IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV-2014-409-000681
[2016] NZHC 1492

BETWEEN	NEW ZEALAND FIRE SERVICE COMMISSION Plaintiff
AND	SELWYN DISTRICT COUNCIL Second Plaintiff
AND	ROSS JOHN LEGG AND ANNETTE JILL LEGG First Defendants
AND	EVOLVING LANDSCAPES LIMITED Second Defendant
AND	AMI INSURANCE LIMITED First Third Party
AND	LUMLEY GENERAL INSURANCE (NZ) LIMITED Second Third Party

Hearing: 7 December 2015

Appearances: G K Rippingale & R M Dixon for the Plaintiffs
A Riches & J Taylor for the First & Second Defendants
I Thain & V Cress for the First Third Party
J Parker & J Herd for the Second Third Party

Judgment: 1 July 2016

JUDGMENT OF NATION J

Introduction

[1] On 10 January 2013, there was a serious fire in the Selwyn District in Canterbury. The fire originated from a burn heap on a lifestyle property belonging to Mr and Mrs Legg (the Leggs). It spread to neighbouring properties where it caused

significant property damage. The claim I deal with is to recover the costs of fighting the fire. My judgment will, however, have implications for other claims which are the subject of different proceedings.

[2] The claim for the costs of fighting the fire is made by the New Zealand Fire Service Commission and the Selwyn District Council under the Forest and Rural Fires Act 1977. After all evidence had been taken, their claims were admitted by both the Leggs and Evolving Landscapes Limited (Evolving Landscapes), the landscaping business run by the first defendants.

[3] The Leggs' property was insured with AMI Insurance Limited (AMI). Evolving Landscapes was insured with Lumley General Insurance (NZ) Limited (Lumley).

[4] The fire heap on the Leggs' property had been used to burn vegetation and other material from their lifestyle block but also vegetation, including some tree stumps from the Evolving Landscapes business. The major issue before me is whether or not, in terms of their particular policies, AMI and Lumley have any obligation to indemnify the Leggs and Evolving Landscapes on the claims that have been made against them.

How the fire started

[5] On a lifestyle block in the country, it is common to dispose of green waste or other rubbish using a fire. The Leggs had a burn heap on their property for that purpose. It was about 1.5 kilometres from their home at the north-western end of their property. On the burn heap was some paper and other rubbish from their household including paper from the office and their home. That office was also the office for Evolving Landscapes. There was also vegetation from their lifestyle block. This included the stumps of some olive trees that had been on the property. They also had a large planted area around their home which would have generated significant waste. The majority of the material was green waste or slash from the Evolving Landscapes business.[1] This was not all of the green waste generated by

[1] I use the term "green" waste to refer to vegetation in the same way as witnesses use the term.

that business. On occasions, Mr Legg took green waste from the business to EcoDrop refuse stations. The heap also included probably three pine stumps which had been brought to the burn heap from another property in the Selwyn area in connection with some work Evolving Landscapes was doing on that property.

[6] By 16 December 2012, the heap was of a size where Mr Legg decided it was necessary to set it alight. The land involved was also going to be taken over by a neighbouring property, a quarry. Mr Legg was conscious that, as summer continued, it was likely that there would soon be fire restrictions.

[7] On 16 December 2012, Mr Legg was engaged with his landscaping work with Evolving Landscapes. The fire was set alight in the morning by Mrs Legg and their son, Matthew. Matthew was aged about 22 and living away from home at the time. Mr and Mrs Legg had then been living on their lifestyle block for some 20 years. Both Mr and Mrs Legg came from a farming background. Both had experience of lighting such fires and knew the dangers and risks involved.

[8] Mrs Legg and Matthew minded the fire initially and kept an eye on it during the day. Matthew Legg left the area around 5.00 pm. By that time, the heap had substantially burnt down to a pile of ash. Photographs taken on the day of the fire, 10 January 2013, showed the remains of a stump sitting on top of the heap of ash. Matthew Legg could not recall that stump being there when he left but, on all the evidence, I consider it probably was in that position. On the other side were the remains of some light branches and some thicker branches, perhaps up to 20 centimetres thick. Amongst the branches and under them was what appeared to be household rubbish.

[9] Late in the afternoon of 16 December 2012, Mr Legg came to the property. He borrowed a neighbour's tractor to push material from the periphery onto the heap. He says he did this to burn as much material as he could and also to help clear the area around the fire to ensure there was an area of bare ground between the heap and any surrounding vegetation.

Not all vegetation put on the burn heap was fresh.

[10] The neighbour from whom he borrowed the tractor was someone who had farmed in the area. There was no evidence that this farmer had been concerned at a fire being lit at that time.

[11] Mr Legg used the tractor in this way on the evening the fire was lit and over the days immediately after 16 December. His evidence as to when he last did this was not entirely clear. I am satisfied that he ceased doing this at the latest five days after 16 December, i.e. by 22 December. Mr Legg said that when he used the tractor on this occasion, the tractor was fitted with a blade with tines which meant it could not be scraped over the ground in a way that left the ground completely clear. Some rubbish and branches may have fallen between the tines and remained on the ground.

[12] One of the allegations made by both AMI and Lumley was that the Leggs had failed to take adequate care in putting new vegetation on the heap between the time of the initial fire on 16 December 2012 and the major fire of 10 January 2013.

[13] In their evidence as briefed, both Mr and Mrs Legg said that neither of them had put any fresh vegetation on the heap over that period. Under cross-examination, Mr Legg initially said he would not have done so because, with the impending transfer of this land to the quarry, he had intended to start a new heap nearer the house. When it was suggested to him that he had not started this new heap until sometime in January 2013, he made certain statements which could have suggested he might have put vegetation generated through Evolving Landscapes' business on the heap after 16 December.

[14] I am satisfied that no new green waste was put on this heap after 16 December 2012. Some branch material had remained on the heap after the fire. The fire investigator, Mr King, said that it did not appear to have been burnt in the major fire of 10 January 2013. The strong nor-western winds which caused the heap to re-ignite were blowing strongly away from where the remaining branches were situated. The strength of the wind was such that, as is apparent from the photographs, some plastic and paper on the upwind side of the heap had not been burnt. It was Mrs Legg's evidence that the new heap had not been started probably until mid-January. She did not think it had been started at the time of the major fire

on 10 January 2013. She considered it unlikely that any vegetation would have been generated from the business and brought to the heap over the intervening period. She said that, with the Christmas break, their landscaping work was suspended and they took a break from similar work around their own property.

[15] The branches, plastic and other minor bits of paper rubbish that remained on the heap after the fire of 10 January 2013 were probably near the heap when it was set alight on 16 December 2012. Either on the evening after the fire was lit or the days immediately afterwards, it is likely that these branches and the accompanying rubbish were pushed up or thrown onto the heap by someone who was tidying up the area after the fire.

[16] I am satisfied that such material that was pushed onto the heap was either burnt or, as the fire cooled, simply remained on the heap unburnt. If this did not happen on 16 December 2012 or on the days immediately afterwards when Mr Legg was visiting the heap, then I am satisfied that the material was put on the heap when, to all appearances, the fire was out and there was no longer any heat in the heap that would have caused these branches to burn. I am satisfied of this because those branches were still there on 10 January 2013.

[17] There were no fire restrictions in place on 16 December 2012. Mr Legg said he had considered the weather forecasts. He said it was appropriate to set the fire alight at that time because the forecast was for rain. There was no suggestion that there would be strong winds. Prior to lighting the fire, as a precaution against it spreading to surrounding grassland, he had mown to a low level a strip of ground some four to six metres wide around the heap.

[18] I do not consider there was anything careless or reckless in the Leggs setting their fire heap alight on 16 December or subsequently, either themselves or through someone else, tidying up the area around the heap by putting some remaining branches or other rubbish on the heap.

[19] In their garage near the home, the Leggs kept a quad-bike with a small trailer attached to it. They would put household rubbish in plastic bags and leave those

bags on the trailer to be taken at an appropriate time to the fire heap. About two days after Christmas, Matthew Legg wanted to use the quad bike and trailer. He came to the home property and took the bags down to the remains of the fire heap. He said he put the bags about a metre away from the heap. He said he did not put the bags on the heap itself because he understood they would not be using that heap for future fires and would, at some stage, be moving what remained of the heap. He was adamant that there was no indication that there was any heat in the heap at that stage. He had not seen it alight at any time after he left the property around 5.00 pm on the night of 16 December 2012.

[20] On behalf of AMI and Lumley, it was suggested that Matthew Legg put these plastic bags, some of which contained Christmas wrapping paper, on the heap itself thereby increasing the risk that ultimately they would be set alight by the heat that remained in the heap. I find that the bags were not placed on the heap itself and also that, at the time they were put nearby, there was insufficient heat on the outside of the heap to have set them alight.

[21] Matthew Legg explained where he had put the bags by referring to the photographs taken on 10 January 2013. He pointed to an area that appears to be white ash on the periphery of the heap. I am satisfied that the white ash did come from what had been burnt with the plastic bags of rubbish and that this would have occurred on 10 January 2013 rather than on any days before then. That indicates that, at the time the bags were placed near the heap, there was insufficient heat coming from the heap to set them alight. I am satisfied that, at the time Matthew Legg left the bags there, he considered that the heap was well and truly out and there was no danger of these bags being set alight.

[22] The Selwyn District Council declared a restricted fire season would commence on 24 December 2012, meaning that the Leggs could not have a fire on their property without a permit. They neither sought nor obtained any such permit.

[23] For a period of some weeks before 10 January 2013, the weather was hot and dry. Nearby weather recording stations recorded daytime temperatures between 18^{o}C to 26^{o}C in the days from 1 January 2013 to 10 January 2013. Humidity was

low. The fire service has a way of calculating the fire risk according to a formula based on fire fuel moisture content and an initial spread index (denoting the spread potential of a fire). On that basis, the fire risk in the week prior to the major fire, as assessed by nearby weather stations, was extreme.

