NOTE: THIS TRANSCRIPT IS NOT A FORMAL RECORD OF THE ORAL HEARING. IT IS PUBLISHED WITHOUT CHECK OR AMENDMENT AND MAY CONTAIN ERRORS IN TRANSCRIPTION.

IN THE SUPREME COURT OF NEW ZEALAND SC 103/2022
I TE KŌTI MANA NUI O AOTEAROA [2023] NZSC Trans 7

BETWEEN **LOCAL GOVERNMENT MUTUAL FUNDS TRUSTEE LIMITED**
Appellant

AND **NAPIER CITY COUNCIL**
Respondent

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

CIVIL APPEAL

MR RING KC:

May it please your Honours. I'm appearing with Mr Hlavac and Ms Gall for the appellant whom I propose to just call Riskpool to save time.

WINKELMANN CJ:

Tēnā koutou.

MR MCLELLAN KC:

As the Court pleases, I appear with Mr Tompkins for the respondent Council.

WINKELMANN CJ:

Tēnā kōrua. Mr Ring. In terms of timing, how long do you see yourself as being, because it's a reasonably narrow point, isn't it?

MR RING KC:

Yes, well I'm hoping to be done by 12, and maybe even less.

WINKELMANN CJ:

That'd be good, depending on how many questions we ask you.

MR RING KC:

Well, yes, it depends on how efficient I am. That brings me to the first point. For the first time I'm going to try and run this hearing totally electronically from my point of view.

WILLIAMS J:

Oh dear.

MR RING KC:

Yes, so I'd just appreciate it if you'd be gentle with me in that respect. I don't expect any quarter in any other respect but just as far as that is concerned. Second, there is in the back of the court a representative from

Wotton + Kearney, who are the solicitors for the reinsurers for Riskpool and he would appreciate your Honours' approval to take notes on his laptop.

WINKELMANN CJ:
Yes, certainly.

MR RING KC:
Thank you. Now just in terms of how I'm proposing to approach things today. I'm not proposing, unless your Honours have a different view, I'm not proposing to have Ms Gall put up the road map as I'm talking to it, but to have her put up the documents that are hyperlinked in the road map, and so she's going to correctly anticipate what I'm about to say next and go to the correct reference.

So before I start into the road map, perhaps I can just give your Honours what we see is the relevant background facts, and they are in my submission relatively straightforward. They start with a typical leaky building claim by the body corporate and the owners of the Waterfront Apartments in Napier. In 2007 the Napier City Council issued the code compliance certificates. Sometime after that the Waterfront plaintiffs started to discover moisture ingress issues and those moisture ingress issues affected the internal structural elements throughout the complex involving a breach of the Building Code E2 External Moisture, and also B1 Structure, and B2 Durability. So they're of – sorry they're weathertightness defects of what we've been calling a mixed type, and as your Honours know, that's a typical combination of breaches of the Code in this type of context.

That investigation into the nature and extent of those defects and the proper remedial works led to the discovery of other building defects, non-weathertightness defects, structural and ventilation, but at that stage not fire.

Then fast-forward to 2013, which is just days short of the six-year limitation period from the date of the code compliance certificates being issued. The Waterfront plaintiffs issued proceedings against the Napier City Council and

others. At that stage they still hadn't discovered the fire defects. They were discovered about a year or so later. By 2019 the Waterfront plaintiffs were on their seventh amended statement of claim. At that stage they alleged 12 mixed weathertightness defects. All the weathertightness defects that they alleged were mixed in that sense, and they also allege non-weathertightness. At that stage the ventilation issue had gone and the non-weathertightness defects were purely structural and fire, a total of 22 defects in all.

The allegation was that each of those defects had been caused by breaches of one or more aspect of the inspection code, sorry, the inspection role, issuing the building consent, inspections and/or issuing the code compliance certificate. Those defects in total were to be remediated pursuant to two scopes of repair. Those two scopes of repair were location-based in the complex. They were described as the “blocks” and the “balconies” respectively and they each involved both types of defect.

As the High Court and the Court of Appeal held, and as was not appealed by the Napier City Council in this case, each Waterfront plaintiff made one claim against the Council, and one equivalent claim against each of the other defendants in the proceeding, for compensation for their financial loss caused by having a complex with defects.
1010

The measure of damages in accordance with the principled approach in *Invercargill City Council v Hamlin* [1996] 1 NZLR 513 (PC) was the cost of cure and that was in the proceeding based on a common demand with all the other weathertightness – that’s all the other Waterfront plaintiffs, and they also claimed individual consequential losses, occupation loss, storage loss, storage costs and general damages.

So each Waterfront plaintiff made a mixed claim because it included both watertightness defects, again of the mixed type, and also non-weathertightness or watertightness defects. There were only multiple claims because there were multiple Waterfront plaintiffs with common interests which, of course, again is

typical in this leaky building context, and just cutting briefly to the insurance position for a moment, and that gave rise to only one excess under the Riskpool Protection Wording because there was a specific provision, which we'll come to, which said that multiple claims all arising effectively out of the same circumstances will only attract one excess. So that proceeding was then settled in –

KÓS J:
So that one doesn't depend on the framing of the statement of claim, does it?

MR RING KC:
No, no, not at all. In broad terms none of it depends on the framing of the statement of claim. It's the gist, the essence of it, yes.

The Waterfront plaintiffs' claims against all the defendants were settled at a mediation in 2019. Riskpool wasn't invited to attend or was uninvited to attend that mediation. There was a lump sum paid in settlement. A substantial portion or the greater proportion of that lump sum was paid by the Napier City Council. That lump sum was also undivided and unallocated between types of defects or indeed in any other way.

Riskpool indemnified the Council under a scheme against claims, including claims that breached duties as a building regulator but didn't cover them for liability for claims alleging arising directly or indirectly out of or in respect of weathertightness defects.

So if we now just go to the road map, and I've set out under the overview at A1 the essence of the exclusion, and as there has happened in the lower Courts, after the chapeau of the exclusion we just shortened it to "weathertightness defects". It's a lot easier. So the competing interpretations that have given rise to the dispute and are the subject of the sole ground of appeal. For Riskpool we say what it means is there's no cover for any liability for a claim if the claim includes weathertightness defects, and the Council says there is no cover for any liability for a claim to the extent that the liability is causally related to

weathertightness defects. We say that our reasons are the correct ones because we satisfy the tripod for proper contractual interpretation. The ordinary meaning of the text, the wider context of the ordinary meaning of the language used in the evolution of the text of the Protection Wording and third –

WINKELMANN CJ:
Sorry, what was the second one, because I'm not understanding what the second one is.

MR RING KC:
That it meets the ordinary meaning of the language used in the evolution of the Protection Wording. So what is commonly referred to perhaps is, and wrongly in this context, is negotiations.

WINKELMANN CJ:
Okay.

MR RING KC:
In this case we're not in negotiations. We're in a much stronger position because we're actually talking about predecessor contracts. Third, that it's consistent with the common purpose and there is no commercial absurdity. So we say not only, this isn't just the tripod, this is the trifecta.
1015

So if I can just come back now and finish off my introduction, the essential dispute seems to be about what is the subject of the exclusion. Is it liability or is it claims, in essence, and we say that the subject of the exclusion obviously is a claim that alleges or is alleging arising directly or indirectly out of or in respect of weathertightness defects, and we say that just as a weathertightness defect can be a mixed defect, a weathertightness claim can be a mixed claim. These are just different types of claims, they're not types of liability. We also say that, coming back to the elements of the tripod, that these types of claims were originally referred to in the Protection Wording in the schedules and the communications as a building defect claim involving moisture ingress and

sub-limited to $500,000. Simultaneously they were referred to as weathertightness claims, and that label was then carried through, and has been carried through, to the current Protection Wording where since 2009 weathertightness claims have been referred to as excluded.

So if I can just come back now to the road map. There in B2 I've set out that different terminology that I've already discussed, and as you can see building defect, uncontentious really. Weathertightness defect, uncontentious that a breach only of E2 or also involving B1 and B2 being described as a mixed defect, and ironically it's that word *involving* was actually used by my learned friends in their closing submissions in the High Court to describe this type of weathertightness defect. We say a weathertightness claim, similarly, is a building defects claim involving moisture ingress, and that can either be only weathertightness defects, pure or mixed, or can involve non-weathertightness defects defects as well, in which case it's a mixed claim, and that's of course where the contention arises.

The Court of Appeal accepted RiskPool's argument that each of the Waterfront plaintiffs had made a mixed claim with all their claims aggregated together for litigation purposes because of the common (indivisible) demand for compensation for the cost of the scopes of repairs.

WINKELMANN CJ:

Was that someone's Siri was it?

MR RING KC:

So the Court of Appeal accepted the one claim argument and also noted the insurance purposes point that I've already noted, about the excess in condition 1. However, the Court of Appeal rejected RiskPool's argument that the effect of the exclusion is on the claim so that because each Waterfront plaintiff made a mixed claim, there's no cover for the whole claim including the non-weathertightness liabilities, and if I can just interpolate here. It may be helpful to think of this, when you're thinking about the Waterfront plaintiffs, because my learned friends use "claim" in a lot of different ways and try and

muddy the waters as to what it means in the exclusion. The position would be exactly the same, we would be in exactly the same position if there was only one owner of a Waterfront apartment bringing one claim against the Council for both weathertightness and non-weathertightness defects, and that's, in my submission, my suggestion, that's the way to look at it.

1020

The fact that another 63 of them joined in with identical claims, and the body corporate joined in for the common property, no difference whatsoever, and that disposes also of suggestions that the singular and the plural can make any difference in this context. If you even ignore what the Property Law Act 2007 about that not being permissible anyway.

ELLEN FRANCE J:

Sorry, I'm not sure I quite understand the point you're asking us to draw from that example. The way you're saying we could characterise it?

MR RING KC:

The point I'm trying to draw your Honour is that at various stages in my learned friend's submissions they draw a distinction between claim and claims, and they muddy the waters between what each Waterfront plaintiff alleges, and what the whole proceeding is about.

WINKELMANN CJ:

I think our difficulty may be, and I'm just telling you, that you're saying "they muddy the waters". Can you say what you mean as opposed to just describing it in a sort of adjectival way.

MR RING KC:

I'm sorry your Honour. Maybe I'll just leave that and when I come to it naturally I'll deal with it then. So what happened in the Court of Appeal was they ended up holding that the Waterfront plaintiffs mixed claims had to be divided into uninsured watertight defect liabilities and insured non-watertight defect liabilities for Protection Wording purposes, and those are the paragraphs there

that essentially contain those findings. We say there's basically two errors in those findings. The first, the Court of Appeal considered the commercial purpose first, without reference to the text, and then wrongly concluded that the commercial purpose was that Riskpool intended to cover liability for non-weathertightness defects, even if that liability was part of a mixed claim, and that's paragraph 70 and 71.

Second, when they got to the text, which was 74 paragraphs in, they dismissed it in a couple of paragraphs, and in my submission they failed to properly apply the text at that point. They failed to properly apply the evolution of the Protection Wording and they wrongly concluded that both the text and the evolution confirmed that this was the commercial purpose.

KÓS J:

Does context here, this being an insurance contract, provide a gloss to the plain meaning or the objective meaning approach? This is the proposition that you read the insuring clauses generously and the exclusion clauses narrowly?

MR RING KC:

I'm entirely accepting that proposition, but I don't really think it makes, I don't think that principle makes any difference in this case. It's not a matter of us reading anything narrowly, we're just applying the plain meanings of the words.

So at D4 of the road map, we say the structure of the exclusion is that it's got four basic elements. One, what is the subject matter of the exclusion, and we say that is claims. Two, what are the qualifying links, and these are expressed as alternatives, and not all of them refer to causation. Three, what is the future or characteristic we say of the claim that creates the exclusionary effect, and we say that's watertightness defects. Four, what's the exclusionary effect, and that is that there is no indemnity against any liability for these claims.

O'REGAN J:

So liability in that context is liability of the insurer rather than liability of the Council to the leaky homeowners? Or is it the other way round?

MR RING KC:

Well, no, it's, it is the liability of the Council. We don't cover, that is the reference to RiskPool's liability.

O'REGAN J:

Right.

1025

MR RING KC:

So we don't have a liability, if you have a liability for claims and those claims allege weathertightness defects.

O'REGAN J:

Well doesn't that mean the focus is on liability rather than claims then?

MR RING KC:

Well no it isn't because if you look at the qualifying links, and particularly look at alleging. If the focus was on liability then you would be saying, we don't cover liability alleging weathertightness defects. But you can't have a liability alleging weathertightness defects, that's what the claim alleges.

O'REGAN J:

Yes, but it's liability for the claim rather than – we're not saying we're not liable for claims, we're saying we're not liable for your liability for claims arising out of weathertightness et cetera.

MR RING KC:

Well if you frame it that way then it makes no difference to my argument because it's still what the, it's still the claim that is the focus of the exclusion. We don't pay for your liability if the claim et cetera et cetera weathertightness defects.

O'REGAN J:

Right, so you say it's doesn't make any difference whether the focus is on liability or claim?

MR RING KC:

Well –

O'REGAN J:

Because liability is itself in relation to the claim.

MR RING KC:

Well yes except to the extent that the Council wants you to read the exclusion as if the word for claims isn't there, and I mean fundamentally what we're saying is that the full liability is only descriptive, but the purpose of the exclusion is to carve out a claim from the operative clause, or the ensuring clause, that is not going to be covered. Not to carve out a liability that is part of a claim.

WILLIAMS J:

How would that apply in, say, the war exclusion. Let's say, can you hear me?

MR RING KC:

I'm sorry?

WILLIAMS J:

Most people tell me to make less noise than more. How would that apply, for example, to the war exclusion which says arising directly or indirectly out of, let's say you've, a building is damaged through some act of war, and then there's an earthquake. Let's assume there aren't any EQC issues, then there's an earthquake. Are you saying the fact that part of the damage was due to war, excludes all of the damage.

MR RING KC:

I'm just trying to understand what the factual situation would be that arises from that. That first there's a war and then there's an earthquake.

WILLIAMS J:

So the building is bombed, but not destroyed, and then there's an earthquake, unrelated to the war. The whole building comes down. The claim is in respect of the entire cost of rebuild, or whatever it might be, not just the bit relating to the bomb. Uses the same sort of wording "directly or indirectly, arising out of, liability for" et cetera et cetera. Do you say that would mean you couldn't claim anything in respect of destruction of that building, even the bit unrelated to war?

MR RING KC:

Sorry I'm just turning up the war exclusion.

WILLIAMS J:

Clause 3(c) of the PW.

MR RING KC:

Three? Or two?

WILLIAMS J:

"Does not cover liability for property damage…"

MR RING KC:

Two, well that refers to legal liability. It doesn't refer to claims.

KÓS J:

Well it covers – it does not cover liability for liability, which is clearly a way of drafting.

MR RING KC:

Well, yes, yes, that's another reason why, looking at one exclusion and trying to work out what this exclusion means is not necessarily going to provide you with the right answer.

WILLIAMS J:

Yes, but we're construing the contract that's – we have to look at that.

MR RING KC:

Oh indeed, and my primary response to that is that unlike 13 this exclusion doesn't refer to claims.

WILLIAMS J:

So your whole case, then, hinges on claims. On that word?

MR RING KC:

Yes, it does.

WINKELMANN CJ:

And what Justice O'Regan has said to you is that naturally read the clause hinges on liability.

MR RING KC:

Well, and with respect I'm one, not necessarily agreeing with that because you could take out the word "liability" and it would still, we say, say the same thing.

WINKELMANN CJ:

Well, you could, but you could take out other words too, you know, it's just these are the words that were chosen.

MR RING KC:

Well, yes, but what we're saying is that, and my second, and perhaps it's going to be the better point then, in light of your Honours' comment, is that it ends up with the same, in the same situation, and I think, if I can just – it's really the point where – is really what we're making in paragraph 2 of 5 of the road map. That the insuring clause carves out a class of claims that is not covered, and one of those is a mixed claim, and that the cumulative effect of both provisions, if we can turn up the operative clause, that what it – it indemnifies against claims having a particular character, and then the exclusion comes along and says, but not if they also have a specified additional character or the specified additional features. So when you look at the insuring clause and you cut to the essential words, it's to indemnify the member against claims for breach of professional duty. So what it's saying is that we do cover liability for those

claims. We'll indemnify the Council against claims for those breaches of professional duty, but then the exclusion comes along and says, but this indemnity does not cover the Council's liability for claims, and those claims are relevantly linked to the weathertightness – the ones that are relatively linked to weathertightness defects.

