LLR: Insurance & Reinsurance

[2018] Vol. 1 INSURANCE & REINSURANCE 1

NEW ZEALAND COURT OF APPEAL

13 June

; 26 July 2017

AMI INSURANCE LTD

v

LEGG AND OTHERS

[2017] NZCA 321

Before Justice MILLER,
Justice COOPER
and Justice CLIFFORD

Insurance (liability) —Causation —Exclusion for business use of land —Meaning of "arising out of or in connection with" —Concurrent causes.

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() () This was an appeal by AMI against the decision of Nation J, holding that AMI was required to indemnify Mr and Mrs Legg under a lifestyle block policy.

() The Leggs owned a "lifestyle block" (a large piece of land, typically used for farming purposes) at Selwyn, in Canterbury. They carried on farming activity and also a separate landscaping business, Evolving Landscapes Ltd (ELL). The Leggs built and burned a fire heap on the property. Some of the material in the heap came from farming activity and some from ELL. On 16 December 2012 the heap comprised vegetation, paper and other rubbish. Nation J found that most of the vegetation was ELL green waste but a substantial part of it would have come from the lifestyle block. A fire was set on that day and burned without incident. The fire reignited on 10 January 2013, by which time fire restrictions were in place and conditions were hot and dry. The judge found that strong winds caused embers deep within the heap to reignite. Material from the heap then blew onto nearby vegetation and fire spread rapidly onto nearby properties, causing extensive damage.

() It was common ground that: the larger portion of the waste material on the heap when the fire was lit was ELL waste, and that portion included several pine stumps; heavier material was more likely than lighter material to retain heat and smoulder; embers from the fire on 16 December caused the heap to reignite on 10 January; and it was not possible to ascertain whether the material that reignited on 10 January came from ELL.

() The Leggs were found not to have been careless, but they faced strict liability under the Forest and Rural Fires Act 1977. The Leggs and ELL admitted liability to reimburse the Fire Service Commission and Selwyn District Council for extinguishing the fire.

() The policy issued by AMI covered legal liability from accidental damage, including fire. The insuring clause provided: "We will cover, unless excluded by this policy, your legal liability, arising from or in connection with your farming operation, for accidental damage to other people's property occurring anywhere in New Zealand." There was an exclusion for "legal liability arising out of . . . any profession, business or trade not directly connected with your farming".

() AMI relied upon the exclusion. Nation J held that the words "in connection with" required causation, and that AMI had not proved that the Leggs' legal liability was caused by burning ELL's waste on the fire heap. AMI appealed.

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() ———*Held*, by NZCA (MILLER, COOPER and CLIFFORD JJ) that the appeal would be allowed.

() (1) The phrase "in connection with" required a causal relationship. The language required a real and substantial connection between the legal liability and the insured activity.

(a) The phrase was one of intrinsically indefinite meaning and took its meaning from the context (*see* para 22);

() ———*Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2015] 1 NZLR 432, *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] 2 NZLR 444, applied.

(b) The phrase "arising from" plainly signified causation but "in connection with" might have a different and less direct meaning (*see* para 24);

() ———*Intrend Pty Ltd v O'Halloran* [2006] SADC 95, *RAA-GIO Insurance Ltd v O'Halloran* (2007) 98 SASR 123, considered.

(c) In the present case the insuring clause and the exclusion appeared in the same section of the policy and the nature of the connection for each was the same. A real and substantial connection between the particular excluded activity in this case and the legal liability almost inevitably entailed a causal relationship of some kind (*see* para 33);

() ———*Industrial Steel and Plant Ltd v A V Swanson & Sons Ltd* (1982) 2 ANZ Ins Cas 60-489, applied; *Lane v Dive Two Pty Ltd* (2012) 17 ANZ Ins Cas 61-924, *IAG New Zealand Ltd v Jackson* [2014] Lloyd's Rep IR 97 (/ilaw/doc/xref.htm?citation_dest=ILR:2014010097), *JCS Cost Management Ltd v QBE Insurance (International) Ltd* [2016] Lloyd's Rep IR 308 (/ilaw/doc/xref.htm?citation_dest=ILR:2016010308), considered.

() (2) The connection between ELL's business and the liability was both causal in nature and substantial. Material from ELL comprised the

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greater part of the heap, and included stumps capable of forming large embers and smouldering for a considerable time in the right conditions. The size of the heap contributed to the size of the residual pile of ash and unburnt material, so increasing the risk that embers deep within it would continue to smoulder (*see* para 43).

