IN THE SUPREME COURT OF NEW ZEALAND
I TE KŌTI MANA NUI O AOTEAROA

SC 103/2022
CA 444/2021: [2022] NZCA 422
CIV 2017-441-070: [2021] NZHC 1477

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

SUBMISSIONS BY APPELLANT IN SUPPORT OF APPEAL

We certify that the Appellant's submissions are suitable for publication and do not contain any information that is supressed.

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1.0 Introduction

1.1 On 21 December 2022, this Court granted leave to the appellant, Local Government Mutual Funds Trustee Limited (**Riskpool**), to appeal against the liability part of the Court of Appeal's judgment dated 8 September 2022.[1] The approved question was whether the Court of Appeal was correct in:[2]

(1) Its interpretation of exclusion 13(a) in the Professional Indemnity section (Section B) of Riskpool's Protection Wording (**PW**); and

(2) Its consequent finding that the claim by the respondent, Napier City Council (**NCC**), under the PW in relation to its liability to the plaintiff owners of apartments in the Waterfront Apartments complex (**WFPs**) was excluded by exclusion 13(a) only to the extent that NCC's liability arose directly or indirectly out of, or in respect of, weathertightness defects.

1.2 Exclusion 13(a) provided as follows:[3]

> *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 or any applicable New Zealand Standard (or amended or substituted regulation or standard) in relation to leaks, water penetration, weatherproofing, moisture, or any water exit or control system.*

1.3 In the lower courts it was common ground that:

- A building defect may be the result of one or more breaches of the same or different sections of the Building Code.
- Subclause (a) of exclusion 13 described a building defect that was a "*weathertightness defect*"; and the respective judgments adopted this shorthand description for the subclause.[4]
- A "*weathertightness defect*":
  - Was any building defect "*involving an alleged breach of E2 of the Building Code, and a non-weathertightness defect is any defect not involving an alleged breach of E2 of the Building Code*"[5] (emphasis added).

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[1] *Napier City Council v Local Government Mutual Funds Trustee Limited* [2022] NZCA 422 (Miller, Brown & Katz JJ). **(101.0159-101.0182**, at paras [1] – [82]**)**.

[2] *Local Government Mutual Funds Trustee Limited v Napier City Council* [2022] NZSC 152 **(05.0009)**.

[3] **(302.0299-302.0300)**.

[4] **(101.0031**, at paras [7] – [8] & f/n 4**)**. The Court of Appeal used the same description without defining it.

[5] This was NCC's terminology (NCC's HC closing subs, para 12.10). Section E2 of the Building Code deals with External Moisture.

- Included a mixed defect, being a defect "*involving*" alleged breaches of both E2 and also other sections of the Building Code, such as B1 (Stability) and/or B2 (Durability).[6]

- All the weathertightness defects in this case were this latter type of mixed defect, in that each involved both a breach of E2, as well as a breach of E1 (Surface Water), B1, and/or B2.[7]

1.4 The expression, "*weathertightness claims*", was first used between the parties in June 2006, in the PW documents and as synonymous with "*Building Defects Claims Involving Moisture Ingress*". Subsequently, it appeared (only) in the annual PW schedules, initially to describe "*Claims*" that were sub-limited to $500,000 and, subsequently, to describe "*Claims*" that were "*EXCLUDED*" altogether. Riskpool says that it must logically follow that a "*weathertightness claim*" is a building defects claim that either is based solely on weathertightness defects or (as in this case) is "*mixed*"[8], in that it involves both weathertightness defects and non-weathertightness defects.

1.5 However, and contrary to the High Court's judgment,[9] the Court of Appeal held, that, on a proper interpretation of the exclusion, NCC's liability for each of the WFPs' "*Claims*" was divisible between weathertightness and non-weathertightness defects.

1.6 Riskpool says that the Court of Appeal erred in this conclusion. It should have held that any cover for NCC's liability for the WFPs' "*Claims*" was entirely excluded — because the co-involvement of the weathertightness defects tainted the whole mixed claim. The common intention to exclude these mixed claims in their entirety was the only reasonable inference from the language in the PW documents and associated communications[10] — as the following makes clear:

- The subject-matter of the exclusion is "*Claims*", not "*liability*"; and

- Pursuant to the specified alternative qualifying links, what is excluded is indemnity for NCC against any liability if this liability is for "*Claims*": (1) "*alleging*"; and/or (2) "*arising directly or indirectly out of*"; and/or (3) "*in respect of*", weathertightness defects; and

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[6] **(101.0031**, para [8]**)**.

[7] In terms of: (1) number, there were 12 weathertightness defects (#1 — #12) and 9 non-weathertightness defects (#13 - #21); (2) amount, based on the HC's apportionment, the weathertightness defects accounted for about 75% of the total remedial works costs.

[8] The expression, "*mixed claims*" was used by Devlin J in *West Wake Price & Co v Ching* [1956] 3 All ER 821 (HC), to describe a claim involving both insured and uninsured components — in that case, involving indivisible causes of action (at p.825/C) **[RP AUTH 27]**.

[9] *Napier City Council v Local Government Mutual Funds Trustee Limited* [2021] NZHC 1477 **(101.0129**, para [345]**)**.

[10] In relation to relevant background to the proper interpretation of the insurance contract in force between Riskpool and NCC with effect from 30 June 2014, Riskpool only relies on the evolution of the PW, as its proper meaning is evidenced from the PW documents themselves, correspondence between Riskpool and all Members including NCC, and Riskpool's Annual Reports sent to all Members including NCC. As a result, Riskpool does not challenge the Court of Appeal's conclusions on the Dalton Street claim (**101.0172-101.0174**, paras [46] — [55]).

- When this cover was first restricted by the sub-limit, the subject-matter of both the exclusion and its complementary extension, as evidenced by the heading on the endorsements expressly incorporated into the then current PW wording, was "*Building Defect Claims Involving Moisture Ingress*" (emphasis added); and

- This was synonymous with "*Weathertightness Claims*", as evidenced by the contemporary correspondence, the heading on the extension when subsequently inserted into the PW and, from 2009, the Limit of Indemnity in the PW which provided that these "*Weathertightness Claims*" were "*Excluded*".

1.7 If, at this stage, in accordance with the applicable principles, the Court of Appeal had then done the required cross-check against common purpose, it could not reasonably have concluded that "*something had gone wrong with the language*" — being the test required to override the ordinary meaning of the words used; and, instead, it would have been constrained by the unqualified use of "*involving*" in this context which could only reasonably refer to mixed "*Claims*".

2.0 Facts

2.1 Riskpool was a subsidiary of New Zealand Local Government Insurance Corporation Limited and the trustee of what was known as the New Zealand Mutual Liability Riskpool Scheme. The Scheme provided insurance cover to local authorities for public liability and professional indemnity risks. NCC became a Member of the Scheme at its inception in 1997 and renewed its cover annually on 30 June in each year until the expiry of the 2014/2015 Fund Year when it withdrew from the Scheme. Subsequently, the Scheme failed — predominantly because of the cost to Riskpool and its Members of these types of claims.[11]

2.2 In 2007, NCC had issued code completion certificates for the Waterfront Apartments complex. In October 2014, during the 2014/2015 Fund Year, the WFPs brought proceedings against NCC and other construction participants.[12] The WFPs' statement of claim pleaded one cause of action in negligence against each defendant.[13] In relation to NCC, the SoC alleged that NCC was negligent in all three aspects of its "*inspection role*". The statement of claim alleged against all defendants, including NCC, that, as a result of their negligence, the complex was constructed with substantial weathertightness defects, as well as some significant non-weathertightness defects.

2.3 The WFPs claimed lump sum compensation based on the aggregate cost of two pleaded scopes of remedial works (for the blocks and balconies, respectively), plus consequential losses and general damages. Each scope of works, once

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[11] **(101.0162**, para [13]**)**.

[12] NCC had not received any prior notice of the claim; nor was it previously aware of any notifiable circumstance.

[13] **(303.0485)**. The WFPs' last pleading was their 7SoC 5 October 2018.

completed, would remediate both weathertightness and non-weathertightness defects.[14]

2.4 NCC claimed indemnity from Riskpool. By its insuring clause, the PW covered NCC for "*Claims*" for breach of its inspection role due to negligence, a "*Claim*" being defined as "*...the demand for compensation made by a third party against the Member...*".[15] Riskpool declined cover on the basis that: (1) each WFP had made one "*Claim*" on NCC; and (2) the PW did not cover NCC for its liability for these "*Claims*" because they were "*alleging*", or were "*arising directly or indirectly out of*", or were "*in respect of*" weathertightness defects — even though they were also "*alleging*", or were also "*arising directly or indirectly out of*", or were also "*in respect of*" non-weathertightness defects.

2.5 The WFPs' proceeding settled at a mediation in February 2019, to which Riskpool was invited and then, the day beforehand, disinvited. As part of a confidential settlement, NCC agreed to pay an undivided and unallocated lump sum of $12,355,000 to the WFPs.[16]

2.6 By this proceeding, NCC sought to recover from Riskpool the proportion of this settlement sum allegedly attributable to just the non-weathertightness defects[17] — on the basis that exclusion 13(a) did not fatally infect each of the WFPs' "*Claims*" as a whole but, instead, required Riskpool to divide NCC's liability between the two categories of defect.

3.0 Court of Appeal's Judgment

3.1 In the liability section of its judgment, the Court of Appeal upheld the High Court's conclusion in favour of Riskpool that each of the WFPs had made one "*Claim*" against NCC that pleaded both weathertightness and non-weathertightness defects.[18] However, disagreeing with the High Court, the Court of Appeal then held that, on a proper interpretation, exclusion 13(a) only applied to NCC's liability that was specifically causally connected to or attributable to weathertightness defects — requiring an apportionment of the settlement sum.

3.2 The Court of Appeal's relevant findings are mainly encapsulated in paras [60], [67], [75], [76] & [81] of its judgment as follows:

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[14] **(101-0164-101.0165; 101.0175**, paras [22], [24] & [59]**)**.

[15] The Court of Appeal "*observed*" that "*Claim*" in the Deed of Trust (which takes priority over the PW in the event of inconsistency **(301.0009**, Deed of Trust, cl. 14: **303.0391**, Scheme Rules 2013, cl. 2.2: **302.0294**, PW, Section B, insuring clause**)** referred to NCC's claim for indemnity **(101.0165**, para [27]**)**. If this played any part in the Court of Appeal's reasoning or conclusions, this was obviously an error. In the Trust Deed, "*Underlying Claim*" is synonymous with "*Claim*" in the PW **(301.0002**, Deed of Trust, cl. 1.1**)**.

