IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV-2010-425-000588
[2015] NZHC 1983

BETWEEN	SOUTHLAND INDOOR LEISURE CENTRE CHARITABLE TRUST Plaintiff
AND	INVERCARGILL CITY COUNCIL First Defendant
AND	A S MAJOR Second Defendant
AND	OMAHA INVESTMENTS NO. 1 LIMITED First Third Party
AND	MAURICE JOHN HARRIS Second Third Party

Hearing:	22, 23, 29 and 30 June, 1-3, 7-9, 14, 15, 21-23 July 2015
Appearances:	M G Ring QC, C J Jamieson and D R Weatherleyfor Plaintiff D J Heaney QC and K B Dillion and S J Wethey for First Defendant
Judgment:	20 August 2015

JUDGMENT OF DUNNINGHAM J

Summary of findings

A. The Council owed a duty of care to the Trust when issuing the code compliance certificate (CCC) and there are no reasons to distinguish the majority decision of the Supreme Court in *Spencer on Byron*, which held that a territorial authority's duties under the Building Act 1991 were owed to both original and subsequent owners "regardless of the nature of the premises".

B. The Council was negligent in issuing a CCC on 20 November 2000, for remedial works to the stadium roof trusses, when it had no information before it on which it could have reasonably concluded the work complied with the building code.

C. The Council's negligence was causative of the loss as there was no subsequent point where the Council could show that it could have properly issued the CCC and yet the damage would still have inevitably occurred. This is primarily because condition 4 of the building consent was never satisfied, and a reasonable and prudent Council would have required it to be before a CCC was issued. If it had been satisfied, it is likely that the defects would have been detected.

D. The Trust was not contributorily negligent by failing to implement all the recommendations made by HCL in its letter dated 9 June 2006, as the advice did not put the Trust on notice of the potential safety risk the trusses posed.

E. The indemnity in the lease between the Council and the Trust does not apply to this claim, as it was not drafted so broadly as to cover claims of negligence against the Council which arose independently of the parties' respective rights and obligations as lessor and lessee of reserve land.

F. The Trust's loss, which was fixed at $15,126,665.35 by agreement, should be discounted by $750,000, to reflect betterment to the Trust in terms of saved maintenance costs on those components of the stadium where the Trust saved the cost of one cycle of refurbishment or replacement of that component within the term of the lease.

G. GST should not be added to the judgment sum because this is a compensatory payment, not a taxable supply, and so should only reflect the net loss to the Trust. Section 5(13) of the GST Act does not change that position as the damages award is not a "payment under the insurance contract".

H. In respect of the Council's cross-claim against Mr Major, the Council is entitled to a 90 per cent indemnity from Mr Major.

Contents

Introduction

[1] On the morning of Saturday, 18 September 2010, snow arrived in Invercargill. However, Stadium Southland opened as normal. Roey Bugden was on reception, and Brad Sycamore set up for the morning's tennis on the community courts. Joanne Smith, the secretary of a local tennis club, arrived with her three children and other junior members for their tennis coaching session.

[2] The coaching session with the juniors finished at around 11.00 am. Families then began packing up to go home before the snow created travel problems. As the stadium emptied out, and the snow continued, staff decided they should get approval to close the stadium down early so they, too, could get home.

[3] At around 11.20 am, and before the stadium had closed, Mrs Smith heard "a really big bang", but "it wasn't a short sound, it was quite long – a massive rumbling". Ms Bugden also said "It wasn't just one bang. There were successive noises but within a very short timeframe". It sounded like "thunder or an earthquake", or even "a tornado". Before she knew what was happening, Mrs Smith said "stuff came spinning towards me. The doors from events courts 1 and 2 blew open with the wind". When she looked into the community courts she could see daylight at the east end and knew that the roof had fallen.

[4] There were about eight people in the building at the time. All the occupants ran for their lives, but, as Mrs Smith says, "it felt like the collapse chased us out". Miraculously, all escaped unscathed. When Ryan Sycamore, the stadium administrator, arrived shortly afterwards, he recalled "you could immediately see that the main structure on the front had failed … The fire doors at the front were wide open. It looked like they had been blown open". It was clear once the occupants gathered outside, that the stadium roof had collapsed. Indeed, the expulsion of air caused by the collapse was so strong that loose items, like a chilly bin that was inside the building, were blown outside.