So what is being carved out, and this is a key point in our submissions, is claims having a particular character being insured, but not if they also have a specified additional character, or specified additional features, and in this case that's weathertightness defects, and it's an example, we say, of the application of the principle that the specific provision overrides the general, and to that extent we – in that respect we note Derrington and Ashton. So it operates in contradistinction of the description of the cover in the insuring clause. It prevails because it's a specific provision –

O'REGAN J:
This isn't coming up on our screens.

ELLEN FRANCE J:
No, I've asked the registrar to reset.

MR RING KC:
I'm sorry, it's not coming up on your screens?

O'REGAN J:
No, it's coming up on Justice Kós', so you can address your submissions to him.

MR RING KC:
Let me read it, if it can stay still on my screen I'll read it to you. The exclusion, it's disappeared.

KÓS J:
What's the reference please, so we can look at it?

MR RING KC:

The reference is Derrington and Ashton in our authorities, page 1845, paragraph 10-14. "It operates," this is the exclusion, "in contradiction of the description of the cover in the insuring clause. Indeed, that is a necessary consequence of its purpose, and in the absence of any other impediment, it prevails because it is a specific provision as opposed to the general insuring promise and because of its purpose of modifying the insuring promise. That purpose is to preclude cover that would otherwise be provided under the wide terms of the insuring promise," and then it goes on to say, "… and so the conflict between them does not create any ambiguity".

KÓS J:

So can you ask you, we're focused at the moment on clause 13 and the word "Claims" which you place a lot of weight on, and that's capital "C" Claims, it's defined term. If that were not a defined term, would your argument be weaker, because the defined term is important. The defined term is *the demand* for compensation.

MR RING KC:

The demand. I don't think it actually would make any difference because "Claim" in that context would still refer to the claim by the Waterfront plaintiff against the Council.

KÓS J:

Well, no, it's much more naturally subdivisible in the mind of the ordinary reader, I think, if it's an undefined term. You seem to gain much more strength, to my mind, from the fact that it is *the demand* for compensation, which give you at least some support for collecting them together.

MR RING KC:

Well perhaps my best answer is that I reserve my position on that, but fortunately it doesn't say that, it is capitalised, and so it has to be treated as a common intention that it's the as defined term.

KÓS J:

Well that's clear, so do you put therefore considerable weight on the way in which the expression "Claims" is defined?

MR RING KC:

Yes we do. Yes we do, and indeed that's already baked into the ground of appeal because that was the findings in the lower court, and I mean the essentially finding in the lower court, in the lower courts based on *West Wake Price & Co v Ching* [1956] 3 All ER 821 (HC) amongst others, is that in the hierarchy of the generality, the demand is right up the top, the cause of action, or causes of action are then underneath that, and then you get down to particulars, and we're actually in, when we're talking about weathertightness defects and non-weathertightness, we're actually talking about particulars of particulars. We're not talking about different claims.

WINKELMANN CJ:

Right, so moving on.

MR RING KC:

I'm sorry your Honour.

WINKELMANN CJ:

Because there's not a lot to this argument really is there. I mean it's quite a narrow point.

MR RING KC:

Well it is, it is.

WINKELMANN CJ:

Yes.

MR RING KC:

It is a narrow point.

KÓS J:

Well I mean your strong points are defined term and alleging.

MR RING KC:

Yes.

KÓS J:

And that's the nutshell of your argument.

WINKELMANN CJ:

And then we move on and you say the Court of Appeal went straight to commercial purpose.

MR RING KC:

Yes, well, can I just make a couple more comments in this section, because I think this is the section that where the high contention from the Council comes.

WINKELMANN CJ:

Which section is this? We're in section…

MR RING KC:

We're at paragraph 5, D5 of the road map.

WINKELMANN CJ:

Okay, D5, got it.

MR RING KC:

Let me come down to paragraph 3. We say that claims is the subject, and not liability. One, otherwise the reference for claims is redundant, and two, liability can't be alleging something but a claim can, and the cases that support those propositions are the *Medical Assurance Society of New Zealand Ltd v East* (2015) 18 ANZ Insurance Cases 62-074 (NZCA), which is authority for that formulation in paragraph 2, particularly of what "does not cover" means, means doesn't indemnify against, and then it matches up to the wording in the insuring clause. *Walton v National Employers' Mutual General Insurance Association*

Ltd (1973) 2 NSWLR 73 (NSWCA), *Allianz Australia Ltd v Wentworthville Real Estate Pty Ltd Co* (2004) 13 ANZ Insurance Cases 61-598 (NSWCA) is authority for the proposition that we referred to about having a particular character but the exclusion takes out claims that have an additional character or special factors, and *AIG Australia Limited v Kaboko Mining Ltd* (2019) 20 ANZ Insurance Cases 62-205 (FCAFC) is a specific authority for the proposition that a liability can't, that the wording has to make sense, and it's liability for claims and the key word is "liability" then the word "liability" has to satisfy the qualifying links that follow it. If it's "Claims" then it's "Claims" that have to satisfy the qualifying link that follow it. "Liability" does not satisfy, for example, the alleged link.

Finally we just say in this point that that interpretation also reflects the defined claim, demand for compensation. That the subject matter of a claim is not associated with the conduct, and that's the *Junemill Limited (in liq) v FAI General Insurance General Company Ltd* (1997) 9 ANZ Insurance Cases 61-377 (QCA), and that what is, in practice in fact what we're dealing with is lump sum compensation undivided between defects, and if you go back to the fundamental source of that liability, and again to the *Invercargill City Council v Hamlin* formulation of that, it is liability that compensates the diminution in value because of the cumulative effect of all the discovered and discoverable defects.

1040

ELLEN FRANCE J:

So on that approach, Mr Ring, if, for example, fire had been discovered later, but let's say still within the fire defects, still within the limitation period, if there's a separate claim, in terms of a separate statement of claim, et cetera, in relation to that, you'd say, well, on that basis that doesn't make any difference to your argument?

MR RING KC:

Correct. Absolutely. It's still the same claim. The relevance of – going back to the *Hamlin* point and remembering that what we're fundamentally talking about

here is a loss by way of diminution in value. It's a lot harder to see, if not impossible, to see how if the Waterfront plaintiffs, for example, had claimed diminution in value and not the cost of repairs, then how would you divide up between the weathertightness defects and the non-weathertightness defects, and how would you divide up, for example, consequential loss between weathertightness defects and non-weathertightness defects?

Then finally we make the point there that condition 2(f), and if you can turn that up, condition 2(f) is that common –

WILLIAMS J:
Apparently we can't.

MR RING KC:
Again? I'm sorry.

WILLIAMS J:
System's gone dead for some reason.

WINKELMANN CJ:
We can all get the document up on our screens. We've got the document up on our screens anyway, I think.

MR RING KC:
Yes, okay. Well, 2(f) is standard insurance provision that says that at any time the insurer can pay the amount of the claim, wash its hands and walk away. Of course, that couldn't work if claims are divided in this way between uninsured weathertightness defects and insured non-weathertightness defects.

WINKELMANN CJ:
This is condition 2(f) on what page of the document?

MR RING KC:
It is 302.0306.

WILLIAMS J:

Is that the page or the document?

MR RING KC:

36 is the native page of the document.

WINKELMANN CJ:

Why wouldn't that work?

MR RING KC:

Well, it says it shall be then under no further liability in connection with such claims. So…

ELLEN FRANCE J:

That's just – you're just going around in a circle though, aren't you, depending on what your view of – whether you can divide claims or not?

WINKELMANN CJ:

It also suggests there might be multiple claims, which doesn't work in your scenario, does it, because…

MR RING KC:

Well, yes, it does because it's talking about a series of claims that give rise to the one excess. It's that condition –

WINKELMANN CJ:

So the multiple plaintiff type thing?

MR RING KC:

Yes.

KÓS J:

Well, claim is a claim for, demand for compensation laid by a third party and so if you had two third parties.

MR RING KC:

Yes, and remember condition 1 only defines claims in the aggregate for the purpose of the excess. So if you only used the word "Claim" here you wouldn't be covering those multiple claims in a leaky building situation.

So we say for those reasons the focus of the, subject of the exclusion is the claim and not the liability for that claim and so it's not divisible, and we then turn to the specified qualifying links as supporting that. We make the point exclusion doesn't necessarily have to be based on causation, and reference there to *AMI Insurance Limited v Legg* (2017) 19 ANZ Insurance Cases 62-148 (NZCA), and Derrington and Ashton, that it can be in relation to a defined activity, a place, a time, a nature of a loss, and there's no reason in principle that parties couldn't exclude indemnity against a whole claim if it included both weathertightness defects and non-weathertightness defects.

1045

KÓS J:

Can we just go back to Justice France's question because I'm not sure I'm satisfied with your answer? If Mr Jones, a Waterfront plaintiff, makes one demand for compensation relating to weathertightness and then, secondly, makes a separate claim in a separate statement of claim in relation to fire, are those not two claims for the purposes of the definition of "Claim"? They're two demands, they're distinct.

MR RING KC:

Well, they wouldn't be two demands, your Honour. First of all, he wouldn't be able to run them in accordance with the rules under two separate causes of action because it would conflict the rules and so you've got to put everything –

WINKELMANN CJ:

What rules?

MR RING KC:

The High Court Rules.

WINKELMANN CJ:

So do we read the High Court Rules under these conditions?

MR RING KC:

Well, no, I'm talking about it from a practical point of view, your Honour.

KÓS J:

No, but I mean a claim doesn't depend on a statement of claim.

MR RING KC:

No.

KÓS J:

You're an insurer, so the question is you get a letter that says there's something wrong with it and you should pay, and then you get another letter that says there's something wrong with this too and you should pay, they're both relating to the same apartment but they're two demands.

MR RING KC:

Well, with respect, Sir, they're not two demands. It is one common demand that is based on two different types of problem.

WILLIAMS J:

The logic of that –

WINKELMANN CJ:

It's two different causes of action.

WILLIAMS J:

The logic of that is that if you had claims three years apart you still wouldn't be covered for the second problem.

MR RING KC:

Well, if it is part of the same engagement by the Council and the same breaches of the inspection role –

WILLIAMS J:
Yes, but your argument –

WINKELMANN CJ:
It's bringing in causation.

WILLIAMS J:
Yes.

MR RING KC:
Well, I don't think I am, your Honour. I'm talking about the substance of the demand for compensation that is being made and even if there are two separate causes of action brought together or at two separate times, one alleging fire defects and the other alleging weathertightness defects, that would be one demand in respect of the, as far as the liability of the Council is concerned, that's one demand arising out of one Council engagement under one inspection role.

WINKELMANN CJ:
So you're reading quite a lot of wording, words, then, into the exclusion.

MR RING KC:
I don't think I am, your Honour, because I'm actually relying on cases like *ISP* in the – we haven't referred to that but –

WINKELMANN CJ:
Well, then, maybe we should go to the cases you're relying on.

MR RING KC:
Well, that one isn't in the bundle because it wasn't something that I necessarily thought would come up, but it's one example of a number of cases where later defects have come up and they've been outside the limitation period and the Court has said no because there is already on foot a claim for weathertightness

defects. Just because, in that case, structural defects have emerged later, that's not a separate claim that is outside the limitation period. It's –

KÓS J:

That's a very sophisticated argument for an ordinary to make, having regard to such cases. The ordinary reader here is the Chief Executive of Napier City Council who receives this wording, or the Chief Risk Officer, who receives this wording and asks himself: "What have I got here?"

MR RING KC:

Well, that's right, but the word "demand" is a word that very much has a legal connotation to it. It has a practical connotation but it has a legal connotation to it as well and the legal connotation is that it is the highest level of generality that you can get, and so the fact that that claim can be divided into multiple causes of action brought at the same time or at separate times or not, legitimately or not, doesn't change it from being in law and in ordinary meaning a demand, and when I say "ordinary meaning", if you look at *West Wake & Ching* where the word "claim" was not defined in the policy, they relied on the ordinary meaning and the ordinary dictionary meaning was that it was a demand.

WINKELMANN CJ:

So it's where we look at – so "demand" is not a defined term, is it?

KÓS J:

No.

MR RING KC:

No.

1050

WINKELMANN CJ:

But "Claim" is defined in a way that it is. It's not defined by reference to a rising out of particular acts or omissions, the same act or omission by the Council.

It's simply defined by reference to a demand for compensation made by a third party.

MR RING KC:

Yes, but we're already at the point where the Waterfront plaintiffs have only made one demand and that demand includes both weathertightness defects and non-weathertightness defects. If what your Honours are saying is that at some later stage it could come up with another demand, then –

KÓS J:

Well, there were separate demands here, so we know that fire came later.

MR RING KC:

Well, that wasn't a separate demand. That was an attempt to add the fire defects to the claim, or to, well, to the cause of action, but it was still the same claim. It was still based on the same breaches of the inspection role, exactly the same breaches of the inspection role, and – well, exactly the same breaches of the inspection role, the same engagement by the Council. With respect, I –

WILLIAMS J:

The same inspection?

MR RING KC:

Well, the same code compliance certificate, yes. Whether it was the same inspections exactly I don't know but it wouldn't matter because it's the same code compliance certificate.

WILLIAMS J:

It all hinges on the certificate, not the act of the actor who did the inspecting well or not well?

MR RING KC:

The cases say that if you've ended up with a code compliance certificate then you go there and the quality of the inspections, whether even before limitation

period or after, really just feed into the decision to issue the code compliance certificate or not. If inspections are bad, then the code compliance certificate is going to be bad. But you don't need to go further back than the code compliance certificate.

WILLIAMS J:

Well, the plaintiff doesn't need to go back further than the – question is whether the insurance company can avoid it.

MR RING KC:

Well, there can't be multiple demands based on the building consent, each inspection and the code compliance certificate.

WILLIAMS J:

That takes us back to claim and causation, doesn't it? It's the same question.

MR RING KC:

It is, your Honour, but that question has been settled in the lower Courts and wasn't the subject of an appeal here. The question that there is one claim here has been settled.

ELLEN FRANCE J:

Yes, but I think the point of the questioning is to try and tease out the implications of the interpretation that you're advancing.

MR RING KC:

Well, maybe the best way for me to answer it, your Honours, is to say that if it could be proven at a later stage that there was another demand then that demand would amount to a separate claim and that separate claim would then be able to be assessed under the Protection Wording on its own merits.

WINKELMANN CJ:

But just to go back to your definition of what "a claim" is, you would read in, I say "read in", you probably would dispute that, but you would say that 7,

definition of 7, you should effectively say shall mean demand for compensation made by a third party against the member arising from the same action or omission by the member?

MR RING KC:

Well, I'm not reading it in because if you go back to the insuring clause on the previous page, sorry, two pages back, I'm just using the words, essentially the words from the insuring clause –

WINKELMANN CJ:

Where's that?

MR RING KC:

– because it's in respect of claims made against –

WINKELMANN CJ:

What page? Page 2?

MR RING KC:

It's 302.0228 but the native page will be 24. So it's not just claims full stop. It's claims arising – I'm sorry, we're on the wrong page.

WINKELMANN CJ:

Are we looking for page 24, native page?

MR RING KC:

Yes, we're at page 2. We should be at page 24.

WINKELMANN CJ:

Well, we're at page 2 because you said two pages back and that was two pages back from the…

KÓS J:

I think we're in the public liability policy.

1055

MR RING KC:

Yes, I'm sorry. I didn't realise. It's the same definition but it was in the public liability section. We need to go to section B.

WINKELMANN CJ:

And that's on page 24?

MR RING KC:

On page 24. So it's claims for "breach of Professional Duty arising out of any negligent act, error or omission wherever or whenever the same was or may have been committed or alleged to have been committed on the part of the Member…" So if you've negligently issued a code compliance certificate, that is your breach of professional duty, and the fact that it is defective because you shouldn't have certified weathertightness defects, you shouldn't have certified non-weathertightness defects, you shouldn't have certified both, makes no difference. That is still the claim that you're facing and that is the effect of the lower Court hearings and judgments.