[16] **(303.0438**, Settlement Agreement 14 February 2019, Annexure 1, Payment Schedule**)**.

[17] NCC also claimed an apportionment of defence costs between weathertightness & non-weathertightness defects. Before the High Court trial, the parties agreed an amount of defence costs payable if, notwithstanding exclusion 13(a), the settlement sum was apportionable.

[18] **(101.0175**, para [59]**)**. There is no challenge to this finding.

> *[60] … The exclusion carves out a class of Claims which are causally connected to weathertightness defects. Not all of the defects in the plaintiffs' Claims fell into that class…*
>
> *[67] We have found that each plaintiff made a single Claim, but that is not the end of the inquiry. For insurance purposes a third party's demand for compensation may be aggregated or divided…The question is whether they may be divided according to the nature of the Council's liability.*
>
> *[75] … The words "alleging or arising directly or indirectly out of, or in respect of" contemplate an indirect (but specific) causal connection to weathertightness. Consistent with that, the exclusion removes cover for "liability for" Claims causally connected to weathertightness…*
>
> *[76] The commercial purpose does not compel the conclusion that the parties intended to exclude liability for sums not causally related to weathertightness, as we have explained. It points rather to the conclusion that such Claims are within the indemnity but excluded to the extent they are causally attributable to weathertightness defects.*
>
> *[81] … we conclude that Exclusion 13 removed cover for the plaintiffs' claims only to the extent that the Council's liability alleged arose directly or indirectly out of, or in respect of weathertightness defects.*

3.3 In reaching these conclusions, the Court of Appeal erred in each of the following ways.

3.4 In relation to the text, it wrongly failed to:

(1) Treat the text as "*centrally important*", and then cross-check its provisional interpretation against the parties' intended commercial purpose.

(2) Correctly interpret or apply the expression in the exclusion that Section B of the PW "*does not cover liability for Claims…*"

(3) Treat the limbs in the exclusion, "*Claims <u>alleging</u>…*" weathertightness defects, or "*Claims…<u>in respect of</u>…*" weathertightness defects, respectively, as stand-alone alternative links and, as a result, to recognise, consider or apply the non-causal meaning of both or, at least, of "*alleging*.

(4) Apply the *Wayne Tank* principle to exclude any indemnity, because one concurrent cause of the "*Claims*" was expressly excluded.

3.5 In relation to the wider PW context, it misstated and/or misunderstood the correct evolution of the PW, which initially limited, and then excluded, any indemnity against NCC's liability for "*Claims*" that included both weathertightness and non-weathertightness defects – as evidenced by: (1) the endorsements initially incorporated into the PW, headed "*Building Defect Claims <u>Involving</u> Moisture Ingress*"; and (2) the contemporaneous description in the PW of these types of "*Claims*" as "*Weathertightness Claims*", and the repetition of this description in successive PW schedules.

3.6 In relation to commercial purpose, it wrongly:

(1) Assumed, contrary to the text and the wider PW context, that, because Riskpool was willing to continue to provide indemnity for building defect claims that did not involve weathertightness defects, it must necessarily

have intended by exclusion 13(a) to treat mixed "*Claims*" as divisible into separate liabilities for weathertightness and non-weathertightness defects, respectively.

(2) Held, based on the extreme example of weathertightness as a "*trifling*" part of the "*Claim*", that Riskpool's interpretation of the exclusion was "*commercially absurd*" — particularly, without giving proper weight to: (a) the interpretation context (in dealing with the *de minimis* principle); and/or (b) the mutual insurance scheme context.

4.0 Text

Proper approach: provisional interpretation of text

Court of Appeal

4.1 As the Supreme Court held in *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* and affirmed in *Bathurst Resources Ltd v L&M Coal Holdings Ltd*:[19]

> *[63] While context is a necessary element of the interpretive process and the focus is on interpreting the document rather than particular words, the text remains centrally important. 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.* (footnotes omitted)

4.2 The Court of Appeal expressly recognised these principles.[20] However, it did not first address the actual text of the exclusion until 74 paragraphs into the 82-paragraph liability section of its judgment. By then, it had already decided the "*commercial purpose*", namely:[21]

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

Error in approach

4.3 The reasons that this commercial purpose conclusion was wrong, and the proper textual analysis that the Court of Appeal should have undertaken, are addressed in detail later. At this stage, Riskpool's focus is on the Court's error in approach

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[19] *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2015] 1 NZLR 432 (SC), at pp.454/29 — 455/4, para [63] (McGrath, Glazebrook & Arnold JJ) **[RP AUTH 9]**; *Bathurst Resources Ltd v L&M Coal Holdings Ltd* [2021] 1 NZLR 696 (SC), at pp.717/21 — 712/9, para [43] (Winkelmann CJ & Ellen France J) **[RP AUTH 5]**. This judgment was pending when the HC delivered its judgment.

[20] **(101.0170-101.0171**, paras [41] & [43]**)**.

[21] **(101.0179**, paras [70] — [71]**)**.

— which is that it failed to apply a first principle of contractual interpretation and, instead, did the exact opposite of what it was required to do.

4.4 This is not one of those instances where a proper approach requires a court to consider a number of factors but it does not matter in which order or under which headings the court does so, so long as, ultimately, they are all taken into account. As the Court of Appeal held in *Pyne Gould Guinness Ltd v Montgomery Watson (NZ) Ltd*, apparently coining the description, "*cross-check*", in this context:[22]

> *[29] The best start to understanding a document is to read the words used, and to ascertain their natural and ordinary meaning in the context of the document as a whole. One then looks to the background — to "surrounding circumstances" — to cross-check whether some other or modified meaning was intended....*

Reasons for proper approach

4.5 There are good reasons for this two-stage approach and this order. First, it gives primacy to the language chosen by the parties to express their bargain, which is the objective manifestation of their presumed common intention; and, second, it provides the court with a constraining framework within which to make the required commercial purpose assessment.

4.6 As Lord Mustill said in *Charter Reinsurance Co Ltd v Fagan*, "*...the inquiry will start, and usually finish, by asking what is the ordinary meaning of the words used.*"[23] However, the existence of a dispute about contractual intention necessarily implies that the ordinary meaning may not have been what the parties objectively intended "*and, in part, those opposing constructions can sometimes be assayed by reference to the commercial result which they produce.*"[24]

Ascertaining commercial purpose

4.7 It follows that relevant commercial purpose must be logically and rationally ascertained from the language used by the parties, the surrounding circumstances, and the general nature of the provision in question. Moreover:[25]

> *(1) "Purpose" is something that must be assessed objectively and frequently it is not clear and is highly contestable;*
>
> *(2) "Purpose" is something which may be assessed at various levels of abstraction;*
>
> *(3) A document may contain competing purposes and questions may arise as to the extent to which a provision intends to advance one of those purposes; and*
>
> *(4) Even where an underlying purpose can be discerned, the extent to which it can inform meaning is limited by the words used.*

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[22] *Pyne Gould Guinness Ltd v Montgomery Watson (NZ) Ltd* [2001] NZAR 789 (CA), at p.799, para [29] **[RP AUTH 18]** — endorsed in *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] 2 NZLR 444 (SC), at p.459/19 — 31, para [24] & f/n 26 (Tipping J) **[RP AUTH 24]**. Also, *Trustees Executors Ltd v QBE Insurance (International) Ltd* (2011) 16 ANZ Insurance Cases 61-874 (NZCA), at p.78,613, para 31 (William Young P, Glazebrook & O'Regan JJ) **[RP AUTH 22]**.

[23] *Charter Reinsurance Co Ltd v Fagan* [1997] AC 313 (HL), at p.384 (Lord Mustill) — cited in *Rockment Pty Ltd t/as Vanilla Lounge v AAI Ltd t/as Vero Insurance* (2020) 20 ANZ Insurance Cases 62-259 (FCAFC), at p.78,423, para 53 **[RP AUTH 19]**.

[24] *Rockment Pty Ltd t/as Vanilla Lounge v AAI Ltd t/as Vero Insurance*, at pp.78,423 — 78,424, para 54.

[25] *Rockment Pty Ltd t/as Vanilla Lounge v AAI Ltd t/as Vero Insurance*, at p.78,425, para 57.

Relationship with commercial absurdity

4.8 The related principles of commercial absurdity only become relevant if the ordinary meaning of the text, provisionally reached and then cross-checked against commercial purpose, would produce an interpretation so wholly irrational that it could not realistically reflect the parties' presumed common intention.[26]

4.9 Collectively, the proper approach dictated by these principles is meant to prevent the Court from "*arrogating to themselves overconfidently the role of arbiter of commercial reasonableness or likelihood*" and rewriting the bargain because of a subjective assessment that it has turned out to be unduly favourable to one party.[27]

Meaning of text

Court of Appeal

4.10 Having (wrongly) decided the parties' commercial purpose for the exclusion without reference to the language of the exclusion, the Court of Appeal purported to justify this mistaken view against the actual text in three cursory and conclusory paragraphs:

> *[74] ...cover does not extend to liability for Claims "alleging or arising directly or indirectly out of, or in respect of" a weathertightness defect. These words address the degree of proximity between demand for payment and underlying liability that is necessary to trigger the exclusion.*
>
> *[75] We accept that the exclusion contemplates that a Claim may incorporate a number of Council liabilities. The words "alleging or arising directly or indirectly out of, or in respect of" contemplate an indirect (but specific) causal connection to weathertightness. Consistent with that, 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. But the language of causation shows 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.*
>
> *[76] The commercial purpose does not compel the conclusion that the parties intended to exclude liability for sums not causally related to weathertightness, as we have explained. It points rather to the conclusion that such Claims are within the indemnity but excluded to the extent they are causally attributable to weathertightness defects.*

Interpreting an insurance contract exclusion

4.11 The purpose of an exclusion is to carve out from the claims covered by the general words in the insuring clause some claims which the parties specifically want to exclude — not necessarily just based on what caused or contributed to them.[28] "*Sometimes this is...of a most extensive degree.*"[29] Although an

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[26] *Firm Pl 1 Ltd v Zurich Australian Insurance Ltd*, at pp.461/1 — 463/35, paras [88] — [97] (McGrath, Glazebrook & Arnold JJ): *Rockment Pty Ltd t/as Vanilla Lounge v AAI Ltd t/as Vero Insurance*, at p.78,424, paras 54 — 55.

[27] *Firm Pl 1 Ltd v Zurich Australian Insurance Ltd*, at pp.461/25 — 462/11, paras [89] — [90] (McGrath, Glazebrook & Arnold JJ). Also, *Vector Gas Ltd v Bay of Plenty Energy Ltd*, at p.482/38, para [123] (Wilson J).