() (3) Where a loss had two effective and interdependent causes, one within the policy and one excluded by it, the exclusion prevailed. The rationale was that where an insuring clause and an exclusion were found together, one arrived at the parties' intent by subtracting the latter from the former. This was a case of two interdependent causes, neither of which could be isolated as the cause of the fire on 10 January 2013. On the facts, AMI proved on the balance of probabilities that the excluded cause – ELL material – was effective (*see* paras 46 and 52);

() ———*Wayne Tank and Pump Co Ltd v Employers Liability Assurance Corporation Ltd* [1973] 2 Lloyd's Rep 237 (/ilaw/doc/xref.htm?citation_dest=LLR:1973020237); [1974] 1 QB 57, *State Insurance Office Manager v Bettany* (1990) 6 ANZ Ins Cas 76-818, *Countryside Finance Ltd v State Insurance Ltd* [1993] 3 NZLR 745; (1993) 7 ANZ Ins Cas 61-168, *McCarthy v St Paul Insurance Co Ltd* (2007) 157 FCR 402, *Body Corporate 326421 v Auckland Council (The Nautilus)* [2015] NZHC 862, applied; *Derksen v 539938 Ontario Ltd* [2001] 3 SCR 398, not followed; *Leyland Shipping Co v Norwich Union Fire Insurance Society* [1918] AC 350, *Becker, Gray & Co v London Assurance Corporation* [1918] AC 101, *Techni-Chemicals Products Co Ltd v South British Insurance Co Ltd* [1977] 1 NZLR 311, *D A Constable Syndicate 386 v Auckland District Law Society* [2010] 3 NZLR 23; [2010] 16 ANZ Ins Cas 61-850, *Lumley General Insurance (NZ) Ltd v Body Corporate No 205963* (2010) 16 ANZ Ins Cas 61-853, *QBE Insurance (International) Ltd v Wild South Holdings Ltd* [2015] Lloyd's Rep IR 259 (/ilaw/doc/xref.htm?citation_dest=ILR:2015010259); [2015] 2 NZLR 24, referred to.

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() () The following cases were referred to in the judgment:

(1918AC101)

Becker, Gray & Co v London Assurance Corporation (HL) [1918] AC 101;

(2015NZHC862)

Body Corporate 326421 v Auckland Council (The Nautilus) (NZHC) [2015] NZHC 862;

(192934LlLRep1)

Clan Line Steamers Ltd v Board of Trade (HL) (1929) 34 Ll L Rep 1; [1929] AC 514;

(19933NZLR745)

Countryside Finance Ltd v State Insurance Ltd [1993] 3 NZLR 745; (1993) 7 ANZ Ins Cas 61-168

(2010NZCA237)

D A Constable Syndicate 386 v Auckland District Law Society (NZCA) [2010] NZCA 237; [2010] 3 NZLR 23; [2010] 16 ANZ Ins Cas 61-850;

(2001SCC72)
Derksen v 539938 Ontario Ltd (SCC) 2001 SCC 72; [2001] 3 SCR 398;

(19992AC22)
Environment Agency (formerly National Rivers Authority) v Empress Car Co (Abertillery) Ltd (HL) [1999] 2 AC 22;

(2014NZSC147)
Firm PI 1 Ltd v Zurich Australian Insurance Ltd (NZSC) [2014] NZSC 147; [2015] 1 NZLR 432;

(19902NZLR408)
Groves v AMP Fire & General Insurance Co (NZ) Ltd (NZCA) [1990] 2 NZLR 408;

(ILR:2014010097)
IAG New Zealand Ltd v Jackson (NZCA) [2013] NZCA 302; [2014] Lloyd's Rep IR 97 (/ilaw/doc/xref.htm?citation_dest=ILR:2014010097);

(19822ANZInsCas60-489)
Industrial Steel and Plant Ltd v A V Swanson & Sons Ltd (1982) 2 ANZ Ins Cas 60-489;

(2006SADC95)
Intrend Pty Ltd v O'Halloran [2006] SADC 95;

(2015NZCA524)
JCS Cost Management Ltd v QBE Insurance (International) Ltd (NZCA) [2015] NZCA 524; [2016] Lloyd's Rep IR 308 (/ilaw/doc/xref.htm?citation_dest=ILR:2016010308);

(2012NSWSC104)
Lane v Dive Two Pty Ltd (NSWSC) [2012] NSWSC 104; (2012) 17 ANZ Ins Cas 61-924;

(1918AC350)
Leyland Shipping Co v Norwich Union Fire Insurance Society (HL) [1918] AC 350;

(2010NZCA316)
Lumley General Insurance (NZ) Ltd v Body Corporate No 205963 (NZCA) [2010] NZCA 316; (2010) 16 ANZ Ins Cas 61-853;

(2007FCAFC28)
McCarthy v St Paul International Insurance Co Ltd (FCA) [2007] FCAFC 28; (2007) 157 FCR 402 (/ilaw/doc/xref.htm?citation_dest=2007157FCR402);

(2014NZCA447)
QBE Insurance (International) Ltd v Wild South Holdings Ltd (NZCA) [2014] NZCA 447; [2015] Lloyd's Rep IR 259 (/ilaw/doc/xref.htm?citation_dest=ILR:2015010259); [2015] 2 NZLR 24

(2007SASC245)
RAA-GIO Insurance Ltd v O'Halloran (SCSA) [2007] SASC 245; (2007) 98 SASR 123;

(19906ANZInsCas76-818)
State Insurance Office Manager v Bettany (1990) 6 ANZ Ins Cas 76-818;

(19771NZLR311)
Techni-Chemicals Products Co Ltd v South British Insurance Co Ltd [1977] 1 NZLR 311;

(2010NZCA608)
Trustees Executors Ltd v QBE Insurance (International) Ltd (NZCA) [2010] NZCA 608; (2010) 16 ANZ Ins Cas 61-874;

(2003NZAR270)
Tucker v New Zealand Fire Service Commission [2003] NZAR 270;

(2010NZSC5)
Vector Gas Ltd v Bay of Plenty Energy Ltd (NZSC) [2010] NZSC 5; [2010] 2 NZLR 444;

(LLR:1973020237)
Wayne Tank and Pump Co Ltd v Employers Liability Assurance Corporation Ltd (CA) [1973] 2 Lloyd's Rep 237 (/ilaw/doc/xref.htm?citation_dest=LLR:1973020237); [1974] 1 QB 57.

