**IN THE HIGH COURT OF NEW ZEALAND**
**AUCKLAND REGISTRY**

**I TE KŌTI MATUA O AOTEAROA**
**TĀMAKI MAKAURAU ROHE**

**CIV-2017-441-000070**
**[2018] NZHC 2269**

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| BETWEEN | | NAPIER CITY COUNCIL<br>Plaintiff/Respondent |
| AND | | LOCAL GOVERNMENT MUTUAL FUNDS TRUSTEE LIMITED<br>Defendant/Applicant |

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| Hearing: | 16 April 2018 |
| Appearances: | D H McLellan QC and S Collier for the Plaintiff/Respondent<br>M Ring QC for the Defendant/Applicant |
| Judgment: | 30 August 2018 |

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**JUDGMENT OF HINTON J**

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*This judgment was delivered by me on 30 August 2018 at 3.00 pm pursuant to Rule 11.5 of the High Court Rules*

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*Registrar/Deputy Registrar*

*Counsel/Solicitors:*
Daniel McLellan, Queens Counsel, Auckland
Michael Ring, Queens Counsel, Auckland
Wilson Harle, Auckland

## Introduction

[1] This judgment relates to a strike-out application made by an insurer against an insured. It turns on interpretation of an exclusion clause in the insurance contract.

[2] In the substantive proceeding, Napier City Council is seeking a declaration that Local Government Mutual Funds Trustee Limited (RiskPool) has to indemnify it for liabilities the Council may have to the owners of the Waterfront Apartments in Napier (the Waterfront Plaintiffs), arising from non-weathertightness defects, together with its own costs and expenses incurred in the Waterfront proceedings.

[3] RiskPool has declined the Council's claim for indemnity. In response to the Council's application for declaratory relief, it has brought this strike-out application on the basis that the Council has no tenable claim for indemnity in respect of any liability the Council has to the Waterfront Plaintiffs.

## Background

[4] In 2013, the Waterfront Plaintiffs issued proceedings against the Council, and 10 others involved in the construction of an apartment complex called "Waterfront Apartments". The Waterfront statement of claim pleads one cause of action in negligence, which, as against the Council, is that as building regulator it owed a duty of care in performing regulatory functions as an inspector, and it breached that duty in each of the three components of that role (issuing building consents, inspections during construction, and issuing code compliance certificates).

[5] The Waterfront statement of claim pleads that, as a result of the breaches, the apartments were defectively constructed. The defects are then broken down into different types depending on the particular clause of the building code that has been breached. Some of the pleaded building code breaches, and therefore defects, are categorised as being weathertightness (Code E) or part-weathertightness defects (Code E plus other Codes), and some as non-weathertightness defects (Non-Code E). The cost of remedial work is estimated at $9,336,298, which is then broken down by location, rather than by defect.

[6] The Council accepts for all purposes that it will not be indemnified for any weathertightness defects. The Council also accepts (at least for present purposes) that it will not be indemnified for any part-weathertightness, or mixed defects. The question is whether it has an arguable claim for indemnification, at least based on non-weathertightness defects.

**The insurance contract**

[7] The relevant clauses of the contract are set out below.

[8] The Professional Indemnity Protection Wording provides:

> Now The Fund hereby agrees …
>
> 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 wherever or whenever the same was or may have been committed or alleged to have been committed on the part of the Member or on behalf of the Member including:
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> a) all costs and expenses incurred with the written consent of the Fund in the defence or Settlement of any such Claim;
>
> …

[9] Exclusion 13 of the contract provides:

> 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 exit or control system; or[1]
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> …

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[1] For ease of reference, the water-related issues, referred to in Exclusion 13, have been together labelled in this judgment as weathertightness defects.

[10] For the purposes of both the Professional Indemnity Protection Wording and Exclusion 13, "Claim" is defined to 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 Members' [sic] costs and expenses.

**Argument for strike-out**

[11] Mr Ring QC, acting for RiskPool, says that the "Claim", as referred to in the relevant clauses, is the entirety of the Waterfront Plaintiffs' claim against the Council, being, in terms of the definition clause, "the demand for compensation made by a third party against [the Council]". That "Claim" is contained in the one statement of claim with one demand for compensation. The "Claim" as pleaded "alleges or arises directly or indirectly out of, or is in respect of" weathertightness defects (at least in part), and therefore Exclusion 13 applies to it (in entirety).

[12] The essence of RiskPool's argument is that if the liability faced by the Council is at all related to weathertightness defects, then the exclusion applies, and RiskPool has no obligation to indemnify, even in respect of those portions of the "Claim" which have nothing to do with weathertightness defects.

**Law on strike-out**

[13] The principles governing the strike-out jurisdiction are well-established. RiskPool has to show that the Council has no realistic prospect of establishing a right to indemnity from RiskPool, in the event that the Council is found liable to the Waterfront Plaintiffs.

