

Stadium Southland Roof Collapse: Update from Supreme Court Decision

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BUILDING DEVELOPERS WILL BE relieved to hear that the Supreme Court¹ has overturned the Court of Appeal's decision in *Invercargill City Council v Southland Indoor Leisure Centre Charitable Trust*.² In our previous article in Volume 18-2 of *The Property Lawyer* we considered the Court of Appeal's decision, in which it held that although the Invercargill City Council ('the Council') had carelessly issued a Code Compliance Certificate ('CCC') for work undertaken on the roof of Stadium Southland, the Council had no liability for the later collapse of the stadium roof in a heavy snowfall.

Facts

During the initial construction, flaws were identified by a Council inspector in the roof as designed by the Southland Indoor Leisure Centre Charitable Trust's ('the Trust') engineer Mr Major. Conditions were added to the Building Consent requiring remedial work to be carried out as per the recommendations of an independent engineer, Mr Harris. Mr Major was required to submit a Producer Statement ('PS4') to the Council which was to include measurements providing evidence that the remedial work met the specifications of Mr Harris.

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The Council issued the CCC for the remedial work before receiving the PS4 from Mr Major. A PS4 was submitted at a later stage by Mr Major, but without the requisite measurements. The roof was not remediated to the specifications required by Mr Harris. Although it identified deficiencies in the late PS4, the Council

never sought the additional measurements that would have confirmed whether the roof had been appropriately remediated. Dunningham J found that the Council was liable in negligence.

A few years later, the Trust noticed that the roof was leaking and that it flexed in high winds. The Trust also wanted to satisfy itself that the leaking and flexing was not indicative of any structural safety concerns were there to be a heavy snowfall. The Trust commissioned a further report from Mr Harris. His report stated that the roof design was adequate but he recommended that visual inspections of the roof trusses be undertaken. The Trust followed the recommendations required to resolve the leaking, but did not arrange for the roof trusses to be inspected. Dunningham J in the High Court found that this was a “*missed opportunity to avoid the occurrence of the loss*”, but that the Trust's omission did not amount to contributory negligence warranting a deduction in damages.³

Duty of care and negligence vs Negligent misstatement

The Court of Appeal overturned the High Court's decision. It held that the only possible cause of action against the Council

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was negligent misstatement (rather than negligence), as the only error of the Council which was not time-barred was the negligent issuing of the CCC, not any negligent inspection. The Court of Appeal was unanimous in finding that the claim could not succeed because the Trust could not prove specific reliance on the CCC. The majority (Harrison and Cooper JJ) went further, holding that the Council did not even owe a duty of care. The Court of Appeal distinguished *Body Corporate No 207624 v North Shore City Council (Spencer on Byron)*⁴ on the basis that it would be unfair for councils to owe a duty of care to “commissioning owners” of commercial buildings whose professional contractors (e.g. engineers, architects) caused the loss.

The Supreme Court held that there was no basis for departing from *Spencer on Byron*. Under the Building Act 1991, there is no basis to differentiate between the Council’s function of performing physical inspections and its function of issuing CCCs. Both are performed with the purpose of ensuring buildings comply with the Building Code. The statutory duty of care of councils to perform those functions is not removed by the existence of an overlapping duty of care owed by professionals engaged to design and construct Code compliant buildings (although the professionals’ actions may amount to contributory negligence). The Supreme Court restored the finding of Dunningham J: that the Council owed a duty of care and had been negligent.

Contributory negligence

However, the majority of the Supreme Court disagreed with Dunningham J’s finding that the Trust had not been contributorily negligent. The majority (Elias CJ, O’Regan and Ellen France JJ) agreed with Court of Appeal’s finding (unnecessary in light of its finding that there was no liability) that a deduction of 50 percent was warranted for Trust’s subsequent actions.

The minority in the Supreme Court of William Young and Glazebrook JJ found that, given the second report by Mr Harris said the roof design was adequate, it was unreasonable for the Trust to incur any cost beyond the recommendations which were required to remedy the leaks. The minority agreed with Dunningham J that the Trust’s



omission was not negligent.

The majority, on the other hand, held it was incumbent on the Trust, once it had raised safety concerns with Mr Harris, to follow through with all of his recommendations. As the inspection would have identified the deficient construction, the Trust’s damages were reduced for its contribution to its losses.

Conclusion

The Supreme Court’s decision overturns what the writers had earlier considered was an arbitrary departure from *Spencer on Byron*. While negligent professionals

designing and constructing defective buildings must share liability, commissioning owners must also be able to rely on Councils to perform their statutory functions to inspect and ensure compliance with the Building Code. This regulatory function is a necessary independent check and balance for the construction industry.

1. *Southland Indoor Leisure Centre Charitable Trust v Invercargill City Council* [2017] NZSC 190, [2017] 1 NZLR 278.
2. *Invercargill City Council v Southland Indoor Leisure Centre Charitable Trust* [2017] NZCA 68, [2017] 2 NZLR 650.
3. *Southland Indoor Leisure Centre Charitable Trust v Invercargill City Council* [2015] NZHC 1983, at [169].
4. *Body Corporate No 207624 v North Shore City Council* [2012] NZSC 83, [2013] 2 NZLR 297 [*Spencer on Byron*].

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