[24] Throughout that time, I am satisfied that neither Mr Legg nor Mrs Legg thought their fire heap posed a risk, whether to themselves, their property or any neighbouring properties. They had assumed that, within two or three days of the fire having been lit on 16 December 2012, it was completely out. They had not heard anything to suggest otherwise from their son after he had gone to the heap and put the bags of rubbish near it not long after Christmas. Sheep were being grazed in the area of the fire by a neighbour who they knew regularly went to that area to check on stock. They had not been told anything by that person to suggest that the heap posed a risk which they needed to deal with.

[25] On 10 January 2013, Mr Legg left the property to do landscaping work connected with Evolving Landscapes. He did not return until the evening after the fire had already spread and done serious damage to other properties. Mrs Legg left her home around 2.15 pm to travel to Riccarton. She went to her vehicle straight from the home. Despite the fact that the fire must have erupted around that time, she did not smell, see or hear anything to alert her to what was about to happen. While she was in town, someone told her that there was news of a major fire in the Selwyn District. She was not overly concerned. Mrs Legg arrived at the first police cordon around 5.00 pm. It was then she saw the amount of smoke coming from the fire. This cordon was approximately 1.5 kilometres from her home and Mrs Legg was told she could go no further. She was eventually allowed to walk along the road towards another cordon. She could see the fire was coming from the general area of their property. She was intensely anxious as to the safety of her home and the animals they had on the property. At that point, she was given a lift in a vehicle being driven by a Mrs Dorothy Barnard. Although Mrs Legg did not know this woman's surname, she knew her by her first name and had met her previously. Mrs Barnard's sister and brother-in-law owned a chicken farm not too far from the Leggs' property.

[26] Mrs Barnard gave evidence that, when Mrs Legg was in the car, she said words to the effect "I hope it's not my fire, I had it going this morning". That was the evidence which AMI and Lumley relied on in pleading that this fire on 10 January 2013 had started from a fire lit by the Leggs or on their instructions that same day. Mrs Legg acknowledged that she did say something like "I hope it's not our fire". She was adamant that she did not say anything about a fire being lit that morning.

[27] I am satisfied that Mrs Legg did not say that she had lit a fire that morning. Mrs Legg was sure that she did not say this and that she would not have said it because she did not in fact light any fire that morning and neither did anyone else as far as she knew. The fire investigator, Mr King, said there was no direct evidence of any fire having been lit on the morning of 10 January 2013 or close to that time. He saw nothing to suggest that material on top of the heap had been set alight on the day of the fire other than by re-ignition from within the heap.

[28] Probably both Mrs Legg and Mrs Barnard were in a state of high anxiety at the time this conversation took place. If Mrs Barnard was not concerned for her own property, she must have been most concerned about damage that might have been done to her sister's property. She had no hesitation in telling the Court that her sister and brother-in-law lost 18,000 chickens in the fire and lost everything financially as a result of the fire. Mrs Barnard certainly thought she was being honest in recalling the conversation which she described. Honest witnesses can be mistaken. I have no doubt that Mrs Barnard is mistaken in believing that Mrs Legg referred to a fire having been lit that morning.

[29] AMI and Lumley rely on the comment which Mrs Legg acknowledges she made as proving in some way that Mrs Legg knew their fire heap posed a danger and a risk during the period between 16 December 2012 and 10 January 2013, either because of the heat that remained within it or because of vegetation that she knew they had placed on top of the heap. I do not accept that it is probative evidence of any weight as to either.

[30] Mrs Legg could see from the smoke that it came from the vicinity of her property. As must frequently be the case with a house fire, where the occupier hopes that the fire did not emanate from something they may have done or omitted to do, it was not surprising for Mrs Legg to think about their fire heap and wonder if something unexpected might have resulted from it. The fact that she shared such a concern with someone she did not know well was consistent with her not knowing that it would be such a cause but thinking that, with a fire having started in the vicinity, perhaps it could have been.

[31] Mr King was the only fire investigator to give evidence. He prepared a report for the Selwyn District Council. He was at the scene of the fire by around 5.30 pm on 10 January 2013. He arranged for the photographs of the heap to be taken soon after that time. He was accepted by all parties as a competent expert witness. He was highly experienced, having been a fire investigator for some 12 years and having been involved in the investigation of 28 rural fires prior to the Selwyn investigation.

[32] Mr King was satisfied that the fire started as a result of the embers within the heap igniting some of the branches or other rubbish that was on top of the heap, embers from that material being blown by the strong winds onto nearby vegetation with the fire then rapidly spreading over a substantial area. On his evidence, I am satisfied that the fire started not with the material on top of the heap being lit from outside but from the heat generated from deep within the heap, no doubt as Mr King said was likely, as a result of the high temperatures and strong winds that were prevalent at the time. This is consistent with the evidence that no one lit a fire on that day. Consistent with this explanation too, when Mr King tested the state of the heap that evening, he was able to insert his hand through the top layer of the heap but not beyond about 20 centimetres because of more intense heat deep beneath.

[33] The fire thus resulted from the fact that, contrary to the Leggs' knowledge or expectation, hot embers with the potential to re-ignite remained deep within the heap long after they thought the fire had gone out. I do not consider the fact that there were old branches or any household rubbish on top of the heap to be the cause of the fire. As Mr King acknowledged, it was quite possible that embers could have spread

from the heap onto nearby vegetation in the high winds even without there having been loose material on top of the heap.

The plaintiffs' claim

[34] The first and second plaintiffs claim $217,118.30 for the costs of suppressing the fire. The claim is made under s 43 of the Forest and Rural Fires Act. A few days before the commencement of the hearing, the Leggs admitted liability to the plaintiffs for those costs. Their company, Evolving Landscapes, of which Mrs Legg was the director, continued to deny liability.

[35] Although the plaintiffs acknowledged that the insurer third parties were contending that the fire of 10 January 2013 was the result of a fire lit on 10 January 2013, the plaintiffs' case was, in accordance with their expert witness, Mr King, that the fire resulted from the re-ignition of the earlier fire lit on 16 December 2012. As was acknowledged by counsel for Evolving Landscapes and the Leggs, liability under s 43 of the Forest and Rural Fires Act is strict in that a defendant will be liable if he produces the situation from which the fire results in circumstances where the concatenation of events leading to the fire is a matter of ordinary as opposed to extraordinary occurrence.[2] Liability under s 43 thus exists "without proof of negligence or want of care".[3]

[36] When the hearing began, the issue as far as the plaintiffs were concerned was whether or not, when they prepared the heap and lit the fire on 16 December 2012, Mr and Mrs Legg were acting on behalf of Evolving Landscapes.

[37] At the conclusion of evidence, when counsel was to present submissions, I was told that Evolving Landscapes now also admitted liability to the plaintiffs. The plaintiffs are thus entitled to judgment as against both the Leggs and Evolving Landscapes.

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2 *Tucker v New Zealand Fire Service Commissioner* [2003] NZAR 270 (HC) at [42], [51]-[52], [61].

3 *Garnett v Tower Insurance Ltd* [2011] NZCA 576, (2011) 17 ANZ Insurance Cases 61-918 at [38].

Evolving Landscapes' claim for indemnity against Lumley

[38] Evolving Landscapes has claimed indemnity under an insurance policy with Lumley in which 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.

[39] The policy also stated:

> Lumley's maximum liability in respect of any one Occurrence, irrespective of the number of claims arising therefrom, shall not exceed the Limit of Indemnity stated in the Schedule.

[40] Subject to the policy terms, unless otherwise stated, certain specific coverage was automatically provided for. In this section there was the following clause:

> **3.3 Forest and Rural Fires Act**
>
> Lumley will indemnify the Insured in respect of liability under the Forest and Rural Fires Act 1977 for:
>
> (a) costs and losses incurred during the Period of Insurance recoverable under section 43;
>
> (b) levies imposed by a Fire Authority and apportioned to the Insured during the Period of Insurance under sections 46 and 46A.
>
> Provided that a sub-limit of $250,000 any one Period of Insurance shall apply, and an Excess of $1,000 shall apply.
>
> This Extension will apply regardless of whether or not Property Damage has occurred.

[41] In a section headed "Conditions", there were the following clauses:

> **5.7 Fraudulent Claims**
>
> If the Insured makes any claim knowing the same to be fraudulent or false in any respect, this Policy shall become void and any claims hereunder shall be forfeited.
>
> …

5.14 Reasonable Precautions

The Insured shall take all reasonable precautions to:

(a) prevent the manufacture, sale or supply of defective Products.

(b) comply, and ensure that the Insured's employees, servants and agents comply, with all statutory obligations, by-laws or regulations imposed by a public authority for the safety of persons or property.

(c) at the Insured's own expense, trace or recall or modify any of the Insured's Products containing any defect or deficiency of which the Insured has knowledge or has reason to suspect.

[42] In a statement of defence to the third party claim, Lumley pleaded:

(a) The Policy does not respond as the occurrence was not in connection with the second defendant's business; and

(b) the second defendant did not comply with condition 5.14(b) of the Policy, in that it failed to take all reasonable precautions.

[43] In closing submissions, Mr Parker for Lumley said that, because it had been established that waste generated by the business of Evolving Landscapes had been burnt in the fire of 16 December 2012, Evolving Landscapes accepted that that fire was an occurrence which had occurred in connection with the business of Evolving Landscapes and Evolving Landscapes thus had cover for any liability for property damage that was caused by the fire, if not otherwise excluded under the policy.

Failure to take reasonable precautions

[44] With regard to the defence and allegation that Evolving Landscapes had failed to take reasonable precautions, Mr Parker acknowledged that it is not enough that there might have been negligence or carelessness on the part of Mr and Mrs Legg acting for Evolving Landscapes.

[45] In contrast to the AMI policy, the particular obligations the Leggs had under the policy in this regard were spelt out.

[46] Mr Parker submitted that, if I found a new fire was lit by Mrs Legg on 10 January 2013, then Lumley would not be liable because Evolving Landscapes would be in breach of condition 5.14(b) of the Lumley policy. This would be because Mrs Legg had lit a fire in breach of the fire restrictions that were in place.