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() () Mike Ring QC, Ian Thain and Sophie Merkin, instructed by DLA Piper, for AMI; Andrew Riches and Tania Hutchinson, instructed by Saunders & Co, for Mr and Mrs Legg. The other respondents did not appear and were not represented.

Wednesday, 26 July 2017

JUDGMENT

Justice MILLER

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1. The phrase "in connection with" occurred twice in the Leggs' policy of insurance for their lifestyle block: once to extend cover to damage "arising from or in connection with" farming activities, and once to exclude it for damage "arising out of or in connection with" any other business.

() 2. The Leggs built and burned a fire heap on the property. Some of the material in the heap came from farming activity on the lifestyle block and some from a separate landscaping business run by their company, Evolving Landscapes Ltd (ELL).

() 3. Several weeks after the fire appeared to have gone out the remains of the heap unexpectedly reignited in very dry conditions, causing extensive damage to neighbouring properties. Under rural fire legislation the Leggs were strictly liable to the New Zealand Fire Service Commission and Selwyn District Council for the costs of putting out the fire.[1]

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1 We were given to understand that other claims from neighbouring owners are pending. We express no view about them.

The Leggs seek indemnity from their insurer for the lifestyle block, AMI.

0 4. The Leggs and AMI agree that the policy extended to legal liability for burning green waste and rubbish from farming activities on the lifestyle block. They part company over the exclusion. AMI says the exclusion applies because some of the green waste came from ELL's business and there exists a sufficient connection between that business activity and the damage. It argues that causation is unnecessary; rather, it suffices if the one thing "has to do with" the other. In the High Court Nation J rejected this argument, reasoning that AMI must prove the excluded business activity was the proximate cause of the legal liability and finding that it could not establish causation on the facts.[2]

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2 New Zealand Fire Service Commission v Legg [2016] NZHC 1492; [2016] 3 NZLR 685 at paras 131 to 135.

Background

0 5. A full account of the facts is found in the judgment under appeal. Most of the judge's careful findings are not controversial for our purposes, and a short narrative will suffice.

0 6. The Leggs' lifestyle block is at Selwyn, in Canterbury. They insured structures and farming activity with AMI under the lifestyle block policy. They also own ELL, which is run from the property but does its work on the properties of its clients. Its activities were insured under a policy with another insurer, Lumley.

0 7. It was the Leggs' practice to use a fire heap to burn green waste and rubbish from the property and some, but not all, of the green waste generated by ELL. On 16 December 2012 the heap comprised vegetation, paper and other rubbish. Nation J found that most of the vegetation was ELL green waste but a substantial part of it would have come from the lifestyle block.[3]

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3 At paras 5 and 134(b).

0 8. On that day the Leggs lit the heap, having first ascertained that there was no fire ban and conditions were suitable. It seems to have been lit at that time because the Leggs anticipated a summer fire ban and they were in the process of leasing or selling that part of the property to a neighbour.

0 9. The fire burned without incident. It was tended by Mr Legg from time to time, using a tractor to push material from the periphery into the heart of the fire. The judge found that he last did this by 22 December, at which time the fire appeared to be out.[4]

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4 At para 11.

The judge also found that some branches, a stump and some household rubbish had not been burned completely.[5]

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5 At para 8.

() 10. The fire reignited on 10 January 2013, by which time fire restrictions were in place and conditions were hot and dry. The judge found that strong nor'west winds caused embers deep within the heap to reignite.[6]

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6 At para 14.

Material from the heap then blew onto nearby vegetation and fire spread rapidly onto nearby properties, causing extensive damage.

() 11. Pine stumps had been added to the pile by a contractor to ELL before it was lit on 16 December, and the judge accepted that the heap also contained olive tree stumps from the lifestyle block.[7]

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7 At para 5.

Before us counsel agreed that the evidence established that:

(a) The larger portion of the waste material on the heap when the fire was lit was ELL waste, and that portion included several pine stumps.

(b) Heavier material – meaning, more than 100 mm thick, such as remnants of larger branches, or stumps – is more likely than lighter material to retain heat and smoulder.

(c) Embers from the fire on 16 December caused the heap to reignite on 10 January.

(d) However, it is not possible to say what material left those embers, meaning that it cannot be known whether the material that reignited on 10 January came from ELL. The source could have been olive tree stumps or branches from the lifestyle block, for example.

() 12. There was also evidence, which the judge appeared to accept, that the material from ELL would have resulted in a larger pile of ashes and unburnt material than would have been left had the

lifestyle block material been burned alone, and that the size of that residual pile contributed to embers deep within it retaining their heat.[8]

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8 At paras 32 to 33.

() 13. The judge found that the Leggs were not careless.[9]

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9 At para 18.