[5] The roof collapse was a huge blow for the Southland Indoor Leisure Centre Charitable Trust (the Trust). It had overseen the proposal for an indoor stadium for Southland, and had been responsible for its funding and construction. As predicted,

the stadium had proved to be a valued community facility and the Trust, with the support of the Council, committed to rebuilding it. The stadium is now rebuilt, bigger and better than before, but at significant cost. It is the question of who should bear the repair costs which is at the heart of these proceedings.

[6] Unlike many building defect disputes, there is no dispute over how and why the stadium roof failed. The combination of poor quality welding and a failure to follow the plans and specifications for remedial work to the roof trusses meant the roof was unable to carry the snow loadings experienced that day.

[7] What is in issue is whether the Council breached a duty to exercise reasonable skill and care in issuing a code compliance certificate for remedial works to the trusses for the stadium roof and, if it did, whether it should be liable for the repair costs sought by the Trust. In determining that question I must also consider the various defences raised by the Council, including whether there has been contributory negligence by the Trust, and whether the provisions of the lease between the Trust and the Council preclude a successful claim.

The events leading to the collapse

A stadium for Southland

[8] The Trust was established in 1998 at the instigation of the Invercargill Licensing Trust. The Invercargill Licensing Trust had formed a committee which established there was strong interest in a covered stadium and leisure centre for Invercargill. It then commissioned a concept design for the stadium and recommended the establishment of an incorporated charitable trust to progress the proposal.

[9] The Trust was constituted by deed dated 29 April 1998. It was governed by a voluntary board of trustees which included representatives from the following organisations:

(a) the Invercargill Licensing Trust;

(b) the Community Trust of Southland;

(c) the Invercargill City Council;

(d) the Southland Building Society;

(e) Sport Southland; and

(f) the Southland District Council.

[10] Once sufficient funding was obtained through donations and grants, McCulloch Architects Limited (McCulloch Architects) was engaged to design the stadium and to project manage its construction. McCulloch Architects engaged a local engineer, Mr Tony Major, as the consulting engineer for the project.

[11] The location of the stadium was the subject of discussion between the Council and the Trust. They eventually agreed that Surrey Park, a centrally located Council reserve with existing facilities for sport and recreation, was the preferred site. On 7 July 1999 the Trust signed a lease with the Council for the area of land on which the stadium was to be erected. Work on construction could then get underway in earnest.

[12] The main building consents were issued in 1999 and the majority of the building work was undertaken during that year.

A problem arises and the Trust responds

[13] The stadium the Trust built was a large, generally rectangular building. Along one side of it were two large events courts plus a reception area, squash courts, toilets and changing rooms. Within the large open area on the other side of the building, were five smaller community courts.

[14] In November 1999, when the large roof over the community courts was partly completed, the trustees became aware that some of the trusses in that part of the stadium roof were sagging under their own load.

[15] In late November 1999, both the Council, through its principal building officer, Mr Simon Tonkin, and the Trust, through Mr Ray Harper, its chairman, put these concerns in writing to the architect. Responsibly, the Trust required an independent engineer to be involved in the design of the remedial works and it sought "[a]n assurance from both yourself and the engineer that the resulting structure [after remedial work] has integrity, is safe, complies with acceptable design standards, and will remain intact for the expected life of the building".

[16] As a consequence, Mr Maurice Harris, of Harris Consulting Limited (HCL) in Auckland, was instructed by the Trust to review the engineering for the community court roof trusses and "to certify that the structure following the remedial action is sound, complies with acceptable design standards, and may be safely accepted by the trustees and will remain intact for the expected life of the building". In the course of doing that work the Trust also sought an explanation from HCL of the exact nature of the problem and its cause, and of the remedial action which was necessary.

[17] After visiting the stadium on 8 December 1999, Mr Harris provided a preliminary report to the Trust. That report identified there had been a "mistake in the computer input for the roof trusses" and, as a result, "the community court trusses, and their supporting structure have been designed for lighter loads than required and do not meet New Zealand Code requirements".

[18] His full report, provided in late December 1999, identified 11 elements in the structural elements of the building which did not meet the strength and serviceability limits prescribed by the New Zealand Building Code. The critical concerns related to the community court trusses. He said:

> These trusses have been designed without taking the full loading into account. In addition some trusses chords were reduced in what appears to be a "cost cutting exercise".
>
> As a result the 6 mm thick top and bottom chords are too light and require strengthening. End web members are also too light and require strengthening.
>
> …

> Because the trusses were relatively shallow for their span, deflections under dead load were high and these were exaggerated by the construction method adopted whereby the trusses were lifted in pairs, (with purlins, and roofing attached) and were simply supported with dead load deflection already occurring before being fixed to the columns.
>
> Because the design was so critical the construction methodology should have been clearly outlined and monitored by the design engineer.