[47] In relation to this potential defence, Mr Parker submitted:

> If it is found that the company, Evolving Landscapes Limited, either through Mr or Mrs Legg placed fresh flammable material on the burn pile thus causing the fire to re-ignite then that would be a breach of condition 5.14. If it is found that Mrs Barnard and her husband are to be believed and Mrs Legg acknowledge [sic] having the fire going that morning then that clearly would be a breach of condition 5.14. It is not necessary that Mrs Legg actually ignited the fire on 10 January 2013 and by that I mean placed a match to flammable material or used some other form of ignition. If she merely placed the flammable material on the burn pile and that material caught fire and she knew it then that would be sufficient breach of condition 5.14.

[48] I have found that no fresh material was placed on the fire heap after 16 December 2012 in such a way as to cause the heap to re-ignite. I find the fire was not ignited on 10 January 2013 by way of Mrs Legg or anyone else placing flammable material on the fire or through such material being directly lit. Although the burning of some material left on top of the heap may have been a factor in the spreading of the fire, it was not the cause of the fire that occurred on 10 January 2013. Even if it had been, that would not have provided Lumley with a defence pursuant to clause 5.14, given that material remained on the heap only because Mr and Mrs Legg believed that the fire of 16 December 2012 was completely out and there was no longer a risk of re-ignition.

[49] During his submissions, Mr Parker accepted that, if the Leggs had put slash or other materials on the heap when they thought the fire was out, their actions would not have afforded Lumley a defence under clause 5.14 of the policy.

[50] While it might be argued that the fact the heap did re-ignite on 10 January 2013 is evidence that the Leggs did not take enough care to ensure the fire was completely out and could not re-ignite, such possible negligence would not have been so gross as to have involved a breach of clause 5.14(b) so as to allow Lumley to avoid liability under the policy.

The reasonable care condition: the legal test

[51] In order to justify declinature of a claim or cancellation of the indemnity policy on grounds of breach of a reasonable care condition, the insurer must prove the conduct of the insured to have been reckless or grossly irresponsible.[4]

[52] In *Cee Bee Marine Ltd v Lombard Insurance Co Ltd,* Richardson J (delivering the judgment of the Court of Appeal) noted that the condition must be construed with regard to the context of the particular policy and the specified risks. His Honour further clarified:[5]

> The test in a special risks policy as in this case is much more stringent than an ordinary prudence of plain negligence standard. In principle this must be so. A commercial contract such as an insurance policy must be construed having regard to the commercial objectives of the policy or clause of the policy. By issuing an industrial special risks policy the insurer agrees to indemnify the insured against the consequences of its own or a third party's negligence in relation to the use of the property insured… The commercial purposes of such insurance would be frustrated if the insurer were permitted to avoid the indemnity against the consequences of the insured's negligence which the insurance was intended to provide.

[53] After summarising developments in English, Australian and Scots case law (which requires that the insured, knowing of the risk, deliberately failed to take measures to avoid it or took measures which it knew were inadequate), Richardson J held that the recognised test as to whether an insured has taken all reasonable precautions to prevent loss or damage "remains open for final consideration in this country".[6] In the circumstances, it was unnecessary to determine whether recklessness was properly a subjective or objective test. Nevertheless, the wording of the judgment itself suggests a judicial preference for a hybrid subjective-objective test.

[54] In *MMI Insurance NZ Ltd v P D Davies Ltd*, Neazor J said the general thrust of authority in New Zealand had been that more than carelessness was required.[7]

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4 *Cee Bee Marine Ltd v Lombard Insurance Co Ltd* [1990] 2 NZLR 1 (CA).
5 At 12.
6 At 13.
7 *MMI Insurance NZ Ltd v P D Davies Ltd* HC Napier AP1/98, 4 September 1998.

There had to be a significant or substantive failure on the part of the insured commensurate with "recklessness", "gross irresponsibility" or "gross carelessness".[8]

[55] In *Cee Bee Marine Ltd v Lombard Insurance Co Ltd*, on the evidence, those at the scene had taken appropriate steps to extinguish the fire and thought they had successfully extinguished it and left the area safe.[9] It was a case "where either it broke out again because it was not completely extinguished, or broke out afresh… Either way it was, as the Judge found, a plain case of negligence."[10]

[56] Relevant to the Leggs' case, Richardson J added:[11]

> Considered with hindsight in the light of the devastating outcome, prudence would no doubt have suggested that some further steps should have been taken but neither his [Mr Farrant's] own evidence nor the bare fact that fire broke out in his absence and destroyed stock, plant and equipment justifies concluding that the company acted recklessly.
>
> What is a reasonable precaution for an insured to take must depend on the particular circumstances. The greater the foreseeable risk of a loss, the greater the precautions which may be required. But it would turn the object of insurance on its head to make the insured indemnify the insurer against ordinary negligence on the part of the insured. In this case we are not satisfied that the insured failed to take all reasonable precautions.

[57] In *Kelly v National Insurance Co of New Zealand Ltd*, the Court of Appeal affirmed its stance in *Cee Bee Marine*.[12]

[58] Accordingly, clause 5.14 does not provide Lumley with a defence to the claim against Lumley as a third party.

Fraudulent claim

[59] In submissions for Lumley at the conclusion of the evidence, Mr Parker raised the possibility of a defence based on clause 5.7 of the policy. In interviews conducted by Lumley on 28 May 2013, Mr Legg had said he had not put any fresh green waste from the business on the fire heap between 16 December 2012 and

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8 At 5-6.
9 *Cee Bee Marine Ltd v Lombard Insurance Co Ltd*, above n 4.
10 At 14.
11 At 14.
12 *Kelly v National Insurance Co of New Zealand Ltd* [1995] 1 NZLR 641 (CA).

10 January 2013. When asked questions about this during the hearing, he made various statements which indicated he could have put green waste on the heap over that period. Mr Parker acknowledged that it was only when he was reviewing the evidence for the purpose of closing submissions that he had thought this evidence from Mr Legg could support this claimed defence which had not been pleaded. He accepted that, for the defence to be available, I would have to give Lumley leave to amend its pleadings so that it could be relied on as such a defence. He sought leave accordingly, pursuant to r 7.7 of the High Court Rules.

[60] Having heard all the evidence, I am not willing to grant such leave. If Lumley thought there was potential for such a defence to be raised, it should have been referred to as an affirmative defence in the pleadings. There would also be serious prejudice to Evolving Landscapes and Mr and Mrs Legg if the amendment were to be permitted after all witnesses had been called and when it was not suggested to Mr or Mrs Legg in cross-examination that they had been dishonest in their interviews with the Lumley investigator.

[61] In his interviews with the Lumley and AMI investigators and with the police, Mr Legg said he had not put fresh green waste on the heap during the relevant period. In cross-examination, it was not suggested to him that, when he gave the answers he did to those investigators, in particular the investigator for Lumley, he had said something which he knew to be untrue. While he did give some evidence during the hearing which might have suggested he had put green waste on the heap over the relevant period, as already stated, I would not have been satisfied that this later evidence was necessarily correct and that his earlier statements, closer to the time of the fire, were wrong. The evidence that emerged during the hearing would certainly not have been enough to satisfy me that he had been dishonest when discussing what happened with Lumley's investigator or indeed the other people who investigated this fire. More probably than not, the vegetation or slash on top of the heap on 10 January 2013 had been there on 16 December 2012 but had been pushed up onto the heap in the days after the 16 December 2012 fire.

[62] Accordingly, even had I given leave to amend pleadings, clause 5.7 would not have provided Lumley with a defence to Evolving Landscapes' third party claim for indemnity. On that claim, Evolving Landscapes is entitled to judgment.

Liability of AMI on third party claim

[63] Mr and Mrs Legg had an insurance policy with AMI. It was titled "Your Lifestyle Block Policy". Section 16 of the policy was as follows:

> **16. Legal liability**
>
> *Cover for your legal liability*
>
> If you have chosen this cover it will be stated in the Policy Schedule. 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.
>
> 1. What we will pay
>
> a. We will pay up to $2 million for any claim or series of claims arising from any one event.
>
> b. We will also pay any reasonable legal expenses you incur that are first approved by us, or any legal expenses that are recoverable from you by any claimant.
>
> *Special covers*
>
> The following special covers are automatically included. Cover is provided on the same basis as 'Cover for your legal liability'.
>
> …
>
> 3. Forest and Rural Fires Act 1977
>
> a. We will cover you for any liability under the Forest and Rural Fires Act 1977 up to $2 million, including defence costs, except that for levies imposed by a Fire Authority under Section 46 of the Act, we will cover you up to $250,000.

[64] In submissions for AMI, Mr Thain said that AMI accepted that the Leggs had coverage for their liability for the costs claimed from them by the plaintiffs and in respect of other claims that were before the Court on other proceedings for property damage arising from the fire. AMI accepted that, whether the damage resulted from the fire lit on 16 December 2012 or from some later date, the fire was in connection with their farming operation.

[65] An introduction to the policy stated the insurance contract consisted of (amongst other documents) the policy and the policy schedule.

[66] Mrs Legg arranged the policy in November 2009. A proposal for farm insurance was made by Mrs Legg in a telephone discussion with an AMI employee, Mrs Paula Houghton. She gave evidence at the hearing. The answers to a number of questions were recorded electronically. The proposal forms produced as part of the common bundle record this information:

> 16. Do you want cover for legal liability? Yes
>
> Sum insured: $1,000,000

[67] The policy schedule for the period from 5 September 2012 to 5 September 2013 for "Your Lifestyle Block Farm Policy" said it covered:

> 16. Legal liability $1,000,000 $14.39

The $14.39 refers to the premium.

[68] If AMI is liable to indemnify Mr and Mrs Legg under the policy for their legal liability arising out of the fire, there is an issue as to whether AMI's liability will be limited to $1,000,000 as referred to in the schedule or $2,000,000 as referred to expressly in section 16. It was agreed that issue would not be dealt with in these proceedings.

