPool in reliance on its indemnity. The Council's position was that Exclusion 13(a) excluded only those parts of the claim concerning weathertightness so that demands not relating to weathertightness, such as the fire risk defects, were not excluded.

[5] To summarise briefly, in relation to liability, the High Court found in favour of RiskPool.[1] In case the conclusion on the interpretation of the exclusion clause was wrong, the High Court made various findings on the quantum of RiskPool's liability. The Court of Appeal reversed the decision of the High Court on liability.[2] RiskPool's cross-appeal against the quantum finding was unsuccessful. RiskPool has now appealed from the decision of the Court of Appeal on liability.[3]

[6] The primary question before this Court is whether the insurer is liable for a portion of the claim unrelated to weathertightness, as the Court of Appeal held; or whether the effect of the exclusion clause in the policy is to exclude cover for that part of the claim.

Background

What were the claims against the Council?

[7] In 2006 and 2007, the Council issued building consents, inspected the building work and issued code completion certificates for the Waterfront Apartments complex. The Waterfront Apartments plaintiffs brought proceedings against the Council (and other construction participants) in October 2013. The statement of claim pleaded one cause of action in negligence against each of the defendants. In terms of the Council, the allegation was that the Council was negligent in all three aspects of its "inspection role". The allegations against all defendants, including the Council, were that as a

---

1 *Napier City Council v Local Government Mutual Funds Trustee Ltd* [2021] NZHC 1477 (Grice J) [HC judgment]. RiskPool's earlier attempt to strike out the Council's claim was unsuccessful: *Napier City Council v Local Government Mutual Funds Trustee Ltd* [2018] NZHC 2269; *Local Government Mutual Funds Trustee Ltd v Napier City Council* [2019] NZCA 411; and *Local Government Mutual Funds Trustee Ltd v Napier City Council* [2019] NZCA 444.

2 *Napier City Council v Local Government Mutual Funds Trustee Ltd* [2022] NZCA 422, [2022] 3 NZLR 528 (Miller, Brown and Katz JJ) [CA judgment].

3 The High Court findings on quantum were at the level of principle and it was agreed in the Court of Appeal that if RiskPool was liable, the matter had to be remitted to the High Court to finally resolve quantum. RiskPool did not seek leave to appeal to this Court against the findings on the cross-appeal.

result of their negligence the apartment complex was built with various defects in breach of the Building Code. To reiterate, only some of these defects related to weathertightness. Some, for instance, related to fire safety compliance and structural integrity issues.

[8] The plaintiffs sought lump sum compensation based on the aggregate cost of two pleaded scopes of remedial works relating to the apartment blocks and balconies, along with consequential losses and general damages. The scope of works, once undertaken, would remediate both the weathertightness and non-weathertightness defects.

[9] Against this background, the Council claimed indemnity from RiskPool. As we have noted, the Council agreed to pay an undivided lump sum to the plaintiffs as part of its settlement. While questions remain as to quantum, of the $12 million settlement figure, some $4.4 million was identified as attributable to non-weathertightness breaches. In the present proceeding, the Council sought to recover from RiskPool that part of the settlement sum attributable to solely the non-weathertightness defects, such as those relating to fire.

The policy documentation

[10] We preface our discussion of the documentation with a little background about the New Zealand Mutual Liability RiskPool Scheme. The Scheme was set up in 1997 as a response to dissatisfaction by local authorities with the commercial insurance market. RiskPool is a subsidiary of New Zealand Local Government Insurance Corporation Ltd and is the trustee of the Scheme. As the Court of Appeal explained, the "commercial substance" of the Scheme was that local authorities pooled risk, acting as both insured and insurer.[4] Members of the Scheme "funded claims to the extent of their annual contributions and any calls made on them for" further contributions to meet any deficit.[5] RiskPool laid off some of its own risk by reinsuring through commercial reinsurers.

---

4 CA judgment, above n 2, at [7].
5 At [7].

[11] The Council became a member of the Scheme on its inception in 1997. As the Court of Appeal observed:

> [13] Local authorities appear to have had high hopes for RiskPool when it was established. It was envisaged that over time the Scheme would build a surplus that could meet claims. It did not work out that way … . An initial surplus was wiped out by leaky building claims in the early 2000s and from then on the Scheme could not obtain reinsurance on terms matching the Protection Wording. The resultant obligation to fund such liabilities eventually led to Members leaving the Scheme.

[12] The Council withdrew from the Scheme at the end of the 2014/2015 Fund Year. The Scheme itself subsequently ceased offering liability cover.

