

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

ROADMAP OF APPELLANT'S ORAL SUBMISSIONS ON APPEAL

27 APRIL 2023

We certify that the Roadmap of Appellant's Oral Submissions on Appeal are suitable for publication and do not contain any information that is suppressed.

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#	Para Ref:	Riskpool Subs Summary
A Overview		
1	1.6	1. Exclusion 13(a): The PI section of the PW " <i>does not cover liability for Claims alleging or arising directly or indirectly out of, or in respect of</i> " weathertightness defects. 302.0255
	1.5	2. Competing interpretations: <ul style="list-style-type: none"> • RP: There is no cover for any liability for a claim if the claim includes WTD. • NCC: There is no cover for any liability for a claim to the extent that the liability is causally related to WTD.
	3.4-3.6	3. RP reasons: (1) ordinary meaning of text of PW; (2) ordinary meaning of language used in evolution of PW; (3) consistent with commercial purpose/no commercial absurdity.
B Terminology		
2	1.3	1. Building defect: breaches of BC (uncontentious).
	1.3	2. Weathertightness defect (WTD): breach of only E2 or also " <i>involving</i> " (e.g.) B1, B2 (" <i>mixed defect</i> ") → all defects in WFPs' " <i>Claims</i> " were WTDs (uncontentious).
	1.4	3. " Weathertightness claim " (WT claim): " <i>Building defects claims involving moisture ingress.</i> ": (1) only WTD (uncontentious); or (2) also " <i>involving</i> " NWTd = " <i>mixed claim</i> " (contentious).
C Court of Appeal		
3	cf. NCC 2.6	1. CA: <ul style="list-style-type: none"> • Accepted that RP's argument that each WFP made mixed claim, with all WFPs' "<i>Claims</i>" aggregated together for: (1) litigation purposes because of common (indivisible) demand for compensation for cost of 2 location-based multi-defect scopes of works + indivisible compensation per WFP for consequential losses; (2) insurance purposes (excess, condition 1 302.0261) [59]. • Rejected RP's argument that effect of exclusion is on claim so that, because each WTF made mixed claim, no cover for whole claim, including NWTd liabilities. • Held that WFPs' mixed claims had to be divided into (uninsured) WTD liabilities & (insured) NWTd liabilities for PW purposes. [60],[67],[75],[76],[81]
	3.1-3.2	
	4.2-4.3	2. Basically 2 errors: <ul style="list-style-type: none"> • Considered commercial purpose first without reference to text & wrongly concluded that commercial purpose was to cover liability for NWTd even if part of mixed claim [70]-[71]. • Failed to properly apply text & evolution of PW, & wrongly concluded that they confirmed this purpose [74]-[76].
	4.10	

