JUDGMENT FOR PUBLIC RELEASE: SEE ADDENDUM.

IN THE HIGH COURT OF NEW ZEALAND
NAPIER REGISTRY

I TE KŌTI MATUA O AOTEAROA
AHURIRI ROHE

CIV-2017-441-070
[2021] NZHC 1477

BETWEEN	NAPIER CITY COUNCIL Plaintiff
AND	LOCAL GOVERNMENT MUTUAL FUNDS TRUSTEE LIMITED Defendant

Hearing:	27 July 2020 to 12 August 2020 (further submissions received September 2020)
Counsel:	D H McLellan QC and G Tompkins for Plaintiff M G Ring QC, C J Hlavac and K Welsford for Defendant
Judgment:	21 June 2021

JUDGMENT OF GRICE J

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Introduction

[1] Napier City Council (NCC or the Council) was a member of a mutual scheme arrangement that brought together local authorities in New Zealand. The scheme provided an indemnity cover for its local authority members for various risks including civil liability.[1]

[2] The scheme was established in 1997 under a trust deed (Trust Deed) in response to a growing dissatisfaction by local authorities with the commercial insurance sector's response to their insurance needs. It was known as the New Zealand Mutual Liability RiskPool Scheme (RiskPool Scheme or Scheme). The defendant, Local Government Mutual Funds Trustee Ltd (RiskPool), was the trustee of the scheme.[2] It was a subsidiary of New Zealand Local Government Insurance Corporation Ltd (LGIC), which was essentially owned by the members. The Riskpool Scheme no longer offers indemnity cover.

[3] Mr Paul Carpenter of the insurance brokers Jardine Lloyd Thompson (JLT) was involved in the setting up and management of the scheme. The RiskPool Scheme operated in much the same way as an insurer. It issued "Protection Wording" similar to that contained in a commercial insurance policy and offered its members claims' handling and risk management services. It also negotiated with and obtained reinsurance from commercial underwriters.[3]

[4] The Scheme operated well for the first few years of its existence but in the early 2000s the level and nature of some claims were causing concern. The claims were largely as a result of what has been described as the "weathertight" or "leaky building" crisis. In particular, the Scheme was exposed to substantial costs for remedial work associated with weathertight complaints in relation to multi-unit dwellings.

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1 Including professional indemnity cover.

2 The defendant and New Zealand Local Government Insurance Corporation Limited are parties to a Deed of Trust made on 1 July 1997 varied on 22 June 2007.

3 Mr Carpenter said the wording was based on the 1990s wording used by the commercial insurer FAI Insurance Ltd.

[5] RiskPool took various steps to limit its exposure to those claims culminating in the introduction of a weathertight exclusion. That exclusion was added as cl 13(a) (the weathertight exclusion) to the list of exclusions in the Protection Wording in 2009 and included in the terms for the annual renewals from that date. It is the meaning of the indemnity cover and Exclusion cl 13(a), which is at the heart of this case.

[6] The Council is suing RiskPool for breach of contract and seeks contribution to a settlement payment it made in 2019 to settle proceedings involving weathertight and other building defects filed in 2014 against the NCC by owners of a multi-apartment complex known as the Waterfront Apartments. The settlement was negotiated at mediation. [redacted]. The global figure was paid in full and final settlement for the cost of the works required to remedy weathertight and non-weathertight building defects as well as structural and fire safety compliance failures. [redacted]. The global settlement agreement did not make any specific allocations in relation to the matters settled.

[7] Put simply, RiskPool says it is not liable to contribute anything toward the settlement amount because there was only one "Claim" against the NCC. Exclusion cl 13(a) excluded all other building defects and compliance failures from cover when a weathertightness[4] complaint was involved. This included non-weathertight defects discovered as a result of the investigation or in the repair of the weathertight defects.

[8] The NCC says that while the weathertight as well as mixed weathertight and non-weathertight complaints are excluded from cover, non-weathertight building defects, structural and fire safety compliance issues discovered in investigations or in the course of the works are not.[5] Further issues arise concerning the apportionment of the global settlement figure if RiskPool does not succeed in its primary argument that cover was excluded.

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[4] For the purposes of this judgment "weathertight" complaints or defects bears the meaning to the failure of any building to meet the relevant requirements of the New Zealand Building Code in relation to "leaks, water penetration, weatherproofing, moisture or any water exit or control system". This is the wording of the weathertight Exclusion cl 13(a). See below at [47].

[5] Complaints is adopted as a neutral term as it was by the Court of Appeal in *Local Government Mutual Funds Trustee Ltd v Napier City Council* [2019] NZCA 444 at [17] ["Reasons Judgment of the Court of Appeal"].

Background

[9] In 2007 the NCC issued completion certificates for a 52 apartment complex in Humber Street, Napier, known as the Waterfront Apartments. As the relevant local authority, it had been responsible for the issue of the original building consents as well as for the relevant inspections undertaken in the course of construction and the issue of the code compliance certificates.

[10] In October 2014 the NCC was served with proceedings brought by the Waterfront apartment owners and its body corporate (the Waterfront plaintiffs) for an amount not then quantified for the repair of extensive building defects and compliance failures.

[11] The Waterfront plaintiffs' statement of claim pleaded only one cause of action against the NCC. It was in negligence alleging a breach of duty to exercise reasonable care and skill in: issuing the building consents; carrying out the inspections; deciding whether to issue the code compliance certificates; and by failing to establish and enforce a system that would give effect to the Building Code. The damages claimed were for repair costs together with consequential losses and general damages.

[12] The initial Waterfront plaintiffs' statement of claim[6] served in October 2014[7] listed the complaints as: plumbing (various defects in the bathrooms); air conditioning (inadequate heating and cooling air conditioning system); roof structure; breeze way floors – membrane (allowing moisture to enter into the basement carpark below); roof cladding – membrane (failing and allowing moisture to enter into the structure below); basement tanking (precast concrete joints and pockets in the basement failing allowing moisture ingress); and rain screens to precast concrete panels. The defects were said to have resulted in damage including the movement of the roof structure, excessive noise during high winds and moisture ingress through the exterior envelope into the structure of the building so that it did not comply with the building code.[8]

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6 Statement of Claim – *Body Corporate 388915 v HBS Pandora Prop Limited* & Ors, 9 October 2013, CBD 306.2549.

7 It was filed in 2013.

8 Statement of Claim – *Body Corporate 388915 v HBS Pandora Prop Limited* & Ors (Waterfront Plaintiffs' Claim), 9 October 2013, at [24] CBD 306.2549.

[13] The claim was not quantified but a schedule was attached to the statement of claim listing the general damages claimed by the various apartment owners totalling $1.825 million. By October 2018 the claim had been quantified at $11,804,887.25 including $10,287,039 for remedial work and $1,57,848.25 for consequential losses.

[14] On the eve of the mediation held on 14 February 2019, a Schedule of Claim was presented to the NCC which is Attachment 1 to this judgment. The amount of the claim had increased. The list of defects alleged had also changed over time.

[15] The relevant NCC officers and the NCC's lawyers and experts had worked intensively in the weeks before the mediation to clarify the claim and to prepare and revise their advice to the Council in preparation for the mediation.

[16] By the time the matter went to mediation in February 2019, the NCC and 15 other defendants were involved. One of the risks the NCC faced was that the other defendants became insolvent and would be unable to contribute by the time the matter went to trial. As the defendants were jointly and severally liable the NCC negotiated the contributions of the other defendants who were able to pay, and the settlement offers were made as global figures. The claim settled at mediation on 14 February 2019.

Notification of claim

[17] The NCC had notified RiskPool shortly after it had received the Waterfront plaintiffs' statement of claim. RiskPool declined cover on the basis that indemnity cover was excluded. It pointed to Exclusion cl 13(a) and said that the notification had arisen due to allegations which included weathertight complaints and therefore all building defects in the claim were excluded.[9]

[18] NCC therefore instructed Ms Helen Rice of the legal firm, Rice Speir, to manage its defence of the Waterfront claim. Ms Rice had been the lawyer recommended by RiskPool. NCC put RiskPool on notice that it might challenge the declinature when it had further information.

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[9] When I refer to non-weathertight building defects I include structural defects and fire compliance failures.

[19] The terms of the settlement were confidential, but the agreement has been made available to the Court. The settlement agreement records a global sum payment to the Waterfront plaintiffs. It is not broken down by amounts to remedy specific defects nor into weathertight and non-weathertight amounts. [redacted].

[20] NCC accepts that RiskPool is not liable for the full amount of the settlement sum as it relates to compensation for the remedy of weathertight and mixed defects. However, it says RiskPool is liable for an amount attributable to the non-weathertight defects.

[21] The NCC now seeks judgment for the amount of the global settlement which it contributed together with defence costs and expenses.[10] It has put RiskPool to proof as to what amount is excluded from the indemnity.

The RiskPool scheme

[22] RiskPool emphasised that it operated a mutual fund scheme for the benefit of its members. It was not a "for profit" and not a commercial operation. RiskPool was established in 1997 by the LGIC and JLT to provide liability services for its member local authorities. This included an indemnity cover for civil liability and a claims handling service tailored to the needs of local authorities.

[23] The indemnity cover was for public liability and professional indemnity. Its terms were set out in the Protection Wording, which was amended from time to time. In general terms members renewed their cover annually. Members came and went from the scheme over time.

[24] Mr Paul Carpenter of JLT, who had been involved in the establishment of the RiskPool Scheme, managed the Scheme and the claims handling service as well as arranging the reinsurance from the Scheme's inception in 1997. Mr Carpenter reported to the board of RiskPool (RiskPool's Board or Board) and the reinsurers.

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[10] The parties reached agreement concerning the quantum of defence, costs and expenses in relation to the Waterfront claim, subject to an adjustment depending on a finding concerning liability for bathroom defects, being $737,832.91 or $748,995.41.

[25] In 2012, Civil Financial Services Ltd took over the Scheme management but JLT through Mr Carpenter retained the claims management role. Mr Carpenter continues to manage the run-off claims for the RiskPool scheme and the reinsurers as well as managing various territorial authorities' insurance arrangements. This cover is now taken out directly with commercial insurers.

[26] Mr Carpenter gave evidence for RiskPool. He emphasised that the Scheme's mutual character had given it a point of difference from an arm's length "commercial" insurer, which was focused on profit. The idea of the Scheme was that the members would fund a pool of money that could pay claims. The Scheme held a self-insured retention with separate funds established annually so that claims would be paid out of the fund established for the year in which they were notified.

[27] In the first few years of the Scheme's operation, RiskPool had been able to maintain a reasonable self-insured retention pool. That retention was funded by member contributions and investment income. RiskPool had initially intended to build a surplus to maintain its self-insured retention over time. However, the retention was wiped out by claims in the early 2000s. The members funded the claims to the extent of their annual contributions and any calls made on them for additional contributions for a fund year deficit.

[28] The Scheme indemnity cover responded on a "claims made" basis.[11] From 2009 onwards claims largely relating to weathertight issues led to calls being made on members over a series of fund years. Some local authorities had to pay although they were no longer members at the time of the call but had been in the fund years which had gone into deficit due to substantial claims made. Mr Carpenter said this led to members and ex-members expressing unhappiness because they were being exposed to calls arising from weathertightness claims well after the relevant fund year. Mr Carpenter said this was probably the predominant factor causing members to leave, leading to the failure of the Scheme.

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[11] In simple terms, "claims made" cover responds when a claim is made, regardless of when the claim event occurred. It provides cover only for claims made during the period of cover.

[29] The Scheme reinsured its risk through a commercial reinsurance scheme brokered by JLT. The wording and cover provided by the reinsurance arrangements did not mirror the Protection Wording. NCC said it was not aware of the wording of the reinsurance policy.[12] The reinsurer has played no part in these proceedings.

[30] The Board had six members, four of whom were senior local government employees such as chief executives or directors of finance of member local authorities. The Board included a representative from JLT (Mr Carpenter) and one from Civil Financial Services Ltd, which took over the role of the Scheme's manager in 2002.

[31] The Scheme documents set out the relationship between RiskPool and its members including the NCC.

The Scheme's documents

[32] LGIC established the Scheme and the Trust and held the shares in the trustee company (RiskPool) on trust for the members.

[33] The Trust Deed provided that the Scheme documents (Scheme's Documents) would be construed in the following order of priority:

(a) the Trust Deed,[13] which was paramount;

(b) Scheme Rules;

(c) the Constitution;

(d) the Deed of Participation; and

(e) the Guidelines (the Protection Wording) for each member.

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[12] For instance, the Scheme continued to offer indemnity cover for weathertight claims to members after 2006 when the reinsurers excluded it.

[13] This was dated 1 July 1997. The document produced was an amalgam of the Deed of Trust dated 19 July 1997 and the Deed of Variation of Deed of Trust dated 22 June 2007.

[34] The Deed of Participation, which was signed by each member as they joined the Scheme, recorded that the member agreed to observe and be bound by the terms of the Deed of Trust and Scheme's Documents as if the member were a party to those documents (amended from time to time).

[35] The Trust Deed recorded the Scheme's purpose under "Background" as follows:

> 3.1.1 To establish and maintain an Annual Fund for each Fund Year for the benefit of Members … to pay the Civil Liabilities of the Members arising from the Risks covered by the Scheme and specified in the Scheme Documents with the intention that Members' needs for insurance cover and insurance expenses are reduced for the benefit of residents and ratepayers;
>
> 3.1.2 To provide Pooled Cover in respect of Risks [both as defined in the Trust Deed] as may be determined from time to time by the Board [of RiskPool];
>
> 3.1.3 To manage and settle or pay Claims made against Members;

[36] The Trust Deed contained an interpretation section relevantly providing:

> "**Annual Fund**" means the separate fund established, pursuant to the Scheme Documents, for each Fund Year of the Scheme.
>
> …
>
> "**Civil Liability**" means any civil liability resulting from an obligation, function, power or duty of a Member arising under law and includes any public liability and any liability for negligence of the Member.
>
> "**Claim**" means any claim by a Member in respect of that Member's Civil Liability during the term of the Scheme in respect of the Risks.
>
> …
>
> "**Deed of Participation**" means the deed of participation required to be entered into by each Member pursuant to clause 16.
>
> "**Fund**" means all assets and property of the Scheme and includes each separate Annual Fund.
>
> …
>
> "**Fund Year**" means the year commencing 4.00pm on 30th June in each year and terminating 4.00pm on 30th June in the next following year, or as otherwise determined by the [directors of the defendant].
>
> …

"**Indemnity Cover**" means insurance cover purchased by the [directors of the defendant] on behalf of Members to meet the Claims of the Members in the amount and in respect of the Risks determined from time to time by the [directors of the defendant] being amounts payable in excess of the pooled cover.

…

"**Member**" means any person or body (whether incorporated or not) admitted as a Member to the Scheme pursuant to the Scheme Documents.

"**Pooled Cover**" means cover provided from the Fund to manage and, if the Claims are accepted by the [directors of the defendant], settle or pay the Claims against the Members in respect of the Risks.

"**Risks**" means those risks of Civil Liability of each Member and which fall within the Guidelines for Exercise of Discretion for the relevant Fund Year.

…

"**Scheme Documents**" means this deed, the Scheme Rules, and the Constitution of Trustee Company and for each Member, its Deed of Participation and the Guidelines.

…

"**Scheme Rules**" means the rules of the Scheme as promulgated by the [directors of the defendant] from time to time.

…

"**Underlying Claim**" means any claim for civil liability (covered for the time being under the Guidelines) made against a Member which may give rise to a Liability; but also includes a claim which may give rise to a Liability to a Member under any other category of risk to that Member which the Guidelines of the Scheme may properly have been extended to cover pursuant to the terms of this deed.

[37] The Trust Deed also provided that "unless the context clearly otherwise required" words importing the singular included the plural and vice versa.

[38] The Trust Deed included the following:

(a) that LGIC appointed RiskPool's Board (RiskPool was a subsidiary of LGIC);

(b) that the Board was responsible to LGIC as a shareholder (as trustee for the members); and

(c) that the Board could act in the best interests of LGIC notwithstanding that it may not be in the best interests of RiskPool.

[39] The Trust Deed provided for the setting up of the annual funds to which Members for that year would contribute in proportions determined by the Board. Underlying claims made on any Members during the relevant fund year would be met from the pooled cover for that fund year. Any further amounts would come from the indemnity cover for that fund year. If the underlying claim exceeded the pooled and indemnity cover for the fund year the excess came from surpluses from previous fund years and from additional contributions by Members to the limit of the guarantee by LGIC.

[40] The purpose of the Scheme rules was to set out the administrative mechanisms "by which the scheme is administered so as to put the purpose and intent of the Deed of Trust into effect".

[41] The Scheme Rules set out the following definitions:

> **'*Claim*'** means any claim made under the Protection Wording;
>
> **'*Fund*'** means each separate annual fund established pursuant to clause 4 of the Deed of Trust; **'*Fund Year*'** has a corresponding meaning; the first Fund Year is from 4.00 pm on 30 June 1997 to 4.00 pm on 30 June 1998; subsequent Fund Years are from 4.00 pm on 30 June in a calendar year to 4.00 pm on 30 June in the next calendar year, unless otherwise determined by the Board;
>
> …
>
> **'*Member*'** means any person or body (whether incorporated or not) admitted as a member of the Scheme pursuant to clause 11.1 of the Deed of Trust and these Rules; **'*Membership*'** has a corresponding meaning;
>
> **'*Protection Wording*'** means, in relation to any particular Member and Fund Year, the combined liability protection wording issued to that Member by the Scheme setting out the risks covered by the Scheme and the terms, conditions and limits in respect of those risks: this term equates to the term '*Guidelines*' in clause 8.1. of the Deed of Trust; …
>
> **'*Scheme*'** means the scheme more formally known as the New Zealand Mutual Liability RiskPool;
>
> …

[42] The Scheme Rules provided that an offer of membership could be made to any organisation approved for admission by the Board.

[43] The Scheme also provided:

(a) Prior to the end of the Fund Year, the Board would provide written notice to each member of the Fund advising whether the Member would be offered Membership for the next Fund Year and if so the initial contribution payable by the member in respect of that Fund Year.

(b) Members who did not accept membership were required to give the Scheme Manager written notice of the decision within a certain timeframe. If a member failed to give that notice (so presumably left) the Fund closed. The member was required to reimburse the Scheme within 20 days for its share of the reinsurance and other expenses that had been incurred by the Fund because of the expectation of the member's participation, estimated to be 25 per cent of the initial contribution.

(c) A local authority became a member of the Fund by notifying the Scheme Manager in writing that it accepted the offer of Membership[14] and paying the initial contribution within 20 days of the start of the relevant Fund Year otherwise the offer of membership lapsed.[15]

[44] RiskPool agreed to indemnify each Member for damages or compensation for professional indemnity claims in accordance with the Protection Wording (the Guidelines) during the Annual Fund period. It set out the "risks covered by the Scheme and Members and the terms, conditions and limits in respect of those risks".

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14 Scheme Rules as annexed to RiskPool's Annual Report 2015 at 27 ["Scheme Rules"] at [4(a)].
15 At [4(b)].

[45] The relevant terms and conditions of the indemnity cover were set out in the Protection Wording.[16] The Protection Wording for the year in which the claim was made, 2014/15, as in earlier years was contained in a document entitled "Combined Public Liability and Professional Indemnity Protection Wording" issued for that year.

[46] That Protection Wording provided general indemnity claims' cover and defined "Claim".[17]

[47] The exclusions to the general cover were set out in an Exclusions section[18] which insofar as relevant read as follows:

> **Exclusions**
>
> This Section of the Protection Wording does not cover liability for:
>
> 1) the first amount of any Claim shown as the Excess in the Schedule and for the avoidance of doubt, the "WHRS/WHT" Excess applies to any Claim directly or indirectly arising out of, resulting from, or in connection with Claims registered pursuant to the Weathertight Homes Resolution Service Act 2002 or the Weathertight Homes Resolution Services Act 2006, or any Act in substitution thereof, and applies to all Claims in connection with registrations lodged with the Weathertight Homes Resolution Service or the Weathertight Homes Tribunal pursuant to that legislation;
>
> 2) any legal liability of whatsoever nature directly or indirectly occasioned by, happening through or in consequence of war, invasion, act of foreign enemy, hostilities …;
>
> 3) any legal liability of whatsoever nature directly or indirectly caused by or contributed to by or arising from ionising radiation …;
>
> 4) negligent acts, errors or omissions occurring within the United States of America or the Dominion of Canada …;
>
> 5) Claims made or actions instituted outside the Dominion of New Zealand or the Commonwealth of Australia;

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16 The Trust Deed and Scheme Rules constituted a contract *for* insurance between RiskPool and Napier City Council on the terms and conditions of the Scheme documents including the applicable Protection Wording.

17 See below at [80]–[81].

18 Combined Public Liability and Professional Protection wording. Section 13 – Professional Indemnity Exclusions (CB 302.1015).

6) any Claim:

(a) notified or arising out of circumstances notified under any previous Protection Wording or insurance contract of the Member;

(b) made or threatened … on or before the attachment date of the Protection Wording as specified in the Schedule; …

7) any Claim:

a) for breach of contract; or

b) arising out of the Member's involvement in a tender or a tender process.

8) Claims caused by or arising from:

a) the approval of land for subdivision; or

b) the issue of a building permit or a building consent as the case may be;

…

9) Claims arising from the sale the sale or the negotiations to sell by the Member of real or personal property, or Claims arising directly or indirectly from the acquisition or disposal or otherwise dealing with land under the Public Works Act 1981 or any Act in substitution thereof;

10) any amount(s) awarded by any Court of law against the Member as exemplary and/or punitive damages or fines and/or penalties imposed by a Court and/or Tribunal;

…

12) This Section of the Protection Wording does not cover liability for any legal liability of whatsoever nature directly or indirectly, caused by, or contributed to, or arising from or in connection with asbestos or asbestos containing material.

13) This Section of the Protection Wording does not cover liability for Claims alleging or arising directly or indirectly out of, or in respect of:

a) the failure of any building or structure to meet or conform to the requirements of the New Zealand Building Code contained in the First Schedule to the Building Regulations 1992 and any applicable New Zealand Standard (or amended or substituted regulation or standard) in relation to leaks, water penetration, weatherproofing, moisture ingress, or any water exit or control system; or

> *b) mould, fungi, mildew, rot, decay, gradual deterioration, micro-organisms, bacteria, protozoa or any similar life forms in building or structure.*[19]
>
> [Emphasis added]

[48] NCC says that the plain and natural meaning of the Protection Wording was that Exclusion cl 13(a) did not exclude liability for claims apart from those relating to weathertightness. It says the exclusion was never intended to operate as a broader exclusion to exclude building or compliance defects beyond weathertightness. Non-weathertightness complaints created a separate liability even if they were included as part of a complaint about weathertight defects or were discovered as a result of investigations or work triggered by the weathertight complaints. I refer to this as the NCC meaning.

[49] RiskPool on the other hand says Exclusion cl 13(a) was intended to exclude all building defects and compliance liability in any claim "alleging or arising directly or indirectly out of or in respect of" weathertight claims.[20] It says the liability risk faced by the Scheme which it was intending to exclude under Exclusion cl 13(a) was not just for weathertightness complaints but included non-weathertight complaints, which were part of the claim. The risks intended to be excluded were the building defects and structural failures which were the ultimate result of the systemic failure of the building industry to respond properly to the introduction of performance-based building regulation and widespread defective construction, design and workmanship.

Strike out application

[50] RiskPool had pursued an application to strike out the plaintiff's claim saying it disclosed no cause of action because the plain meaning of the indemnity cover clause and Exclusion cl 13(a) was that a "Claim" that involved a weathertight complaint included liability for all building and structural defects augured by the demand for compensation or the Claim. There was no differentiation based on the nature of the liability or the loss whether that might be by the nature of the defects or more generally by weathertight or non-weathertight categorisation. RiskPool says the word "Claim"

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19 I refer to this clause in italics as "Exclusion cl 13".
20 Exclusion cl 13, above n 19.

is as defined in the definition section of the Protection Wording. A "Claim" is "the demand for compensation made by a third party against the member…". RiskPool said the Claim was the first demand based on the alleged breach and the "factual skeleton", which may require further details to be later supplied in pleadings, particulars, schedules of defects or otherwise. A Claim was excluded in its entirety if it was tainted by a weathertight complaint. I refer to this as the RiskPool meaning.

[51] The High Court dismissed the strike out application. Hinton J found that Exclusion cl 13 could relate to a number of claims in one demand.[21] These might include weathertight and non-weathertight complaints. Only the compensation attributable to the weathertight defects was excluded.[22]

[52] In the appeal from the dismissal of the strike out application the Court of Appeal reached the same conclusion as the High Court for "slightly different reasons".[23] Kós P noted that, on a literal view of the drafting, RiskPool had a point but that meaning had the "heady consequence" that a claim based upon a structural defect (which would be covered) suddenly becomes uncovered because a third party plaintiff tips a minor weathertightness complaint (to use an undefined term) into the Claim (to use the defined term):[24] was that what the parties intended? The Court gave an example of a claim involving non-excluded structural defects requiring say $5 million but that to remedy a single defective leaking window flashing required say $1,000 to remedy. On RiskPool's argument the entire loss would be excluded.[25]

[53] The Court of Appeal was struck by the "variegated series of exclusion clauses". It noted that there was room for "extrinsic evidence as to context and purpose, in construing what the parties were seeking to achieve in the somewhat erratic drafting of the exclusion wording".[26] It said that the issue would be more effectively resolved at trial in light of the evidence and any extrinsic evidence called.[27]

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21 *Napier City Council v Local Government Mutual Funds Trustee Ltd* [2018] NZHC 2269 ["High Court Strike Out Judgment"].
22 NCC conceded that mixed weathertight and non-weathertight defects were also excluded.
23 Reasons Judgment of the Court of Appeal, above n 5, at [30].
24 At [36].
25 At [27].
26 At [38].
27 At [41].

[54] Extrinsic evidence to aid interpretation was called by both parties. I deal with that later.

The Waterfront claim

[55] The Waterfront plaintiffs' proceedings were served on the NCC in October 2014.[28] On 16 April 2014, the NCC notified RiskPool of the circumstance.

[56] On 16 October 2014 the NCC sent an email to RiskPool with the subject line: "Building Defects Claim – Body Corporate 388915 (Waterfront Apartments) – 7 Humber Street, Napier – High Court proceedings CP: 2013-441-402". In the letter the NCC referred to attached copies of correspondence and related information received by it relating to the claim and said, "it is the NCC's view that indemnity should be provided pursuant to the cover provided to NCC under its membership/insurance policy with New Zealand Mutual Liability RiskPool". The letter went on to ask for instructions as to the appropriate course of action and noted a statement of defence was required to be filed.

[57] RiskPool responded on the same day with a covering email saying:

> I am afraid that NCC has not had cover in place for any property suffering any degree of moisture ingress defects since 30 June 2009. As such, there is no cover with RiskPool for this notification.
>
> We are happy to assist with risk advice and/or reconsider our position on the receipt of new information in the alternative.
>
> I have also copied Helen Rice into this email as Helen may be able to assist NCC with legal opinion in defence of allegations made.

[58] Attached to RiskPool's email was a formal letter dated 16 October 2014 addressed to Mr Bryan Faulknor, the Corporate Property Manager.[29] It said:

> … our position is the RiskPool protection wording does not respond on this occasion. We ask that you refer to Exclusion 13a of our protection wording –
>
> …

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[28] The Statement of Claim was dated 9 October 2013 and the proceedings were filed in October 2013.