[13] The Scheme operated under a Trust Deed, Scheme Rules, Constitution, Deed of Participation and the Protection Wording (referred to as the Guidelines in some of the Scheme documents). The exclusion clause forms part of the last of these. Under cl 14 of the Trust Deed the documents comprising the Scheme were to be construed in the following order of priority: the Trust Deed; the Scheme Rules; the Constitution; and then the Deed of Participation and the Protection Wording for each Member. The Scheme Rules noted that the Trust Deed and the Rules constituted a contract between the Scheme and the Member.

[14] Before the Court of Appeal there was some debate about the effect of the provision in the Trust Deed giving the board of RiskPool a discretion to meet claims. RiskPool maintains an argument about the effect of that provision in its submissions on commercial absurdity but, as we shall discuss, on our approach we need not address that argument.[6] Accordingly, in terms of the Trust Deed we need only note that a "Claim" was defined as "any claim by a Member in respect of that Member's Civil Liability during the term of the Scheme in respect of the Risks". "Risks" in turn, means the risks of "Civil Liability" within the Protection Wording. The term "Civil Liability" was defined to mean "any civil liability resulting from an obligation, function, power or duty of a Member arising under law". This included public liability and negligence.

---

6 See below at [71].

[15] We come back subsequently to discuss the changes in the wording of the Protection Wording which followed on from the concerns about the effect of the leaky building claims.[7] At this point we simply note the relevant wording from the document entitled "Combined Public Liability and Professional Indemnity Protection Wording" (Version RP10PLPI-EX) in issue in this case.

The Protection Wording

[16] The Protection Wording began by setting out the hierarchy of documents reflecting that in the Trust Deed. The Protection Wording was then divided into two parts, being "Section A – Public Liability" and "Section B – Professional Indemnity". Each Section had its own group of definitions, insuring clauses, exclusions, extensions and conditions.

[17] The preamble to Section B, addressing professional indemnity, stated that RiskPool would indemnify the Council against breach of Professional Duty as follows:

> To indemnify the Member up to but not exceeding the amount specified in the Schedule, against Claims first made against the Member and reported to the Fund during the period specified in the Schedule for breach of Professional Duty arising out of any negligent act, error or omission wherever or whenever the same was or may have been committed or alleged to have been committed on the part of the Member or on behalf of the Member including:
>
> a) all costs and expenses incurred with the written consent of the Fund in the defence or settlement of any such Claim;
>
> b) all appeal bonds.
>
> In the event that the total amount paid to dispose of a Claim which would have otherwise fallen under this Protection Wording is less than the Excess specified in the Schedule, or if the defence shall be successful and the Claim is dismissed or withdrawn, the Member shall not be liable for any defence costs in excess of the Excess specified in the Schedule, provided that the defence costs were incurred with the Fund's prior agreement.

[18] "Professional Duty" was defined to mean a legal duty of care owed by the Council in relation to certain activities. Those activities included the exercise of statutory powers to provide approvals or information. As is apparent, were it not for Exclusion 13(a), this language would extend to the issue of building permits and code

---

7 At [61][61]–[68] below.

compliance certificates and the conduct of building inspections, that is, the activities of the Council in issue in this case.

[19] "Claim" is a defined term and means:

> … the demand for compensation made by a third party against the Member including the costs and expenses incurred in the defence of any such Claim but shall not include the Member's costs and expenses.

[20] The Schedule provided there was a limit of $100 million and an excess of $10,000 for "each and every Claim". These limits did not apply to weathertightness claims, as they were entirely excluded. As the Court of Appeal noted, it is relevant to note the limits because "they go some way to explain what work is done by the concept of a 'Claim'".[8] The excess clause provided:

> In respect of each Claim made against the Member the amount of the Excess specified in the Schedule shall be borne by the Member at its or their own risk and the Fund shall only be liable to indemnify the Member in excess of such amount. For the purpose of this Condition the term "Claim" shall be understood to mean any and all Claims which are within the scope of this Section of the Protection Wording and any Extension which may be included, and which arise out of the one event or by reason of the same negligent act, error or omission.

[21] The professional indemnity section of the Protection Wording then set out some exclusions, including Exclusion 13.[9] That part began "[t]his Section of the Protection Wording does not cover liability for: …". The first named exclusion was the excess. Other exclusions were defined by the type of liability, for example, legal liability in consequence of war. Other clauses used the defined term "Claim" to exclude demands for compensation against the Council made outside New Zealand or which arose out of, by way of example, the approval of a subdivision.

