IN THE SUPREME COURT OF NEW ZEALAND
I TE KŌTI MANA NUI **SC 103/2022**

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

SYNOPSIS OF SUBMISSIONS FOR RESPONDENT
28 MARCH 2023

Counsel for the respondent certify that these submissions are suitable for publication and contain no suppressed material.

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1. INTRODUCTION

> *…the general exceptions are designed to carve out from those claims which are covered by the general words some which the parties specifically wish to exclude.*[1]

1.1 That description of the essential nature of exclusion clauses in insurance policies defines the issue in this appeal: the general and the specific, and in particular whether generally covered liabilities arising from causes *unrelated to weathertightness* are excluded by a limiting provision in the policy which refers *specifically only to weathertightness*.

1.2 The Council incurred a liability under a settlement with the "Waterfront Plaintiffs" which was alleged to have arisen from its negligence. The settlement settled claims against it in relation to weathertightness and non-weathertightness defects.

1.3 There is no issue that liabilities under the settlement agreement arising from both types of defect fall within the "general words" – namely the insuring clause on the first page of the professional indemnity section of the policy.[2] There is also no dispute that liabilities relating to weathertightness fall within the specific exclusion.

1.4 The policy provision relied on by Riskpool refers in its exclusionary words only to weathertightness defects. The weathertightness exclusion provides ("**exclusion**"):[3]

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

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[1] *Walton v National Employers' Mutual General Insurance Association* [1973] 2 NSWLR 73, 84; [1974] 4 Lloyds Rep 385,

[2] 302.0294.

[3] Exclusion 13, 302.0299.

1.5 Despite referring only to weathertightness defects, the High Court held that the Council's liabilities arising from allegations of negligence resulting in defects that are causally *unrelated* to weathertightness defects are excluded. The Court of Appeal reversed this, confirming that the overall effect of the words used was that liability for claims was excluded to the extent there was a causal link to weathertightness defects.[4]

1.6 This is undoubtedly correct. The limitation of the exclusion to weathertightness defects demonstrates clearly and objectively that the parties' intention was to only exclude the *specific* risks referred to.

1.7 Accordingly, the Council's liabilities for non-weathertightness claims against it are not specifically excluded and therefore remain covered by the general insuring clause.

2. BACKGROUND

2.1 Riskpool was a mutual insurance scheme established for the purpose of jointly insuring local territorial authorities' civil liabilities (**Riskpool Scheme**). It spread the risk of insured perils across its members,[5] with re-insurance on equivalent terms purchased on the commercial market.[6] The Riskpool Scheme provided local authorities across New Zealand with an alternative to commercial insurance, with its purpose promoted as providing the opportunity for insurance cover that was more favourable than commercial insurance.[7]

2.2 Riskpool provided liability insurance through a Combined Public Liability and Professional Indemnity Protection wording, which included Professional Indemnity cover promising ("**Protection Wording**"):

> To indemnify the Member up to but not exceeding the amount specified in the Schedule, against Claims first made against the Member and reported to the Fund during the period specified in the Schedule for breach

[4] *Napier City Council v Local Government Mutual Funds Trustee Ltd* [2022] NZCA 422 (**CA judgment**) at [75],
[5] With the support of re-insurance contracts placed on the London market.
[6] 201.0004 and 201.0006.
[7] 201.0003 and 201.0035.

> of Professional Duty arising out of any negligent act, error or omission… committed or alleged to have been committed on the part of the Member …

2.3 The Protection Wording was subject to a range of exclusions (the rest of which are not in issue).

2.4 The exclusion was introduced in response to the "leaky building crisis". In the early stages of the crisis, Riskpool continued to insure liabilities. As it worsened, Riskpool introduced a series of policy limitations on cover, culminating with the full exclusion introduced in 2009. Although the crisis continued to involve and worsened after 2009, the wording of the exclusion remained the same.

2.5 The body corporate and 50 owners of units in the Waterfront Apartment Complex ("**Waterfront Plaintiffs**") commenced proceedings in 2013 alleging that the Council and other defendants were liable in negligence for various types of building defects in the Waterfront Apartments complex ("**Waterfront Proceedings**").

2.6 By 2019, 22 categories of defect were alleged, some of which were caused by moisture (non-compliance with part E2 of the Building Code) for which cover is not sought by the Council while others had no relationship whatsoever to moisture (non-compliance with structural and fire safety regulations) (which the Council say, as did the Court of Appeal, are not excluded). The Waterfront Plaintiffs losses were measured as the total cost associated with the repairs of all 22 categories, with experts identifying the separate and distinct remedial work required to repair each defect.

2.7 Council defended the proceeding through to settlement at mediation in February 2019. It agreed to pay $12,355,000 out of a total settlement of $13,655,000 against total claimed liability of $20,374,014.98. The expert evidence was that approximately $4.4 million[8] of remedial work was to remediate defects wholly unrelated to weathertightness. The repairs included, for example, structural reinforcement to the complex's southern wall, which had been identified as having a more than low probability of becoming unstable during a wind event.

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[8] The final quantum is yet to be fixed by the High Court.

Procedural History

2.8 Riskpool relied on the exclusion to deny cover for Council's liability for both weathertightness and non-weathertightness defects. Council commenced this proceeding in 2017 only seeking indemnification for liabilities arising from non-weathertightness defects.

2.9 Riskpool unsuccessfully applied to strike out this proceeding based on generally the same interpretation that it has advanced through the Courts. It appealed the strike out decision unsuccessfully. The issue before this Court has now been the subject of judicial attention on four occasions.

2.10 In the strike out decision, Hinton J rejected Riskpool's interpretation concluding that "the focus should be on the language of Exclusion 13" rather than the word "Claim" read in isolation.[9] Her Honour held that "there was no reason to read down the definition of "Claim" in the contract or to take a restrictive approach".[10] The Court of Appeal dismissed Riskpool's appeal.[11]

2.11 The trial Judge accepted Riskpool's argument that the word "Claim" is central so where a proceeding included weathertightness any other building defects were "tainted by the weathertight complaint".[12]

2.12 The Court of Appeal rejected this reasoning. Miller J for the Court applied settled and predictable principles of contractual interpretation concentrating on textual analysis. Through focusing on all of the words in the exclusion and the broader Protection Wording, the Court rejected Riskpool's distortion of the meaning of the exclusion by emphasising singular words in isolation and relying on immaterial extrinsic evidence.

2.13 The Court did not accept Riskpool's submission that the meaning of the word "Claim" was significant to the scope of the exclusion.[13] The

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[9] *Napier City Council v Local Government Mutual Funds Trustee Limited* [2018] NZHC 2269 (**HC strike out judgment**) at [14]-[15].
[10] At [19].
[11] *Local Government Mutual Funds Trustee Limited v Napier City Council* [2019] NZCA 411; [2019] NZCA 444 (**CA strike out judgment**).
[12] *Napier City Council v Local Government Mutual Funds Trustee Ltd* [2021] NZHC 1477 (**HC judgment** at [164].
[13] CA judgment at [57] and [58].