Failure to take reasonable precautions

[69] In its statement of defence to the Leggs' claim, as a second affirmative defence, AMI asserted that AMI was entitled to decline the claim or void or cancel the AMI policy under a clause in a section of the policy as follows:

> **Your responsibilities**
>
> These are your responsibilities as a policy owner. If you do not fulfil these responsibilities we can decide not to accept a claim or to cancel or void your policy.
>
> 1. Protecting your property

a. You and anyone else covered by this policy must take every care to protect all property covered by this policy and avoid incurring any legal liability to others.

b. You must keep your property in good condition at all times.

[70] AMI pleaded that the Leggs had:

(a) failed to take reasonable steps to properly extinguish a fire ignited at their residential lifestyle block on 16 December 2012; and/or

(b) allowed a fire to ignite on 10 January 2013 at their residential lifestyle block in breach of a fire ban imposed by the Selwyn District Council; and/or

(c) placed, or permitted a third party to place, flammable material (including paper from the home-office of Evolving Landscapes) on the burn pile between 16 December 2012 and 10 January 2013 in circumstances that caused the flammable material to ignite.

[71] The Leggs left some debris on top of the heap on or after 16 December 2012. They permitted their son to leave plastic bags containing rubbish near the heap in the days soon after Christmas 2012. I do not consider that in doing so they were reckless or careless to the degree required to justify AMI declining to indemnify under this part of the policy, given the Leggs reasonably believed the fire had gone out in the days after 16 December 2012 and was no longer at risk of re-igniting. There is also no evidence that they increased the risk of re-ignition by putting material on or near the fire on 10 January 2013 or that anyone lit a fire on that day.

[72] It is clear that the fire did re-ignite from embers within the heap on 10 January 2013. The Leggs thus had not completely extinguished all embers in the heap after the fire of 16 December 2012. Mr King did not suggest that normal and prudent practice would have required them to pour water on the heap to an extent that would have provided absolute certainty that embers could not re-ignite. I noted that, after the major fire of 10 January 2013, there was a restricted fire season, the fire risk levels were extreme and Mr King had put his hand in the heap but had not

been able to put it in beyond the length of his hand because of the intense heat. No one from the fire service thought it necessary to pour water on the remaining heap to ensure that, if strong winds blew up again, the branches that remained on the heap did not ignite or that embers from the heap were not blown onto nearby vegetation. Heat from the heap had not been sufficient to set alight the branches and the small amount of household rubbish that was on the heap in the days after 16 December 2012. The heat was not sufficient to set alight the bags of rubbish that Matthew Legg placed near the heap soon after Christmas 2012. The Leggs reasonably thought the fire they had started on 16 December 2012 was completely burnt out and the remaining embers no longer posed a risk of a future fire. Unfortunately for them and others, they were mistaken and there must have been some embers hot enough within the heap to be set aflame in the high winds.

The exclusion clause

[73] AMI's primary defence to the Leggs' claim for indemnity was based on an exclusion clause appearing under the heading "What is not covered by cover for your legal liability" as follows:

> **What is not covered by 'cover for your legal liability'**
>
> …
>
> 6. No cover for liability arising from other occupations
>
> a. 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 operation.

[74] In the "Definitions" section of the policy, "farming operation means your agricultural or horticultural business or lifestyle block at the location stated in the policy schedule". In its statement of defence, AMI pleaded in relation to this exclusion clause:

> (i) the First Defendants' legal liability is in connection with the Second Defendant carrying on the "business or trade" of landscaping and garden maintenance; and

(ii) the Second Defendant's business is not directly connected with the "lifestyle block at the location stated in the Policy Schedule" (as per the applicable alternative in the definition of "farming operation") because:

A. none of the Second Defendant's landscaping and garden maintenance is carried out at the location; and/or

B. the underwriting risk presented by the Second Defendant's business is of a different nature to that underwritten by a residential lifestyle block insurance policy.

[75] In accepting that AMI was, disregarding the exclusion clause, liable to provide cover for liability for damage to property arising from the Leggs' fire, AMI accepted that burning of household rubbish and green waste in the way that occurred was the sort of event for which the Leggs had obtained cover. Nevertheless, AMI contends that, as a matter of law based on the particular words of this policy, AMI's liability under the policy is excluded. AMI says that, on the evidence, the risk for the Leggs and thus AMI was increased through the Leggs putting material generated from the business on the heap. AMI also submits that the risk was increased because the heap that was set alight on 16 December 2012 was much bigger than it would otherwise have been because of the material on the heap from the Evolving Landscapes business. AMI also refers to the evidence of Mr King that the possibility of embers remaining within the heap was increased through the Leggs putting the pine tree stumps on the heap.

[76] It is for AMI to establish and prove that the exclusion clause operates to avoid the AMI policy from having to respond.

[77] For AMI, Mr Thain submitted that what AMI had to establish was:

- a connection between the legal liability of Mr and/or Mrs Legg to other parties and the business of Evolving Landscapes; and

- the business of Evolving Landscapes was not directly connected with Mr and Mrs Legg's farming operation on the lifestyle block.

[78] Referring in particular to judgments of Miller J in the Court of Appeal, Mr Thain submitted AMI did not have to prove "a direct or proximate causal

connection".[13] He submitted that, to establish there was the necessary connection, the Court had to be satisfied only that the connection was "of sufficient consequence or significance in the circumstances of the case" or that there was "a discernible and rational" link.[14] Mr Thain submitted that, although a causal connection did not have to be established, there was such a connection in this case because:

- waste from Evolving Landscapes' business activities was the main reason for the fire lit by Mrs Legg and her son on 16 December 2012 because it was the majority of the material which the Leggs wished to dispose of by the fire;

- smouldering embers from Evolving Landscapes' waste that was burnt in the fire provided the necessary ignition source for the fire on 10 January 2013; and

- the waste added to the pile between 16 December 2012 and 10 January 2013 included paper-waste from Evolving Landscapes' office.

[79] Mr King said (in cross-examination) that heavier material would burn on for an extended period. There was clear evidence that one of the tree stumps had not burnt completely. It remained on top of the heap after the fire on 10 January 2013. Any material that had been around it or over it had largely disappeared. Mr King said he saw no evidence that the stump had been ablaze on 10 January 2013 but said he had not checked underneath it to see whether any part of it was still burning. There was no evidence that the other stumps that had been brought onto the fire had remained part of the heap after the fire on 16 December 2012.

[80] Mr Riches, for the Leggs and Evolving Landscapes, pointed out that Mr King had said the chances of hot embers remaining from the fire would be increased through the wooden material being part of the fire but he had referred to that being

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13 *JCS Cost Management Ltd v QBE Insurance (International) Ltd* [2015] NZCA 524 at [37], citing *IAG New Zealand Ltd v Jackson* [2013] NZCA 302, (2013) 17 ANZ Insurance Cases 61-982 at [29].

14 At [37].

possible with branches or wooden material of more than 10 centimetres. That material was of the sort that could be expected to be put on the fire from the lifestyle block itself. Mr Riches also referred to the evidence that the remains of olive trees, including tree stumps from the lifestyle block, had been part of the 16 December 2012 heap.

[81] Mr Thain also submitted that the exclusion clause applied even though waste from the lifestyle farming operation and Mr and Mrs Legg's home was also included in the fire on 16 December 2012 and contributed to the fire on 10 January 2013. He relied on what he said was the accepted insurance law principle that, if there are two proximate or efficient causes of a loss and one cause falls within the insuring clause of the policy and the other is expressly excluded by an exclusion clause, the exclusion will apply to exclude the entire claim. He referred to this as the *Wayne Tank* principle.[15] Mr Thain referred to the way the principle was explained by Gilbert J in *Body Corporate 326421 v Auckland Council (the Nautilus)*:[16]

> [338] No difficulty arises where a claim has only one cause. If the cause is within the insuring clause and not excluded by an exclusion clause, the claim is covered.
>
> [339] However, where the claim has two or more causes, the claim will be covered only if at least one of these causes is within the insuring clause and none of the causes is excluded by an exclusion clause.
>
> [340] For the purposes of both the insuring clause and the exclusion clause in the policy, cause includes any indirect cause as is clear from the use of the words "arising out of". The relevant cause does not need to be the proximate cause, merely a material contributing factor.

And also by Lord Phillips in *The "Demetra K"*:[17]

> …Where, however, a policy contains an express exclusion of cover in respect of loss resulting from a specified cause, underwriters will be under no liability in respect of a loss resulting from that cause, notwithstanding the fact that there may have been a concurrent cause of the loss which falls within the cover.

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15 *Wayne Tank & Pump Co Ltd v Employers' Liability Assurance Corpn Ltd* [1974] QB 57, [1973] 3 All ER 825 (EWCA Civ) [*Wayne Tank*].

16 *Body Corporate 326421 v Auckland Council (The Nautilus)* [2015] NZHC 862 (HC) at [338] to [340].

17 *Kiriacoulis Lines SA v Compagnie d'Assurances Maritime Aeriennes et Terrestres (The "Demetra K")* [2002] EWCA Civ 1070, [2002] 1 Lloyd's Rep IR 795 [*The "Demetra K"*] at [18].

[82] I do not consider that I am bound by authority to find that causation is irrelevant in establishing a sufficient connection between elements referred to in an exclusion clause relied upon by an insurer to avoid having to indemnify an insured for liability that would otherwise be covered by the policy.

[83] In *IAG New Zealand Ltd v Jackson*, IAG was relying on an exclusion clause which said Mr Jackson was "… not insured for civil liability in connection with any dishonest, fraudulent, criminal or malicious acts or omissions by you …".[18] Mr Jackson, who was an insurance broker, was found liable to the plaintiffs for the losses they suffered through not insuring their property as a result of his dishonestly telling them that he had arranged the cover they wanted.