[22] As the Court of Appeal said, this was a "claims made" policy.[10] Both the indemnity and Exclusion 13 use the defined term "Claim" as meaning a demand for compensation made by a third party.

---

8 CA judgment, above n 2, at [25].
9 See HC judgment, above n 1, at [47].
10 CA judgment, above n 2, at [28].

[23] The exclusion clause provided as follows:

> 13) This Section of the Protection Wording does not cover liability for Claims alleging or arising directly or indirectly out of, or in respect of:
>
> a) the failure of any building or structure to meet or conform to the requirements of the New Zealand Building Code contained in the First Schedule to the Building Regulations 1992 … in relation to leaks, water penetration, weatherproofing, moisture, or any water exit or control system; or
>
> b) mould, fungi, mildew, rot, decay, gradual deterioration, micro-organisms, bacteria, protozoa or any similar life forms, in building or structure.

The decision of the High Court

[24] Grice J considered the "literal meaning" of the exclusion was "clear in context".[11] The reasonable person with the relevant background knowledge would have understood the exclusion clause to have had the meaning advanced by RiskPool where the "commercial reality … was that RiskPool could not continue to make significant losses due to building defects associated with weathertightness claims".[12] The Judge also saw the admissible extrinsic evidence as providing support for "a mutual intention" consistent with RiskPool's approach to the clause.[13] Finally, the Judge rejected the Council's argument that RiskPool's approach would be commercially unrealistic.

The decision of the Court of Appeal

[25] The Court of Appeal found that each of the Waterfront plaintiffs had made a single demand for compensation against the Council, with each claim arising out of the same negligent course of conduct. It accepted that for the purposes of the policy limit and excess the claims could have been aggregated. But the Court did not accept that was the end of the inquiry. These were "mixed" claims in that the "demand for compensation was the aggregate sum of repair costs for defects", some of which

---

11 HC judgment, above n 1, at [327].
12 At [344].
13 At [323].

related to weathertightness and some not.[14] In this case, the issue was whether the plaintiffs' demands for compensation may be divided according to the nature of the Council's liability.

[26] In concluding the claim was divisible, the Court said it was necessary to inquire "into the real nature of the Council's liability" to decide whether an exclusion applies.[15] The words "alleging or arising directly or indirectly out of, or in respect of" in Exclusion 13(a) were seen to "contemplate an indirect (but specific) causal connection to weathertightness".[16] Consistently with that, the Court observed, the exclusion "removes cover for 'liability for' Claims causally connected to weathertightness. The connection needed is between a weathertightness defect and the Council's liability to pay the compensation demanded."[17] The language used showed "only that a Claim is not covered to the extent that weathertightness defects were an indirect cause of the loss for which compensation is claimed".[18]

[27] The Court did not see the commercial purpose as compelling the view the intention was to exclude liability for sums which had no link to weathertightness. That was because the commercial purpose pointed "rather to the conclusion that such Claims are within the indemnity but excluded to the extent they are causally attributable to weathertightness defects".[19]

[28] While Exclusion 13 was to be read along with the other exclusions, the Court did not see those as of great assistance.

[29] The Court of Appeal also drew some support for its interpretation from the Council's commercial absurdity argument, namely, that on RiskPool's approach, a Claim would be excluded even where "a trifling part of the demand" was causally connected to weathertightness.[20]

---

14 CA judgment, above n 2, at [60].
15 At [72].
16 At [75].
17 At [75].
18 At [75].
19 At [76].
20 At [79].

[30] On the Court's interpretation it was not necessary to consider contra proferentem (the principle that ambiguous terms should be construed against the party that proposed them).[21] However, to the extent that ambiguity remained, it would be resolved against RiskPool since RiskPool, as between itself and the Members of the Scheme, was responsible for the wording.

Overview of the arguments on the appeal

[31] RiskPool essentially says that once it is determined the plaintiffs each had a single Claim and that Claim includes weathertightness, that is the end of the inquiry. Cover is excluded by Exclusion 13(a). That follows, RiskPool argues, from the structure and text of the exclusion clause, the context and the commercial purpose.

[32] In developing these submissions, RiskPool argues that the subject of the exclusion is the "Claim" and this is not divisible. It follows that this building defect claim was excluded as it predominantly concerned weathertightness defects. RiskPool contends that, at its heart, the nature of the demand for compensation is for "economic loss by way of depreciated market value of their apartments caused by the existence of the totality of the non code compliant defects: 'and not for physical damage to' the complex and/or for the existence of these defects, either individually, by type, or collectively". The Claim does not become divisible just become some of the compensation can be, in RiskPool's view, "arbitrarily allocated, equally or unequally, between particular defects". On this approach, contrary to the Court of Appeal's analysis, the Claim is not divisible as between the defects.