Court accepted that each plaintiff in the Waterfront Proceedings pursued only one "Claim", but "a very important point" was that they were "mixed claims" which involved liabilities caused by weathertightness defects, and separate liabilities with no causal relationship to weathertightness defects.[14]

2.14 The exclusion applied to "liabilities for claims", not "claims". "Claims" can be either aggregated or divisible for insurance purposes.[15] By using "language of causation", the words in the exclusion necessarily contemplated divisibility based on an inquiry into the "real nature" of the Council's liability.[16] The words "alleging or arising directly or indirectly out of, or in respect of" contemplated an indirect (but specific) causal connection between the "liability for Claims" and weathertightness defects.[17] The overall effect of the words was that "liability for claims" was excluded to the extent there was a causal link to weathertightness defects.[18]

2.15 Riskpool unjustifiably criticises the Court of Appeal decision as being predicated on considerations of commercial purpose rather than textual analysis. In fact, paragraphs [29]-[82] addressed the competing contentions about the meaning the words,[19] Riskpool's reliance on inadmissible extrinsic materials to influence meaning,[20] the significance of the word "claim",[21] and the overall meaning of the text.[22]

2.16 Commercial purpose was then applied as a cross check which confirmed the conclusion that had already been reached. It approached commercial purpose in accordance with this Court's decision in *Firm PI,*[23] noting that inquiring into the underlying cause of liability was orthodox practice when deciding whether an exclusion applies.[24] While there could be "no doubt" that Riskpool intended to

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[14] CA judgment at [60]-[61]
[15] CA judgment at [67].
[16] CA judgment at [72].
[17] CA Judgment at [75].
[18] At [75].
[19] At [29]-[37].
[20] At [38]-[55].
[21] At [56]-[66]
[22] At [67]-[72]
[23] *Firm PI 1 Ltd v Zurich Australian Insurance Ltd t/a Zurich New Zealand Ltd* [2014] NZSC 147, [2015] 1 NZLR 432.
[24] CA Judgment at [73].

exclude all cover for *weathertightness* defects, the extrinsic evidence did not show that the commercial purpose extended to excluding liability for *non-weathertightness* defects.[25]

Riskpool's interpretation

2.17 Riskpool's interpretation is that the weathertightness exclusion removes the indemnity provided by the general insuring clause for all liabilities, however caused, wherever a third party claimant has chosen to allege weathertightness and non-weathertightness liabilities within the same "Claim".

2.18 Riskpool's premise is that the definition of "Claim" aggregates the Waterfront Proceeding into one indivisible "Claim", and the exclusion removes cover for that "Claim" in its entirety as soon as a weathertightness defect is alleged. Riskpool's phraseology is that the presence of any alleged weathertightness defect within a proceeding "taints" all other forms of liability – as her Honour had accepted in the High Court.

2.19 The effect of Riskpool's argument is that the cause of underlying liability is irrelevant. All liability (however caused) is excluded wherever a "Claim" (i.e. according to Riskpool, a proceeding) *involves* an alleged weathertightness defect.

2.20 The scope of the exclusion is not governed by the description of the excluded peril (weathertightness) but rather how the third party has formulated and pursued its demands for compensation.

3. CONSTRUCTION PRINCIPLES

3.1 Insurance policies are interpreted in accordance with settled principles of contractual interpretation.[26] The starting point is the natural and ordinary meaning of the words used in the policy. The focus is on all of the words used in the relevant clause and wider document as a whole, rather than assessing the meaning of specific words in isolation. This ensures due weight is afforded to the context

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[25] At [70]-[73].
[26] *Lumley General Insurance (NZ) Ltd v Body Corporate No 205963* (2010) 16 ANZ Insurance Cases 61-853 (CA) at [27].

in which the clause appears, including the nature, purpose and object of the contract.[27]

3.2 While insurance policies are interpreted according to ordinary principles of contractual interpretation, the particular context and purpose of insurance contracts influence the way in which they are to be read.[28] As explained by the Court of Appeal in *QBE Insurance (International) Ltd v Wild South Holdings Ltd,*[29] no special rules apply:

> "the court's ultimate objective, as in any other case, is to decide what meaning the parties intended their words to bear. Analysis begins with the words of the contract, but an apparently plain meaning can be displaced if the context shows that the parties intended their words to mean something else".

3.3 The contract must be interpreted as a whole, which in the context of exclusion clauses requires regard to all the words of the clause along with its context within the broader policy. In *Darlington Futures Ltd v Delco Australia Pty Ltd*,[30] the High Court of Australia described the approach:

> … the interpretation of an exclusion clause is to be determined by construing the clause according to its natural and ordinary meaning, read in the light of the contract as a whole, thereby giving due weight to the context in which the clause appears including the nature and object of the contract, and, where appropriate, construing the clause *contra proferentem* in case of ambiguity.

3.4 An insurer who wishes to exclude cover must do so in clear and unequivocal language,[31] noting also that exclusion clauses have consistently been held to be interpreted narrowly.[32] If there are two genuinely available alternatives, preference should be given to the one that limits rather than expands the exclusion.[33]

3.5 It is imperative to ascertain the commercial purpose of the relevant exclusion and interpret it in a way that is most consistent with that

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[27] *Darlington Futures Ltd v Delco Australia Pty Ltd* 161 CLR 500 at 510-511.
[28] *Mount Albert City Council v New Zealand Municipalities Co-op Insurance Co Ltd* [1983] NZLR 190 (exclusion clause read narrowly because of its context within an insurance policy).
[29] [2014] NZCA 447
[30] *Darlington Futures Ltd v Delco Australia Pty Ltd,* above n 27 at 510.
[31] *SKM Industries Pty Ltd v Australian Reliance Pty Ltd* [2017] NZCA 325 at [29].
[32] *Mount Albert City Council v New Zealand Municipalities Co-op Insurance Co Ltd* [1983] NZLR 190 (CA) at 196.
[33] *Dalby Bio-Refinery Ltd v Allianz Australia Insurance Ltd* [2019] FCAFC 85 at [32].

purpose. The starting point in this exercise is the insuring promise. Exclusion clauses are to be construed on the basis that they "cut out something already included by the general recitals and provisions".[34]

3.6 The clause must be "read in the context of the contract of insurance as a whole" and "construed in a manner that is consistent with and not repugnant to the purpose of the insurance contract."[35]

3.7 If uncertainty in the natural and ordinary meaning of the policy cannot be resolved through assessment of the relevant context and purpose, the latent ambiguity is resolved *contra proferentem* against the party who drafted the provision, here Riskpool.