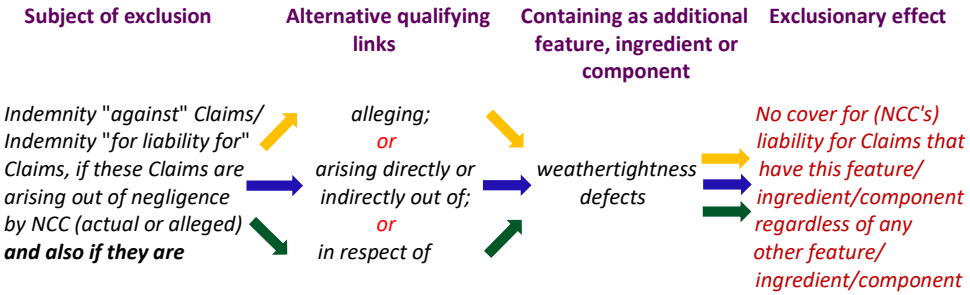
[28] "*Not every exclusion clause operates by excluding a defined activity; some may be concerned with time, place, or nature of loss (for example exemplary damages may be excluded*" (*AMI Insurance Ltd v Legg* (2017) 19 ANZ Insurance Cases 62-148 (NZCA), at p.75,804, para [32] (footnote omitted) **[RP AUTH 4]**).

[29] *Walton v National Employers' Mutual General Insurance Association Ltd* (1973) 2 NSWLR 73 (NSWCA), at p.84/D (Bowen JA) **[RP AUTH 25]**: Derrington & Ashton, *The Law of Liability Insurance* (3rd edition: LexisNexis Butterworths Australia: 2013), vol. 2, para 10-2, p.1828 **[RP AUTH 8]**.

exclusion clause should be construed narrowly, this does not justify a strained meaning. Its proper interpretation still takes place in the overarching context of ascertaining the presumed intention of the parties, primarily by reference to the language that they have chosen.[30]

Structure of exclusion

4.12 Pursuant to the terms of exclusion 13(a), Riskpool "*does not cover liability for Claims alleging or arising directly or indirectly out of, or in respect of*" weathertightness defects. Contrary to the Court of Appeal's conclusions, the structure of the exclusion is as follows:



PW does not cover liability for Claims

4.13 The Court of Appeal held that:

> *[60] ... The exclusion carves out a class of Claims which are causally connected to weathertightness defects. Not all of the defects in the plaintiffs' Claims fell into that class...*
>
> *[66] ... The question is whether, as a matter of construction, the exclusion clause allows RiskPool to deny a request for indemnity that is within the policy limits. The answer depends on whether the Wording contemplates that a Claim is divisible when it incorporates insured and excluded liabilities that are not co-extensive (in the sense that to pay one is to discharge the other).*
>
> *[67] ... The question is whether they may be divided according to the nature of the Council's liability...*
>
> *[72] We accept that "Claim" is defined at what Mr Ring described as a high level of abstraction — a demand for compensation. But the exclusion necessarily contemplates an inquiry into the real nature of the Council's liability...*
>
> *[74] ... the Protection Wording makes clear what was meant: cover does not extend to liability for Claims "alleging or arising directly or indirectly out of, or in respect of" a weathertightness defect. These words address the degree of proximity between demand for payment and underlying liability that is necessary to trigger the exclusion.*
>
> *[75] ... 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...*

"*Claim*", not "*liability*"

4.14 The Court of Appeal correctly stated (at para [60] above) that the exclusion "*carves out a class of Claims*" from the insuring clause.[31] By this statement alone, the Court of Appeal should have recognised, that the subject-matter of the exclusion was "*Claims*" against NCC and not NCC's liabilities pursuant to them.

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[30] *Trustees Executors Ltd v QBE Insurance (International) Ltd*, at p.78,614, para 38 (William Young P, Glazebrook & O'Regan JJ).

[31] However, the Court of Appeal was wrong about that they had to be "*causally connected*" to weathertightness defects.

4.15 The words in the expression, "*does not cover liability for...*" are linguistically linked together. They describe the carve-out effect. By the insuring clause Riskpool promised to "*indemnify* [NCC] *...against Claims...arising out of*" (emphasis added) its negligence having any consequences whatsoever.[32] In other words, Riskpool promised to indemnify NCC for any liability that it may have (actual or alleged) for this type of claim. This reflects that NCC's liability is the fundamental purpose of the cover and is the only circumstance in which NCC would require an indemnity in relation to a "*Claim*".[33] It is also reflected in the terms of the Trust Deed, by which an "*Underlying Claim...may at the discretion of the Board be met...*".[34]

4.16 Consistent with its carve-out purpose, an exclusion must be read by reference to the insuring clause.[35] In the exclusion, the expression, "*does not cover liability for...*", is "*simply shorthand for...* [does not] *indemnify the insured against*'."[36] As a result, NCC was not "*indemnified against*" or, in other words, it was not covered for its liability for, the specified "(*class or type of*) *Claims*", namely, "*Claims*" that it was negligent and that also alleged weathertightness defects, or arose out of weathertightness defects or were in respect of weathertightness defects.

4.17 In *Walton*, the NSWCA made the same point in respect of the element in an insuring clause describing the insured's business activities:[37]

> *...The point about s. 3B is that it applies to claims for which the insured is legally liable, made by third parties on the insured, but limited to those claims "arising out of negligence in the conduct of the insured's business as stockbrokers." The question is to determine the meaning of this last-mentioned phrase.* ***It is a phrase which defines the type of claim and not the type of legal liability.*** (emphasis added)

4.18 The proper approach is also set out in the NSWCA's judgment in *Allianz Australia Ltd v Wentworthville Real Estate Pty Ltd Co*. Mason P held that an insuring clause provides indemnity for claims "*having a particular character*". The policy exclusions address the same types of claim. The relevant enquiry is whether the claim has "*an additional character*", namely, the extra features specified in the exclusion — features that, if they exist and satisfy the specified links, the parties have agreed would disqualify the insured from indemnity for that type of claim, notwithstanding that it is within the terms of the insuring clause.[38]

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[32] **(302.0294)**.

[33] Except for defence costs which were the subject of a separate indemnity promise.

[34] **(301.0004**, Deed of Trust, cl. 4.2**)**. An "*Underlying Claim*" is a "*claim for civil liability*" against a Member **(301.0002**, Deed of Trust, cl. 1.1**)**. So, it is synonymous with a "*Claim*" under the PW. Similarly, the Scheme Manager had delegated authority to meet "*Claims*" (for indemnity) falling within the PW where the "*Underlying* Claim" is one "*for which the Member is reasonably liable and would in all probability be held liable at law for the amount of the Claim*" **(301.0007**, Deed of Trust, cl. 8.3.3**)**.

[35] *Allianz Australia Insurance Ltd v Rawson Homes Pty Ltd* (2021) 21 ANZ Insurance Cases 62-289 (NSWCA), at pp.78,801-509 — 78,801-510 (Leeming JA) **[RP AUTH 2]**.

[36] *Medical Assurance Society of New Zealand Ltd v East* (2015) 18 ANZ Insurance Cases 62-074 (NZCA), at p.76,700, para [20] **[RP AUTH 17]**. In that case, in a material damage policy, the clause stated that MAS "*will cover the cost*" of reinstatement.

[37] *Walton v National Employers' Mutual General Insurance Association Ltd*, at p.78/E (Kerr CJ).

[38] *Allianz Australia Ltd v Wentworthville Real Estate Pty Ltd Co*, (2004) 13 ANZ Insurance Cases 61-598 (NSWCA), at p.77,175, paras 38 — 39 (Mason P) **[RP AUTH 3]**. The insuring clause provided indemnity against legal liability

4.19 However, the Court of Appeal failed to recognise that the subject of the exclusion was "*Claims*", and not "*liability*". This meant that it effectively, and erroneously, treated the expression, "*liability for Claims*", in the exclusion as if it consisted of just the word, "*liability*",[39] making redundant the reference to "*Claims*" as well.[40]

4.20 The Court of Appeal then compounded this error by making the inconsistent findings that the links ("*alleging…*", etc): (1) "*address the degree of proximity between*" NCC's liability and the "*Claims*"; cf., (2) "*contemplate an indirect (but specific) causal connection*" between "*weathertightness*" and the "*Council's liabilities*", respectively.[41]

4.21 Quite apart from anything else, the parties made their common intention unequivocally clear in this respect by specifying "*alleging*", and/or "*in respect of*", as equal alternatives to "*arising directly or indirectly out of*". In particular, in the ordinary use of language it is not possible to have a "*liability…alleging*" something. So, the parties could not reasonably have intended by exclusion 13(a) that Riskpool would "*not cover liability…alleging…*" weathertightness defects. However, not covering "*…Claims alleging…*" weathertightness defects is immediately recognisable as an entirely orthodox use of language in this context.[42]

4.22 The FCAFC's judgment in *AIG Australia Limited v Kaboko Mining Limited* also supports this analysis. The insuring clause provided that AIG would "*pay the Loss*" of each insured arising from "*Management Liability*", being liability arising from his or her actual or alleged conduct as a manager. "*Loss*" was defined as legal liability resulting from a management liability claim satisfying the insuring clause. The relevant exclusion was for indemnity against the insured's "*Loss in connection with any Claim arising out of, based upon or attributable to*" KML's insolvency.[43]

4.23 The FCAFC held that, if the exclusion had referred only to "*Loss*", with no reference to "*Claim*" as well, the specified links to insolvency ("*arising out of, based upon or attributable to*") would have needed to be evaluated by reference to the insured's legal liability. The focus would be on the character of this

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for any claim in respect of civil liability. The exclusion stated that Allianz "*shall not indemnify the Insured in respect of any claim against the Insured…(k) For any alleged or actual bodily injury or property damage*" (p.77,171, paras 12 & 15 — Mason P).

[39] "*… the exclusion necessarily contemplates an inquiry into the real nature of the Council's liability*" **(101.0179**, para [72]**)**.

[40] The Court of Appeal did not cite any authority for this interpretation.

[41] **(101.0180**, para [74], cf., paras [75] & [76]**)**.

[42] Devlin J applied the same reasoning in *West Wake Price v Ching* when he stated that "*one cannot pay a cause of action*", but someone can "*pay a claim*" (at p.831/B — C).

