

Legal alert - Court of Appeal decision on Council liability when issuing code compliance certificates

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The Invercargill City Council has successfully appealed a High Court decision which found that it breached a duty of care owed to a commissioning owner and was negligent in issuing a code compliance certificate. The Council had previously been ordered to pay \$15,126,665.35 to the Southland Indoor Leisure Centre Charitable Trust (the Trust) for the cost of rebuilding Stadium Southland.

The Court of Appeal decision in *Invercargill City Council v Southland Indoor Leisure Centre Charitable Trust* suggests there will be limited circumstances in which a local authority will be liable in negligence to a commissioning owner when issuing a code compliance certificate.

The Trust had constructed Stadium Southland on Council land in 1999. Due to defective design the roof began to sag. Remedial design work was undertaken by an independent engineer. The Council consented the remedial design on the basis that the original engineer was to certify by producer statement that the completed work met the remediation design. The Council issued a code compliance certificate in 2000 without receiving a producer statement. The consent issued required specific measurements to be given but these were omitted from the producer statement that was eventually provided. The information eventually supplied was insufficient and remained unchecked by the council. Some 10 years after completion, heavy snowfall caused the roof to collapse.

The Trust claimed that the Council was liable in negligence and negligent misstatement for issuing the code compliance certificate and that it relied on the Council and suffered loss as a result. The High Court agreed and the Council was ordered to pay the cost of the rebuild, less an amount for betterment. The Council appealed and the Trust lodged a cross appeal challenging the reduction to the rebuild costs for betterment.

The Court of Appeal allowed the appeal and found that the Council was not liable for the resulting damage to the Stadium. The Court distinguished the case of *Spencer on Bryon*^[1] which created a rule that a local authority owes a duty of care to a commercial building owner when inspecting construction. In this instance claims relating to Council inspections were time barred and the case concerned only the issue of a code compliance certificate which turned on negligent misstatement. To succeed, the Trust had to prove it had specifically relied upon the code compliance certificate, but it was unable to do so. While all three Court of Appeal judges agreed that there was no reliance by the Trust, they differed in views as to whether a duty of care arose in the first place.

In his judgment, Justice Miller found the Council had a duty to satisfy itself that the building design complied with the building code. It complied with that duty by relying on producer statements. However, there was not a duty to inspect the work to ensure that it complied, as built, with the code. It assumed a lesser responsibility to check that an appropriately qualified person had supplied adequate evidence that consent conditions had been met. When the Council issued the code compliance certificate without seeing a PS4 it was in breach of this limited duty of care. However Miller J found that the Trust did not rely on or willingly involve the Council in the remediation process. Even if reliance had been found, damages would have been reduced by 50 per cent to reflect the Trust's contributory negligence.

The joint decision of Justices Harrison and Cooper considered that none of the elements for negligent misstatement existed and no duty of care arose. The issue of the certificate of code compliance did not in itself justify imposing a duty of care owed to a commissioning owner. The Trust had engaged contractors and assumed control over design and construction. As a commissioning owner the Trust relied on its agents and did not rely on the Council's certificate. In these circumstances, their honours felt it was not fair, just and reasonable to impose a separate duty of care owed by the Council to protect the Trust from its own negligence.

The Court of Appeal's approach to the question of council liability was very different to that taken by the High Court. Watch this space to see if there is an appeal of the decision to the Supreme Court that might provide definitive guidance in this area.

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