3.8 As explained in *The Law of Liability insurance*:[36]

> [t]he general principle that an insuring clause should be given a liberal construction in favour of cover and that an exclusion should be construed strictly is well known and accepted, and there is no reason why the difference should not produce different results if the language used admits of it…
>
> …[t]he process of construction begins with the insuring clause, and within this paradigm it will be read broadly and exclusions and limitation provisions will be read narrowly… In some jurisdictions, it is said that policies are not construed against the insurer, unless the expression is ambiguous, but in practical terms this leads to much the same result.

3.9 In many cases, initial ambiguity can be resolved by assessing the words of the relevant exclusion in light of the contract as a whole, giving due weight to context and purpose. As Kirby J explained in *Insurance Commission (WA) v Container Handlers Pty Ltd*:[37]

> [t]he law books are full of disputes over the meaning of insurance policies. Because disputes about language are notoriously liable to produce different outcomes, a rule of construction was long ago adopted by the English courts to the effect that *intractable ambiguities* in printed instruments, such as insurance policies should be resolved in favour of the person receiving them and against the person propounding

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[34] *Allianz Australia Insurance Ltd v Rawson Homes Pty Ltd* [2021] NSWCA 224 at [10].
[35] *Impact Funding Solutions Ltd v AIG Europe Insurance Ltd* [2017] 4 All ER 169 at [7]. See also: *Ashmere Cove Pty Ltd v Beekink* (2009) 15 ANZ Insurance Cases 61-826 (FCA) at [104]
[36] *The Law of Liability Insurance,* Derrington and Ashton (3rd ed, 2013, LexisNexis Butterworths, Chatswood) vol 2 at 1841 and vol 1 at 362; accepted in *Lumley General Insurance Ltd v Port Phillip City Council* (2013) 18 ANZ Insurance Cases 61-994 (VSCA) at [107].
[37] *Insurance Commission of Western Australia v Container Handlers Pty Ltd* (2004) 218 CLR 89.

> them. This was a useful rule. Amongst other things, it encouraged insurers to express policy conditions clearly where they limited recovery, so that the insured would know precisely whether it was entitled to indemnity or not. The maxim was applied by this Court from its earliest years. It may occasionally still be useful where dictionaries and logic along do not resolve ambiguity.

4. THE INSURING PROMISE

4.1 The Court of Appeal accepted Riskpool's submission that this is a liability policy.[38] The insuring clause indemnifies for the cost of the Council's liability to third parties. Logically, this is why the exclusion was drafted to exclude "liability for claims" rather than "claims" simpliciter. The exclusion carves out from the general indemnity for liability those specific liabilities that are identified in it.

4.2 The evidence at trial was that liability for building defects had always been a significant aspect of the risk which the Protection Wording protected against.[39] Even prior to the exponential increase in council liability for weathertightness defects in the early 2000s, building defect claims were the single biggest professional indemnity risk posed to member councils.[40] Riskpool's evidence was that building defect claims for non-weathertightness defects were an even more important risk now.[41] Accordingly, liability for non-weathertightness building defects was (and remained throughout the Riskpool cover) a known and important risk which the policy always covered.

4.3 Riskpool's case is in essence that building defect claims (i.e. non-weathertightness claims) have continued to be covered by the policy, but if a building defect proceeding involves both weathertightness and non-weathertightness liabilities, then all liability is excluded.

4.4 This is an illogical interpretation by Riskpool that essentially reads into the exclusion words which are not there. If it had genuinely wished to exclude non-weathertightness liabilities in mixed claims, it

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[38] CA judgment at [108].
[39] 201.0041.
[40] 302.0176. Riskpool's 2010 Annual Report shows that for each of the five years preceding 2002-03, the single most common cause of a claim/notification to Riskpool was Building Control Matters (apart from "Other").
[41] 201.0041.

could have attempted to draft the exclusion accordingly, while having to cater for the difficulties of mixed claims in some circumstances (namely, on Riskpook's view, de minimis/immaterial weathertightness defects, as is dealt with below).

5. THE EXCLUSION

5.1 The fact that the exclusion does not refer to risks other than weathertightness is obvious, but it is nevertheless a significant indicator that the drafters' approach was orthodox. It was to exclude only the specific perils referred to.

5.2 The notional reasonable reader would not interpret the exclusion to exclude liability which has no causal relationship with the risks described in the exclusion. Nor would a reasonable reader be expected to:

(a) Apply the degree of scrutiny and deference that Riskpool does to the word "Claim", particularly given the policy's various usages of the word and allied text.[42]

(b) Ignore the words "liability for" immediately prior to "Claims", noting that the Protection Wording insured against liabilities not claims.[43]

(c) Read the words "involving" and "weathertightness claims" into the words of the contract. And then extrapolate further that a "weathertightness claim" means a legal proceeding "involving" weathertightness defects but potentially also unrelated liabilities.

5.3 The reasonable reader would instead focus on the purpose of the exclusion (weathertightness). Reading the words in the exclusion overall, the reasonable reader would understand that it applied to exclude liability for the described peril (non-compliance with weathertightness regulations), with its scope governed by the liability for weathertightness building failures.

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[42] CA strike out judgment at [31]-[32].
[43] At [31]-[32].

Obstacles in the text to Riskpool's approach

5.4 Riskpool's interpretation necessarily relies on this Court accepting all of the following:

(a) The Protection Wording provides indemnity for liability, while the exclusion excludes liability for "Claims".[44]

(b) What is excluded is not "liability for claims" for weathertightness defects, but rather the "Claim" itself. The words "liability for" immediately before the word "Claims" are essentially ignored.

(c) All demands for compensation made against the Council within the Waterfront Proceeding must be treated as only one "Claim". It is the form of the demand rather than the substance of the liabilities that are determinative.

(d) The words "alleging or arising directly or indirectly out of, or in respect of" do not require any causative link between the "liability for Claims" and the subject matter of the exclusion (being weathertightness defects). Those words mean "involving", despite that word not appearing in the contract.

5.5 Riskpool's interpretation is predicated on the notion that all of the liabilities and losses alleged within the Waterfront Proceeding must be aggregated within the definition of "Claim".

5.6 This gives legislative-like attention to one word in the text ("Claims") but the quality of Riskpool's own drafting does not justify this as a reliable approach.

5.7 Grice J in the High Court said of the policy language - referring to the Court of Appeal's provisional description of the alternative views of the drafting on the strike out appeal,[45] "it appears the latter ['a bit of a mess'] is the case".[46]

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[44] Riskpool's Submissions, 8 March 2023 ("**Riskpool Submissions**") at 1.6.
[45] CA strike out judgment at [33] and [38]-[42] (as to the reasons for dismissal of the appeal).
[46] HC judgment at [94].