[29] Mr Faulknor had dealt with the 2012 Dalton Street claim for the NCC.

This notification has arisen due to claimant allegations including Weathertight defects at their property. As such, any claim that may follow is excluded. However, we are available to assist NCC with any liability advice they require.

[59] The NCC, through Mr Faulknor, responded by letter of 30 October 2014. It said:

We refer to your letter 16 October 2014 advising that exclusion 13(a) of FY 18 protection wording applies to this claim.

Your letter advises that the notification "has arisen due to claimant allegations including Weathertight defects at the property".

Paragraph 23 of the statement of claim dated 9 October 2013 lists 19 defects as follows:

a) Plumbing\air conditioning;

b) Roof structure;

c) Defective membranes to the breezeway floors and roof;

d) Basement tanking;

e) Rain screens to pre-cast concrete panels; and

f) Other.

At paragraph 24, the pleaded damage is:

a) Movement of the roof structure;

b) Excessive noise during high winds; and

c) Moisture ingress through the exterior envelope and into the structure of the building.

The claimants have not particularised which clauses of the building code they allege have been breached.

The claimants' solicitors have advised that an expert report will be obtained before the end of the year. It is anticipated that the report will result in amendment of the claim to provide further information about the defects and damage.

It is the Council's position that it is premature for RiskPool to decline the claim based on exclusion l 3(a) simply based on the statement of claim in its current form. The Council places RiskPool on notice that it may challenge the declinature pending receipt of further information and documentation about the defects and damage/loss.

In the interim, the Council will instruct Rice + Co Lawyers to manage its defence and would be grateful if RiskPool could confirm its agreement to the Council's proposed plan of action.

[60] Following that letter, RiskPool referred the matter to the Scheme Manager, Mr Carpenter, to review. The RiskPool Assistant Claims Manager, Mr Tim Clarke, emailed the NCC on 6 November 2014 saying that Mr Carpenter had reviewed the statement of claim and

> … Our previously advised position remains. This property is the subject of moisture ingress defects regardless of any amended statement of claim the claimants may issue and/or any particularised causes they identify under the Building Act. It follows that any claim by NCC on RiskPool for this property is subject to Exclusion 13(a) which has been in place since 30 June 2009. The appointment of defence solicitors in the general conduct of this matter is for Council to consider. …

[61] Mr Clarke suggested that if Mr Faulknor wished to discuss it further he should contact Paul (Carpenter).

[62] Some nine months later, on 7 July 2015 the NCC, through Mr Faulknor, again emailed Mr Clarke, saying:

> …
>
> Council has subsequently received further information relevant to this matter relating to fire defects issues which was not part of the original claim.
>
> This is a High Court building defects claim. The claimants served proceedings on the Council in 2014. The current statement of claim pleads weathertightness defects and structural defects, but no fire defects. The claimants have not yet quantified their claim.
>
> The fire defects do not appear to relate to leaks, water penetration, weather proofing or moisture; so it appears exclusion 13 (a) should not apply to the fire defects.

[63] The email attached a copy of the report from Anvil Fire Consultants Ltd and advised that the purpose of the email was "to notify Council's appropriate insurer" of the fire defects claim.

[64] Mr Clarke responded by email the same day taking the same position:

> … as explained on West Quay applies also to Humber Street. Should one or more weathertight defect [sic] exist, the entire building is excluded … . The wording does not operate to cover or exclude on a per defect basis.

[65] Mr Clarke offered to discuss this further.

[66] On 2 September 2015 the NCC again wrote to RiskPool saying it was struggling to understand the basis for the declinature and sought a copy of the legal advice that RiskPool had relied on so the NCC could understand the basis for the declinature. Mr Carpenter replied on 2 November 2015 confirming the weathertight Exclusion had applied since June 2009 saying:

> The principal reason for the exclusion is that the systemic failures that gave rise to weathertight issue throughout the country became uninsurable and un-reinsurable.
>
> Often weathertight claims also exhibit building defects that are not weathertight in nature. The definition of a Claim is a third party demand for compensation for a breach of a professional duty arising out of any negligent act, error or omission. The weathertight exclusion excludes any Claim that arises directly or indirectly from the failure of a building to conform with the Building Code in relation to leaks, water penetration etc.
>
> …
>
> Because the single Claim in respect of 17 Humber Street includes weathertight features, the Claim is completely excluded by weathertight exclusion. Council professional indemnity covers do not operate on a defect by defect basis.

[67] Mr Michael James, a fire engineer, had provided a report to the NCC dated 27 July 2015. He said that the fire defects listed in that report had not been caused by weathertightness issues "and the scope of repair could be carried out independently of recladding the building". Mr James was not called in these proceedings to give evidence.

The issues

[68] RiskPool conceded that the NCC was liable to the Waterfront plaintiffs for negligent breach of its statutory duty which led to weathertight failures for which remedial work was required on the Waterfront Apartments. However, RiskPool denies it was liable to indemnify the NCC for the Waterfront plaintiffs' underlying claim.[30] It puts the NCC to proof both on liability and the reasonableness of the settlement amount insofar as it can be attributed to any exclusively non-weathertight complaints.

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[30] The amended statement of defence to the first amended statement of claim refers to the weathertight and non-weathertight defects by reference to Schedule 3 of the Waterfront Plaintiffs' Statement of Claim of October 2018. The weathertight defects are defects number 1–14 and the non-weathertight defects are defects number 15–22 (with the fire defects being defects number 15–21 and structural defects being number 22).

[69] The parties each formulated the core issues differently. I consider the core questions in this proceeding are:

(a) Does the RiskPool Scheme provide indemnity for the NCC's liability to the Waterfront plaintiffs in circumstances where the building failed to conform to code compliance for weathertight and non-weathertight standards?

(b) If the liability is within the cover is it nevertheless excluded by exclusion cl 13(a) (the weathertight exclusion)?[31]

(c) If RiskPool is liable what is the extent of that liability and the quantum?

[70] Those core questions involve a number of sub issues that I will deal with under the main headings below.

[71] At the heart of the case is the interpretation of the Scheme's Documents and the meaning of "Claim" used in context. Both parties called witnesses to give evidence designed to shed light on the mutual intention of the parties as to the meaning.

[72] In that regard RiskPool called Mr Carpenter. The Council objected to substantial parts of Mr Carpenter's evidence. I deal with that below. NCC called Mr Wayne Jack, the Chief Executive of the Council at the time of the mediation. He attended the mediation on 14 February 2019 and had authority to settle up to a set amount on the Council's behalf. NCC also called Ms Rice, its lawyer, who had advised it on the Waterfront claim and settlement. Ms Rice was present at the mediation. Mr Mark Powell, the building surveyor who had advised NCC on the Waterfront claim was also called. He also gave expert evidence on the apportionment of the global sum for the purposes of these proceedings.

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[31] This is a shorthand description of Exclusion cl 13(a) in the Protection Wording which is set out in full below and refers to the failure of any building to conform with the New Zealand Building Code and applicable standards in relation to "leaks, water penetration, weather proofing, moisture ingress, or any water exit or control system".

[73] Before looking at the extrinsic evidence the wording of the relevant text needs to be examined.

[74] Acceptance of an offer of membership of RiskPool created a contract between the member (NCC) and the Scheme. Therefore, the Scheme's Documents including the Protection Wording are to be interpreted according to the usual rules of contractual interpretation.

Contractual interpretation

[75] Tipping J in *Vector Gas Ltd v Bay of Plenty Energy* (*Vector Gas*) noted that the "ultimate objective in a contract interpretation dispute is to establish the meaning the parties intended their words to bear".[32]

[76] More recently, the Supreme Court in *Firm PI 1 Limited v Zurich*[33] noted that the contractual language must be interpreted within its overall context broadly viewed. It said that a purpose or contextual interpretation "is not dependent on there being an ambiguity in the contractual language".[34] However, the Court warned that the language of many commercial contracts had features that ordinary language is unlikely to have as it is the result of a process of negotiation. The written contract when finally agreed is an attempt to record in a formal way "the consensus reached and will have the important purpose of creating certainty, both for the parties and for third parties…".[35]

[77] The Court went on to say that while the context was a necessary element of the interpretative process and the focus is on interpreting the document rather than the particular words, "the text remains centrally important". If the language at issue, construed in the context of the contract as a whole, has an ordinary and natural meaning, "that will be a powerful, albeit not conclusive, indicator of what the parties

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32 *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5, [2010] 2 NZLR 444 ["*Vector* Gas"] at 457 per Tipping J at [19]; and *D A Constable Syndicate 386 v Auckland District Law Society Ltd* [2010] NZCA 237, [2010] 3 NZLR 23 ["*D A Constable Syndicate* (CA)"] at [23].

33 *Firm PI 1 Ltd v Zurich Australian Insurance Ltd T/A Zurich New Zealand* [2014] NZSC 147, [2015] 1 NZLR 432 ["*Firm PI 1 Ltd*"].

34 *Firm PI 1 Ltd v Zurich Australian Insurance Ltd T/A Zurich New Zealand*, above n 33, at [61].

35 At [62]. The Court also referred to *D A Constable Syndicate* (CA), above n 32, in relation to the Court of Appeal's interpretation of the wording of an insurance policy: *Firm PI 1 Ltd*, above n 33, at fn 49.

meant".[36] Nevertheless, the wider context may point to an interpretation other than the obvious one and may also assist in determining the meaning intended in cases of ambiguity or uncertainty.[37]

[78] I now turn to the relevant text of the Scheme's Documents and, in particular, of the Protection Wording.

The Protection Wording (the Guidelines)

[79] The word "Claim" (with a capital "C") was used in both the general indemnity cover clause and in Exclusion cl 13 of the Protection Wording.[38]

[80] The general indemnity claims' cover (the Indemnity Cover Clause) reads as follows:

> To indemnify the Member up to but not exceeding the amount specified in the Schedule, against Claims first made against the Member and reported to the Fund during the period specified in the Schedule for breach of Professional Duty arising out of any negligent act, error or omission … committed or alleged to have been committed on the part of the Member including:
>
> a) all costs and expenses incurred with the written consent of the Fund in the defence or settlement of any such Claim;
>
> …

[81] "Claim" has a defined meaning in the section headed "Definitions" as follows:

> The term "Claim" shall mean the demand for compensation made by a third party against the Member including the costs and expenses incurred in the defence of any such Claim but shall not include the Member's costs and expenses.[39]

[82] Exclusion cl 13 was added to the list of exclusions set out under the section headed "Exclusions" in the Protection Wording in 2009.[40]

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36 *Firm PI 1 Ltd*, above n 33, at [63].
37 At [63].
38 See above at [46]–[47].
39 I refer to Clause 3 as the "Definition of Claim".
40 This is set out in full above at [47].

[83] The present Exclusion cl 13 was the latest addition to the list of Exclusions. The Exclusions section had been amended by additions and deletions from time to time. There appears to have been little thought given to redrafting the Exclusions section as a whole to make it consistent.

[84] The basis for the wording of Exclusion cl 13 was wording used in an earlier Exclusion for multi-unit structures, which was entitled: "Multi Unit Building Defect Claims Involving Moisture Ingress." An Extension had provided a sublimit of $500,000 on claims for multi-unit building defect claims involving weathertight claims.[41] This was inserted in 2006 and subsequently deleted in favour of the present Exclusion cl 13, which was introduced initially as a sublimit before being amended to a total exclusion.

[85] The word "Claim" is used in other Exclusions. For instance:

(a) Exclusion cl 1: in relation to the Weathertight Houses Resolution Service claims excess: "The first amount of any Claim shown as the Excess in the Schedule and for the avoidance of doubt, the "WHRS\WHT" excess applies …".

(b) Exclusion cl 5: "Claims made or actions instituted outside …" New Zealand or Australia.

(c) Exclusion cl 6:

> Any Claim:
>
> a) notified or arising out of circumstances notified under any Previous Wording or insurance contract of the Member;
>
> …
>
> d) … otherwise notified or arising from circumstances known to the Member prior to inception …

[41] Multi-unit included ten or more units. The heading and text of the multi-unit Exclusion is set out in Attachment 3.

(d) Exclusion cl 7: "Any Claim: … for breach of contract or due to involvement in a tender process".

(e) Exclusion cl 8:

> Claims caused or arising from: …
>
> a) the approval of land for subdivision; or
>
> b) the issue of a building consent.

(f) Exclusion cl 9: "Claims arising from the sale …" by the member of real or personal property.

(g) Exclusion cl 11: "The Fund will not meet any Claims made by any Member in respect of the liability or losses incurred where that liability or loss: …" relates to processes or data affected by dates or times recorded by electronic devices. This appears to be related to the anticipated difficulties with computer devices maintaining data due to date changes at the millennial rollover into 2000.

(h) Exclusion cl 13: "This Section of the Protection Wording does not cover liability for Claims alleging or arising directly or indirectly out of, or in respect of: …" weathertight complaints. This is the Exclusion at issue in these proceedings.

[86] Some of the clauses in the Exclusions section do not use the word "Claim":

(a) The chapeau for the Exclusion section as a whole reads: "This Section of the Protection Wording does not cover *liability* for:" (Emphasis added).

(b) Exclusion cl 2: "*any legal liability of whatsoever nature* … relating to war …" (Emphasis added).

(c) Exclusion cl 3: "*any legal liability of whatsoever nature* directly or indirectly caused by or contributed to by or arising from ionising radiation …" (Emphasis added).

(d) Exclusion cl 4: "*negligent acts, errors or omissions* occurring within the United *States* …" (Emphasis added).

(e) Exclusion cl 10: "*any amount(s) awarded* by any Court of law against the Member as exemplary and/or punitive damages or fines and/or penalties imposed by Court and/or Tribunal" (Emphasis added).

(f) Exclusion cl 12: "This Section of the Protection Wording *does not cover for any legal liability of whatsoever* nature directly or indirectly, caused by, or contributed to, or arising from or in connection with asbestos or asbestos containing material". (Emphasis added).

[87] The word "Claim" is used with a capital "C" in the Exclusions, which indicates the use of the defined meaning: "the demand for compensation made by the third party against the Member".[42] In turn, the general indemnity cover clause refers to: "Claims, first made against the Member and reported to the Fund during the period specified in the Schedule for breach of professional duty arising out of any negligent act …".

[88] Also relevant is the Excess clause set out in the "Conditions" section of the Protection Wording. This is an excess aggregation clause which says "for the purpose of" that condition the term "Claim":

> … shall be understood to mean any and all Claims which are within the scope of this Section of the Protection Wording and any Extension which may be included, and which arise out of the one event or by reason of the same negligent, act, error or omission.

[89] The member must "as soon as practicable" give written notice of any occurrence of which they became aware which might give rise to a claim against them. The timing of a notification of a claim is important as the cover or fund in place in the year in which the claim is notified responds. This is a claims made cover. An

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42 The definition of "Claims": see above at [81].

underlying claim by a third party must be notified by the member of the time it becomes aware of the claim. It will generally not be covered if the member notifies it in a later year.

[90] If there is to be any assistance from a comparison of the wording of the Exclusions, it would indicate that, in Exclusion cl 13, "Claims alleging" weathertight complaints, has the widest ambit, as it refers back to the demand for compensation first made against the member. On a literal meaning, the making of a weathertight allegation taints the whole claim. In comparison, the asbestos exclusion (Exclusion cl 12) excludes "*legal liability* of whatsoever nature directly or indirectly, *caused by, or contributed to, or arising from or in connection with asbestos or asbestos* containing material". So non-asbestos defects not connected or arising from asbestos material even if it was discovered as a result of the asbestos investigation or works would not be excluded. Whereas Exclusion cl 13 covers all liability for Claims where a weathertight complaint has infected the Claim, so all non-weathertight defect liability is also excluded.

[91] The use of the words "negligent acts …" and "amounts" (for damages) in Exclusions are more specific to the legal formulation of the Claim.

[92] However, the Court of Appeal was not sure there was any assistance to be had from the drafting of the Exclusions. It observed that there were a number of "curiosities" about the drafting saying:[43]

> [31] … The insuring clause is an indemnity "*against Claims*" made for breach of professional duty arising out of negligence. The chapeau to the exclusion clauses provides that that section of the protection wording "does not cover *liability*" for certain items. So the clause immediately sets up a contest between cover for Claims, and certain defined liabilities which are excluded.
>
> [32] It may also be observed that those excluded liabilities are set out in several varying fashions: (1) "amounts [of any claim]";[44] (2) "legal liability" for certain events;[45] (3) "negligent acts, errors or omissions" of certain kinds;[46]

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43 Reasons Judgment of the Court of Appeal, above n 5.
44 Exclusion cls 1 and 10.
45 Exclusion cls 2, 3 and 12.
46 Exclusion cl 4.

(4) "claims" in an undefined sense;[47] (5) "Claims" in a defined sense;[48] and then — critically for present purposes — (6) "liability for Claims".[49]

[33] If this is deliberately differentiated drafting, then the differentiation approaches fine art. The alternative view open is that it is all just a bit of a mess. Not art, and not fine at all.

[34] The essential question is what effect the parties intended this exclusion clause to have. Is the drafting deliberately intended to convey different outcomes according to whether one is dealing with an act, liability for an act, a "claim" or a "Claim" or "liability for [a] Claim"?

[35] Of particular interest are exclusion cls 12 and 13. They appear to be words added later. The drafter has overlooked the chapeau wording at the start of the exclusion clauses, to which those clauses do not respond. Exclusion cl 12 excludes "liability for any legal liability" (arising from asbestos). (The case for the drafting being a mess gains some traction at this point.) Exclusion cl 13(a) excludes "liability for Claims" alleging or arising directly or indirectly out of or in respect of water ingress.

[36] If one takes a very literal view of the drafting, RiskPool has a point. A "Claim" in its defined sense is a demand for compensation, and there is some serious authority to the effect that, in the world of insurers and insureds, you do not subdivide claims into their constituent parts — be they causes of action or something inferior again, such as a particular. Is that what the parties here intended by adopting the word "Claim" in exclusion cl 13(a)? If so, it has the rather heady consequence pointed out by Mr McLellan that a claim based upon structural defect (which would be covered) suddenly becomes uncovered because the third party plaintiff tips a minor weathertightness complaint (to use a neutral term) into the Claim (to use a defined term). Was that what the parties intended?

[37] The inquiry is then complicated by the fact that some exclusion clauses exclude "claims" (e.g. cls 5 and 8), some exclude "Claims" (e.g. cl 7), but cl 12 excludes "liability for any legal liability" and cl 13(a) excludes "liability for Claims". Assuming deliberately differentiated drafting, as opposed to the alternative available theory, is there an *intended* difference between these formulae? In particular, is there a difference between excluding "Claims" and "liability for Claims"? To place one's finger on the exact issue, was the latter formulation intended to exclude entirely bundled claims made which incorporate a weathertightness issue (even if merely minimally), or was it intended only to exclude the *liability* for that part of the claim asserting liability for damage caused by water ingress? Mr Ring says the former; Mr McLellan the latter.

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47 Reasons Judgment of the Court of Appeal, above n 5, Exclusion cls 5 and 8.

48 Exclusion cl 7.

49 Exclusion cl 13.

[93] The Court of Appeal said that it was being asked to decide the meaning of "a highly variegated series of exclusion clauses in a contextual, factual vacuum". It said it was unwilling to do that as:[50]

> [38] … We consider extrinsic evidence may shed some light on intended meaning. In particular, contextual evidence on the circumstances in which exclusion cls 12 and 13 were added, on the implications for this mutual insurance scheme of weathertightness and other regulatory risk, and on the extent to which one, other or both were intended to be excluded from cover. The NCC wishes to call that sort of evidence at trial, although the exact detail of that evidence is not known to us at this still-interlocutory stage of the proceeding.

[94] In general terms I consider the wording of the other Exclusions provides little assistance in interpretation of Exclusion cl 13. Kós P wondered if they were "fine art" or "a bit of a mess". It appears the latter is the case. No thought was apparently given to consistency by the draftsperson of the various Exclusions. That is borne out by the fact that Mr Carpenter said they were inserted as a cut and paste exercise.[51]

The Parties' interpretations

NCC's interpretation

[95] NCC says that a straightforward reading of Exclusion cl 13 leads to the conclusion that if a Claim (a demand for compensation) by a claimant against the Council was not caused by any of the excluded complaints – that is, the weathertight complaints – then the liability claim for non-weathertight defects is not excluded.

[96] NCC says this conclusion follows from an interpretation of the Exclusions based on the following:

(a) The interpretation gives precedence (as required by the canons of construction) to the natural and ordinary meaning of the words.

(b) It is consistent with the purpose of the policy.

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50 Reasons Judgment of the Court of Appeal, above n 5, at [38].
51 See below at [298].

(c) If RiskPool had wanted to exclude building defect liability for non-weathertightness related losses, it would have said so explicitly.

(d) RiskPool's interpretation would produce perverse and absurd results that the parties cannot be taken to have intended.

(e) At worst, for the Council, if RiskPool's interpretation is even available, the exclusion clause is ambiguous and must be construed against the party who drafted it: RiskPool.

[97] NCC said that an exclusion clause should be construed in a manner consistent with the commercial purpose of the contract of insurance and where possible to avoid the exclusion operating to substantially defeat the indemnity granted by the policy and render the policy "practically illusory".[52]

[98] The intention, Mr McLellan submitted, was that the RiskPool policy would provide member councils with equal to or better insurance protection than that which was available on the commercial market. The policy was to provide a wide form of indemnity insurance to protect councils against their exposure for negligence in carrying out their public functions, including in relation to building defect claims, which had always been a significant aspect of the risk against which the claims cover protected.

[99] Mr McLellan submitted that the natural and ordinary meaning of the words was that they excluded liability arising from weathertightness defects but did not exclude liability which had no causal connection to weathertightness as would be the case here. Exclusion cl 13 only dealt with liability arising from failures of buildings to conform to the requirements of the building code in relation to weathertight matters. There was no reference to failures of buildings due to other causes. Mr McLellan said it would have been straightforward for RiskPool to add words to the exclusion that made it clear that the exclusion applied notwithstanding that the building or structure

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[52] *Ashmere Cove Pty Ltd v Beekink* [2009] FCA 564, 15 ANZ Insurance Cases 61-826 at 104; citing *Alex Kay Pty Ltd v General Motors Acceptance Corporation* [1963] VR 458 (VSC) at 462–463, and *Fraser v BN Furman (Productions) Ltd* [1967] 1 WLR 898 (CA) at 905–906.

also failed to meet or conform to the requirements of other provisions of the building code.

[100] In support of the NCC meaning Mr McLellan also pointed to evidence of Mr Carpenter as to RiskPool's intention at the time of the introduction of Exclusion cl 13. Mr McLellan took Mr Carpenter to a Board report and the following exchange occurred:

> Q: So you were taking away weathertightness but you weren't taking away non-weathertightness?
>
> A: That's correct.

[101] Mr McLellan points to the wording of Exclusion cl 13 and says that the use of the word "liability" supports NCC's meaning of the Exclusion. The Exclusion says "this section of the Protection Wording does not cover *liability* for Claims …". Mr McLellan says the word "liability" is a reference to the Council's liability to third parties rather than RiskPool's liability to the Council. The fact that the Exclusion does not say "does not cover Claims" (but includes the word "liability") confirms that the Exclusion only excludes cover for liability relating to weathertightness complaints.

[102] Therefore, the NCC says the weathertightness Exclusion should properly be read in simple terms as follows:

> Does not cover liability for [demands for compensation made by a third party] alleging or arising ... from weathertight complaints.

[103] The plaintiff noted there were 22 defects, which could be separated into weathertightness, structural and fire defects.

[104] Mr McLellan said that Exclusion cl 13 is limited to "liability for Claims alleging or arising" out of, which means caused by weathertightness peril. The test is whether the liability is caused by a weathertightness peril not whether the liability was discovered as a result of one.

[105] NCC says that in support of the meaning it contends for a "Claim" is the use of the plural in Exclusion cl 13(a). This logically means that one negligent act can give rise to multiple claims for the purposes of the insuring clause.

[106] NCC says its interpretation is reinforced by the words of the excess aggregation clause,[53] which expressly provides that "[f]or the purpose of this Condition", only one excess is payable for "Claims which arise out of the one event or by reason of the same negligent act …". NCC says that the words "[f]or the purpose of this Condition", do not detract from its argument that the wording illustrates the potential for multiple claims to arise. Otherwise it says there would have been no need for the additional clarification in the excess clause. That would not have been necessary if everything was included in the claim or original demand for compensation because if that were correct, only one excess would be payable regardless.

[107] Mr McLellan pointed to the approach taken by commercial insurers as illustrated in *Body Corporate 326421 v Auckland Council (Nautilus)*.[54] This involved a Zurich professional indemnity policy that defined "Claim" as including any form of "legal process served on the insured". The insuring clause used the term "arising out of" to describe the link required between the Claim and "the excluded peril". The underwriter in that case did not attempt to advance its argument on the same basis as RiskPool does in these proceedings when it was open to it given the wording of the insuring clause. This was despite the fact that *Nautilus* involved numerous different types of building defects with different causes giving rise to a divisible loss. Instead the underwriter denied liability on the basis that the relevant exclusion excluded defective workmanship.[55]

[108] In *Nautilus*, Gilbert J undertook a defect by defect assessment to ascertain the cause of each defect, what the loss was, and whether each was covered or excluded. NCC says that is what should occur in this case and not only does *Nautilus* demonstrate that RiskPool's approach is unorthodox but, as the Protection Wording had been intended to afford similar if not better cover than that available on the commercial market, it should be construed in accordance with accepted insurance contract principles rather than at odds with the way in which the commercial market insurer and an experienced High Court Judge approached the matter in *Nautilus*.

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53 See above at [88].
54 *Body Corporate 326421 v Auckland Council* [2015] NZHC 862 (Nautilus).
55 At [342].

[109] NCC says that a reasonable reader would not interpret Exclusion cl 13 to exclude liability which had no causal relationship to the specified excluded risks.

[110] NCC points to a decision where an insolvency Exclusion was held not to exclude a claim against directors brought after the company became insolvent.[56] In *AIG Australia Ltd v Kaboko Mining Ltd*, the Federal Court of Australia Court said there was no substantive causal connection between the claim and the company's insolvency.[57] In that case, while the insolvency was the motivation for bringing the claim, the Court held the wording required an identified act to establish a claim. Insolvency was not such an act.[58] The separate claim against directors was not therefore excluded.

[111] NCC submitted that it was absurd that a building defect claim for non-weathertightness losses became uninsured simply because the plaintiff introduced a weathertightness loss. It said that it was unprincipled that the mere incorporation of a new and unrelated loss would exclude previously insured losses. The example given was of a plaintiff suing a council for $10m of non-weathertightness losses and a weathertightness loss of $1,000.

[112] Mr McLellan also rejected RiskPool's suggestion that this result might be resolved by implying into the policy a "*de minimis*" threshold. Mr McLellan said the "*de minimis*" argument did not get past the starter's gun. An implied term to that effect could be the only contractual basis for such a submission. There was no such threshold in the Exclusion. Commercial certainty is a critical feature of the risk allocation exercise, the Council submitted, and the suggestion that either an insured or an insurer would read in an imprecise and undefined concept of "materiality" to define risk allocation was itself absurd.

[113] In addition to the natural and ordinary meaning of the words, NCC said a cross-check should be made against the underlying commercial purpose of the indemnity contract taking into account business common sense. It said the

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56 *AIG Australia Ltd v Kaboko Mining Ltd* [2019] FCAFC 96, [2019] 20 ANZ Insurance Cases 62-205.