So I'm at the road map at number 6, text D6. They're all equally ranking alternatives and they don't all, in my submission, refer to a causative connection. "Arising" does, we accept that, but it infers that it will also apply to other or allow for other concurrent or contributing causes to the claim.

WINKELMANN CJ:

Sorry, are you saying something implies something?

MR RING KC:

No, I'm saying that the ordinary meaning of the words and as defined in the authorities, "arising directly or indirectly out of", means it has to be a material contributing factor and if you're talking about a material contributing factor you are necessarily not talking about an exclusive cause, and that's the inference that I'm referring to, your Honour.

"Alleging" refers to unproven assertions. Referred your Honours to *Hird v Chubb Insurance Company of Australia* (2016) 19 ANZ Insurance Cases 62-103 (VSC) and *Black's* dictionary in that respect. It's an inquiry into the characteristics or features. It is not an inquiry into cause. Multiple allegations we say don't cancel each other out just because a claim is alleging A and B. It's still alleging A. The Court of Appeal we say erred in effectively ignoring "alleging" as a standalone alternative, and there was no separate, in those paragraphs, no separate assessment of the word "alleging" in this context at all.

"In respect of" has been defined as some discernible or rational link. Again, it's not necessarily causative but it may be. Sometimes it can mean "for". But it also contemplates multiple links in the same way as arising indirectly from multiple causative factors, not exclusive cause. And again, the separate meaning of that word was also ignored by the Court of Appeal.

We rely on the *Wayne Tank and Pump Co Ltd v Employers Liability Assurance Corp Ltd* [1973] 3 All ER 824 (CA) principle. If a claim, or a loss or a liability for that matter, results from two or more causal factors, the indemnity is excluded if the claim or cause of – is caused or contributed to by one of those factors. There's no indivisibility. The excluded part contaminates the whole claim. There's no indemnity at all, even if there are unmentioned, unexcluded causes.

We rely on the *Nautilus* judgment, *Body Corporate 326421 v Auckland City Council* [2015] NZHC 862. The Court of Appeal relied on the *Nautilus* judgment but in my respectful submission mischaracterised it. I mean first of all *Nautilus* was a different wording entirely, but when his Honour, Justice Gilbert, referred to the principle in *Nautilus*, as you can see at paragraph 73 on your screen which is the extract from the Court of Appeal judgment –

WINKELMANN CJ:

Which is not on our screens so you'll just have to pause for a moment. Did you want us to get the *Nautilus* up?

1100

MR RING KC:

I'm sorry. Can I suggest that you pull up the Court of Appeal judgment at paragraph 73? Sorry –

KÓS J:

Why do we do that? It's simply in your written submissions at paragraph 4.44.

MR RING KC:

Yes, if you go to the written submissions. Thank you, Sir. That's probably the most convenient place. 4.44 and 4.45. This is where we deal with this point. So what Justice Gilbert said was that the claim will only be covered if there are two or more causes, if at least one of them is within insuring clause and none of the causes of the claim is excluded by the exclusion. The Court of Appeal redrafted that to read, at paragraph 76, the "claims are within the indemnity but excluded to the extent they are causally attributable". Well, that is not what Justice Gilbert said. What Justice Gilbert said supports the proposition that we are making.

So that takes us to the conclusion that we've made at…

KÓS J:

Isn't Justice Gilbert's statement simply a repetition though or a rehashing of the *Wayne Tank* principle?

MR RING KC:

Yes, it is. It's an entirely orthodox proposition. But the point I'm making is that what the Court of Appeal did is not.

WINKELMANN CJ:

You're saying that not that they misstated *Nautilus*, that they misstated the *Wayne Tank* principle?

MR RING KC:

Well, when they applied Justice – yes, thank you, your Honour, but I'd also say that when they applied Justice Gilbert's statement in his judgment, which they reproduced at paragraph 73, they added in the words "to the extent" in paragraph 76.

KÓS J:

But aren't we dealing with two different things here? *Wayne Tank* is about causation of loss and what we're dealing with at the moment is construction of the insuring and exclusion clauses.

MR RING KC:

Well, it's causation of liability.

KÓS J:

Yes.

MR RING KC:

And we're dealing with causation of liability, to the extent that the qualifying links refer to causation.

WINKELMANN CJ:

I must say I'm unclear from your argument whether you're accepting that they do or don't because at your 4 you say doesn't necessarily have to be based on a causation, but then at your 6.3…

MR RING KC:

What I'm saying your Honour is that there are three separate qualifying links, each of equal importance, and each are effectively alternative routes to the exclusionary effect. "Arising from" we accept is causative but it is multiple causative by – in its ordinary meaning. We do not accept that "alleging" is causative at all in any sense. We do not accept that "in respect of" is necessarily causative. It may or it may not be.

WINKELMANN CJ:

It doesn't really matter if anything is causative though, does it?

MR RING KC:

Well, the Court of Appeal thought it did because they said that all three of them created a causal connection and we challenge that. We say that that was an error on the Court of Appeal's part to say that there was a required causative connection here between the excluded liability and weathertightness defects.

ELLEN FRANCE J:

Could I – sorry – just check going back to *Wayne Tank*, there, there were two equivalent causes. Does the principle apply more broadly, do you say?

MR RING KC:

Not necess– well, I'm saying it doesn't matter whether they're equivalent causes or they're consecutive causes, and one of the other authorities that we referred to in the submissions, *McCarthy v St Paul International Insurance* Co *Ltd* (2007) 14 ANZ Insurance Cases 61-725 (FCAFC), is authority for that proposition, and it's referred –

ELLEN FRANCE J:

But you agree *Wayne Tank* itself is dealing with single loss two equivalent causes?

MR RING KC:

Yes, it is. It's dealing with concurrent causes, yes. But in the sense that it's being used by the Court of Appeal, they're also using it as concurrent causes. They're saying that the weathertightness defects and the non-weathertightness defects are concurrent causes of the liability.

O'REGAN J:

Well, they're saying one's a cause of part of the liability and another's cause of a different part, whereas *Wayne Tank* is saying the same causes are for the whole liability or…

1105

MR RING KC:

Yes. It comes back to the – it certainly comes back to the divisibility point.

O'REGAN J:

But isn't that quite a big difference though?

MR RING KC:

Well, again it depends on whether you're dividing up the liability and ignoring the word "Claim" or whether you're saying the exclusion, the subject of the exclusion is the claim, and I accept that.

WINKELMANN CJ:

Mr Ring, this criticism of the Court of Appeal, the sort of micro-analytical parsing of their words, are you saying they said that these three different phrases indicated causal connection simply in reliance upon them setting out the phrase at paragraph 75, the words "'alleging or arising directly or indirectly out of, or in respect of' contemplate…" because that's simply saying the phrase, isn't it, and you do read contracts in whole sentencing, not micro-analysing?

MR RING KC:

I'm going to have to go to the book. The paragraphs, there's a number of paragraphs, and I thought we referred to them at number 4 of the submissions, where they make it clear that their only focus is on causative. If you look at 60: "The exclusion carves out a class of Claims which are causally connected to weathertightness defects." Now that is before we ever get to any textual analysis, and that conflates all three separate qualifying links, does not treat them as alternatives, does not identify what they separately mean. It just lumps them all together and says everything's causative.

WINKELMANN CJ:

Well, okay. I don't think you've answered my question but I don't know that you will.

MR RING KC:

I'm sorry, your Honour, can I try again?

WINKELMANN CJ:

Well, it seems to me, I don't know, it seems to me the approach you're taking is slicing everything up very finely. The Court of Appeal has taken it seems to me a reasonably conventional approach, looking at what the exclusion is driving at, and so they've looked at the phrase in paragraph 75 and one of the criticisms you make is that they have treated various bits of this phrase as causal, but actually all they've done is they've said that this phrase indicates causation to us, it's the language of causation.

MR RING KC:

Well, with respect, your Honour, the word "alleging" is not the language of causation.

WILLIAMS J:

Depends on what's being alleged.

MR RING KC:

Well, if you've got "alleging" and that is a parallel, an alternative to "arising indirectly or directly out of" and a parallel alternative to "in respect of" then –

WILLIAMS J:

What would you be alleging that can make it make sense? What would you actually be alleging?

MR RING KC:

Well, if you come – I'm sorry, your Honour, the point that I'm making, and I hope I'm going to answer your Honour's question in that, is that in its natural meaning what the clause is saying, what the exclusion is saying is if the claim alleges weathertightness defects we don't want to be involved.

WILLIAMS J:

But the claim will never just allege weathertightness defects. It will –

WINKELMANN CJ:

But you also have to read the words in the –

WILLIAMS J:

It'll allege weathertightness defects caused by your failures.

MR RING KC:

Well, yes. Well, okay, so what they're saying is: "If the claim alleges weathertightness defects caused by your failures, we don't want to be involved."

WINKELMANN CJ:

But, well, the Court of Appeal –

WILLIAMS J:

There will always be causation in there because you can't bring a claim saying: "My house leaks. Pay for it to fix it." There is no such claim.

MR RING KC:

I'm sorry, yes.

WINKELMANN CJ:

Yes, okay, can I just take you back to the language though because where does "alleging" take you in that clause if you just isolate it because it doesn't seem to me to make any sense? It's saying, it must be saying "alleging arising" – I've got to try and find the document, which is the hopeless aspect of this. It must – you have to try and make the sentence –

WILLIAMS J:

"Arising directly or indirectly out of, or in respect of".

WINKELMANN CJ:

Mmm.

WILLIAMS J:

It has to. You can't really parse "alleging" and say that doesn't say, that doesn't refer to causation, because that just doesn't make any sense.

WINKELMANN CJ:

Mmm, because it seems to me all the Court of Appeal is saying is that this is a phrase we construe as a whole.

1110

MR RING KC:

Well, then I think my answer to that would be twofold, your Honours. First of all, the principle of interpretation that applies here, in my respectful submission, is that the parties have used three different words in alternatives. So what they intended was, what they must be taken to have intended by a reasonable observer is that the claim might be alleging weathertightness defects, or the claim – and if so it's excluded. Or the claim might be arising directly or indirectly out of weathertightness defects, therefore it's excluded. Or the claim might be in respect of weathertightness defects, therefore it's excluded, and they've used three different words and to –

WINKELMANN CJ:

That involves isolating, arising directly or indirectly, to applying to only one of those, does it, or what does it involve doing with arising directly or indirectly on your interpretation?

MR RING KC:

Well it involves treating each of those alternatives, separated by the word "or", as disjunctive alternatives, and with the intention that having used all three there must be at least shades of meaning between them.

KÓS J:

Does it matter on your argument? I mean we seem to be spending a lot of time on a point that doesn't seem to be central to your argument.

MR RING KC:

Well it matters to the extent that claim fits naturally to alleging in respect of and arising out of, liability doesn't. That's the, I think, the reason, in the same way as the, in *AIG v Kaboko* the Federal Court of Australia Full Court said that you can't have a liability in respect of, but you can have a claim in respect of, and we're just using the same principle and applying it here.

So that takes us to our interpretation conclusion at paragraph 8. We also say that this is supported by the Protection Wording evolution that the common use of the language commencing at 2006 was that claims to which the exclusion applied would be building defects claims involving moisture ingress which were also described as weathertightness claims and for which indemnity was initially limited to 500,000 and then excluded.

We've referred to the interpretation principles, which we've already talked about, and at paragraph 11 what we're saying is that the evolution of this exclusion started with it being described, specifically described in the Protection Wording as building defect claims involving moisture ingress, and we're saying the use of the word "involving" there makes it clear that it wasn't intended to be exclusive.

O'REGAN J:

Does it make I that much clearer. It's not including. Involving is not quite the same as including, is it?

MR RING KC:

Well if you go down to paragraph 3 here, "involving" by definition necessarily implies a part that is contained or including. So yes, with respect your Honour, I would very respectfully disagree with that. That "involving" necessarily and can only, in ordinary language, refer to inclusivity and not exclusivity, and that, again, we've got the definition in Derrington and Ashton, and the decision in *Standard Life Assurance Ltd v ACE European Group* [2012] Lloyd's Rep. IR 655 (HC), paragraph 250 that I've referred to there in paragraph 3, and we say

if exclusivity had been intended it would have been qualified by the words “only”, “exclusively”, “just”, or “solely” or something along those lines.

KÓS J:

But you wouldn’t have done that either because that’s simply putting – I mean someone here is hostage to the terminology. In this case Mr McLellan complains that he is that hostage in a case where the claim is for 500 million or something, and only one million relates to building defects. Well, your argument is simply if he were to put the word “only” in there he’d end up with the same kind, form of hostage, just the other way round.

1115

MR RING KC:

If you had the word “only” in there then depending on where it was put you would be able to – I think we would be in difficulty on an argument that said the exclusion applied to mixed claims or –

KÓS J:

Yes, but you’d end up with liability for weathertightness claims in that context because the claim brought against you was not only about weathertightness, so you’re the hostage this time.

MR RING KC:

Well, that’s – yes, I agree, that’s the point that’s being made, yes.

WINKELMANN CJ:

So we’re onto your evolution of Protection Wording, are we?

MR RING KC:

Yes, we are.

WINKELMANN CJ:

We can deal with this in a prompt way, can we?

MR RING KC:

Well…

WINKELMANN CJ:

Without trawling through documents.

KÓS J:

We're halfway through it already.

MR RING KC:

Well, can I just commend to you schedule 1 of our submissions and the highlighted part of it – and the highlighted parts of it, because there are both correspondence in there and there are documents, and I think one of the key points we're making here is that the Court of Appeal wrongly assumed that the word "involving" never formed part of the contractual matrix, and in fact it did and it was the initiating form of when this limitation was first introduced and is therefore very telling about what was intended to, or what intended, and I mean that in the objective reasonable observer sense, was intended to achieve.

So the summary of it is, as we've said at paragraph 11 at number 1, that from 2002 the reinsurers removed the weathertightness cover because they wanted to avoid liability for claims that had their genesis in systemic failures. By 2006 there was a full weathertightness exclusion imposed by the reinsurers. Riskpool held off restricting indemnity under the Protection Wording until 2006. It started by sub-limiting indemnity and also limiting it to multi-unit developments in excess of 10 units.

KÓS J:

So I take it from that that the context is the reinsurers still provided cover for structural and fire misdeeds by Councils?

MR RING KC:

Claims. They covered claims, building defect claims that were not weathertightness defects claims.

O'REGAN J:

So their wording was the same, was it? Was their wording the same as the policy wording?

MR RING KC:

Wasn't exactly the same but very similar, yes.

So Riskpool held off its restrictions and then when it had to introduce restrictions it implemented them first by an exclusion and an extension, so it completely eliminated these claims, and then it brought them back by way of an extension sub-limited to $500,000 and it did so by endorsements that were incorporated into the Protection Wording with effect from 30 June 2006 and it sent them to members, the actual endorsements, with the letter 29 August 2006 that's referred to in the schedule.

We just refer to the headings being admissible as an aid to interpretation.

I've referred to the ordinary meaning of "involving" as only consistent with inclusivity and not exclusivity, and the application of the ordinary meaning of "involving" in this context is that a claim must have this feature among its contents and that would include a "mixed claim" as that expression has been used in *West Wake* and as I've already used that expression earlier. It includes, at a minimum, weathertightness defects but not –

WINKELMANN CJ:

Are you reading out from the letter?

MR RING KC:

No, I'm reading from paragraph 4 – well, I'm making submissions from paragraph 4 at number 11.

WINKELMANN CJ:

Can I just check if the letter makes this point that you're saying, the letters drawing it to their attention, because what you're saying is that once these

extensions would apply, these exclusions apply, then Council would be losing right to indemnity in the sort of mixed claim scenario.

MR RING KC:

Yes.

WINKELMANN CJ:

So is that drawn to their attention?

MR RING KC:

I think that in my submission it is, your Honour, and –

WINKELMANN CJ:

So I was just wondering about the letter.

1120

MR RING KC:

Let me go to the – if I can point you in the right direction, let me go to the exact references that do that. If you look at 301.0110.

WINKELMANN CJ:

Are they scheduled in your…

MR RING KC:

That's in schedule 1, 14 June 2007.

WINKELMANN CJ:

Right, got it.

MR RING KC:

301.0110.

O'REGAN J:

That just refers to cover for weathertight claims.