#	Para Ref:	Riskpool Subs Summary
D		Text
4	4.12	<p>Structure of exclusion: 4 basic elements:</p> <ol style="list-style-type: none"> 1. Subject-matter of exclusion ["<i>Claims</i>"]. 2. Qualifying links (as alternatives but not all referring to causation): [(1) "<i>alleging</i>"; or (2) "<i>arising directly or indirectly out of</i>"; or (3) "<i>in respect of</i>"]. 3. Feature or characteristic (of "<i>Claim</i>") creating exclusionary effect [WTD]. 4. Exclusionary effect [no indemnity against any "<i>liability for (these) Claims</i>"].
5	<p>4.11 cf. NCC 5.26 4.24-4.25 4.16 cf. NCC 1.1, 1.6, 4.1, 5.1 cf. NCC 1.1, 5.1, 5.18 4.19, 4.21 4.23-4.24 4.16, 4.17 4.18, 4.22-4.23 4.28-4.29 5.25</p>	<p>Subject of exclusion ["<i>Claims</i>"]:</p> <ol style="list-style-type: none"> 1. Exclusion carves out from insuring clause 302.0250 class of "<i>Claims</i>" not covered = mixed "<i>Claim</i>" by each WFP aggregated together because of common demand for compensation. 2. Cumulative effect of both provisions = indemnity against claims "<i>having particular character</i>", but not if they also have specified "<i>additional character</i>" or specified extra features. <ul style="list-style-type: none"> • "...<i>indemnify against</i>..." = "...<i>(does) cover liability for</i>..." → RP will "<i>indemnify</i> [NCC] <i>against Claims</i> (for breach of Professional Duty)..." , but this indemnity "<i>does not cover</i> [NCC's] <i>liability for Claims</i>" (relevantly linked to WTD). • Example of application of principle that specific provision overrides general provision [D&A, p.1845, para 10-14 #8]: (1) insuring clause is general = all claims that NCC legal liable arising from all breaches of "<i>Professional Duties</i>", including as building regulator (def. 2(d)); (2) exclusion is specific = all claims that NCC legal liable arising from breaches of "<i>Professional Duties</i>" as building regulator involving WTD. • Unremarkable/common that exclusion referring to one feature of claim has effect of excluding cover in respect of other features [D&A, pp.1847-1848, para 10-16 #8] (e.g. basis of <i>Wayne Tank</i> principle). 3. Subject: "<i>Claims</i>", not "<i>liability</i>": <ul style="list-style-type: none"> • Otherwise reference to "<i>for Claims</i>" redundant. • "<i>liability</i>" can't be alleging something, cf. "<i>Claim</i>". 4. Relevant cases: (1) <i>MAS v East</i>, p.76,700, para [20] #17; (2) <i>Walton v National Employers Mutual</i>, p.78/E #25; (3) <i>Allianz v Wentworthville</i>, p.77,175, paras 38 – 39 #3; (4) <i>AIG v Kaboko Mining</i>, p.77,182, paras 27 – 30; p.77,186, paras 45 – 47 #1. 5. Interpretation also reflects nature of: <ul style="list-style-type: none"> • "<i>Claim</i>"/"<i>the demand for compensation</i>": (1) subject-matter, not associated conduct [Junemill, p.77,127 (col. 2) #3] = lump sum compensation undivided between defects. • Liability compensates for loss by diminution in value because of cumulative effect of all discovered/discoverable defects – even if measure of damages turns out to be cost of cure. • Condition 2(f) 302.0306 only consistent with "<i>Claim</i>" indivisible between liabilities.
6	<p>4.11 cf. NCC 1.1, 5.2-5.3 4.31-4.32 4.33 cf. NCC 5.1 4.34-4.36 4.36-4.37</p>	<p>Specified qualifying links:</p> <ol style="list-style-type: none"> 1. Exclusion doesn't necessarily have to be based on causation – e.g., defined activity, time, place, nature of loss [AMI v Legg, para [32] #4: D&A, p.1850, para 10-17 #8] → no reason in principle that parties couldn't exclude indemnity against whole claim if included both WTD & NWTD. 2. Equally ranking alternatives; don't all refer to causative connection cf. [60], [75], [76], [81]. 3. "<i>arising directly or indirectly out of</i>": material contributing factor → requires causation inquiry → infers that it will apply even if other concurrent or contributing causes to "<i>Claim</i>" [D&A, p.1850, para 10-17 #8]. 4. "<i>alleging</i>": (1) unproven assertions [Hird, p.74,851, para 57 #11; Black's, pp.86-87 #6] = inquiry into characteristics/features, not cause; (2) multiple allegations don't cancel each other out; (3) effectively ignored by CA as stand-alone alternative [60], [75], [76], [81]. 5. "<i>in respect of</i>": (1) "<i>some discernible and rational link</i>" → not necessarily causative but may be; (2) sometimes, "<i>for</i>"; (3) also contemplates multiple links; (4) also effectively ignored by CA.
7	<p>4.39-4.40 cf. NCC 5.18 4.44 4.45</p>	<p>Wayne Tank principle:</p> <ol style="list-style-type: none"> 1. If: (1) "<i>Claim</i>" (or loss or liability) results from two or more causal factors: (2) indemnity excluded if claim caused or contributed to by one of these factors, no indivisibility → excluded part contaminates whole claim → no indemnity at all (even if unmentioned unexcluded cause(s)). 2. <i>Nautilus</i> #7: (1) different policy wording, indivisible "<i>Claims</i>" argument not raised, judgment didn't mention it; (2) nonetheless Gilbert J held claims indivisible consistently with at least "<i>arising out of</i>" alternative and other 2 by analogy (#7: para [339]: [73]); (3) despite purporting to accept & apply <i>Nautilus</i>, CA held to contrary that claim was divisible [76].
8		<p>Provisional interpretation of exclusion 13(a) based on text:</p> <p>Ordinary meaning of words in subject-matter & qualifying links = if a "<i>Claim</i>" satisfying insuring clause concerns both WTD & NWTD, NCC has no cover for any liability for that "<i>Claim</i>".</p> <p>→ to be cross-checked against wider context: (1) evolution of PW; (2) commercial purpose/absurdity.</p>