[43] *AIG Australia Limited v Kaboko Mining Limited* (2019) 20 ANZ Insurance Cases 62-205 (FCAFC), at pp.77,182, paras 27 — 30 **[RP AUTH 1]**. In that case, "*Claim*" was defined by reference to a demand or civil proceeding "*for a specified act error or omission*". If the PW had defined "*Claim*" in the same way, each WFP would have made multiple "*Claims*" on NCC, and the exclusion would have been divisible between weathertightness defects and non-weathertightness defects, respectively.

amount and whether it was sufficiently linked to insolvency.[44] However, because the exclusion referred to "*Loss*" in connection with any "*Claim*", the specified links to insolvency should not be read as applying to "*Loss*". This interpretation would give the words, "*in connection with any Claim*" no work to do. Rather:[45]

> *...the insolvency link qualifies the types of Claims for which indemnity for Loss must be provided. If the Loss (liability to pay) is 'in connection with' any Claim with the specified insolvency link then it is excluded.*

4.24 Similarly, in this case, the insuring clause in the PW provides indemnity against "*Claims...for breach of Professional Duty arising out of any negligent act, error or omission...*". Exclusion 13(a) addresses "*the same type of 'claim'...*". The relevant words of the exclusion are "*liability for Claims*" — being analogous to "*Loss in connection with any Claim*", in *AIG Australia Limited v Kaboko Mining Limited*.[46] The links are that they are "*alleging or arising directly or indirectly out of, or in respect of*" weathertightness defects. As a result, they should be not be read as applying to "*liability*", but to "*Claims*". Otherwise, as Mason P held in *AIG Australia Limited v Kaboko Mining Limited*, the words, "*...for Claims*", would have no work to do.

4.25 Once the proper focus is placed on the "*character*" of the WFPs' "*Claims*", not on the character of NCC's legal "*liability*", the relevant inquiry becomes whether the "*Claims*" have the "*additional character*" or feature that they are also "*alleging or arising directly or indirectly out of, or in respect of*" weathertightness defects. If so, indemnity against NCC's liability for each "*Claim*" is excluded in its entirety — regardless of whether the "*Claim*" has another "*additional character*" or feature in relation to non-weathertightness defects.

Indivisibility

4.26 The next logical question flowing from this conclusion should have been whether the class of "*Claims*" which the exclusion carved out was "*Claims alleging...*", etc. solely weathertightness defects, or whether the exclusion carved out mixed claims as well; and the answer should have been that, because of their co-involvement in the "*Claims*", these weathertightness defects tainted the whole of each "*Claim*"; and it should not have been, as the Court of Appeal did, to read words into the exclusion that are not there and that contradict the ordinary meaning of what is there.

4.27 Having concluded that the exclusion should be read as providing that Section B of the PW "*does not cover liability for...*" weathertightness defects, the Court of Appeal went on to formulate (in the passage above in para [66]) as the central issue whether the PW "*contemplates that a Claim is divisible* [into] *insured and excluded liabilities...*" The Court of Appeal also begged the "*question*", or asked

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[44] *AIG Australia Limited v Kaboko Mining Limited*, at pp.77,186, para 45. Riskpool specifically cited this part of the FCAFC's judgment in support of its argument. But the Court of Appeal did not refer to it.

[45] *AIG Australia Limited v Kaboko Mining Limited*, at p.77,186, para 47.

[46] The result would have been the same in *AIG Australia Limited v Kaboko Mining Limited* even if the exclusion had read, "*Loss for any Claim*" or "*liability for any Claim*".

the wrong "*question*", by framing it as "*whether, as a matter of construction, the exclusion clause allows RiskPool to deny a request for indemnity that is* ***within the policy limits***."[47] Every exclusion allows the insurer to deny a request for indemnity that would otherwise be within the insuring clause — because that is its very purpose.[48] The "*policy limits*" in this context are what is left of the insuring promise in the insuring clause after carving out what has been excluded by the particular exclusion.

4.28 As defined in the policy, a "*Claim*" is "*the demand for compensation*" (emphasis added). This refers to the subject matter of the claim (rather than the conduct associated with it).[49] In this building defects context, each WFPs' demand is not "*apportionable*" between types of defects. Despite the primary measure of damages by way of "*cost of cure*", the essential nature of the WFPs' demand for compensation and, therefore, also of NCC's liability, 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. Each of the WFPs suffered this economic loss when the defects were actually discovered or reasonably discoverable, because that marked the moment at which a reasonably knowledgeable purchaser would have paid less for the apartment than if the complex did not have these defects; and the defects were not necessarily discovered or discoverable individually or strictly in type order.[50]

4.29 It follows that the "*Claim*" does not become divisible just because some of the claimed compensation for the overall scope of remedial works has been or can be arbitrarily allocated, equally or unequally, between particular defects — such as common remediation costs (demolition/disassembly, reconstruction/reassembly, P&G, scaffolding, etc). Additionally, other heads of loss/compensation are clearly indivisible between types of defects — consequential losses (loss of rent/alternative accommodation costs, storage, etc) and general damages.[51]

Specified alternative qualifying links

4.30 Even if the WFPs' "*Claims*", or NCC's liability, were inherently divisible between weathertightness and non-weathertightness defects, respectively, the specified alternative qualifying links betwen "*Claims*"/"*liability*" necessarily infer that this was not what the parties must be taken to have intended.

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[47] **(101.0177**, para [66]**)**.

[48] Derrington & Ashton, vol. 2, pp.1845 — 1846, para 10-14.

[49] *Junemill Limited (In liq) v FAI General Insurance Company Limited* (1997) 9 ANZ Insurance Cases 61-377 (QCA), at p. 77,127 (cols 1 — 2) (Fryberg J) **[RP AUTH 13]**.

[50] *Invercargill City Council v Hamlin* [1996] 1 NZLR 513 (PC), at p.526/5 — 43 **[RP AUTH 12]**.

[51] Although not claimed in this case, the compensation commonly includes an also indivisible stigma head of loss, that is, a residual diminution in value even after all defects have been repaired, which is attributable to the market's perception of the risk of further latent defects, again not categorised by reference to any particular class of building code requirements not complied with.

4.31 Without distinguishing between the individual alternative links, the Court of Appeal held that weathertightness defects and "(*liability for*) *Claims*" required a causative connection — as follows:

> *[60] … The exclusion carves out a class of Claims which are causally connected to weathertightness defects. Not all of the defects in the plaintiffs' Claims fell into that class….*
>
> *[75] …The words "alleging or arising directly or indirectly out of, or in respect of" contemplate an indirect (but specific) causal connection to weathertightness. Consistent with that, 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. But the language of causation shows 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.*
>
> *[76] The commercial purpose does not compel the conclusion that the parties intended to exclude liability for sums not causally related to weathertightness, as we have explained. It points rather to the conclusion that such Claims are within the indemnity but excluded to the extent they are causally attributable to weathertightness defects.*
>
> *[81] For these reasons we conclude that Exclusion 13 removed cover for the plaintiffs' claims only to the extent that the Council's liability alleged arose directly or indirectly out of, or in respect of weathertightness defects.*

4.32 Despite Riskpool's submissions to the contrary,[52] the Court of Appeal treated all three links as effectively synonymous, and as ineffective in achieving a total exclusion of the WFPs' "*Claims*" in their entirety — even though they are stand-alone equal alternatives and each is applicable in its ordinary meaning. By doing so, the Court of Appeal overlooked or ignored that "*alleging*" cannot convey a causative connection, and "*in respect of*" does not necessarily do so either.

Arising directly or indirectly out of

4.33 This is synonomous with "*arising from*". Both refer to indirect causation. To satisfy either, the relevant cause, in this case, weathertightness defects, only has to be "*merely a material contributing factor*".[53] This does not rule out other contributing factors. But it does infer their potential co-existence.

Alleging

4.34 The Court of Appeal did not acknowledge, let alone address, the separate meaning of "*alleging*" in this context. Instead, it seems to have regarded "*alleging*" as necessarily conveying a causal relationship, effectively synonymous with the other two links.[54]

4.35 Plainly, "*alleging*" does not refer to or otherwise connote any causal connection. Rather, in ordinary language, "*alleging*" means asserting as true or provable. Similarly, in relation to legal proceedings, it refers to "*an assertion of fact which*

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[52] **(101.0167-101.0168**, para [33]**)**.

[53] *Body Corporate 326421 v Auckland Council, Brookfield Multiplex Constructions (NZ) Limited & Walker Architects Limited [Nautilus]* [2015] NZHC 862, at para [340] **[RP AUTH 7]**. So, "*directly or indirectly*" adds nothing to the intended meaning of the expression.

[54] **(101.0180**, paras [74] — [75]**)**.

a party undertakes to prove."[55] In this context, "*alleging*" described the nature or content/components of the WFPs' "*Claims*", not what caused them.[56]

4.36 As a result, the relevant inquiry in this context was whether the character of the WFPs' "*Claims* was that they were asserting as a fact or feature of the "*Claims*" that the complex had weathertightness defects. In undertaking this inquiry, the Court of Appeal should then have held that it did not matter what other facts or features the "*Claims*" were also asserting — such as non-weathertightness defects. They were not mutually exclusive. Neither did this additional component or ingredient "*cancel out*" the co-existence of the weathertightness defects assertions. Rather, the "*Claims*" had both features. They simultaneously asserted both types of defects — albeit, predominantly, weathertightness defects.[57]

In respect of

4.37 The same analysis and criticism of the Court of Appeal's judgment applies to the other, also separate, alternative, "*in respect of*" — similarly not individually acknowledged or addressed.

4.38 "*In respect of*" has been described in an insurance context as having a very wide meaning. It conveys that there is "*some discernible and rational link*" between the two specified things. However, this is not necessarily a causal relationship.[58] Sometimes, it is contrasted with "*for*"; in other cases, they have been treated as synonymous.[59] It follows that a "*Claim*" that includes weathertightness defects is "*in respect of*" them — even if it also includes, involves or is "*in respect of*" non-weathertightness defects.

Wayne Tank principle

4.39 The Court of Appeal also erred in failing to apply the *Wayne Tank* principle. Despite referring to it in Riskpool's submissions,[60] again the Court of Appeal did not directly address this argument.

4.40 The principle is that, if a claim[61] results from two or more causal factors, whether direct and/or indirect, and an exclusion expressly excludes indemnity for this

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[55] *Hird v Chubb Insurance Company of Australia* (2016) 19 ANZ Insurance Cases 62-103 (VSC), at p.74,851, para 57 **[RP AUTH 11]**: *Black's Law Dictionary* (9th edition: West (Thomson Reuters): 2009), pp.86 — 87 **[RP AUTH 6]**.

[56] As Peter Gibson LJ (dissenting) held in *MDIS Ltd v Swinbank* [1999] Lloyd's Rep IR 516 (CA), "*..., 'alleging" is simply not a synonym for "resulting from" or any other participial phrase pointing to causation*" (at p.526 (col.2)) **[RP AUTH 16]**.