MR RING KC:

Well if that could be scrolled up please, hopefully there's a highlighted… ah yes. We're going to continue to provide cover for weathertightness claims. So that, I'm just giving you that to show a continued – and that, of course, I appreciate begs the question of what is a weathertightness claim, but I want to come to that next.

O'REGAN J:

And then the next sentence says, we have "resolved that cover for weathertight claims must be subject to an aggregate sub-limit of $`500,000."

MR RING KC:

Correct.

WINKELMANN CJ:

There's no indication that weathertight claims is a defined term there, is it?

MR RING KC:

Well it isn't a defined term.

WINKELMANN CJ:

Well, "Claims" is a defined term, because you say a lot turns on the definition.

MR RING KC:

Well but weathertightness claims is the same expression as was used – which was previously building defect claims involving moisture ingress, because that expression was used at the same time in the correspondence when those endorsements were provided, and that was a – the building defects claims involving weathertightness, involving moisture ingress, was the heading in both the endorsements –

WILLIAMS J:

The problem with the word "involving" is that it's not as clear as you suggested is, it could be I'll get involved, in which case I probably won't be the only one

there, there'll be others. But it also could be, this provision relates to offences involving firearms. Now that wouldn't apply to any offences that didn't involve firearms, so it doesn't resolve this issue for you. It could mean one or the other, whereas "includes" certainly would have.

MR RING KC:

Well, again, I go back to the ordinary definition of "involves".

WILLIAMS J:

Well that's what I was putting to you.

MR RING KC:

Well involve – and I've given you the authorities for that.

WILLIAMS J:

Well offences involving firearms.

MR RING KC:

Well that's a different context your Honour.

WILLIAMS J:

No it's not, it's the English language. I mean the cases you've put up are also in different contexts, we're trying to work out what this contract means.

MR RING KC:

Well –

WILLIAMS J:

The question is whether "involving" was intended to be inclusive or exclusive.

MR RING KC:

Okay, well let me, if I may your Honour, give you a comparable example to the one you've used. Let's suppose somebody was charged with offences involving firearms and offences involving something completely different.

It would be correct to say that they were charged with offences involving firearms.

WILLIAMS J:

Yes, that's very, very clever, but if the statute says this offence applies to – sorry, this provisions applies to offences involving firearms, right, there's no way it would apply to anything else.

MR RING KC:

Well –

WILLIAMS J:

I guess you make my point, which is context tells you what the meaning is.

MR RING KC:

Well, indeed, and –

WILLIAMS J:

Okay so but it doesn't resolve it, so then you need to point to context to indicate inclusively here, because "involves" doesn't give you that answer.

MR RING KC:

Well, at best it takes – because of the very example that I gave you, at best it takes me a long way down the track, in my respectful submission, but let me – well –

WILLIAMS J:

It just makes it possible. How far down that track is a matter of context.

MR RING KC:

Okay, I'll take possible. I feel like I'm making progress even. So let me take you to the –

KÓS J:

Just before you do, can we just look at the letter you've just put up. So here's Mr Brian Hollands, who is someone at the Napier City Council, and he gets this letter and you've told him that "cover for weathertight claims must be subject to an aggregate sub-limit of $500,000".

1125

Now Mr Hollands, in the example I'm going to give you, has on his desk a claim from an unhappy developer which involves a property which has $1 million problem for weathertightness and, coincidentally, a $1 million problem for fire ratings. Now does this mean that the total cover that Mr Hollands is going to get for that combined claim, one claim on your argument, is now 500,000?

MR RING KC:

Correct, because otherwise you're diving – otherwise you're talking about multiple claims, because the only other limit on claims is the limit in the schedule which was variously 100 million in respect of other claims. So how would that limit work in that mixed claim context? It couldn't work incon– consistent with the terminology and text that has been used and the definition of "Claim" and the acceptance that this is one claim.

WINKELMANN CJ:

You're going to have difficulty when you come to the point that you rely on this to show that there was mutual intention that this was the meaning because it certainly is not apparent to me that it's the meaning from that letter.

MR RING KC:

Well, I do want to go correspondence which I think is better.

WINKELMANN CJ:

Okay, that'd be good.

MR RING KC:

Well, I was only just starting my – I was just trying to set the scene, your Honour.

WILLIAMS J:

You're not the only lawyer to have said that to this Court.

MR RING KC:

Can we please go to the, again out of the schedule, 11 May 2009 at 301.0153? If you can pull that up, please.

WILLIAMS J:

Can you give me the number again, sorry?

MR RING KC:

301.0153, and as you can see the beginning of the letter is similar to the previous letter except now we're talking about the point in time in which these weathertightness claims are being excluded in their entirety instead of just seeing "sub-limited", and if you look at half way down that paragraph, notwithstanding that weathertightness claims are being excluded in their entirety, "[we are] pleased to continue to manage the administration" of the weathertightness claims "for the broader benefit of Local Government and we will continue to provide our risk management" assessment.

So what they're saying is you are not insured at all for your weathertightness claims but we'll continue to manage them or can manage the administration of them for the broader benefit of local government. If what was being done was to divide the claim between what we insure and what we don't insure then we wouldn't be saying that. We would be saying that we will continue to insure you for the non-weathertightness aspect of this weathertightness claim. In my submission no reasonable reader, with respect, could take from that anything other than weathertightness claims are being excluded in their entirety and they're not going to be divided up between what's insured and what isn't insured any more. But we'll do you a favour and we'll manage them for nothing.

WINKELMANN CJ:

Where does it come from when it's not going to be divided up any more?

MR RING KC:

Well, it says we've resolved not to continue providing weathertightness, "this cover", that is weathertightness claims cover, to the Council and weathertightness claims will be excluded from renewal.

So just pausing there. That either means, on my interpretation, our interpretation, there is no cover for mixed claims at all or, on the Council's interpretation, there is no cover for the weathertightness aspect of mixed claims but there is cover continuing unaffected for the non-weathertightness part of that mixed claim.

Then it goes on to say, notwithstanding that, we're going to continue to manage the administration of the Members' weathertightness claim for the broader benefit of local government. Well, you wouldn't be administering the management. Anybody who received this letter from Council would know that Riskpool wouldn't be managing the administration of the weathertightness claim if it was continuing to insure part of it. It wouldn't be saying: "We'll manage it." It would be saying: "We'll continue to indemnify you for part of it."

WINKELMANN CJ:

But that just begs the question about what a weathertightness claim is.

MR RING KC:

Well, with respect, your Honour, no, it doesn't. It actually tells the reader that what a weathertightness claim was intended to be was a claim that was a mixed claim.

WINKELMANN CJ:

Well, I don't get that out of that, I have to say.

KÓS J:

Yes, I'm struggling with that.

WILLIAMS J:

Couldn't it be the reverse, that presuming there are non-weathertightness claims that are continuing to be managed and indemnified by Riskpool, Riskpool is continuing to manage the weathertightness bits because where the two are mixed it's still in the game anyway?

MR RING KC:

But, your Honour, we've already got to the stage, with respect, that there is one claim here brought by the Waterfront and that –

WILLIAMS J:

But this is a general letter. It's not about a particular claim.

MR RING KC:

Yes, it is, but –

WILLIAMS J:

So you said that you could draw from that sentence an "exclusion of mixed claims" meaning –

MR RING KC:

Yes.

WILLIAMS J:

– and I'm suggesting you there's a scenario which would in fact include it because why else would Riskpool be doing the service for free if it didn't know that it was already going to be involved in weathertightness adjacent claims, shall I put it that way? So it was already going to be there.

WINKELMANN CJ:

We'll just take this answer and then we'll break for morning tea so there's no follow-up questions.

MR RING KC:

Well, I need to make it count.

WINKELMANN CJ:

Or you could answer it after morning tea, Mr Ring, because I must say I'm completely confounded by it.

MR RING KC:

All right. Then in that case I think we should all take a break.

WINKELMANN CJ:

Okay.

COURT ADJOURNS: 11.32 AM

COURT RESUMES: 11.51 AM

MR RING KC:

Before the adjournment we were dealing with weathertightness claims and I'm just going to answer that question. Can I do so also in conjunction with referring you to paragraph 12 of the road map, which encapsulates the argument that we're essentially making here.

WILLIAMS J:

Paragraph 12 of?

MR RING KC:

Of the road map.

WINKELMANN CJ:

D12.

WILLIAMS J:

Of the road map, thank you.

MR RING KC:

Yes, so just to come back to the question of what does a weathertightness claim mean here. I just want to go back so let's look at the context in which we're

now dealing with this. First of all we've looked at the text, and we see that all the qualifying links in the exclusion are not exclusive references to other types or causes or anything like that , and we've looked at the word "involving" and in its ordinary meaning it is also non-exclusive, so we're asking ourselves whether there is an inconsistency between that and what we're now looking at, and what we're looking at is weathertightness claims against the background that previously they were referred to as building defect claims involving moisture ingress and there is no question, in my respectful submission, that building defect claims involving moisture ingress and weathertightness claims are treated by the communications and documents as synonymous for the reasons that are set out in the schedule.

That then takes us to the question of this type of correspondence that I've referred to at 301.0153. The reference here is that we're not going to provide any more cover for weathertightness claims. Weathertightness claims will be excluded from renewal. Remembering we're in the context that, if we're talking about one Waterfront plaintiff as the paradigm example, the Waterfront plaintiff has brought a mixed claim that involves weathertightness defects and non-weathertightness defects. So it's brought one claim. If that is a weathertightness claim then it is excluded from renewal. If it's not a weathertightness claim then it's fully covered, unconditionally and fully covered. So against that context we look at what is being said here, and what it said is the weathertightness claim is going to be excluded from, in its entirety from renewal. Notwithstanding that we're going to manage that claim. That is, we're not going to pay anything for it, but we're going to manage it, and that is totally inconsistent with one claim, which is all we're talking about here, divided between weathertightness defects and non-weathertightness defects being also divided in terms of what Riskpool was going to pay for and not going to pay for. What it said is we're not paying for the whole claim, and we're not talking about two claims here, one weathertightness and one non-weathertightness. We're talking about one claim involving mixed defects.

1155

So the only way to read this, in my respectful submission, to a reasonable reader is that whatever a weathertightness claim is, it is excluded in its entirety, and a weathertightness claim necessarily includes building defects that are moisture ingress, and building defects that are totally unrelated to moisture ingress, and includes a mixed claim. If it doesn't, there can't be two separate claims. It has to be the one claim.

KÓS J:

I assume mixed claims are reasonably common?

MR RING KC:

Reasonably common, they're virtually 100%.

KÓS J:

All right, so presumably they're for, there would be prior to the 11th of May 2009 some claims history to show how this mutual insurer handled mixed claims. So what's the evidence of that because –

MR RING KC:

Well there were no exclusions. So, or there were no exclusions or restrictions, so there was no need to differentiate between claims involving just weathertightness defects, and claims involving weathertightness defects, and non-weathertightness defects.

WINKELMANN CJ:

I'm just going to indicate Mr Ring, we can't run over time today, so can you just make sure you use your time accordingly.

MR RING KC:

Have you got a deadline for me your Honour?

WINKELMANN CJ:

I'll just ask Mr McLellan, how long would you estimate you will be?

MR MCLELLAN KC:

I was anticipating that I would start around 12.30.

WINKELMANN CJ:

So the deadline is 12.30.

MR RING KC:

Yes, I was working to something earlier than that so.

WINKELMANN CJ:

Please, work to the earlier time.

MR RING KC:

No, I'm not going to stretch it out unnecessarily.

WINKELMANN CJ:

Because it is now three minutes to 12.

MR RING KC:

Yes, understood your Honour. So the final point that I'm just making in this context is what if one Waterfront plaintiff had brought his or her mixed claim in 2007 when there was a sub-limit of $500,000. There couldn't have been a $500,000 sub-limit for part of the claim and $100 million for the $5 million, whatever the limit was, for the rest of the claim.

WINKELMANN CJ:

Why?

MR RING KC:

Well because the rest – because the limit for the rest of it is for other claims, and the claim is not divisible between the two.

WINKELMANN CJ:

So it's the same argument again.

TECHNICAL ISSUE – CLICKSHARE

MR RING KC:

Thank you. because claim is a capital “C” in the schedule, and there can only – and there is, we know, only one claim here, and –

WINKELMANN CJ:

So this is another go on the merry-go-round then Mr Ring?

O’REGAN J:

Well it’s just another basis on which –

MR RING KC:

Well, it’s an example.

O’REGAN J:

Everything comes back to the “Claim” definition.

MR RING KC:

Correct, and why you can't divide a claim – in 2007 why you couldn’t divide a claim between the watertightness part, and the non-watertightness part. So hence our conclusion in paragraph 14.

O’REGAN J:

Can I just ask you, in relation to the letter you showed us, there was a handwritten note on it saying: “I need someone to explain to me what this means”. Is that any evidence about whether anyone did explain it, and what the explanation was?

MR RING KC:

No there isn't because they didn’t call this person to give evidence –

O’REGAN J:

I see. It wasn’t asking the insurer to explain.

MR RING KC:

No.

O'REGAN J:

It was somebody else in the Council?

MR RING KC:

It was internal.

O'REGAN J:

Oh I see, sorry.

MR RING KC:

Just before I leave this topic I forgot to mention that this is only one letter. If you go through the schedule you'll find multiple letters that say pretty well exactly the same thing over a period of time after this one, and you'll also find it in at least two of the annual reports that were issued in virtually the same language, and those are referred to also in the schedule or in the submissions, and in fact that's at number 3 at 16.

KÓS J:

And is there no evidence of how these claims were managed when the exclusions started to emerge in 2006 up to the current wording, which I think was the 2009 year. In other words, was your rather rigid view of claims consistently applied by the insurer?

1200

MR RING KC:

I think there is some evidence that that's in fact how it was done because there was a reference to referring – I think even on this one there was correspondence referring Napier City Council to RiskPool's preferred legal advisers, I think it was Rice Speir at that stage, to have them manage the claim. So I think the correspondence is consistent with what they're saying here.

KÓS J:

Well, perhaps you could give us that after lunch.

MR RING KC:

Yes, we'll see if we can find it in the evidence.

Okay, commercial purpose/absurdity. We say that this provides the proper framework to consider the commercial result of the competing interpretations. The commercial purpose is logically and rationally discerned from the text, the surrounding circumstances and the general nature of the provision.

Commercial absurdity only arises if applying the provisional interpretation from the text produces a nonsensical result which is yet another reason why you do the textual analysis first before you go to a commercial purpose assessment.

The purpose of that framework, as we say in number 4, emerging from the cases, including *Firm PI 1 Limited v Zurich Australian Insurance Limited* [2015] 1 NZLR 432 (SC), is that it prevents the Court: (1) from acting as an arbiter of commercial reasonableness; second, it prevents the Court from rewriting the bargain because of a subjective assessment; third, in insurance context, the Court would be making a unilateral underwriting evaluation that it's not equipped to make.

So what's the commercial purpose here? We say the Court of Appeal wrongly stated that the commercial purpose was that Riskpool had no purpose to exclude liability for mixed claims but it had a positive purpose not to exclude indemnity for non-weathertightness claims whether either solely in a non-weathertightness claim or in a mixed claim.

We say there's a material difference between indemnifying for solely non-weathertightness defect claims and weathertightness defects in a mixed claim, and these include, first, that in a solely non-weathertightness claim it may not be discovered because it requires a catastrophic event, such as a fire or earthquake; second, in mixed claims these are all latent defects also invariably

revealed in investigating the weathertightness defect, and a good example of that is this case where the fire defects were only found in the investigation some one year after the proceedings had even been issued, and by then the Council is often the only solvent defendant, and these are in fact all the factors that ultimately caused Riskpool to fail. That is recorded in the evidence, accepted by, certainly referred to by the High Court and not really disputed, in my submission. The references in paragraph 16(2) to the High Court judgment are themselves references back to correspondence, contemporary correspondence and documents at the time that support those conclusions.

That then led to weathertightness claims being managed but not indemnified even though they involve non-weathertightness defects. That's the point we've made previously.

We say that's supported by RiskPool's communications evidence and contrary to the Court of Appeal which said that based on the evidence Riskpool did not have this purpose. The evidence was evidence of Mr Carpenter's intention in, or giving evidence of RiskPool's intention, in introducing the weathertightness claims exclusion. If we can pull – I was going to say if we could pull – ah, we can pull that up.