5.8 This "mess" was apparently the result of the exclusion being a "cut and paste" from another insurer's policy.[47] Riskpool now seeks to take the benefit of uncertainty created by its own drafting but any ambiguity introduced by its drafting must of course be resolved in favour of the Council.

5.9 The definition of "Claim" is:[48]

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

5.10 Despite that definition, "Claim" is used inconsistently throughout the Protection Wording, including in singular and plural form.[49] It is used in its plural form in the exclusion, which is consistent with there being multiple "demands" by the plaintiffs in the Waterfront Proceedings. The plural form is also consistent with each individual plaintiff's demands including divisible demands for compensation for the separately identified losses caused by the various unrelated building defects.

5.11 Inserting the pluralised definition into the introductory phrase of the exclusion, results in wording that anticipates situations where one factual pattern may involve multiple demands for compensation. The result is that only those "demands" arising from weathertightness are excluded:

> This Section of the Protection Wording does not cover liability for [**demands** for compensation] alleging or arising directly or indirectly out of, or in respect of…. [weathertightness defects].

5.12 The insuring clause also refers to "Claims… made against the Member… arising out of any negligent act….". This explicitly recognises the intention of the policy to cover multiple "Claims" arising from "any" single negligent act.

5.13 Likewise, Condition 1 (the Excess Clause) treats as one claim all claims that "arise out of the one event or by reason of the same negligent act, error or omission"'. The effect of this is to aggregate

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[47] HC judgment at [209].
[48] 302.0296.
[49] HC judgment at [85]; CA strike out decision at [32].

all “Claims” if they arise out of one negligent act so that only one excess is payable. This clause is an express acknowledgement that multiple “claims” may arise out of the same underlying act(s).[50] If all liabilities arising out of the same negligent act were the same “Claim” anyway, or had already been aggregated by operation of the definition of “Claim”, there would have been no need for this wording in the Excess Clause.

5.14 Most of the exclusions include the potential for “mixed” proceedings such as those in the present involving divisible complaints or demands within the one proceeding some of which may be covered and some not (e.g. exclusions 6, 7, 8, 9). There could be no suggestion in those exclusions that an excluded risk would vitiate cover altogether for otherwise covered aspects of a proceeding.

5.15 In contrast, the exclusion does not include language expressly aggregating related demands, complaints or allegations. Nor – perhaps most importantly - does it provide that in the case of a “mixed” proceeding the exclusion operates against the entire proceeding.

5.16 Riskpool’s interpretation of “Claim” is based at least in part on the assumption that all of the plaintiffs’ “Claims” arose from the building not meeting the weathertightness provisions of the building code and are therefore entirely excluded. However, this fails to have regard to the object of the exclusion – weathertightness. Correctly construed, the Council’s claim under the Protection Wording relates to liabilities for claims arising from the failure of the building to meet the requirements of the building code in relation to fire, structural and internal plumbing standards.

5.17 The Waterfront Plaintiffs’ claims (and the Council’s liability) for non-compliance with structural and fire regulations were wholly unrelated to weathertightness defects – the Council’s negligence caused a different type of building failure which involved wholly different repair work. Those structural and fire safety liabilities are covered by the insuring clause and are not within the scope of the exclusion.

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[50] Thereby avoiding the issue in cases relied on by Riskpool such as *Thorman v New Hampshire Insurance Co (UK) Ltd* [1988] 1 Lloyd’s Rep 7 (CA).

"Claim"

5.18 Riskpool identifies no precedent to support its contention that the entire Waterfront Proceeding was one indivisible "Claim", and that this defines the scope of the exclusion. Nor can Riskpool point to any precedent where an exclusion has been interpreted to exclude subject-matter not referred to in the text. This is unsurprising because exclusions remove cover for *specified* perils.

5.19 Riskpool relied below on authorities considering the word "claim" in different contexts which it said supported its contentions. None of those cases was concerned with the interpretation of the word "claim" in exclusion clauses,[51] and the issue was not determinative of the scope of cover.[52]

5.20 The relevant authorities emphasise that one proceeding may involve one or multiple claims. Whether there is one or multiple claims for insurance purposes depends on the context (e.g. the definition of one or more claims for the purpose of single or multiple excesses or policy limits, rather than whether an exclusion applies to exclude cover altogether).

5.21 *West Wake Price & Co v Ching* determined that the "claim" attaches to the "object claimed" and this is not necessarily the same as the cause of action.[53] The object (or objects) claimed are determined by reference to the relief sought. The focus is on the nature of relief or losses claimed, so that where there are different types of loss there are in substance different claims. Focussing on the substantive object or objects pursued means that the number of "claims" does not turn mechanically on the number of proceedings or causes of action.

5.22 Likewise, In *Murphy v Swinbank*[54] the Court's focus was on the loss and divisibility of the losses. Where, in substance, the loss or damage is separate and distinct, there are multiple claims.

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[51] As cited in the CA Judgment at fn 34-36.
[52] They related to whether claims were notified within the correct policy period, whether new allegations against an insured fell outside the policy period and to disputes between insurers on multiple layers of cover.
[53] *West Wake Price & Co v Ching* [1956] 3 All ER 821 (QB) at 831.
[54] *Murphy v Swinbank* [1999] NSWSC 934 at [493]-[494].

Ascertaining whether there are distinct claims "may be undertaken by the extent to which damages in respect of each alleged claim can be isolated".[55]

5.23 Rather than focusing on the number of "proceedings" or causes of action, the correct approach is to examine whether the third party is in substance seeking compensation for different and divisible losses. To answer this question, the Court must look at the real nature of the claims (irrespective of the form of the pleadings) to ascertain the "objects" that were causative of loss. As noted in *Quintano v BW Rose Pty Ltd*, "damage is the gist of an action in negligence".[56] One action in negligence can have multiple damage. This principle is explicitly recognised in the insuring clause itself[57] and also the excess clause.[58]

5.24 Applying this to the Waterfront Proceeding, the Council was exposed to liability for separate and divisible loss arising from breaches of the weathertightness code (part E2), and non-weathertightness aspects of the Code (not part E2):

(a) For each of the 22 alleged categories of defect, the statement of claim identified the section of the building code breached (some weathertightness and some non-weathertightness), and the economic loss caused by reference to the remedial work required for each defect.

(b) The experts in both the Waterfront Proceeding and in the present proceeding were able to separately identify the loss caused by each defect, including by differentiating between losses caused by weathertightness and those caused by structural and fire defects.[59]

5.25 The distinction between weathertightness and non-weathertightness defects was not simply a matter of particulars. It went to the heart of the losses suffered by the plaintiffs (i.e. the "object" of the claim in

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[55] At [493].
[56] *Quintano v BW Rose Pty Ltd* [2008] NSWSC 793, (2009) 15 ANZ Insurance Cases 61-805 at [10].
[57] As it indemnifies members for "Claims" (plural) arising out of "any negligent act" (singular).
[58] 301.0130.
[59] For example, Schedule 1 to Mr White's Reply brief of evidence compared the defect by defect apportionment completed by the Council and Riskpool's experts.