[33] RiskPool says that the focus of the exclusion clause is upon the "Claim" and not upon the factual source or causation of the Claim. Further, the application of the exclusion does not necessarily have to be based on causation as the language used in what RiskPool calls the clause's "qualifying links", do not all refer to a causative connection. RiskPool's case is that the parties made their intentions clear by specifying "alleging" and/or "in respect of", as equal alternatives to "arising directly or indirectly out of".

---

[21] See *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015] 1 NZLR 432 at [66] per McGrath, Glazebrook and Arnold JJ.

[34] RiskPool also seeks to draw support for its interpretation from the context, particularly, the evolution of the policy wording, and by contemporaneous documentation.

[35] The Council generally supports the approach of the Court of Appeal. The Council says that RiskPool's approach focuses unduly on the word "Claims" in the exclusion clause, invoking its definition, and would have the Court ignore words running counter to its argument, particularly, "liability for Claims". The Council also argues that divisibility of Claims is, as the Court of Appeal says, orthodox and that RiskPool's arguments about the qualifying links are contrary to principle. Finally, to the extent that RiskPool relies on the interpretation adopted in other insurance cases, the Council says these are distinguishable and should be read in their specific context.

[36] We expand on the parties' arguments as necessary in the discussion which follows.

The principles of interpretation

[37] As the Court of Appeal observed, "[t]he general rule is that contracts of insurance are interpreted in the same way as any other".[22] The general approach to contractual interpretation is that set out in this Court's decision in *Firm PI 1 Ltd v Zurich Australian Insurance Ltd*.[23] The approach is an objective one with the aim of ascertaining:[24]

> … the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

---

22 CA judgment, above n 2, at [68]. See also: Paul Michalik and Christopher Boys *Insurance Claims in New Zealand* (2nd ed, LexisNexis, Wellington, 2023) at 17–23; and Robert Merkin and Chris Nicoll (eds) *Colinvaux's Law of Insurance* (2nd ed, Thomson Reuters, Wellington, 2017) at 53.

23 *Firm PI*, above n 21, at [60]–[63], [77]–[79], [84] and [88]–[93] per McGrath, Glazebrook and Arnold JJ. This was endorsed in *Bathurst Resources Ltd v L&M Coal Holdings Ltd* [2021] NZSC 85, [2021] 1 NZLR 696 at [43]–[47] and [57] per Winkelmann CJ and Ellen France J and [232] per Glazebrook, O'Regan and Williams JJ.

24 At [60] per McGrath, Glazebrook and Arnold JJ citing *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 (HL) at 912 per Lord Hoffmann. The factors considered relevant in *Firm PI* were factored into the interpretation of the insurance contracts in issue by this Court in *Ridgecrest NZ Ltd v IAG New Zealand Ltd* [2014] NZSC 117, [2015] 1 NZLR 40 at [24] and [25] (a case pre-dating *Firm PI*); see also *Tower Insurance Ltd v Skyward Aviation 2008 Ltd* [2014] NZSC 185, [2015] 1 NZLR 341 (decided two months after *Firm PI*).

[38] This Court in *Firm PI* also made the point that "[w]hile context is a necessary element of the interpretative process and the focus is on interpreting the document rather than particular words, the text remains centrally important".[25] We interpolate here that the latter point is worth emphasising because RiskPool argues that the Court of Appeal did not give the text the necessary prominence. The Court in *Firm PI* continued, noting that:[26]

> If the language at issue, construed in the context of the contract as a whole, has an ordinary and natural meaning, that will be a powerful, albeit not conclusive, indicator of what the parties meant. But the wider context may point to some interpretation other than the most obvious one and may also assist in determining the meaning intended in cases of ambiguity or uncertainty.