But liability under section 43 of the Forest and Rural Fires Act 1977 is strict.[10]

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10 Tucker v New Zealand Fire Service Commission [2003] NZAR 270 at paras 42 to 43.

Accordingly, the Leggs and ELL both admitted liability to reimburse the plaintiffs, the Fire Service and Selwyn District Council, for extinguishing the fire, and judgment was entered accordingly. Neither plaintiff has taken part in this appeal.

The policies

() 14. As noted, the Leggs insured the lifestyle block with AMI and ELL insured its business with Lumley. Both policies extended to legal liability from accidental damage, including fire, to third parties, and Nation J held both insurers liable.[11]

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11 New Zealand Fire Service Commission v Legg, above footnote 2, at paras 62 and 135. For reasons we need not go into, the Lumley policy may not cover all of the liabilities resulting from the fire.

Lumley has not appealed the judgment against it, but the judge's findings about ELL's claim supply context for AMI's appeal, so we will note the provisions of both policies.

The AMI policy

() 15. The insureds were the Leggs and the policy was described as a lifestyle block policy. It covered primarily farm buildings and structures, farm plant and supplies and produce, and livestock. It also extended to legal liability; and specifically, to liability under the Forest and Rural Fires Act. The relevant insuring clause, clause 16, stated that:

> "We will cover, unless excluded by this policy, your legal liability, arising from or in connection with your farming operation, for accidental damage to other people's property occurring anywhere in New Zealand."

() 16. The cover for legal liability was subject to an exclusion for any business not directly connected with the Leggs' farming operation:

"There is no cover for legal liability arising out of or in connection with any retail shop (except a shop on your farm property selling your farm produce), café, restaurant, tourist operation or any profession, business or trade not directly connected with your farming . . ."

() 17. As noted, Nation J found the exclusion inapplicable, reasoning that "in connection with" required causation and AMI, which carried the onus of establishing it, had not proved that the Leggs' legal liability was caused by burning ELL's waste on their fire heap.[12]

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12 At para 132.

The Lumley policy

() 18. The Lumley policy extended cover to legal liability for property damage caused by an occurrence in connection with the insured's business. Lumley agreed to:

". . . indemnify the Insured for all amounts the Insured shall become legally liable to pay for compensation in respect of . . . Property Damage that occurs within the Territorial Limits and that:

(a) happens during the Period of Insurance; and

(b) is caused by an Occurrence in connection with the Insured's Business."

() 19. The policy specifically extended to liability under the Forest and Rural Fires Act, subject to a sub-limit (which may explain why the Leggs are pursuing AMI).

() 20. Lumley initially denied cover, pleading that the occurrence did not occur in connection with the business of ELL, but Nation J recorded that in closing submissions its counsel accepted that because ELL waste had been burnt in the fire, cover extended to liability for resulting property damage.[13]

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13 At para 43.

Lumley continued to resist liability, relying on defences, including lack of reasonable care, that do not concern us. Nation J found Lumley liable for all sums for which the plaintiffs had obtained judgment against ELL.[14]

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14 At para 62.

The appeal

() 21. The questions we must decide are:

(a) What sort of connection did the exclusion clause require between the legal liability and ELL's business activity?

(b) Was that connection established on the facts?

(c) Does it matter that the fire commingled insured and excluded activities?

Connection between legal liability and excluded business activity

0 22. The argument before us turned on the phrase "in connection with". We preface what we have to say by remarking that the authorities do not assist us much. The phrase is one of intrinsically indefinite meaning, incapable of close definition in the abstract. It always takes its meaning from the context supplied by a given policy and set of

circumstances.[15]

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15 See Firm PI 1 Ltd v Zurich Australian Insurance Ltd [2015] 1 NZLR 432 at paras 60 to 62 per McGrath, Glazebrook and Arnold JJ; and Vector Gas Ltd v Bay of Plenty Energy Ltd [2010] 2 NZLR 444 at paras 19 and 22 per Tipping J.

It is necessary to discuss the authorities, however, because of the use the judge made of them.

Does "arising from" qualify "in connection with"?

0 23. The phrase "in connection with" appeared in the AMI policy after the compound noun it qualified ("legal liability") and the words "arising from" or "arising out of". Mr Riches, appearing for the Leggs, argued that proximity to words importing causation confirmed that "in connection with" is also concerned with causation. For this proposition he cited the judgment of the District Court of South Australia in *Intrend Pty Ltd v O'Halloran*, in which it was said of the same wording in an exclusion clause that "arising" must qualify "in connection with".[16]

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16 Intrend Pty Ltd v O'Halloran [2006] SADC 95 at para 147.

The clause in that case excluded cover for claims arising out of or in connection with the insured's occupation.

0 24. We prefer Mr Ring QC's submission, for AMI, that "arising from" plainly signifies causation, but "in connection with" may have a different and less direct meaning. This view is consistent with the authorities, which characterise "in connection with" as the phrase of widest ambit typically found in the insuring clause or exclusion. Mr Ring QC cited *RAA-GIO*

Insurance Ltd v O'Halloran, an appeal from the judgment in *Intrend*.[17]

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17 RAA-GIO Insurance Ltd v O'Halloran (2007) 98 SASR 123.

There the Supreme Court of South Australia accepted that the connection required by "in connection with" is "less demanding" than "arising out of".[18]

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18 At para 28 per Duggan J.