WINKELMANN CJ:
Voilà. So it all turned on opening those things.

WILLIAMS J:
Not for us, unfortunately.

MR RING KC:
Right.

WINKELMANN CJ:
We can see it in front.

MR RING KC:

So this is referred to in my learned friend's submissions at paragraph 6.6 and it's said there that Mr Carpenter's evidence supports the proposition that, or the interpretation, that Riskpool is advancing, and we're saying if you read the cross-examination in full, in this part of it in full and in its context, it doesn't actually say that. So if you – this is where the start of that discussion about building defect claims arose in the cross-examination.

WINKELMANN CJ:

Where are you at in your road map?

MR RING KC:

16(4). So if you can scroll that up, please. So talking here about traditional building defect claims and the question is: "Of course [I'm talking about] building defect claims and again I'm not talking about weathertightness…" Now he doesn't say "weathertightness claims", just says "weathertightness".

If you follow through now to the next highlighted passage: "[You're intending] the usual cover … for building defect claims [but] not weathertightness claims would continue?" And: "That's correct," and here's the key bit of the cross-examination: "So you were taking away weathertightness but you weren't taking away non-weathertightness?" "That's correct," and in that context Mr Carpenter is talking about weathertightness claims by which he's referring to mixed claims as well.

WINKELMANN CJ:

How is this evidence admissible?

MR RING KC:

Well, I don't think it is, your Honour, frankly, but it was relied on by the Court of Appeal because this was the part of the good evidence that they said supported the commercial purpose, and it was relied on by my learned friends, but as you can see in paragraph 4 I started this by waying it was RiskPool's unilateral intention and I was –

KÓS J:

This was the draftsman explaining what he meant?

MR RING KC:

Yes, and I was hoping that somebody would say, well hold on, unilateral intention doesn't matter, in which case I would immediately agree, and therefore this is inadmissible, but even if it was admissible it's non-supportive and in fact supports our position, so that's our position on that evidence your Honour.

So that takes us to the final section, which is the commercial absurdity and nonsense point. The Court of Appeal held that RiskPool's interpretation created a commercial absurdity but this was just based on an extreme example of a "trifling part of the demand [being] causally connected to weathertightness." There were no authorities or principles cited for this but we say that on the authorities there are at least three points to be noted here. First, it requires a strong case at this point that something has actually gone wrong with the language. So it is, again, very much start with the text, get a provisional interpretation, cross-check that against the evolution of the Protection Wording and then cross-check that against commercial purpose. But when the Court of Appeal were dealing with this section, they hadn't got to the text yet, at all.

Second, and I'm giving you two authorities for this, an "extreme example shouldn't, on its own, satisfy strong case requirement".

Third, "Insurer not required to demonstrate exclusion has objectively justifiable commercial rationale", and again there's authority for that proposition cited in *Hird*. But, in fact, we did have a commercial rationale, and it was material to the rationality assessment here, that first of all members are both insured and uninsured –

KÓS J:

No, insured and insurer.

MR RING KC:

Both, sorry, the insured and the insurer, and as a result of that the net financial benefit or detriment of a particular is not known until years later. So it's just impossible to say that there was a commercial nonsense or a commercial absurdity about the interpretation that Riskpool is advancing in our submission.

Finally, we see the interpretation and context do cater for the extreme example, first on the de minimis basis. If the claim can truly be described – or sorry, the weathertightness part of the claim can truly be described as trifling, and therefore immaterial, an objective observer would reasonably infer that the parties would accept Riskpool to ignore it, and if not, then it must by definition be material and so it's reasonable to have regard to it.

Second, and independent of this, Riskpool, had an "absolute and unfettered discretion in deciding on indemnity" and was required by the deed to "be influenced but not bound by the Protection Wording." Objective observer would reasonably infer that parties would expect Riskpool to exercise discretion where the weathertightness defect part of the claim was, indeed, trifling, and we make the point again, this is an unreasonable example in practice. There is no evidence that the postulated extreme case has ever been declined by Riskpool, has ever been made, or has even existed, and we're talking 25 years of RiskPool's, plus of Riskpool in business, and since 2006 to 2015-16, 2015 at least, in relation to the cover with Napier City Council.

So that takes us to our final conclusion that the provisional interpretation is consistent with the evolution. It's cross-checked against purpose and consistent with that. There's on strong case for commercial absurdity or commercial nonsense. There's no strong case that something has gone wrong with the language.

Unless I can help you further, your Honours, those are our submissions.

WINKELMANN CJ:

Excellent. Thank you Mr Ring.

MR MCLELLAN KC:

Thank you, your Honours. The road map starts with the core issue in this case, which this is now the fifth time that that central issue of contractual interpretation has come before the Courts, and it is, as your Honour the Chief Justice noted, it is a relatively narrow point, but you'll appreciate that the submissions that certainly the appellant has filed are dense and complicated and so have I necessarily needed to respond to those, but I'll try to be as brief as I can in my submissions.

I haven't dealt with issues of the authorities on interpretation, they are in the written authorities, but might I just point to two authorities in particular, which are referred to in the written submissions, and that is the *Lumley General Insurance (NZ) Ltd v Body Corporate No 205963* (2010) 16 ANZ Insurance Cases 61-853 (CA), which I think your Honour Justice Ellen France delivered the decision in, and the subsequent *Trustees Executors Limited v QBE Insurance (International) Limited* (2011) 16 ANZ Insurance Cases 61-874 (NZCA) decision, both of which are in the authorities, and the primary point that arise out of those, that exclusion clauses in particular are to be interpreted narrowly. They are not to be given a strained meaning, and of course more generally even that when interpreting an insurance contract, as with any others, it is the natural and ordinary meaning of the words that are sought to be understood.

1215

So from that starting point, but particularly the authorities in relation to exclusion clauses, I then embark on the task of explaining my client's position, and that's set out at the beginning of the road map, but just to elaborate slightly, I say that the exclusion does not exclude non-weathertightness liabilities simply because the subject matter of the exclusion is limited to weathertightness liabilities and I say that that somewhat obvious point is nevertheless a very strong point in favour of the Council. It would be a generally surprising and unconventional approach to insurance, particularly given the need for consumer protection and that this is an exclusion clause which, of course, was borrowed from another insurer's policy, it would be unconventional for the exclusion to be taken to

exclude something that it doesn't refer to. It's almost axiomatic and fundamental to the purpose of exclusion clauses.

O'REGAN J:

But you're talking about weathertightness liabilities there and Mr Ring's point is that that isn't what the clause says. It says liability for weathertightness claims.

MR MCLELLAN KC:

It says liabilities for claims arising from weathertightness, and in my submission, which I advance quite strongly, the notional, reasonable *Firm PI* P1 insurer, reader, would take from that is that liabilities, losses, arising from weathertightness breaches are the only things, the only risks or losses that are excluded from the policy.

O'REGAN J:

You've just substituted "breach" for "Claim".

MR MCLELLAN KC:

I'm sorry, your Honour?

O'REGAN J:

You've just substituted the word "breach" for the word "Claim" which is what appears in the exclusion clause.

MR MCLELLAN KC:

I'm reading on from the causative linkage word, so the clause says it excludes liability for claims arising out of, et cetera, breaches of the weathertightness regulations. So in my submission the subject of the exclusion is very clearly weathertightness breaches and liabilities arising from claims that make those allegations, and the notional, reasonable reader would not take from that that if the Council is alleged to be liable for fire regulation breaches that they would also fall within the exclusion, and that's where I say that her Honour, Justice Grice, fell into error into accepting RiskPool's submission that if there was just one allegation of weathertightness in a claim that the whole claim

became tainted by that, and in my submission the Court of Appeal in the substantive appeal was quite right to say that liability for claims requires an analysis of what the true character of the liability is, what it arises from factually, and those liabilities here are plainly mixed but divisible. That's – I'm jumping ahead a little bit, but in terms of when we get to the *Wayne Tank* point, you'll remember Lord Denning's statement where he's really explaining the point using the previous authorities, he said that the loss in *Wayne Tank*, and the other authorities that were on point, was not apportionable, and that, I say, is quite key to understanding the difference between this case and *Wayne Tank* because *Wayne Tank* was concerned with non-apportionable, in other words, loss which was not apportionable between causes, one of which was excluded and one of which was not, whereas here, and I'll come to this in a moment just to demonstrate exactly what the underlying facts are, here we're dealing with absolutely apportionable and divisible losses and that's what I say the exclusion is getting at in the language that it's used, and it would appear that some of the language might be accidental in this policy, that clearly it's been built over time. There are clumsinesses in it, but reading it as we must, according to the leading authorities on construction, the exercise is to try and divine what the parties' objective intention was in this exclusion and I say that it was to exclude only weathertightness-related liabilities, just to give it the shorthand.

1220

I say that RiskPool's interpretation of the exclusion is unnatural, it is strained, it focuses almost with legislative attention on words, some words in the policy which I say don't have legislative drafting quality, and as the courts below on strike-out in particular, and the Court of Appeal have recognised, have different meanings in the – in different contexts of the policy, and I'll develop this point slightly, but while of course the whole of the policy is relevant context to the interpretation exercise, ultimately what we need to do is to come back to the meaning of the exclusion itself, and so it is the meaning of the words the drafters have used accidentally, or by borrowing other insurer's language, to understand what those words mean in that immediate context. Once we are satisfied about general purpose of the policy and those wider contextual issues, and I say that Riskpool really tries to rewrite, or at least reinterpret this clause from its natural

and ordinary meaning by doing things like saying that you can actually ignore liability for claims, and just focus on the word “claims”, and that’s what Riskpool needs to do, of course, it needs to look at the bigger thing, in other words the claim, and devalue the words “liability for”, and I say that’s simply theoretical approach to the matter, and then of course to also devalue or almost say you can ignore those important causative words alleging arising out of or in respect of. So RiskPool’s argument is, I say, a somewhat aspirational one based on a different exclusion clause.

Just coming back to the key passage in *Firm PI*, and in the pithy part of the judgment at 60 barely needs repetition, but the key parts that I say that Riskpool ignores are “… the aim being to ascertain ‘the meaning which the document would convey to a rea person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract’. This objective meaning is taken to be that which the parties intended.” Then of course the text remains centrally important and appended to those principles we also have the principles in *Bathurst Resources Ltd v L&M Coal Holdings Ltd* [2021] 1 NZLR 696 (SC), which become relevant to the, what I say is the poor-quality extrinsic evidence which Riskpool relies upon to try to, again, modify the meaning of the exclusion clause.

Just touching on that, to open the point, as the Court of Appeal said, that extrinsic evidence that it relies upon the schedule that you will recall appears in a report which the, which Riskpool refers to in that correspondence that my friend took you to a few moments ago, it is but a heading and that heading, which was “involving moisture ingress”, my learned friend tries then to join the dots through to the later policy, to the later actually Protection Wordings, which used weathertightness claims in the extension, when the extension was required to include a $500,000 sub-limit, but importantly that heading “involving moisture ingress” never appeared in the policy itself.

1225

So it is, I say, drawing a very long bow to say that those now redundant words in a schedule somehow can alter the meaning of the exclusion. And even if they have any probative value, I say that the words "involving moisture ingress" are inherently ambiguous in any event. So – and I was apparently guilty of in closing submissions using the word "involving" myself in the High Court, but that perhaps is not a point in RiskPool's favour, because it really demonstrates the very generic nature of that single word anyway. A word to describe something very generally such as "weathertightness claims". But not to be treated in the very detailed way that my friend has.

Just on that point, and just because I made a note here which I'll subsequently forget, my friend referred you to the *ISP* decision when you were debating with him the, probably to describe it in this way, it may be fair, the difference between procedural and substantive, namely how the High Court Rules might treat causes of action or demands, and my friend referred to the *ISP* decision as supporting his position on that. That was a decision, in fact, on whether a new, whether a cause of action that was sought to be included into a statement of claim was a new cause of action for the purposes of limitation principles. So I suggest, with respect, that that's not likely to have any real play here because it is procedural and what we must do is look at the substance of the words used, and the substance of the facts.

So the Council's case is that the liabilities alleged by the Waterfront plaintiffs against the Council were separately identifiable, divisible, and as was their cause, and perhaps jumping ahead again to deal with the word "alleging" and picking up on a point that Justice Williams made, was that nevertheless there is a causal link between alleging and the failure of a building to conform with weathertightness regulations, because that relates to a negligent act, and I'll come back to deal with these causes of words in a little more detail, but it's perhaps convenient to do so here just before I look at our facts, because that is exactly what this case was about. The drafters of the policy presumably wished to use the word "alleging" to create the lightest possible causative connection between the subject of the exclusion and liability for claims. In other words a

mere allegation should be enough to – a mere allegation of weathertightness should be enough to tip the claim out of the policy.

I just want to take a slightly different approach to my friend to the allegations that were made in the Waterfront proceedings, and just start with some basics about it. If we have a look at the state of claim, which is the, in the –

WINKELMANN CJ:

What document in the case on appeal?

MR MCLELLAN KC:

It is 303.0485. In the table of contents, it's on the final page, second to last document, and it's all very conventional in the pleadings itself. As the Court of Appeal noted there was once cause of action relied upon by each of the Waterfront plaintiffs, and one cause of action against the defendant, against the Council. What I want to take you to though is just so that it is understood how these allegations against the Council were, indeed, divisible. Schedule 3, which is in the native document, page 33, or .0521, if we have a look at defects 1 and 2 we can see that –

1230

WINKELMANN CJ:

Sorry, what was the native document number?

MR MCLELLAN KC:

Page 33 in the – and it's headed: "Schedule 3 – Defects". Do you see that these first two defects are mixed? B and E which is weathertightness, and so the Council's not claiming for those. We see similar defects through the next pages until we get to page 39 or .0528. Defects 13 and 14 are slightly confusing because they do allege durability and weathertightness but these are bathrooms and the weathertightness issues were internal rather than coming through the cladding. So it was accepted by Riskpool that these are indeed non-weathertightness classified for present purposes. Then we see from there

right through to the end of the schedule solely no-weathertightness breaches of the Code alleged by the plaintiffs.

So when we are speaking of "divisibility", that's one of the starting points for this case that the experts were able to reach a measure of agreement as to whether particular defects fell within weathertightness or non-weathertightness.

Then if we go to – and I can deal with this quite quickly – if we go to Justice Grice's decision, which is 101.0028, at paragraph 399, so this just describes the coding that was given by my client's experts to the various categories of defects and which Riskpool then adopted and critiques and, as I say, in the end –

WINKELMANN CJ:
What paragraph does that say –

MR MCLELLAN KC:
I'm sorry, 399.

ELLEN FRANCE J:
And so what do you say is the position where, let's just take an aspect of the claim, where you can't apportion?

MR MCLELLAN KC:
Yes, I'm just going to step through.

If you have a look at 399 about halfway down her Honour said that "the defects were numbered from 1 to 22" which is what we've just looked at in the pleading. "Colours were then allocated to each category of claimed work as a convenient way to show the separate defects and their categories: remedial work only required as a result of non-weathertightness defects (orange); remedial work required for both weathertightness and non-weathertightness defects apportioned between the weathertightness defect remedial work and the remedial work only required due to non-weathertightness defects (green);

remedial work required for both weathertightness and non-weathertightness defects (purple) and remedial work required exclusively for weathertightness defects (blue)."

So the Council's case is based on the first two, orange and green, and not on purple and blue, and purple the Council did not seek indemnity for because they are true *Wayne Tank* type defects or losses. Green you can see is mixed as well but they are mixed in a way that they are divisible, so the experts could agree on the quantum that arises from that and, of course, quantum is yet to be fixed by the High Court but that's largely because of the need to reach a view on apportionment of the settlement sum that was paid to covered and non-covered liabilities.

1235

So that's the factual scheme behind the proceeding, just so that the Court understands what it is that is being claimed, and the Court of Appeal recorded in the judgment that – and this is at 61 – well, really recording what I've just explained to you in slightly more detail but as, just at the end of that paragraph, as I pointed out to the Court of Appeal: "It has been common ground throughout that some of the items claimed in this case have nothing to do with weathertightness. Some relate to non-compliance with fire regulations and some to a structural wall." So I wish to demonstrate just how that was done and how unequivocal it is as to the divisibility in fact between weathertightness and non-weathertightness defects which have nothing to do with weathertightness.