[19] The report also proposed a remedial option. The remedial work included jacking the existing trusses, cutting them at three points and aligning them to achieve an upwards precamber of 225 mm at the midpoint, welding in steel plates at the cut points, and then welding steel strengthening plates, end to end, along the top and bottom chord of each truss.

[20] The report concluded by saying:

> The problems that have arisen are design problems and appear to be due to the following reasons:
>
> (1) Lack of checking.
>
> (2) Failure to carry out sufficient seismic analysis.
>
> (3) Insufficient detailed design input into connections and member slenderness.
>
> (4) Failure to follow design codes.
>
> (5) Pressure to reduce structure costs without detailed re-analysis.

However it also concluded that "[f]ollowing remedial work we believe the building will meet the structural requirements of the New Zealand Building Code".

Meanwhile, back at the Council

[21] It was not just the Trust which was concerned to know why there appeared to be a design flaw in the building. The Council, too, was proactive about the issue. As soon as Mr Tonkin was aware of the problem, he wrote to the architects seeking a report on the cause of the sag, the structural stability of the building, and any remedial measures to rectify the sag and to recamber the roof structure. Mr Tonkin also sought, by return fax an assurance that, "there is no immediate danger from collapse of the structure".

[22] On 15 December, in the absence of response, Mr Tonkin again faxed the architects saying "this matter now requires urgent attention". A week later a further fax was sent to the architects for a response. A day later, on 23 December 1999, Mr Tonkin again faxed the architects, requiring a response before 10.00 am the following day.

[23] McCulloch Architects finally responded that afternoon advising that the HCL report had been commissioned but not yet received. It enclosed the plan of the proposed remedial work which the Trust's engineer, Mr Major, and the review engineer from HCL, had agreed was appropriate. It also confirmed that both engineers advised that the building was not in danger of collapsing saying it was "deflections rather than structural integrity that is the issue".

[24] On 24 December 1999 Mr Tonkin acknowledged the architects' letter of 23 December 1999 and the plan for remedial work. He also recorded that an amendment to the building consent must be applied for and that a peer-reviewed producer statement would be required from the engineers on the cause of the problem and the proposed rectification. Finally, he stated that Council reserved the option to engage a further independent engineer to review the consulting engineer's report.

[25] That same afternoon, the HCL report became available, and the architect provided a copy to Mr Tonkin on a "read only" basis. The final step taken by Mr Tonkin that day was to write to Mr Major asking him to "advise what the problem was with your design [for the trusses] and how the error came about" and advising that "Council will review how we handle your producer statements after we receive the above information".

Building consent for the remedial works

[26] There was some urgency to implement the remedial works because the official opening, to be attended by the then Prime Minister, the Rt Honourable Helen Clark, was scheduled for 25 March 2000. Indeed, the Council said in its 24 December 1999 facsimile to the architects, that if they wished to carry on with remedial work, the Council would not stop the work, but it would not give

approval to it until it had the required information to enable it to issue a building consent for it.

[27] On 4 January 2000, HCL prepared a producer statement in respect of its design review of the planned remedial work on the community court trusses.[1] HCL also prepared an accompanying explanatory letter which it advised "should remain attached to the producer statement". Importantly, it provided detailed commentary on how the proposed remediation should be implemented, both on the six trusses constructed of 6 mm thick square hollow section (SHS) steel, and on the three trusses fabricated using 9 mm thick SHS steel. The letter set out precise measurements for the precamber to be achieved before the internal props were removed, and for the net precamber, under normal conditions, once the remedial works were complete. It concluded by saying:

> Please ensure the contractor and supervising engineer has a copy of drawing 97139 and this letter prior to beginning repairs.
>
> Complete the first truss and review results prior to completing other trusses in the same manner.
>
> Please contact us if you have any queries or any aspects of the repair work do not comply with the deflections indicated.

[28] On 6 January 2000, Mr Tonkin met on site with the engineer, the architects, and the builders, where they discussed the proposed remedial works, and how the construction methodology contributed to the original problem. The Council was advised that an application for an amended building consent for the remedial works would follow shortly.

[29] Once it received and reviewed Mr Major's producer statement for the design of the remedial works (or PS1), and Mr Harris' producer statement for review of that design (or PS2) and his accompanying letter, Council issued a building consent on 14 January 2000.