We observe, however, that the case illustrates the point that general words take meaning from context, for the court rejected an argument that "in connection with" required no causal connection in the circumstances and held that the necessary nexus was not established on the facts. The insured was at his place of work when the loss happened, so there was some connection to the excluded activity, but he was there for a social purpose completely unrelated to his occupation.[19]

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19 At para 30 per Duggan J.

"In connection with"

0 25. In holding "in connection with" requires causation, Nation J followed the judgment of this court in *IAG New Zealand Ltd v Jackson*, in which this court said:[20]

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20 IAG New Zealand Ltd v Jackson [2014] Lloyd's Rep IR 97 (footnote omitted).

> "29. In this case IAG must establish a nexus or relationship between dishonest conduct and civil liability if it is to exclude cover for liability incurred when delivering professional services. The dishonest act need not be the direct or proximate cause of the civil liability, and it need not precede the liability in time. But we accept, following *Industrial Steel and Plant Ltd v Swanson & Sons Ltd*, that 'in connection with' does demand some causal or consequential relationship between the two things in this setting . . ."

0 26. In a dissenting judgment in *JCS Cost Management v QBE Insurance (International) Ltd* Miller J explained the reference in *Jackson* to "causal or consequential":[21]

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21 JCS Cost Management Ltd v QBE Insurance (International) Ltd [2016] Lloyd's Rep IR 308 at para 37 per Miller J (dissenting) (footnote omitted).

> ". . . I observe that, as this court held in *IAG New Zealand Ltd v Jackson*, the phrase 'in connection with' requires a nexus between one thing and another but the nature and closeness of the required connection always depends on context and purpose. Writing the judgment of the Court in *Jackson*, I went on to say that the connection must be causal or consequential. On reflection, 'consequential' may mislead. The term is apt if it is taken to mean, as we did, a connection that need not be causal but which the court decides is of sufficient consequence or significance in the circumstances of the case. Not every temporal or other connection will do. Derrington and Ashton describe the necessary connection as a 'discernible and rational link', and greater precision may not be possible in the abstract."

0 27. Nation J discounted this passage, reasoning that the majority in *JCS* required a causal connection between the insured's liability and his professional activities and pointing out that *Jackson* bound him while the dissent just quoted did not.[22]

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22 New Zealand Fire Service Commission v Legg, above footnote 2, at para 89.

He cited the following passage from the majority judgment in *JCS*:[23]

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23 JCS, above footnote 21, at para 58 per Courtney and Clifford JJ.

> "58. It is a fundamental principle of insurance law that an insurer is liable only for loss proximately caused by an insured peril, though parties can agree that a causal connection less than proximate cause will suffice. The causal link is typically identified by the use of prepositions or prepositional phrases that carry recognised meanings in the context of insurance policies. The subject matter of the cover, the insured peril and the nature of the causal link required between them are ordinarily identified in the insuring clause."

0 28. We observe that the majority was not there addressing the meaning of the prepositional phrase

"in connection with". The paragraph introduced discussion of a different point, namely whether "by" in the policy language required a causal connection between the insured peril and the insured's business. It is this point, not "in connection with", that divided the court.[24]

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24 At paras 57 to 60 per Courtney and Clifford JJ. The court also divided on the associated question of whether the case was properly decided summarily. See at para 29 per Miller J (dissenting) and para 52 per Courtney and Clifford JJ.

As Nation J recognised,[25]

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25 New Zealand Fire Service Commission v Legg, above footnote 2, at para 90.

the majority also cited *Lane v Dive Two Pty Ltd*,[26]

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26 JCS, above footnote 21, at para 56 per Courtney and Clifford JJ.

in which it was held that "in connection with" merely requires a relationship between one thing and another.[27]

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27 Lane v Dive Two Pty Ltd (2012) 17 ANZ Ins Cas 61-924 at para 68.

0 29. Accordingly, we respectfully consider that the judge read too much into the majority judgment in *JCS*. So far as "in connection with" is concerned, the majority judgment was consistent with the dissent.

0 30. However, it does not follow that the judge was wrong to find that causation was required in this policy and in the circumstances of this case. As this court said in *Jackson*:[28]

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28 Jackson, above footnote 20, at para 24.

> "The phrase 'in connection with' plainly requires a nexus between one thing and another, but the nature and closeness of the required connection always depends on context and purpose."

0 31. We turn to consider the AMI policy.

"In connection with", in context

0 32. Mr Ring QC submitted that "in connection with" must be symmetrical, in that it must mean the same thing in the insuring clause and the associated exclusion. That need not always be so. As Mr Riches argued, words need not always have the same meaning throughout a policy and the contra proferentum rule may apply where there is ambiguity. A court may be guided by evidence of the parties' bargain. Not every exclusion clause operates by excluding a defined activity; some may be concerned with time, place, or nature of loss (for example exemplary damages may be excluded).[29]

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29 For a more detailed discussion of these points, see Derrington and Ashton The Law of Liability Insurance (3rd Edition, LexisNexis, Chatswood, 2013) at chapter 10.

0 33. In this case, however, the insuring clause and the exclusion deal with the same activity-related risk (legal liability), and they appear in the same section of the policy. The policy extended cover to one general activity, farming, and excluded it for other specified activities. In these circumstances, we accept that the nature of the connection required is the same.