**Analysis**

[14] I do not agree with Mr Ring's argument.

[15] In my view, the focus should be on the language of Exclusion 13. That is the clause at issue. Mr Ring's focus is on the meaning of "Claim", which leads to confusion.

[16] There is no dispute but that the "Claim" or "Claims" being talked about in the context of Exclusion 13 are the claim or claims made by the third party against the policyholder, not the claim by the policyholder against the insurer.

[17] On the face of it, Exclusion 13 envisages a number of claims arising out of the failure of any building: the clause expressly refers to "Claims" (plural) arising out of the failure of a building (singular). I read Exclusion 13 as referring to claims in relation to different defects. Again, it provides that the Professional Indemnity Protection Wording does not cover liability for "Claims" arising out of the failure of any building to meet the Code in relation to [weathertightness defects]. It logically follows that the Protection Wording does cover liability for claims arising out of the failure of any building *not* in relation to [weathertightness defects], or, more precisely, that such liability is not excluded. At the least, on the face of Exclusion 13, I cannot see that it is inconsistent with a proposition that there could be a number of claims arising out of the failure of any one building, some in relation to weathertightness defects, and others not in relation to weathertightness defects.

[18] While the definition of "Claim", referring as it does to "the" demand for compensation made by a third party against a member, suggests there might be only one "Claim" by a third party, it also does not preclude there being a number of "Claims", constituting a number of demands for compensation by a third party against a member.

[19] There is no reason to read down the definition of "Claim" in the contract or to take a restrictive approach, particularly in the context of construction of an exclusion clause. If anything, the definition seems to be there to expand the ordinary meaning

of claim beyond the demand by the third party, to include the "costs and expenses incurred in the defence [but not the members' costs]". The costs and expenses incurred in the defence of a "Claim" are not part of what would otherwise be a demand by the third party.

[20] As Mr McLellan QC representing the Council, points out, "Claim" is used in the contract in different ways and not with precision, nor would that be expected. By way of example, the Protection Wording sometimes refers to the third party's demand for compensation against the member (as here), but elsewhere refers to the member's "Claim" against RiskPool. So, in extension 2, which extends cover for defamation, the clause excludes cover for "any Claim brought by a member party". Inserting the language of the definition into that exclusion would mean it should be read as "any [demand for compensation by a third party] brought by a member party", which makes no sense. This illustrates that the definition is not meant to be governing or strictly applicable.

[21] In any event, the definition of "Claim" can be inserted into the language of Exclusion 13, without doing any violation to the above construction of the exclusion clause. The effect is that the Protection Wording does not cover liability for [demands for compensation made by a third party against the member] arising out of the failure of any building in relation to weathertightness defects.

[22] In addition, I note that in the Protection Wording, the word "Claims" (in its plural form) is used, and an indemnity is to be granted for any "Claims" (plural) arising out of any negligent act, which is expressed in the singular. The operative insurance provision therefore suggests, or is at least consistent with, the possibility of more than one "Claim" arising out of a single negligent act.

[23] I do not find the cases cited to me by Mr Ring on interpretation of the word "claim" helpful. This case is about interpretation of an exclusion clause. The cases Mr Ring cites are concerned with differently-worded contracts and different provisions. They are not concerned with exclusion clauses. The Courts have made it

clear that the boundaries to be ascribed to the word "claim" need to be ascertained by reference to the particular contract at hand and the particular issue.[2]

[24] The case upon which Mr Ring most relies, *Thorman v New Hampshire Insurance Co (U.K.) Ltd*, dealt with the question of which insurer was liable to indemnify the insured, which turned on whether there was one claim, or a multitude of claims.[3] That is a considerably different scenario to the one before me. What is being suggested in the present case is that the Council may in fact have no right to indemnification depending on whether there is one "Claim" or multiple "Claims".

[25] Mr Ring also cites *Haydon v Lo & Lo* and *Trollope & Colls v Haydon*.[4] Both cases were concerned with the definition of "claim" in relation to the excess to be paid by the insured under the insurance policy. In such circumstances, again, different commercial considerations to the present arise. The Courts were not being asked to interpret an exclusion clause, nor were they being asked to consider whether the insured should receive no cover under the contract on the basis of what constituted a "claim". What they were being asked to consider was what portion of liability the insured should have to bear.