57 At [44].

58 See below at [150].

Protection Wording was intended as a substitute for commercial insurance and RiskPool marketed itself as providing no less cover than was available in the commercial market with its intention being to stay ahead of the commercial market in terms of the breadth of cover provided where it was possible to do so. NCC pointed to Mr Carpenter's evidence that, at the time the Protection Wording was introduced in 2009, RiskPool was aware that professional indemnity coverage for building defect claims was an important protection for local authorities.

[114] Mr McLellan also said these matters can be inferred from the nature of the scheme regardless of extrinsic evidence. He said it was obvious that insured members would only move from commercial market options if they were able to access similar or better terms through RiskPool. He noted that Hinton J in the High Court saw the case as a contractual interpretation case and suggested that extrinsic evidence would not alter that. However, the Court of Appeal had said there was a case for looking at extrinsic evidence.

[115] In summary, NCC says that the natural meaning of the clause, when read in context and in view of the acknowledged intention that insurance cover for building defects was important to councils, was that the building defect cover would remain other than for weathertight defects. Objectively NCC says this can be taken to have been the intention of both RiskPool and the members.

[116] Finally, NCC said that if there was some ambiguity remaining it must be construed *contra proferentum* against the party who drafted it.[59] This inevitably resulted in the Exclusion being construed narrowly against the drafter and any ambiguity should be resolved in the Council's favour because it was not responsible for introducing the ambiguity.

RiskPool's interpretation

[117] Mr Ring suggests that a literal interpretation should be adopted in relation to both the indemnity cover clause and Exclusion cl 13(a). This favours the RiskPool meaning. He says the word "Claim" bears the meaning set out in the Definitions

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[59] *Daken v Hartford Fire Insurance Co Ltd* [1971] NZLR 971 (SC).

section of the Protection Wording being "the demand for compensation made by a third party against a Member". The words in the general indemnity clause in the Protection Wording provided indemnity "against Claims first made against the Member and reported to the Fund during the period… ".[60] Exclusion cl 13(a) carves out from that cover the Claims that have weathertightness elements.

[118] Therefore the "Claims" made against the NCC by the Waterfront plaintiffs for the negligent acts, errors or omissions in undertaking its statutory responsibilities in issuing building consents and inspecting and issuing the completion certificates for the Waterfront Apartments were excluded in their entirety. The weathertight complaints tainted all other complaints in the Claim whether they be later particularised or otherwise differentiated.

[119] RiskPool says Exclusion cl 13 means that all building defect and structural complaints that are involved with a weathertight complaint are one claim subject to "*de minimis*" materiality.

[120] If that argument fails, then RiskPool says the wording used in Exclusion cl 13(a) was broad enough to extend to all non-weathertight complaints that arose "directly or indirectly out of, or in respect" of the weathertight Claim. The weathertight issues had precipitated the investigations and work that led to the discovery of the other defects requiring remedial work.

[121] In summary RiskPool says:

(a) A Claim is defined as a "demand for compensation". A demand is merely an assertion of an obligation to pay and "nothing more is necessary".[61] It is a "factual skeleton".

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60 See above at [46].

61 Referring to *Financial Construction Services Ltd v Negril Holdings Ltd* [2004] UKPC 40, [2005] 2 LRC 351 (PC) at [40]; citing *Re Colonial Finance Mortgage Investment & Guarantee Corporation Ltd* (1905) 6 SR NSW 6 at [9].

(b) The Statement of Claim is not the "Claim", but the causes of action are merely the vehicles for legal enforcement of the Claim.[62]

(c) Whether there are one or more demands for compensation depends on the facts of the case and the context. The characteristics that assist in assessing whether there is one Claim include: [63]

(i) the number of claimants;

(ii) the number of contracts and their relationship with each other;

(iii) the nature of the claim; and

(iv) the timing of claims.

(d) A starting point is the way that the demand is made and how it is described by the insured or its solicitors.[64]

(e) Of particular significance is that a lump sum is demanded in compensation against the defendant.[65]

[122] RiskPool pointed out that NCC's solicitors in their advice in their first settlement recommendation in December 2018 had described the proceedings as a "claim" that the Waterfront Apartments contained various defects requiring remediation and went on to list the defects including the non-weathertight defects.

[123] The Court of Appeal noted that there was some serious authority in the "world of insurers and insureds" that you did not subdivide claims into their constituent parts

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62 *Thorman v New Hampshire Co (UK) Ltd* [1988] 1 Lloyd's Rep 7 (CA) ["*Thorman*"] at 16 per Stockman LJ; and *Baulderstone Hornibrook Engineering Pty Ltd v Gordion Runoff Ltd* [2006] NSWSC 223, 14 ANZ Insurance cases 61–701 ["*Baulderstone Hornibrook*"] at [903].

63 *Mabey and Johnson Ltd v Ecclesiastical Insurance Office PLC (No 2)* [2003] EWHC 1523 (Comm) ["*Mabey v Johnson Ltd*"] at [12]–[13].

64 *Haydon v Lo & Lo* [1997] 1 Lloyd's Rep 336 (PC) at 340.

65 *Citibank NA v Excess Insurance Company Ltd* [1999] 1 Lloyd's Rep 122 (HC) ["*Citibank*"] at 127–128. In that case there were two or three causes occurring some years apart but there was no suggestion that this gave rise to more than one claim in respect of Citibank's cumulative financial loss. The Court held that "there was one claim by Citibank by the damage caused by the fire".

whether that was causes of action "or something inferior again such as a particular".[66] RiskPool again relied on those decisions, some of which I refer to below.[67]

[124] RiskPool also pointed out that the compensation would be necessarily a global sum. This was because the essential nature of the Waterfront plaintiffs' loss that could be compensated was economic loss by way of depreciated market value whether that was measured by the costs of repairs or depreciation in the market value, depending on the circumstances. But the compensation was an amount attributable to the totality of the defects and not for the separate physical effects of each of the defects. This supported there being only one claim.

[125] Mr Ring pointed out there was no attempt in the Waterfront plaintiffs' Statement of Claim to categorise defects as weathertight and non-weathertight breaches of the Building Code. There was only one single demand by each plaintiff on NCC that because of the defects their apartments were not constructed to comply with all the requirements of the Building Code.

[126] Mr Ring said in summary:

(a) There were 51 demands for compensation, which the Protection Wording treated as 51 claims for the purpose of the insuring clause in reference to Claims but one "Claim" for the purpose of applying the excess because of the excess aggregation clause.[68]

(b) There was no contract between the Waterfront plaintiffs and the NCC but there was one single statutory engagement to undertake all three components of the inspection role for the construction of the complex giving rise to the separate duties to the plaintiffs.

(c) NCC had negligently performed its regulatory functions, which caused financial loss and grounds for a claim of compensation.

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66 Reasons Judgment of the Court of Appeal, above n 5, at [36].

67 See below at [150]–[161].

68 For the purposes of cl 1 of the excess condition, the aggregation was based on establishing one event or "… the same negligent, act, error or omission."

(d) All the defects were caused in the course of a single construction project.

(e) The demand for compensation was made and negotiated as a lump sum.

[127] In conclusion, RiskPool says that an objective analysis as to what the "Claim" was in the Statement of Claim between the Waterfront plaintiffs and NCC is not influenced by the terms of the insurance cover and exclusions, but rather by the application of the meaning of "Claim". The Waterfront plaintiffs did not need to categorise the defects for the purposes of the claim and they did not do so. There was one claim against each of the various defendants in the Waterfront proceedings. The accusations against each of the defendants related to responsibility for the compensation uncategorised at that stage in a single cause of action in negligence.

[128] The year of notification was critical. The members on risk in the relevant Annual Fund year might face a call if that year was in deficit and they may be different from those on risk in a subsequent year.

[129] RiskPool submitted that Exclusion cl 13(a) was clear on its face. It carved out an Exclusion to the general cover for "Claims alleging or arising directly or indirectly out of, or in respect of … the failure of" the Waterfront plaintiffs' complex to comply with weathertight requirements (E2 of the Building Code) in "relation to leaks, water penetration, weatherproofing, moisture, or any water exit or control system".

[130] RiskPool says that Exclusion cl 13(a) was triggered by a claim alleging a breach by the NCC of its statutory obligations resulting in the complex containing weathertight defects. The weathertightness defects were not extinguished by the fact there were also non-weathertight defects included. The non-weathertight defects merely augmented the Claim. The underlying weathertightness defects remained and operated to exclude all building defect liability involved in the Claim.

[131] RiskPool says the fact that the Exclusion refers to "Claims" in the plural is not relevant. First, because singular and plural are interchangeable. Secondly, the

reference to Claims in the plural is to each of the Waterfront plaintiffs' claims for the same compensation made against the NCC.

[132] RiskPool says that interpretation leads to a conclusion that there was only one Claim. It was not necessary to go any further. However, it suggested two alternative avenues to reach the same conclusion.

[133] RiskPool's first alternative approach to reaching the same conclusion was that a wide application was indicated by the words "alleging or arising directly or indirectly out of, or in respect of …" the failure of the Waterfront plaintiffs' complex to comply with weathertight requirements. "In respect of" had been described in an insurance context as one of the widest expressions conveying a connection or relationship between two things.[69] The Claim (notice of demand) self-evidently arose directly or indirectly out of the weathertight defects and in respect of them. Even if the non-weathertight defects were a material contributing factor to the claim, the specified excluded circumstances (arising out of weathertightness defects) infected the whole claim given the width of the phrase "in respect of".

[134] Mr Ring also argued that an analogy could be drawn from the "twin causes principle". He said weathertightness and/or non-weathertightness defects were a "type" of liability not a "cause" of liability. He said that it was well-established law that if a claim has two causative events or circumstances and one cause is covered and the other is excluded, the claim is not insured.[70] He submitted that under the insuring clause RiskPool had agreed to pay for a "Claim" that NCC had failed to prevent the construction of the complex that did not meet the requirements of the building code. However, in the Exclusion there "was stipulated freedom" from a "Claim(s)" involving failures of the complex to meet requirements related to weathertightness. As Lord Denning had said in *Wayne Tank* "the loss is not apportionable". Therefore, Mr Ring argued the only way to give effect to this limitation in the Exclusion was for

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69 *Antico v CE Heath Casualty & General Insurance Ltd* [1996] 38 NSWLR 681 (NSWCA) at 696 per Kirby P; citing Mann CJ in *Trustees Executors & Agency Co Ltd v Reilly* [1941] VLR 110 at 111.

70 That mixed insured and non-insured causes will be treated as non-insured: *Wayne Tank and Pump Co Ltd v The Employers' Liability Assurance Corporation Ltd* [1973] 3 All ER 825 (CA) ["*Wayne Tank*"], at 830/C and G–J per Denning MR, 831/H per Cairns LJ and 837/C–D per Roskill LJ.

RiskPool to be exempted from any indemnity obligation if non-compliance with weathertightness requirements was a material contributing factor to the claim and/or if there was a discernible and rational link between this non-compliance and the "Claim", notwithstanding the predominant, equal or (in this case) lesser causative effects of non-compliance with other Building Code requirements.

[135] RiskPool said that while an Exclusion clause usually would be interpreted *contra proferentum* against the underwriter to favour a narrow interpretation, that principle did not apply when the words used were clear. Nor did it authorise adopting a strained interpretation or finding of ambiguity simply because the word has more than one meaning in ordinary language. RiskPool submitted that the overall objective was to ascertain the presumed mutual intention of the parties and a conclusion of genuine ambiguity is the last resort when other aids of interpretation have failed to achieve that objective.[71]

[136] RiskPool submitted that the extrinsic evidence supported what must have been the mutual intention of the parties: that any claim involving allegations of liability for weathertightness defects excluded all liability for building defects associated with the claim.

The "Claim" cases

[137] The starting point in contractual interpretation is the text itself. The Supreme Court reiterated that the text remained "centrally important". If the text has an ordinary and a natural meaning construed in the context of the contract as a whole that is a powerful (albeit not conclusive) indicator of what the parties intend.[72] The meaning attributed to "Claim" is central. It has been considered in a number of cases.

[138] The Privy Council decision in *Haydon v Lo & Lo* [73] was concerned with serial incidents of theft each said to require payment of an excess. There were 43 incidents of theft by a clerk in a law firm who had defrauded one estate client by making a series

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71 *Trustees Executors Ltd v QBE Insurance (International) Ltd* [2010] NZCA 608, [2011] 16 ANZ Insurance Cases 61-874 at [39]–[40]; citing *Lumley General Insurance (NZ) Ltd v Body Corporate 205963 (Morningside Drive)* [2010] NZCA 316, [2010] 16 ANZ Insurance Cases 61-853 at [27].

72 *Firm PI 1 Ltd,* above n 33, at [63].

73 *Haydon v Lo & Lo*, above n 64, at [340].

of payments out of the estate accounts. The Privy Council found that there was only one claim because the facts indicated there was one claim relating to one client which embraced the series of thefts. The Privy Council noted that in the circumstances the "reality is that there was only one demand, namely the demand made by the Tang Estate on Messrs Lo and Lo" for the aggregate amount. The acts of theft were separate but the Privy Council held that for the purposes of aggregation of the excess there was one claim as there was one defendant and one plaintiff with, "in reality", only one demand.

[139] In *MDIS Ltd v Swinbank,*[74] the English Court of Appeal explained the focus must be on substance over form when considering what constituted a "claim". It said many irrelevant factors might influence how a third party framed a claim against an insured. That included the level of information it had as well as broader tactical factors. Those factors should not dictate the meaning of "claim" for insurance purposes.

[140] In *Murphy v Swinbank*,[75] the New South Wales Supreme Court said that if the loss or damage was separate and distinct it would weigh in favour of there being multiple claims:[76]

> Where there are separate and distinct causes of action giving rise to the same loss or damage … it is easy to understand why there is only one claim. Where however there are separate and distinct causes of action leading to separate and distinct heads of loss of damage then it is not easy to understand why there is but one claim. Further, and a fortiori where there are separate and distinct causes of action relating to separate and distinct transactions and leading to separate and distinct loss or damage, there is I accept, no basis in reason or principle for finding that there is but one claim.

[141] In *Mabey and Johnson Ltd v Ecclesiastical Insurance Office,*[77] the English High Court confirmed that it was the "reality of the position", which determined whether in any given situation there was one or a number of claims.

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74 *MDIS Ltd v Swinbank* [1999] 2 All ER (Comm) 722 at [731].
75 *Murphy v Swinbank* [1999] NSWSC 934.
76 At [494].
77 *Mabey and Johnson Ltd*, above n 63, at [12]; citing *Citibank*, above n 65, at [127].

[142] In *Thorman v New Hampshire Insurance Co (UK) Ltd*,[78] the England and Wales Court of Appeal, was required to decide whether a claim had been notified in a particular year to establish which insurer was liable to indemnify an architect facing claims of professional negligence. There had been a change of insurer after a claim had been notified. The issue was whether the claim, which had been notified to the first insurer, included more than the "brickwork deficiencies", which were referred to in the notification. The first insurer argued that the claim for non-brickwork deficiencies had not been notified and so was not included in the notification for the brickwork deficiencies.

[143] The Court found the wording of the original notification letter when the first insurer was on risk could be interpreted to include non-brickwork as it referred to serious problems having arisen with the development "inter-alia" with regard to cracking and defective brickwork. Donaldson MR said that this was the clearest possible claim in respect of all serious problems which had arisen and was not just confined to brickwork. The fact that the notification had been unparticularised and uninformative was "nothing to the point". A much later listing of the defects in a Scott Schedule[79] (and particularised in the subsequent statement of claim) had not been served within the period of the first insurer's risk. His Honour indicated that the wide terms of the original notification letter coupled with the later issue of the writ (which was issued while the first insurer on risk but not served until later) amounted to the making "of an all embracing claim".

[144] In that case, Donaldson MR provided some examples of what might constitute a separate claim in general terms as follows:[80]

> Let me take some examples. An architect has separate contracts with separate building owners. The architect makes the same negligent mistake in relation to each. The claims have a factor in common, namely the same negligent mistake, and to this extent are related, but clearly they are separate claims. Bringing the claims a little closer together, let us suppose that the architect has a single contract in relation to two separate houses to be built on quite separate sites in different parts of the country. If one claim is in respect of a failure to specify windows of the requisite quality and the other is in respect of failure to supervise the laying of the foundations, I think that once again the claims

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78 *Thorman*, above n 62.
79 A Scott Schedule sets out the defects alleged and the respondent's responses.
80 *Thorman*, above n 62, at [11]–[12].

> would be separate. But it would be otherwise if the complaint was the same in relation to both houses. Then take the present example of a single contract for professional services in relation to a number of houses in a single development. A single complaint that they suffered from a wide range of unrelated defects and a demand for compensation would, I think, be regarded as a single claim. But if the defects manifested themselves seriatim and each gave rise to a separate complaint, what then? They might be regarded as separate claims. Alternatively, later complaints could be regarded as enlargements of the original claim that the architect had been professionally negligent in his execution of his contract. It would, I think, very much depend upon the facts.

[145] Also in *Thorman*, Stockman LJ said:[81]

> … that the question whether there is one claim or a serious of separate claims depends upon the facts of each case and the context in which the question falls to be decided. The context, in my view, is whether all the defects as [sic] embraced in a general claim, or only those relating to the brickwork, when notified as a claim during the relevant period of insurance. …

[146] The thrust of those cases is that the formulation of the claim by a third party should not be determinative of an insurer's liability and it is the underlying facts that are determinative.[82] The pleadings do not determine what constitutes a claim although they may add colour and character.[83]

[147] Mr Ring also referred to *Baulderstone Hornibrook Engineering Pty Ltd v Gordian Runoff Ltd.*[84] In that case, the Supreme Court of New South Wales was considering the design and construction of earth walls at an airport. There had been accelerated corrosion of the lateral support steel straps in the walls and excessive loss of sand from behind the walls. The insuring clause indemnified the insured against claims for "breach of professional duty … by reason of an act, error or omission". The Court held that the insured had made one claim involving two defects with each defect being a particular of the allegation of breach of duty.[85]

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81 *Thorman*, above, n 62, at [16].
82 *Haydon v Lo & Lo*, above n 64, at [340].
83 *Thorman*, above n 62, at [15].
84 *Baulderstone Hornibrook,* above n 62, at [8]. That case went on appeal but the point relevant to these proceedings did not go on appeal.
85 At [1174] and [1194].

[148] Similarly in *ISP Consulting Engineers Ltd v Body Corporate 89408*,[86] the New Zealand Court of Appeal was required to determine whether the insured's latest amended Statement of Claim introduced a fresh cause of action against ISP that was time-barred or whether it simply particularised the already repleaded and in time cause of action. The previous Statement of Claim had pleaded structural defects that had resulted in weathertight issues: non-compliance with both E2 (weathertight) and B1 (structural) and/or B2 (durability) of the Building Code. The latest Statement of Claim had added further structural defects that had no weathertightness component.[87] The Court of Appeal in that case held that the legal basis for the Body Corporate's claim had not changed. Both statements of claim alleged breaches of duty of care in providing engineering services for the construction of apartments with "no distinction drawn, and the words used, between weathertight and structural responsibility". The new structural defects were merely particulars of the existing cause of action.[88]

[149] Mr Ring submitted that the above cases showed that "Claim" was "the demand" and a higher level concept than a cause of action let alone particulars. In the context of a single engagement on a construction project, the distinction between weathertightness defects and non-weathertightness defects was only a matter of particulars, which did not even give rise to separate causes of action. Mr Ring submitted it was impossible that it could give rise to separate claims.

[150] NCC cited *AIG Australia Ltd v Kaboko* in support of the proposition that an insolvency exclusion did not extend to exclude claims for breach of directors' and officers' duties.[89] In that case the insolvency Exclusion was a blanket exclusion for "any loss in connection with any **Claim** and **Losses** arising out of, based on or attributable to the actual or alleged insolvency of the **Company** or any actual or alleged liability of the **Company** to pay any or all of its debts when they fall due". The Federal Court of Australia held the definition of 'claim' was not expressed in terms of the act of bringing the claim or the reasons or motivations for the claim: which in that case was the insolvency of the company. The Court said that the definition

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86 *ISP Consulting Engineers Ltd v Body Corporate 89408* [2017] NZCA 160, (2017) 24 PRNZ 81 ["*ISP Consulting Engineers Ltd*"].

87 At [1] and [29]–[33].

88 At [23], [26], 34] and [38]. The omission was an error by the plaintiffs. See [18].

89 See also above at [110].

spoke of a "demand or a civil proceeding for a specified act, error or omission". In such instances, a Claim is defined by reference to "the identified act, error or omission, not some aspect of the reasons motivating the making of the demand or the bringing of the proceedings".[90]

[151] Therefore the insolvency stand-alone provision did not exclude liability for the claim against the officers.

[152] *AIG Australia Ltd v Kaboko* is not generally helpful in the present case. The finding of the Federal Court that the blanket insolvency Exclusion was unrelated to the breach by the officers of the company, turned on the wording of the policy.

[153] The NCC pointed to the excess aggregation clause in the Protection Wording as suggesting there might be multiple claims for liabilities referred to under Exclusion cl 13(a) because the aggregation clause was required to clarify there might be a number of claims when otherwise it may be that seriatim claims attracted separate excesses.

[154] However, the definition of "Claims" in the Excess clause was specifically limited to that clause.[91] The Excess clause was directed at seriatim claims such as those in *Haydon v Lo & Lo*. They must arise out of one event or by reason of the same negligent act. I do not think the clause assists in interpretation in the present case.

[155] There are factors present in this case similar to those pointed to as relevant in *Thorman*[92] to indicate a wide meaning for the word "Claim" as follows:

(a) In *Thorman* there was one complex involved albeit comprising separate dwellings. Here there was one complex with separate buildings and units.

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90 *AIG Australia Ltd v Kaboko Mining Ltd*, above n 56, at [29].
91 See above at [88].
92 *Thorman*, above n 62.

(b) In *Thorman* the liability alleged was in negligence. There might have been both claims of negligence and contractual breach. Here there is one cause of action in negligence.

(c) In *Thorman* there were multiple defects that resulted in the buildings requiring to be remedied as a result of the negligence of the insured. Here there were failures of compliance in relation to a number of building requirements but all were regulatory failures.

(d) In *Thorman* the notification of the claim was sufficiently wide to cover both brickwork referred to specifically in the notification and non-brickwork issues by the use of the words "inter alia" and issue of the writ within the relevant cover period but not served until the second insurer was on risk. Here the original Statement of Claim which was served referred to all the defects in general terms with the possible exception of fire compliance defects, which I deal with below.

(e) The specific details in *Thorman* were given later. A Scott Schedule was provided some time after the writ was issued.[93] Here the full list of defects was not supplied until some time later.

[156] In *Thorman*[94] the England and Wales Court of Appeal held that there was one claim made in the initial demand despite the fact that the defects and causes were provided later. The Scott Schedule with the details of the defects, breaches and damage was provided quite some time after notification and after the writ was issued. There was a single contract involved and all the breaches arose in negligence.

[157] In *Thorman* examples were given of situations that might indicate separate claims such as where neither the breaches of duty nor the damages claimed in the first action were the same damages as claimed in a second.[95] In a case where the defects

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93 The writ was not served until 18 months after it was issued, and the statement of claim was not received until later and well outside the relevant insurance cover period.

94 In *Thorman* the critical point for the parties was establishing the point in in face of the Claim as that meant one insurer not the other was on risk.

95 *Thorman*, above n 62, at [15] and [16].

manifested themselves seriatim and each gave rise to a separate complaint they might be regarded as separate claims although later complaints could be regarded as enlargements of the original general claim. As Donaldson MR said: it all depends "on the facts".

[158] In this case there was a single apartment development with multiple dwellings and common areas. There were a number of building consents, inspections and compliance certificates issued over the period of construction which the NCC says could provide one basis for defining separate claims. It accepts there was one cause of action in negligence but says each of the defects were separate claims. Alternatively, it says the defects which could be categorised as "weathertight" formed one claim and those "non-weathertight" formed a separate claim for the purposes of the Exclusion.

[159] The full details of the extent and type of defects and the cost to remedy them were not finalised until just before the mediation in February 2019. On the eve of the mediation a schedule was produced by the Waterfront plaintiffs containing the particulars of the defects together with the costs to remedy them. Since the initial statement of claim, some defects had been removed and others had been added.

[160] The original notification made by the NCC to RiskPool in October 2014 was wide. It attached the statement of claim and while the defects were "unparticularised and uninformative",[96] nevertheless in general terms all the defects were mentioned except the fire related defects. They were added later and I refer to those below.

[161] In *AIG Australia Ltd v KabokoI,*[97] the Federal Court of Australia did suggest that definitions should not be construed outside of the operative provisions to which they applied. Where there was an issue as to the proper construction of an operative provision in a commercial instrument then the provision should be read by inserting the definition into the provision.

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96 *Thorman*, above n 62, at [12]. Donaldson MR noted that the original letter to the insured by the claimants was "unparticularised and uninformative" but said there was nothing in that point. The general breadth of the letter of claim and issue of the writ within the relevant insurance period was sufficient.

97 *AIG Australia Ltd v Kaboko Mining Ltd*, above n 56, at [43].

[162] Adopting that approach in this case the Exclusion would read:

> 13. This Section of the Protection Wording does not cover liability for Claims [being the demands for compensation made by a third party against the member] alleging or arising directly or indirectly out of, or in respect of:
>
> (a) The failure of any building or structure to meet or conform to the requirements of the New Zealand Building Code contained in the First Schedule to the Building Regulations 1992 or any applicable New Zealand Standard (or amended or substituted regulation or standard) in relation to leaks, water penetration, weather proofing, moisture or any weather exit or control system; …

[163] That wording makes it clear that "liability" does not govern the words "the failure of any building …" but is governing the word "Claims". Therefore, it is the "liability for Claims" which governs the Exclusion.

[164] On the face of the Exclusion where a demand for compensation is made against a Member by a third party for breach of professional duty arising out of any negligent act[98] alleging or arising directly or indirectly out of or in respect of the failure of a building to meet weathertight standards, any other failures or building defects within that Claim have been tainted by the weathertight complaint.

[165] RiskPool responded to NCC's argument that a minor weathertight complaint could taint a significant non-weathertight claim. It said that first the mutual insurance scheme provided a contract for insurance not a contract of insurance. NCC did not have an absolute right to indemnity for any "Claim" but rather the RiskPool obligation was to consider in "its absolute and unfettered discretion" the application for indemnity.[99] RiskPool said given this "safety valve" a reasonable observer would not reject RiskPool's interpretation simply because of an extreme and improbable example.

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98 Which includes breach of legal duty of care by breach of a statutory duty under cl d(2) of the Definition section.

99 *Wellington City Council v Local Government Mutual Funds Ltd* [2017] NZHC 2901, [2017] 19 ANZ Insurance cases 62-161; at 76.109 [152]–[154].

[166] RiskPool also argued that an alternative route to the same conclusion was by the application of the Latin maxim, *de minimis non curat lex*, which means that the law does not concern itself with trivial matters.

[167] Mr Ring noted that this would be objectively assessed, and the test would be whether the defect was trivial or immaterial.[100] Mr Ring noted that other expressions to describe *de minimis* taken from earthquake damage cases in relation to considering whether damage was *de minimis* were "negligible"; "minimal"; and "not material".[101]

[168] RiskPool said that the application of the doctrine could be seen as a general principle of law that applied by obviating any legal liability such that the plaintiff's claim had to be dismissed. Or alternatively, in a contractual setting by finding an implied term. Both were to be objectively assessed in the circumstances of the case.[102]

[169] Mr Ring pointed out the principle had been applied in a building defects context. In *Jackson v Green*, defects that would cost $25 and $75 to repair were held to be *de minimis* in the context of a construction contract for $100,000.[103]

[170] Mr McLellan said there was no basis for implying such a term in this arrangement, therefore, the extreme example could eventuate.