West Wake terms) – was each relevant element of the building suffering from moisture ingress or a clearly not excluded cause such as structural flaws? Was there loss caused solely by those non-weathertightness flaws? On the evidence, there was approximately $4.4 million in building repairs that was attributable solely to non-weathertightness building failures.[60] The procedure adopted by the Waterfront Plaintiffs was to sue for everything in one proceeding, but there should not be a different answer about insurance cover if each was sued for separately.

Whether one or multiple Claims is irrelevant

5.26 Riskpool's singular focus on the word "Claim" fails because the exclusion excludes "liability for Claims".

5.27 Defining the scope of what is excluded by reference to "liability for claims" confirms the confined limits of the exclusion – namely that it is concerned only with excluding liability arising from the specified weathertightness risks.

5.28 This differentiates the exclusion from other exclusions which were drafted to exclude "Claims" simpliciter.[61] It also reflects that the indemnity is for liability not claims. Riskpool as policy drafter cannot now ignore this differentiated drafting.

5.29 Riskpool refers to a series of authorities which it says are supportive of its attempt to remove the words "*liability for*" from the exclusion wording.[62] Those cases are not relevant:

(a) *Medical Assurance Society of New Zealand Ltd v East* - the issue was the timing of payments due under a reinstatement policy where the insuring clause said the insurer "will cover the cost" of reinstatement. The Court held that this phrase was shorthand for "indemnify the insured against".[63]

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[60] The experts attribute between $1.28-1.32m to bathroom defects, $2.6-2.9m to fire defects, $239,000 to structural defects, and $218,000 to other non-weathertightness repairs.
[61] See exclusion clauses 1, 5, 6, 7, 8 and 9 (302.0253 and 302.0254).
[62] Riskpool submissions at 4.16 – 4.24.
[63] *Medical Assurance Society of New Zealand Ltd v East* [2015] NZCA 250, [2015] 18 ANZ Insurance Cases 62-074 at [20].

(b) *Walton v National Employers' Mutual General Insurance Association* - involved an exclusion applicable to "*claims*" "arising out of negligence".[64] It was held that the phrase "arising out of negligence" **limited** the scope of the exclusion to only claims which were in substance for negligence.

(c) *Allianz Australia Ltd v Wentworthville Real Estate Pty Ltd* - the insuring clause indemnified for "legal liability for claims" but the exclusion was "in respect of any claim…for any alleged or actual bodily injury or property damage".[65] This is opposite to the Riskpool wording. Even on that wording, the scope of the exclusion turned on the true "character" of the third party claims (alleged or actual bodily injury).

(d) *AIG Australia v Kaboko Mining Limited* – involved a claim by former directors for indemnity for insolvent trading claims under a directors and officers liability policy that included an insolvency exclusion which removed cover for any "Loss in connection with any Claim arising out of…insolvency". It was held that the exclusion did not apply because there was no substantive causal connection between the insolvent trading claims against the directors and the company's insolvency. While the policy drafting in that case was different,[66] it is orthodox reasoning as the Court held that the one proceeding involved multiple "claims" and the exclusion only applied to the extent there was a causal connection between the claims and insolvency.

Divisibility of claims

5.30 Even if it were accepted that each plaintiff in the Waterfront Proceeding pursued a single "demand for compensation" it does not

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[64] *Walton v National Employers' Mutual General Insurance Association* [1973] 2 NSWLR 73.

[65] *Allianz Australia Ltd v Wentworthville Real Estate Pty Ltd* [2004] NSWCA 100, (2004) 13 ANZ Insurance Cases 61-598 at [15] and [38].

[66] The drafting excluded "*Loss in connection with any Claim arising out of…[insolvency*]", which meant the relevant link with insolvency was between the type of Claims rather than the Loss. By comparison, the Riskpool exclusion applies to "liability for Claims". The Court said (at 46) that the insolvency exclusion could have been expressed to apply to "any Claim with such an insolvency link (without any reference to Loss), but because it did not do so "It is not liability for Claims that is to be excluded, but rather liability for Loss".

necessarily follow that the exclusion must exclude liabilities for claims arising from both weathertightness and non-weathertightness. That is because, depending on the context, a third party's demand for compensation may be either aggregated or divisible for insurance purposes.[67]

5.31 Issues of divisibility and aggregation regularly arise in the context of excess clauses. Whether claims are aggregated or divisible depends on the substance of the underlying factual context and the relevant policy wording – "the focus of attention is not on legal classification but on the factual case".[68]

5.32 So, for example, in *QBE Insurance Ltd v MGM Plumbing Ltd* a single proceeding in negligence relating to the installation of a waterproof membrane in a housing development required the payment of 47 excesses (one for each house) because the defects had no common cause.[69] Likewise, in *Seele Austria GmbH Co KG v Tokio Marine Europe Insurance Ltd,*[70] subcontractors had installed defective windows throughout a building project. A separate excess was payable in respect of each defective window because there was no single mistake which all defects could be attributed. It was rather the result of poor workmanship repeated over and over again.

5.33 Other contexts demonstrate the orthodoxy of treating "claims" as divisible where that is the objective intention of the parties:

(a) **Contribution between insurers -** for example, where a claim arises from a continuing series of acts by the insured straddling multiple insurers (or insured and uninsured periods). The leading United Kingdom asbestos cases are illustrative. In *Zurich Insurance PLC UK Branch v International Energy Group Ltd,* the UK Supreme Court assessed contribution between two insurers and the

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[67] CA judgment at [67].
[68] *Distillers Co Bio-Chemicals (Aust) Pty Ltd v Ajax Insurance Co Ltd* (1974) 130 CLR 1.
[69] *QBE Insurance Ltd v MGM Plumbing Ltd* (2003) 12 ANZ Insurance Cases 61-555 (QSC).

[70] *Seele Austria GmbH Co KG v Tokio Marine Europe Insurance Ltd* [2009] 1 All ER (Comm) 171 (CA).

insured (for an uninsured period) where a claimant had been exposed for 27 years.[71]

(b) **Allocation of defence costs –** for example, where a claim relates to a mixture of insured and uninsured conduct, insured and uninsured claimants, or conduct insured by multiple insurers. Depending on the facts and policy wording, the insurer's liability for defence costs can be allocated between covered and uncovered claims.[72]

5.34 Read overall, the reasonable reader would interpret the introductory phrase to the Weathertightness Exclusion as collectively using language of causation, so that "liabilities for claims" are excluded where there is a causal connection to weathertightness. This contemplates divisibility of "Claims" based on the true nature of the liability in question.