[30] The conditions of the building consent for the remedial works were as follows:

---

[1] Known as a PS2.

a) The provisions of the New Zealand Building Code override anything that is inconsistent in these specifications and plans must be complied with.

b) Please note that the consent fees paid allow for the number of inspections noted on the orange inspection card. Any extra inspections required will be charged prior to the issue of a Code Compliance Certificate.

c) Please note that any deviation from the approved documents is subject to an amendment to the Building Consent. Application forms are available at the Building Consents counter of the Administration building in Esk Street.

d) Consulting Engineer, Mr Major to confirm in writing to Council that the 6 Community Court trusses precamber is in line with Harris Consulting letter dated 4.01.2000, and individual trusses measurements are to be included in the record.

e) Producer Statement Construction Review required from Mr Major for remedial work to the 6 Community Court trusses.

[31] The first three conditions appeared to be generic conditions included in any building consent issued by the Council. Indeed, as no inspections were proposed by the Council for this work, condition 2 was not even applicable.

[32] Condition 4 referred back to the HCL letter of 4 January 2000. I consider it was intended to capture the express instructions in that letter regarding the precamber to be achieved while the remedial works were undertaken, and regarding the net precamber which should be present once the props were removed and the trusses were experiencing a normal load. However, the condition appears to have only picked up on the instructions for the six lighter weight trusses, even though the letter gave instructions for the remedial work which was required on all nine of them.

[33] Condition 5 required Mr Major to review the construction process and to provide a producer statement (PS4) confirming that the remedial work had been carried out in accordance with the design.

Implementation of the remedial works

[34] Work to effect the repairs to the trusses progressed quickly. When Mr Tonkin visited the site on 21 January 2000 for a general inspection, he noted that:

> At present they are still correcting the trusses in the community courts. Seven have been done. They are not a gentle round they are more in lines and still a bit twisted and up and down a bit, but with a gentle camber up in the middle.

[35] Although the Council was not planning to inspect the remedial welding work, as neither Mr Tonkin nor his staff felt they had the appropriate expertise to do so, its building staff nevertheless continued with their inspections of the overall building work, and where they saw items that did not appear satisfactory, they raised their concerns with the architect.

[36] For example, on 27 January 2000, a fax was sent to McCulloch Architects listing five items that were noted on a general visit and that "appeared not in accordance with the building code". One of those related to the community court trusses, with Mr Tonkin noting "connections at truss 1-9 to truss 10, some bottom connections not welded yet and standard of additional plates and welding questionable on other connections. Please have consulting engineer check and comment". In the same facsimile, Mr Tonkin also sought a response to the six items he had identified of concern, in an earlier facsimile dated 10 January 2000, and which had been followed up by a facsimile of 21 January.

The Council asks Mr Major to "please explain"

[37] While the works were underway, the Council's Director of Environmental and Planning Services wrote to Mr Major on 2 February 2000, following up on Mr Tonkin's earlier letter requesting an explanation for the problem with the roof trusses in the leisure centre and why they were not designed to comply with the building code. Importantly, the letter concluded that "unless and until we receive an explanation from you that is satisfactory to us, I believe it would be improper for us to accept any future producer statements".

[38] On 4 February 2000, Mr Major responded to the Council's letter explaining that the discernible sag in the roof was quickly identified by HCL as being "a mistake in my assessment of the live load requirement". He explained that, as originally designed, with the chord members being made out of 9 mm thick SHS, "the trusses were sufficiently strong to function as simply supported elements …

even with the full live load allowance". However, at the time of tendering he agreed to a reduction in the gauge of the chord members to 6 mm thick SHS. Given this, along with his error in calculating the live load allowance, and the damage sustained at the precast column heads which the trusses were connected to, it was recommended that all the trusses be strengthened.

[39] Mr Major's letter of explanation was referred to Mr Miller, a Council engineer, who seemed unimpressed by Mr Major's explanation. He noted on the letter that "this is no reason for an error to occur". Nevertheless, the Council responded to Mr Major, acknowledging his letter, and saying "it will take us a little while to consider your explanation but I will get back to you as soon as possible".

[40] On 8 February 2000, Mr Tonkin again followed up with the architect seeking responses to his letters and facsimiles of 10, 21 and 27 January 2000. On 9 February 2000, the Council received responses from both McCulloch Architects and from Mr Major to its queries. Relevantly, the architect's response to the Council's observation that the "standard of additional plates and welding questionable on other connections", was that "[r]emedial work has superseded this observation".