[84] Miller J, for the Court of Appeal, stated that, in this context, "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".[19]

[85] Miller J referred, with approval, to the judgment of the High Court of Australia in *Dickinson v Motor Vehicle Insurance Trust*.[20] There, the Court was concerned with proceedings where a child was burnt after another played with matches when they had been left in a parked car while the driver went shopping. The High Court held the injuries arose out of the use of the car. Miller J referred to its statement:[21]

> … The test posited by the words "arising out of" is wider than that posited by the words "caused by" and the former, although *it involves some causal or consequential relationship* between the use of the vehicle and the injuries, does not require the direct or proximate relationship which would be necessary to conclude that the injuries were caused by the use of the vehicle.

[86] Miller J also referred to a decision of the Supreme Court of South Australia in *RAA-GIO Insurance Ltd v O'Halloran*.[22] That is of particular relevance in the current situation. The policy there excluded claims arising out of or in connection

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18 *IAG New Zealand Ltd v Jackson*, above n 13, at [13].
19 At [24].
20 At [26], citing *Dickinson v Motor Vehicle Insurance Trust* [1987] HCA 49, (1987) 163 CLR 500.
21 At [26], citing *Dickinson v Motor Vehicle Insurance Trust*, above n 20, at 200 (emphasis added).
22 At [27], citing *RAA-GIO Insurance Ltd v O'Halloran* [2007] SASC 245, (2007) 98 SASR 123.

with the business of the insured. Mr O'Halloran's loss arose when he returned to his office building after hours for non-work purposes and caused a fire which damaged other premises. As Miller J stated:[23]

> A Full Court found that "in connection with" required an appropriate nexus between his liability and his business or occupation. It did not suffice that he was in the building where his office was located, for he went there for a non-work purpose. Accordingly the exclusion did not apply.

[87] Miller J also referred, with approval, to a judgment of O'Regan J in *Industrial Steel and Plant Ltd v A V Swanson & Sons Ltd*.[24] There was an extension in the policy for losses "caused by or in connection with or arising from goods or materials supplied, installed or used by the insured in building work". The plaintiff had installed a crane on a building site. It was damaged when another contractor's crane toppled onto it. O'Regan J held there was "no relationship of cause and effect, or causal relationship or sense of consequence between the crane as a mere item of goods and the loss of damage sustained".[25]

[88] After considering these judgments, Miller J stated:

> [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. We reject Mr Ring's alternative test – namely, that there need be no sense of consequence so long as the connection is "material" – as both uncertain and without support in the authorities.

[89] Miller J did put some gloss on what he had said in this regard, in his dissenting judgment in *JCS Cost Management Ltd v QBE Insurance (International) Ltd*.[26] It was there he said the connection had to be only "of sufficient consequence or significance in the circumstances of the case" or of there being "a discernible and rational link".[27] I accept that Miller J did say that, in *IAG New Zealand Ltd v*

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23 At [27].
24 *Industrial Steel and Plant Ltd v A V Swanson & Sons Ltd* (1982) 2 ANZ Insurances Cases 60-489 (HC).
25 At 77,787.
26 *JCS Cost Management Ltd v QBE Insurance (International) Ltd*, above n 13.
27 At [37].

Jackson, the Court of Appeal had meant that a connection need not be causal provided it was of sufficient consequence or significance in the circumstances of the case. In its earlier judgment, which however binds me, the Court of Appeal did say, in construing an exclusion clause, "but we accept… that "in connection with" does demand some causal or consequential relationship between the two things in this setting".[28] It is also material that Miller J made his comments in *JCS Cost Management Ltd* when the Court of Appeal was construing the meaning of the words "in connection with" in an insuring clause, not an exclusion clause.

[90] It was in that context that the majority discussed the phrase "in connection with". They cited, with approval, a statement of Adamson J in *Rian Lane v Dive Two Pty Ltd* and said "in connection with" did not require a direct causal link.[29] Adamson J had said the words "merely require a relationship between one thing and another".[30] The majority went on to say that what the insured did in that case was sufficiently connected with the insured business but that was not sufficient to require indemnity because the insured's liability had to "have been causally connected to the conduct that [he] engaged in as part of his professional business practice".[31]

[91] In discussing whether there was cover, the majority stated:[32]

> 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.

[92] AMI accepts that the burning of the fire heap on 16 December 2012 and liability resulting from it was a risk for which the Leggs were insured under their policy with AMI. In my view, for the exclusion clause to operate, AMI had to establish that, in an effective way, the connection of events and circumstances with

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28 *IAG New Zealand Ltd v Jackson*, above n 13, at [29].
29 *JCS Cost Management Ltd v QBE Insurance (International) Ltd*, above n 13, at [52].
30 *Rian Lane v Dive Two Pty Ltd* [2012] NSWSC 104, (2012) 17 ANZ Insurances Cases 61-924 at [68].
31 *JCS Cost Management Ltd v QBE Insurance (International) Ltd*, above n 13, at [57].
32 At [58] (citations omitted).

Evolving Landscapes' business was causative of the liability which the Leggs have to other parties, including the Rural Fire Service.

[93] Whether or not this was so must be decided firstly by a careful consideration of the insurance contract. The approach I have to take in construing the terms of the policy is the same I took in *Newbery v AA Insurance Ltd*.[33]

[94] Insurance contracts are interpreted according to the ordinary principles of contractual interpretation.[34]

[95] The objective of construction of a contract is to give effect to the intention of the parties. That intention is determined by reference to their expressed rather than actual intentions. The purpose of the contract may be inferred from the language used by the parties, judged against the objective contextual background.

[96] The inquiry concerns what a reasonable and properly informed third party would consider the parties intended the words of their contract to mean.[35] This reasonable person is hostile to technical interpretations and undue emphasis on niceties of language but there is no presumption that words will be interpreted according to their ordinary meaning.[36]

[97] As contracts are interpreted objectively, evidence as to what the individual parties subjectively intended or understood their words to mean is not relevant and should be disregarded by the Court.[37]

[98] Neither party suggested that the context in which this insurance contract was formed or its background would affect the meaning I should give to the words used in the policy. In interpreting the policy, my focus has to be on its language. This is appropriate given this was a standard consumer policy and not a contract

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33 *Newbery v AA Insurance Ltd* [2015] NZHC 2457.

34 *MacGillivray on Insurance Law* (13th ed, Sweet & Maxwell, London, 2012) at [11-001]; *D A Constable Syndicate 386 v Auckland District Law Society Inc* [2010] 3 NZLR 23 (CA) at [23].

35 *Vector Gas Ltd v Bay of Plenty Energy Limited* [2010] NZSC 5, [2010] 2 NZLR 444 at [19].

36 *Multi-Link Leisure Developments Limited v North Lanarkshire Council* [2010] UKSC 47, [2011] 1 All ER 175 at [21]; *Trustees Executors Ltd v QBE Insurance International Ltd* [2010] NZCA 608, (2010) 16 ANZ Insurance Cases 61-874 at [33].

37 *Vector Gas Ltd v Bay of Plenty Energy Ltd*, above n 35, at [19] per Tipping J; *O'Loughlin v Tower Insurance Ltd* [2013] NZHC 6701, [2013] 3 NZLR 275 at [36] per Asher J.

individually negotiated between the parties.[38] In that context, the ordinary meaning of words is important.

[99] That summary is consistent with the approach which Tipping J said should be taken in interpreting contracts generally in *Vector Arena*, a passage relied on by Mr Thain.[39]

[100] It is important to recognise that the Court is not concerned with the construction of the insuring clauses but with the construction of an exclusion clause which the insurer is arguing excludes it from having to indemnify for an event and liability which would otherwise be covered by the policy.

[101] Importantly, the insurance contract and the words of the exclusion clause have to be interpreted in the context of it being a fundamental principle of insurance law that an insurer is liable for loss proximately caused by an insured peril.

[102] A reasonable insurer and reasonable insured would consider that, when they had agreed liability would be excluded if the insured's legal liability "arose out of or in connection with" a business not directly connected with the insured's farming operation, liability would be excluded if events or circumstances relating to that other business had, in some effective way, caused the liability to a third party. I do not consider a reasonable insurer would have understood or intended that it could rely on the words "in connection with" to avoid liability where the connection with a non-farming business was not in any way causative of the liability.

[103] Say, in this case, the person who had assisted Mrs Legg in setting the fire heap alight on 16 December 2012 had been someone employed by Evolving Landscapes rather than her son, all material on the heap had come from the lifestyle block and, apart from helping with the lighting of the fire, the Evolving Landscapes employee had nothing to do with the ongoing management of the fire or seeing that it had been extinguished. Would a reasonable insurer or insured have thought liability could be excluded simply because, on 16 December 2012, an

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38 Burrows, Finn & Todd *Law of Contract in New Zealand* (5th ed, LexisNexis, Wellington, 2016) at [6.2.2(e)].

39 *Vector Gas Ltd v Bay of Plenty Energy Ltd*, above n 35, at [19].

Evolving Landscapes employee had helped start the fire? The reasonable objective third party would have thought that to apply the exclusion clause in this way would have been unreasonable. If asked why, the answer would have been that the involvement of the Evolving Landscapes employee had nothing to do with how the Leggs became liable to other parties. If pressed further as to why it had nothing to do with the Leggs having a liability to other parties, the reasonable and properly informed third party would have said it was because the involvement of the Evolving Landscapes employee did not, in any effective way, cause or bring about the Leggs' liability.

[104] So, in my view, the exclusion clause which AMI relies on has to be construed to require AMI to prove that, in some way, the events and circumstances of 10 January 2013 were connected with the landscaping business of Evolving Landscapes in a way that, in an effective sense, caused the Leggs to incur a liability to other parties, including the Rural Fire Service.

[105] If there was any uncertainty about this, that uncertainty could exist only because of an ambiguity in what the words "arising out of or in connection with" might mean. With such ambiguity and uncertainty, applying the contra proferentem principle, the exclusion should be interpreted in the way most favourable to the Leggs. Application of that principle would require the clause to be interpreted against the interests of the party who drafted the policy, AMI.

[106] In *IAG New Zealand Ltd v Jackson*, Miller J stated that "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".[40]

[107] In having regard to the purpose and context of an insurance contract and the purpose of an exclusion clause, I consider that use of the words "in connection with" required the connection to be causative of the liability, for which AMI says its obligation to indemnify is excluded.