5.35 Riskpool seeks to avoid this drafting by pointing to the words "alleging" and "in respect of", saying that those do not necessarily contemplate any causative link between the "Claim" and weathertightness.

5.36 This is contrary to established authority. Riskpool relies on the dissenting judgment in *MDIS Ltd v Swinbank*.[73] However, the majority of the English Court of Appeal held that as a matter of commercial sense the word "alleging" in an insurance contract contemplated an enquiry into "proximate cause".[74]

5.37 That case involved a liability insurance policy which provided cover for claims "alleging neglect", and it was held that this required enquiry into whether neglect was the "proximate cause" of liability.[75] Otherwise, the scope of insurance would have been arbitrarily

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[71] *Zurich Insurance Plc UK Branch v International Energy Group Ltd* [2015] 2 WLR 1471.
[72] For example *New Zealand Forest Products Ltd v New Zealand Insurance Co Ltd* [1997] 3 NZLR 1 (PC); *Structural Polymer Systems Ltd v Brown* [2000] Lloyd's Rep IR 64 (Comm); *McCarthy v St Paul International Insurance Co Ltd* [2007] FCAFC 28, (2007) 157 FCR 204.
[73] In which Peter Gibson LJ stated (at p526) '"alleging" is not a synonym for "resulting from" or any other participial phrase pointing to causation'.
[74] *MDIS Ltd v Swinbank* [1999] 2 All ER (Comm) 722.
[75] The level of causative link required by "alleging" was the equivalent of "in respect of" – both being proximate cause (at [27]),

determined by the form in which the third party claimant had articulated their claim.

5.38 The reasoning in *MDIS Ltd v Swinbank* regarding the meaning of "alleging" has been endorsed by the New Zealand High Court.[76] Likewise, appellate courts in the UK and Australia have consistently held that the term "in respect of" contemplates a causal link when used in insuring provisions.[77]

5.39 The requirement for "some connexion or relation"[78] has even more force in the context of an exclusion clause, because the purpose of the provision is to remove indemnity only for the identified subject matter (weathertightness). Every instance where the Courts have endorsed a lesser causal connection for the terms "alleging" and "in respect of" has been in the context of insuring clauses, with the result being indemnity for a wider set of losses.[79] There is no precedent for interpreting those expressions loosely (i.e. to remove connotations of causation) for the purpose of broadening the scope of an exclusion clause to apply to liabilities which are not the subject matter of the exclusion.

Irrelevance of Wayne Tank

5.40 *Wayne Tank* is authority for the proposition that where there are two causes of a loss, "one within the general words of the policy and the other within an exception"[80] the entire loss is excluded. That is because where there is one loss that is the product of two causes, the entire loss has been caused by an excluded cause notwithstanding the existence of another concurrent insured cause.

5.41 The practical effect of *Wayne Tank* is that the indemnity position is ascertained by quantifying the total loss that is within the general indemnity, and subtracting the total quantum of loss that is within the

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[76] *Clasper v Duns* [2008] NZCCLR 32 (HC) at [116]-[117].
[77] UK – *Tesco Stores Ltd v Constable* [2008] Lloyd's Rep IR 636 (CA) at [21]-[22]. Australia – *Trustees Executors & Agency Co Ltd v Reilly* [1941] VLR 110 at 111.
[78] *Trustees Executors & Agency Co Ltd v Reilly* at 111.
[79] *National Vulcan Engineering Insurance Group Ltd v Pentax Pty Ltd* (2004) 20 BCL 398. *Siegwerk Australia Pty Ltd (in liq) v Nuplex Industries (Aust) Pty Ltd* (2014) 18 ANZ Insurance Cases 61-999 (FCAFC), *Kellogg Brown & Root Pty Ltd v John Holland Pty Ltd (No 4)* [2018] NSWSC 326.
[80] *Wayne Tank and Pump Co Ltd v Employers Liability Assurance Corporation Ltd* [1974] 1 QB 57 (CA) [*Wayne Tank*] at 67-68 per Lord Denning MR, 69 per Cairns LJ and 74-75 per Roskill LJ.

relevant exclusion. Applied to this case, the *Wayne Tank* approach involves:

(a) Ascertaining the full liability paid by Council to the Waterfront Plaintiffs under the settlement agreement; and

(b) Subtracting the amount of liability caused by weathertightness defects (non-conformity with E2).

5.42 That process identifies the quantum of any loss/liability that is within the indemnity and not excluded (here, the liability for building repair work caused *only* by non-weathertightness).

5.43 Riskpool misinterprets *Wayne Tank* by saying it applies to multiple causes of "Claims" rather than loss/liability.[81] That conflates the "claim" with the "liability/loss" in a way not anticipated by *Wayne Tank*, and indeed the judgments in *Wayne Tank* do not refer to "claims".

5.44 On any view of it, however, *Wayne Tank* does not help Riskpool. Its central argument is that there is only one "Claim" involving all liabilities pursued in the Waterfront Proceeding. On that interpretation, because there is only one claim, no issue of concurrency engaging *Wayne Tank* could arise.

5.45 The correct application of *Wayne Tank* can be illustrated by the facts of this case. Liabilities incurred by the Council resulting from mixed weathertightness and non-weathertightness fall within the *Wayne Tank* principle. They result from an excluded *and* a non-excluded cause, and are therefore excluded. This has always been accepted by the Council (as was recognised in the High Court's judgment[82]).

5.46 On the other hand, *Wayne Tank* is irrelevant to liabilities resulting solely from non-weathertightness causes simply because they are the result of (only) a non-excluded cause.

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[81] Riskpool Submissions at 4.40 say that the principle is that "if a claim results from two or more causal factors… and an exclusion expressly excludes indemnity for this claim… there is no indemnity for any of the claim". Riskpool itself acknowledges the conflation of "Claims" with "liabilities" and "loss" by footnoting the word "claim" to say – "Or a loss, or a liability – depending on the language of the particular exclusion".

[82] At [362].

5.47 Up until this Court, the parties had agreed that there were substantial remedial costs at the apartment complex that were *solely attributable* to non-weathertightness building defects. Riskpool now seeks to argue that "the reality" is that all of the remediation costs had to be incurred "in order to remediate both types of defects and, therefore, weathertightness defects were causative of a type of "Claim" that was excluded".[83]

5.48 This is wrong on both parties' expert evidence. The approach of Riskpool's building and quantity surveyor expert witness was to assess whether there was an additional cost to repair only non-weathertightness building defects, assuming that the repair work was done in conjunction with repairs to the weathertightness defects. Mr Smith identified, for example, $2.6 million caused solely by repairs to fire defects (Defects 15-19).[84] There is no suggestion that these costs needed to be incurred to remediate weathertightness defects.