[41] On 17 February, the Director of Environmental and Planning Services provided his response to Mr Major's explanation for the design errors in the community court trusses, saying:

> You will appreciate that I had to ask for this explanation, in view of our original acceptance of your producer statement. You will also no doubt appreciate that it is not appropriate for me to comment on the content of your explanation.
>
> My concern is that from now on Council must have good reason to be satisfied that you have put in place quality control procedures that will ensure that these kind of problems will not recur.
>
> For this reason, before we can accept another producer statement from you for new work, I will need a letter from you detailing what these revised quality control procedures are.

[42] Mr Major's response came on 28 February 2000 saying:

> I have been engaged in private practise in Invercargill for over thirty years, and we are currently handling up to 300 projects a year. Almost without exception, we have had no problems.
>
> Given this, you will allow that I am no fool, and can rest assured that I have certainly learnt a great deal from the problems we have encountered over the last couple of months.
>
> From now on I intend to:-
>
> a) only accept commissions where adequate time is allowed for the design and documentation phases,
>
> b) be rather more pedantic where savings in the structural content are requested,
>
> c) prepare calculations to a standard that will allow an independent check to be carried out,
>
> d) engage an independent engineer to carry out a full peer review, covering design philosophy and arithmetical check, for any major projects, or those which involve difficult or novel solutions.

[43] The Council responded soon afterwards saying:

> I accept that the procedures you have adopted will provide an improved level of quality control, and on that basis I am happy to withdraw our previously stated difficulties and reservations about accepting producer statements from you.

The issue of the code compliance certificate for the remedial works

[44] The remedial work on the community trusses was completed by early February, keeping the building on track for the opening on 25 March 2000.

[45] On the understanding that the remedial work was complete, Mr Tonkin wrote to McCulloch Architects in mid February 2000 seeking provision of the documents required by conditions 4 and 5 of the building consent.

[46] Formal advice of completion of the remedial work was provided to the Council on 1 March 2000, with a request to issue a final code compliance certificate (CCC). It is not clear why the request was not actioned then but instead went into abeyance until much later in 2000. On 31 October 2000, the Council wrote to the architects listing the information that was still required under conditions 4 and 5 of

the building consent before a CCC could be granted for the remedial works. That information was again sought by Mr Tonkin on 16 November 2000.

[47] There is no record of that information being received, yet on 20 November 2000, a CCC for the remedial work was issued under the signature of a clerk working in the consents team. What was not clear until it was revealed in cross-examination, was that Mr Tonkin had not authorised the issue of a CCC, but one was nevertheless issued by the Council, possibly because a CCC was required before the Trust could be issued with a liquor licence for an upcoming function in the stadium.

[48] As Mr Tonkin frankly admitted:

> The issue that I think we have here is that I actually can't tell you why we issued that code compliance certificate, it is a possibility [that it was issued so the Trust could obtain an on-site licence] because there's no notes from me to say, "please issue code compliance certificate".

[49] It seems no one from within the Council could now explain how the CCC came to be issued, with Mr Tonkin acknowledging that "all I can say is that I didn't authorise the code compliance certificate".

The subsequent provision of information to support the code compliance certificate

[50] Although the CCC was issued in November 2000, the Council continued to seek the information required under conditions 4 and 5 of the building consent after that date.

[51] On 17 January 2001, Council staff met with representatives of the Trust and the construction team to discuss the outstanding requirements in order for the stadium, as a whole, to obtain a CCC. It was noted by Mr Miller, the Council's engineer, that Council was still waiting for Mr Major's producer statement for the work on the community court trusses. That prompted immediate action, because, on 22 January 2001, the Council received what was described as a "producer statement – construction" and a covering letter dated 16 January 2001 from Mr Major.

[52] The covering letter detailed the methodology which was adopted to implement the community court truss repairs, noting what checks were done on site to "confirm that the result was visually acceptable". The PS4 provided by Mr Major was expressed in the following terms:

> This Consulting Practice has been engaged by McCulloch Architects Ltd to provide structural observation services for the building work detailed in drawing NO 97139 and the relevant specifications for **modifications to existing trusses** for a new building constructed for Southland Indoor Leisure Centre Charitable Trust at Surrey Park, Invercargill.
>
> As a suitably qualified independent design professional, covered by a current policy of Professional Indemnity Insurance to a minimum value of $200,000 I hereby certify that the modifications have been generally constructed in accordance with the details shown in the above drawings and specifications.