[57] In terms of: (1) number, there were 12 weathertightness defects (#1 — #12) and 9 non-weathertightness defects (#13 - #21); (2) amount, based on the HC's apportionment, the weathertightness defects accounted for about 75% of the total remedial works costs.

[58] *Technical Products Pty Ltd v State Government Insurance Office* (1989) 5 ANZ Insurance Cases 60-914 (HCA), at p.75,868 (col. 2) (Brennan, Deane & Gaudron JJ) **[RP AUTH 21]**. The expression, "*arising...out of*", already inherently provides for a causal connection that may be direct or indirect. So "*directly or indirectly*" adds nothing to its meaning.. Dawson J referred to a "*material connection*" (p.75,870 (col. 1)). Toohey J (dissenting) referred to a sufficient "*nexus*" (p.75,872 (col. 1)).

[59] Derrington & Ashton, vol. 1, pp.505 — 506, para 3-140.

[60] **(101.0167-101.0168**, para [33]**)**.

[61] Or a loss, or a liability — depending on the language of the particular exclusion.

claim if caused or contributed to by one of these factors, there is no indemnity for any of the claim. It applies to both concurrent contributing causes and concurrent independent causes. The principle is based on the basic approach to contractual interpretation. The relevant overarching question is still whether the parties intended that there would still be (some) cover where the claim is wholly or partly brought about in the circumstances encompassed by the relevant exclusion.[62]

4.41 It does not matter that some or all of the same liability may or would have been caused just by a non-excluded cause. Even if this would have been hypothetically possible, in the real world the "*Claim*" has actually been caused as well by something that the parties agreed would be disqualifying if, in fact, it was a material contributing factor to the claim, and/or if, in fact, there was a discernible and rational link between it and the claim.[63]

4.42 Applied to this case, it does not matter that the WFPs would have needed to incur some or all of the cost of making good a weathertightness defect anyway in order to make good a non-weathertightness defect. The reality is that the WFPs did actually have to incur the cost in order to remediate both types of defects and, therefore, weathertightness defects were causative of a type of "*Claim*" that was excluded and/or, even if the relevant word in the exclusion is "*liability*", a type of excluded liability.

4.43 As Lord Denning MR held in *Wayne Tank*, in relation to an exclusion in which the specified connection was between the excluded circumstances and the insured's "*liability*", "*...the loss is not apportionable...*".[64] Similarly, in this case where the specified connection was to each of the WFPs' "*Claims*", the "*demand for* [lump sum] *compensation*" was not divisible and neither was the compensation — as discussed above. But even if the liability was apportionable between types of defects, that still does not change the indivisible nature of the "*Claims*".

4.44 Although the Court of Appeal did not expressly deal with the *Wayne Tank* principle, it did refer to Gilbert J's judgment in *Body Corporate 326421 v Auckland Council, Brookfield Multiplex Constructions (NZ) Limited & Walker Architects Limited [Nautilus]* that had applied the *Wayne Tank* principle, upholding NCC's submission that the case supported its position. However, the Court of Appeal erred by failing to differentiate between "*loss*" (liability) and "*Claim*" in applying the exclusion, stating as follows:[65]

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[62] *McCarthy v St Paul International Insurance Co Ltd* (2007) 14 ANZ Insurance Cases 61-725 (FCAFC), at pp.75,931 — 75,932, paras 91 — 93; p.75,934, paras 103 — 104; p.75,938, paras 114 (Allsop J) **[RP AUTH 14]**. The principle applies equally to whatever causal or other connectors are specified in the insuring clause and exclusion — in that case, in both, it was "*arising from*" (p.75,961, para 88; p.75,936, para 111; pp.75,938, paras 117 — 118 (Allsop J).

[63] *McCarthy v St Paul International Insurance Co Ltd*, at p.75,936, para 109 & p.75,938, para 115 (Allsop J). By analogy, the same applies to "*alleging*", and to "*in respect of*" in its non-causative meaning.

[64] *Wayne Tank and Pump Co Ltd v Employers Liability Assurance Corp Ltd* [1973] 3 All ER 824 (CA), at p.830/*e* — *g* (Lord Denning MR); p.831/*g* — *h* (Cairns LJ); p.837/*c* — *g* (Roskill LJ) **[RP AUTH 26]**.

[65] **(101.0179-101.0180**, para [73]**)**. *Body Corporate 326421 v Auckland Council, Brookfield Multiplex Constructions (NZ) Limited & Walker Architects Limited [Nautilus]*, at para [339] — footnoting *Wayne Tank* & *McCarthy*. In 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 [of the Claim] is excluded by an exclusion clause*** (footnotes omitted – emphasis added)

4.45 As can be seen, this passage from *Nautilus* actually supported Riskpool's position – because it correctly encapsulated the all-or-nothing *Wayne Tank* principle that Riskpool contended applied to this case; and it directly contradicted the divisible liabilities conclusion that the Court of Appeal instead then reached and applied, for example as follows:[66]

> *[76] … **such Claims are within the indemnity but excluded to the extent they are causally attributable** to weathertightness defects.* (emphasis added)

5.0 Wider PW Context – Evolution of PW Wording

Court of Appeal

5.1 In its earlier judgment, on Riskpool's strike-out application, the Court of Appeal had accepted NCC's argument that the background to the introduction of exclusion 13 could be helpful in determining its proper interpretation;[67] and the subsequent judgment correctly recognised that this evidence was admissible.[68]

5.2 The documents and correspondence evidencing the evolution of exclusion 13 are set out in **Schedule 1**. A key feature was Riskpool's initial description of its subject-matter, conveyed to NCC, as "*Building Defect Claims Involving Moisture Ingress*" (emphasis added), which was also shortened to "*Weathertightness Claims*".

5.3 However, the Court of Appeal erred in dismissing the significance of the word, "*involving*", in this context. As a result, it also ignored the significance of both the contemporaneous and subsequent references to the expression, "*Weathertightness Claims*" – which has been carried through to the applicable PW for the 2014/2015 Fund Year, by the schedule which provides that there is no Limit of Indemnity for these "*Claims*" because they are "*EXCLUDED*".

5.4 The Court of Appeal held as follows:[69]

> *[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*

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case, also involving a different policy wording, the contractor's insurers did not raise the all-or-nothing "*Claims*" argument at issue here and the judgment did not mention it.

[66] **(101.0180**, para [76]**)**. The fact that the Court of Appeal considered it necessary to add the words, "*to the extent*", underscores its error. Self-evidently, the parties did not see fit to include these words; and they would have achieved the same result by referring to "*liability*", instead of the expression that they actually used, "*liability for Claims*".

[67] **[101.0016**, para [41]**]** (*Local Government Mutual Funds Trustee Ltd v Napier City Council* [2019] NZCA 444 (Kós P, Duffy & Wylie JJ)**)**.

[68] **(101.0162;101.0180**, paras [14] & [74]**)**.

[69] **(101.0180**, para [74]**)**.

> *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".***
>
> *[74] RiskPool contends, as explained above, that a Weathertightness Claim is a Claim "involving" moisture ingress and this can only mean that the excluded Claim includes but need not be limited to weathertightness defects.* ***"Involving" does not appear in the Protection Wording, as we have explained at [16] above.*** *The papers in which it appeared (in a heading) are admissible background, but the Protection Wording makes clear what was meant: cover does not extend to liability for Claims "alleging or arising directly or indirectly out of, or in respect of" a weathertightness defect...*
>
> (emphasis added)

Building Defect Claims Involving Moisture Ingress

Court of Appeal

5.5 As stated above, the Court of Appeal actively disregarded the heading, "*Building Defect Claims Involving Moisture Ingress*", on the endorsements and, in particular, the reference to the word, "*involving*", in this context, because "[i]*nvolving" does not appear in the Protection Wording...*". However, whatever the Court of Appeal actually meant by this, it erred in dismissing the relevance of this word in this context.

5.6 In particular, quite apart from the absence of evidence or submissions in either lower Court to the contary, the Court of Appeal appears to have overlooked or ignored that each endorsement:

- Had this heading; and
- Also had the heading that it would be "*ATTACHING TO AND FORM PART OF*" the then current PW, "*RP02PLPI-IN*", as an "*EXCLUSION*" or an "*EXTENSION*", as the case may be, "*With effect 4:00pm 30 June 2006*" which was the commencment date of the 2006/2007 period of insurance. Additionally, Section B of RP02PLPI-IN expressly stated that indemnity was "*subject to the limitations, terms and conditions...endorsed hereon:...*";[70] and
- Was enclosed in this exact form in Riskpool's letter to NCC 29 August 2006.[71]

Evolution of PW — "Involving"

5.7 From 2006, in response to the imposition by its reinsurers of a full "*building defects*" exclusion, Riskpool introduced a succession of changes to the PI section, Section B, of the PW.[72]

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[70] **(301.0037)**.

[71] **(301.0068)**.

[72] **(101.0162-101.0163; 101.0179**, paras [13], [15] — [16], [70]**)**.

5.8 The first change was by two retrospectively imposed but foreshadowed endorsements, exclusion 13 and extension 7, which were expressly incorporated into the then current PW, version RP02PLPI-IN, from the commencement of the 2006/2007 Fund Year on 30 June 2006. The exclusion, headed "*Multi Unit Building Defect Claims Involving Moisture Ingress*", excluded any cover whatsoever for these claims, and the identically headed extension then wrote back the cover for the same claims but sub-limited to $500,000.

5.9 By letter 29 June 2006 to all Members, Riskpool warned of this impending change, using essentially the same expression as did the heading to describe its intended application, namely, "*multi-unit building defect claims involving alleged breaches of Clause E2 'Moisture Ingress' of the Building Code*" (emphasis added).[73] True copies of these endorsements, including their headings as stated above, were then sent to Members enclosed in Riskpool's letter 29 August 2006.

Meaning of "involving"

5.10 It is well-established that headings in an insurance policy are "*a legitimate aid to interpretation*".[74] In ordinary language and in this context, "*involving*" necessarily conveys inclusivity. It refers to content, something that is an essential part or component — an ingredient, usually one element of two or more.[75] In *Standard Life Assurance Ltd v ACE European Group*, the High Court held that.[76]

> *250. ...on the proper construction of the exclusion liability "**involving** or arising out of fair valuation or failure to apply fair valuation" means liability which has **as an ingredient** or is caused by either a faulty fair valuation or a failure to apply the principle of fair valuation; and the clause cannot reasonably be understood to refer to liability which involves, merely as an incidental part of the history of how a loss occurred, a perfectly proper fair valuation of assets...* (emphasis added)

5.11 A "*Claim*" that "*involves*" moisture ingress building defects has this feature among its contents — as an ingredient or a material and substantial element. The inquiry required by the exclusion is into the existence or otherwise of this ingredient. If confirmed, the exclusion applies — whether weathertightness defects are the only ingredient of the "*Claim*", or whether they co-exist with other ingredients so that there is a "*mixed claim*".