0 34. In reaching this conclusion we part company with Nation J, who found it significant that the burning rubbish was an included risk and the heap was of a size and composition consistent with farming activity.[30]

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30 New Zealand Fire Service Commission v Legg, above footnote 2, at paras 75, 120 and 134 (c).

As we see it, to exclude liability from rubbish brought from other properties onto the lifestyle block as part of a separate business is not to undo the parties' bargain. We note that the judge subsequently accepted, when dealing with an argument about the application of section 11 of the Insurance Law Reform Act 1977, that the introduction of ELL material would have caused an increased risk of loss.[31]

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31 At para 151. This finding is not easy to reconcile with the judge's finding, at para 102, that the connection with the "non-farming business was not in any way causative of [the Legg's] liability".

0 35. However, we do not find that symmetry of meaning assists AMI's contention that in this policy "in connection with" means "having to do with", a phrase which may in some circumstances permit only a loose connection. The insuring clause extended cover for legal liability to activities in connection with "your farming enterprise". As the court pointed out during argument, this language requires a real and substantial connection between the legal liability and the insured activity. The same quality of connection must be required by the exclusion.

0 36. The point that a mere circumstantial connection will not do is illustrated by *Industrial Steel and Plant Ltd v A V Swanson and Sons Ltd*,[32]

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32 Industrial Steel and Plant Ltd v A V Swanson & Sons Ltd (1982) 2 ANZ Ins Cas 60-489 (HC).

a 1982 judgment of O'Regan J which this court followed in *Jackson*.[33]

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33 Jackson, above footnote 20, at para 29.

In that case Industrial Steel sold to Swanson a Liebherr tower crane under one contract, and agreed to erect it under another. Industrial Steel subcontracted Titan Plant Services to erect the Liebherr using another crane. During erection the Titan crane toppled over, damaging the two cranes and other property. The damage was attributable to the negligence of employees of Industrial Steel and Titan. Industrial Steel sought indemnity from its insurer under a public liability policy. Cover extended to accidental damage "caused by or in connection with" goods sold or supplied by Industrial Steel; in this case, the Liebherr crane. O'Regan J held that cover under this provision required a relationship of cause and effect, or a causal element of sense of consequence between the Liebherr crane as a "mere item of goods" and the legal liability.[34]

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34 Industrial Steel, above footnote 32, at 77,787.

To ask the question with what did the damage have to do was to receive the answer that it was the negligent erection. It would be "nonsense" to say that the damage was

"in connection with" the Liebherr crane itself as an item of goods sold.[35]

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35 At 77,787.

0 37. In our opinion, a real and substantial connection between the particular excluded activity in this case and the legal liability must almost inevitably entail a causal relationship of some kind. Counsel could not identify any non-causal connection that would be sufficiently real and substantial to exclude cover.

0 38. Accordingly, we agree with Nation J, although for somewhat different reasons, that in context the connection between the liability and the excluded activity required a causal relationship.[36]

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36 New Zealand Fire Service Commission v Legg, above footnote 2, at para 107.

We turn to consider the connection in this case.

Was the necessary connection between legal liability and excluded activity established on

the facts?

0 39. Nation J accepted that there was a connection between the liability and ELL:[37]

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37 At para 134(f).

". . . [S]ignificant material from the business, which the Leggs had chosen to insure with Lumley, was brought onto the lifestyle block and set alight. In that sense, the introduction and setting alight of that material was part of what happened on 10 January 2013. The embers left from the burning of that material could have been what re-ignited the debris which remained on top of the heap or that in the high winds was blown onto surrounding vegetation setting it alight."

0 40. However, the judge reasoned, this connection was not sufficient. We have recorded some of his findings at paras 9 and 10 above. In addition, he found that:[38]

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38 At para 134.

"The heap that was set alight on 16 December 2012 was of a size and nature that could have resulted entirely from normal use of the lifestyle block . . .

. . . The material from [ELL] placed on the heap before 16 December 2012 was not such as to, of itself, create a risk of an accidental fire or accidental re-ignition . . .

The evidence did not establish that without the material from [ELL] there would have been no re-ignition . . .

With material on the heap from [ELL], the risk of fire spreading and of liability arising for property damage was no greater than could have been reasonably anticipated with AMI providing cover as set out in the policy for damage arising from operations in connection with the lifestyle block.

. . . [I]t has not been established that it was embers from the [ELL] material which reignited on 10 January 2013. The re-ignition and the spread of the fire could have occurred without material from the business having been introduced to the heap."

0 41. The judge's conclusion was that:[39]

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39 At para 134(g).

"AMI has thus not proved, on the balance of probabilities, that the introduction of the pine stumps or other vegetation from [ELL] caused the re-ignition of the fire on 10 January 2013 or the Leggs' liability for which they otherwise had cover under the policy."

() 42. We have reached a different view. We preface our conclusions by noting that AMI need not prove that the specific embers that reignited on 10 January came from ELL's business. Causation involves inductive reasoning, in which conclusions are derived as a matter of probability and may rest on common sense.[40]

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40 Groves v AMP Fire & General Insurance Co (NZ) Ltd [1990] 2 NZLR 408 at page 412 per Hardie Boys J. See also Environment Agency (formerly National Rivers Authority) v Empress Car Co (Abertillery) Ltd [1999] 2 AC 22; at page 29 per Lord Hoffmann. William Young J adopted this latter approach in Tucker when considering whether the defendant in that case "caused" the relevant fire: Tucker, above footnote 10, at para 49.