[53] On 26 January 2001, Mr Tonkin referred the letter and the PS4 from Mr Major to Mr Miller, with a request to "check if Council's concerns have been addressed. The community court truss amendment 00/00011 is tagged – please read condition". The advice which came back from Mr Miller the same day noted "conditions on consent should be referred to engineer, and appropriate comment received".

[54] That prompted a facsimile from Mr Tonkin to Mr Major on 30 January 2001 noting the terms of condition 4 on the building consent which required Mr Major to confirm in writing that the community court trusses precamber was in line with the HCL letter of 4 January 2000 and to provide the individual truss measurements in the record. He asked Mr Major to resubmit his letter to satisfy that condition.

[55] Nearly six months later, on 23 July 2001, Mr Tonkin wrote to the architects requesting, among other things, the "datum heights of the community court trusses" so that a final CCC could be granted for the building structure. A further fax chasing up datum heights for the community court trusses and other matters was sent by the Council on 12 September 2001. It seems the very precise requirements of HCL's letter of 4 January 2000, which were embodied in condition 4 of the building consent, had evolved over time into no more than a request for the heights of the trusses as a benchmark against which future deflections could be checked.

[56] On 30 October 2001 a plan was provided to the Council showing the heights from floor level of the community courts to the underside of each truss. It did not, however, confirm that the precamber measurements complied with HCL's letter of 4 January 2000. Indeed there was a considerable variation in the heights shown on the plan. For example, truss 2 actually had a sag of 54 mm, rather than a net precamber of 85 mm as recommended by HCL.

[57] However, provision of the plan which showed only the height of each truss from the floor, appeared to satisfy Council's inquiries. No further requests for information were made and no check was made of the plan to see how it compared with the HCL precamber requirements. A CCC for the stage 4 building consent for the stadium, dealing with structure and plumbing, was issued on 9 April 2003.

The collapse and its aftermath

[58] When the building collapsed on the morning of 18 September 2010, it triggered an investigation into the cause of the collapse. The Department of Building and Housing commissioned the National Institute of Water and Atmospheric Research Limited (NIWA) to report on the snowstorm and the ground snow loading. A data collection campaign was undertaken by NIWA on 19 September 2010 in order to establish the snow loading experienced in Invercargill on the day of the collapse and to assist in assessing the basis for snow loading requirements for buildings in this region.

[59] Dr Jordy Hendrikx, who at the time was a snow and ice research scientist for NIWA, prepared a report on the findings, dated October 2010. In that report, he explained that the assessment of snow loading was based on measurements taken in the field adjacent to Stadium Southland on 19 September 2010. The initial report did not make any conclusions regarding the actual snow loading experienced on the roof of this or any other building in Invercargill.

[60] In his brief of evidence exchanged before the hearing Dr Hendrikx explained that his initial field work assessed the ground snow loading adjacent to Stadium Southland on 19 September 2010 at .45 kPa, with a mean range of .41 to .48 kPa and a minimum and maximum ground snow load of .38 to .59 kPa respectively.

However, Dr Hendrikx noted that the load on the roof on 18 September at approximately midday would be less than the ground snow load observed in the NIWA report on 19 September and it would be between .85 to 1.0 of the ground snow load, giving a range of approximately .35 kPa to .48 kPa for the roof snow loading. He also observed that there would be a "slightly lower ground snow loading on 18 September 2010", but he could not accurately quantify that.

[61] Dr Hendrikx then undertook further work to quantify the relative percentage of precipitation which fell before midday on 18 September 2010, and between then and 3.00 pm on 19 September 2010, and, by the time of the hearing he felt able to quantify the difference in ground snow load, and therefore in the roof snow load, between the time of collapse around 18 September 2010 and the time the ground snow load on the adjacent field was measured on 19 September 2010. That resulted in a revised assessment of roof snow load at the time of collapse of .30 kPa (but with a range of between .21 kPa to .33 kPa). Those measurements were agreed to in the course of expert witness conferencing and I accept them as providing a reliable range for the roof snow loading at the time of collapse.

[62] The relevance of this information is that it demonstrates that the roof snow loading did not exceed the snow loading which the building was designed to withstand under the relevant building code standards of the time. The expert engineers agreed that the theoretical snow loading capacity of the building, as designed, should have been about .50 kPa with no more than a 1 per cent probability of failing at that load.