[39] In developing its submission on the principles, RiskPool says that the Court of Appeal did not turn to consider the text of the exclusion clause until late in the piece and only did so having first determined the "commercial purpose" of the contract. The Council emphasises the need to interpret the contract as a whole and says also that clear and unequivocal language must be used if an insurer wishes to exclude cover. In reliance on *Mount Albert City Council v New Zealand Municipalities Co-operative Insurance Co Ltd*, the Council notes also that exclusion clauses in an insurance contract have consistently been held to be given a narrow interpretation.[27]

[40] RiskPool's argument about the approach of the Court of Appeal to the principles is a reference to the following excerpt from the Court of Appeal judgment:

> [70] There can be no doubt that RiskPool intended to exclude all cover for weathertightness defects. As Mr Ring submitted, the context was that the cost of meeting such claims had become unsustainable and cover had to be aligned with the total exclusion already imposed by reinsurers. The terms on which the reinsurers did so are unknown, as we have explained. We must work with the evidence of dealings between RiskPool and its Members.
>
> [71] That evidence does not show that the commercial purpose extended to excluding liability for non-weathertightness defects when combined in a Claim for weathertightness defects. It shows on the contrary that RiskPool continued to offer cover for non-weathertightness defects. That was part of

---

25 At [63] per McGrath, Glazebrook and Arnold JJ.

26 At [63] per McGrath, Glazebrook and Arnold JJ (footnote omitted).

27 *Mount Albert City Council v New Zealand Municipalities Co-operative Insurance Co Ltd* [1983] NZLR 190 (CA) at 196 per Cooke J.

> what the Supreme Court described in *Firm PI* as the "structure" of the parties' bargain.
>
> (footnote omitted)

[41] We see RiskPool's argument as placing undue emphasis on both the placement and content of the paragraphs set out immediately above. It is clear in the judgment that the text has been treated as central to interpretation. Immediately after the passages we have just cited, the Court acknowledges the definition of "Claim" is defined at "a high level of abstraction — a demand for compensation".[28] But, as we have said, the Court took the view that the exclusion "necessarily contemplates an inquiry into the real nature of the Council's liability".[29] Further, the Court is in any event simply making a point about what RiskPool said was its intention, and as to the absence of evidence supporting that view.

The text of the exclusion clause

[42] We agree, generally for the reasons given, with the Court of Appeal's construction of the exclusion clause. When the clause is read as a whole, in context, it is clear that the common intention was to exclude only the risks specifically referred to, namely, weathertightness. The High Court found that it was possible to identify a part of the settlement which addressed liability not arising directly or indirectly from weathertightness defects.[30] In this situation, where the Council faced liability for separate and divisible loss arising from breaches of the weathertightness and non-weathertightness aspects of the Building Code, only the former are excluded from cover notwithstanding that the claim was presented on a mixed basis.

[43] In our view, RiskPool's interpretation errs in focusing unduly on only one part of the exclusion clause. And as to that, the definition of "Claim" is not within the clause itself — it appears elsewhere in the policy documentation, and is a general, multipurpose, definition. When read as part of the whole clause and in context, that word simply cannot carry the weight argued for by RiskPool.

---

28 CA judgment, above n 2, at [72].
29 At [72].
30 The methodology adopted is not in issue on this appeal.

[44] The result advanced by RiskPool is also textually awkward because the role for both the introductory words ("liability for") and the qualifying links ("alleging or arising … out of" etc) is left unclear. For example, do each of "directly or indirectly" apply to both "alleging" and "arising"? Putting that awkwardness to one side, importantly, what is expressly excluded is "liability for Claims alleging or arising directly or indirectly out of, or in respect of" the two listed matters. The effect of RiskPool's proffered interpretation is to ignore the words "liability for". It is no answer to say, as RiskPool does, that the words "does not cover liability for" is simply shorthand for "[does not] indemnify" because that begs the question as to what the exclusion clause when read as a whole actually covers.

[45] RiskPool also says that the Court erred in not treating the latter part of the exclusion clause as standalone, alternative links. In particular, RiskPool says that the Court was wrong to treat the words "alleging" and "in respect of" as indicating some causal link. An "allegation" on RiskPool's analysis, has its dictionary meaning, namely, an unproven assertion.[31] RiskPool argues that the phrase "in respect of" can sometimes be causative but is not necessarily so.

[46] The Council submits the Court of Appeal's approach is an orthodox one and that the requirement for "some connexion or relation" is even more important in the context of an exclusion clause.[32] That is because the object of the clause is to remove indemnity solely for the identified subject matter, here, weathertightness.

[47] We agree that while the Court of Appeal uses the language of causation, essentially the Court is looking at what it is the clause is driving at, its purpose — what is it that is excluded? There is no error in that focus. Moreover, read in the context of the clause, we do not see either of the terms "alleging" or "in respect of" as removing any need for a link or proximity with weathertightness.

[48] As we have said, RiskPool relies on the Court of Appeal's finding that there was one "Claim" arising out of the same negligent course of conduct in issue here.

---

31 Citing Bryan A Garner (ed) *Black's Law Dictionary* (9th ed, West, St Paul, United States of America, 2009) at 86–87; and *Hird v Chubb Insurance Company of Australia Ltd* [2016] VSC 174, (2016) 19 ANZ Insurance Cases ¶62-103 at [57].