[171] I am of the view that the *de minimis* doctrine does apply – whether by operation of law as a general principle or by way of an implied term. The fact that the Scheme is a mutual fund and that RiskPool has an unfettered discretion to accept claims supports that conclusion. There is nothing in the protection wording that overrides that discretion or indicates that the parties would have intended such strict compliance as to override the application of *de minimis* where the result might be that the member would have the whole claim excluded despite only a minor weathertight element in the claim.

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100 *Veba Oil Supply & Trading GmbH v Petrotade Inc* [2001] EWCA Civ 1832, [2002] 1 All ER 703 at [13], [26] and [28].

101 *He v Earthquake Commission* [2019] NZCA 373 at [8]; *Fitzgerald v IAG New Zealand Ltd* [2018] NZHC 3447 at [32] and [35]; and *C & S Kelly Properties Ltd v Earthquake Commission* [2015] NZHC 1690 at [4], [38], [175], [303], [306] and [360].

102 *Veba Oil Supply & Trading GmbH v Petrotade Inc,* above n 100, at [26] and [48].

103 *Jackson v Green* [2016] NZHC 3041 at [4] and [113].

[172] The determination *de minimis* is to be assessed objectively. The threshold that would apply would be low in any event so in most instances should not present any difficulty. The recognition of such a threshold deals with the extreme examples.

[173] NCC's point that RiskPool could have added clarification so that there was no room for mistake that the clause had the RiskPool meaning, can be said of any number of contractual provisions that come before the Court for interpretation. As will be apparent, even if there was some room for argument as to the meaning of the Exclusion back in 2009, in my view, the extrinsic evidence establishes that the RiskPool meaning of Exclusion cl 13 had been conveyed clearly to NCC at the time of the annual renewals preceding the Waterfront plaintiffs' claim.

[174] In conclusion Exclusion cl 13(a) on its face was effective to exclude all complaints including the non-weathertight complaints in the Waterfront plaintiffs' claim for the reasons put forward by RiskPool and as set out above. That is the meaning of the text.

[175] A strong submission by NCC was that the effect of the exclusion, if applied according to the RiskPool meaning, would be commercially unrealistic or absurd. That depends on the extrinsic evidence itself as to the intention of the parties. I now turn to that.

Extrinsic evidence in contractual interpretation

[176] The inquiry as to whether extrinsic evidence is admissible to aid the interpretation of a contract was summarised by Tipping J in *Vector Gas* when he said:[104]

> The necessary inquiry therefore concerns what a reasonable and properly informed third party would consider the parties intended the words of their contract to mean. The Court embodies that person. To be properly informed the Court must be aware of the commercial or other context in which the contract was made and of all the facts and circumstances known to and likely to be operating on the parties' minds. Evidence is not relevant if it does no more than tend to prove what individual parties subjectively intended or understood their words to mean, or what their negotiating stance was at any particular time.

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[104] *Vector Gas*, above n 32, at [19] per Tipping J. (Footnotes omitted).

[177] The rationale for excluding evidence of subjective intention or understanding is that the common law focuses on the final form of the contract as it is the "ultimate consensus of the parties".[105] What happened during negotiations is irrelevant except to the extent it can assist in finding a common intention. Tipping J went on to note that the words remain central and the exercise is and remains one of interpretation:[106]

> Subject to the private dictionary and estoppel exceptions to be mentioned below, it is fundamental that words can never be *construed* as having a meaning they cannot reasonably bear. This is an important control on the raising of implausible interpretation arguments. Furthermore, the plainer the words, the more improbable it is that the parties intended them to be understood in any sense other than what they plainly say.

[178] Tipping J however went on to note that a meaning that may appear plain and unambiguous on its face is always being susceptible to being altered by context. His Honour commented that such an "outcome will usually be difficult of achievement. Those attempting the exercise unsuccessfully may well have to pay for the additional costs caused by the attempt".[107]

[179] A special meaning will exist if the words used were linguistically capable of only one meaning or were wholly obscure but the objective context indicates that the meaning, which was linguistically impossible, was in fact what the parties did intend.

[180] His Honour also noted that circumstances, which surround the making of the contract, can operate both before and after its formation, however, relevance should be the "touchstone for the exclusion of evidence".[108]

[181] In *Wholesale Distributors Ltd v Gibbons Holdings Ltd* (*Gibbons*),[109] Tipping J expressed the view that evidence of subsequent conduct should be admissible if capable of providing objective guidance as to the intended meaning. That post contract conduct should be shared or mutual. His Honour also noted that generally speaking, issues of contractual interpretation only arise in three circumstances: mistake, ambiguity, and special meaning.

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105 *Vector Gas*, above n 32, at [20] per Tipping J.
106 At [23] per Tipping J. (Footnotes omitted).
107 At [24] per Tipping J.
108 At [29] per Tipping J.
109 *Gibbons Holdings Ltd v Wholesale Distributors Ltd* [2007] NZSC 37, [2008] 1 NZLR 277 ["*Gibbons*"].

[182] The current leading authority on subsequent conduct as an aid to interpretation remains *Gibbons* in which the Supreme Court held that subsequent objective conduct rather than subjective statements of intention could be used to construe a contract. In that case a "legal analysis" of the leasehold assignments was at odds with what Gibbons Holdings Ltd argued was the actual intention evidenced by the commercial transactions as a whole and pre-contractual and post-contractual conduct.[110] However, the Supreme Court warned that post-contractual conduct must be mutual or shared rather than that of one party only.[111] In *Gibbons*, the meaning of the documents in question when looked at on their own were at odds with the parties' "actual intention" as ascertained from a review of the commercial transaction as a whole. Elias CJ noted that the subsequent conduct of the parties would support that conclusion but, in the event, it was not necessary to reach that conclusion.[112]

[183] Thomas J in *Gibbons* went on to analyse the particular evidence relating to the negotiation and the subsequent conduct for which leave to adduce had been sought. He did not accept the suggestion that admitting such evidence should involve a "trawl" through possibly historical pre-contractual correspondence and drafts to ascertain the particular meaning of a clause. Similarly, the prospect of a subsequent party having to carry out a sort of "due diligence" on what had transpired at the time the original contract was entered into was not acceptable.[113] He said however that those difficulties were overstated, and no party should be disadvantaged "by virtue only of the difficulty of obtaining access to evidence of pre-contractual or post-contractual conduct".[114] His Honour agreed with Tipping J that the evidence must be of "jointly shared" intention.[115] However, he parted with Tipping J on the latter's view that this meant the subsequent conduct needed to be "shared" or mutual. Thomas J considered that evidence that a party acted "inconsistently" with its later assertion in the case[116] could be of value.[117]

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110 *Gibbons*, above n 109, at [78] per Thomas J.
111 *Open Country Cheese Co Ltd v Fonterra Cooperative Group Ltd* HC Auckland CIV-2008-404-727, 11 December 2009; and *Trustees Executors v QBE Insurance (International) Ltd*, above n 71.
112 *Gibbons*, above n 109, at [7] per Elias CJ.
113 At [118] per Thomas J commentating on warnings in academic writing.
114 At [120] per Thomas J.
115 At [122] per Thomas J.
116 *Gibbons*, above n 109, at [135]–[137] per Thomas J.
117 At [52] per Tipping J and [122] per Thomas J.

[184] The Supreme Court has indicated that it proposes to consider the issue of subsequent conduct in relation to the interpretation of contracts in a matter for which it has recently given leave to appeal. It noted that the principles of contractual interpretation had been determined by it in *Firm PI 1 Ltd v Zurich*[118] but granted leave to appeal *Bathhurst*, with a request that counsel address the comments made by Thomas J in *Gibbons.*[119] In principle, *Gibbons* had established that subsequent conduct was admissible in appropriate cases to aid interpretation but the nature of the subsequent conduct, which should be allowed, remains unclear.

[185] I now turn to consider the contested extrinsic evidence.

The evidence of Mr Carpenter (admissibility issues)

[186] Mr Carpenter, of JLT, had managed the Scheme at the relevant times. He had particular experience and expertise in local government liability matters and had been involved with the establishment and, among other things, worked for the Scheme since its inception in June 1997.

[187] Mr Carpenter had reported to and advised the Board on the risks posed by the weathertight claims as well as on the various changes to the Protection Wording. He produced various documents relevant to that issue, including a report he provided to the Board on the increasing cost to RiskPool of weathertight claims, dated May 2006.

[188] Mr Carpenter dealt with members including the NCC over the annual renewals of their membership of the scheme, annual contributions and calls made on members by the Scheme. He was involved in the production of the RiskPool Annual Reports to members. He also handled the claims for RiskPool and dealt with the reinsurers.

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[118] *Bathurst Resources Ltd v L&M Coal Holdings Ltd* [2020] NZSC 73 ["*Bathurst*"] at [1] citing from *Firm PI 1 Ltd*, above n 33, at [60]–[64], [77]–[79] and [88]–[93] per Arnold J for the majority (Elias CJ and William Young J reserving their position).

[119] At [1](a) referring to *Firm PI 1 Ltd*, above n 33, at [1](b).

[189] Counsel for NCC prepared a table setting out the parts of Mr Carpenter's evidence to which each objection related. In general terms the objections fell into four categories, which I set out together with the RiskPool responses, as follows:

(a) Category 1: communications between RiskPool and its reinsurer. This included discussions and correspondence between RiskPool and its reinsurers negotiating the terms of renewal and Protection Wording of RiskPool's reinsurance including an exclusion similar to Exclusion cl 13(a).

The NCC said:

(i) It was not privy to the negotiations between RiskPool and its reinsurers. It was not a party to the reinsurance contracts, nor did it receive the reports made by RiskPool to the reinsurers.

(ii) Any admissible contextual evidence can only be in communications between RiskPool and the NCC regarding reinsurance. This was what both parties were aware of at the time. An example is RiskPool's renewal letter to the NCC for the 2006–2007 policy period referring to reinsurance when a sub-limit for multi-unit building defect claims alleging "Moisture Ingress" code breaches was introduced into the NCC's RiskPool Protection Wording. In that letter RiskPool had commented that "this is a particularly difficult renewal given current reinsurance market conditions for local government Liability Risks".

(b) Category 2: internal RiskPool communications. This category included reports to and resolutions of RiskPool's Board, legal advice obtained by RiskPool and records of internal decision-making concerning, in particular, weathertightness exclusions as well as how RiskPool had dealt with other weathertight claims before the weathertight exclusion was inserted. It also related to RiskPool Board's subjective reasons for

making changes to the policy protection wording and Mr Carpenter's views on why RiskPool had sought various Protection Wording changes and what he believed RiskPool had been trying to achieve.

The NCC says none of this evidence was known (or reasonably available) to it. Therefore, it says the material cannot be contextual evidence relevant to ascertaining objective intention for the purposes of interpretation of the Protection Wording.

(c) Category 3: post-contract conduct. This category included evidence relating to RiskPool's declinature of other members' claims after the weathertightness Exclusion was incorporated as well as the responses of other members. It also included communications between the NCC and RiskPool in 2012 about a claim for indemnity relating to a building in Dalton Street, that the NCC had notified to RiskPool. RiskPool declined cover, with reasons, in December 2012.

The NCC says that all the conduct occurred after the Protection Wording changes added the weathertightness Exclusion cl 13(a) in 2009. It says the 2012 conduct involving NCC's claim cannot assist the Court in determining the objective meaning of the words intended by both the NCC and RiskPool at the time the weathertightness Exclusion was agreed, which was the date that Exclusion cl 13(a) was first included for the year commencing 30 June 2009.

(d) Category 4: evidence concerning the asbestos Exclusion, which had been added to the Protection Wording. This category included evidence as to why RiskPool incorporated the asbestos Exclusion in its protection wording in 1991. The evidence covered how the Exclusion clause was drafted and RiskPool's subsequent correspondence with its reinsurers on the asbestos Exclusion.

> The NCC says that RiskPool's unilateral deliberations over a separate Exclusion dealing with an unrelated peril are not relevant to the interpretation of the weathertight Exclusion nor are its negotiations with reinsurers regarding that Exclusion. This information was known only to RiskPool and therefore the material cannot provide contextual evidence relevant to the contractual interpretation exercise.

[190] The objections to Mr Carpenter's evidence largely relate to Mr Carpenter's evidence on matters to which the NCC says it was not privy.[120]

[191] Mr Carpenter said that the systemic problems leading to the "weathertight crisis" were the result of various industry-wide reforms introduced in the 1990s. These included the move from prescriptive building regulation to a "performance based" approach. That approach relied heavily on the sector policing itself. The change in regulation occurred at the same time as other changes in the building sector, including the introduction of untreated timber and the use of various types of cladding system and moisture-proofing materials which were either defective or were incorrectly applied or installed. These were the contributors to the significant costs incurred in building defect claims made against the scheme by local authorities involving moisture ingress or weathertight defects.

[192] The disputed evidence was intended by RiskPool to support its contention that the NCC should have been aware that the weathertight/leaky building crisis was a shorthand description of the systemic failures in the building sector where the water ingress or weathertight complaints were the outward manifestation of wide-ranging defects uncovered in weathertight claims. The weathertightness issues were the outward signs that precipitated the investigations, then uncovered multiple building defects resulting from the systemic changes.

[193] RiskPool responded to the NCC's objections saying that it had adduced the evidence to provide information for the Court on the background and context to the insertion of Exclusion cl 13(a) into the Protection Wording. RiskPool says the relevance of the impugned evidence had been foreshadowed at an interlocutory stage

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[120] With the exception of the evidence relating to the Council's claim declined by RiskPool in 2012.

by the Court of Appeal.[121] It said that the Court of Appeal, in dismissing the appeal by RiskPool to strike out these proceedings, had noted that the NCC would likely call extrinsic evidence to shed some light on the intended meaning of the Protection Wording, in particular, contextual evidence about the circumstances in which Exclusions 12 and 13 were added. The Court noted these would also shed light on the implications for the mutual insurance scheme of weathertightness and other regulatory risks and "the extent to which one, other or both were intended to be excluded from cover".[122] The Court of Appeal had said that the exact detail of that evidence was not known to the Court at that interlocutory stage of the proceeding.

[194] In summary RiskPool says the evidence is admissible as it goes to:

(a) Background knowledge, which was known or reasonably available to the parties: it says that the Mutual Scheme operated transparently and provided frequent updating communications to Members. In addition, it says full or further information and explanations including details of all claims and reports given to the Board by Mr Carpenter were available on request if the NCC had sought them.

(b) Counter the argument of commercial absurdity: it says the evidence provides rational reasons for and the context in which members (in their dual capacity as owners of and claimants on the Scheme) would have interpreted cl 13.

(c) Demonstrate inconsistent conduct by the NCC: it says the evidence shows the NCC failed to speak out before 30 June 2014 against RiskPool's declinature of indemnity in respect of claims involving non-weathertight defects with weathertight complaints. That evidence relates to the manner in which the NCC and other members reacted. RiskPool says that the annual renewal of the Schemes' cover by the NCC over the years from 2009 to 2014 on terms including Exclusion cl 13(a) is relevant to the consideration of common intention.

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121 Reasons Judgment of the Court of Appeal, above n 5.
122 At [38].

> It is also relevant to the meaning that the document in question would convey to a reasonable person having all of the background knowledge, known or reasonably available to the parties as at 30 June 2014, which was the date of the annual renewal immediately preceding the Waterfront claim.

[195] I now consider the "mutuality" of the information that Mr Carpenter and RiskPool's Board had sent out to members. Of relevance to the "reasonable availability" of this material to members is the tension between RiskPool and individual members' interests.

[196] In May 2006 Mr Carpenter, in a report to the Board, said that the reinsurers would likely react to recent notifications by members by imposing a blanket building defects Exclusion at the next renewal. In that report Mr Carpenter recommended that the Board resolve in principle to exclude multi-unit building defect claims giving rise to weathertightness issues (described as breaches of cl E2 of the Building Code). The Exclusion was to have effect from the renewal date for the 2006 year. Mr Carpenter had said in his report that the net effect would be to exclude multi-unit claims cover to those councils that were the most frequent claimants but to continue cover for single standalone dwelling claims and to provide a cover to a limited extent to other members.

[197] His Board report went on to note that members would view this as an erosion of cover although less so than what was occurring in the commercial insurance market. He noted there was a risk that some councils might review their RiskPool membership as they would see the Exclusion as the removal of the only "meaningful cover they receive from RiskPool". The Report concluded by saying:

> The membership will need to be advised of the changes and a strategy for communicating those changes carefully will be developed once the likely reinsurance renewal outcome is known.

[198] Mr Carpenter was asked about this in cross-examination. He indicated that what he had meant was that the changes would be communicated after the completion of the reinsurance negotiations and once he had a fully formed plan to put to the

members about the decisions made by the Board for the forward structure of the reinsurance programme.

[199] There is nothing unusual or sinister in his approach. The Board and Mr Carpenter were trying to keep as many Members as possible happy and to that extent were keeping an eye on the manner in which information was presented to Members.

[200] In my view, it does indicate that the Members were going to receive an appropriately worded communication designed to announce the Exclusions proposed (at that stage a higher sublimit for multi-dwelling building defects for weathertight claims), when the Board and Mr Carpenter were ready to do so with carefully crafted wording. This suggests the Board reports and discussions were not designed to be available to Members and supports NCC's argument that the information was not "reasonably available".[123]

[201] Relevant to "reasonable availability" are any indications that RiskPool was willing to share reports and advice that it received, which might be of relevance to Members. For instance, the Board obtained a legal opinion dated 27 September 2012 as to whether Exclusion cl 13 applied to a Member's claim involving weathertight defects. RiskPool did not make this available to its Members generally.

[202] The NCC notified a claim in December 2012. It had been sued by the Hawkes Bay Regional Council in relation to the construction or alteration of a building at Dalton Street, Napier. RiskPool replied in December 2012 advising that the claim was not covered because it included weathertight allegations. In declining the claim, RiskPool referred to having obtained "appropriate legal advice" that once there was an allegation of breach of the weathertight standards the weathertight Exclusion applied to exclude the "entire claim".

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[123] The multi-dwelling building defects Exclusion along the lines described in the May 2006 report to the Board was introduced in the 2006 renewal. In the case of NCC this Exclusion was accompanied by an extension that extended cover for multi-unit building defect claims up to a sub-limit of $500,000 per claim.

[203] The RiskPool letter to the NCC concludes by saying:

> This scenario encompasses a type of claim RiskPool and its Members have agreed not to indemnify by way of exclusion.
>
> Should you have any queries please do not hesitate to contact our office.

[204] This suggests the legal advice referred to was that contained in the comprehensive legal opinion obtained by the NCC in the letter from counsel of 27 September 2012. This was not apparently supplied to NCC at the time of its 2012 claim. While counsel's opinion referred to individual claims by way of examples those items could have been anonymised or redacted without compromising the advice. Most of the letter contains general legal advice on the meaning of the Exclusion.

[205] In RiskPool's Annual Report for 2008 (year ended June 2008) the chairman mentioned that the Scheme had 78 local authority Members out of a possible 85 and it was the Board's goal that the seven local authorities who were not Members of RiskPool reconsider their position and join the fund for 2009/2010.

[206] The tension between the Members' individual interests as claimants and that of RiskPool is also evident from comments in that Annual Report:[124]

> It cannot be emphasized enough: our goal is not just to reduce claims wherever we can. We are here to help our members as much as we can within the limits of our protection wording and with regard to the overall good for the membership. In particular, we take a long-term view of our members' liabilities and are very careful in managing all claims and potential claims to avoid unwanted precedents for future claims. The Board continues to work on strategies that will continue to deliver a scope of insurance cover at a competitive and sustainable price, and contract certainty. We are constantly striving to find ways of reducing the cost to members without impairing the protection offered.

[207] This again suggests that RiskPool was managing what was sent to Members. Members did not know what information the Board and Mr Carpenter were privy to which might be relevant to their understanding of Exclusion cl 13(a) and RiskPool was not forthcoming with even relevant information such as the 2012 legal opinion.

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[124] RiskPool Annual Report 2008. Chairman's Report at p 3.

[208] Mr Carpenter as the Scheme Manager provided the advice to the Board on the Protection Wording and the Exclusions. RiskPool's lawyers were also involved in advising on and drafting the Exclusions. RiskPool's then lawyer, Mr Heaney, advised on the wording of the Exclusion clauses and also attended Board meetings.

[209] Mr Carpenter said that the drafting of the Exclusions was the result of "cut and paste". The wording for Exclusion cl 13(a), he said, was a copy of the FAI reinsurer's Exclusion wording. This is borne out by the wording copied into Exclusion cl 13(a) (minus the heading) of the Exclusion contained in the professional indemnity reinsurance agreement entered into between the reinsurers and RiskPool for the period 30 June 2006 to 30 June 2007, which provided:[125]

BUILDING DEFECTS EXCLUSION CLAUSE

> Reinsurers hereon shall not be liable in respect of any Claim alleging, arising directly or indirectly out of, or in respect of:
>
> The failure of any building or structure to meet or conform to the requirements of the New Zealand building Code contained on the First Schedule to the Building Regulations 1992 or any applicable New Zealand Standard (or any amended or substituted regulation or standard) in relation to leaks, water penetration, weatherproofing, moisture, or any effective water exit or control system;
>
> Or
>
> Mould, fungi, mildew, rot, decay, gradual deterioration, microorganisms, bacteria, protozoa or any similar or like forms, in any building or structure.

[210] In that insurance year, RiskPool chose to continue to provide coverage for weathertight claims despite the fact that its reinsurer had inserted the building defects Exclusion above.

[211] The wording of the above clause was used for the multi-unit building defects Exclusion inserted into the Protection Wording.

[212] NCC pointed to a draft which never made the Protection Wording and of which it was unaware at the time. It was a precursor to the multi-unit building defect

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[125] Any dispute concerning the reinsurance is subject to English law and the jurisdiction of the English Courts. This is not admissible against Napier City Council and is set out only to confirm Mr Carpenter's evidence that the Exclusion was a "cut and paste" exercise.

Exclusion proposed to the Board by Mr Carpenter prior to obtaining legal advice. The draft proposed linking the Exclusion to claims arising from specified negligent acts (being Member councils' key building functions). This approach was not pursued by RiskPool following legal advice. NCC said this indicated it is reasonable to infer that RiskPool was aware of the distinction at the time and chose not to pursue that form of the Exclusion.

[213] Some higher risk councils were to be excluded entirely from the multi-unit Clause. However, NCC was allowed a sub-limited extension.

[214] In June 2007 weathertight claims in general became subject to a $500,000 sublimit.[126] In that year, the Protection Wording excesses for the weathertight homes resolution service and weathertight homes tribunal claims were listed as $50,000 for each claim.[127] The general professional indemnity excess was $10,000 for each claim.

[215] In December 2007, RiskPool again wrote to the NCC advising that on 19 December 2007 RiskPool's Board had resolved to continue to provide for weathertightness claims for the 2008-2009 fund year "on the current basis, which is a $500,000 annual aggregate sub-limit after the application of NCC's excess to claims. All of the other types of claims RiskPool covers will remain covered".

[216] In Mr Carpenter's Scheme manager's operational review in the 2008 Annual Report, he noted the number of non-weathertight claims being reported had continued to reduce due to the litigation management strategy and good risk management practice adopted by the Members. He then went on to say:

> … Weathertightness claims however continue to be made against councils and there appears to be no reduction in the numbers of these claims. This is most likely due to the latency of defects, which means that it can be quite some time before the historical alleged negligence manifests itself as damage and a claim is made. It is unfortunate that more often we are seeing councils left as the 'last man standing' because other defendants and third parties are wound up, insolvent or are not able to significantly contribute towards settlement. Equally, we note an increased exposure to damages awarded by the courts as a consequence of joint and several liability for judgement sums.

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126 Letter dated 14 June 2007 from RiskPool to Napier City Council (common bundle 302.0731).
127 The professional indemnity excess was $10,000 for each claim.

[217] Mr Carpenter said the claims environment had led the Board to introduce an aggregate sublimit of $500,000 for weathertightness claims from the beginning of the year in order to protect the fund and ensure that a good degree of inter-member equity was maintained. He commented:

> Good risk management practices continue to cause a reduction in the overall non-weathertightness claims out-turn.

[218] In the Risk Management section of the report the comment was made that there had been an improvement in risk management practices within councils and there was a downward trend in non-weathertight claims. The report said:

> … These claims are categorised by the relatively short time between the alleged negligence and the claim being made, whereas with building defect claims and weathertightness claims in particular, the damage will lay latent for some years following the alleged negligence. …

[219] Under the heading "Claims" in the report, it was noted that "the majority of notifications received during the 2007–08 period continued to be weathertight related with common allegations of negligently issued building consents, negligent inspections and the negligent issuing of code compliance certificates".

[220] The introduction of Exclusion cl 13 had been signalled on 11 May 2009 and it came into force on 30 June 2009.

[221] RiskPool wrote to the NCC on 11 May 2009 saying:[128]

> We are pleased to offer terms for NCC's membership of RiskPool for the year beginning at 4.00pm on 30 June 2009.
>
> We are pleased to advise that NCC's limits of indemnity for Public Liability and Professional Indemnity are maintained at $100m each and every claim and in the annual aggregate for all·c1aims.
>
> As you will no doubt be aware, RiskPool has continued to provide coverage for weathertight claims by way of an annual aggregate sub-limit of $500,000 inclusive · of costs. This has been the subject of on-going Board review. We advise that the Board has resolved not to continue providing this cover to NCC and weathertight claims will be excluded from renewal. This is a step that must be taken to ensure that inter-member equity is maintained. Notwithstanding that, RiskPool will be pleased to continue to manage the administration of Members' weathertight claims for the broader benefit of

[128] Common bundle 302.0879. Letter dated 11 May 2000 from RiskPool to Napier City Council (Brian Hollands).

> Local Government and we will continue to provide our risk management advisory services as they relate to risks that give rise to these types of claims.
>
> NCC's renewal contribution for the 2009-10 membership period is $57,000 plus GST. …
>
> Otherwise, all other sub-limits, terms and· conditions remain unchanged. We trust that this is in order and welcome any enquiry or discussion.

[222] Mr Carpenter noted in the 2009 Annual Report for the year commencing 30 June 2009, that there were continued increases in remedial costs for building defect claims. He noted that the Board was monitoring the development of these claims and from time to time made underwriting changes based on information and circumstances at those times. He summarised the changes to cover made over time as follows:

- The application of a minimum excess for Weathertight Homes Resolution Service/Tribunal claims of $50,000 on all open claims over all years;
- The introduction of a multi-unit exclusion in Fund 10 for Councils with a frequency of these claims;
- The introduction of a $500,000 annual aggregate sub-limit for all weathertight claims for each Member for Funds 11 and 12 to limit the Fund's exposure to any Councils with a frequency or severity of claims; and
- The introduction of an exclusion for weathertight claims from June 2009 except for 23 low risk Councils, for which the $500,000 annual aggregate cover was maintained and is the subject of reinsurance protection.

[223] In the 2009 Annual Report, the chairman noted that there had been an explosion in the costs of resolving "leaky building claims". He attributed this to a move away from targeted repair to full repair resulting in increased repair costs, greater awareness of the cost of repairs resulting in harder settlement bargaining, as well as the increasing frequency in which the Council was the "last man standing".