[63] In short, if the stadium had been properly constructed as designed, it should have been able to withstand the roof snow loading experienced during the 18 September snowfall event, so that was not the cause of the collapse.

The Department of Building and House investigation

[64] The Department of Building and Housing commissioned two consulting engineers to investigate and report on the collapse of Stadium Southland. One of the engineers, Dr Clark Hyland, appeared as an expert witness to explain the findings of the investigation. The Court also heard evidence from Mr Charles Wheeler, an

expert welding inspector, who examined the welds in the community court trusses salvaged from the collapse of Stadium Southland, in order to identify whether they complied with the relevant New Zealand Welding Standards.

[65] The findings of that investigation were not in dispute. The stadium collapse was likely to have been initiated by the compression failure of the defective mid-span top chord splice in the roof truss at the eastern end of the community courts. The collapse then progressed through other roof trusses, causing a westward displacement of the trusses in the supporting columns. As the building displaced westward, the bottom chord bolts that were connecting the spine trusses to the two eastern most columns, fractured. The spine trusses then fell to the ground as the two western most support columns collapsed. One of the trusses at the western end of the community courts then fell to the floor soon after. The welds failed and strengthening plates peeled away on some of the roof trusses.

[66] The report concluded that the remedial work, as designed, was compliant in terms of strength, but would "have been complex and difficult to achieve [to the necessary level of quality] without skilled and experienced steel construction personnel and appropriate supervision".

[67] Critically, there were a number of construction defects identified. They included the following:

(a) The welding was visibly deficient in that:

(i) The cut faces of the top chord box sections had not been prepared for welding where packet plates were to be installed.

(ii) The packer plates had not been welded all around to the box section. The top face of the boxed plate connection (including the plate to plate connection) had not been welded.

(iii) The packer plates had not been ground back before installing the strengthening plates to the side of the box section. The packer plates

therefore protruded beyond the profile of the box section. This meant the strengthened plates had been installed on either side of the packer plates and did not, as intended, continue across the packer plate joint.

(iv) Where the box section was welded to the packer plate, incomplete penetration butt welds had been used.

(v) Side strengthening plate segments were not butt welded together.

(vi) Side strengthening plates were poorly stitch-welded to the box sections.

(b) The cutting and packing of the truss top chords had in many cases resulted in poor chord alignment at the joint.

(c) The removal of bolts from where the trusses connected to the top of the southern columns was poorly carried out, with some being gas cut and then not replaced, and others not being reinstalled, as evidenced by the TCM thread inserts being filled with grout.

(d) The cutting of the cleats connecting the trusses to the main gantry, and the subsequent reinstatement, was in some instances extremely poor.

(e) Solid steel washers were not welded to the gantry as required by the design.

[68] It was also identified that if there had been an adequate construction monitoring regime in place, the deficiencies should have been identified and corrected at the time of construction. Those conclusions were not contested in the hearing.

The IPENZ investigation of Mr Major's role

[69] Mr Major had an integral role in the stadium construction. He was the consulting engineer to the project, and it was his design error that led to the need for

the remedial work on the community court trusses. He, in conjunction with HCL, prepared the plan and specifications for the remedial work. Furthermore, the Council, when issuing the building consent for the remedial work, chose not to have its own inspectors inspect that work themselves, but to have Mr Major provide a PS4, or producer statement for construction review, confirming that the work "has been carried out in accordance with certain technical specifications".[2]

[70] The Department of Building and Housing's report raised concerns about the skills and competencies of the parties involved in the design and construction of the stadium. As a consequence, the Institute of Professional Engineers of New Zealand (IPENZ) initiated an "own motion" complaint against Mr Major, alleging that he had carried out engineering activities in a careless or incompetent manner, which resulted in the collapse of Stadium Southland.

[71] After conducting an investigation, the IPENZ investigating committee determined that Mr Major did not sufficiently recognise the importance of construction monitoring during the truss modification work. It concluded he should have:

(a) formally clarified the actions and timings of monitoring inspections that he required, to allow him to visually check samples of the work actually carried out; and

(b) fully documented the work done, e.g. photographs, for signing off purposes.

[72] IPENZ found that Mr Major did not visually inspect the truss modification work, particularly the work to the top chord before access staging was removed by the contractor. Instead, he simply accepted the steel-work fabricator's word as to the sufficiency of the work done. The committee concluded "Mr Major's issuing of a PS4 covering this aspect of the work in the manner he did was unacceptable, given the reliance that others such as the owner and regulator would be placing on it". As a consequence, Mr Major was expelled from membership of IPENZ.