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[40] *IAG New Zealand Ltd v Jackson*, above n 13, at [24].

[108] It is also only if the exclusion clause is construed in this way that AMI can, as it seeks to do, rely on the *Wayne Tank* principle to avoid liability. It is only where there has been a concurrent *cause* of the insured's loss for which the insurer's liability is excluded that courts have applied the *Wayne Tank* principle and excluded the insurer from liability.

[109] In *Wayne Tank,* under the exclusion clause the insurer was not liable to indemnify for "damage caused by the nature or condition of any goods sold or supplied by or on behalf of the insured".[41] A fire resulted from the insured installing equipment and apparatus which were seriously defective and at risk of catching fire (the basis of exclusion). A fire occurred because an employee had switched on heating tape and left it unattended throughout the time when the installation had not been tested (an event for which there was cover).

[110] In *Body Corporate 326421 v Auckland Council (The Nautilus),* there was cover for the insured's liability arising out of design work but exclusion in respect of any claim arising out of defective workmanship by the insured.[42] Claims were made against the insured in relation to the design of the building but liability was excluded because defective workmanship was also "alleged to be a material contributing cause" of all losses.

[111] In *Countrywide Finance Ltd v State Insurance Ltd,* a ferry boat sank at its moorings.[43] The exclusion clause stated "the insurers shall not be liable for any loss of damage caused by or resulting from… action of micro-organisms, biological processes… or insects". Hammond J held the sinking resulted from a failure in the hull caused in part by rot (for which there was cover) and in part because of worm damage which Hammond J held to be damage by insects.[44] Applying *Wayne Tank*, he held that liability was excluded, stating:[45]

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41 *Wayne Tank*, above n 15, at 828.

42 *Body Corporate 326421 v Auckland Council (The Nautilus)*, above n 16.

43 *Countrywide Finance Ltd v State Insurance Ltd* [1993] 3 NZLR 745 (HC).

44 On appeal, the Court of Appeal held a worm was not an insect. Hammond J's judgment was overturned on that factual basis because it had thus been proved the exclusion clause applied: *Countrywide Finance Ltd v State Insurance Ltd* (1996) 7 TCLR 271 (CA).

45 At 756.

> If there is a dominant cause of the loss, then the Court will have regard to that. But, if there are two approximately equal or, I would say, co-mingled causes, the insurer can effectively rely on one of those causes not being in the policy.

[112] In *McCarthy v St Paul International Insurance Co Ltd,* solicitors were insured against any loss arising from any claim incurred in connection with their practice.[46] An exclusion clause provided there would be no indemnity "in respect of any liability… brought about by the dishonest or fraudulent act or omission of the insured including… any person employed in connection with the practice".

[113] The solicitors were facing 36 claims arising out of their advice in recommending an investment to clients (advice for which they were insured). The advice on those claims however involved them passing on to clients information about the proposed investment prepared by their loan manager in respect of which he was found to have been dishonest.

[114] Kiefel J discussed in detail the *Wayne Tank* principle. Stone J and Allsop J agreed with his judgment. Kiefel J stated:

> 88. *Wayne Tank* must be seen against the background of the place of causation in insurance law.
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> …
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> 91. It has been said that when an argument as to causation arises in respect of rival causes under a policy of insurance, the first task of the Court is to look to see whether one only of the causes can be identified as the proximate or efficient cause: *The "Alizia Glazial*" [2002] 2 Lloyd's Rep 421 at 431. Nevertheless, if applying commonsense principles and recognising the commercial nature of the insurance policy that is the context of the question, two causes can be seen as proximate or efficient, the terms of the policy must then be applied to those circumstances. Once the availability of two relevantly proximate causes is accepted, care is necessary in analysing the response of an insurance policy. If there are two concurrent causes one falling within the policy, the other simply not covered by the terms of the policy, the insured may recover…
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> …
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> 92. More difficulty arises, however, where one can discern two proximate or efficient causes and one falls within, and the other is excluded from, the policy. That is the circumstance to which *Wayne Tank* was directed.

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[46] *McCarthy v St Paul International Insurance Co Ltd* [2007] FCAFC 28, (2007) 157 FCR 402.

> 93. *Wayne Tank*, the cases referred to in *Wayne Tank* and other illustrations of the "principle" found in *Wayne Tank* can be seen as the operation of ordinary contractual principles upon facts revealing two proximate causes which are concurrent and interdependent, in the sense that neither would have caused the loss without the other. In such cases the two causes can be seen as inseparable and so, in effect, as joint…
>
> …
>
> 97. All the cases referred to in *Wayne Tank* involved factual circumstances in which the two proximate causes were concurrent and interdependent in the sense that neither would have caused the loss without the other.

[115] Keifel J then referred to the particular circumstances in five of those judgments.[47] He went on to consider numerous other cases where an insured had failed to obtain indemnity in respect of a loss caused by two causes (one excluded, one covered) operating in an interdependent way.

[116] What I take from all these judgments is that the *Wayne Tank* principle is concerned with concurrent causes of the liability for which the insured seeks cover. That is how the principle was defined in the statements of Gilbert J in *Body Corporate 326421 v Auckland Council* and by Lord Phillips in *The "Demetra K"*, referred to by Mr Thain.[48]

[117] It follows that, for the *Wayne Tank* principle to apply so as to exclude AMI from having to indemnify the Leggs, the Leggs' liability resulting from the fire had to have arisen out of or been connected with Evolving Landscapes' business in a way that was causative of the Leggs' liability.

[118] In most, if not all, of the cases which I have referred to, this was clearly what has to be considered in terms of the policy because the exclusion clause referred to losses "caused by", "arising out of" or "arising from".

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47 *John Cory & Sons v Burr* [1883] 8 App Cas 383, [1881-5] All ER 414 (HC); *Leyland Shipping Co Ltd v Norwich Union Fire Insurance Society Ltd* [1918] AC 350 (HL); *Board of Trade v Hain Steamship Co Ltd* [1929] AC 534 (HL); *P Samuel & Co Ltd v Dumas* [1924] AC 431 (HL); *Atlantic Maritime Co Inc v Gibbon* [1954] 1 QB 88 (EWCA).

48 *Body Corporate 326421 v Auckland Council*, above n 16, at [338]-[340]; *The "Demetra K"*, above n 17, at [18].

[119] It has been argued for AMI that, through use of the words "in connection with" in the exclusion clause, causation is not essential in this way. I have held that this is not how the contract and the exclusion clause should be interpreted. If, however, I am wrong in that, I would not be prepared to extend the *Wayne Tank* principle to give effect to an exclusion clause in the circumstances that applied here.

[120] There was nothing exceptional or unanticipated about the Leggs' creation of a fire heap on their property, the nature of the material on the heap or the way it was lit. The risk of a fire spreading to cause damage to neighbouring properties was a risk which AMI agreed to cover when it issued the policy. The liability which the Leggs have as a result of what happened was a risk which AMI had agreed to cover and which presumably it had taken into account when fixing the premiums for its policy and potentially if and when it arranged any reinsurance to cover the risk it was assuming. I would not extend the *Wayne Tank* principle to allow AMI to avoid liability on the basis that there was some connection between the Leggs' liability and the Evolving Landscapes business if that connection was not causative in an effective way of the Leggs' liability.

[121] The judgment of the Supreme Court of Canada, in *Derksen v 539938 Ontario Ltd*, is instructive.[49] The Supreme Court of Canada was concerned with the potential application of several insurance policies and also a legislative limitation on certain liability. One of the issues for the Court was "if the loss arose out of two concurrent causes, is coverage under the Commercial General Liability policy (the CGL policy) excluded by the automobile exclusion clause in that policy?" Under the CGL policy, the insurer agreed to pay damages for which the insured became liable because of "bodily injury" to which the insurance applied. Compensatory damages for bodily injury included damages for death resulting at any time from the "bodily injury". The CGL policy excluded coverage for bodily injury or property damage arising out of the ownership, use or operation of an automobile and for bodily injury or property damage with respect to which any motor vehicle policy was in effect.

[122] In that case, an insured contractor had, through its foreman, been laying cable. On a particular day, work had to be halted earlier than usual. During the

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[49] *Derksen v 539938 Ontario Ltd* [2001] SCC 72, [2001] 3 SCR 398.

clean up, the foreman removed a sign assembly from the ditch. He placed the steel base plate for the sign unsecured on a cross-member of the tow bar for a compressor unit attached to the rear of a supply truck. The foreman then drove the supply truck along a highway. The steel base plate flew off the towbar and through the windshield of an oncoming school bus, killing one child and seriously injuring three others. Lower courts and the Canadian Supreme Court held the accident arose from concurrent causes. There was non-auto-related negligence through the foreman's failure to clean up the site properly by failing to store the base plate. There was also auto-related negligence consisting of the foreman setting the vehicle in motion without having conducted even a cursory check of the base plate.

[123] The appellant insurers argued that:

> If a loss is caused by concurrent causes, one covered by the policy and the other excluded by an exclusion clause, and the excluded peril is essential to the chain of causation leading to the loss, there is no coverage.

[124] The appellants relied on various Canadian judgments as supporting this argument. The Supreme Court distinguished those cases on their facts or because of the particular wording of the relevant insurance contracts. The insurers also sought support for their position in the general principle which they drew from *Wayne Tank*. The Supreme Court considered, with some care, the judgments in *Wayne Tank*. Major J for the Court stated:

> 46. On review of the analysis in *Wayne Tank*, which had its roots in the field of maritime law, there is no compelling reason to favour exclusion of coverage where there are two concurrent causes, one of which is excluded from coverage. A presumption that coverage is excluded is inconsistent with the well-established principle in Canadian jurisprudence that exclusion clauses in insurance policies are to be interpreted narrowly and generally in favour of the insured in case of ambiguity in the wording (c*ontra proferentem*).
>
> 47. Separate from the shortcomings in the analysis in *Wayne Tank*, another compelling reason for rejecting the presumptive proposition advocated by the appellants is the fact that insurers have language available to them that would remove all ambiguity from the meaning of an exclusion clause in the event of concurrent causes. This can be accomplished by the insurer clearly specifying that if a loss is produced by an excluded peril, all coverage is ousted despite the fact that the loss may also have been caused by another, covered peril.