6. WIDER CONTEXT AND COMMERCIAL PURPOSE

6.1 Where the words in a contract have more than one potential meaning the Courts are entitled to prefer the construction which is consistent with business common sense and reject the other.[85]

6.2 In *Lumley General Insurance v Body Corporate No 205963,* the Court of Appeal rejected an interpretation of an exclusion that did not make commercial sense because it would have resulted in the exclusion applying differently depending on whether defects were on the roof or in walls of the structure.[86]

6.3 In this case, after reaching a decision on the ordinary meaning of the words used, the Court of Appeal correctly acknowledged that the commercial purpose "does not compel the conclusion that the parties intended to exclude liability for sums not causally related to weathertightness."[87]

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[83] Riskpool Submissions at 4.42.
[84] Smith brief of evidence at [19] and conclusions at Schedule 1
[85] *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900 at [21].
[86] *Lumley General Insurance v Body Corporate No 205963* (2010) 16 ANZ Insurance Cases 61-853 (CA) at [29].
[87] CA judgment at [76].

The wider context

6.4 Riskpool relies heavily on background documents, extracting single words and saying that they significantly impact the meaning of the words that are actually used in the contract. This does not help because the objective meaning of the words actually used in the contract is clear.

6.5 If recourse is to be had to the wider context when the exclusion was drafted (2009) then, if anything, the objectively assessed intention of the parties was to remove cover for weathertightness liabilities, while otherwise retaining cover for building defect liabilities wholly unrelated to weathertightness.

6.6 Riskpool's witness explained that when Riskpool drafted the exclusion the intention was for the existing cover for non-weathertightness building defect claims to continue.[88] Paul Carpenter explained that the intention was to take away from cover weathertightness but not for non-weathertightness[89] - "So you were taking away weathertightness but you weren't taking away non-weathertightness? A: That's correct."[90]

6.7 Mr Carpenter could have, but did not, add the qualification that cover for non-weathertightness was being taken away if it existed in the same building as weathertightness.

6.8 Significantly, there is no evidence that when the exclusion was introduced in 2009 member councils were facing building defect claims which included a mixture of weathertightness liabilities and significant other liabilities (such as structural or fire related building failings). That was not a known risk.

6.9 Riskpool now says, without any evidential basis, that in the mid-2000s the "paradigm building defects claim involving moisture ingress" were "predominantly weathertightness defects" but investigation would bring "to light substantial previously latent non-weathertightness defects".[91]

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[88] 201.0041.
[89] 201.0041.
[90] 202.0444.
[91] Riskpool Submissions at 6.18.

6.10 This is an unwarranted effort to revise the background to fit Riskpool's theory. Riskpool cannot point to evidence which shows that substantial non-weathertightness defects within buildings that also had moisture ingress problems were an issue for Riskpool. The inter-party correspondence surrounding the exclusion makes no reference to that contingency. The exposure to “mixed claims” became significant to Riskpool several years after the exclusion was drafted – when cases such as this Waterfront Proceeding were commenced. While the leaky building crisis continued to evolve, Riskpool’s policy wording remained unchanged.

6.11 As it was not the relevant risk in 2009, there is nothing to suggest a mutual intention to exclude non-weathertightness defects if they existed in the same building as weathertightness. If that had been the parties’ intention then it would have been addressed specifically in the drafting (rather than arising through an unnatural interpretation based on a singular focus on the word “Claim”).

6.12 Riskpool, as the policy drafter, cannot now rely on imprecision in its drafting to broaden the scope of the exclusion to apply it to risks that were not in contemplation at the time of drafting.

6.13 Riskpool also seeks to support its view of the background by placing significant emphasis on the word “involving” in 2006 renewal correspondence, along with the title of an earlier policy provision (also from 2006) which referred to “Building Defect Claims Involving Moisture Ingress”.

6.14 Riskpool says that this extrinsic evidence must have been what the parties meant when Riskpool referred to “weathertightness claims” in the extrinsic materials from 2009. It then combines these usages of "involving" in background materials to argue that it shows a mutual appreciation in 2009 that “weathertightness claims” could also “involve” other types of building defects.

6.15 This is a wholly unrealistic interpretation that seeks to wrench a single word out of its merely background context and then re-shape it to try to give it a precise meaning that happens to match Riskpool's case. It also ignores:

(a) The phrase "weathertightness claims" only appears in background correspondence sent by Riskpool itself. It cannot be safely assumed that Riskpool was using (or members contemplated) that phrase with the level of precision it now ascribes.

(b) The provision title that Riskpool says is the intended subject matter of the Exclusion ("building defect claims involving moisture ingress") was ***actually removed*** by Riskpool when it drafted the full exclusion in 2009. If it were significant, it would have been retained.

(c) The exclusion is not drafted to apply to "weathertightness claims" but rather to claims arising (etc) out of the failure of buildings to conform to the requirements of part E2 of the building code. If "weathertightness claims" is to be used as a shorthand it must be treated as abbreviating the text of the exclusion itself. Complicated arguments about what Riskpool might have meant when referring to "weathertightness claims" in extrinsic materials do not assist. If the intention was for the exclusion to be governed by Riskpool's definition for "weathertightness claims," the exclusion would have used language such as "involving" (or perhaps better – *including*).

(d) It does not pass the threshold for admissibility under *Bathurst*.[92] The mere use of a single word in its own background context does not come near to proving that the parties agreed on a specialised meaning, and nor does it prove anything relevant to the notional reasonable person.

6.16 When looking at the words of the exclusion in 2009, a reasonable reader would not have attached any degree of significance to single words gathered from various background documents. If the intention was to exclude "weathertightness claims" "involving" other types of building defect liability then the exclusion would have been expected to say so.

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[92] *Bathurst Resources Ltd v L & M Coal Holdings Ltd* [2021] 1 NZLR 696 at [75] and [81].

6.17 The simpler explanation is that by 2009 the risk which had become uninsurable was simply council exposure to liability for non-compliance with weathertightness regulations. That was the known risk that was being removed from the scope of cover, but not non-weathertightness building defect claims which the parties objectively understood would continue.

Orthodoxy of Court of Appeal's approach

6.18 Inquiry into underlying cause is the orthodox and accepted approach when applying exclusion clauses.[93]

6.19 As there is no known case of an insurer adopting the approach advanced by Riskpool, there is no direct precedent where an exclusion has been applied to exclude liabilities not referred to in it. There are, however, examples where apportionment between insured and excluded liabilities has been endorsed by courts applying similar policy wordings (and in the way that the Council supports in the present case).

6.20 For example, *Body Corporate 326421 v Auckland Council ("Nautilus"),*[94] was a weathertightness liability case against a defendant whose insurer had declined liability. The insuring clause was not materially different to the present. It provided indemnity for claims (defined to include any form of process served on the insured) but was subject to an exclusion for any claim arising out of defective workmanship.