It does not necessitate a "minute" or "microscopic" analysis.[41]

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41 Clan Line Steamers Ltd v Board of Trade [1929] AC 514 at page 530 per Viscount Sumner.

() 43. We agree with the judge that there was a connection between ELL's business and the liability. We respectfully differ from him in that we consider it was both causal in nature and substantial. The salient points are that:

(a) Material from ELL comprised the greater part of the heap, and included stumps capable of forming large embers and smouldering for a considerable time in the right conditions.

(b) The size of the heap contributed to the size of the residual pile of ash and unburnt material, so increasing the risk that embers deep within it would continue to smoulder.

() 44. We accept that, as the judge found, the heap might have stayed hot had there been no ELL material in it.[42]

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42 New Zealand Fire Service Commission v Legg, above footnote 2, at para 134(g).

However, this is only to confirm that the court cannot be satisfied that ELL material was the proximate or dominant cause. It remains the case, in our opinion, that there was an effective causal connection between ELL's material and re-ignition and resultant damage on 10 January.

Does it matter that the fire commingled insured and excluded activities?

() 45. Generally speaking, where an insurance policy speaks of loss "caused by" an insured or excluded event, a court must identify a single proximate cause of loss if it can.[43]

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43 McCarthy v St Paul International Insurance Co Ltd (2007) 157 FCR 402 at para 91 per Alsop J.

The proximate cause is not necessarily the last in time; rather, it is the cause adjudged efficient or dominant.[44]

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44 Leyland Shipping Co v Norwich Union Fire Insurance Society [1918] AC 350 at page 369 per Lord Shaw. See also Davies "Proximate Cause in Insurance Law" (1996) 7 Insurance Law Journal 284 at page 294.

Where an insured cause is found to be the proximate cause, cover applies. Where an excluded cause is the proximate cause, the exclusion applies. The insurer carries the onus of proving that an exclusion removes cover for a risk otherwise within the policy.

0 46. The *Wayne Tank* principle – it is an aid to contract interpretation, rather than a rule of law – states that where a loss has two effective and interdependent causes, one within the policy and one excluded by it, the exclusion prevails.[45]

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45 Wayne Tank and Pump Co Ltd v Employers Liability Assurance Corporation Ltd [1974] 1 QB 57 at pages 67 to 68 per Lord Denning MR, page 69 per Cairns LJ and pages 74 to 75 per Roskill LJ.

The rationale is that where an insuring clause and an exclusion are found together, one arrives at the parties' intent by subtracting the latter from the former. As it was put in *Wayne Tank* itself, "[s]eeing that [the underwriters] have stipulated for freedom, the only way of giving effect to it is by exempting them altogether".[46]

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46 At page 67 per Lord Denning. See also at page 75 per Roskill LJ.

In McCarthy v St Paul Insurance Co Ltd, Alsop J explained it more elaborately: "Given that the two causes are interdependent and the loss would not have occurred without the operative effect of the excluded cause, the non-response of the policy can be comfortably and logically accepted as the intended result of the revealed agreement of the parties."[47]

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47 McCarthy v St Paul Insurance Co Ltd, above footnote 43, at para 103.

AMI invokes the *Wayne Tank* principle here.

() 47. In this case proximate cause is not the policy standard; the AMI policy is not confined to loss "caused by" an event. We have held that "in connection with" required a causal relationship in the circumstances, but it is a lesser standard than "caused by".[48]

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48 Compare Davies, above footnote 44, at pages 287 to 289.

This does not affect the *Wayne Tank* principle, so long as: (a) the parties intended to exclude loss suffered in connection with ELL's business; (b) the excluded cause was an effective cause of the loss; and (c) the included and excluded causes were interdependent, in that the included cause would not have caused the loss in any event.[49]

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49 Clarke, "Insurance: The Proximate Cause in English Law", (1981) 40 CLJ 284 at page 298.

() 48. Nation J declined to apply *Wayne Tank*.[50]

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50 New Zealand Fire Service Commission v Legg, above footnote 2, at para 119.

He cited *Derksen v 539938 Ontario Ltd*, in which the Supreme Court of Canada held that coverage clauses must be interpreted broadly, and exclusion clauses narrowly, and excluded "the presumption that where there are concurrent causes, all coverage is ousted if one of the concurrent causes is an excluded peril".[51]

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51 At paras 122 and 127, citing Derksen v 539938 Ontario Ltd [2001] 3 SCR 398 at paras 48 to 49.

On this approach, if an insurer means to exclude cover in such circumstances, it must say so expressly in the policy.[52]

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52 Derksen, above footnote 51, at paras 46 to 47.

Absent such express language, it appears that the insurer must show the excluded cause was proximate or dominant.

() 49. The judge found that AMI had failed to prove "the fire was caused in an effective way" by the excluded activity.[53]

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53 New Zealand Fire Service Commission v Legg, above footnote 2, at paras 132 to 133.