#	Para Ref:	Riskpool Subs Summary
D		Evolution of Protection Wording
9	5.6	<p>Overview:</p> <p>Common use of language commencing 2006 = "<i>Claims</i>" to which exclusion 13(a) applied are "<i>Building Defect Claims Involving Moisture Ingress</i>", which are also "<i>Weathertightness claims</i>" → for which indemnity initially limited to \$500,000, then excluded.</p>
10	5.1	<p>Interpretation principles:</p> <ol style="list-style-type: none"> Both CA judgments accepted evolution of PW evidence admissible. "...evidence of prior negotiations to the extent those negotiations would affect the way the language adopted is interpreted" is admissible as relevant & probative [<i>Bathurst, p.719/30, para [48] & p.758/30, para [232](a) #5</i>]. Argument for admissibility stronger for language in & accompanying predecessor provisions when introduced → objective acceptance, particularly after successive renewals.
11	<p>Schedule 1 5.6 cf. NCC 5.4(d)</p> <p>5.7</p> <p>5.8-5.9</p> <p>5.10</p> <p>5.11</p> <p>5.12</p>	<p>"Building Defect Claims Involving Moisture Ingress":</p> <ol style="list-style-type: none"> This was term of 2006/2007 PW = heading of both exclusion 13 & extension 7, incorporated by endorsement – cf. CA wrongly dismissed [<i>16</i>]-[<i>17</i>] & [<i>74</i>]: <ul style="list-style-type: none"> From 2002, reinsurers removed weathertightness cover because wanted to avoid liability for claims that had their genesis in systemic failures → by 2006, full weathertightness exclusion [<i>15</i>]-[<i>16</i>]. RP held off restricting indemnity under PW until 2006 → indemnity sub-limited \$500,000 → implemented by exclusion + extension, with this heading, incorporated into PW w.e.f. 30/06/2006 → sent to Members with letter 29/08/2006. Headings admissible as aid to interpretation [<i>Xu, p.625/33-40, para [56] & p.140/10, para [133] #28</i>]. Ordinary meaning of "<i>involving</i>": <ul style="list-style-type: none"> Refers to part = contains, but not necessarily only contents [<i>D&A, p.506, para 3-140 #8: Standard Life, pp.710-711, para 250 #20</i>] → unqualified = inclusivity, not exclusivity. If exclusivity intended, would have to have been qualified – "<i>only</i>", "<i>exclusively</i>", "<i>just</i>", "<i>solely</i>". Application of ordinary meaning of "<i>involving</i>": <ul style="list-style-type: none"> "<i>Claim</i>" has this feature among its contents → "<i>mixed claim</i>" [<i>West Wake, p.825/C #27</i>] → includes, at a minimum, WTD but not necessarily only WTD. General word expressing overall effect of "<i>alleging</i>", "<i>arising...out of</i>" & "<i>in respect of</i>".
12	<p>5.15-5.20</p> <p>5.21-5.22</p>	<p>"Weathertightness Claims":</p> <p>Common intention that:</p> <ol style="list-style-type: none"> "<i>Building Defect Claims Involving Moisture Ingress</i>" & "<i>Weathertightness Claims</i>" are synonymous: (1) first referred to in same letter 29/08/2006 enclosing endorsement; (2) in 2007 became heading to extension 7 in reprinted PW + schedule sub-limit; (3) remained in schedule 1st as sub-limit, then from 2009 as "<i>excluded</i>" (other "<i>Claims</i>" \$100m, then \$200m, limit). Claims not divisible into WTD & NWTD defects = types of claims (WT claims & other building defect claims): <ul style="list-style-type: none"> Ltr RP/NCC 21/12/2007 301.0112: (1) RP would continue to cover WT claims on current basis (\$500,000 sub-limit); (2) "<i>All of the other types of claims RiskPool covers will remain covered.</i>" Ltr RP/NCC 301.0167: w.e.f. 30/06/2009: (1) RP would continue to cover "<i>Building defect claims</i>" (i.e., just NWTD); (2) WT claims (formerly "<i>Building Defect Claims Involving Moisture Ingress</i>" & included mixed claims) totally excluded for most Members, including NCC (whole claim excluded, not just WTD liability).
13	<p>Schedule 2</p> <p>5.23</p> <p>5.25</p>	<p>What if WFPs' "Claims" first made 2006 – 2010?</p> <ol style="list-style-type: none"> 2006/2007: indemnity against "<i>Claims</i>" involving breaches of E2 sub-limited to \$500,000 → other "<i>Claims</i>", \$5m per claim, \$10m annually → "<i>Claims</i>" cannot be subject to separate limits (e.g., condition 2(f) 2002 301.0050: also in 2010 PW 302.0306). 2007/2008: indemnity against "<i>weathertightness claims</i>" sub-limited to \$500,000 (cf. \$100m). 2009/2010: indemnity against "<i>weathertightness claims</i>" excluded (cf. \$100m/\$200m).
14		<p>Provisional interpretation of text of exclusion 13(a) cross-checked against evolution of PW:</p> <p>Language used in evolution of PW – PW documents (exclusion, extension & schedule) & correspondence – cross-checks as only consistent with exclusion (and extension) applying to whole indivisible liability for mixed claims.</p>