He gave examples of where such exculpatory language had been used and held to be effective.

[125] Major J went on:

> 48. For the foregoing reasons, I decline to adopt the presumption that where there are concurrent causes, all coverage is ousted if one of the concurrent causes is an excluded peril. If an insurer wishes to oust coverage in cases where covered perils operate concurrently with excluded perils, all it has to do is expressly state it in the insurance policy.
>
> 49. Whether an exclusion clause applies in a particular case of concurrent causes is a matter of interpretation. This interpretation must be in accordance with the general principles of interpretation of insurance policies. These principles include, but are not limited to:
>
> (1) the *contra proferentem* rule;
>
> (2) the principle that coverage provisions should be construed broadly and exclusion clauses narrowly; and
>
> (3) the desirability, at least where the policy is ambiguous, of giving effect to the reasonable expectations of the parties.

[126] Major J then carefully considered what was meant by the exclusion clause in that insurance contract. He agreed with the first instance Judge who held there was nothing in the CGL policy to indicate that coverage for an insured risk would be rendered inoperative in the event that an expressly excluded risk constituted an additional cause of the injury. In that regard, he said the exclusion cause was ambiguous with respect to losses resulting from concurrent causes.

[127] Relevant to the situation I am dealing with, Major J dealt with the argument that interpreting the exclusion clause (as the Court did) so as not to exclude liability would require the insurer to cover a risk for which it did not collect a premium. Major J said this would not be the case, "[the insurer] agreed to cover liability which arose from non-auto-related causes and accepted a premium for assuming this risk".[50] Negligent clean up of the work site was a non-auto-related cause of the injury, the risk of which CGL had accepted with its policy. Contrary to the argument advanced for the appellant, Major J stated "if the insurer was not held liable on the

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[50] At [56].

wording of [the exclusion] clause, it would have collected a premium for a risk which it did not cover".

[128] The Supreme Court of Canada has thus held that, in cases where there are two concurrent causes of a liability for which there would otherwise be indemnity, precise and clear words are required before the insurer's liability can be excluded through an exclusion clause. The Court has thus sought to limit the effect of the *Wayne Tank* principle in such situations to an extent that has not been recognised in the United Kingdom, Australia or New Zealand.

[129] The specific principles of interpretation which the Supreme Court of Canada referred to are also consistent with the way insurance contracts have been interpreted in New Zealand. The Court referred to the principle that coverage provisions in an insurance contract should be construed broadly and exclusion clauses narrowly. That principle is implicitly recognised in the the different ways Miller J construed the words "in connection with" in *IAG New Zealand Ltd v Jackson* (an exclusion clause) in contrast to the broader interpretation he referred to in *JCS Cost Management Ltd* (an insuring clause).[51] The contra proferentem rule is applied in New Zealand in situations where there is uncertainty amounting to ambiguity. The reasonable expectations of the parties are important in New Zealand when the Court is considering what a reasonable and properly informed third party would consider the parties intended the words of their contract to mean.

[130] It could be argued that, for the reasons considered important by the Canadian Supreme Court, the *Wayne Tank* principle should be more limited in effect than has until now been the case in New Zealand. It is not necessary for me to make that decision. I have however decided that the *Wayne Tank* principle should not be extended to apply to a situation where liability has been caused by an event or circumstances which the insurer agreed to cover but there is some connection with circumstances, not causative of the insured's loss, which the insurer argues should exclude its liability.

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[51] This principle also explains why it was appropriate for counsel for Lumley to acknowledge that the fire was sufficiently "connected with" Evolving Landscapes' business for Evolving Landscapes to have coverage under the Lumley policy, while the connection may not have been sufficient for AMI to rely on that wording to exclude its liability under the exclusion clause.

[131] It follows that, for the *Wayne Tank* principle to exclude AMI from having to indemnify the Leggs, AMI has to concede that the circumstances involving a connection with Evolving Landscapes have to have been causative of the Leggs' loss for the exclusion clause to operate.

[132] Accordingly, because of the way I have interpreted the exclusion clause and alternatively because of the way the *Wayne Tank* principle is to be applied, AMI had the burden of proving that the Leggs' liability resulting from the fire was caused in an effective way by the Leggs burning material from the Evolving Landscapes business on their fire heap.

[133] AMI has not discharged that onus.

[134] The evidence satisfies me:

(a) As was stated by the fire investigator, the 10 January 2013 fire resulted from the re-ignition of embers from the 16 December 2012 fire and it setting alight material on the heap.

(b) A majority of the material burnt on 16 December 2012 had been brought to the heap in connection with the business of Evolving Landscapes. Some of the branches that were on top of the heap after 16 December 2012 may have come from the business but not necessarily so. 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. There was also no evidence that the heap had to be of any particular size for heat or embers to be retained deep within it with the potential for re-ignition on 10 January 2013.

(c) The evidence did not establish that without the material from Evolving Landscapes there would have been no re-ignition. While it is possible there was heat retained below the stump that remained on top of the fire, this is speculation. Mr King did not see what was under the stump. There was no sign the stump had been burning on

10 January 2013. There was no evidence the other two stumps had remained within the heap unburnt or only partially burnt after 16 December 2012. Apart from saying that wood of 100 millimetres or more was more likely to smoulder or result in embers that could result in re-ignition, Mr King could not say what it was in the heap or how the material accumulated there that led to the re-ignition.

(d) The material from Evolving Landscapes 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. (In that sense, the situation is very much in contrast to that in *Wayne Tank* where the equipment and apparatus installed was seriously defective and at risk of catching fire.)

(e) With material on the heap from Evolving Landscapes, 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.

(f) Nevertheless, significant 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. However, it has not been established that it was embers from the Evolving Landscapes 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.

(g) AMI has thus not proved, on the balance of probabilities, that the introduction of the pine stumps or other vegetation from Evolving Landscapes caused the re-ignition of the fire on

10 January 2013 or the Leggs' liability for which they otherwise had cover under the policy.

(h) Mr and Mrs Legg accepted that material on the heap on 16 December 2012 would have included paper material from the business. It is likely this was a small part of all the material on the heap at that stage. It was not the sort of material that was likely to retain heat and smoulder away deep within the heap after the fire appeared to have gone out in the days after 16 December 2012. Paper material from the business that was on the heap on 16 December 2012 is likely to have been burnt in the fire that occurred on that day. The household material in supermarket bags that Matthew Legg put near the fire after Christmas Day may have included unused calendars from the business and some other office paper. If so, it was not placed on the heap but to the side of it and was probably not set alight with the initial re-ignition.

Mr King said that paper found some distance from the heap, down-wind from that heap, on 10 January 2013 was charred in a way that indicated it had obviously not been involved "in the initial run of fire". He could also not say where that paper had initially been stored. He said that, although paper could have been involved in transporting the fire from the burn pile to the light grasses, this would be "purely guess work" given the burn nature of the paper. He also said that the fire could have spread through embers from the heap itself being blown onto the nearby grassed area. AMI has not proved that putting paper from the Evolving Landscapes business on the fire heap caused the heap to re-ignite or to spread.

[135] Accordingly, AMI has not established that the exclusion clause applies to avoid AMI having to indemnify the Leggs against liability resulting from the fire.

Section 11 Insurance Law Reform Act 1977

[136] Mr Riches submitted for the Leggs and Evolving Landscapes that, if the Court considered the exclusion clause did apply, through the application of s 11 of the Insurance Law Reform Act, the Leggs would still be entitled to indemnity.

[137] Section 11 provides:

> **11 Certain exclusions forbidden**
>
> Where—
>
> (a) by the provisions of a contract of insurance the circumstances in which the insurer is bound to indemnify the insured against loss are so defined as to exclude or limit the liability of the insurer to indemnify the insured on the happening of certain events or on the existence of certain circumstances; and
>
> (b) in the view of the court or arbitrator determining the claim of the insured the liability of the insurer has been so defined because the happening of such events or the existence of such circumstances was in the view of the insurer likely to increase the risk of such loss occurring,—
>
> the insured shall not be disentitled to be indemnified by the insurer by reason only of such provisions of the contract of insurance if the insured proves on the balance of probability that the loss in respect of which the insured seeks to be indemnified was not caused or contributed to by the happening of such events or the existence of such circumstances.

[138] The authors of *Colinvaux's Law of Insurance in New Zealand* state:[52]

> … s 11 of the 1977 Act regulates the effects of any provisions in the policy, however expressed, which exclude or limit the insurer's liability to indemnify in certain events or circumstances: the assured is not disentitled to indemnity where there is no causal connection between such events or circumstances and the relevant loss. This section has been held applicable to a range of different provisions, including ordinary exclusions, claims conditions and even warranties. It is not possible to contract out of the provisions of this Act.

[139] The authors also state that a condition precedent which seeks to limit cover may be limited in effect by s 11:[53]

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[52] Robert Merkin and Chris Nicoll (eds) *Colinvaux's Law of Insurance in New Zealand* (Thomson Reuters, Wellington, 2014) at [5.1.2].

[53] At [5.3.4(4)].

> … which applies in relation to any condition in the policy in the nature of an exclusion or limitation on the liability of the insurer to indemnify. Where it applies, s 11 will therefore defeat the intent and purpose of general [precedent] clauses.

[140] Mr Riches submitted that the exclusion clause purports to exclude cover in circumstances where it arises from or in connection with the operation of a business not connected to the farming operation as defined under the policy. He submitted that this clause is inserted by AMI because of the increased risk of loss arising from the operation of a business.