5.12 It follows that a reasonably well-informed observer in 2006 could only reasonably have inferred that the reduction in cover for "*Building Defect Claims Involving Moisture Ingress*" to a maximum of $500,000 necessarily evinced the parties' common intention that this would apply to all building defect claims that

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[73] **(301.0056)**.

[74] *Xu v IAG New Zealand Limited* [2019] 1 NZLR 600 (SC), at p.625/33 — 40, para [56] & f/n 71 (William Young, O'Regan & Ellen France JJ) & p.640/10, para [133] (Glazebrook & Arnold JJ) **[RP AUTH 28]**.

[75] Derrington & Ashton, vol. 1, p.506, para 3-140.

[76] *Standard Life Assurance Ltd v ACE European Group* [2012] Lloyd's Rep IR 655 (HC), at pp.710 — 711, para 250 **[RP AUTH 20]**. The policy in that case used "*involving*" as an alternative to the "*arising out of*". The proper interpretation of "*involving*" was not at issue on appeal (*Standard Life Assurance Ltd v Ace European Group* [2013] 1 All ER (Comm) 1371 (CA)).

alleged, arose out of and/or were in respect of either: (1) solely weathertightness defects; or (2) mixed defects.[77]

"*Weathertightness claims*"

Court of Appeal

5.13 For the reasons above, the Court of Appeal was also wrong to ignore the reference to "*involving*" in the context of the parties' inferred common intention as to what "*weathertightness claims*" meant.[78] If the Court of Appeal had realised that the expression, "*Building Defect Claims Involving Moisture Ingress*", had in fact been incorporated into RP02PLPI-IN by the 2006 endorsements, it should then have concluded that the reasonable observer would necessarily infer a common intention that "*weathertightness claims*" was the shorthand description for these exclusively weathertightness defect or mixed defect claims.

5.14 This was also consistent with the parties' common approach to "*weathertightness defects*" and use of language. Just as, in NCC's agreed terminology, a "*weathertightness defect*" may also "*involve*" or include breaches of non-weathertightness requirements in the Building Code, so too a "*weathertightness claim*" may also "*involve*" non-weathertightness defects.

Evolution of PW — "Weathertightness Claims"

5.15 In both in its heading and its text, Riskpool's letter 29 August 2006, enclosing the endorsements, described the changes to the PW effected by the two endorsements as applying to "*multi-unit weathertightness claims*" (emphasis added) — necessarily inferring a similar common intention in this mutual context that "*Building Defect Claims Involving Moisture Ingress*" and "*weathertightness claims*" were synonymous expressions and, therefore, that these claims, to which the cover was (then) being restricted, may also involve non-weathertightness defects.

5.16 For the 2007/2008 Fund Year, Riskpool reprinted the PW so that it included both exclusion 13(a) and extension 7, but with the multi-unit qualification in each case deleted so that the exclusion and the $500,000 sub-limit also applied to all dwellings. Extension 7 also appeared in the PW with the heading, "*Weathertightness Claims*". There was no heading to exclusion 13. The schedule to the PW stated that the PI coverage limit was $100m "*each and every Claim*" and "*in all during the Fund Year*", but $500,000 "*in all during the Fund Year for Weathertightness Claims*".

[77] The CA appears to have accepted that "*involving*" was used as a general word intended to express the overall effect of all three specified qualifying links **(101.0180**, para [74]**)**.

[78] **(101.0180**, para [74]**)**.

5.17 By June 2009, after holding off as long as it could, Riskpool informed its Members that it had to introduce a total exclusion for "*weathertightness claims*", to align with the total exclusion that its reinsurers had already imposed in June 2006. At the same time, it expressly stated that, notwithstanding that Members had no indemnity entitlement for these claims, it would "*continue*" to provide management services for the administration of them "*for the broader benefit of Local Government*" — necessarily inferring to the reasonable observer that indemnity for the whole claim had originally been sub-limited and was now wholly excluded. Riskpool reinforced this inference by stating that it would nontheless "*continue*" to provide its risk management advisory services relating to these types of claims.[79]

5.18 These statements are only consistent with an all-or-nothing indemnity approach to "*weathertightness claims*"; and they are irreconciliable with dividing the claim into insured and uninsured liabilities, based on defect type.

5.19 In implementing this for the 2009/2010 Fund Year, Riskpool again amended and re-issued the PW — this time deleting extension 7 and leaving only exclusion 13(a) — with the cumulative effect that coverage for these "*weathertightness claims*" was excluded altogether. The coverage limit in the schedule to the PW was also amended to state "*Excluded*" for "*Weathertightness Claims*", while retaining the $100m per "*Claim*" and in the annual aggregate for other "*Claims*".

5.20 The subsequent re-issued PW for the 2010/2011 Fund Year was in identical terms and was the PW applicable to NCC for the 2014/2015 Fund Year. In the 2014/2015 schedule the coverage limit for other "*Claims*" was increased to $200m "*..., but;* [still] *Excluded Total limit for all claims in the aggregate for Weathertightness Claims.*"

Meaning of "Weathertightness Claims"

5.21 As the High Court held,[80] these documents show that, during the period from June 2006 to June 2014, the expressions: (1) "*weathertightness claim*", in both the PW (including the schedule) and the accompanying correspondence, whether or not capitalised and whether singular or plural, referred to a building defects "*Claim*" "*involving*" moisture ingress in breach of Section E2 External Moisture of the Building Code; and (2) "*alleging or arising directly or indirectly out of, or in respect of*", in the PW, captured the same inclusive/co-existent concept as did the word, "*involving*", in the heading to the exclusion and extension and in the accompanying correspondence.

5.22 The PW schedules provided alternative Limits of Indemnity for "*Weathertightness Claims*" (initially, "*$500,000*" annually, then "*EXCLUDED*"), and

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[79] **(101.0116-101.0117**, paras [295] — [296]: **301.0153**, letter RP/NCC 11 May 2009**)**. Also stated in RP's Annual Reports sent to NCC **(302.0176**, AR 2010, p.6 — 1st para: **302.0323**, AR 2011, p.6 — 1st para**))**.

[80] **(101.0128**, para [341]**)**.

for other "*Claims*" ($100m).[81] This was incompatible with a common intention to divide each of the WFPs' "*Claims*" or "*Weathertightness Claims*" into separate liabilities for weathertightness and non-weathertightness defects, respectively, to which different Limits of Indemnity would necessarily then have to apply.

Indemnity if WFPs' Claims First Made in Earlier Fund Years?

5.23 Finally, and given that there has been no evidence or suggestion that, since 2006, there has been any change of presumed common intention in respect of the exclusion's application to mixed claims, it is instructive in this context to consider what would have been the resulting proper interpretation of exclusion 13(a), and its consequent application to the WFPs' "*Claims*", if the WFPs had first made their "*Claims*" under the PW in force in any of the Fund Years between 2006/2007 and 2010/2011.

5.24 This is summarised in **Schedule 2**. It demonstrates that a reasonably well-informed observer in 2006/2007 could only reasonably have inferred, at least provisionally and subject to cross-check against an ultimately confirmed commercial purpose, that the exclusion and extension were both introduced to apply to building defects claims "*involving*" moisture ingress, also described as "*weathertightness claims*", and would limit indemnity for the whole claim to $500,000, even if the claim also involved non-weathertightness defects. The same applies in each subsequent year — until 2009/2010, after which this would have been nil.

5.25 This conclusion is reinforced by condition 2(f) of the PW, which has been in force in the same form since before 2006/2007. It provided that Riskpool was entitled to pay the Limit of Indemnity applicable to the "*Claim*" and then it would be under no further liability.[82] As with the QC clause in *West Wake Price & Ching*, this provision could not work with respect to "*Weathertightness Claims*" involving both types of defect if there were separate Limits of Indemnity applicable to different parts of them.

6.0 Commercial Purpose/Absurdity

Court of Appeal

6.1 As stated above, the Court of Appeal erred in jumping straight to a concluion about the commercial purpose of exclusion 13(a) without first properly considering its text, let alone treating the text as "*centrally important.*" It held that, because Riskpool was willing to continue to provide indemnity for building defect claims that did not involve weathertightness defects, by exclusion 13(a) Riskpool must necessarily have intended to treat mixed "*Claims*" as divisible for

[81] **(301.0111**, 2007/2008: **302.0268**, 2010/2011).

[82] **(301.0050**, RP02PLPI-IN**: 301.0106**, RP07PLPI-IN: **301.0149**, RP09PLPI-EX: **302.0262**, RP10PLPI-EX**).**

indemnity purposes into separate liabilities for weathertightness and non-weathertightness defects, respectively.

6.2 This conclusion was encapsulated in the following findings:

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

6.3 Significantly, the Court of Appeal specifically recognised that, before 2006/2007, NCC was indemnified for three types of "*Claims*" — those ("*alleging*", etc) only weathertightness defects, those ("*alleging*", etc) only non-weathertightness defects, and mixed claims. However, the Court of Appeal erred in holding that the relevant evidence "*did not show*" that this commercial purpose extended to mixed claims, but "*shows on the contrary*" that it continued in respect of only non-weathertightness defects claims.

Commercial purpose

6.4 The Court of Appeal did not identify the specific evidence on which it relied for these conclusions — which should, of course, have been grounded in the objectively assessed parties' common intention. Moreover, there was nothing "*contrary*" (or illogical or inconsistent) in continuing to indemnify NCC for "*Claims…alleging*", etc, non-weathertightness defects, when this was all that the "*Claims*" involved but not when the "*Claims*" were also "*alleging*", etc, weathertightness defects — and, if mixed, were still also refrred to as "*weathertightness claims*".

6.5 This underscores the reasons stated above that the text is "*centrally important*" and is the starting point for the interpretation process. Otherwise, there is no framework for evaluating one alternative interpretation over another, and the Court is effectively making a unilateral and subjective underwriting evaluation which it is not permitted or equipped to do.[83]

6.6 Had the Court of Appeal already properly considered the text, including the evolution of the PW and, particularly, the significance of the references to "*involving*" and "*weathertightness claims*", it is inconceivable that it would have viewed "*the evidence of dealings between RiskPool and its Members*" as supporting its adopted interpretation. On the contrary, all the relevant evidence

[83] *Hird v Chubb Insurance Company of Australia*, at pp.74,846 — 74,847, paras 28/21 & 22 & 30/12 & 13.

pointed in the same direction as the historic and current text in the PW, as Riskpol has contended above.

