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The Supreme Court rules on negligence in Stadium Southland

Negligence comes at a cost for Southland Leisure Centre Charitable Trust and the Invercargill City Council.

The Supreme Court decision of *Southland Leisure Centre Charitable Trust v Invercargill City Council* (**Stadium Southland**) reaffirms the duty that all local authorities hold in respect of their obligations under the Building Act 1991 (the **Act**), and the subsequent Building Act 2004.[1] Regardless of whether a party is the original, subsequent or commissioning owner, a local authority is bound by its duties under the Act to ensure the building complies with the building code.

When it rains it pours… and when it snowed, it collapsed

The Southland Indoor Leisure Centre Charitable Trust (the **Trust**) formed to organise the construction of Stadium Southland, an indoor sporting and recreation facility in Invercargill. Invercargill City Council (the **Council**) leased land to the Trust for the stadium. Construction was substantially completed in 2000.

During construction it became apparent that the roof design was defective, as the roof began to visibly sag. A remedial design was recommended by an independent engineer, Mr Harris, and remedial works were undertaken in late 2000. The Council did not inspect these works, but rather relied on a producer statement from the Trust's original engineer Mr Major. The Council issued a code compliance certificate in November 2000 (**CCC**), after which Stadium Southland was opened to the public. The CCC was however issued without Mr Major's producer statement (**PS4**).

Mr Major eventually provided his PS4 twelve months after remedial works had completed, certifying the works *generally* complied with the remedial design.

Despite the issue of the PS4, the roof continued to suffer significant issues. The roof leaked and moved up to six inches during high winds. The Trust sought advice from Mr Harris, who recommended an inspection of the roof trusses and welds by a suitably qualified engineer. The Trust failed to follow this advice, resulting in the devastating collapse of the stadium roof in 2010 under the weight of snow. Fortunately, no people were harmed as a result of the collapse.

The Trust took action against the Council, claiming in negligence and negligent misstatement in relation to the remedial work on the stadium. Negligence, being the breach of a duty to take reasonable care, differs from negligent misstatement. A claim in negligent misstatement requires a party to prove that they have both relied on a statement of fact or opinion, and have directly suffered loss as a result. At the High Court Justice Dunningham found in favour of the Trust, stating the Council owed the Trust a duty of care when issuing the CCC. Justice Dunningham awarded over $15m to the Trust, being the agreed cost of rebuilding the stadium, minus $750,000 for betterment. The Council successfully appealed this decision to the Court of Appeal.

Overruled in the Court of Appeal

The Court was unanimous that negligent misstatement was the only cause of action, requiring proof that the Trust specifically relied on the CCC when determining the building was code compliant (and therefore safe). The Court distinguished the current case from that of *Spencer on Byron*, where it was determined a local authority owes a duty of care to building owners (both commissioning and subsequent owners) when inspecting buildings and determining code compliance, regardless of the premises' nature.[2] Justices Harrison and Cooper instead found that the Council did not owe a duty of care to the Trust, as the Trust had relied on its own agents that it had commissioned to construct and inspect the stadium. Without reliance on the CCC, the Trust could not claim

[1] *Southland Indoor Leisure Centre Charitable Trust v Invercargill City Council* [2017] NZSC 190.

[2] *Body Corporate No 207624 v North Shore City Council* [2012] NZSC 83, [2013] 2 NZLR 297 [*Spencer on Byron*].

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(Continued)

they had suffered loss as a result of the Council's negligence.

In his dissenting judgment Justice Miller found that the Council did owe the Trust a duty, but rather than needing to inspect the building itself, the Council had a limited duty of checking "that an appropriately qualified person had supplied adequate evidence that the consent conditions had been met".[3] This duty would have been met by relying on the PS4 that Mr Major provided, as the PS4 should have provided evidence that consent conditions were met and confirmed that the remedial works complied with the design. However, the Council breached this limited duty when it issued the CCC without first considering the PS4. Given that the Trust did not rely on the CCC, no finding of negligent misstatement could be made.

The Supreme Court disagrees

The Trust appealed, questioning whether the Court of Appeal was correct to reverse the High Court judgment. The principal issues before the Court for determination were whether:

- The Court of Appeal was correct to distinguish this case from the decision in *Spencer on Byron*;
- The claim should be characterised as negligence rather than negligent misstatement; and
- The Trust's actions amounted to contributory negligence.

The Supreme Court found the Court of Appeal erred in distinguishing *Spencer on Byron* from the present case. The Council has a duty to ensure the building complies with the relevant building code, and all of the Council's functions including inspection and issuing CCCs must comply with this duty. The Council's duty arises from its regulatory role under the Act, and no distinction should be drawn because the Trust was a commissioning owner.

[3] *Invercargill City Council v Southland Indoor Leisure Centre Charitable Trust* [2017] NZCA 68 at [98].

Given the finding that the Council does owe a duty of care, the action had to lie in negligence and not negligent misstatement. The Supreme Court held that the Council breached this duty when they negligently issued the CCC without first seeing the PS4.

Finally, it was determined that the Trust's failure to follow its own agent's advice to have the stadium roof inspected amounted to contributory negligence. Had the Trust followed the recommendation that the roof trusses and welds be inspected, it is likely the defects would have been discovered and appropriate action undertaken. As a result of the Trust's contributory negligence, damages were reduced by 50 per cent.

Take home messages from Stadium Southland

The Supreme Court's decision expands the duty of care that local authorities have under the Act to all forms of building owners, whether they are original, subsequent or commissioning owners of either residential or commercial properties. Given the control that each Council has over the building process and issue of code compliance certificates, and the reliance that is placed on Council's to certify the safety of its constituents' buildings, this expansion is unsurprising. Stadium Southland makes it clear that while local authorities may rely on the work of experts or professionals to certify their works, the local authority still has a duty to ensure the certification complies with all Building Consent terms and conditions.

It is clear that where a party has engaged experts and sought advice, the decision not to follow this advice will be examined by the Courts. As in this case, the cost of such a decision could be extensive; and as such a robust decision making process should be followed and documented.

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