[141] He submitted that, on the evidence, the Leggs had established that any involvement of Evolving Landscapes did not cause or contribute to the fire (and the subsequent legal liability) because the fire of 16 December 2012, and any resulting liability for property damage arising from it, was an event covered by the AMI policy. He contrasted the situation with the fire with that of *Nelson Forests Ltd v Three Tuis Ltd*.[54] There, the owner of a lifestyle block had no cover for the business of renting out tourist cabins on the property. The owner had disposed of hot ashes from one of the cabins that led to the fire.

[142] In *New Zealand Insurance Co Ltd v Harris*, the Court of Appeal referred to the report of the Contracts and Commercial Law Reform Committee of July 1975 which led to the enactment of the Insurance Law Reform Act 1977 and s 11:[55]

> The committee concluded that, while insurers were of course entitled to define the risks in respect of which they would indemnify by excluding circumstances that increased the risk, it was unreasonable for them to avoid liability on the grounds that the risk was increased where the loss resulted from some cause other than the circumstances relied on as increasing the risk.

[143] The Court of Appeal stated:[56]

> Section 11 contemplates a two step inquiry where the contract of insurance excludes or limits the insurer's liability on the happening of certain events or the existence of certain circumstances. The first is to determine whether the insurer's liability has been so defined because the happening of the events or the existence of the circumstances was in the view of the insurer likely to

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54 *Nelson Forests Ltd v Three Tuis Ltd* HC Nelson CIV-2010-442-84, 9 December 2010 (later reversed in part on another point).

55 *New Zealand Insurance Co Ltd v Harris* [1990] 1 NZLR 10 (CA) at 15.

56 At [15].

> increase the risk of occurrence of the loss. That inquiry rests on an assessment of the bona fide view of the insurer in relation to the matter.
>
> Even where the purpose of the limitation is entirely legitimate the insured is not necessarily disentitled to be indemnified. That is for consideration at the second step. The inquiry there is whether the loss in respect of which the insured seeks to be indemnified was caused or contributed to by the happening of the events or the existence of the circumstances. The onus of proof rests on the insured and the answer turns on the objective assessment of the Court or Arbitrator, not on the subjective views of the insurer. There is then a presumption of a causal link between the relevant events or circumstances and the particular loss.

[144] Counsel for both the Leggs and AMI referred to the judgment of Hardie Boys J in *Barnaby v South British Insurance Co Ltd* where he observed "the section is not designed to deal with exclusion clauses which specify the kind of loss or the quantum of loss to which cover does not apply at all".[57] Mr Riches referred to *Colinvaux's Law of Insurance in New Zealand* where it is said:[58]

> So, to paraphrase [referring to the passage of *Barnaby* above], s 11 of the Insurance Law Reform Act 1977 applies to exclusions for perils which are otherwise covered by the policy, not to perils which are outside the policy in the first place.

[145] Mr Thain submitted that, in this instance, the exclusion clause is one that specified the kind of loss for which there is no cover at all. He submits that the losses that could arise from a business separate from the farming operation on the lifestyle block were a different risk for which the policy clearly stated there was to be no cover. He submitted that the Leggs had treated the risks as being different, choosing to insure risks associated with their business (Evolving Landscapes) through Lumley rather than AMI.

[146] Mr Riches submitted that the loss in the current circumstances was not of that sort because the fire was one that could have occurred in connection with the farming operation on the lifestyle block and was not of a different nature.

[147] The distinction made by Hardie Boys J was not made by the Court of Appeal in *New Zealand Insurance Co Limited v Harris*. The authors of *Colinvaux* refer to

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[57] *Barnaby v South British Insurance Co Ltd* (1980) 1 ANZ Insurance Cases 60-401 (HC) at 77,008.

[58] *Colinvaux's Law of Insurance in New Zealand*, above n 52, at [5.6.7].

"the borderline nature of *Barnaby*" in their discussion as to actual or potential difficulties arising from that judgment.[59]

[148] In this instance, AMI was bound to indemnify the Leggs against liability arising from or in connection with "your farming operation, for accidental damage to other people's property occurring anywhere in New Zealand".[60] AMI had agreed to indemnify the Leggs against liability or loss resulting from the burning of a fire heap on their lifestyle property, the spreading of that fire and damage to other properties.

[149] If the exclusion clause could have the effect of excluding or limiting AMI's liability, it would have been because the lighting of the fire, the subsequent escape and spreading of the fire and damage to other properties was connected with a business not connected to their farming operation. This would be a situation where the exclusion clause was so defined as to limit the liability of AMI to indemnify the Leggs "on the happening of certain events or on the existence of certain circumstances". In that sense, s 11(a) applies.

[150] I did not receive evidence from AMI or the Leggs as to why AMI did not provide cover for liability arising out of or in connection with the Evolving Landscapes business. I am nevertheless satisfied that the exclusion of liability in relation to events or circumstances connected with a business not connected to the farm operation would have been because there would have been an increased risk of the Leggs suffering a loss or incurring a liability to others if, on their property, they were conducting a business other than the farming operation which would normally be associated with a lifestyle block. The words "such loss" in 11(b) refers back to the word "loss" used in a general sense in 11(a).

[151] AMI would have agreed to provide cover to the Leggs, in terms of its lifestyle block policy, on its assessment of the risks that would normally be associated with ownership of such a block and activities normally associated with such a farming operation. There would have been increased risks of "loss", used in a

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59 At [5.6.7] and [5.6.11(1)-(2)].
60 AMI "Your Lifestyle Block Policy", cl 16.

general sense, had there been cover for activities not normally associated with such a lifestyle block.

[152] On the first step of the enquiry, discussed by the Court of Appeal in *New Zealand Insurance Co Ltd v Harris*, I would hold that the exclusion clause on which AMI would rely is one to which s 11(a) and (b) apply.

[153] The difference in the way I interpret and apply s 11 does not produce an unreasonable result. It could mean that the Leggs might obtain indemnity from AMI on a policy not intended to provide cover for non-farming operation activities, with their premiums having been fixed and the insurer having assumed the risk and potentially having arranged indemnity reinsurance for itself on the basis it had no such risk. However, the application of s 11 in this way will be of benefit to the insured and at the cost of the insurer only if the Leggs can succeed on the second step of their enquiry, that is, satisfying me that the connection between the events around the fire and the incurring of liability to others "was not caused or contributed to by" the connection which the events and circumstances had with the non-farming business. The outcome on my analysis thus accords with the purpose for which s 11 was enacted.

[154] As pointed out by the authors of *Colinvaux*, on applying s 11 in this way, the result in *Barnaby v South British Insurance* would have been no different.[61] There, the exclusion clause excluded cover for the loss of a retaining wall which was due to faulty design. The wall had collapsed because, at least in part, in a situation where there was exceptionally heavy rain and thus loading on the wall, its design was defective and this was at least a contributing cause to its collapse.

[155] Applying the clause in this way to the Leggs' situation, there would be a presumption that the connection with the landscaping business of Evolving Landscapes caused or contributed to the events or circumstances which resulted in the Leggs having a liability to others. Section 11 could only assist the Leggs if they had proved, on the balance of probabilities, that their liability resulting from the events and circumstances was not caused or contributed to by the connection of the

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61 *Colinvaux's Law of Insurance in New Zealand*, above n 52, at [5.6.7].

events and circumstances with the Evolving Landscapes business. On the particular facts here, they would have needed to prove that the accumulation and burning of material from the landscaping business, including the pine stumps, did not contribute to the reignition of the fire on 10 January 2013.

[156] In *New Zealand Insurance Co Ltd v Harris*, the Court of Appeal said:[62]

> In construing a statutory provision of this kind designed for practical application on a day to day basis, refined analysis in terms of metaphysical inquiries into causation should be eschewed. Again, a simplistic "but for" approach would rob s 11 of much of its efficacy and deny its application in examples given by the Contracts and Commercial Law Reform Committee as requiring statutory reform (see para 29). Rather it is a matter of determining, under a section concerned with exclusion from cover where the limitation has been included because the event or circumstance is likely to increase the risk of loss occurring, whether the loss actually sustained by the insured was caused or contributed to by the relevant event or circumstance. If the existence of the relevant circumstances did not in itself increase the risk of loss, there is no justification either in principle as the Contracts and Commercial Law Reform Committee emphasised, or under the statutory language, for denying the insured the protection of the cover.

[157] The greater proportion of material on the burn heap on 16 December 2012 was from the Evolving Landscapes business. That material did include tree stumps and bigger material which could have burnt or smouldered longer than other material. If s 11 was relevant, in all the circumstances of this case, the changed burden of proof would have been of significance. The Leggs have not been able to prove and have not proved that the burning of material from the landscaping business did not contribute to the happening of events and the circumstances that on 10 January 2013 led to their liability and loss.

[158] Had I held the exclusion clause was, on the face of it, effective to exclude AMI's liability to the Leggs, because of the shift in the burden of proof, I would not have applied s 11 to find that AMI nevertheless had to indemnify the Leggs.

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62 *New Zealand Insurance Co Ltd v Harris*, above n 55, at 16.

Conclusion

[159] The plaintiffs are entitled jointly and severally to judgment against the Leggs and Evolving Landscapes jointly and severally in the sum of $217,118.30, together with interest under the Judicature Act 1908 from 8 April 2013.[63]

[160] The Leggs are entitled to judgment against AMI for all sums for which the plaintiffs have obtained judgment against the Leggs.

[161] Evolving Landscapes is entitled to judgment against Lumley for all sums for which the plaintiffs have obtained judgment against Evolving Landscapes.

Costs

[162] If costs are not agreed, a memorandum as to costs is to be filed on behalf of the plaintiffs within 20 days. A memorandum for the first and second defendants is to be filed within a further 14 days. Memoranda on behalf of the first and second third parties are to be filed within a further 14 days. Memoranda in reply on behalf of either the plaintiffs or the first and second defendants are to be filed within a further 14 days. The memoranda are to be no longer than five pages. I will make a decision as to costs on the basis of those memoranda.

Solicitors:
Saunders & Co, Christchurch
DLA Piper, Auckland
Chapman Tripp, Wellington
Morrison Kent, Wellington.

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[63] The first and second defendants agreed that interest should be payable from that date.