One final document, just to finalise that point. This is a schedule to the brief of evidence of Mr White which is not referred to in the case on appeal. It's a supplementary document. Can I have the reference, please?

WILLIAMS J:

303.0573.

MR MCLELLAN KC:

Sorry, your Honours, I've just…

WINKELMANN CJ:

What are you looking for, Mr McLellan?

MR MCLELLAN KC:

I'm looking for Mr White's…

WILLIAMS J:

Sorry, that's the reply.

MR MCLELLAN KC:

So if we go to appendix A which is page 8 digitally.

ELLEN FRANCE J:

Sorry, what's the document number?

MR MCLELLAN KC:

303.0573, and the bundle reference is –

WINKELMANN CJ:

Did you say 303.0…

WILLIAMS J:

In the supplementary documents.

MR MCLELLAN KC:

573 in the supplementary, and the –

WILLIAMS J:

What are we looking at? The appendix?

MR MCLELLAN KC:

Appendix A which is page .0580.

WILLIAMS J:

Helpfully around the wrong way.

MR MCLELLAN KC:

So this is a schedule comparing the Council's expert's opinions, which is the top section of the table, against Mr Smith's, that's CFS, his view of things, and you'll see that the – we don't need to dwell on this but you can see defect, the third, fourth and fifth rows relate to the completely non-weathertightness defects that I've referred to, and then there are some other non-weathertightness parts in defects 21 and 22 but relatively small, and you'll see that the two experts reached the view between them that it was 34% and 30%. There was some movement on that following evidence at trial but the differences are immaterial. What I'm demonstrating there is the strong measure of agreement between the experts as to the divisibility of the non-weathertightness liabilities claimed by the plaintiffs from the weathertightness liabilities.

And as we've said in the submissions, those percentages translate roughly to the number that we've included in the submissions which is about $4.4 million of the 12 million-odd settlement sum that was paid by the Council to settle with the Waterfront plaintiffs. So that 4.4 million has, to use the Court of Appeal's words, nothing to do with weathertightness.

1240

So to move on in this summary of the argument. In my submission, once an orthodox textual interpretation is applied the result should be as held by the Court of Appeal. The exclusion doesn't refer to anything other than liabilities for claims caused by weathertightness non-compliance and so the exclusion doesn't apply to non-weathertightness liabilities, and that, in my submission, should be an end to the matter. There's –

KÓS J:

That depends on the definition of "Claim" which is the – we've spent hours talking about this but actually that's the only thing to talk about in some ways.

MR MCLELLAN KC:

Yes, I'll come back to that in more detail…

WINKELMANN CJ:

Where are you in your road map?

MR MCLELLAN KC:

Sorry, I've probably gone slightly off the road. I'm –

WILLIAMS J:

Is there no GPS on that Apple computer of yours?

MR MCLELLAN KC:

No, I don't, your Honour, or at least I don't know how to use it. I'm somewhere between 5 and 6.

WINKELMANN CJ:

Okay. I thought you were at 10 so that helps.

O'REGAN J:

You were being an optimist.

MR MCLELLAN KC:

Well, yes, I probably am somewhere further on because I'm really just summarising the points that are made in more detail later on in the submissions. So yes, I'll, of course, come back to the point about the definition of "Claim" but in short I say that the whole of the words of the exclusion must be read together. "Liability for claims arising from," et cetera.

Even if there is something in RiskPool's argument as to the meaning of the exclusion, which I say there is not, then, in my submission, the doctrine of contra proferentem would apply in favour of the insured. This was clearly an insurer-drafted contract and any ambiguity that the Court might find must be resolved against the party responsible for introducing the ambiguity.

Pretty fundamental point, same as I advanced at the Court of Appeal and the Court of Appeal accepted my submission that resort does not need to be had to it but if it did then the doubt would go in the Council's favour.

KÓS J:

Was there evidence of claims management involving mixed claims where some part of a claim was excluded?

MR MCLELLAN KC:

We deal with that point at 6.9 and 6.10 of our written submissions where we say that RiskPool's points on this, that were developed a little bit before I stood up, are exaggerated, and I say there that 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", and I say over the page that that's an unwarranted effort to revise the background to suit RiskPool's theory. It hasn't pointed – sorry, your Honour?

WINKELMANN CJ:

What paragraph are you at?

MR MCLELLAN KC:

6.9 and 6.10. I say that Riskpool can't point to evidence which shows that substantial non-weathertightness defects within buildings that also had moisture ingress problems were an issue for Riskpool, at least at the relevant time, namely when the policies were – when that debate particularly over the schedule was happening, and so that didn't happen until sometime later, in other words around 2014 when this claim was being dealt with and only then, when these mixed claims did start to become a problem, did Riskpool take or advance the argument that it was entitled to decline mixed claims, which I say is certainly within *Bathurst* principles, not probative evidence because by that point Riskpool was facing very substantial sums in mixed claims and –

KÓS J:

Well, they were obviously worried about it in 2007 but these policy wordings will exist for a long time and there are lots of exclusions. Justice Williams referred to war before but there are others, like breach of contract. So the prospect of a mixed claim, claim, you know, and being a demand for compensation based on an excluded and a non-excluded event has existed since the outset of the inclusion and exclusions here.

1245

MR MCLELLAN KC:

Well, it's a given in any liability insurance context, in any policy, and of course, as I said, this exclusion was cut and pasted from some other insurer's policy, that's dealt with in Justice Grice's decision where she accepts that, and therefore it's a pretty standard provision. But these exclusions all look as if they are fairly standard insurance exclusions and some require, dictate, mixed claims being insured. For example, the breach of contract exclusion that your Honour refers to, but also perhaps a good example is exclusion 6 which excludes liability for claims which are notified prior to the particular insurance contract commencing, so that if a plaintiff sued on two causes of action, one of which was pre-commencement of the insurance contract, that would be excluded, but a post-commencement cause of action would not be excluded. It's pretty basic stuff that the – that's envisaged in those cases that there will be mixed liabilities and I say the same applies, and –

KÓS J:

And therefore apportionment, you say?

MR MCLELLAN KC:

And therefore apportionment between the two claims, between the liabilities, just to come back to that word, because, of course, the chapeau to the exclusions, "does not cover liability for", exclusion 6, "any claim". So it's exactly the same format as exclusion 13 which we're concerned with. And, as I keep saying, it would be highly unorthodox for any other result to apply because it would certainly not be the expectation of the notional reasonable reader that

you're excluded for something that isn't referred to. Perhaps just as an example on the other side of the fence, exclusion 5: "Claims made or actions instituted outside the Dominion of New Zealand..." That has to be the whole claim that's excluded, but –

WILLIAMS J:
New Zealand hasn't been a dominion for quite some time. Must be a pretty old clause.

MR MCLELLAN KC:
Well, they have – yes, "or the Commonwealth of Australia," yes.

KÓS J:
That's all right.

MR MCLELLAN KC:
That's correct.

WINKELMANN CJ:
Yes, that's all right. Yes, that's correct.

MR MCLELLAN KC:
No, no, I was just correcting myself as I spoke. But yes, you're quite right, which indicates that Riskpool, which is a Mutual Association, it's presumably, we can reasonably infer, has gone off and looked at other insurance wordings and put something together that works for them, but it is very much in the format and style of a regular insurance policy and these exclusions look very familiar to those of us who look at policies from time to time.

Perhaps just while I'm in the exclusions, if we have a look at – I don't need to go on about the variations of usage of the word "Claim", I don't think, because it's been so well covered in the various decisions so far, but if I can just add one to that, which is the Y2K exclusion in 11, and it appears to me at least that perhaps the exclusion, when the policy was originally drafted, finished at

exclusion 10. The Scheme started in 1997, so the Y2K exclusion looks as if it's been put in some time before 2000 but after inception. But if you just have a look at the way that's drafted: "The following exclusion applies to this section of the Protection Wording. The Fund will not meet any Claims," capital "C" claims, "made by any member." In other words a claim made under the policy. This is not a claim by a third party. So again, and there are a couple of other instances of that kind of careless or deliberate language, don't really know where "Claim" is not used in the sense of a third-party claim against the member council.

Then the asbestos exclusion at 12 and 13, of course, cover a, use a similar kind of language. 12: "This Section of the Protection Wording does not cover liability for any legal liability," so something's gone wrong there. But whoever's including these clauses, they seem to have ignored the chapeau to the exclusions because they are using repetitive language. Perhaps not a great deal turns on that but it does point to the – well, I think that the Court of Appeal on the strike-out decision asked the rhetorical question whether this was fine art or just a bit of a mess, and Justice Grice concluded after hearing the evidence and considering the matter fully that the latter, "a bit of a mess", was apparently the case.

So I say that if we ever do get to the point of there being some ambiguity here then that "bit of a mess" shouldn't fall at the feet of my client.

Once we've gone through all of the contextual and the, well, textual and contextual aspects of the clause, we then get to the point which we have repeatedly made in all of the Courts that RiskPool's argument just can't be right because it would produce absurd results, and just going back to *Firm PI* for a moment, this is in the section of the judgment dealing with absurdity at paragraph 89, if the language of a contract suggests a particular meaning – this is my submission but built on the *Firm PI* principles – if the language of a contract suggests a particular meaning but that meaning would produce a commercially absurd result then that may be a reason to read the contract in a different way. Well, that's actually very much this Court's principle, but here I say the problem for Riskpool is slightly in reverse. I say that the language of

the Protection Wording in its natural and ordinary meaning does not suggest RiskPool's meaning. The absurd results that we've referred to throughout the proceeding, which were referred to by the Court of Appeal, is telling, or at least more telling than one of my weaker arguments in the Court of Appeal, this is at paragraph 79 of the Court of Appeal's judgment, I say that they point strongly away from RiskPool's interpretation so it's, as it were, a negative cross-check on RiskPool's, I say, tenable anyway interpretation of the exclusion, and the examples which we've referred to in the past are a claim, which includes a trifling element of weathertightness liability, which according to Riskpool must be excluded, or a claim against an insured which starts life as an entirely non-weathertightness defect claim, and it's amended to include some weathertightness defects, so there'd be no doubt there, and the reason I referred to Mr Carpenter's evidence that my friend was critical of, was not to try to trap him into saying, oh well obviously this exclusion is not directed at with non-weathertightness, because I wasn't asking him that, I was just asking that the intention was admissible or not, but he filed, he served a brief I needed to cross-examine on that –

WINKELMANN CJ:

Sorry, Mr McLellan, are you going to take us back to the question that Justice Kós asked some time earlier, which was definition of "Claim" I think?

KÓS J:

Yes, I'm just wrapping up my summary on this absurdity point and then I'll come back to the substance.

WINKELMANN CJ:

Oh, so we're been in an overview, have we, because I was trying to see where we were in the map. I'm not obsessed with your road map, but I assumed that your road map bore some relationship to what you were planning to…

MR MCLELLAN KC:

Well these things develop, and when you going second it's not always straightforward, to stick to the road map, but this is my final point in the overview anyway.

WINKELMANN CJ:

I must say I was quite attracted to the structure in your road map but anyway, carry on.

MR MCLELLAN KC:

Well we'll return to that shortly. So the – yes, just on that final example that a claim which starts life as a non-weathertightness defect claim is amended to include a weathertightness defect, so there'd be no doubt that earlier when the claim, the demand was first made, that the, that indemnity would be available to the Council because the claim was solely related to non-weathertightness defects, but by some, I would say, strange mechanism the whole liability of the Council would then become non-indemnified because of an amendment by the plaintiffs to include a weathertightness liability.

1255

So just to finish on that point, RiskPool's answer to those arguments in the High Court was, in my submission, a somewhat ambitious advancement of a de minimis theory, which was accepted in the High Court, but the Court of Appeal rejected it easily holding that it doesn't have any place in the interpretation of contracts. It relates generally to questions of whether there is damage, and the authorities that were cited in support but are no longer relied upon, weren't relevant to contract interpretation.

Now Riskpool takes a more muted position on de minimis and suggests that it can be treated solely as a matter of proper interpretation of the exclusion in its Protection Wording and wider context. Those are RiskPool's submissions. But in my submission that still sounds like a de minimis concept because, which is subject to the same problems as the Court of Appeal identified namely the subjectivity of it is at 1%, is it 1,000, is it $100,000 et cetera, which I say simply

do not assist Riskpool and therefore there is no good answer to the absurdity propositions that we have put up.

So I'm just going to turn to the Court of Appeal's judgment now. Do you want me to do that or break now your Honour? I'm in your hands.

WINKELMANN CJ:
I think we'll break now. You seem to be making very good time. How long do you think you'll be after the adjournment?

MR MCLELLAN KC:
Yes. I do have a little bit to do but I would hope to finish at 3.30.

WINKELMANN CJ:
Really?

MR MCLELLAN KC:
Sorry three, what did I just say?

WINKELMANN CJ:
We start at 2.15. You seem to be almost through your argument, to me, when I looked at it.

MR MCLELLAN KC:
Yes, I'll have a look at it, and I'll endeavour to finish by three.

WINKELMANN CJ:
Okay. We'll take the adjournment then.

COURT ADJOURNS: 12.57 PM

COURT RESUMES: 2.18 PM

MR MCLELLAN KC:
I'm at paragraph 14 of the road map.

WINKELMANN CJ:

Very good.

MR MCLELLAN KC:

And some of this I've already dealt with, and before I get to the specific point about the meaning of the words immediately in the exclusion I just want to go back to my written submissions at 5.10 just to deal with some of the context to the word “Claim” and at 5.9 I've set out the full definition of “Claim” and at 5.10 we refer to the inconsistent usages of the word throughout the policy. It’s used in plural form in the exclusion, which is consistent with there being multiple demands, also consistent with each individual plaintiff demands including divisible demands for compensation. Then at 5.13 I refer to the excess clause, which I haven't referred to yet, that is condition 1 of the policy, which is at 302.0305, and that includes the words: “For the purpose of this Condition the term ‘Claim’”, defined term, “shall be understood to mean any and all claims which are within the scope of the Section of the Protection Wording and any Extension…”.

So the effect of that is to aggregate all claims if they are arise out of one negligent act, this is at 5.10 of my submissions, and that clause, I submit, is an express acknowledgement that multiple claims may arise out of the same underlying acts. 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 be no need for this wording in the excess clause.

1420

So you can see that the drafters tailor the particular provisions that they have intentions either to be aggregated or divisible accordingly and of course in the exclusion I say there’s been no effort taken to aggregate claims such that all possible demands, whether referred to in the exclusion or not, are in fact excluded, and that’s the point I make at 5.15.

Then if we skip ahead, because I've really dealt with this already, to 5.21 –

WINKELMANN CJ:

Has that really answered Justice Kós' point? Question rather. Not point, question.

MR MCLELLAN KC:

No, I'm coming to develop that a little bit more by reference to the Court of Appeal's judgment. Just in – I'm leading up to that by discussing the principles that to the extent that some of the very high-level authorities help to understand what a claim is, but at the end of the day it is the wording of the individual policy that matters most. At 5.21 I've referred to Justice Devlin's decision in *West Wake Price* using the language which is so often cited. The claim attaches to the object claimed, and this is not necessarily the same as the cause of action. The object or objects claimed are determined by reference to the relief sought, which can, you can see in there the DNA of a demand. "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." Well here different demands. Perhaps just replying to something my friend said earlier on at the beginning of his submissions, he talks about the sequence in which particular demands were made in this proceeding, and I say that's completely irrelevant. It's – the task is to identify the true factual nature of a particular demand to see whether it is mixed or not mixed, and divisible or not divisible, and if it's divisible and isn't referred to in the exclusion, then it's covered.

O'REGAN J:

Was the definition of "claim" in the policy in *West Wake* the same as the definition of "Claim" in this policy?

MR MCLELLAN KC:

The issue primarily concerned the insuring clause, and that's set out at 823 of the decision, which insured "against loss for any claim or claims which may be made against them… in respect of any act of neglect, default or error on the part of the assured… or their partners or their servants…" or agents. So it's, the decision is relevant at a high level in terms of identifying what a claim is.

WILLIAMS J:

Aren't we getting rather too much high-level help here?

