Big loss for insurer in legal battle with Napier Council over leaky building clause

In a recent case, the Supreme Court of New Zealand ruled in favour of the Napier City Council in an insurance claim involving building defects including weathertightness or "leaky building" issues, in what is seen as a return to the status quo after an initial shock High Court decision.

WRITTEN BY SAM DORNE

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→ The Supreme Court examined a weather tightness clause in relation to mixed insurance claims.

Waterfront Apartment complex build in Napier turns sour

The case, *Local Government Mutual Funds Trustee Limited v Napier City Council* [2023] NZSC 97, revolved around the owners of the Waterfront Apartment complex in Napier suing the Council. The beginnings of the dispute can be traced back to 2013 when the owners of the Waterfront Apartment complex alleged that the Napier City Council had been negligent in issuing building consents, ensuring adequate inspections, and issuing code compliance certificates. The defects included issues related to weathertightness, fire risk, and other breaches of the Building Code.

The Council eventually settled the dispute in 2019. It agreed to settle with the owners for a global

figure of approximately $12 million but did not separate the different heads of damage, so issues relating to weathertightness were intermixed with all of the other issues with the build.

The Council sought to recover some of the sums from its insurer, Local Government Mutual Funds Trustee Limited trading as "RiskPool".

However, Riskpool refused to pay the claim, arguing that an exclusion clause in the policy, which included weathertightness issues, applied to all of the Council's claim including those unrelated to weathertightness issues. The exclusion clause stated that the insurance contract *did not cover liability for Claims alleging or arising directly or indirectly out of, or in respect* of weathertightness defects.

RiskPool argued that the exclusion clause should be interpreted to exclude all claims arising from the same negligent course of conduct, including mixed claims. It contended that weathertightness defects are often closely connected with other building defects, making it difficult to distinguish them by cause. Because of this, it argued, the claim could not be divided into separate parts and it was *not liable neither for weathertightness defects nor for the unrelated defects. In other words, because the apartment owners' demand for compensation included weathertightness claims, insurance cover was entirely excluded.*

Legal proceedings

The case went through the High Court and the Court of Appeal before reaching the Supreme Court. The High Court ruled in favour of RiskPool, which was a shock to many in the industry. However, the Court of Appeal reversed this decision and held RiskPool liable only for the portion of the claim unrelated to weathertightness, which was estimated at $4.4 million as it was considered normal practice to separate out weathertightness issues when handling claims.

The Supreme Court's decision

Undeterred, RiskPool decided to roll the dice and appeal to the Supreme Court.

In its unanimous decision the Supreme Court rejected the arguments advanced by RiskPool.

The Supreme Court analysed the language of the exclusion clause and its context within the insurance contract. The Court

emphasised that the ordinary and natural meaning of the language is a crucial indicator of the parties' intentions. Additionally, the wider context can help determine the meaning in cases of ambiguity or uncertainty.

The Court concluded that the exclusion clause intended to exclude only the risks explicitly referred to, namely, weathertightness defects. In doing so the Court held that *when the clause is read as a whole the meaning is clear.*

It acknowledged the High Court's finding that a part of the settlement addressed liability not arising from weathertightness defects. Therefore, the Court held that only weathertightness defects were excluded from insurance coverage, even though the claim was presented on a mixed basis. It emphasised that clearer language would be necessary to exclude liability for the part of the claim relating to non-weathertightness defects, finding that:

> The Council is correct to say that there is nothing in the language of the exclusion clause which would convey to the reader that divisible parts of a claim that do not relate to weathertightness are being excluded. Clearer language would be required to exclude liability for that part of the claim relating to non-weathertightness defects which would otherwise have come within the insuring clause.

Conclusion

The article concludes by emphasising the importance of carefully analysing exclusion clauses in insurance policies and the need for clear and precise language to avoid ambiguity.

About the author

Sam Dorne works as a Knowledge Manager in The ADR Centre's Knowledge Management Team, working with BDT. He recently returned to NZ after nearly 19 years of living in the UK where he spent the last several years working as a civil litigation solicitor mainly dealing with the recoverability of legal costs and consumer claim cases. He has experience in advocacy, case management and legal drafting and had several cases go to the Court of Appeal in England.