32 Citing *The Trustees Executors & Agency Co Ltd v Reilly* [1941] VLR 110 (VSC) at 111.

The Council does not necessarily accept that characterisation but does agree with the conclusion of the Court of Appeal that this characterisation does not remove the need to consider "the real nature of the Council's liability".[33] The Council is correct to say that there is nothing in the language of the exclusion clause which would convey to the reader that divisible parts of a claim that do not relate to weathertightness are being excluded. Clearer language would be required to exclude liability for that part of the claim relating to non-weathertightness defects which would otherwise have come within the insuring clause.[34]

[49] RiskPool suggests that the interpretation argued for by the Council requires the addition of the word "only" or "just" or a similar word. We disagree. When the clause is read as a whole the meaning is clear. RiskPool's approach would dissect the clause to focus unduly on individual words. Further, as we shall discuss, there is nothing in the contextual points relied on by RiskPool to indicate an intention to aggregate.

[50] RiskPool relies on *Medical Assurance Society of New Zealand Ltd v East*[35] for the proposition the phrase "does not cover liability for" is shorthand for "[does not] indemnify". But, as with the other cases relied on by RiskPool in support of the proposition that "the Claims" as defined forms the central concept,[36] we see these authorities as reflecting the particular context in which they arose and/or the specific wording of the contract in issue.

[51] Similarly, the case of *West Wake Price v Ching*, cited by RiskPool, does not assist to any great extent.[37] That case involved one loss where it was not known which of three possibilities had caused it. This is different from the present case where the causes of the loss are both known and divisible. Nevertheless, we agree with the

---

33 CA judgment, above n 2, at [72].

34 The CA judgment, above n 2, at [68] cites Desmond Derrington and Ronald Shaw Ashton *The Law of Liability Insurance* (3rd ed, 2013, LexisNexis Butterworths, Chatswood) vol 2 at [10-14] for the proposition that such clauses are to be construed strictly. *Lumley General Insurance (NZ) Ltd v Body Corporate No 205963* [2010] NZCA 316, (2010) 16 ANZ Insurance Cases ¶61-853 at [27] makes the same point.

35 *Medical Assurance Society of New Zealand Ltd v East* [2015] NZCA 250, (2015) 18 ANZ Insurance Cases ¶62-074.

36 *Walton v National Employers' Mutual General Insurance Association Ltd* [1973] 2 NSWLR 73 (extent to which negligence cover extended to carelessness of insured's employees) at 78; and *Allianz Australia Ltd v Wentworthville Real Estate Pty Ltd* [2004] NSWCA 100, (2004) 13 ANZ Insurance Cases ¶61-598 (scope of clause excluding claims against the insured for bodily injury).

37 *West Wake Price v Ching* [1957] 1 WLR 45 (QBD).

Court of Appeal that the relevant principle for this case emerging from *West Wake Price* "is that the exclusion clause should not be interpreted to force RiskPool to indemnify the Council for a liability which is outside the Protection Wording".[38]

Does the *Wayne Tank* principle apply?

[52] We also need to address RiskPool's argument that the Court of Appeal did not apply the principle in *Wayne Tank and Pump Co Ltd v The Employers' Liability Assurance Corporation Ltd* to exclude the present claim where one concurrent cause was expressly excluded.[39]

[53] *Wayne Tank* involved a public liability policy. The defendant insurers gave cover relevantly for sums the plaintiffs might be liable to pay as damages resulting from an accident involving fire. The exclusion clause provided there was no cover for "damage caused by the nature or condition of any goods or the containers" supplied by the insured. The fire giving rise to the claim under the policy in *Wayne Tank* was caused, first, by the nature or condition of the goods supplied by Wayne Tank and, second, by the conduct of an employee in switching on the heating tank and leaving it unattended throughout the night. The first cause came within the exclusion, the second did not.

[54] The Court in *Wayne Tank* took the view that as there were two "equally efficient" causes of the loss, one within the policy and the other excluded, the exclusion applies.[40]

---

38 CA judgment, above n 2, at [65].

39 *Wayne Tank and Pump Co Ltd v The Employers' Liability Assurance Corporation Ltd* [1974] 1 QB 57 (CA).