6.7 Additionally, in reaching this conclusion, the Court of Appeal did not take into account, adequately or at all: (1) that weathertightness defects complaints were usually the trigger for the later discovery of latent non-weathertightness defects caused by systemic failures in the building industry;[84] (2) the predominant incidence by 2014 of mixed "*weathertightness claims*"; (3) the difficulties in defending these claims; (4) Riskpool's (lack of) reinsurance for them;[85] and (5) the cost of them to Riskpool and its Members and their overall effect on the continued viability of the Riskpool scheme. All these factors were an undisputed part of the parties' mutual knowledge well before 30 June 2014, including through Riskpool's Annual reports and letters Riskpool/Members warning of or making calls for additional contributions — as set out in **Schedule 1**.

6.8 Even without the provisional textual interpretation above, these factors should have led the Court of Appeal to view the common purpose of the exclusion (and the extension, while it applied) in the opposite way that it in fact did — namely, it should have concluded that, ultimately, there was a total exclusion of coverage for all weathertightness claims. It was not disputed that these claims, in their entirety and not just to the extent of the weathertightness defects, had led to increased premiums and calls on Members long after the expiry of the Fund Year applicable to the claim and even, in some cases, after Members had withdrawn from the Scheme — first, openly threatening the continued viability of the Scheme and, ultimately, actually resulting in its failure.[86]

Commercial absurdity

Court of Appeal

6.9 The Court of Appeal took this erroneous conclusion a stage further, by holding that Riskpool's interpretation was actually commercially absurd. This finding was based on the extreme example of "*a trifling part of the demand [being] causally connected to weathertightness*".[87]

Unjustified reliance on extreme example

6.10 This error also has its origins again in the Court's failure to treat the text as the "*primary source for understanding what the parties meant...*" — because, having established this touchstone, it "*requires a 'strong case' to persuade a court that*

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[84] As in fact happened in this case. The WFPs served their first SoC in 2014. The fire defects were not discovered until mid-2015 **(303.0414**, email chain NCC/RP 07/07/2015**)**.

[85] The Court of Appeal recorded as "*common ground*" that, "*in order to avoid liability for claims that had their genesis in systemic failures*", reinsurers removed weathertightness cover and faced with worsening claims, RiskPool gradually followed suit **(101.0162-101.0163**, para [15]**)**. "*However, Riskpool could not obtain reinsurance on terms matching the Protection Wording. The resultant obligation to fund such liabilities eventually led to Members leaving the Scheme*" **(101.0162**, para [13]**)**.

[86] **(101.0179**, para [70]**)**. Mr Carpenter's unchallenged evidence was that this long-tail liability "*was probably the predominant factor causing members to leave, leading to the failure of the Scheme*" (**101.0035-101.0036**, para [28]: **201.0005** (BoE Carpenter para 20)).

[87] **(101.0181**, paras [78] — [80]**)**.

something must have gone wrong with the language."[88] This essential grounding in the text was also emphasised by Hammerschlag J in *HDI Global Specialty SE v Wonkana No 3 Pty Ltd* as follows:[89]

> *124. In a commercial context, absurdity is more than just lacking in genuine commercial good sense. It entails commercial nonsense, to the point where it is obvious that the parties did not mean what they said and obvious what they meant to say.*

6.11 However, as noted above, the Court of Appeal did not apply, or even refer to, these principles. Had it done so, the unchallenged evidence of the mutually known factors set out above would necessarily and reasonably have led to the conclusion that the language had been used "*in accordance with conventional usage*", so that it excluded indemnity in respect of "*Claims*" involving weathertightness defects, no matter what other defects the "*Claims* " also alleged, etc. In particular, there was nothing in this conclusion that lacked good sense, let alone entailed a commercial nonsense such that, obviously, the parties did not mean what they said, and such that what they did mean to say was also obvious.

6.12 In assessing what would be commercially rational from the parties' common perspective as at 30 June 2014, it was also highly material in this mutual scheme context that a Member would not know until long after a Fund Year expired whether a proposed PW amendment would result and/or whether an introduced amendment had resulted, in a net gain to it, based on its own indemnity entitlements, or a net loss, based on its contributions and calls made to fund indemnity for other Members' claims.[90]

6.13 In any event, such extreme examples do not logically call into question the plain meaning and orthodox application of the words used to the particular factual situation that has arisen. This reflects that the proper interpretation inquiry is into what the document means in the relatively common set of circumstances to which is has to be applied in this case. That outcome should not be usurped by a potentially different answer to the different question of what the document would have meant, not in this actual case, but in an extreme hypothetical situation that the parties may or may not have contemplated and that there was no evidence had ever occurred or was likely to occur.

6.14 As the English Court of Appeal held in *Direct Travel Insurance v McGeown*:[91]

> *... Clearly, the true meaning of the words in issue, whether or not looked at in the context of the document as a whole, cannot be found by comparing absurdities resulting from extreme applications of conflicting interpretations. Some intermediate meaning has to be identified which those offering and those seeking such insurance cover would reasonably apply to the words in question to accord with business common sense.*

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[88] *Firm PI 1 Ltd v Zurich Australian Insurance Ltd*, at pp.461/1 – 463/35, paras [88] – [97] (McGrath, Glazebrook & Arnold JJ). Resort to the text would also have revealed that materiality is already inherent in the ordinary meaning of (at least) "*arising...out of*"; and the same could be readily inferred as the common intention in relation to "*alleging*" and "*in respect of*" so that they meant "*to a material extent*".

[89] *HDI Global Specialty SE v Wonkana No 3 Pty Ltd* (2020) 20 ANZ Insurance Cases 62-250 (NSWCA), at p.78,286, para 124 (Hammerschlag J) **[RP AUTH 10]**.

[90] **(101.0160-101.0161**, para [7]**)**.

[91] *McGeown v Direct Travel Insurance* [2004] Lloyd's Rep IR 599 (CA), at p.603, para 15 (Auld LJ) **[RP AUTH 15]**.

6.15 Similarly, in *Turek Enterprises, Inc., d/b/a Alcona Chiropractic v State Farm Mutual Automobile Insurance Company, State Farm Fire and Casualty Company*, the United States District Court, E.D. Michigan, Northern Division stated:[92]

> *...the task here is not to speculate on the outer limits of coverage, and Plaintiff provides no authority for discounting the plain meaning of a term because such meaning might produce counterintuitive results...*

Interpretation caters for extreme example

6.16 In any event, even if there is a legitimate role for extreme and unlikely examples, the Court of Appeal was wrong to treat the "*trifling...weathertightness defect*" example as counting against Riskpool's contended-for common intention[93] – for either or both of the following reasons.

De minimis

6.17 In the High Court and Court of Appeal, Riskpool formally relied on the principle of *de minimis* as an answer in itself to the extreme example of a "*Claim*" where weathertightness is a "*trifling*" part. However, the better approach may be to treat this solely as a matter of proper interpretation of the exclusion in its PW and wider context.

6.18 Given that the fundamental interpretation question is what the document means to the parties in the context of the circumstances that have actually arisen between them, the basic enquiry involved ascertaining their presumed common intention where the WFPs' complaints were about predominantly weathertightness defects in a multi-unit complex anticipated to cost millions of dollars to fix, the investigation of which brought to light substantial previously latent non-weathertightness defects. This was the paradigm building defects claim involving moisture ingress that prompted the introduction of increasingly restricted coverage in 2006 culminating in its total exclusion three years later.

6.19 The Court of Appeal referred to the *de minimis* principle in this context, even if applied "*at a generous level*", as meaning that "*the tail is wagging the dog*". However, nothing about this claim was "*trifling*". The weathertightness defects were more than just "*material*" – to both parties, and to a reasonable well-informed observer; and applying *de minimis* "*at a generous level*" would seem to be a contradiction in terms. Moreover, to allow a hypothetical "*trifling*" example to dictate the outcome of this case would be to allow this dog to be wagged by the tail of a different dog altogether.

Discretion

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[92] *Turek Enterprises, Inc., d/b/a Alcona Chiropractic v State Farm Mutual Automobile Insurance Company, State Farm Fire and Casualty Company*, 484 F. Supp. 3d 492 (2020) (United States District Court, E.D. Michigan, Northern Division), at p.503 **[RP AUTH 23]**.

[93] **(101.0181-101.0182**, paras [79] – [80]**)**.

6.20 The Court of Appeal also rejected that it was:[94]

> *...a sufficient answer that RiskPool might in the exercise of discretion admit such a Claim. That begs the question, since the Trust Deed provides that the Board must be guided by the Protection Wording, and presumably will start with it.*

6.21 The Court of Appeal erred in this conclusion as well, given the nature and extent of Riskpool's discretion under the Trust Deed. The Trust Deed is the paramount document. Its terms have priority over the terms of the PW.[95] Pursuant to the Trust Deed, Riskpool's Board had "*absolute and unfettered discretion*" in deciding on indemnity and "*shall be influenced but not bound by*" the PW.[96]

6.22 The Court of Appeal was wrong to hold that this "*begs the question.*" Rather, it is the very point. Riskpool and all the Members liable in respect of that Fund Year had specifically agreed that, even if, on a strict interpretation of the PW, exclusion 13(a) applied to a particular "*Claim*" by one of the Members, Riskpool could nonetheless decide to indemnify the Member — disadvantaging the other Members. While the express terms of the Trust Deed exclude any constraints on Riskpool's discretion, the involvement or inclusion in the "*Claim*" of a "*trifling*" weathertightness component would be a classic example of when the parties would have reasonably contemplated that Riskpool would exercise this discretion.[97]

7.0 Costs

7.1 If Riskpool's appeal succeeds, it seeks costs and disbursements on the normal basis (for two counsel, including travel and accommodation), pursuant to the Supreme Court Rules 2004, rule 44(1).

Dated: 8 March 2023

.....
Michael Ring KC/Christopher Hlavac
Counsel for appellant

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[94] **(101.0181-101.0182**, para [80]**)**.

[95] **(301.0009**, Deed of Trust, cl. 14: **303.0391**, Scheme Rules 2013, cl. 2.2). **(302.0294**, PW, Section B, insuring clause**)**.

[96] **(301.007**, Deed of Trust, cl. 8.2**)**.

[97] **(101.0161; 101.0181-101.0182**, paras [9] & [80]**)**.