[224] The chairman went on to say:

> RiskPool was not fully reinsured for fund years … because full reinsurance for leaky homes was not available. For fund year 13, the current fund year, the fund is fully reinsured (the Board was able to secure reinsurance cover for the 23 low-risk NCCs that still enjoy limited leaky homes cover) and the Board intends that future fund years will also be fully reinsured.
>
> …

[225] In February 2009 the RiskPool Board met. Mr Carpenter was present and under the general heading Strategic Review and the subheading Leaky Building Coverage the minutes read as follows:

> **iii.** **Leaky building coverage** – Unless it was possible to obtain full reinsurance, it was agreed to remove leaky building cover.
>
> - The view of the Fund Manager was that it might be difficult for reinsurance to be obtained, but enquiries would be made as soon as possible.
> - It was considered that leaky building claims could be a problem for local authorities until 2018 or even later.
> - The possibility of a separate fund for leaky building cover was raised and dismissed. Having the cover would be good, but the possibility of being exposed to a call for someone else's leaky claims was unattractive.
> - There was a risk that RiskPool might expose itself to competition by not offering this cover. On the other hand, as market leader, removal of it by RiskPool might lead to RiskPool's competitors removing it.
> - The Scheme Manager would continue to handle leaky building claims from year 13 as if they were covered by the RiskPool in the same way as it does now. The cost of doing this would be built into members' contributions.
> - Although leaky building cover might not be offered for year 13, building defect cover other than water penetration would continue to be covered.

[226] Under the heading Reinsurance it was noted the fund manager had been instructed to negotiate "non-leaky reinsurance" for year 13 on a similar basis to that for year 12 subject to suitable terms being available.

[227] As noted above, following this Mr Carpenter, for RiskPool, wrote to the NCC on 11 May 2009 to advise that the coverage for weathertight homes by way of an aggregate sublimit of $500,000 inclusive of costs would not continue. He said "weathertight claims will be excluded from renewal".

[228] On 30 June 2009 Mr Carpenter wrote to the NCC saying that RiskPool would be making a call for the shortfall in the mutual pool's funds. He said this had been

caused "predominantly by the 'leaky' building issue which has significantly impacted the sector, including RiskPool". He went on to say:

> …
>
> **Impact of the Leaky Building issue**
>
> All Councils with responsibilities under the Building Act have, to varying extents, been impacted by the leaky building issue. Nationally the extent of the issue is huge, with some estimates suggesting the broader industry faces liabilities into the billions of dollars.
>
> Unfortunately, as the issue has evolved, other parties such as builders, sub-trades, developers and architects have vanished, Councils and RiskPool are increasingly finding that they are the only party responding to claims, and judgements against Councils are increasing. At this time, on average, about a third of any claim is being met by the Council and RiskPool. When this trend is considered together with the average total cost of a claim increasing threefold in the past three years, to about $230,000 per claim, it is presenting significant liabilities for both Councils and RiskPool.
>
> As the leaky building issue has evolved, reinsurers have introduced changes to their cover and ultimately ceased cover. Despite RiskPool being very successful at gaining judgements in favour of, and beneficial to Local Government, it is becoming apparent that is does not have sufficient funds to cover all claims made against it.

[229] The letter set out the details of the call and then then referred to the consistent evaluation by the Board of potential liability using "sophisticated actuarial and other assessment techniques". It noted the continuing trend of "significant claims" against the sector and the possibility of future calls. The letter ended as follows:

> The Board has considered all options available to it and regrettably must make a Call. It is very conscious of the financial constraints currently facing the sector and has not made the decision lightly. It remains very supportive of Local Government's attempts to engage Central Government to contribute more substantially to the burden that is the result of the systemic failure that has befallen the building industry.

[230] On 24 September 2009 RiskPool again wrote to the NCC to expand on the reasons for the call and to provide further information regarding the weathertightness issues. RiskPool said:

> You will no doubt recall the 2002/03 media coverage of the experiences some property owners were having with moisture ingress. As the issue gained momentum, litigation against local authorities increased, both in the Weathertight Homes Resolution Service (now the Weathertight Homes Tribunal) and before the courts.

There are three main features of weathertight claims that have become apparent. Firstly, they are more concentrated in the Auckland region and other larger cities. Secondly, the ultimate number of claims in each of our Fund Years has become clearer and thirdly, the cost of these claims to Local Government has escalated reasonably significantly.

Territorial authorities have always faced building defect litigation, and that litigation has historically been quite manageable. RiskPool has a good record of resolving cases against Councils on the most favourable terms, or alternatively running cases to trial where the is a good prospect of achieving an improvement in the common law for Local Government.

Mindful of ensuring that the development of the common law and our experience with resolving building defect claims, RiskPool's Board resolved to continue to cover these claims. The Board has monitored the out-turn of weathertightness claims and the extent of the Fund's reinsurance arrangements (which being in the commercial market have changed as the issue has evolved) over the years and has made underwriting changes as thought appropriate at a number of points in time such as:

- *The application of a minimum $50,000 excess on all WHRS/WHT claims effective 1 February 2006;*

- *The application of a multi-unit exclusion for a number of Councils from 30 June 2006;*

- *The application of a $500,000 annual aggregate sub-limit for all weathertight claims for all Councils from 30 June 2007;*

- *Weathertight claims excluded for most Councils from 30 June 2009.*

The Claims Experience

In terms of claims it is fair to say that the frequency of claims have been against larger city Councils particularly in the Auckland region, and also those Councils elsewhere that had rapid development in the late 1990's and early 2000's.

Virtually all mid-sized territorial authorities have experienced claims albeit with a lower frequency than the larger cities. Very few Councils have avoided claims altogether. Indeed, there have been reasonably large claims against Councils that you would not necessarily expect to have weathertight claims.

Over the last 8 to 12 months though, the liability environment for Local Government has changed. Plaintiffs or claimants are generally no longer compromising their claims in return for avoiding litigation. Councils are increasingly exposed to joint and several liability for damages as other defendants are unable to pay their share of the liability. This is probably a consequence of the economic environment and in many more cases it is seeing the local authority left as "the last man standing".

This has meant that a disproportionate cost of these claims is left resting with the Councils only. This in turn has had a direct impact on RiskPool,

> particularly for the Fund Years prior to 1 February 2006 when the Board began to take action to address the emerging liability picture associated with weathertight claims.

[231] The 2009 RiskPool Annual Report was sent to the NCC with a letter on 27 November 2009. The report again noted the difficulties with the weathertight litigation "with many uncertainties, variables and a changing liability environment both in terms of an unpredictable jurisdiction and the practical effects of other respondents more frequently not able to meet the liability for damages. The effect of this has been a rapid deterioration in claims provisions and this obviously had an effect on RiskPool's accounts". In that letter further calls were made. A proposal was also put forward that the six Councils with the most weathertight claims would pay all three calls at once (calls were to be made in July 2010, July 2011 and July 2012) to assist the fund in the interim. The letter also outlined the steps being taken by RiskPool in relation to underwriting under the heading "Underwriting Steps Taken". This was largely a repeat of that set out in the previous letter[129] with the addition of:

> • Weathertight claims excluded for most councils from 30 June 2009, *with reinsurance cover in place for those councils with on-going sub-limited weathertightness cover.*
>
> *The last point above is important as it means that an opportunity for deficits in Fund Year 13 (2009-10) onwards is limited only to reinsurer failure when a reinsurance claim on foot, and that risk is monitored by counter-party rating.*
>
> [Emphasis added]

The events leading to the introduction of Exclusion cl 13(a)

[232] Mr Carpenter, in his evidence, explained that as the number of weathertightness claims had increased RiskPool had looked for ways to provide its Members with better cover than the commercial market could provide but also to manage the risks to the Scheme.

[233] Before the introduction of the sublimit of $500,000 for multi-unit dwelling building defect claims, on 3 May 2006 Mr Carpenter had presented a paper to the Board headed "RiskPool Coverage – Multi-unit Building Defect Claims".[130] The

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129 See above at [230].
130 Referred to above at [196].

purpose of the report was to address the risks posed by large multi-unit building defect claims. Mr Carpenter said these were weathertightness claims which were generally outside the Weathertight Homes Resolution Service (WHRS).[131]

[234] By 2009 it had become obvious that the steps taken by RiskPool to manage the risks of weathertight claims, particularly in relation to multi-unit apartment buildings, were not enough.

[235] A useful summary of the position, as RiskPool saw it, was set out in its letter to the NCC dated 26 July 2012.[132] It set out the new reinsurance provisions and management arrangements noting the problems it had obtaining insurance following the Christchurch earthquakes as well as the effects of the slow recovery from the Global Financial Crisis. In particular, it noted:

> Members have been telling us for some time that they want RiskPool to provide reliable and stable insurance arrangements, without the risk of calls.

[236] It went on to discuss the difficulties it had faced concerning weathertightness claims and the sudden escalation in costs associated with these claims:

> Paul Carpenter at JLT remains in charge of claims management. The primary focus is on mopping up the remaining weather tightness claims. The good news is that we can see an end to the weather tightness claims because of the changes made to building practices starting in 2003 and the ten year limitation period for bringing claims. Invariably the Council is now the "last man standing" and the Courts continued resistance to efforts to have the Crown share local government's liability burden is not making the negotiation of favourable settlements any easier. A measure of volatility in the value of weather tightness claim settlements therefore remains, both up and down, but we are doing everything we can to limit that volatility and to settle claims within reserve amounts. The Financial Assistance Programme introduced by the Government in 2010 has not had any significant effect on RiskPool's claims performance.
>
> The Board is concerned about the increasingly hostile liability environment for local government, in which the Courts are demonstrating a greater willingness to find liability in areas where there has not historically been liability. …

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131 WHRS was a statutory service provided by the government designed to resolve residential weathertight building claims outside the court system although there had been multi-unit claims dealt with by the Service. It involved inspection, report, mediation and adjudication services.

132 This provides an overview. It is not relevant nor admissible as evidence against the Napier City Council.

> Over the last few years the challenge which has occupied most of the Board's time and energy has been the management and settlement of weather tightness claims. True to one of its founding principles (that RiskPool would not react like a traditional insurer when faced with claims) RiskPool tried to stay in the market and provide leaky building cover to all of its Members for as long as it could. Some of the smaller councils with good claims history retain limited weather tightness cover even today.
>
> …
>
> Estimating the final cost of weather tightness claims has proved to be very difficult, in part due to the way the Government's Weather tight Homes Service worked. There is a significant lead time between when the claim was lodged and when it is able to be accurately quantified. Actuarial advice has been taken but hard information was sparse in the early days and the issues were novel. The deterioration in RiskPool's financial position was as sudden as it was dramatic. The accounts, which at the end of June 2008 were showing a manageable deficit of $1.2 million over the previous 11 fund years, were showing a deficit of just over $21 million over 12 fund years by June 2009. And this came after a $4 million call made during that year. Claims continued to mature at amounts well in excess of the estimated settlement amounts shown in the 2009 accounts.
>
> In November 2009 the Board advised that it proposed to address the funding deficits arising from weather tightness claims by a potential call for up to $27 million in three instalments of $9 million in 2010, 2011 and 2012. At that time we thought that the 2012 call might be for a "wash up" amount less than $9 million but sadly that has not proved to be the case. In November 2011 we signalled that the 2012 call would need to be for the full $9million and that there was a possibility of a further $9 million call in 2013. My letter of March 2012 confirmed the further call in 2013 for $9 million and advised of the possibility of one further call in July 2014. The calls up to 2013 will bring the total amount raised from calls to $40 million approximately. The Board has not yet seen the accounts for the year ending 30 June 2012 and is reluctant to make an estimate of the likely amount of the 2014 call before doing so.
>
> We appreciate the effect calls have had, and continue to have, on Members and regret the necessity to make them.

[237] The RiskPool letter had said that as at 30 June 2011 RiskPool had a net deficit of $21.1 million which would be partially funded by a call being invoiced at that time. It had paid and reserved claims in the region of $150 million, of which reinsurance cover was estimated to contribute around $65 million, towards settlement of those claims leaving a balance of $85 million to be funded from annual contributions, reserves and calls.

[238] By the time the Waterfront claim notification was lodged by NCC with RiskPool, Mr Carpenter said that there was no self-insured retention left in the fund. At that stage Mr Carpenter estimated that the reinsurance limit (which had a

Building Defects Exclusion clause for weathertight claims)[133] was somewhere in the range of $100 to $300 million provided by 18 reinsurers.

Analysis

Reasonable availability of evidence

[239] Counsel were in agreement on the proper approach to the interpretation of a contract. In summary this entails an objective assessment of the meaning that the document would convey to a reasonable person having all the background knowledge known or reasonably available to the parties at the time of the contract. The contractual language must be interpreted within its own overall context broadly viewed.[134]

[240] In making this assessment the text remains centrally important. If the language construed in the context of the contract as a whole has an ordinary and natural meaning, this is a powerful, but not necessarily final indicator of what the parties meant. At the same time the wider context may point to some interpretation other than the most obvious one and may also assist in determining the meaning intended in cases of ambiguity or uncertainty.

[241] Lord Mance in *Re Sigma Finance Corporation*,[135] a judgment of the UK Supreme Court, commented that the law excludes from the admissible background, declarations of subjective intent for reasons of practical policy but the boundaries are in some respects unclear. His Lordship noted, quoting Lord Hoffman that the meaning of a document is taken against what the parties using those words "would reasonably have been understood to mean".[136]

[242] To recap, the courts have noted that the wider context includes the purpose of the contract to the extent that it can be reasonably and reliably identified, the textual

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133 For the wording of the Exclusion see above at [207].

134 *Firm PI 1 Ltd*, above n 33.

135 *Re Sigma Finance Corp (in admin rec)* [2009] UKSC 2, [2010] 1 All ER 571 at [37] per Lord Collins. Lord Hope and Lord Mance concurred with Lord Collins' judgment. The judgment was referred to in *Firm PI Ltd*, above n 33, at [62].

136 *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 (HL) at 912 per Lord Hoffmann at [10].

context and relevant factual matters "known" or "reasonably available to both parties".[137] As Thomas J said in *Gibbons*, care must be taken before allowing in extrinsic evidence information which while not actually known by one party could or might have been upon request if the other had known about it.[138]

[243] Mr Carpenter said that as RiskPool was a Mutual Scheme, Members could ask for any material held by RiskPool. Therefore, all Members including NCC either were aware or could and should have been aware of the developments in the weathertight claims and steps being taken by RiskPool to manage the risk. He said that NCC was fully aware of the weathertightness issues as they arose and developed from its receipt of the annual reports and correspondence from RiskPool including letters concerning potential and actual calls. In addition, when he was talking to staff from the various Councils, Mr Carpenter said he would often update them with information about weathertightness. Weathertightness was a key issue for local authorities from the early 2000s on. He said NCC in common with other Members could ask for any information and it would have been made available to them.

[244] Whether or not the impugned extrinsic evidence was reasonably available to the NCC is essentially a matter of fact. The assessment is an objective standard. The question is whether a reasonable person (in the shoes of the parties) aware of the "commercial or other context in which the contract was made and of all the facts and circumstances known to and likely to be operating on the parties' minds" would have known the information was available and secondly, if they asked for it whether the information would have been made available.[139]

[245] The fact that RiskPool was a Mutual Scheme of itself did not mean that all material to which it was privy was available to Members. RiskPool was a separate corporate entity that acted as a Trustee. LGIC, an incorporated company, was the shareholder and it appointed the Board, in accordance with the Trust Deed.

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137 *Firm PI 1 Ltd*, above n 33, at [63] per McGrath, Glazebrook and Arnold JJ.
138 At [95].
139 *Vector Gas*, above n 32, at [19] per Tipping J: see above at [176].

[246] The Board was required to hold an annual meeting for Board Members, which was to be conducted as closely as practicable in accordance with the constitution and the Companies Act 1993 as if it were a meeting of shareholders of a trustee company. In general terms the trustee company appears to have adopted a corporate board model.

[247] RiskPool did not point to any communication to the NCC that conveyed a message as to what might have been available, nor that all the material and information, including the information known to the Board and Mr Carpenter, was available to the Members. Mr Carpenter could recall no specific discussions with the NCC about the weathertight issues facing RiskPool and the sector.

[248] Despite Mr Carpenter's assertion that the Scheme was a mutual fund and so was "transparent" to its members, neither the Board's nor Mr Carpenter's correspondence with reinsurers', information concerning the reassurance negotiations, nor the wording of the commercial reinsurance or Board Reports and minutes were circulated to Members. Members were not generally privy to each other's claims unless they were described in the Annual Report. The manner in which RiskPool communicated with its Members was through annual reports, meetings, correspondence and discussions direct with a Member.

[249] RiskPool was not forthcoming even with relevant information. For instance, when the 2012 claim was declined, Mr Greg Morton of RiskPool (the then Claims Manager) wrote to NCC declining the claim. He said that "appropriate legal advice" in relation to the situation arising had been obtained. Mr Morton explained the reason for the declinature as follows:

> We… in relation to this situation … confirm that indemnity is not provided under our Protection Wording. Our advice concludes, should a claimant's allegations constitute one claim, and an exclusion such as our "weathertight exclusion" 13(a) or (b) apply to the claim, the entire claim is excluded.
>
> Essentially should the claimant allege that all the breaches of the weathertight standards and the Building Code for all the loss, breaches of other standards in the Building Code effectively provides an alternative basis for recovering the same loss. The scenario encompasses a type of claim RiskPool and its Members have agreed not to indemnify by way of exclusion.
>
> Should you have any query, please do not hesitate to contact our office.

[250] In the circumstances, if RiskPool was as transparent as Mr Carpenter claims, RiskPool would have sent NCC a copy of that legal advice, which appears to be the advice from Mr Ring dated 27 September 2012. It would have been a simple matter to send that letter with any redactions as necessary. The general advice in the letter, apart from the examples given in relation to two matters, contains nothing confidential but would have explained in detail the legal position.

[251] In my view, Mr Morton's explanation was sufficient on its own to make it clear that the claim was rejected because the claimant's allegations constituted one claim and so the weathertight Exclusion applied to all defects in the claim. However, the further explanation he gave of other breaches effectively providing an alternative basis for recovering the same loss was obscure without provision of the full legal advice.

[252] Nevertheless, the NCC did not pursue the matter by asking for the legal advice or challenging the interpretation of the clause put forward by RiskPool. Mr Jack, in evidence, said that it wanted to bide its time until it found a "better case" in order to take the issue on with RiskPool.

[253] In my view, the material to which Mr Carpenter and the Board was privy, which was not distributed to Members, was not "reasonably available" to NCC. In summary this is because:

(a) RiskPool was an entity separate from the Members and was a wholly owned subsidiary of LGIC. The Members were not shareholders although the shares were held in trust for the Members of the Scheme.[140]

(b) RiskPool's interests were not wholly aligned to those of its individual Members. While in general terms the Board could act in the best interests of LGIC[141] and so the benefit of the membership as a whole, that did not mean that it had an obligation to act in the best interests of LGIC. It certainly had no authority to act in the best interests of

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140 Trust Deed at [F] (Background).
141 At [6.3].

individual members. Often particularly in relation to the claims handling and retaining Members, there was a tension between the interests of the Member seeking to recover under the indemnity and the Membership as a whole in preserving the fund and retaining Members.

(c) The Board agendas, minutes and reports and discussions were not circulated to Members. The Board papers and its minutes indicated the Board's ongoing concern about the Scheme's solvency (for which the Board Members had responsibility) and the need to make calls on Members for losses caused by claims where the reinsurance provided no cover. The Board papers show there was concern about the loss of Members due to dissatisfaction with the cover on the one hand and the level of the calls on the other.[142] Information which was published was carefully written with that tension in mind. Reports and advice by the Fund Manager and the scheme's lawyer on Claims and related matters were made to the Board[143] but there is no evidence that Members ever knew of their existence.

Conclusion on admissibility of evidence

[254] The shareholders as a body have primacy in a company, however, the powers of the management of the company are conferred on the Board.[144] In this case the sole shareholder was LGIC, which held the shares as trustee for the Members. There is nothing to suggest the Members could insist on being provided with management information, particularly sensitive material, by RiskPool. The annual meetings and Annual Reports, and the annual renewal letters, calls, and communications on specific claims, were the ways in which RiskPool communicated with its Members. The Scheme Manager and the Fund Manager were to be available at all times to Members of the Scheme "to answer any questions on the conduct of the Scheme's activities", but there is no suggestion that the Board, the Scheme, or the fund manager would share all material made available to the RiskPool Board members and the Scheme Manager with any Members on request.

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142 This was noted in the minutes of the Board's meeting on 10 February 2006 and again on 12 May 2006.
143 Trust Deed at [10.2.4].
144 Companies Act 1993, s 128.

[255] The Board papers indicate that the Board was aware of the tension created between telling Members too much and so losing them, and keeping them informed. Indications are that the Board tailored its communications carefully, particularly when communicating changes to the terms of the indemnity cover.

[256] In any event, a Member would not know what to request. A Member would assume that what it saw in the Annual Reports and was told in other communications was all that it needed to know and in fact all that was available to inform it on its cover. If it did not know the information was available, it cannot be said that the information was reasonably available upon request.

[257] I conclude that from an objective point of view Mr Carpenter's evidence in the objections set out in categories 1 and 2 as it relates to the communications between RiskPool and its reinsurer and the internal RiskPool Board material including minutes and communications as well as the material in category 4, relating to the asbestos Exclusion,[145] should not be admitted as evidence. The NCC was not privy to that information and the information was not reasonably available to it.[146] It is not relevant for the purpose of assessing mutual intention.

Conclusion in relation to the 2012 Dalton Street claim

[258] Mr Carpenter's evidence insofar as it relates to evidence of conduct subsequent to 2009 and, in particular, information conveyed to NCC in relation to the 2012 claim however is in a different category for the following reasons.

[259] A group mutual scheme indemnity cover is not identical to commercial insurance but it has similarities.[147] The Scheme provides a contract of indemnity for members on the terms set out in the scheme documents.[148] A renewal of an insurance policy generally operates as new contract. Until acceptance of the renewal offer there

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145 See the list of categories of objection above at [189].

146 The exclusion of this evidence includes the evidence that NCC relied upon, which was included in that evidence.

147 In a group scheme in which Members are jointly and severally liable to contribute to the loss suffered by any member there is a passing of the risk whereas under a contract of insurance there must be such a right to receive money or monies worth on the loss to which the cover refers: Desmond Derrington and Ronald Ashton *The Law of Liability Insurance* (3rd ed, Melbourne VIC, LexisNexis Australia, 2013) ["Derrington and Ashton *The Law of Liability Insurance*"] at [2-6].

148 Trust Deed at [F] (Background).

is no contract for insurance or indemnity that year.[149] The same occurs with the renewals of Scheme Membership. Each annual renewal is an acceptance by the Member of the Offer to become a Member on the terms offered including those in the Protection Wording and Exclusions.

[260] The Trust Deed required for the establishment of the Annual Funds and for Members to join the Scheme for the Fund Year by payment of the contribution determined by the Board for that year.[150] It was contemplated that the Guidelines (the Protection Wording) were to be set annually.[151] The indemnity cover was purchased annually[152] and the contributions by Members were assessed annually by reference to various risk factors.[153] The Board had absolute discretion to determine whether claims should be met from the pooled cover[154] and to set the Guidelines for the exercise of its discretion at the commencement of each Fund Year.[155]

[261] The contract between the Member and the Scheme was formed by the Member accepting the offer of RiskPool for the relevant Fund Year and paying the contribution set by the Board.[156] The member had agreed to be bound by the terms of the Scheme documents (which included the Scheme Rules) as amended from time to time when it signed the Deed of Participation. Therefore, a contract was formed between the Member and the Scheme with the terms for the contract for that year set out in the Scheme Documents.[157] At the time of the renewal for the next year the previous annual fund is closed.[158]

[262] The implications of being a Member for a particular year are significant. First, because the Annual Fund responds to "Claims made" in that year. Secondly, because those Members for that year are liable for both the initial annual contribution and any calls which may be made later in the event of a deficit for that year.

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149 Derrington and Ashton *The Law of Liability Insurance*, above n 147, at [2-98].
150 Trust Deed at [11.1].
151 At [6.6.2].
152 At [6.6.4].
153 At [6.6.5].
154 At [8.2].
155 At [8.1].
156 The offer of membership was made in writing with advice of the annual constitution payable by the Member: Scheme Rules, above n 14, at [3.3].
157 At [5.2]
158 At cl 6.

[263] Exclusion cl 13 was first inserted into the Protection Wording in the annual renewal for the year commencing 30 June 2009.

[264] On 11 May 2009, RiskPool had written to NCC advising that weathertight claims would be excluded from the renewal. The relevant terms, which were the subject of these proceedings, were adopted for the insurance period commencing 30 June 2009.[159]

[265] The letter offering the renewal for the year beginning 30 June 2009 from RiskPool to the NCC is set out above.[160]

[266] The NCC's indemnity cover containing the Exclusion cl 13 renewal was included in each of the renewals from the year 2009 to the 2014 year. Notification of the Waterfront claim occurred in the year commencing 2014.[161]

[267] In December 2012, Mr Faulknor, on behalf of NCC, emailed RiskPool enclosing a claim against the NCC for negligent inspections and issue of the code compliance certificate alleging both weathertight and non-weathertight defects in a building in Dalton Street, Napier. The claim had been made by Hawkes Bay Regional Council against Herbert Construction Company Ltd. The claim was for a contribution or indemnity against the NCC as first third party in negligence. The defects alleged in that statement of claim included leaks and water penetration, slab movement, dishing of the floor, roof defects, cladding and other external defects, defective aluminium joinery, fire stopping defects and structural issues.

[268] Mr Morton, of RiskPool, emailed Mr Faulknor shortly after receiving the claim and asked Mr Faulknor to phone him. A phone discussion apparently took place and following that, Mr Morton referred to the discussion in a letter "confirming RiskPool's position in respect of indemnity for the non-weathertight defects".

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159 Extension 7 was also deleted. The extensions are discussed below at [288]–[293].

160 See above at [221].

161 There is a suggestion that the NCC became aware of the Waterfront plaintiffs' claim in June 2014. However, there were at least two annual renewals after that date.

[269] The letter dated 10 December 2012 to the NCC said:

> …
>
> You have requested that RiskPool give consideration to the provision of indemnity under our protection wording for this matter which *originated out of weathertight defects and is now the subject of non-weathertight defects.*
>
> We have obtained appropriate legal advice in relation to this situation arising and can confirm *that indemnity is not provided under our protection wording. Our advice concludes, should a claimant's allegations constitute one claim, and an exclusion such as our 'weathertight exclusion' 13(a) or (b) apply to the claim, the entire claim is excluded.*
>
> Essentially, should the claimant allege that all the breaches of the weathertight standards in the building code account for all the loss, breaches of other standards in the building code effectively provides an alternative basis for recovering the same loss. This scenario encompasses a type of claim RiskPool and its Members have agreed not to indemnify by way of exclusion.
>
> [Emphasis added]

[270] The explanation given in the last paragraph of the excerpt from the letter is obscure. Mr McLellan argued that the last paragraph of that letter gave reasons that were inconsistent with the reasons for which the 2014 Waterfront plaintiffs' claim was declined. However, despite the infelicitous drafting, it is clear from and in the context of the previous two paragraphs of that letter that the declinature was based on the fact that both breaches, weathertightness defects and any other non-weathertight defects were excluded from cover because they were associated with a weathertight defects complaint. When that letter was put to Mr Jack in cross-examination, he agreed that was the meaning that the letter conveyed to him.