6.21 The High Court noted that "where the claim has two or more causes, the claim will be covered only if at least one of those causes is within the insuring clause and none of the causes is excluded by an exclusion clause", and "…if the plaintiffs' claim against [the defendant] in relation to cladding, for example, has two material contributing causes, defective design coming within the 'Professional Activities and Duties' definition of the insuring clause and defective workmanship excluded by exclusion 9, the claim is not indemnified even if the defective workmanship is only an indirect

[93] Court of Appeal judgment at [73].
[94] [2015] NZHC 862.

cause of the claimed loss".[95] This reasoning reflects an orthodox application of *Wayne Tank*, but also that claimed losses not caused by (excluded) defective workmanship remain insured.

6.22 The Court then undertook a defect by defect assessment to ascertain the cause of the losses alleged by the plaintiffs.[96] On the facts, all were excluded.[97] The insurer did not take the point now taken by Riskpool, but the Court's examination of each of the defects to ascertain underlying cause of the loss represents the kind of orthodox approach endorsed by the Court of Appeal.

6.23 The same sort of enquiry into underlying cause of liability was endorsed by the High Court in *Arrow International.*[98]

Commercial absurdity of Riskpool's interpretation

6.24 Riskpool's interpretation inherently results in extreme consequences that are contrary to common sense and the purpose of liability insurance.

6.25 It is contrary to common sense, for example, for a claim against a Council to be covered if it includes solely structural defects, but for it to be entirely excluded if a plaintiff later amends to add a weathertightness defect. It would be similarly absurd for a third party claim that is fundamentally about structural building failings to be completely excluded because of a "trifling"[99] weathertightness complaint.

6.26 To use a real world example, in evidence Mr Carpenter described the Southland stadium roof collapse as the type of building defect claim which the Protection Wording would continue to indemnify.[100] On Riskpool's interpretation, if a minor weathertightness issue (for example a leaking flashing) were discovered at the stadium, the

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[95] At [338]-[347].
[96] Set out at [347] – [368].
[97] At [351], [355], [357], [359], [360]-[361], [368].
[98] *Arrow International Ltd v QBE Insurance (International) Ltd* [2009] 3 NZLR 650 (HC) at [94]. The insured made a claim against its general liability insurer after settlement of a defective building proceeding. The insurer contended that a "defective product" exclusion applied, and sought apportionment to the extent underlying building defects were caused by defective product.
[99] CA judgment at [79].
[100] 201.0013.

entire collapsed roof claim would become excluded. This is not an unlikely scenario.

6.27 As pointed out in *Firm PI,*[101] what might appear to be an absurdity, when examined more closely can be seen (as in that case) that the 'absurdity' arises not from the proposed interpretation, but from the facts which produce an unfortunate commercial outcome for a party.

6.28 That is not the case here. The absurdity that would arise from Riskpool's interpretation is inherent in its interpretation and does not arise from the facts of the present case. The true interpretation needs to 'work' in other fact settings so as not to produce the absurd results given by the Council's hypothetical examples. Even Riskpool appears to accept that its interpretation needs a "work around" solution in some circumstances. Conversely, the Council's interpretation works in all circumstances, albeit that the result in some may not suit Riskpool.

6.29 In the Courts below Riskpool attempted to answer the difficulties presented by its interpretation by relying on a "de minimis" or materiality argument. It relied on a number of authorities,[102] none of which involved contractual interpretation or the implication of a threshold into a contract.

6.30 Now Riskpool argues that "the better approach may be to treat *this* solely as a matter of interpretation of the exclusion in its PW and wider context".[103] "This" appears simply to be a reference to "de minimis", so Riskpool's argument has not moved on substantively. (Riskpool has never pleaded an implied term, no doubt recognising that it could not satisfy the requirements.)

6.31 Contract law does not recognise a general principle of “materiality” before contractual provisions apply. This is something that the parties themselves must agree as part of the bargain.

6.32 Concepts of materiality inherently involve subjective judgement as to where the threshold lies – is it 1% or 10%? Or would the threshold

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[101] At [94].
[102] As cited at fn100-103 of the High Court judgment (101.0077).
[103] Riskpool Submissions at [6.17].

be an absolute monetary sum rather than proportionate to the size of the overall loss? A case could involve, say, $1 million worth of non-weathertightness defects and $1000 of weathertightness defects. Or it could be a $100 million claim, where a 1% materiality threshold would be $1 million.

6.33 Absent an express contractual mechanism, there is no objective or certain way of answering that question. The line is impossible to draw because it involves subjectivities that the drafters appear not to have envisaged.

6.34 Riskpool's submission that a threshold can be applied to the exclusion as “a matter of proper interpretation”, is contradicted by the absolute terms in which the exclusion is drafted (it does not say, for example, that only *material* weathertightness liabilities are excluded). Riskpool's approach requires the Court to read words in.

6.35 Riskpool also relies on a discretion in its trust deed. However, as the Court of Appeal said, "the Trust Deed provides that the Board must be guided by the Protection Wording, and presumably will start with it".[104] Riskpool is required to exercise its discretion for the purpose for which it was conferred (to operate a mutual insurance scheme for the benefit of Members), consistently with the terms of its governing documents (which include the Protection Wording) and cannot act arbitrarily or irrationally.[105]

6.36 This was also consistent with Riskpool's witness, Mr Carpenter, that Riskpool "adopted the protection wording as the guidelines for the exercise of that discretion and the Board would not refuse a claim where there’s clear coverage".[106] Also consistent with that position, Riskpool relied on a discretion in its first statement of defence but abandoned this in later pleadings.[107]

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[104] CA Judgment at [80].
[105] *Wellington City Council v Local Government Mutual Funds Trustee Ltd* (2017) 19 ANZ Insurance Cases 62-161 (HC) at [167].
[106] 201.0038 L10-14
[107] Amended statement of defence (101.0020).

7. CONCLUSION

7.1 Riskpool's denial of the Council's claim under the Protection Wording is based on an unorthodox and unnatural approach to the text of the Weathertightness Exclusion. It contradicts the conventional understanding that an exclusion clause should be read narrowly in order to exclude only the specific liabilities referred to. Riskpool's interpretation would produce perverse results that cannot be resolved by the unprincipled application of a de minimis materiality theory.

7.2 Although the Council respectfully agrees with the Court of Appeal's conclusion that it is not necessary to resort to the contra proferentem rule, if any ambiguity remained about the exclusion it should be resolved against Riskpool.

7.3 The appeal should be dismissed. In that event, the Respondent seeks costs and disbursements in this Court on the usual basis for two counsel.

Dated 28 March 2023

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Counsel for the Respondent

Counsel for the respondent certify that these submissions are suitable for publication and contain no suppressed material.