SCHEDULE 1
Evolution of Amendments to Protection Wording in respect of "*Building Defect Claims Involving Moisture Ingress*"/"*Weathertightness Claims*" 2002/2003 — 2014/2015

Date	Document	Contents	CoA
2002/2003 PW Period			
30/06/2002	RP02PLPI-IN	RP issued new PW → contained no exclusion 13 but included any endorsements.	301.0012 301.0037
2004/2005 PW Period			
21/12/2005	Letter RP/Members	Substantial fall in Scheme's surplus because of extra reserving needed for "*leaky buildings claims*".	301.0055
2006/2007 PW Period			
Effective 30/062006	BoE Carpenter (paras 65 — 67)	Reinsurers imposed full weathertightness claims exclusion (described as "*building defects exclusion*").	201.0013 – 201.0014
29/06/2006	Letter RP/NCC	Because of reinsurance availability issues, RP had to impose $500,000 sub-limit on NCC for "*multi-unit building defect claims involving alleged breaches of Clause E2 'Moisture Ingress' of the Building Code*".	301.0056
30/06/2006	Endorsements + 2006/2007 schedule	1. RP imposed $500,000 sub-limit for 10-unit+ developments for weathertightness claims, by 2 endorsements headed (in form attached to Board paper 16/08/2016): • Exclusion: "**ENDORSEMENT ATTACHING TO AND FORMING PART OF:** **NEW ZEALAND MUTUAL LIABILITY RISKPOOL** **PROTECTION WORDING RP02PLPI-IN** **SECTION B PROFESSIONAL INDEMNITY** **EXCLUSIONS** With effect 4.00pm 30 June 2006 ***Exclusion 13 Multi Unit Building Defect Claims Involving Moisture Ingress***" (No PI cover for "*liability for claim(s)*" alleging, etc, weathertightness defects for 10-unit+ building). • Extension: "**ENDORSEMENT ATTACHING TO AND FORMING PART OF:** **NEW ZEALAND MUTUAL LIABILITY RISKPOOL** **PROTECTION WORDING RP02PLPI-IN** **SECTION B PROFESSIONAL INDEMNITY** **EXTENSIONS** With effect 4.00pm 30 June 2006 "***Extension 7 Multi-unit Building Defect Claims Involving Moisture Ingress***" (Notwithstanding "*Exclusion 13 Multi-unit Building Defect Claims Involving Moisture Ingress*", PI cover extended to "*indemnify against Claims in respect of*" weathertightness defects for 10-unit+ building to a maximum of $500,000). 2. Section B Limits of Indemnity (**LoI**) still applied to other "*Claims*": $5m "*each and every Claim*"; but $10m "*in all during the Fund Year*".	301.0062 301.0063 303.0572
29/08/2006	Letter RP/NCC	"***2006-2007 SCHEDULE AND MULTI-UNIT WEATHERTIGHTNESS CLAIMS SUBLIMIT EXTENSION***": 1. Due to "*changes in reinsurance arrangements*", effective from 30/06/2006, RP had: • Imposed $500,000 sub-limit on LoI for multi-unit "*weathertightness claims*" → also defined "*multi-unit*" as 10+ legal titles or units intended for occupation within one building. • Implemented by excluding weathertightness claims altogether & then writing back cover but LoI sub-limited to $500,000. 2. Letter attached: • 2 endorsements in same form as attached to Board paper 16/08/2016. • 2006/2007 schedule, including Section B LoI.	301.0068 301.0062 301.0063 303.0572
2007/2008 PW Period			
14/06/2007	Letter RP/NCC	RP: 1. Increased LoI for other claims to $100m per claim and in aggregate. 2. Continued to provide coverage for "*weathertight claims*" with ongoing Board review → to "*prudently continue*" this cover, Board resolved that "*cover for weathertight claims*" requires aggregate sub-limit on LoI of $500,000 inclusive of costs.	301.0110

Date	Document	Contents	CoA
30/06/2007	RP07PLPI-IN + 2007/2008 schedule	RP: 1. Issued new PW → imposed sub-limit on LoI of $500,000 for all weathertightness claims, by inserting new provisions: • Exclusion 13(a) & (b). Compared with endorsement: (1) deleted heading; (2) amended introductory words from "*Claim*" to "*Claims*; (3) deleted 10-unit qualification. • Extension 7. Compared with endorsement: (1) amended heading to "***Weathertightness Claims***" (2) amended introductory words to delete reference to heading for exclusion 13; (3) deleted 10-unit qualification; (4) inserted proviso that RP's liability under extension "*limited to the sum specified in the Schedule.*" 2. Amended schedule Section B LoI: $100m "*each and every Claim* (and) *in all during the Fund Year, but; $500,000 in all during the Fund Year for Weathertightness Claims.*"	301.0069 301.0099 301.0103 301.0111
21/12/2007	Letter RP/NCC	Board had resolved to "*continue to provide cover for weathertightness claims for the 2008-09 Fund Year on the current basis.*"	301.0112
2009/2010 PW Period			
11/05/2009	Letter RP/NCC	RP had been providing coverage for "*weathertight claims*" with $500,000 annual aggregate sub-limit → following Board resolution, "*weathertight claims will be excluded from renewal...*", but RP will continue to "*manage the administration of members' weathertightness claims for the broader benefit of Local Government...*".	301.0153
30/06/2009	Letter RP/NCC	1. RP's call for additional contributions "*caused predominantly by the 'leaky' building issue which has significantly impacted the sector, including RiskPool...*". 2. "*As the leaky building issue has evolved, reinsurers have introduced changes to their cover and ultimately ceased cover. Despite RiskPool being very successful at gaining judgements in favour of, and beneficial to Local Government, it is becoming apparent that is* (sic) *does not have sufficient funds to cover all claims made against it.*" 3. RP's losses not covered by reinsurance have given rise to deficits, requiring calls on Members for "*Additional Contributions*" pursuant to Deed of Trust.	301.0154
30/06/2009	RP09PLPI-EX + 2009/2010 schedule	RP issued new PW → RP imposed full weathertightness claims exclusion, by: 1. Leaving exclusion 13 intact. 2. Deleting extension 7. 3. Amending Section B LoI to: $100m "*each and every Claim* (and) *in all during the Fund Year, but; Excluded in all during the Fund Year for Weathertightness Claims.*"	301.0113 301.0147 301.0157
24/09/2009	Letter RP/NCC	RP called for additional contributions: 1. Cost of "*weathertightness claims*" to Local Government "*has escalated reasonably significantly*". 2. Previous underwriting changes in response to "*weathertightness claims*" included: • Application of multi-unit exclusion for a number of Councils from 30 June 2006. • Application of $500,000 annual aggregate sub-limit for all weathertight claims for all Councils from 30 June 2007. • Weathertight claims excluded for most Councils from 30 June 2009.	301.0162
27/11/2009	Letter RP/NCC	RP will have to make 3 calls because of "*weathertightness claims*", with amounts depending on final claims development → repeated #2 above, except for addition to last bullet point about reinsurance, "*Weathertight claims excluded for most Councils from 30 June 2009, with reinsurance cover in place for those Councils with on-going sub-limited weathertightness cover.*"	301.0165
2010/2011 PW Period – 2014/2015 PW Period			
30/06/2010	RP10PLPI-EX + 2010/2011 schedule	RP issued: 1. New PW = identical to RP09PLPI-EX. 2. 2010/2011 schedule.	302.0226 302.0268
29/11/2011	Letter RP/NCC	1. 3 calls previously foreshadowed will be at full amounts → deterioration in "*weathertight claims position*" principally due to increased remedial costs to which Councils are exposed, often as last solvent defendant. 2. Reminded Members that "*fully aligned reinsurance programme has been in place since June 2009*" (i.e., back-to-back total exclusions for weathertightness claims).	303.0365
30/06/2014	2014/2015 schedule	1. Applicable PW = RP10PLPI-EX. 2. Section B LoI: $200m "*each and every Claim* (and) *Total limit for all claims in the aggregate during the Period, but; Excluded Total limit for all claims in the aggregate for Weathertightness Claims.*"	303.0413

SCHEDULE 2
What if WFPs had made their Claims in earlier Fund Years?

<table>
<tr><th>PW Period</th><th>Text & Wider Context</th><th>(Provisional) Interpretation
(subject to cross-check against commercial purpose)</th></tr>
<tr><td rowspan="2">2006/2007</td><td>Text:
1. PW Wording: RP02PLPI-IN, incorporating by endorsement Exclusion 13 & extension 7.
2. Endorsements headed:
• "Exclusion 13 Multi Unit Building Defect Claims Involving Moisture Ingress".
• "Extension 7 Multi Unit Building Defect Claims Involving Moisture Ingress".</td><td rowspan="4">1. Synonymous expressions:
• "... building defect claims involving alleged breaches of Clause E2 'Moisture Ingress' of the Building Code".
• ".... Building Defect Claims Involving Moisture Ingress".
• "Claims (1) alleging..."; or (2) "arising directly or indirectly out of"; or (3) "in respect of" weathertightness defects.
• "Weathertightness Claims".
2. Each expression refers to "Claims" for:
• Just weathertightness defects; or
• Both weathertightness & non-weathertightness defects ("mixed claims").</td></tr>
<tr><td>Wider context:
Letters RP/Members, including NCC:
1. 29/06/2006: RP has to impose $500,000 sub-limit on NCC for "multi-unit building defect claims involving alleged breaches of Clause E2 'Moisture Ingress' of the Building Code".
2. 29/08/2006:
• Attached endorsements.
• Stated that applied to "weathertightness claims".</td></tr>
<tr><td>2007/2008
&
2008/2009</td><td>1. PW Wording: RP07PLPI-IN, including:
• Exclusion 13: no heading.
• Extension 7: headed "Weathertightness Claims"
2. Schedule: $500,000...for Weathertightness Claims."</td></tr>
<tr><td>2009/2010</td><td>1. PW Wording: RP09PLPI-EX, including:
• Exclusion 13: no heading.
• Extension 7: deleted.
2. Schedule: EXCLUDED...for Weathertightness Claims."</td><td>3. 2006 – 2009: limit of indemnity against NCC's liability for:
• "Weathertightness Claims", limited to $500,000 in the annual aggregate; or
• All other "Claims", $100m.</td></tr>
<tr><td>2010/2011
→</td><td>1. PW Wording: RP10PLPI-EX, same as RP09PLPI-EX.
2. Schedule: same as 2009/2010 for "Weathertightness Claims."</td><td>4. 2009 →: limit of indemnity against NCC's liability for:
• "Weathertightness Claims", excluded altogether; or
• All other "Claims", $100m (then, $200m).</td></tr>
</table>