#	Para Ref:	Riskpool Subs Summary
E		Commercial purpose/absurdity
15	4.6 4.7 4.8 4.9, 6.5	<p>Approach/Principles: Order of analysis = text (first) → wider context/commercial purpose:</p> <ol style="list-style-type: none"> 1. Provides proper framework to consider commercial result of competing interpretations [<i>Rockment (citing Charter Reinsurance)</i>, pp.78,423-78,424, paras 53-54 #19]. 2. Commercial purpose is logically and rationally discerned from text, surrounding circumstances & general nature of provision [<i>Rockment</i>, p.78,425, para 57]. 3. Commercial absurdity only arises if applying provisional interpretation from text produces nonsensical result [<i>Rockment</i>, p.78,424, paras 54-55; <i>Firm PI</i>, pp.461/1-463/35, paras [88]-[97] #9]. 4. Purpose of framework = prevents Court: (1) acting an arbiter of commercial reasonableness; (2) rewriting bargain because of subjective assessment; (3) in insurance context, making unilateral underwriting evaluation not equipped to make [<i>Firm PI</i>, pp.461/25-462/11, paras [89]-[90] #9].
16	6.1-6.2 6.7-6.8 NCC 6.6	<p>Commercial purpose:</p> <ol style="list-style-type: none"> 1. CA [70]-[71]: wrongly stated that, based on evidence, RP had: (1) no purpose to exclude liability for mixed claims; (2) positive purpose not to exclude indemnity for NWTD whether in solely NWTD claim or mixed claim. 2. Material difference between indemnifying for solely NWTD defects claims & NWTD in mixed claims – including that: (1) solely NWTD claim = may not be discovered because requires catastrophic event (e.g. fire, EQ); (2) mixed claims = latent defects also invariably revealed in investigating WTD (e.g. this case – fire defects 2+ years later HC, [62] 101.0047) &, by then, council often only solvent defendant → ultimately caused RP to fail AR 2008 HC, [216] 101.0090. Also: HC: [294](a)(3) 101.0114; [329] 101.0125; [344] 101.0129. 3. "weathertightness claims" managed but not indemnified even though involve NWTD letter RP/NCC 11/05/2009 301.0153; letter RP/NCC 24/09/2009 301.0163; AR 2010 302.0176; AR 2011 302.0323. 4. Supported by RP's communications evidence → RP's unilateral intention mischaracterised by NCC NoE Carpenter pp.170/26-171/8; p.171/18-27 201.0040-201.0041 → PC was referring to indemnity against building defect claims not involving WTD, not to indemnity for liability for NWTD component in weathertightness claims (mixed claims) → not referred to by CA; only mentioned in passing by HC HC, [100] 101.0059.
17	6.9 6.10 6.13-6.15 6.12 6.17-6.19 6.20-6.21	<p>Commercial absurdity/nonsense:</p> <ol style="list-style-type: none"> 1. CA held RP's interpretation created commercial absurdity, because of extreme example of "trifling part of the demand [being] causally connected to weathertightness" [78]-[80]. 2. CA cited no principles/authorities, but: <ul style="list-style-type: none"> • Requires strong case that something must have gone wrong with language [<i>Firm PI</i>, p.461/8, para [88] #9; <i>HDI Global Specialty</i>, p.78,286, paras 124-126 #10]. • Extreme example shouldn't, on its own, satisfy strong case requirement [<i>Direct Travel</i>, p.603, para 15 #15; <i>Turek Enterprises</i>, p.503 #23]. • Insurer not required to demonstrate exclusion has objectively justifiable commercial rationale [<i>Hird</i>, pp.74,846-74,847, para 30/12 & 13 #11] → but RP did → material to rationality assessment here that: (1) members are both insured & insurer; (2) net financial benefit/detriment of particular interpretation not known until years later. 3. In any event, interpretation & context cater for extreme example: <ul style="list-style-type: none"> • <i>De minimis</i>: if WTD part of claim "trifling" (= immaterial), objective observer would reasonably infer that parties would expect RP to ignore; if not, must be material & so reasonable to have regard to. • RP has "absolute and unfettered discretion" in deciding on indemnity and "shall be influenced but not bound by" the PW" → objective observer would reasonably infer that parties would expect RP to exercise discretion where WTD part of claim "trifling" (unrealistic example in practice). • No evidence that postulated extreme case ever declined by RP, made or even existed.
18		<p>Provisional interpretation of text consistent with evolution of PW, cross-checked against purpose:</p> <p>Ordinary meaning of words in text & evolution of PW excluding indemnity for whole mixed claim has rational commercial purpose/involves no commercial absurdity or nonsense → no case, let alone strong case, that something must have gone wrong with language.</p>