[26] Mr McLellan relies on *Body Corporate 326421 v Auckland Council (The Nautilus)*.[5] The policy in that case defined "claim" as "any form of legal process served on the insured", the legal process being a statement of claim. As with the present case, the insurer denied liability for the defects in the completed building on the basis of an exclusion clause. The approach adopted by Gilbert J was to examine each defect listed in the statement of claim individually, to determine whether it was excluded. Mr McLellan notes that it does not appear to have been argued, or contemplated by Gilbert J, that the entirety of the statement of claim could have been struck out on the basis of the argument advanced by RiskPool in the present case. Rather, counsel and the Judge in *The Nautilus* seem to have proceeded on the

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2 *Thorman v New Hampshire Insurance Co (U.K.) Ltd* [1988] 1 Lloyd's Rep 7 at 16. See also: *Trollope & Colls Ltd v Haydon* [1977] 1 Lloyd's Rep 244 (CA) at 250; and *Wellington City Council v FAI (NZ) General Insurance Company Ltd* HC Wellington CP74/98, 7 August 2000 at [50].

3 *Thorman v New Hampshire Insurance Co (U.K.) Ltd* [1988] 1 Lloyd's Rep 7.

4 *Haydon v Lo & Lo* [1997] 1 Lloyd's Rep 336 (PC); *Trollope & Colls v Haydon* [1977] 1 Lloyd's Rep 244.

5 *Body Corporate 326421 v Auckland Council* [2015] NZHC 862.

assumption that the defects and loss complained of were divisible. I take Mr McLellan's point, but cannot place much reliance on arguments an insurer did not make, and the Court subsequently did not consider. (I note also that Gilbert J eventually determined that the exclusion clause operated to exclude the insurer from liability to indemnify the insured in respect of every defect.)

[27] Ultimately therefore, the case law is not directly relevant.

[28] Returning to the contract, in my view, the intention of the parties must have been to exclude liability on the part of RiskPool in respect of weathertightness defects, and not to exclude liability in respect of other defects, whether these are pleaded in the one statement of claim or not.

[29] Mr Ring's interpretation is not consistent with commercial reality. If the contract were to be read in the way he argues, there would be little indemnity left to an insured. The contract would deny them the entire benefit of an indemnity if the "Claim" made against them included even the most minor weathertightness defect, or worse, on Mr Ring's argument, even if that defect were wrongly alleged.

[30] I agree with the Council that, had this been the intention of the parties, they would have chosen to express it in more unequivocal language.

[31] I do not consider the effect of the exclusion clause is unclear, but where the limits and effect of such a clause are unclear, it is to be interpreted against the party relying upon it. So, to the extent there is any ambiguity, I would favour the Council's position.

[32] The fact that there is one statement of claim and effectively only one sum nominated in the statement of claim, does not mean the Council will be unable to demonstrate at trial that it nonetheless incorporates a number of distinct "claims", some of which may not "allege", or "arise out of", weathertightness issues. I note here that, in my view, distinct qualifying building code breaches, each with a distinct quantum, will need to be established by the Council.

[33] The Court will have to look at the real nature of the claims, irrespective of the form of the pleading. The authorities consistently reiterate that limited weight should be placed on how the third party has formulated its claim in determining whether there is one claim or multiple claims and that the "craftiness" or "clumsiness" of the claimant's pleading is not determinative of the characterisation of a claim for purposes of professional indemnity insurance.[6]

[34] As indicated already, it would be illogical if, because of a single allegation of a weathertightness defect in a third-party statement of claim, an insured was met with a wholesale denial of liability by an insurer. If that were the intent of the contract, it needed to be clear. It is far from that.

**Conclusion**

[35] I conclude that it is arguable for purposes of Exclusion 13 that multiple claims can be included in a single statement of claim, whether arising from the same act of negligence, or different acts/causes of action. It is arguable that some of those claims, as in demands for compensation for different building code breaches, do not allege or arise out of weathertightness issues. It is therefore arguable that the Council has a right to indemnity under the contract. The extent of that right is yet to be determined, as distinct non-weathertightness "claims" will need to be proven.

[36] RiskPool has failed to satisfy me that the Council has no realistic prospect of establishing a right to indemnity, in the event the Council is found liable to the Waterfront Plaintiffs. The application for strike-out is therefore declined.

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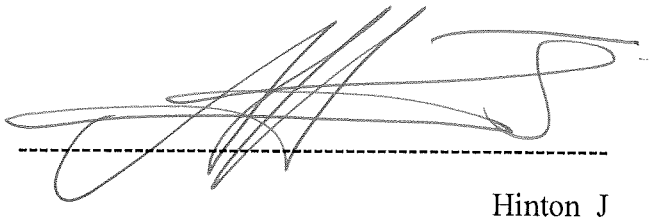
6 *West Wake Price & Co v Ching* [1956] 3 All ER 821 (QB) at 831; *Haydon v Lo & Lo* [1997] 1 Lloyd's Rep 336 (PC) at [340]; *Quintano v BW Rose Pty Ltd* [2008] NSWSC 793, (2009) 15 ANZ Insurance Cases 61-805 at [9].

[37] The Council is entitled to costs. Mr McLellan sought to be heard. If costs cannot be agreed, the Council should file a brief memorandum within 14 days. RiskPool is to respond within a further 14 days.



Hinton J