40 At 67–68 per Lord Denning MR, 69 per Cairns LJ, and 74–75 per Roskill LJ.

[55] We agree with the Council that the *Wayne Tank* principle does not assist RiskPool here.[41] It is irrelevant to liabilities which, like the fire defects, result solely from non-weathertightness issues simply because those liabilities are a result (and only a result) of a non-excluded cause. In contrast to the position in *Wayne Tank*, as we have noted at [9] above, it is possible in this case to apportion loss as between that caused by weathertightness (or by a mixture of weathertightness and other issues) and that not caused by weathertightness.

[56] RiskPool also says that the Court of Appeal erred in relying on the decision in *Body Corporate 326421 v Auckland Council* (*Nautilus*) for the proposition that it was necessary to make an inquiry into the real nature of the Council's liability.[42] RiskPool says in fact that the *Nautilus* case supports its approach because it reflects an application of the "all-or-nothing" *Wayne Tank* principle on which RiskPool relies. The Court of Appeal, RiskPool argues, in fact conflated "loss" (liability) and "Claim" in its application of the exclusion clause. This is a reference to the observation by the Court of Appeal that:

> [73] … Cover was excluded under a claims made policy for liability arising out of poor workmanship. It followed that a claim was not indemnified if defective workmanship was an indirect cause of the loss. Gilbert J held that:
>
> > … where the claim has two or more causes, the claim will be covered only if at least one of these causes is within the insuring clause and none of the causes is excluded by an exclusion clause.
> >
> > (footnote omitted).

[57] The observations in *Nautilus* referred to by the Court of Appeal do, as the parties agree, reflect an application of the *Wayne Tank* principle. The insurance contract in that case covered the insured for claims (defined to include any form of legal process served on the insured) but was subject to an exclusion for claims arising out of defective workmanship. The High Court concluded that the defects in issue

---

41 We do not need to reach any concluded view on the merits of the principle. We simply record the observation in Robert Merkin *Colinvaux's Law of Insurance* (13th ed, Sweet & Maxwell, London, 2022) at [5-096] that "the principle is now firmly established" but "its operation may be unfortunate". As also noted in *Colinvaux's*, the reasoning in *Wayne Tank* was rejected in Canada in *Derksen v 539938 Ontario Ltd* 2001 SCC 72, [2001] 3 SCR 398. The principle was applied by the Court of Appeal in *AMI Insurance Ltd v Legg* [2017] NZCA 321, [2017] 3 NZLR 629, at [46]–[51] and [54].

42 *Body Corporate 326421 v Auckland Council* [2015] NZHC 862.

were all excluded as coming within the exclusion clause. But, as the Council submits, the case is illustrative of an approach involving an examination of each of the defects to determine the underlying cause of the loss. That is the approach advanced by the Court of Appeal in this case. We see no error in that analysis.

Other clauses in the contract

[58] We are inclined to agree with the Court of Appeal that there is not a great deal of assistance to be gained from the other exclusion clauses in the contract. There is no particular pattern to the drafting of the other exclusions. That said, there is no inconsistency between our approach to this exclusion and the other exclusions. RiskPool notes some of these clauses are framed as exclusions for "legal liability", for example, as a consequence of war. But we see that wording as achieving the same result as that in Exclusion 13(a). We note also that the exclusion relating to asbestos would exclude "any legal liability of whatsoever nature". However, that clause too appears to require some causal link because the liability which is excluded must be "caused by, or contributed to, or arising from or in connection with" asbestos. Even if that is not the case, the fact that Exclusion 13 is not so broadly expressed is telling.

[59] Finally, as the Council says, a number of the exclusions include the potential for "mixed" proceedings like the present, involving divisible demands. For example, Exclusion 7 covers "any Claim: a) for breach of contract; or b) arising out of the Member's involvement in a tender or tender process".

[60] We add that we do not see anything in RiskPool's submission that there is any contrary indication to be drawn from other provisions within the policy documentation. RiskPool points to cl 2(f) of the Protection Wording. That clause is under the heading "Claims Procedure" and provides that the Fund may pay the limit of indemnity applicable to a Claim or any lesser settlement amount "and shall then be under no further liability" in respect of such Claims. RiskPool argues that this supports the conclusion that "Claims" are indivisible for the purposes of the contract. We do not accept that any such assumption underlies cl 2(f).

Context and the evolution of the Protection Wording

[61] RiskPool relies on two matters of context. The first of these is the evolution of the Protection Wording. The second is the contemporaneous correspondence. We address each in turn.