[271] It is apparent that the RiskPool Claims Manager who signed the letter of declinature of 10 December 2012 had spoken to Mr Faulknor, of NCC, by telephone following the notification. It appears the NCC did not then push the issue.

[272] In essence, a claim very similar to the present claim was declined on the basis that it included weathertight and non-weathertight defects. This was almost two years before the Waterfront plaintiffs' claim notification was made.

[273] Mr Jack gave evidence for the NCC. He had been the CEO of NCC between September 2014 and March 2020. He was involved in the NCC's response,

investigation, defence and settlement of the Waterfront proceedings and had been given authority by the NCC to settle at mediation. However, Mr Jack did not directly deal with RiskPool over the claims. He was not with the NCC at the time of the 2012 claim. He did not appear to have been involved in the day to day handling of the 2014 notification of the Waterfront claim to RiskPool. Nor would he be expected to be so involved as the CEO. Mr Faulknor, who handled both those claims as the Corporate Property Manager, is still with the NCC but did not give evidence.

[274] Therefore, at the time it accepted the Protection Wording including Exclusion cl 13 for the 2014/2015 year, NCC was aware that the meaning intended by RiskPool for that Exclusion was to exclude cover for all weathertight and non-weathertight defects and failures if a weathertight claim was made.

[275] RiskPool's view of what the Exclusion cl 13(a) meant was specifically made known to the NCC in 2012. When the NCC renewed its cover the following year it did so with the knowledge that RiskPool's intention was that the Exclusion included all defects or breaches of other standards if a claim was associated with a weathertight breach. NCC cannot say after that, that it did not know the meaning intended by RiskPool for the Exclusion cl 13.[162]

[276] On that basis, NCC accepted the offer of Membership based on the Protection Wording including Exclusion cl 13 offered for the 2014/2015 year.

[277] The 2012 conduct and correspondence surrounding the claim in my view was not subsequent conduct. It is relevant to the meaning of Exclusion cl 13(a) in the contract of indemnity formed for the 2014/2015 year. It is admissible as evidence as to the mutual knowledge of the parties at the time that renewal took place.

[278] I now turn to the general communications between RiskPool and NCC, apart from the 2012 claim to examine whether a mutual intention is generally discernible.

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[162] There was no suggestion that the knowledge of officers of the NCC could not be imputed to the NCC itself.

General communications to Members

[279] Mr Carpenter said he had not turned his mind to the issue of claims discovered as a result of a weathertight complaint involving weathertight and non-weathertight defects in 2009. However, by the time RiskPool received the 2012 Dalton Street notification from the NCC, it had obtained legal advice on the wording of the weathertight Exclusion which indicated that the wording was wide enough to cover any building defect claim where the discovery of the defects had been sparked off by an investigation or repair of a weathertight complaint. This meaning was specifically conveyed to the NCC in 2012 at the time of the Dalton Street claim.

[280] From a reading of the correspondence between the NCC and RiskPool, and RiskPool's Annual Reports sent to Members up to 2009 when the relevant Exclusion clause was first introduced, it appears that these communications did not spell out the fact the weathertight Exclusion would exclude all building defects. There was no specific explanation of what was meant when RiskPool referred to "weathertightness" or "leaky building" risks or claims in its reporting. It did not spell out that the terms "weathertightness" and "leaky buildings" were describing the manifestation of what was a systemic building industry problem resulting in poor construction design and workmanship and building defects generally.

[281] However, the officers of the NCC who were dealing with RiskPool and managing the RiskPool claims were aware of the increasing building defect risks faced by courts and RiskPool over the period essentially from 2003 to 2014 and would have been familiar with the systemic issues as the Exclusions to manage RiskPool's risks were introduced.

Evolution of Exclusion cl 13

[282] In 2003 the reinsurers introduced an Exclusion for any liability in connection with applications lodged with the Weathertight Homes Resolution Service (WHRS) from 2002. RiskPool did not insert that Exclusion in the indemnity cover for Members.

[283] In 2006 RiskPool introduced a $50,000 excess for WHRS claims. It notified the NCC of this in December 2005.[163] This was to have effect from 1 February 2006.

[284] The Weathertight Homes Resolution Service provided an option for homeowners to have their claims investigated, mediated and adjudicated upon by the Weathertight Homes Tribunal. The service was intended to provide a timely and cost effective method for homeowners to resolve their weathertight homes claims. However, the tribunal only had jurisdiction in relation to weathertight issues. Amendments were made to the service which came into force in 2007.[164] This extended the application of the service to "class actions" for multi-unit buildings and provided a "financial assistance package" to enable owners to finance repairs. The remedies remained limited to the cost to remedy the water penetration and the damage caused by the water penetration only.[165]

[285] At the time of annual renewal on 29 June 2006, RiskPool wrote to the NCC concerning the imposition of a $500,000 sublimit for indemnity for multi-unit building defect claims. The letter said:

> This is a particularly difficult renewal given current reinsurance market conditions for Local Government liability risks. There are therefore some changes to the cover Council will receive for the forthcoming period. Regrettably we have to introduce a $500,000 sub-limit of indemnity for multi unit *building defect claims* involving alleged breaches of Clauses E2 "Moisture Ingress" of the Building Code. This change takes effect 30 June 2006.
>
> We also remind you that as advised in January 2006, a minimum $50,000 excess for claims with Weathertight Homes Resolution Service applies to claims registered with the Service after 1 February 2006.
>
> [Emphasis added]

[286] On 29 August 2006, RiskPool again wrote to the NCC confirming the introduction of the multi-unit sublimit cover. It did not mention that it was a "building defect" sublimit as it had in the earlier letter.[166] It instead referred to "a

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163 In that letter, RiskPool noted it was not a change the Board was making lightly, but stated "[h]owever, the size of the leaky building problem is such that a change is necessary and the Board considers that to be a better alternative overall than withdrawing cover for WHRS entirely".

164 Weathertight Homes Resolution Services Act 2006.

165 Section 50.

166 See above at [285].

sub-limited cover of $500,000 for multi-unit weathertightness claims". It went on to note that the Board had defined "multi-unit" to mean more than ten legal titles or units intended for separate occupation within one building. It said:

> From a wording perspective, we have to in the first instance exclude "multi-unit" claims and reintroduce the sub-limited cover. Accordingly we attach by way of endorsement an exclusion clause and an extension clause that forms part of the Public Liability and Professional Indemnity Protection Wording issued to Council.
>
> We also attach NCC's 2006-2007 schedule setting out limits of indemnity, sub-limits and excesses.

[287] The sub-limited cover had been effected on 30 June 2006 by inserting an Exclusion (as Exclusion cl 13) into the Protection Wording as follows:

> **Exclusion 13 Multi Unit Building Defect Claims Involving Moisture Ingress**
>
> This Section of the Protection Wording does not cover liability for Claim alleging, arising directly or indirectly out of, or in respect of:
>
> a) the failure of any building or structure to meet or conform to the requirements of the New Zealand building Code contained in the First Schedule to the Building Regulations 1992 or any applicable New Zealand Standard (or any amended or substituted regulation or standard) in relation to leaks, water penetration, weatherproofing, moisture, or any effective water exit or control system;
>
> or
>
> b) mould, fungi, mildew, rot, decay, gradual deterioration, micro-organisms, bacteria, protozoa or any similar or like forms, in any building or structure;
>
> where the building structure(s) the subject of a Claim(s) includes more than ten (10) Units, constructed under one or more building consent(s), regardless of the Unit(s) the Claim(s) is in respect of is for:
>
> a) one building;
>
> b) a series of buildings constructed pursuant to a common consent; or
>
> c) one or more buildings within the same development.
>
> For the purposes of this Exclusion, Unit(s) shall mean a building or part thereof in respect of which a separate legal title may issue and/or a part designed or intended for separate occupation.
>
> Where there is a conflict between the provisions of this Exclusion and other provisions contained herein the provisions of this Exclusion shall prevail.

All other terms, conditions and exclusions remain unchanged.

[288] In addition to the Exclusion, an Extension providing the sublimit was added to the Protection Wording as follows:[167]

> **Extension 7 Multi-unit Building Defect Claims Involving Moisture Ingress**
>
> It is hereby agreed that notwithstanding Exclusion 13 "Multi-unit Building Defect Claims Involving Moisture Ingress" cover by this section of the Protection Wording is extended to indemnify the Member against Claims in respect of:
>
> a) the failure of any building or structure to meet or conform to the requirements of the New Zealand Building Code contained in the First Schedule to the Building Regulations 1992 or any applicable New Zealand Standard (or any amended or substituted regulation or standard) in relation to leaks, water penetration, weatherproofing, moisture, or any effective water exit or control system;
>
> or
>
> b) mould, fungi, mildew, rot, decay, gradual deterioration, micro-organisms, bacteria, protozoa or any similar or like forms, in any building or structure;
>
> where the building structure(s) the subject of a Claim(s) includes more than ten (10) Units, constructed under one or more building consent(s), regardless of the Unit(s) the Claim(s) is in respect of, to a maximum limit of indemnity of $500,000.
>
> For the purposes of this Extension a Claim or Claims means a demand for compensation by a third party or parties against the Member where the third party or parties demands compensation for losses arising directly or indirectly out of, or in respect of:
>
> a) one building;
>
> b) a series of buildings constructed pursuant to a common consent; or
>
> c) one or more buildings within the same development.
>
> For the purposes of this Extension, Unit(s) shall mean a building or part thereof in respect of which a separate legal title may issue and/or a part designed or intended for separate occupation.
>
> All other terms, conditions and exclusions remain unchanged.

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[167] That is taken from the draft wording in a paper dated 16 August 2006 by Mr Carpenter produced in the Common Bundle.

[289] On 14 June 2007, RiskPool wrote to the NCC advising that the NCC's membership would renew on 30 June 2007 and claims would be subject to a sublimit of $500,000 inclusive of costs for weathertight claims.[168]

[290] The Exclusion in the Protection Wording operative from 30 June 2007 read as follows:

> This Section of the Protection Wording does not cover liability for Claims alleging or arising directly or indirectly out of, or in respect of:
>
> a) the failure of any building or structure to meet or conform to the requirements of the New Zealand Building Code contained in the First Schedule to the Building Regulations 1992 or any applicable New Zealand Standard (or amended or substituted regulation or standard) in relation to leaks, water penetration, weatherproofing, moisture, or any water exist or control system; or
>
> b) Mould, fungi, mildew, rot, decay, gradual; deterioration micro-organisms, bacteria, protozoa or any similar life forms, in building or structure.

[291] The accompanying extension read as follows:

> **Weathertightness Claims**
>
> It is hereby agreed that notwithstanding Exclusion 13 cover by this section of the Protection Wording is extended to indemnify the Member against Claims in respect of:
>
> a) The failure of any building or structure to meet or conform to the requirements of the New Zealand Building Code contained in the First Schedule to the Building Regulations 1992 or any applicable New Zealand Standard (or any amended or substituted regulation or standard) in relation to leaks; water penetration, weatherproofing, moisture, or any water exist or control system; or
>
> b) Mould, fungi, mildew, rot, decay, gradual deterioration, micro-organisms, bacteria, protozoa or any similar or like forms, in any building or structure;
>
> **PROVIDED ALSO THAT** the Fund's liability in respect of this extension shall be limited to the sum specified in the Schedule.
>
> Subject otherwise to the terms, conditions and exclusions of this Section of the Protection Wording.

[292] The Schedule noted the sublimit of $500,000 for weathertightness Claims.[169]

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168 See above at [214].

169 Schedule for Fund Year 30 June 2007 to 30 June 2008 provided a $100,000,000 sublimit for other Claims under the Professional Indemnity limits of indemnity and a $10,000 excess.

[293] On 11 May 2009, RiskPool advised NCC that weathertight Claims "will be excluded from renewal". From 30 June 2009, weathertight Exclusion cl 13(a) was inserted and the sublimit extension was deleted.

[294] The extrinsic evidence which I have found admissible included the following:

(a) The general correspondence and communications including annual reports, which both parties were privy to up to the introduction of the weathertight exclusion (Exclusion cl 13). This includes:

(i) information on the earlier "multi-unit building defect" exclusion which had been introduced for weathertight claims on 30 June 2006;

(ii) information on the weathertight claim exclusion and extension effecting a sublimit of $500,000 inclusive of costs introduced on 30 June 2007; and

(iii) information on the excess of $50,000 applied to WHRS and tribunal claims that were unsettled on 1 February 2008.

(iv) the RiskPool Annual Report for 2008 (year beginning 30 June 2008), including the Scheme Manager's operational overview. This said that:

1. "Weathertightness claims" continued to be made against Councils and there appeared to be no reduction in the numbers of those claims. That was most likely due to the latency of defects, which meant that it could be quite some time before the historic alleged negligence manifested itself as damage and a claim was made. Councils were more often left as the "last man standing" and that there was increased exposure to damages awarded by the Court as a consequence of joint and several liability for judgment

sums.

2. "Good risk management practices continued to cause a reduction in the overall non-weathertightness claims turnout."

3. "Non-weathertight claims are characterised by the relatively short time between the alleged negligence and the claim being made, whereas with building defect claims and weathertightness claims in particular, the damage will lay latent for some years".

(b) The 2009 RiskPool Annual Report, which:

(i) Referred to building defects continuing to dominate the claims experience. It gave an illustration of a claim based on NCC's negligence in issuing a building consent and inspections leading to a fire, which caused considerable damage to a lodge. It went on to say that case "confirms the duty issue beyond weathertightness claims involving commercial properties".

(ii) Commented that, "building defect claims involving weathertightness issues continue to present the biggest liability challenge to Local Government and RiskPool. … that trend, possibly due to economic conditions, has continued to worsen for Local Governments. In addition to that, claimants or plaintiffs are less willing to compromise in order to achieve early settlement, adding to the cost of these claims".

(c) The 2012 claim by the NCC involving weathertight and non-weathertight defects expressly declined by RiskPool on the grounds that it was a weathertight complaint.

[295] The reasonable and properly-informed third party embodied by the court would have been aware of the context in which the scheme was operating and in which the contract and annual renewals were made.[170] That reasonable and knowledgeable person would have known what a notional NCC officer who had been dealing with RiskPool, the indemnity cover and claims, as well as calls, would have known. It is also relevant that the readers of the reports were NCC staff and officials who were dealing with building and construction issues on a day-to-day basis. Based on that, the notional reasonable person would have known that:

(a) Prior to the introduction of the 2006 multi-unit building defects sublimit it was referred to as a sublimit for multi-unit building defect claims in the correspondence preceding its introduction.

(b) That the multi-unit $500,000 sublimit (and subsequent weathertight $500,000 sublimit exclusion clause) used almost identical exclusion wording as had been used in Exclusion cl 13(a). The text of the multi-unit sublimit exclusion clause and the sublimit extension are set out in Attachment 2 to this judgment. The notional reasonable and knowledgeable person would have also been aware of the explanations given in the Scheme manager's report to Members:

(i) that "large developments are too difficult to reserve with any confidence";

(ii) that "[f]rom an underwriting perspective, the method of addressing a combined frequency and severity risk is to exclude cover for that risk"; and

(iii) that, "[a]gain from an underwriting perspective the method of addressing a severity risk without a frequency issue is the sub-limit cover so that worst case scenario reserving can be made with certainty. The balance of the membership represents a low frequency/high severity risk and accordingly are to have

[170] This is the nature of the enquiry suggested by Tipping J in *Vector Gas*, see above at [176].

cover for multi-unit claims sub-limited to $500,000 each claim".[171]

(c) The claims registered with the WHRS carried an excess of $50,000 from 1 February 2006. The notional person would have also been aware that WHRS claims could only be brought for weathertight claims and that other building defect claims in general which were included with weathertight claims could not be determined, except by consent, in the WHRS.

(d) In 2009 when the total weathertight exclusion was introduced, the wording for Exclusion cl 13 was identical to the operative exclusion wording for the previous multi-unit development exclusion, but with the second part which limited the exclusion to multi-unit buildings deleted. Exclusion cl 13 is set out in Attachment 3.

(e) That the removal of the $500,000 sublimit for multi-unit building defects including weathertight claims would leave multi-building defects claims with only $10,000 excess if they were not excluded from cover entirely.

[296] The notional reasonable and knowledgeable person would have also known that RiskPool had offered to continue to manage the administration of Members "weathertight claims for the broader benefit of Members". This suggested the whole claim would be excluded and RiskPool was not offering to manage parts of the claim which might be left after taking out the weathertight defects due to the exclusion.

Analysis on liability

[297] As with an insurance policy, an insured is required to prove that there has been a loss that was proximately caused by the insured peril including that the loss fell

[171] NCC was one of the Councils who were allowed a sublimit rather than a total exclusion.

within the period of risk.[172] Once the insured has done so the burden shifts to the insurer to make its defence, including that the peril was excluded.

[298] The reason for curiosities apparent in the drafting of the Exclusion clauses were explained by Mr Carpenter when he said the drafting was by "cut and paste". That puts pay to the drafting being "deliberately differentiated", and supports Kós P's view that it was "a bit of a mess".[173]

[299] The letters from RiskPool which gave notice of the sublimit and total Exclusion respectively, each included the comment that: "Otherwise all other sublimits, terms and conditions remain unchanged"[174]

[300] Mr Carpenter was asked to comment on that as follows:[175]

> Q There you are giving notice that the board's resolved not to continue providing the earlier limited coverage for weathertightness claims. But your - you were aware of course, you intended that the usual cover for local authorities for building defect claims not weathertightness claims would continue?
>
> A. Yes that's correct.
>
> Q. And that's apparent isn't it from the final paragraph where you said that otherwise all other supplements [sic] [sublimits], terms and conditions remain unchanged?[176]
>
> A. That's correct.

[301] This does not assist NCC. The comment in the letter was in the context of the removal of a sublimit and exclusion but other terms and conditions remaining. Mr Carpenter's response was to a question about building defect claims being covered. They continued to be covered as long as they were not associated with a weathertight claim.

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172 Robert Merkin and Chris Nichol *Colinvaux's Law of Insurance in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2017) at [7.2.1].

173 Reasons Judgment of the Court of Appeal, above n 5, at [33].

174 Letter dated 14 June 2007 from RiskPool to NCC (Brian Hollands) advising of the $500,000 sublimit for multi-unit development claims. Letter dated 11 May 2009 from RiskPool to NCC (Bryan Faulknor) advising of the removal of the sublimit for the weathertight exclusion.

175 Notes of Evidence; cross-examination of Paul Carpenter, p 171, lines 15–27.

176 Supplements should read sublimits.

[302] Nor is there assistance for interpretation to be taken from the wording of the other Exclusions. When the present Exclusion 13 was drafted it was not done with the other Exclusion clauses in mind. However, the present Exclusion cl 13 had its origins in the earlier exclusion for multi-unit building defect claims involving moisture ingress clause. That had been inserted in the Protection Wording operative from the annual indemnity cover renewal commencing 30 June 2007.

[303] That sublimit Exclusion and the Extension as set out in Attachment 2 operated to provide a sublimit of $500,000 for "Multi-Unit Building Defect Claims involving Moisture Ingress".[177] The title indicated that the sublimit of indemnity for multi-unit claims involving breaches of the moisture ingress provisions of the Building Code was an exclusion for "building defect claims". This heading suggested that all building defects were excluded when they were related to a weathertight claim. This meaning was conveyed to NCC in a letter from RiskPool dated 29 June 2006, which said "Regrettably we have to introduce a $500,000 sublimit of *indemnity for multi-unit building defect claims* involving alleged breaches of Clause E2 "Moisture Ingress".[178]

[304] When the Board decided to introduce the present weathertight Exclusion, (and the earlier weathertight Exclusion and Extension sublimit to $500,000), the draftsperson merely deleted the references to multi-unit buildings. At the same time Extension 7, which had provided the sublimit of $500,000 for the multi-unit building defect claims and then the weathertight claims, was deleted. It seems a heading for the present Exclusion cl 13 was not retained.

[305] It is arguable that the removal of the heading which had previously, in the multi-unit building defect exclusion, referred to "building defects", might have been done in order to narrow the application of the present Exclusion cl 13. That interpretation would favour the fact that the new Exclusion 13 did not cover all building defects as it had when the multi-unit (sublimit) Exclusion clause had been in place.

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177 Produced by Mr Carpenter.
178 See above at [285].

[306] However, that interpretation overlooks the fact that otherwise the present clause Exclusion cl 13 was worded identically to its predecessor multi-unit building defect Exclusion clause minus the multi-unit restriction. Therefore the more likely interpretation of the clause is that it was intended to operate as an exclusion in the same way as the multi-unit Exclusion, but to exclude all building defects associated with a weathertight claim, not just those relating to multi-unit developments. That interpretation was consistent with the reasons given by RiskPool, and known to the notional reasonable person, that the introduction of Exclusion cl 13(a) (and its predecessors), was intended to manage RiskPool's risk of significant claims.

[307] If the multi-unit sublimit for building defects associated with weathertight complaints was deleted and replaced by an Exclusion that only excluded cover for weathertight defects including those in multi-unit structures, then the general excess of $10,000 would apply to each claim. The indemnifier's risk would have increased significantly by the removal of the sublimit. Even the WHRS excess was $50,000 and that jurisdiction did not generally deal with multi-unit structures. RiskPool's general exposure would therefore have increased by the removal of the multi-unit sub-limit without replacing it with a similar or wider exclusion. The notional reasonable and knowledgeable person would have known this.

[308] The Annual Reports and correspondence with the NCC had referred to multi-unit claims precipitated by moisture ingress, presenting a high risk to the scheme. The notional reasonable person would have immediately realised that the intention RiskPool would have had in introducing Exclusion cl 13 would not have been to increase risk to the Scheme posed by the building defect claims.

[309] The reasonable and properly informed person that the Court embodies would have the knowledge of the managers and officers as to the background and circumstances surrounding the introduction of the various exclusions and the reasons for which they had been introduced. That person would have read the Protection Wording, the Annual Reports and the communications with RiskPool. That person would have also been aware of the systemic building defect problems in the sector associated with weathertight defects. But even without that knowledge of the sector, that person had sufficient information from the material I have referred to above

to know that the intention behind Exclusion cl 13(a) was to narrow RiskPool's risk and the likelihood of further calls.

[310] In addition to the general communications from RiskPool, NCC gained specific knowledge, in 2012, of the meaning intended by RiskPool for Exclusion cl 13(a).

[311] Mr Faulknor dealt with the 2012 Dalton Street claim, which had been declined on the grounds that the claim was a weathertight claim that included non-weathertight defects. The reason for the declinature was that once there was a weathertight claim all building defects were excluded from cover. Mr Faulknor was also the person named in the correspondence who dealt with RiskPool over the Waterfront claim. Mr Faulknor did not give evidence but when the 2012 correspondence was put before Mr Jack in cross-examination, he read it and agreed that was the message he took from it.

[312] Mr Brian Hollands was the recipient of the 14 June 2007 renewal letter from RiskPool which gave notice of the sublimit on weathertight claims. Mr Hollands appears to have been the "Brian" referred to by Mr Jack when he wrote a note on the letter of 11 May 2009 from RiskPool to NCC advising of the total exclusion. Mr Jack wrote on the NCC copy of the letter "Judy, I need Brian to explain exactly what this means…". Mr Jack was unable to recall whether he spoke to Mr Hollands or whether he received the advice sought in the note.

[313] The NCC had been notified in 2012 that a claim in negligence against the NCC, which involved Dalton Street, included non-weathertight defects such as "matters of health and safety", such as "fire stopping", "fire safety", "slab movement" and "structural defects as well as water penetration and leaks" would not be covered. RiskPool had responded to the notification saying that the weathertight Exclusion applied to exclude the entire claim.

[314] Even if the "RiskPool meaning" was not the meaning known and agreed to by NCC at the time of the 2009 renewal when Exclusion cl 13 was added, the NCC definitely knew the meaning ascribed to Exclusion cl 13 by RiskPool following NCC's

unsuccessful December 2012 claim. The NCC then had had the opportunity to refuse to renew for the 2013/2014 years (and the previous years). This predated the Waterfront claim notified in October 2014, so the NCC cannot now say that it was the objective intention that only weathertight complaints were excluded.

[315] Quite apart from anything NCC was required to act in good faith towards the Scheme.[179] The obligation of good faith requires an insured to disclose anything material to the insurer that may affect risk.[180] It extends to anything that would be taken into account by the hypothetical prudent insurer in deciding whether to accept the risk and extend cover and, if so, at what premium. This duty arises on formation of the contract and on any renewal of a contract. That duty is strict and objective. It is a positive duty to disclose.[181] A non-disclosure gives grounds to avoid the contract.

[316] The NCC had a duty to disclose that it did not intend to accept "RiskPool's meaning" when it renewed its indemnity contract following the 2012 claim. With the knowledge it had by that stage it could not quietly bide its time waiting for a better claim based on an interpretation of Exclusion cl 13 which was contrary to RiskPool's asserted meaning of the extent of the cover or in other words, the amount of the exclusion.

[317] If RiskPool had known at the time of renewal in 2014/2015 that NCC intended to wait and challenge the meaning conveyed by RiskPool it is likely RiskPool would have reassessed the risk of covering the NCC and it may have refused to renew or repriced the risk and so increased the contribution required from the NCC in order to renew the indemnity cover. The NCC could have then chosen to renew on the meaning ascribed, or not to renew and to insure elsewhere. NCC could not "keep its powder dry" for a better case.

[318] RiskPool relied upon Thomas J's comments in order to assert that a "speaking silence" approach could be taken here.[182] This is the notion that the Court

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179 At [16.2.2] of the Deed of Trust.
180 Chris Boys and Paul Michalik *Insurance Claims in New Zealand* (LexisNexis, Wellington, 2015) at 106.
181 At 107.
182 *Gibbons,* above n 109, at [133] per Thomas J.

should take an adverse inference from the fact that the NCC had failed to actively dispute RiskPool's interpretation of the meaning of Exclusion cl 13(a) when it had the opportunity to do so. In particular, it failed to take the opportunity to clarify the meaning when RiskPool declined the 2012 claim on the same basis generally that it declined the Waterfront claim.

[319] Whether the "speaking silence" approach will be adopted by the Supreme Court when it considers subsequent conduct in *Bathurst* is a moot point. However, in view of the good faith obligation, the NCC had a positive duty to advise RiskPool it did not accept the basis of the cover with the RiskPool meaning attached to Exclusion cl 13(a).

[320] This is not a true case of post contractual or subsequent conduct evidence. The evidence establishes the information was known to both parties and on that basis the "mutual intention" of the parties as to the meaning of Exclusion cl 13 was established at the indemnity contract renewals, following the 2012 claim, but before the Waterfront claim.

[321] The NCC was on express notice by 2012 that RiskPool's intention was that Exclusion cl 13 would exclude all building defects involving a weathertight defect. The contract renewed annually so the NCC accepted the Protection Wording at the next renewal with that knowledge and must be taken to have accepted the wording on the basis of the RiskPool meaning.

[322] It is well-established law that if a party conducts itself such that a reasonable person would believe that the party was assenting to the terms proposed by the other party, and the other party upon that belief enters into the contract, the party conducting itself will be bound as if that party had intended to agree to the other party's terms.[183] The test is objective and relates to what a reasonable person in the position of the parties would have believed.[184] It is irrelevant that one party to the contract secretly intended that the words should bear a different meaning.[185]

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183 *Smith v Hughes* [1871] LR 6 QB 597 at 607 per Blackburn J.
184 *Firm PI 1 Ltd*, above n 33, at [60].
185 *Airways Corporation of New Zealand Ltd v Geyserland Airways Ltd* [1996] 1 NZLR 116 (HC) at 126.

