

# Insurance matters

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In 1997 a mutual scheme to provide insurance for councils was established. It was born out of growing dissatisfaction with how the commercial market responded to the insurance needs of councils.

The scheme was known as the New Zealand Mutual Liability RiskPool Scheme (RiskPool). It was essentially owned by its members.

RiskPool operated very much like an insurer. It issued “protection wording” similar to commercial insurers and offered claims handling and risk management services. It negotiated with and obtained reinsurance from commercial underwriters.

The scheme operated well for the first few years but, in the early 2000s, the number and nature of some of the claims was causing concern. These claims were what came to be known as “leaky building” claims. RiskPool was exposed to substantial costs for remedial works associated with leaky multi-unit developments.

RiskPool took steps to limit its exposure to these leaky building claims, culminating in the introduction of a weathertight exclusion. That exclusion was added in 2009 and included in the terms for the annual renewals from that date. The meaning of RiskPool’s indemnity cover and weathertight exclusion sits at the heart of a recent High Court judgment *Napier City Council v Local Government Mutual Funds Trustee Ltd* [2021] NZHC 1477.

Napier City Council (the council) sued RiskPool for breach of contract and sought contribution to a payment it made to settle a case against it involving weathertight and other building defects that was brought by the owners of the Waterfront Apartments.

The case was brought in 2014 and settled at mediation in 2019. The council paid a global figure to remedy both the weathertight and non-weathertight defects as well as structural and fire safety defects. The global figure did not allocate amounts to specific defects.

RiskPool argued that it was not liable to contribute anything towards the council’s settlement because there was only one “claim” against the council.

The weather tight exclusion excluded all other building defects and compliance failures from cover when a weather tight complaint was involved. It argued this included non-weathertight defects discovered as a result of the investigation or in the repair of the weather tight defects.

The council argued that while the weather tight as well as mixed weathertight and non-weathertight complaints were

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excluded from cover, non-weathertight, structural and fire safety defects discovered during investigations or in the course of the works, were not.

The decision turned largely on how the word “claim” should be interpreted – whether it meant one albeit mixed claim or whether it could be divided into different parts.

The court applied the accepted approach to contractual interpretation, recognising that the text remains “centrally important”. If the text has a natural and ordinary meaning, construed in the context of the policy as a whole – that is a powerful indicator of what the parties intended.

The court preferred RiskPool’s interpretation which resulted in the exclusion clause effectively excluding all complaints, including those relating to non-weather tightness defects.

While the text is “centrally important” it was the court’s role to decide what the council and RiskPool intended the protection wording to mean. The court considered it needed extrinsic evidence on the mutual intentions of the parties.

The court considered many years of communications between RiskPool and the council, including annual reports explaining the creation and evolution of the weathertight exclusion. The court found it was the mutual intention of both parties to exclude non-weathertight defects because the council was regularly informed of RiskPool’s approach to non-weather tight building defects, it was put on notice of RiskPool’s interpretation, it did not object to its interpretation and continued to enter the scheme annually.

The long-standing relationship between the council and RiskPool was centrally important to the court’s reasoning and ultimate decision. An appeal has been lodged so no doubt more will be written on this in the future. **LG**