



Supreme Court of New Zealand | Te Kōti Mana Nui o Aotearoa

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MEDIA RELEASE

LOCAL GOVERNMENT MUTUAL FUNDS TRUSTEE LTD v NAPIER CITY COUNCIL

(SC 103/2022) [2023] NZSC 97

PRESS SUMMARY

This summary is provided to assist in the understanding of the Court’s judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at Judicial Decisions of Public Interest: www.courtsofnz.govt.nz.

Background

In 2013, a group of apartment owners sued the Napier City Council for negligence in issuing building consents, ensuring adequate inspections and issuing code compliance certificates. Some of the building defects related to weathertightness, alleging non-compliance with clause E2 of the Building Code. Other defects, such as those relating to fire risk, did not relate to weathertightness but to alleged breaches of other parts of the Code.

The Council settled the claim by the apartment owners for about \$12 million. There was no apportionment in the settlement sum between the weathertightness and other defects. However, there was expert evidence showing that it was possible to divide the losses between those flowing from the weathertightness defects and those exclusively attributable to the non-weathertightness defects.

The Council made a claim from its insurer, Local Government Mutual Funds Trustee Ltd (which we will call “RiskPool”), for the portion of remediation costs unrelated to weathertightness.

RiskPool declined cover on the basis an exclusion clause, Exclusion 13(a), relating to weathertightness, applied. The exclusion stated that the relevant section of the insurance contract “does not cover liability for Claims alleging or arising directly or indirectly out of, or in respect of” weathertightness defects.

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) only excluded those parts of the claim concerning weathertightness, so demands not relating to weathertightness, such as fire risk defects, were not excluded. RiskPool maintained that because the apartment owners' demand for compensation included weathertightness claims, the whole claim was excluded.

Lower Courts' decisions

The High Court found in favour of RiskPool, holding that the exclusion clause excluded cover for weathertightness and non-weathertightness complaints where a weathertightness complaint is made. In case the conclusion on the exclusion clause was wrong, the High Court made various findings on the quantum of RiskPool's liability.

On appeal, the Court of Appeal disagreed with the High Court on the operation of the exclusion clause. The Court of Appeal concluded that Exclusion 13(a) only removed cover to the extent the alleged liability arose out of weathertightness claims.

Leave to Appeal

The Supreme Court granted RiskPool leave to appeal. The primary issue before the Court was whether the insurer was 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 as well.

Supreme Court decision

The Supreme Court has unanimously dismissed RiskPool's appeal.

In interpreting the exclusion clause, the Court applied the general approach to contractual interpretation as set out in earlier Supreme Court decisions. The approach is an objective one with the aim of ascertaining the meaning the document would convey to a reasonable person with all the relevant background knowledge.

The Court rejected RiskPool's argument that the Court of Appeal did not give the text of the exclusion clause the necessary weight. Among other things, it was clear from the Court of Appeal judgment that the text was central to its interpretation.

The Supreme Court also agreed, generally for the reasons given by the Court of Appeal, with that Court's construction of the exclusion clause. When the clause was read as a whole, in context, it was clear that the common intention was to exclude only the risks specifically referred to – namely, weathertightness. 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 even though the claim had been presented by the apartment owners on a mixed basis.

The Court considered the interpretation advanced by RiskPool focused unduly on one part of the clause, was textually awkward and ignored certain words. In addition, the Court did not see the contextual matters relied on by RiskPool as sufficiently compelling to have any impact on the proper interpretation of the contract. RiskPool's argument on commercial purpose did not add to its case.

It was not necessary for the Court to address the commercial absurdity arguments or resort to the contra proferentem principle (the principle that ambiguous terms should be construed against the party that proposed them).

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