[323] The admissible extrinsic evidence supports a mutual intention that reflects RiskPool's meaning of Exclusion cl 13.

[324] Even without the 2012 claim evidence, the extrinsic evidence supports RiskPool's meaning. As the Court of Appeal noted there was respectable authority confirming that meaning which I have found was the meaning taken from the text. The admissible extrinsic evidence I have outlined above would have conveyed to the notional reasonable person that Exclusion cl 13(a) must have been intended to cover all non-weathertight defects in a weathertight claim.

[325] NCC argued that RiskPool intended to offer better cover than available in the commercial market. There is little in the way of evidence as to how the commercial market would have treated NCC. It seems RiskPool was offering better cover than might have been available at least until it was no longer able to do so. It may well have continued to do so for less "risky" councils.

[326] NCC's reliance on the *Nautilus* case takes the matter no further.[186] The issue before the court here was not argued there. The evidence therefore was not directed to that point.

Contra proferentum

[327] NCC said that the *contra proferentum* doctrine should be invoked so that Exclusion cl 13(a) is interpreted against RiskPool. That doctrine applies to provide for the interpretation of an Exclusion clause against the person who drafted it. However, it applies only in cases of genuine ambiguity as to the meaning of the clause. In this case the literal meaning of the clause is clear in context. There is no ambiguity here. In any event, if there had been, the extrinsic evidence would have resolved any ambiguity.

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[186] See above, at [108].

Commercial reality

[328] NCC also argued that the application of the RiskPool meaning would be commercially unrealistic or absurd, because if the exclusion extended to all building defects, there would be virtually no building defect cover.

[329] However, even if that were the case (which it was not) that does not derogate from the meaning of Exclusion cl 13. Every day people negotiate contracts of insurance and indemnity on terms that balance risk and cost. One way of managing risk is by excluding liability for claims that are likely to involve high costs. This is often done by identifying a factor that is common to many of the high risk claims. For RiskPool, a significant number of the high risk (high value) claims had a weathertight complaint as a common factor. That was a trigger for discovery of the other latent defects that were caused by the systemic failures in the industry.[187] RiskPool had managed the risk by various means before it introduced the total weathertight Exclusion. For instance, it identified building defects in multi-unit buildings involving weathertight claims as high risk so introduced a sublimit for those. That was insufficient to manage the risk, therefore, it excluded all building defects in moisture ingress claims, whether involving multi-unit developments or otherwise, in a further attempt to manage that risk. Members of the Scheme generally benefitted from that Exclusion by lower costs and so lower calls. It followed that individual members involved in claims, such as the Waterfront claim, might not benefit.

[330] The indemnity cover remained for other building defect claims (not involving weathertight complaints), and other liabilities such as negligence in building control claims, resource management matters, Land Information Memoranda (LIMs) and defamation, for instance.[188]

[331] RiskPool submitted that in order for a commercial absurdity argument to succeed, despite the accepted or prescribed meanings of the words actually used, the proponent must show that the proposed literal interpretation is so apparently irrational that it could not possibly reflect the parties' common intention. RiskPool says this

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[187] The Annual Report commented on these factors: see above at [218] and [219].
[188] Either under the public or professional indemnity provisions in the Protection Wording.

requires an "strong case" to establish that "something must have gone wrong with the language".[189]

[332] RiskPool also noted that "commercial absurdity tends to lie in the eye of the beholder" and that Judges may not be qualified by background and experience to make that assessment.[190] It pointed out that the final terms of a commercial contract could be influenced by a range of influencers including accommodating the parties' varying interests. The Court may not easily identify or understand the reasons underlying these compromises.[191]

[333] In the present context I accept RiskPool's submissions. There is no evidence to support a finding of commercial absurdity or unreality if the RiskPool meaning is applied here. The officers of the Council who had been dealing with the indemnity cover and liaising with RiskPool on the management of the NCC cover from the time it became a Member and who had dealt with RiskPool over claims (including the 2012 claim) and calls, and read the Annual Reports and correspondence, concerning the introduction and background to Exclusion cl 13(a) did not give evidence. Mr Faulknor, who was dealing with the indemnity cover and who dealt with the 2012 claim and the present Waterfront claim, would have been very familiar with the background and context. Mr Jack did not join the NCC until September 2013, well after the 2012 claim was declined. Mr Jack also said that he had not read the Protection Wording nor looked at the history. He had just read the correspondence. He relied on Mr Faulknor and others who had been dealing with the indemnity cover and who had knowledge of the workings of the Scheme and its history for advice. There is little evidence about the market in general except the information on the reinsurance which I have excluded.

[334] Any assumption that "common sense" dictated that Exclusion cl 13(a) could not have the RiskPool meaning because the result would be commercially unrealistic or absurd would be speculation not grounded on proper evidence. Nor would it be appropriate to resort to "judicial notice" to find commercial absurdity in this case.

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189 *Firm PI 1 Ltd*, above n 33, at [88] per McGrath, Glazebrook and Arnold JJ.
190 At [90] per McGrath, Glazebrook and Arnold JJ.
191 At [92] per McGrath, Glazebrook and Arnold JJ.

Judicial notice is an exception to the general rule that cases must be decided on the evidence presented by the parties in open court. It involves the acceptance of a factor or state of affairs without proof. That notice may be express judicial notice of specific facts of the notorious and indisputable variety or, as is argued by the NCC here, notice that could be based on common sense or is contextual in that it strives to provide context, background or a frame of reference in making case-specific findings of fact. It is appropriate to use common sense and human experience to, for example, draw inferences from circumstantial evidence. However, it is not appropriate to introduce a new consideration, such as commercial absurdity, which does not arise from the evidence.[192]

The 2015 fire defect notification

[335] As I noted above the Waterfront plaintiffs' fire defect issues which were specified in 2015 are in a different category to the other complaints in the Waterfront plaintiffs' claims. They were not listed in the 2014 Waterfront plaintiffs' claim.

[336] On 7 July 2015 the NCC emailed RiskPool saying that it had received further information in relation to the Waterfront Apartments claim. It said fire defect issues had been included, which were not part of the original claim and did not appear to relate to leaks, water penetration, weather proofing or moisture" so Exclusion cl 13(a) would not apply to the fire defects. The response from RiskPool on the same day was that if one or more weathertight defects existed all building defects were excluded.

[337] Fire compliance issues had not been listed in the first Statement of Claim, however by the time the Waterfront plaintiffs' claim was made in 2014, RiskPool had conveyed the meaning of Exclusion cl 13(a) as including all complaints discovered as a result of the Waterfront claim.

[338] The fire defects might be said to be so removed from the original notification that they formed a new claim. The fire compliance issues were:

(a) not referred to in the October 2014 Statement of Claim;

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[192] Recent warnings against ungrounded common-sense assumptions may be found in the Court of Appeal for Ontario decisions in *R v JC* 2021 ONCA 131 and *R v JM* 2021 ONCA 150.

(b) not related to weathertightness issues; and

(c) notified seven months or more after the original Claim was made.

[339] The meaning advanced by RiskPool of the Exclusion cl 13 was reiterated to NCC in 2012. As I commented above, the wording of the 2012 letter from RiskPool setting out RiskPool's meaning was not as well-crafted as it might have been but nevertheless it was sufficiently clear to indicate the Exclusion operated to exclude all non-weathertight defects associated with a weathertight claim. It follows that the July 2015 notification were defects originating from the same initial "Claim". The common factor, which operated to exclude cover, remained the weathertight element. There was no new cause of action nor claim.

[340] NCC was on notice as to the meaning of the Exclusion. I also note that by the time it notified the July 2015 fire compliance defects RiskPool had also renewed its membership for the 2014/2015 year with knowledge of the rejection of the claim in October 2014 and that the "…Council has not had cover in place for any property suffering any degree of moisture ingress defects since 30 June 2009".

Conclusion

[341] I conclude that as a matter of interpretation on its face, Exclusion cl 13 excludes cover for weathertight and non-weathertight complaints where a weathertight claim or complaint is made.

[342] The Court of Appeal noted that RiskPool's meaning had "the rather heady consequence" pointed out by Mr McLellan that a claim based upon structural defect (which would be covered) suddenly becomes uncovered because the third party plaintiff tips a minor weathertightness complaint (to use a neutral term) into the Claim (to use a defined term). Was that what the parties intended it asked?

[343] I conclude that was in fact the mutual intention of the parties. The reasonable person with the background knowledge I have described above would have understood the Exclusion to have the RiskPool meaning. *De minimis* would operate to exclude extreme examples.

[344] The commercial reality, which would have been understood by the notional reasonable person, was that RiskPool could not continue to make significant losses due to building defects associated with weathertightness claims. These claims involved latent defects, discovered many years after the building, they were unpredictable and were likely to involve building defects beyond repair of the weathertight issues.

[345] RiskPool has discharged its onus and established that Exclusion cl 13 excludes all building defects involved in the weathertight claim in this case. The RiskPool meaning was conveyed to NCC through communications with it, which would have notified the notional reasonable and knowledgeable person embodied by the court of the meaning of Exclusion cl 13(a) and the implications of the exclusions, sublimits and excesses. In addition, NCC was specifically advised of the meaning of Exclusion cl 13 in the correspondence over the 2012 claim.

[346] RiskPool has no liability to NCC in breach of contract based on its failure to indemnify the NCC for any part of the claim made against it and settled with the Waterfront plaintiffs.

[347] If I am wrong about the meaning of Exclusion cl 13(a), the issue of liability will arise, which I will now consider.

The approach if RiskPool had been liable

[348] I deal only briefly with the remaining issues as they are dependent on the success of the NCC's contention that Exclusion cl 13 does not exclude cover for non-weathertight complaints where they are included with weathertight complaints in a claim.

[349] Hinton J in the High Court, in dismissing the strike out application, was attracted to the NCC meaning. Her Honour concluded that the various qualifying Building Code breaches "each with a distinct quantum, will need to be established by the NCC".[193] The Court would then have a look at the real nature of the claims.

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[193] High Court Strike Out Judgment, above n 21, at [32].

[350] However, the first question is whether the amount paid by NCC under the settlement falls within the scope of the general indemnity cover provision in the Protection Wording, which provides the following indemnity:

> To indemnify the Member …against Claims first made against the Member and reported to the Fund during the period ... for breach of Professional Duty arising out of any negligent act…committed or alleged to have been committed on the part of the Member including:
>
> a) All costs and expenses incurred with the written consent of the Fund in the defence of settlement of any such Claim;

[351] RiskPool conceded that a judgment on the claim was not required and a negotiated settlement would qualify for cover. That appears to be the generally agreed position in the case law.[194] Here the general indemnity cover does not require "legal liability" to be established.

[352] As the settlement was for a global sum and the quantum was not stipulated for the particular heads of damage or defects as might be expected in a court judgment, an apportionment to exclude the parts of the claim or the defects attributable to weathertight and mixed defects on the one hand, and non-weathertight defects on the other, would be necessary. This is a hypothetical question so again, I deal with only briefly.

[353] The authorities support NCC's argument that it is entitled to rely on the fact that it reached a reasonable settlement at the time the Waterfront proceedings were settled. NCC says once it established cover and that the settlement was reasonable then it was for RiskPool to prove what was excluded from cover.

[354] In *Royal Insurance Fire and General (New Zealand) Ltd v Mainfreight Transport Ltd*,[195] the Court of Appeal was faced with a settlement that had been reached by an insured following the insurer's refusal to accept the claim. The Court

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194 For instance see: *Arrow International Ltd v QBE Insurance (International) Ltd* [2009] 3 NZLR 650 (HC) ["*Arrow International* (HC)"] at [93]–[95], which was upheld on appeal in *Arrow International Ltd v QBE Insurance (International) Ltd* [2010] NZCA 408, [2010] 3 NZLR 857; *Auckland District Law Society v D A Constable Syndicate 386* [2009] 1 NZLR 677 (HC) ["*D A Constable* (HC)"]; and *Royal Insurance Fire & General (New Zealand) Ltd v Mainfreight Transport Ltd* (1993) 7 ANZ Insurance Cases 61-172 (CA) ["*Royal Insurance*"].

195 *Royal Insurance Fire*, above n 194, at 77,972.

said the quantum of the settlement between the insured and a third party of liability, must be accepted by the insurer, subject only to an investigation as to whether the insured acted reasonably in settling the claim.[196]

[355] In rejecting the insurer's argument that the insured was required to prove quantum the Court held:[197]

> The very impracticality of such an approach demands its rejection. It would mean that where the insurer has breached the contract by denying liability the insured could never settle and would need to have liability and quantum determined before claiming against the insurer.

[356] The Court then referred to earlier well-established authority that:[198]

> … the correct approach must prevent the insurer who has repudiated liability from contending that the insurer was not legally liable to the extent of the amount of the settlement so long as the insured acted reasonably in settling. Of course reasonableness must encompass the good faith required of an insurance contract.

[357] The Court went on to say that the enquiry should be whether the insured acted reasonably in settling. The enquiry was not "whether with the benefit of hindsight and further information subsequently obtained" the liability could have been less.[199]

[358] The question of reasonableness is a question of fact. In *Royal Insurance Fire and General* the insured acted on the advice of an experienced assessor and was entitled to act on that advice even if it was later shown to be deficient.[200] The Court noted that the insurer, in declining the claim, had acted in a manner indicating it repudiated the contract, which gave rise to an anticipatory breach of contract. The measure of damages for such breach was the amount paid in settlement together with costs incurred for which the insurer would have been liable if consent had been given.

[359] Whether the insured acted reasonably is to be judged at the time settlement was arrived at, not at a later time with the benefit of additional evidence.[201]

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196 *Royal Insurance Fire*, above n 194, at 77,976.
197 At 77,975.
198 At 77,976.
199 At 77,976.
200 At 77,972.
201 At 77,975.

[360] More recently the Court of Appeal endorsed that approach in *D A Constable Syndicate 386 v Auckland District Law Society* (*D A Constable*).[202] In that case the Court of Appeal rejected the argument that an insurer who refused cover could subsequently challenge the existence and scope of an insured's legal liability when the insured had settled on reasonable terms. As in *Royal Insurance Fire and General*,[203] the Court said "that would be to allow the insurer (in effect) to retract its own breach of contract".[204] An insured who had been denied cover in breach of contract must act reasonably and was in effect acting as "a prudent uninsured".[205] Reasonableness required an objective assessment. Reasonableness was not a distinct element for proof under the insuring clause but rather it was part of the general obligation of good faith owed by the parties to the insurance contract.[206]

[361] NCC says that it sought, obtained and acted in reliance on expert technical and legal advice. The advice was given by professionals with extensive experience in building defect litigation. It called evidence in that respect from Ms Rice, who was retained to conduct the proceedings and undertake negotiations with the Waterfront plaintiffs on its behalf. Mr Jack, NCC's CEO, who authorised to settle, gave evidence as to the advice it received before settlement and how the mediation had proceeded.

[362] The plaintiff accepts that it is not entitled to be indemnified for the portion of the settlement attributable to the weathertight defects. It also accepted that it is well-established that if a loss had two or more causes of which one relates to weathertight issues, then the entire losses are excluded from the scope of indemnity.[207]

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202 *D A Constable Syndicate* (CA), above n 32, at [78]–[79].
203 *Royal Insurance Fire*, above n 194, at 77,972.
204 *D A Constable Syndicate* (CA), above n 32, at [78]–[79].
205 See for example: *CGU Insurance Ltd v AMP Financial Planning Pty Ltd* [2007] HCA 36, (2007) 237 ALR 420 at [120]. See also: *Body Corporate 90319 v Starline Holdings Ltd* HC Wellington CIV-2007-485-74, 4 November 2008; and *Arrow International Ltd v QBE Insurance (International) Ltd* [2010] NZCA 408 ["*Arrow International* (CA)"].
206 *Royal Insurance Fire*, above n 194, at 77,975.
207 Relying on *Wayne Tank,* above n 70.

[363] The NCC submitted the quantum assessment was properly approached as follows:

(a) The reliance by RiskPool on Exclusion cl 13(a) to exclude liability for more weathertight defects was wrong therefore that refusal constituted repudiation. As the Exclusion of claims properly payable under the "policy of insurance" goes to the essence of the contract, that refusal constituted repudiation.[208]

(b) RiskPool had therefore repudiated its contractual obligation to the NCC by indicating it refused to provide cover for a claim. It had repudiated liability in breach of the policy terms rather than repudiating the whole policy.[209]

(c) An unequivocal denial of liability with knowledge that the insured could incur costs is repudiation of an obligation. A refusal to indemnify goes beyond expressing a particular view of the contract.[210]

(d) Once repudiation had occurred, the insurer (RiskPool) who had repudiated cannot later contend that the insured was not legally liable to the extent of the settlement amount. The question is only whether the insured acted reasonably.[211] The scope of that reasonableness obligation is the equivalent obligation as imposed on a prudent "uninsured".[212]

(e) The NCC acted as a prudent "uninsured" in achieving the settlement. The approach remains the same whether the underlying claim has been settled rather than determined by a judge. To receive the benefit of an exclusion RiskPool must identify and prove the quantum of the

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208 Relying on *D A Constable Syndicate* (HC), above n 194, at [150].
209 Relying on *D A Constable Syndicate* (CA), above n 32.
210 *D A Constable Syndicate* (HC), above n 194, at [149]–[151].
211 *Royal Insurance Fire*, above n 194, at 77,975.
212 *Body Corporate 90319 v Starline Holdings Ltd* HC Wellington CIV-2007-485-74, 4 November 2008; *Arrow International Ltd* (CA), above n 205.

excluded part, notwithstanding that this may be difficult in the case of a global settlement.[213]

(f) As the settlement figure was a global sum an apportionment to exclude the portion attributable to weathertightness defects is necessary.[214] This requires a defect by defect analysis (in this case being weathertightness, structural and fire defects) to ascertain and quantify the loss caused by each defect and whether it is excluded by the weathertightness exclusion.[215]

(g) Conceptually the same approach is applicable to RiskPool's liability for the other types of loss claimed in the Waterfront proceedings (general damages, consequential loss and expenses), which were settled under the Waterfront settlement agreement. If the NCC acted reasonably in settling these aspects of the Waterfront proceedings RiskPool must prove the portion of these losses attributable to the weathertightness defects.

[364] RiskPool's position was as follows:

(a) The claim by the NCC was for indemnity pursuant to the Protection Wording. It was not damages for breach of contract. Therefore:

(i) The insuring clause applied.[216]

(ii) RiskPool had to prove which defects fell under Exclusion cl 13(a).

(iii) The NCC had to prove the amount for which it was entitled to be indemnified.

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213 Derrington and Ashton *The Law of Liability Insurance*, above n 147, at [10–28].
214 *Arrow International Ltd* (CA), above n 205.
215 *Body Corporate 326421 v Auckland Council* [2013] NZHC 753.
216 These were numbered.

(iv) The NCC had to prove its actual liability to the weathertight plaintiffs as if there was no settlement. In addition, it had to prove how much the established "at trial liability" for weathertight defects would have increased because of the non-weathertight defects to obtain the calculated proportionate increase to the global settlement sum.

(v) The Court's inquiry must be into the NCC's actual liability to the Waterfront Plaintiffs and not just into the reasonableness of the NCC's decision to settle for the global sum.

(vi) A key question is what would have been NCC's total liability.

[365] RiskPool said it accepted that the settlement was reasonable in relation to the defects 1–12 (the weathertight defects) but did not accept the reasonableness in relation to other defects.[217] It said NCC had to prove the quantum of the settlement sum that would have reasonably represented its legal liability to the Waterfront plaintiffs in respect of the exclusively non-weathertight defects.

[366] On the other hand, the Council said that as RiskPool had repudiated the claim, it had the burden of proof once NCC had established the settlement was reasonable. In response to that argument, Mr Ring said that repudiation had not been pleaded and in any event there had been no acceptance of any breach to give rise to a claim based on repudiation.

Repudiation

[367] The NCC's argument based on repudiation is advanced due to the *D A Constable* judgment.[218] In that case, the High Court was required to consider whether the insurer (DAC) had declined cover under the relevant policies of insurance. Following receipt of the letter declining cover the insured had settled the third party

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[217] In its amended statement of claim it pleaded that the Council was required to prove that the settlement sum was a reasonable amount for the Council to have paid to settle its legal liability to the Waterfront plaintiffs in respect of defects number 15 to 22.

[218] *D A Constable* (HC), above n 194, at [26].

proceedings. The Court held that the policy terms did cover the claim.[219] Cooper J found that not only had there been a breach of the contract with the insured by the underwriter but it had repudiated the contract by wrongly declining the cover. As a consequence, the policy conditions no longer applied and the insured did not have to comply with a condition of the policy, which would have required it to obtain the consent of the underwriter to settle.

[368] In *D A Constable*, following notification by the insured, the underwriter had written to the insured saying that based on legal advice (which it provided to the insured) the policy did not respond to the third-party claim. The underwriter invited the insured to comment, to advise of any change in circumstances requiring a review, and to keep it advised of developments. The evidence of the underwriter was that the insured had subsequently decided it did not want the underwriter to assume the part of the proceedings that the underwriter had considered might have been covered. The Court was of the view that this limited offer of assistance by the underwriter was not very helpful as the various parts were inextricably linked.

[369] The Judge rejected DAC's argument that the insured had failed to give it the opportunity to more formally consider and protect its position so was disadvantaged. It said that if it had taken over the claims it would have brought them to a swift end so saving much of the cost.[220]

[370] The Judge's view was that the letters declining cover gave a plain indication by the underwriter that there was no cover under the policy. The Judge found that the underwriter's view was wrong.[221] His Honour said that standing back and looking at the letters and the content of the meeting at which the underwriter said it had offered to participate it was "reasonably plain that the underwriters were declining cover under the policy".[222] The conduct of the underwriter never wavered with respect to potential liability and it took no steps itself whether to defend "or otherwise become involved in the conduct of the litigation". The Judge went on to say that it did not seem right

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219 *D A Constable* (HC), above n 194, at [102].
220 At [138].
221 At [142].
222 At [145].

that the underwriter could now say that it was up to the insured to pursue it for cover under the policy.[223]

[371] The underwriter had legal advice upon which it relied to decline the claim, nevertheless, the Judge found the declinature amounted to repudiation.[224] He reached this conclusion despite the fact that there was a suggestion that the insured had received similar advice at the time.[225] The Judge found that insurer had taken no steps to involve itself or otherwise become involved in the proceedings. His Honour referred to the provisions of the Contractual Remedies Act 1979.[226]

[372] On appeal the Court of Appeal noted that DAC had argued that there was no repudiation because there had been no explicit rejection of liability.[227] However, the Judge had said that the underwriter "faced with valid claims for indemnity under the contract, … indicated that no such cover was available … This was not a case in which it could be said that the underwriter had continued to perform its obligation. On the contrary, it took no steps to do so".[228] His Honour had noted that a wrong decision by an underwriter to exclude claims properly payable under a policy of insurance goes to the very essence of the contract from the insured's point of view.[229] Therefore the effective refusal by the underwriter to comply with its contractual obligations amounted to repudiation which relieved the insured of its obligation to seek the consent of the underwriter to settlement of the third party litigation.[230]

[373] The Court of Appeal, upholding the High Court judgment in *DA Constable*, had relied on the approach taken by it in *Royal Insurance Fire and General*.[231] It accepted the proposition that, provided the insured had acted reasonably in settling the claim, the measure of damages for the breach was the amount paid in settlement together with the costs incurred for which the insurer would have been liable had its consent been obtained. The Court rejected the notion that the insured could not settle

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223 *D A Constable* (HC), above n 194, at [145].
224 At [144].
225 At [136].
226 Now replaced by the Commercial and Contract Law Act 2017 in essentially the same terms.
227 *D A Constable Syndicate* (CA), above n 32, at [75].
228 *D A Constable Syndicate* (HC), above n 194, at [149].
229 At [151].
230 At [156] and [157].
231 *Royal Insurance Fire and General (NZ) Ltd v Mainfreight Transport Ltd* [1993] 7 ANZ INS CAS 61-172 (CA).

and was required to have liability and quantum determined by a Court before claiming against the insurer.[232] It concluded that having repudiated liability in breach of contract the underwriter could not later challenge a settlement arrived at by the insured when it was acting reasonably.[233] Both parties remained bound by the terms of the policy in relation to any other claims or potential claims.[234]

[374] Mr Ring pointed out the Court of Appeal's criticisms of the High Court's decision in *D A Constable*. It had said:

> [83] There is some debate about the concept of repudiation and in particular how the approach taken in relation to insurance contracts in cases like the present sits with repudiation in contract law generally. For example, Neil Campbell in an article on the High Court decision in this case expresses agreement with the outcome but questions the reasoning of the Judge on the effect of condition 2:[235]
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> > Certainly the insurer appears to have repudiated (assuming, of course, that Cooper J's decision on cover is correct), but there is no suggestion that the ADLS ever accepted that repudiation by electing to cancel the policy. Without cancellation of the contract, both parties remained obliged to perform their obligations under the policy; see Burrows, Finn & Todd Law of Contract in New Zealand (3rd ed, 2007) para 18.3.1.

[375] Mr Ring says *D A Constable* is out of date. It predated the Supreme Court decision in *Kumar v Station Properties Ltd* (*Kumar*),[236] now the leading New Zealand case on repudiation. He also pointed out a number of more recent Australian authorities which are inconsistent with *D A Constable*. In addition, RiskPool argued that the indemnity here was a contract for insurance not a contract of insurance as had been the case in *D A Constable.* In that case, the underwriter was obliged to indemnify the insured's legal liability to pay for claims arising out of the relevant "negligent act, error or omission". On the other hand, in a contract of insurance RiskPool's obligation was to properly consider the NCC's application for indemnity.

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232 *D A Constable Syndicate* (CA), above n 32, at [79].
233 At [79].
234 At [84].
235 Neil Campbell Insurance Law Review [2009] NZ L Rev 725 at 740.
236 *Kumar v Station Properties Ltd (in liq and in rec)* [2015] NZSC 34, [2016] 1 NZLR 99.

How does the global settlement figure get apportioned?

[376] The distinction between contract for insurance and contract of insurance does not affect RiskPool's liability for damages. It had agreed to consider the claim and while it may have retained a discretion that consideration was to be undertaken in accordance with the Protection Wording. If it was wrong about cover, it declined the claim wrongfully.

[377] *Mainfreight*[237] is authority for the proposition that if an insurer wrongfully declines liability and leaves the insured to act as a "prudent uninsured" the insurer has breached the essence of the contract for indemnity which gives rise to a right to cancel for repudiation. However, if cancellation does not occur the insured may nevertheless claim damages based on the denial of liability as it amounts to a serious breach of contract, anticipatory or otherwise.[238] This may be described as a "repudiatory" breach in general terms. It is not relevant, in this case, whether repudiation was accepted or not. Provided that the insured acted reasonably in settling the claim, the measure of damages is the amount paid in settlement together with costs.[239] The fact that in this case it was a contract for insurance, and that RiskPool's obligation was to properly consider the claim does not change the availability of damages for breach. Once RiskPool had wrongfully declined the claim, for the purposes of establishing quantum of a global settlement, the approach begins with consideration of whether it was a reasonable settlement insofar as is relevant to the part of the third party claim which should have been covered.