MR MCLELLAN KC:

I'm happy with that your Honour because I say that this case turns on the individual wording of the exclusion but *West Wake Price* is cited by the Court of Appeal in their decision so I'm just, as I say, leading up to that. But coming back to the submissions on this, and here I'm at 5.22 where I refer to another decision, but at 5.23 rather than focusing on the number of proceedings or causes of action, which I say is a somewhat arid debate because we need to come back to the actual words which use, which of course are "liability for claims arising from", but here I say that the correct approach which I respectfully say is the Court of Appeal's approach, is to examine whether the third party is, in substance, seeking compensation for different and divisible losses, and the relevant passages of the Court of Appeal's judgment starts at 59 where the Court accepted that: "Each of the 51 plaintiffs made a single demand against the Council, for compensation for negligence in its permitting, inspection and certifying responsibilities at the…apartments."

1425

But then at 60: "To say this, however, is not to answer the Council's case. 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. These were mixed claims in which the demand for compensation was the aggregate sum of repair costs for defects some of which were indemnified and some not. The compensation claimed from all defects is greater than that from weathertightness defects…alone." Meaning that there are defects which are indemnifiable because they're not weathertightness.

Then the Court discussed *West Wake Price* –

WILLIAMS J:

So this claim simply – does your case just come down to this. If as a matter of fact the thing that is claimed for is divisible, from weather tightness, then it can be treated as a separate Claim for the purposes of the contract?

MR MCLELLAN KC:

Yes it's a separate demand.

WILLIAMS J:

Do you need to say any more than that?

MR MCLELLAN KC:

Well I say not but perhaps I need to just finish this thought. So the Court of Appeal said that that –

WILLIAMS J:

Well as long as it's adding something.

MR MCLELLAN KC:

Sure. I'll just refer you then to 60 –

WINKELMANN CJ:

That's good to – for counsel generally.

MR MCLELLAN KC:

At 66, this thought or this reasoning was completed by the Court on *West Wake*: "The Council accepts this principle. It does not ask RiskPool to indemnify it for excluded weathertightness defects. 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." I respectfully adopt that reasoning as being correct.

WILLIAMS J:

Yes, you've already told us that about five times.

MR MCLELLAN KC:

All right.

WINKELMANN CJ:

So your submission comes down to – and your case could be put probably as simply as this can't it, the definition of "claims" is a general multipurpose definition and to understand whether claims is intending to be aggregated, or single claims you need to look at the context. There's nothing here in the context of the exclusion clause to indicate an intention to aggregate, and the language of the exclusion clause is not such as to convey to anyone who read it that divisible separate claims are being excluded.

MR MCLELLAN KC:

Yes, I respectfully adopt that summary. So it's a combination of the interpretation of the clause and an analysis of the factual matter so I've referred to that *Quintano v BW Rose Pty Ltd* (2009) 15 ANZ Insurance Cases 61-555 (QSC) decision which said that the gist of it, the cause of action in negligence is damage.

WINKELMANN CJ:

Mmm.

MR MCLELLAN KC:

I took you to the statement of claim earlier on just to demonstrate how readily divisible the losses claimed by the Waterfront plaintiffs were. As you said, there is nothing in the clause to indicate an intent to aggregate.

So my – I'll therefore finish on this point. You can answer the question in this case through this rhetorical question. Is this, say $100 of loss, a liability for a "demand for compensation" which arises from weathertightness breaches? That does no violence to the exclusion. It asks the right factual question and in

a case such as this where you have factually divisible losses it provides the right answer.

KÓS J:

Is your argument effectively: delete, in terms of practical significance, all the wording in exclusion clause 13 prior to the letter (a) the failure of any building? In other words, your argument is really the section of the word Protection Wording going to the chapeau does not cover liability for (a) the failure of, (b), mould, fungi et cetera.

1430

MR MCLELLAN KC:

Well that's within (a) as well.

KÓS J:

Yes.

WINKELMANN CJ:

It does, doesn't it? You would say that doesn't matter because it's not a statute you're construing, it's a contract, and people express themselves imperfectly, whereas Mr Ring says against you, well it's against you that it's rendering redundant certain words in the clause.

MR MCLELLAN KC:

Yes, and I say that those words are there for a very good reason. The causative linkages. So you just need to understand the causative linkages and then look at the subject matter of the exclusion to see that this, that these liabilities are not excluded.

So in the road map if I can move on, we are at the final bullet point in 14, which deals with the, those causative words which are dealt with at 5.35 of the written submissions. I don't need to take you in any detail to those, save to say that the *MDIS v Swinbank* [1999] Lloyd's Rep 516 (CA) decision, and I'll give you the specific references there, it's at pages 522, line 18; and 525 at line 27,

clearly showing that RiskPool is relying on a dissenting judgment in that decision, and the majority, and this is at 5.37, sorry, 5.36, the majority held that as a matter of commercial sense the word “alleging” contemplated an enquiry into proximate cause. The other word, the words “in respect of” dealt with in 5.38, and in particular footnote 77, which – and those authorities clearly show that the words “in respect of” are words of the widest causation nexus. That’s the unsurprising propositions I suggest.

WILLIAMS J:

Is the alleging there in the context of an inclusion or an exclusion clause?

MR MCLELLAN KC:

Swinbank is again inclusion.

WINKELMANN CJ:

Which, can you tell us what the, it’s NDIS is it?

MR MCLELLAN KC:

MDIS in 5.36.

WINKELMANN CJ:

Right, got it. Sorry, what was the page?

MR MCLELLAN KC:

It’s paragraph 20 – can you just go, so we can see the paragraph numbers.

WINKELMANN CJ:

Because it seems to finish at 5.27.

MR MCLELLAN KC:

27, so this is the majority.

WINKELMANN CJ:

Got it.

MR MCLELLAN KC:

This is Lord Justice Judge agreeing with Lord Justice Peter Gibson at 27.

WINKELMANN CJ:

So Lord Justice Clarke was a dissenter?

MR MCLELLAN KC:

Correct. I think I've dealt sufficiently with the extrinsic evidence point in my introductory remarks and unless you've got any additional questions for me on that I don't propose to say anything more.

WINKELMANN CJ:

You've also dealt with the absurdity haven't you?

MR MCLELLAN KC:

I don't think I can usefully add anything to that, and was not going to do so. I will leave you to read that final bullet point which is referred to in our submissions. It's just an illustration of the point that I've already made. The only final point I will make is in relation to *Wayne Tank* in my learned friend's submissions at 4.40. RiskPool says that the principle is that if a claim results from two or more causal factor, whether direct or indirect, and an exclusion expressly excludes indemnity for this claim, if caused or contributed, there is no indemnity for any of the claim.

1435

Now I think the word "claim" is used there to provide some parity with the RiskPool's argument in this case, but it's important to remember that in *Wayne Tank* the proposition was about a loss, a factory fire, and as Lord Denning said, the loss was "not apportionable".

WINKELMANN CJ:

Mmm.

MR MCLELLAN KC:

It wasn't a question of seeing whether claims were divisible or not. Specifically didn't use the word "claim", it uses the word "loss/liability", that being what was indemnifiable under the relevant policy. So that's the *Wayne Tank* principle. So unless your Honour's have any other questions for me, those are my submissions.

WINKELMANN CJ:

No. Thank you, Mr McLellan. Mr Ring, did you have a reply?

MR RING KC:

Yes thank you, your Honour. Let me first deal with *Wayne Tank* and a number of points in relation to that. My friend's submission was that it was surprisingly unconventional for an exclusion to exclude something that wasn't mentioned in it, that is non-weathertight defects without any reference to them. Our answer to that you will find in the road map at paragraph D2. Sorry, it's yes, D2, it's D, paragraph 5, D5 second paragraph last bullet point.

KÓS J:

Unremarkable?

MR RING KC:

Unremarkable, correct. It's unremarkable that exclusions referring to one feature of claim has the effect of excluding cover in other features, and I would be grateful if what –

WINKELMANN CJ:

Is that a case?

MR RING KC:

That is – no, that's our Derrington and Ashton and I was hoping that it might be called up. I don't – have we lost quick sharing?

WINKELMANN CJ:

It is a case, or is it a textbook?

MR RING KC:

It's a textbook, it's Derrington and Ashton *Law of Liability Insurance*, Australasian leading textbook on liability. Have your Honour's got that?

WINKELMANN CJ:

Just get it, yes.

MR RING KC:

So at the bottom of the page and it's highlighted: "In order to determine where the relevant exclusion that applies to the one" –

WINKELMANN CJ:

Sorry just, can you just wait a moment?

MR RING KC:

Oh, sorry.

WINKELMANN CJ:

Is it Derrington, volume 1, pages 505 to 506?

MR RING KC:

No, volume 2.

WINKELMANN CJ:

Yes, we've got three entries for Derrington I think.

MR RING KC:

If you go to the combined entry that's in our authorities, there's a combined entry, one document. It's got volume 1 followed by volume 2.

WINKELMANN CJ:

Yes.

MR RING KC:

If you could turn to 1848. "In order to determine where the relevant exclusion applies to one feature or cause of the Claim excludes covers in respect of other features in the Claim unless you construe the terms in the exclusion, consider whether the separate relevant aspects of the Claim are so mingled that the exclusion as construed has the effect of excluding the whole or only that part to which it refers. For example, an exclusion based on causation."

1440

Wayne Tank itself was a case not where the operative cause was not Claim but was legally liable for and *Wayne Tank* can be turned up. The reference to that is page 828, line E. Go to page 828, 828 line E. Hopefully there you'll find the operative clause that's being referred to, it doesn't refer to claims at all, and the issue in *Wayne Tank* was if you – you can scroll down please on that page for me – there's the exclusion in *Wayne Tank* which was effectively a good supplied exclusion, and the facts of that case were that the goods there supplied were defects but also during the testing procedure an electrician negligently flicked a switch when he shouldn't have, and those were the two causes, and because the goods supplied exclusion applied, the fact that the electrician had flicked the switch was a completely different situation, something not mentioned in the exclusion, didn't matter.

WILLIAMS J:

Sorry, was there a goods supplied problem and a flicked switch problem?

MR RING KC:

No it was – well, yes, yes –

WILLIAMS J:

And you couldn't distinguish in damage which was which?

MR RING KC:

No because they were concurrent causes.

WILLIAMS J:

Because you melted the machine one way or another?

MR RING KC:

Yes, but they were concurrent causes, but the point being –

WILLIAMS J:

Well I'm trying to get you to the divisibility point. Was the damage divisible or indivisible in this case?

MR RING KC:

No, no, the damage was indivisible and –

WILLIAMS J:

So what if you've got divisible damage?

MR RING KC:

Well the reason that Lord Denning in this judgment, in my submission, says that the damage – that the loss was not apportionable because it was indivisible, is because it was based on a liability insuring clause and not a claim – sorry a liability exclusion and not a claim exclusion.

WILLIAMS J:

So divisibility was irrelevant?

MR RING KC:

No, divisibility was relevant in that case but it was liability-based because that's what the exclusion said. In our case the question is whether the claim is divisible or not. Because our exclusion refers to claims and not to liability. That's the point I'm making, your Honour, based on *Wayne Tank*.

O'REGAN J:

It refers to both.

MR RING KC:

I beg your pardon?

O'REGAN J:

The exclusion in our case refers to both liability and –

MR RING KC:

Well yes but that comes back –

WINKELMANN CJ:

Would you read out liability?

MR RING KC:

Yes, my point is that claim is the subject of the exclusion.

WINKELMANN CJ:

Can I just ask you to say, then, if you can just wind back because I've lost the thread, why you say this case is relevant?

MR RING KC:

This case is relevant because in this case there were two concurrent causes.

WINKELMANN CJ:

In *Wayne Tank*?

MR RING KC:

In *Wayne Tank* there were two concurrent causes, and because one that wasn't even mentioned in the exclusion was operative the claim was nonetheless excluded even though the exclusion didn't refer to it, and that's my learned friend's point, that if non-weathertightness defects were to be excluded, they should have been mentioned in the exclusion, and how could something that's not mentioned in the exclusion end up being excluded, and I'm explaining how that can happen even on a loss wording, let alone on a claim wording.

WINKELMANN CJ:

And the issue for us is whether this is actually the same category of thing or whether it was something else completely.

MR RING KC:

Well that may be a different point but –

WINKELMANN CJ:

No it's the same – I mean –

WILLIAMS J:

It's a prior point.

WINKELMANN CJ:

Yes, it's a prior point.

MR RING KC:

And in a related – just while we're on *Wayne Tank* if you can scroll up to 830 F that's the reference to loss not being apportionable. Just come up to F. Yes: "Seeing that they have stipulated for freedom, the only way of giving effect to it is by exempting them altogether. The loss is not apportionable."

A related point in relation to the *Nautilus*, my learned friend says that the same applies there, that the claim, I think the way it was expressed was that it related to paragraph 40 of our submissions, and that the *Nautilus* was not an authority that supported us, and again I'm just going to simply remind your Honours of paragraph, the paragraph in *Nautilus* which is cited in the judgment of the Court of Appeal at paragraph 73 which specifically applies *Wayne Tanks* to claims. 1445

WINKELMANN CJ:

Okay well, I mean, I really don't need to be reminded of stuff.

MR RING KC:

Well I'm just – I'm only doing that because a different submission was made to your Honours in relation to the effect of the *Nautilus* judgment by my learned friend, and my counter to that is to just respond by saying please look at paragraph 73 of the Court of Appeal judgment which cites the passages from the *Nautilus* that refers to claims not being divisible.

Next point, your Honours if we can just – I'd just like to talk to my learned friend's submission that although the word involved was used in a heading in a report it was no more than a heading in a report and I want to turn up, if you could turn up for me please, the schedule that was attached to our Statement of Claims, sorry, attached to our original submissions, schedule 1. Schedule 1, thank you. So "involving" was not just a heading in a report. Involving, if you look at the 30 June 2006 section that is in the centre of your screen, the "involving" was on the endorsement for the exclusion and also on the endorsement for the extension. Those documents which were incorporated into the policy, if you scroll down slightly, were then sent in a letter from RiskPool to the Council on 29th of August 2006 in a letter headed "Weathertightness Claims" and referred to the sublimit as being imposed for "multi-unit weathertightness claims". Now that, clearly and unmistakably, says that whatever building defect claims involving moisture ingress means, weathertightness claims means the same thing.

If you can then roll up from there please, and I say it means the same thing, when the word "involving" was used as part of the Protection Wording text, the next thing that happened was that in the succeeding year –

WINKELMANN CJ:

Are we just going through your submissions again?

MR RING KC:

No, no, I'm answering the point that involving was just a heading and you can ignore it, and it has nothing to do with weathertightness claims.

WILLIAMS J:

Your bigger problem, at least from my point of view, is the value of the word for you.

MR RING KC:

Yes.

WILLIAMS J:

Because I think we've agreed it's ambiguous.

MR RING KC:

Yes. With respect –

WILLIAMS J:

Well you agreed with me that you can use word in an exclusive way and I agreed with you that you can use the word in an inclusive way. The question is always context.

MR RING KC:

Yes. Okay, well I just wanted to draw your Honours' attention to that. If I can just complete this, if you could just roll up. 2007, just to complete the picture of where involving flowed into things, "involving" as the heading on the extension for weathertightness claims, so instead of being building defect claims involving moisture ingress, that heading was amended to "Weathertightness Claims", and that's the word that was then used in all subsequent correspondence and all subsequent Protection Wordings, including schedules.

1450

WINKELMANN CJ:

Yes, you didn't kind of argue a personal dictionary type meaning, did you? You didn't argue that there was clear evidence that everybody understood what this all meant and that was transposed?

MR RING KC:

It's not really a personal dictionary issue. It's a question of what, I mean the ordinary meaning of a weathertightness claim isn't just a claim that only involves weathertightness defects. A weathertightness claim can be weathertightness and non-weathertightness defects, and we say it's both.

WINKELMANN CJ:

That doesn't really pick up the argument you're making here though.

WILLIAMS J:

I also think that's conclusory.

MR RING KC:

Well –

WILLIAMS J:

I mean, how do we know that?

MR RING KC:

Well this is the first half of that story, and the second half is the correspondence that I subsequently referred you to which said that weathertightness claims are being excluded in their entirety.

WILLIAMS J:

Yes but, yes, there's a deep and problematic circularity in that reasoning because if we agree that "involving" is ambiguous and context is everything, the removal of "involving" and the expression of a single category, "weathertightness", suggests a context which is exclusion, not inclusive.