[62] The relevant developments in the Protection Wording are highlighted by the Court of Appeal in this way:

> [15] … The narrative was provided by Paul Carpenter, an insurance broker who provided Scheme management services to RiskPool. Reinsurers wanted to avoid liability for claims that had their genesis in systemic failures. In 2002 they introduced an exclusion for toxic mould. In 2003 the Weathertight Homes Resolution Service was established as what Mr Carpenter described as a claimant-friendly jurisdiction. Reinsurers introduced a partial exclusion for weathertightness claims, but RiskPool did not fully mirror this exclusion in [the] Protection Wording at the time.
>
> [16] In 2006 reinsurers imposed a full weathertightness exclusion. RiskPool modified the Protection Wording in consequence, but it did not fully exclude weathertightness cover. Rather, on 29 June 2006 it wrote to the Council advising that it had resolved to introduce a sub-limited cover of $500,000 for "multi-unit building defect claims *involving* alleged breaches of cl E2 'Moisture Ingress' of the Building Code". RiskPool achieved this by introducing an exclusion for such claims and an extension supplying cover up to the sub-limit. We have italicised the word "involving", which Mr Ring emphasised. It also appeared in a RiskPool Board paper in a heading to proposed endorsements to the Protection Wording. The heading was "Exclusion 13 Multi Unit Building Defect Claims Involving Moisture Ingress".
>
> (emphasis in original)

[63] RiskPool is critical of the fact that, in this description, the Court of Appeal has disregarded the heading "Building Defect Claims *Involving* Moisture Ingress" on endorsements (emphasis added). Further, RiskPool says the Court ignored the fact that those endorsements were described as "attaching to and forming part of" the "Protection Wording" with effect from 30 June 2006.

[64] The essence of RiskPool's argument is that "involving" conveys inclusivity. A Claim "involving" moisture ingress defects is one having this feature among its content. RiskPool also places some weight on the fact that "Building Defect Claims Involving Moisture Ingress" and "weathertightness claims" were synonymous

expressions with the result that the restrictions to the cover being imposed extended to non-weathertightness defects.

[65] In response, the Council points out that the word "involving" is not used in the relevant version of the exclusion. The word "involving" cannot be used to give another phrase ("weathertightness claims") a special meaning.

[66] We accept the Council's submissions. Putting to one side whether or not the word "involving" would necessarily alter the interpretation in the way RiskPool contends, that wording is not included in the relevant form of the Protection Wording.

[67] Nor do we find the contemporaneous correspondence helpful. We note, to illustrate the point, that RiskPool places weight on a letter of 11 May 2009 in which RiskPool advised the Council that it had resolved to cease providing weathertightness cover but would "continue to manage the administration of Members' weathertight claims for the broader benefit of Local Government". We assume for these purposes that this letter is admissible. But, regardless of any issue as to admissibility, we simply do not see it as supporting RiskPool's submission that the letter shows that a weathertightness claim was intended to be a mixed claim. Rather, what exactly was meant is unclear.

[68] We do not see the contextual matters relied on by RiskPool as sufficiently compelling to have any impact on the proper interpretation of the contract. In addition, the more important contextual matter is the nature of the clause. The parties agree that, as an exclusion clause, Exclusion 13(a) is to be construed strictly. That too supports the approach we take to interpretation.

What was the commercial purpose of the policy?

[69] RiskPool's submission is that if the Court of Appeal had started with the text it would have reached the correct view as to commercial purpose, namely, that the purpose was to exclude weathertightness Claims, including mixed claims. In supporting this submission RiskPool reprises a point made in the Court of Appeal, namely, that weathertightness defects are often closely connected with other building defects and it is not always easy to distinguish them by cause. In addition, some

reliance is placed on the wish to address the increasing costs of weathertightness claims.

[70] We do not see RiskPool's argument on commercial purpose as adding to its case. Rather, it is essentially another way of putting the submission about the meaning of the text. We agree with the Court of Appeal that the purpose rather supports the view claims such as those brought by the Waterfront plaintiffs are only excluded to the extent they are linked, in the way envisaged by the clause, to weathertightness defects.

[71] We add that on our approach we do not need to deal with RiskPool's argument that the Court of Appeal was wrong to accept that RiskPool's interpretation created commercial absurdity. Nor, on our interpretation of the clause, is there any need to resort to the contra proferentem principle.

[72] For the reasons set out above, we have concluded there was no error in the Court of Appeal's construction of the exclusion clause nor in the Court's associated conclusion as to liability under the contract.

Result

[73] The appeal is dismissed.

[74] Costs should follow the event. The appellant must pay the respondent costs of $25,000 plus usual disbursements. We allow for second counsel.

Solicitors:
Young Hunter Lawyers, Christchurch for Appellant
Wilson Harle, Auckland for Respondent