[378] It is not necessary to prove that the repudiation was accepted in order for the insured to be able to rely on a reasonable settlement (as at the time it was entered into) to establish the quantum of the loss. Nor is it necessary to plead that the breach gave rise to a right to repudiate.[240] In *D A Constable* the Court noted that it was the seriousness of the breach which gave rise to the right to repudiate. The breach itself

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237 *Royal Insurance Fire and General*, above n 194, at 77,974.

238 At 77,975. It is not necessary to consider the issue of damages for anticipatory breach were there has been no acceptance of repudiation as the breach could also be regarded as an actual breach.

239 *Royal Insurance Fire and General*, above n 194, at 77,975.

240 A breach giving rise to a right to repudiate allows the innocent party to wait until performance is due and sue for damages: (Chitty on Contract. Vol 1, 23rd Ed Sweet + Maxwell 2018 London at [24-022].

was properly pleaded here and the circumstances of the breach and its effect were made clear to RiskPool. RiskPool was on notice. It was not necessary for NCC to plead that it relied on the breach to give rise, by operation of law, to its ability to rely on the reasonableness of the settlement to establish the loss. RiskPool does not say it was taken by surprise by NCC's approach.

[379] It is not necessary to further consider *D A Constable*, except to note that it was important for the insured in *D A Constable* to establish repudiation had actually occurred so that the conditions of the contract, one of which was to obtain consent to the incurring of costs, were not binding on the insured. In this case RiskPool consented to the incurring of costs by suggesting that the NCC take steps to defend the claim and instruct a lawyer. Therefore, it is not necessary to establish repudiation.[241]

[380] The next step is to divide the undivided global settlement figure between exclusively non-weathertight defects and defects involving weathertight or mixed issues.

[381] In *Enterprise Oil Ltd v Strand Insurance Co Ltd* ,[242] a global settlement figure had been agreed covering a number of causes of action and heads of damages which included consequential losses.[243] A number of defendants had contributed to the settlement figure including Enterprise Oil. The defendants decided amongst themselves what share they should contribute to the global settlement.

[382] Enterprise Oil was liable only for some of the causes of action compromised in the settlement. The Court there said it had to look at the actual liability of Enterprise Oil in order to ascertain whether the liability did fall within the claims cover. To do that it conducted an analysis of the liability.

[383] *Enterprise Oil* did not follow the earlier English decision of *Lumberman Mutual Casualty Co* (*Lumberman*).[244] That had held that the insured was under no

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241 In much the same way as consent was established in *Arrow International Ltd v QBE Insurance*. See below at [386].

242 *Enterprise Oil Ltd v Strand Insurance Co Ltd* [2006] EWHC 58 (Comm), [2006] 1 Lloyd's Rep 500 ["*Enterprise Oil Ltd*"].

243 *Enterprise Oil Ltd*, above n 242, at [15].

244 *Lumberman's Mutual Casualty Co v Bovis Lend Lease Ltd* [2005] 1 Lloyd's Rep 494.

liability to contribute where cover would have been available for some of the claims settled but the heads of claim were not identified and damages apportioned in the settlement agreement.[245]

[384] The Judge in *Enterprise Oil* was required to determine what the liability of Enterprise Oil would have been under Texas law. The Court completed that assessment and was satisfied that there would have been actual liability established.[246] The fact that a global settlement had been reached that partly included compromising liability for which Enterprise Oil was not responsible, did not preclude recovery by it from the insurer. The Judge was satisfied that on the basis of the expert evidence that the settlement figure was in excess of what would have been a reasonable settlement for the insured's liability.

[385] The Court in *Enterprise Oil* concluded that an insurer always has a right to challenge whether the insured's right to indemnity under a policy has been established.[247] It had a right to challenge quantum and whether, on the facts of the case, the insured liability was within the scope of the liability policy.

[386] In *Arrow International Ltd v QBE Insurance*,[248] MacKenzie J would have been required to apportion a settlement figure between the insured and a third party if the insured had established liability against the underwriter – which it had not. The Judge did not deal specifically with whether or not repudiation had been established despite the fact that it had been pleaded by the insurer in that case.[249] The Judge followed *Enterprise Oil Ltd* and not *Lumberman* in that he accepted that despite an unapportioned global settlement figure the underwriter could be liable for that part of the settlement that could be attributed to the insured liability.

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245 *Enterprise Oil Ltd*, above n 242, at [150]–[151].
246 At [143].
247 At [167].
248 *Arrow International* (HC), above n 194.
249 The Judge did not need to consider the issue of repudiation as, although he had granted leave to amend the statement of claim to plead repudiation six months before the hearing, the claim was withdrawn by counsel for Arrow in the course of opening. The reasons for that course of action are obscure. *Arrow International Ltd* (CA), above n 205, at [93]; and *Enterprise Oil Ltd*, above n 242.

[387] MacKenzie J dealt with the apportionment on a hypothetical basis. The Judge had determined that the insurer was not liable as the policy was not in place at the time the loss was found to have occurred.

[388] MacKenzie J went on to consider what the apportionment of the global figure would have been in order to attribute a figure for the excluded liability. The Judge was satisfied on the evidence that various items had been discounted by the plaintiff in the settlement negotiations based on the plaintiff's assessment of the likelihood of success on these items. The Judge noted the exemplary and stigma damages would have remained on the table if settlement had not been achieved[250] but he concluded that for settlement purposes the plaintiffs entirely discounted those parts of the claim therefore it would have been artificial to attribute any part of the settlement to those items.[251] The Judge concluded those items could be deducted from the total settlement sum and then an apportionment exercise would be carried out between the repair costs not payable by the underwriter and those not excluded under an exclusion clause for defective products, had the claim not failed entirely.

[389] MacKenzie J approached the apportionment by determining what would have been a reasonable apportionment of the global sum at the time of settlement. For that purpose, he looked at the evidence available of what the insured had discounted in its assessment for the purpose of negotiations. Although the Judge recognised that the discounted heads of claim would nevertheless have been pursued had the matter gone to trial, he made an assessment that the insured did not consider those grounds were strong so would have let them go to get a settlement.

[390] MacKenzie J did not follow *Enterprise Oil* insofar as it was authority for the proposition put forward by Mr Ring that in the case of a global settlement an insured must prove "at trial liability". MacKenzie J referred to *Enterprise Oil* but only to indicate that he would not follow *Lumberman's* finding that a global settlement sum could not be apportioned between Heads of Liability and so the whole claim failed.

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250 *Arrow International* (HC), above n 194, at [95].
251 At [94].

[391] It is apparent that MacKenzie J was following the earlier New Zealand Court of Appeal authorities, which had looked at whether the settlement was reasonable and what a reasonable apportionment would have been at the time. That established the quantum for the purposes of the insured's liability.

[392] I propose adopting the same approach as MacKenzie J which is supported by the New Zealand Court of Appeal authority, binding on this Court.

[393] Therefore, the next step, if I had found RiskPool liable, would have been to look at the apportionment of the global settlement paid to the Waterfront plaintiffs by determining what would have been a reasonable apportionment between the weathertight/mixed defects and the other defects, as at the date of settlement.

Apportionment

[394] Ms Rice, who was acting for the NCC on the Waterfront plaintiffs' claim, gave evidence that she had kept RiskPool advised and gave it access to all the documentation on the Waterfront plaintiffs' claim. She took the view that the NCC needed to act as a prudent uninsured and advised it accordingly.

[395] Ms Rice attended the mediation on 14 February 2019 along with representatives of the NCC and a number of experts for the NCC. She indicated she had invited RiskPool to the mediation but it seems they were "uninvited" by the lawyers acting for the NCC in these proceedings. I do not consider this is relevant to the present exercise. If RiskPool had declined the claim wrongfully, it could not reasonably expect to sit in on the mediation.

[396] Ms Rice and Mr Jack described the mediation. The process was facilitated by a very experienced mediator, according to Ms Rice. It had quickly moved from discussions about the defects and testing the evidence into a global figure negotiation.

[397] Ms Rice said there was little, if any, discussion as to what defects and costs were being settled in the global settlement. She said there had been a series of global sum offers that had been exchanged between the parties in an attempt to reach a settlement figure. The final amount had not been negotiated in her presence. Mr Jack,

the NCC CEO and the lead negotiator for the Waterfront plaintiffs, met separately (without counsel present) toward the end of the mediation in order to "bridge the gap" and reached the final settlement figure.

[398] In this claim the issue is not the amounts required to remedy the defects as they are taken from the Waterfront plaintiffs' claim. The challenge is on the apportionment of these numbers.

[399] The NCC's experts who gave evidence covering the appropriate apportionment were Mr Powell, a building surveyor, and Mr White, a quantity surveyor. Mr White did not inspect the Waterfront Apartments but relied on information from Mr Powell to make the apportionments. They examined the quantum of loss attributable to various defects and categorised each item of claimed work into one of four categories. The defects were numbered from 1 to 22 using the same numbering as had been used in the Waterfront plaintiffs' claim. 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).

[400] For the orange category (exclusively non-weathertight defects) NCC claimed that the full amount of the remedial work was covered by the RiskPool indemnity. For the green category, the amount of the cover was the balance of costs required to remedy the defect over and above the cost to remedy the weathertightness defect. Both the purple (mixed causes of the same loss) and the blue (all weathertight defects) losses were excluded.

[401] Mr Smith gave the expert quantum evidence for RiskPool. He is a registered building surveyor and quantity surveyor who has extensive experience in defective building claims. He had visited the Waterfront Apartments on one occasion.

[402] The apportionment was refined in the course of the hearing as the experts' positions were clarified and areas of common ground were established. I will comment briefly on the experts' evidence below. However, the starting point must be the claim made by the Waterfront plaintiffs and what a reasonable apportionment of the global sum would have been at the time of settlement.

[403] This was the approach taken by MacKenzie J in *Arrow International.* He looked at the evidence at the date of settlement to ascertain how a reasonable apportionment might be achieved at that date. As in *Royal Insurance Fire and General*, the Court noted that the assessment of reasonableness was as at the time of settlement.

[404] The most reliable proximate evidence of how the insured might have apportioned the claim sum by defect was set out in the letter of advice to the NCC from Rice Speir, its lawyers, dated 1 February 2019. This was an updated settlement recommendation for the NCC and was prepared for an extraordinary general meeting of the NCC, convened to give authority up to a specified limit to Mr Jack to enable him to settle at the scheduled mediation.

[405] The claim by the Waterfront plaintiffs at that stage was $20.5m made up of estimated repair costs of $15.5m, remedial consultants of $1.2m, consequential losses of $1.3m, general damages of $1.25m, interest of $170,000 and legal and expert litigation costs of $1m.[252]

[406] Rice Speir, in its letter, indicated it considered the NCC had no liability for the following defects:

(a) bathrooms (non-weathertight) defects 13 and 14;

(b) main roof (weathertight) defect 2; and

(c) structural (non-weathertight) defect 22.

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[252] These figures were adjusted before the mediation by Waterfront plaintiffs.

[407] The estimate by Rice Speir based on expert advice was that those three sets of defects were worth a total of $2.2m.

[408] Having made those deductions, together with an overall discount for trial risk, costs of trial and uncertainties, it advised the NCC that settlement of the proceedings might be possible at [redacted]. This included an estimated contribution of the other parties to settlement of up to [redacted]. The contribution by the NCC therefore was suggested as [redacted]. This was just over 60% of what it considered was the realistic quantum at that stage.

[409] [redacted].

[410] [redacted]. Ms Rice appeared at that meeting. The minutes note that she said there were some good defences available should the matter move to a court hearing, for example, in relation to bathroom defects.

[411] Mr Smith, the building surveyor/quantity surveyor expert called by RiskPool, commented in his evidence that Mr White, the NCC building surveyor expert, had at the time of the settlement in 2019 advised NCC using an accepted method of calculation known as "measure and price methodology". [redacted] deduction made by Rice Speir for claims the advice given was that the NCC was not liable. For the purposes of his evidence in these proceedings Mr White had changed methodology and was using a "contractor's claim and estimate" to assign the costs to the work.

[412] While there was no doubt some litigation risk was involved, as explained by Rice Speir in its letter and by Ms Rice in her evidence, it appears that the advice from Rice Speir was firm that there [redacted] (for defects 13, 14 and 22) as no liability existed for those defects. Ms Rice specifically advised the Council that she considered that the exclusion of those defects (with particular reference to the bathroom defects numbers 13 and 14) was based on strong arguments that could be advanced at trial.

[413] The global settlement figure paid by the NCC was [redacted], toward an aggregate settlement of [redacted]. That included all remedial work and consequential

damages. This was against the Waterfront plaintiffs' claim of $19,875,400 by the time of the mediation, of which $16.2m was for remedial costs.[253]

[414] By the time of the mediation, the Waterfront plaintiffs had provided a remedial work cost estimate for defect number 22 of about $2.2m. Therefore, the total for the three sets of defects (2, 13–14 and 22) by the time of the mediation must have been in the region of $3–$3.6m. RiskPool pointed out that the NCC paid almost exactly [redacted] less than the Waterfront plaintiffs' claims for the cost to remedy the defects, which was the figure that the plaintiffs were focused on recovering at the mediation. Mr Ring said the [redacted] figure was made up of [redacted] in relation to the non-claiming units, and [redacted], which would be the minimum figure for the defects that the Council had been advised that it was not liable for.[254]

[415] I am satisfied on the evidence that the NCC negotiated deductions from the remedial cost claims at the mediation, in the vicinity of somewhere between [redacted] and [redacted]. I accept that a figure in that range was deducted during the settlement negotiations for defects 2, 13, 14 and 22. This was a reasonable deduction. The NCC had received expert and legal advice. Ms Rice is a highly experienced lawyer in the area of building defect claims and her advice would have been influential in reaching the settlement figure.

[416] I am satisfied that a deduction of [redacted], being in the mid-range of the specified defect deductions and including the [redacted] allowance for the non-claiming units, was reasonable. I am satisfied that NCC would have refused to pay the claims for the liability of defects 13–14 and 22 and for the non-claiming units.

[417] That is the only portion of the global settlement to which a specific quantum is able to be allocated on the basis of the evidence available as to the deductions notionally made by the NCC for the purposes of settlement. To determine the balance of the apportionment of the global settlement I must review the evidence available at

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253 $19,875,400 was made up of $15,846,000 for remedial work costs and $4,856,594 for consequential damages, which included $1.2m for costs of remedial consultants so formed part of the remedial cost figure.

254 The unit entitlement deduction had been agreed at [redacted] between the experts.

the time to NCC and assess that in light of the expert evidence called by both parties at the hearing.

[418] This leaves defects 1, 3 to 12, 15 to 19 and 20 to 21.

[419] I also bear in mind that RiskPool would not be required to pay for amounts for remedying:

(a) weathertight defects; and

(b) mixed weathertight and non-weathertight defects, relying on the authority of *Wayne Tank*.

[420] If the remedying of weathertight defects resulted in the remedying of the non-weathertight defects, RiskPool cannot be liable because it is providing an indemnity for covered claims excluding weathertight claims. Where one cause is within the general words and would render the insurers liable, and the other is within the Exclusion, the insurers can rely on the Exclusion clause, in the case of mixed claims.[255] Similarly where one cause requires the same remedy as the excluded cause, the indemnifier can rely on the Exclusion.

[421] Of the 22 defects that the Waterfront plaintiffs listed: defects 1 and 3–12 are excluded, because they related to weathertight issues, and defects 2, 13, 14 and 22 would have been excluded in the settlement. I now turn to look at specific issues raised by the experts in relation to the defects 15 to 21.

Defects 15–19 (fire safety compliance)

[422] These defects relate to various fire safety compliance defects. Mr Ring says these were matters for a fire expert and there was no admissible evidence given by such an expert in these proceedings. The evidence in the common bundle was the fire compliance material and reports relied on in the Waterfront proceedings and in

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255 *Wayne Tank,* above n 70, at [827] per Denning MR.

settlement negotiations. The authors of those did not give evidence in these proceedings.

[423] Mr Ring says they are hearsay statements attributable to the NCC's fire and liability experts in the Waterfront proceedings.[256] Therefore, he says, they are inadmissible under s 18 of the Evidence Act 2008, as those experts did not give evidence.

[424] However, hearsay evidence is admissible with the leave of the Judge under s 18(1) of the Act if the circumstances relating to the statements which are relied upon provide reasonable assurance that the statements are true and the Judge concludes that undue expense or delay would be caused if the makers of the statement were required to be witnesses.[257]

[425] In this case the impugned evidence was produced for the purposes of establishing that this was the basis for the claim by the Waterfront plaintiffs and so was relied on by the Council in relation to achieving a reasonable settlement insofar as it related to defects 15–19. I am satisfied that there is a reasonable assurance that those documents were relied on by NCC for that purpose. Mr Ring did not suggest otherwise. There was no dispute about the fact those reports had been used and relied upon in the Waterfront claim negotiations.

[426] I am assessing the reasonableness of the settlement and apportionment at the time of settlement. It would not have assisted me to have those experts give evidence here. Even if the content of the reports was shown to be deficient with hindsight it would not affect my assessment of the reasonableness of the NCC's reliance on them at the time in the circumstances. Therefore, for the purpose of these proceedings, the circumstances relating to the statements provide reasonable assurance that the statements are true. There is no doubt their contents were relied upon in the settlement negotiation. Ms Rice, an experienced lawyer, relied on them, as did Mr Powell, at the time of settlement. Undue expense or delay would be caused if the makers of the

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256 Mr James in relation to fire and Mr Flay in relation to liability.
257 Evidence Act 2008, s 18(1).

statements were required to be witnesses.[258] Therefore even if they were hearsay, I give leave for them to be adduced.

[427] I am of the view that these defects would have been non-weathertight defects. They are described entirely in terms of fire safety and compliance.

[428] As to quantum, the differences between Mr Smith's figure and Mr White's figure for this defect of $2,674,503 and $2,933,210 respectively was largely due to the differences between the experts on the apportionment of scaffolding.[259] I prefer Mr Smith's figure for these defects based on my views concerning the allocation of the scaffolding costs set out below.

[429] Therefore, if RiskPool had been liable for these non-weathertight defects I would have found it was liable for the remedial costs based on the assessment of Mr Smith for defects 15–19.

Defects 20–21 (structural northern decks)

[430] These relate to passive fire-related defects which were alleged to have existed on the northern decks. Mr Smith says that the work required to repair these decks, claimed as non-weathertight defects, needed to be done anyway to remedy weathertight defects. Mr Powell accepted that the repair of the non-weathertight defects 20 and 21 would not have increased the costs which would otherwise be required to repair the weathertight defects required to be done in relation to the decks.

[431] Therefore, on the basis that the work would have been required to be carried out to repair weathertight defects, RiskPool would not have been liable for the costs to remedy them.

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258 Evidence Act 2008, s 128(1).
259 See below at [432]–[435].

P&G and scaffolding

[432] Mr White initially said in his evidence that he had applied a 59%:41% (non-weathertight to weathertight) split over the P&G and scaffolding costs.[260] Mr Smith accepts that apportionment for the P&G was relatively close to his own.

[433] However, Mr Smith takes issue with Mr White's figures adopted for the scaffolding costs. Mr Smith points out the total cost for exterior scaffolding was $870,000 and Mr White apportioned $512,432.29 to interior works. Mr Smith notes that the interior work only would have required some small working platforms and assigned a cost to those of $50,000. On Mr Smith's calculation that amounts to a difference between Mr White and himself of some $462,432.29 (or with contingency and GST added, $555,728).

[434] Mr White conceded in cross-examination that the bathroom repairs had not used scaffolding. These were interior and would not have required external scaffolding. Mr White, the NCC quantity surveyor, had relied on Mr Powell, the building surveyor, for the information on the scaffolding as Mr White did not actually visit the site. Therefore, it appears that without proper investigation Mr White had allocated scaffolding costs without confirming where the scaffolding would actually be used.

[435] Mr Smith's evidence about the costs, which should be attributed to interior scaffolding, is consistent with the fact that exterior scaffolding could not be used in the interiors and also supported by the concession made by Mr White.

[436] I prefer Mr Smith's evidence as to the costs of the scaffolding. He had visited the site and was both a building surveyor and quantity surveyor. He was in a better position than Mr White to make a realistic estimate of the apportionment attributable to the scaffolding in those circumstances.

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[260] There was an arithmetical error. Mr White's apportionment was in fact 56%:44% weathertight to non-weathertight. This is irrelevant for present purposes.

Non-defects

[437] RiskPool pointed to remedial work that was undertaken but for which claims by the Waterfront plaintiffs were not pursued. RiskPool says these should be deducted as RiskPool should not be liable for these. However, these do not seem to have featured in Ms Rice's advice to NCC. I do not consider it is reasonable to deduct them. They would have been caught up in the global settlement figure which was a reasonable approach in the circumstances.

Conclusion on apportionment

[438] I have indicated the findings I would have made concerning apportionment of the global settlement had RiskPool been liable for the Claim. I would have left the detailed calculations for the parties following on my findings. Apart from the quantum I have determined in relation to the defects which I have found were not part of the global settlement amount, the balance of the global sum will require recalculation and adjustment in view of my findings.[261] Leave would have been reserved to the parties to come back to the court if any issues arose in that regard.

Other claims

[439] The apportionment of consequential damages would be based on the apportionment between the weathertight and non-weathertight categories as a result of the recalculation of the quantum following my findings above.

Defence costs

[440] RiskPool had consented to the incurring of costs and expenses in writing, by declining cover and suggesting NCC obtain lawyers to protect its position and in fact suggesting Ms Rice as a suitable lawyer. NCC did instruct Ms Rice. MacKenzie J said in *Arrow International*[262] that when QBE had told the insurer it would "bow out of the defence"[263] it had likely given consent to the incurring of defence costs by the

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261 See above at [416]. Not every issue raised in relation to the experts' evidence has been dealt with as my approach to the reasonableness of the settlement at the time is likely to require a review of all adjustments.

262 *Arrow International* (HC), above n 194.

263 At [97].

insured. In this case the direction to NCC to incur costs was even clearer. RiskPool told NCC to instruct its lawyer and suggested who that should be.

[441] The parties have reached an agreement on the quantum of defence costs and, in view of my hypothetical findings above, they will be in a position to make any necessary adjustments. Leave would have been granted to return to the court if any issues arose in that regard.

Costs

[442] In view of my findings that RiskPool is not liable, there appears no reason why costs should not follow the event in the amount calculated on the category and band assigned for these proceedings. In the event the parties are unable to agree, memoranda should be filed by the defendant within 14 days of the date of the judgment, any response by the plaintiff within a further 14 days, and any reply within a further seven days.

Confidentiality

[443] At counsel's request the judgment will not be published other than to the parties for a period of five days, or such further time as directed, following the delivery of this judgment to enable counsel to make further submissions concerning redactions and confidentiality. A separate minute has been issued in that respect.

Grice J

Solicitors:
Wilson Harle, Tāmaki Makaurau | Auckland, for the plaintiff.
Young Hunter Lawyers, Ōtautahi | Christchurch, for the defendant.

Addendum:

[444] The complete version of this judgment was released only to counsel for the parties to enable them to advise whether there were any parts of the judgment which

they sought to have redacted from the public version of the judgment on grounds of confidentiality.

[445] The parties have sought redactions for reasons of confidentiality and commercial sensitivity to aspects of the judgment set out above.

[446] The court accepts that these redactions should be made to the judgment for reasons of confidentiality and commercial sensitivity.[264]

[447] The judgment with these redactions may now be released and published.

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[264] See Minute of Grice J, dated 29 June 2021.

Attachment 1 – Waterfront Plaintiffs' Claim

[redacted]

Attachment 2 (Multi Building Exclusion and Sublimit)

ENDORSEMENT ATTACHING TO AND FORMING PART OF:

NEW ZEALAND MUTUAL LIABILITY RISKPOOL
PROTECTION WORDING RP02PLPI-IN
SECTION B PROFESSIONAL INDEMNITY
EXCLUSIONS

With effect 4.00pm 30 June 2006

Exclusion 13 Multi Unit Building Defect Claims Involving Moisture Ingress

This Section of the Protection Wording does not cover liability for Claim alleging, arising directly or indirectly out of, or in respect of:

a) the failure of any building or structure to meet or conform to the requirements of the New Zealand Building Code contained in the First Schedule to the Building Regulations 1992 or any applicable New Zealand Standard (or any amended or substituted regulation or standard) in relation to leaks, water penetration, weatherproofing, moisture, or any effective water exit or control system;

or

b) mould, fungi, mildew, rot, decay, gradual deterioration, micro-organisms, bacteria, protozoa or any similar or like forms, in any building or structure;

where the building structure(s) the subject of a Claim(s) includes more than ten (10) Units, constructed under one or more building consent(s), regardless of the Unit(s) the Claim(s) is in respect of is for:

a) one building;

b) a series of buildings constructed pursuant to a common consent; or

c) one or more buildings within the same development.

For the purposes of this Exclusion, Unit(s) shall mean a building or part thereof in respect of which a separate legal title may issue and/or a part designed or intended for separate occupation.

Where there is a conflict between the provisions of this Exclusion and other provisions contained herein the provisions of this Exclusion shall prevail.

All other terms, conditions and exclusions remain unchanged.

ENDORSEMENT ATTACHING TO AND FORMING PART OF:

NEW ZEALAND MUTUAL LIABILITY RISKPOOL
PROTECTION WORDING RP02PLPI-IN
SECTION B PROFESSIONAL INDEMNITY
EXTENSION

With effect 4.00pm 30 June 2006

Extension 7 Multi-unit Building Defect Claims Involving Moisture Ingress

It is hereby agreed that notwithstanding Exclusion 13 "Multi-unit Building Defect Claims Involving Moisture Ingress" cover by this section of the Protection Wording is extended to indemnify the Member against Claims in respect of:

a) the failure of any building or structure to meet or conform to the requirements of the New Zealand Building Code contained in the First Schedule to the Building Regulations 1992 or any applicable New Zealand Standard (or any amended or substituted regulation or standard) in relation to leaks, water penetration, weatherproofing, moisture, or any effective water exit or control system;

or

b) mould, fungi, mildew, rot, decay, gradual deterioration, micro-organisms, bacteria, protozoa or any similar or like forms, in any building or structure;

where the building structure(s) the subject of a Claim(s) includes more than ten (10) Units, constructed under one or more building consent(s), regardless of the Unit(s) the Claim(s) is in respect of, to a maximum limit of indemnity of $500,000.

For the purposes of this Extension a Claim or Claims means a demand for compensation by a third party or parties against the Member where the third party or parties demands compensation for losses arising directly or indirectly out of, or in respect of:

a) one building;

b) a series of buildings constructed pursuant to a common consent; or

c) one or more buildings within the same development.

For the purposes of this Extension, Unit(s) shall mean a building or part thereof in respect of which a separate legal title may issue and/or a part designed or intended for separate occupation.

All other terms, conditions and exclusions remain unchanged.

The sub-limited extension was issued to all Councils except five which were subject to a total exclusion.

Attachment 3 (Present Exclusion cl 13)

13.) Exclusion

This Section of the Protection Wording does not cover liability for Claims alleging or arising directly or indirectly out of, or in respect of:

(a) the failure of any building or structure to meet or conform to the requirements of the New Zealand Building Code contained in the First Schedule to the Building Regulations 1992 or any applicable New Zealand Standard (or amended or substituted regulation or standard) in relation to leaks, water penetration, weatherproofing, moisture, or any water exist or control system; or

(b) mould, fungi, mildew, rot, decay, gradual deterioration, micro-organisms, bacteria, protozoa or any similar life forms, in building or structure.