MR RING KC:

I think the key to this, your Honour, and where we may be at cross-purposes, is that I am working from a standpoint that each Waterfront plaintiff made one claim and we should only be looking at it like one claim which has got weathertightness defects in it, and non-weathertightness defects, and so when

my learned friend is asked questions like: “If the claim was divisible would there be a separate claim for each?” That, in my submission, goes beyond, and with the greatest of respect, incorrectly beyond one claim which is divisible into two parts, because you’re now starting to talk about two different claims and that’s not the position that we’ve got here.

WILLIAMS J:

That’s the procedural position with respect to the High Court Rules, but that surely can't be governing this.

MR RING KC:

No, no, it’s nothing to do with the High Court Rules, with respect your Honour.

WILLIAMS J:

Well you could issue two sets of proceedings if you wanted to.

MR RING KC:

But there would still only be one demand. There would still only be one claim.

WILLIAMS J:

Well, again, that’s just conclusory. Whether there’s one claim or not is the question.

MR RING KC:

Well no it isn't, again with the greatest of respect your Honour, that question is – that bus has come and gone. That question was decided in the High Court and the Court of Appeal and has not been appealed against. That question has been answered. There is only one claim by a Waterfront plaintiff.

WILLIAMS J:

Yes, but the question is, what “Claim”, big “C”, means. Right?

MR RING KC:

Yes, but –

WILLIAMS J:

If you're right that that's been decided in the High Court and the Court of Appeal, then we wouldn't be here, because you would've won.

MR RING KC:

No, we're here because someone is saying, the Council is saying that the exclusion, the word "Claim" in the exclusion is divisible into its separate liabilities.

WILLIAMS J:

That's, precisely.

MR RING KC:

Or into separate liabilities.

WILLIAMS J:

So this issue hasn't been resolved.

MR RING KC:

Well yes, no, whether there is one or more claims has been resolved, and so it is, with the greatest of respect your Honour, it's not appropriate to be looking at this on the basis that there could be separate claims for weathertightness and non-weathertightness. There isn't. There is one claim here, and the question is whether that claim is divisible for the purpose of the exclusion or not. That is the only question. If that's what your Honour is saying then we actually do agree on it.

WILLIAMS J:

Yes, yes.

MR RING KC:

We actually do agree.

WILLIAMS J:

Perhaps I'm the one using claim too loosely but that's precisely what I was thinking.

MR RING KC:

Well I'm sorry if I've been too pedantic about that point, but I think it's quite important because if my learned friend's submissions that he took you, particularly the ones he took you to this morning from about paragraphs 5.9 onwards, it seemed to me to be an attempt to relitigate the one claim conclusion, and to start talking about this as multiple claims when it isn't, and that's the only point that I'm really trying to emphasise here.

ELLEN FRANCE J:

Sorry, Mr Ring, just in terms of one claim, do you know of the, do you know under the Weathertight Homes Tribunal, would that Tribunal have any jurisdiction in relation to the fire aspects, for example?

MR RING KC:

No.

ELLEN FRANCE J:

No?

MR RING KC:

Not it doesn't.

ELLEN FRANCE J:

Right.

1455

MR RING KC:

No it doesn't and there are cases to that effect. There's the judgment of Associate Judge Bell in the, it's just escaped me for the moment, and there's

also a judgment of Associate Judge Smith in the Washington Apartments, and I can certainly provide you the copies of those two judgments.

ELLEN FRANCE J:

No –

MR RING KC:

I mean, they were situations where there was a weathertightness homes claim and then there was later claim that expanded into that, and there were the typical issues in terms of limitation.

ELLEN FRANCE J:

Right, oh yes, yes.

MR RING KC:

As to whether the weathertight homes appointment of an assessor stopped time running for the other claim as well.

ELLEN FRANCE J:

I don't think it's of any moment, I was just noting that in one letter, for example, Mr Carpenter refers to claims made against member councils in the Weathertight Homes Resolution Service/Weathertight Homes Tribunal, which is presumably focusing then on claims over which those bodies have some jurisdiction as opposed to –

MR RING KC:

Only weathertightness defects in our terminology.

ELLEN FRANCE J:

Yes.

MR RING KC:

Yes. A weathertightness claim that is a pure weathertightness claim and not a mixed one, they would not deal with the structural defects and fire defects in the claim that we're involved in.

The next point I wanted to make was – and just finish, I said that was the first part in our – when your Honour said that I hadn't got all the way with weathertightness claims, and the second part is the correspondence and documents that I referred you to which said that the Council – that RiskPool were excluded liability altogether once it got to that point in 2009, excluded liability altogether for weathertightness claims but would continue to manage them, if you remember that correspondence. There were annual returns, sorry, annual reports to the same effect. Your Honour Justice Kós asked me whether there was any examples of how that was done in practice, and the answer is yes in respect of this claim.

KÓS J:
Well, that won't help.

MR RING KC:
Pardon?

KÓS J:
That really won't help though, will it. I mean, by that stage the die was cast. I'm interested in things that existed before the wording was adopted.

WINKELMANN CJ:
As part of the context.

MR RING KC:
Well, no. Okay, I can't give you anything other than a consistent letter that was written but it isn't in the – just the point is it isn't in the case on appeal in this case but it was in the lower courts. So if that becomes relevant then I am happy to provide it.

Coming to the indivisibility point, my learned friend took you to the High Court judgment at para 399, and read to you about Mr White, who was the loss adjustor for the Council, to his very colourful schedules. You might have got

the impression that the Judge actually thought those schedules were relevant and useful from what my learned friend said but in fact the Judge did not say that. But if we can first go to Mr White's brief of evidence, and that which you were also taken to.

WILLIAMS J:
It's 015 –

WINKELMANN CJ:
It's in the supplementary thing, is it?

MR RING KC:
It's at 303.0579. Sorry, I'm not sure that's right.

WINKELMANN CJ:
It's the last page of his brief.

MR RING KC:
Yes. What I want to take you to is paragraphs 29. You were taken to the last page, yes, but I –

WINKELMANN CJ:
Well that's the previous page, paragraph 29, "scaffolding cost". Is it paragraph 29 of that brief, is that "scaffolding cost"?
1500

MR RING KC:
If we can backtrack, I'm not sure if it's the last page or not, yes at 29 Mr White said: "It is a purely hypothetical exercise to assess the preliminary and general costs, including scaffolding, which related exclusive to the non-weathertightness defects…". And then he said in the next paragraph he said: "Furthermore, to assess the cost of say scaffolding for the non-weathertightness… as if these defects existed in isolation is difficult as there are many methodologies…". Then he went on to say at 31 and 32 that

basically what he did, and he said it at 32, is basically what he did was he took a value-based apportionment, and the Judge rejected his evidence in this respect and said that was an inappropriate way of dealing with it and the relevant passages in the High Court judgment are around 428 and 432.

Just in basic terms, everything where Mr White disagreed with RiskPool's loss adjustor and equivalent expert, Mr Smith, she accepted Mr Smith's evidence over Mr White's.

WILLIAMS J:

I think the point was that there are some damages that are severable, or apportionable as Lord Denning says. Did your expert disagree with that?

MR RING KC:

Well they did their best to make an apportionment, but then –

WILLIAMS J:

I'm not talking about a value apportionment, I mean a factual division because Lord Denning's thesis in *Wayne Tank* is founded on the idea of the ability to apportion cause.

MR RING KC:

You couldn't make a factual apportionment because work overlapped because scaffolding was put up to do a whole bunch of different things at the same time.

WILLIAMS J:

Did your experts say that there was nothing in this litigation that was weathertight, that was not weathertight?

MR RING KC:

No. What he did say was there are some things that he could refer to that was a cost that was exclusively related to non-weathertightness defects. So yes, he did say that, and that was the basis of the apportionment that the High Court Judge did.

WILLIAMS J:

Yes.

MR RING KC:

But that only apportioned, for example, that was only an ex post facto apportionment of the defects. It didn't, for example, apportion the consequential losses in which, for example, somebody is held out of their apartment for a period of time. That's an occupation loss because of the cumulative effect of the defects. That's not apportionable, other than in –

WILLIAMS J:

Aren't these questions –

MR RING KC:

Other than an entirely, I'm sorry?

WILLIAMS J:

These are questions of fact?

MR RING KC:

Other than an entirely arbitrary way?

WILLIAMS J:

But once you concede that some things are completely divisible, that's game up, isn't it?

MR RING KC:

Well, no, that's why I'm not conceding it your Honour.

WILLIAMS J:

I thought you did.

MR RING KC:

I mean –

KÓS J:

I mean they're plainly apportionable. You only have to ask yourself the question, would this loss have been incurred other than as a result of the weathertightness defect. Answer, yes you're out of your apartment, so the consequential loss is gone for the extent to which rectification or remediation is the product of the weathertightness.

MR RING KC:

Well it's interesting you say that because that's not, in fact, how the High Court did it. The High Court just did the apportionment, applied the same apportionment to the defect – as they did to the defect. So…

KÓS J:

The short point is, it can be done?

MR RING KC:

Well in an ex post facto situation, yes. I mean –

WINKELMANN CJ:

Mr Ring, you can't maintain unreasonable submissions.

MR RING KC:

I'm not maintaining – I'm sorry your Honour, I'm not maintaining, I'm accepting, yes, ex post facto if the policy says you have to do it, then it has to be done. But it's by no means a straightforward exercise.

WILLIAMS J:

Your best case is it can't be done. Just you can't put that case.

WINKELMANN CJ:

Well, no, you're not saying – you're saying it's irrelevant whether it can factually be done or not. The words, in other words, the words is what you're saying.

MR RING KC:

Yes, thank you your Honour, that's – I'm sorry, that's much more succinct than I've ever put it today, but that's correct.

1505

The next point, you asked about, or you referred to *West Wake* and just a small point there, *West Wake Price*, there was no policy definition of "claim", but Justice Devlin said that claim in its ordinary meaning was a demand. You'll find that reference at 829 between lines F and G. I don't need to take you to it but just if you're wanting to compare those cases, that case to this case, it's directly comparable because the Judge said the "common law" definition is the same as the "policy" definition.

A word about the exclusions. The High Court and the Court of Appeal both ended up saying that the other exclusions didn't help in any way and that's our position as well, that this exclusion was parachuted in and that was the evidence, and you can't really gain much of relevance from the other exclusions.

KÓS J:

Can't possibly be right. I mean, your thesis has to work for claims.

MR RING KC:

Yes.

KÓS J:

Some of the claims may involve other exclusions.

MR RING KC:

Well, I'm sorry, yes. Yes, to that extent –

KÓS J:

If it doesn't work in that context it's a pointer against your argument, but if it does work in your context it's a pointer for it.

MR RING KC:

Yes. So I'm sorry, your Honour, correct. Finally, I just want to talk about *Swinbank* because –

WINKELMANN CJ:

Can I just ask another question about that. Did you just say, and before Justice Kós pointed out a defect in the logic of your argument, but did you say as a proposition of law that the other exclusions are irrelevant because this exclusion was parachuted in?

MR RING KC:

I said that that was a factor – well, I said that was an important factor to be taken into account in assessing the common intention of the parties, yes. Yes.

WINKELMANN CJ:

So what's the definition of – yes, okay. So have you got any kind of, any law that supports a notion that if you bring a clause from one part into it from somewhere else to do a contract it has to be interpreted on its own without reference to the rest of the contract? Because that will be a novel proposition of law.

MR RING KC:

Well no. It's only an inference, your Honour, that the lower courts have already taken from the fact that there is a chapeau to the previous exclusions and this exclusion then starts as if there's no chapeau. So the inference that you would take from that is that this was supposed to be a stand alone exclusion, even though it's number 13. That's the only submission I'm making on that point.

WINKELMANN CJ:

All right, okay, okay thanks.

WILLIAMS J:

You might take, draw the inference that the drafter hadn't read the contract.

MR RING KC:

Well beyond, of course, capitalising “Claims” so you know it’s the defined term.

So I wanted to take you to *Swinbank* and I’d be grateful if that could be pulled up. My learned friend with respect wasn’t correct to say that Lord Justice Peter Gibson dissented and the fault for that is entirely mine because that’s what I put in our submissions but in fact I’ve undersold us in that respect. What happened in this case was that if you can scroll through, please to 519.

WINKELMANN CJ:

Are you saying that Lord Justice Clarke didn’t dissent?

MR RING KC:

No. Lord Justice Clarke was the leader of the majority of the plurality.

WINKELMANN CJ:

Okay.

KÓS J:

Lord Justice Judge was the dissentient.

MR RING KC:

No. He was the second in the plurality.

WINKELMANN CJ:

So as a matter of elimination determination it must have been Lord Justice Peter Gibson who dissented.

MR RING KC:

No, nobody dissented.

WINKELMANN CJ:

Oh, no one dissented?

MR RING KC:

No one dissented.

WINKELMANN CJ:

So it all turns on you saying there was a dissent.

WILLIAMS J:

Well that's not on.

MR RING KC:

Well, I know. I'm sorry, I you know, I just wanted –

WINKELMANN CJ:

Well that's not your job, it's not your job to confuse, Mr Ring.

MR RING KC:

No, well, but it is my job to clarify when I have and that's what I'm trying to do.

WILLIAMS J:

Quite right, quite right.

MR RING KC:

The bottom line here is that they all agreed with my favourite Judge in this case which is Lord Justice Peter Gibson who is the one that says alleging can never mean anything causative. They all agreed with him about that but the other two said we actually prefer a better way. We expressly agree with him on that point but we actually prefer a better way and our better way is to reinterpret alleging to mean in respect of, in that situation.

1510

So I actually have the support of all three Judges in that case and the place where you will find that is if you scroll through to paragraph, I'm sorry, to page 527. You'll see at 527 if you can just go down to the bottom, at the last paragraph that is Lord Justice Peter Gibson propounding the solution and his

solution is that the alleging means alleging but the proviso for negligent conduct applies to all the exclusions above it and not just the dishonesty exclusion it's attached to. So he maintains, in my submission, the integrity of the English language an ordinary meaning and that's the point he's making at the end, notwithstanding what his other two fellow Lord Justices said, and –

WINKELMANN CJ:

You're soon going to be about as long in reply as Mr McLellan was in his submissions.

MR RING KC:

Well no, no, I'm just –

WINKELMANN CJ:

You're coming to an end?

MR RING KC:

Yes, your Honour, I am winding up. But I think –

KÓS J:

Yes.

MR RING KC:

I do think that I owed your Honours a duty to correct the dissenting point particularly as my learned friend adopted it and used it against me, and in fact –

WINKELMANN CJ:

That's very selfless of you.

MR RING KC:

Well, no, no –

WILLIAMS J:

Or very cunning, it's hard to know which.

MR RING KC:

No, no, it's –

WINKELMANN CJ:

No it is quite proper of you Mr Ring, I do accept that.

MR RING KC:

Thank you, your Honour. So if we can go back now – sorry, if you just look at while we're on 526, there's the reference to the key point that he's saying, alleging is: "Not a synonym for 'resulting from'" or anything to do with causation, and that's the key point for me in terms of this case.

If you now backtrack for me please to 525, paragraph 26 and 27, those are the two paragraphs which say from – and this is the leading judgment from Lord Justice, Sir Christopher Clarke, Lord Justice Clarke, saying that: "I entirely agree with the judgment of Lord Justice Judge. I also agree with Lord Justice Peter Gibson." Then it goes on to say in 27 I agree that one way of doing it is the way he suggests, but personally I would prefer to do it another way. Lord Justice Judge said I agree with Lord Justice Clarke, so that's both points.

WINKELMANN CJ:

All right, we'll have to read this carefully, Mr Ring. I don't think we're going to get a clear picture of it today.

MR RING KC:

Well hopefully going direct to those paragraphs will help your Honour's to get a clarity on that, and I think your Honours that those are my submissions in reply.

WINKELMANN CJ:

Thank you, and each party has addressed the issue of costs in these submissions, so I take it we need hear no further on that issue?

MR RING KC:

Not from our side, your Honour.

WINKELMANN CJ:

All right. Well, thank you counsel for your submissions. We'll take some time to consider our decision and let you have it in due course.

MR RING KC:

As your Honours please.

COURT ADJOURNS: 3.14 PM