Stadium Southland case off to the Supreme Court

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BUILDING DEVELOPERS WILL BE PLEASED: the Supreme Court has granted leave for the Trust that built Stadium Southland to appeal the Court of Appeal's decision of *Invercargill City Council v Southland Indoor Leisure Centre Charitable Trust* [2017] 2 NZLR 650. The Court of Appeal found that Invercargill City Council (the Council) owed no duty of care to the Trust when it negligently issued a Code of Compliance Certificate (CCC). Therefore, it did not share any liability for the cost of rebuilding the stadium after the roof collapsed under a heavy snowfall in 2010.

The facts

By luck, all those inside the stadium when the roof collapsed escaped unharmed. The collapse was entirely preventable:

- During construction of the stadium in 1999-2000, a Council inspector noticed that the roof trusses were sagging.
- An independent engineer, Mr Harris, provided a remedial design. The Council granted building consent for the remedial design with the condition that the engineer contracted by the Trust, Mr Major, issue a producer statement (PS4) certifying that the work carried out met Mr Harris' design specifications and measurements.
- The remedial work was not carried out as per Mr Harris' specifications. The defects were not detected by Mr Major as he did not perform any inspections.
- In 2000, before receiving Mr Major's PS4, the Council issued a Code of Compliance Certificate (CCC).
- The Council later received Mr Major's PS4 in which he claimed that the work had been completed as per Mr Harris' design, but his report omitted the measurements which would have confirmed this.
- The Council asked for the measurements. Eventually Mr Major provided some, but not those specified by Mr Harris' design. The supplied measurements indicated the roof was not to Mr Harris' design.
- In 2006, the Trust was sufficiently concerned about leaks and the movement of the roof in wind that it commissioned a report from Mr Harris. He recommended further steps which would have identified that the roof was not built to his design and required further remedial work. The Trust chose not to follow Mr Harris' recommendations.

Negligent Misstatement

Because any inspections by the Council were time-barred, the Trust's claim rested solely on the negligently issued CCC. The Court of Appeal held that a claim based on a CCC lies in negligent misstatement, rather than general negligence. The significance of this is that negligent misstatement required proof of specific reliance on the CCC. The failure of the Council to insist on a PS4 before issuing the CCC and to insist that the condition of its consent be fulfilled meant the Trust lost an opportunity to identify the substandard work. Nonetheless, the Court of Appeal found that the Trust did not actually rely on the CCC as proof that the roof was competently built. Neither did the Trust rely on the CCC in deciding not to follow Mr Harris' advice in 2006.

Duty of care

Miller J found that the Trust's claim failed on this basis. However, Harrison and Cooper JJ found that the Council did not even owe a duty of care to the Trust. The majority found that the collapse was the fault of the Trust's engineer and contractors. It attributed their actions to the Trust and held on policy grounds it would not be fair, just or reasonable for the Council to owe a duty of care to the Trust to protect and indemnify it from its own negligence.

The take-home message from the majority's decision is that "commissioning owners" of buildings (i.e. the first owners of buildings who direct the build) who engage professionals cannot expect to recover losses from a local authority, if the local authority negligently omits to identify any failures of the owner's engaged professionals. The majority found that commissioning owners, unlike subsequent owners, can adequately protect themselves in contract from such losses, by seeking indemnities from professionals and by ensuring their contractors carry sufficient insurance cover.

The majority's decision goes against the line of authority culminating in the Supreme Court's decision in *Body Corporate No 207624 v North Shore City Council (Spencer on Byron)* [2013] 2 NZLR 297) which places a broad duty of care on Councils in performing their statutory functions under the Building Act. It ignores the policy reasons for imposing a duty of care on Councils: to ensure that their statutory function of providing a check and balance on the work performed by professionals is not redundant. Ultimately the Council's role is as the last safety check on buildings. The decision also seems to ignore that duties of care owed by professionals and local authorities can overlap.

The Court of Appeal commented that if the tort of negligent misstatement had been made out, the Trust's damages would have been reduced by 50 per cent for the Trust's contributory negligence, in failing to follow the advice of Mr Harris in 2006. A deduction for contributory negligence would seem in the writers' opinion a more just and equitable result than completing denying the Council had any liability.

The Supreme Court's leave decision was a one liner, advising that the leave to appeal "encompassed all issues in the Court of Appeal's judgment". Hopefully all issues will be clarified.

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