He did not use the term "proximate", but we infer that proximate cause is the standard to which he held AMI. That is so because the substance of his decision is that the exclusion clause did not apply where two effective causes, one included and the other excluded, operated interdependently, and it follows that AMI must prove the excluded cause was proximate.

0 50. New Zealand courts have applied the *Wayne Tank* principle in several first instance judgments.[54]

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54 State Insurance Office Manager v Bettany (1990) 6 ANZ Ins Cas 76-818 (HC) at 76,821; Countryside Finance Ltd v State Insurance Ltd [1993] 3 NZLR 745 at page 756; and Body Corporate 326421 v Auckland Council (The Nautilus) [2015] NZHC 862 at para 340.

Further, as *Wayne Tank* and other cases make clear,[55]

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55 Wayne Tank, above footnote 45, at page 72 per Roskill LJ; and Leyland Shipping Co Ltd v Norwich Union Fire Insurance Society Ltd [1918] AC 350 at pages 370 to 371 per Lord Shaw of Dunfermline.

the principles are the same at common law as they are in marine insurance law, which is governed by legislation.[56]

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56 Techni-Chemicals Products Co Ltd v South British Insurance Co Ltd [1977] 1 NZLR 311 at page 319; and Becker, Gray & Co v London Assurance Corporation [1918] AC 101 at pages 113 to 114 per Lord Sumner. See also Merkin and Nicoll, Colinvaux's Law of Insurance in New Zealand (Thomson Reuters, Wellington, 2014) at page 100.

Where policy decisions fall to be made at common law, courts may find guidance in legislation in the same general field. The Marine Insurance Act 1906 (UK) provides that unless the policy otherwise provides, "the insurer is liable for any loss proximately caused by a peril insured against, but . . . he is not liable for any loss which is not proximately caused by a peril insured against".[57]

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57 Marine Insurance Act 1906 (UK), section 55(1).

The Marine Insurance Act 1908 (NZ) is in materially identical terms.[58]

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58 Marine Insurance Act 1908, section 55(1).

() 51. The *Wayne Tank* principle is also consistent with New Zealand courts' usual approach to

insurance contracts, which are interpreted in the same way as any other, the overall objective being to ascertain the mutual intention of the parties.[59]

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59 D A Constable Syndicate 386 v Auckland District Law Society [2010] 3 NZLR 23; [2010] 16 ANZ Ins Cas 61-850 at para 23; and QBE Insurance (International) Ltd v Wild South Holdings Ltd [2015] Lloyd's Rep IR 259; [2015] 2 NZLR 24 at para 18. It bears emphasis that Firm PI, above footnote 15, was an insurance case.

Exclusion clauses are construed narrowly, but not in a strained or artificial way that deviates from this general approach.[60]

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60 Lumley General Insurance (NZ) Ltd v Body Corporate No 205963 (2010) 16 ANZ Ins Cas 61-853 at para 27.

To follow *Derksen*, then, would be to effect a change of policy toward insurance contracts, going further than the contra proferentum rule permits.[61]

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61 Compare Derksen, above footnote 51, at para 46; and Lumley General Insurance (NZ) Ltd v Body Corporate No 205963, above footnote 60, at para 27. See also Trustees Executors Ltd v QBE Insurance (International) Ltd (2010) 16 ANZ Ins Cas 61-874 at para 40.

() 52. This is a case of two interdependent causes, neither of which can be isolated as the cause of the fire on 10 January 2013. On the facts, AMI proved on the balance of probabilities that the excluded cause – ELL material – was effective. It also excluded farming activities as an independent cause, effective without the ELL material. We have mentioned at paras 10 to 11 and 43 above the facts that lead us to that conclusion. In summary: the greater part of the material on the heap was ELL's; the ELL material included stumps capable of smouldering for a long time deep within a pile of ashes; and the embers were blanketed by an ash pile the size of which owed something to the ELL material. The conclusion that ELL material was an effective and interdependent cause is inescapable.

() 53. Mr Riches did not invoke the contra proferentum rule, but we record that for reasons given at para 34 above it would not avail the Leggs.

0 54. Our conclusion that the exclusion applies entails no substantial departure from the judge's factual findings. In particular, he did not find that the lifestyle block material would have caused the fire in any event. His findings about section 11 of the Insurance Law Reform Act are consistent with this conclusion.[62]

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62 New Zealand Fire Service Commission v Legg, above footnote 2, at paras 151 and 155.

As noted at para 44 above, he did find that the heap might have stayed hot had there been no ELL material in it, but that falls well short of a finding that the lifestyle block material was an effective and independent cause of the 10 January fire. The point on which we depart from the judge, and upon which the case ultimately turns, is whether the *Wayne Tank* principle applies. We hold that it does.

Decision

0 55. AMI proved that the Leggs' legal liability to the authorities for costs of extinguishing the fire on 10 January 2013 was incurred in connection with an excluded activity, ELL's business. To realise the parties' agreement we must give effect to the exclusion. Accordingly, AMI is not liable to indemnify the Leggs for those costs.

0 56. The appeal is allowed accordingly. Judgment is entered for AMI. The Leggs are liable to pay costs for a standard appeal on a band A basis and usual disbursements. Costs in the High Court are to be determined in that court in light of this judgment.