---

2 Building Act 1991, s 2.

[73] Mr Major is named as the second defendant in these proceedings, but took no active part in them. He has agreed to contribute $1,000,000 to the Trust's claim against him. The Council has cross-claimed against him and seeks a finding that the Council is entitled to a full indemnity against him if it is held liable.

The issues for determination

[74] In light of that complex set of background circumstances, the issues for determination are:

(a) Does the Council owe the Trust a duty of care in these circumstances?

(b) If so, was there a breach?

(c) If there was a breach, was it causative of the Council's loss?

(d) Is the claim precluded by a limitation defence?

(e) Is the claim precluded because Council owns the stadium?

(f) Was the Trust contributorily negligent?

(g) If so, to what extent should it be held liable for the loss it suffered?

(h) Is the claim extinguished or otherwise met by the indemnity contained in clause 23 of the lease?

(i) What is the Council's loss and should it be reduced for betterment?

(j) Should GST be payable on the loss and, if so, is it added to the claim before or after the interest is added?

Are any aspects of the claim precluded by limitation defences?

[75] The Trust's pleadings allege that the Council failed to exercise reasonable care and skill in performing its functions under the Building Act 1991 with regard to

the community court truss modification work, including in relation to obligations it had during the period in which the construction work was undertaken.

[76] However, the collapse did not occur until September 2010, and the claim was not filed until 19 November 2010. The Council has therefore pleaded that claims which relate to any acts or omissions of the Council occurring on or before 19 November 2000 are time-barred pursuant to ss 91 and 393 of the Building Acts 1991 and 2004.

[77] I address this issue at the outset because it is sensible to exclude from consideration any claim that is time-barred under the relevant legislation.

[78] Section 393 of the Building Act 2004 provides:

> **393 Limitation defences**
>
> (1) The Limitation Act 2010 applies to civil proceedings against any person if those proceedings arise from—
>
> (a) building work associated with the design, construction, alteration, demolition, or removal of any building; or
>
> (b) the performance of a function under this Act or a previous enactment relating to the construction, alteration, demolition, or removal of the building.
>
> (2) However, no relief may be granted in respect of civil proceedings relating to building work if those proceedings are brought against a person after 10 years or more from the date of the act or omission on which the proceedings are based.
>
> (3) For the purposes of subsection (2), the date of the act or omission is,—
>
> (a) in the case of civil proceedings that are brought against a territorial authority, a building consent authority, a regional authority, or the chief executive in relation to the issue of a building consent or a code compliance certificate under Part 2 or a determination under Part 3, the date of issue of the consent, certificate, or determination, as the case may be; and
>
> (b) in the case of civil proceedings that are brought against a person in relation to the issue of an energy work certificate, the date of the issue of the certificate.

[79] Given the 10 year limitation on bringing claims imposed by the Building Act, the Council says the only act which is not time-barred is the issue of the CCC. This restricts me to consideration of the information the Council had at the time of issue

of the CCC and whether it was negligent to issue the CCC in those circumstances and whether that was causative of any loss. It does not allow me to enquire into the sufficiency of Council's actions or inactions at any earlier point in time.

[80] In the end, this point was less contentious than it seemed in the pleadings. The Trust accepts that it can only claim against the Council in relation to the issue of the CCC on 20 November 2001 and not any negligent acts or omissions which occurred before then. However, I may need to look at events prior to that date to determine what information the Council had at that point in time and thus whether, on the information it relied on, the Council was negligent in issuing the CCC.

[81] I have therefore proceeded on the basis that the Trust's claim relates solely to the negligent issue of the CCC and not to any earlier acts or omissions, including the issue of the building consent or any alleged failures or shortcomings in the inspection process.

Does the Council owe the Trust a duty of care?

Why does the Council say no duty of care is owed?

[82] The Council's first challenge to the Trust's claim was that it owed no duty of care to the Trust in issuing the CCC. It argued that the case involved a "unique" factual matrix which took it outside the circumstances where the Supreme Court's decision in *Spencer on Byron*, held there was a duty of care.[3] Furthermore, looking carefully at the circumstances of this case, and applying the approach in the leading authority of *South Pacific Manufacturing Co Ltd v New Zealand Security Consultant and Investigating Ltd*,[4] it argues that no duty arises.

[83] In endeavouring to distinguish this case from cases such as *Spencer on Byron* and *Sunset Terraces*,[5] the Council pointed out that this is neither a traditional circumstance, such as in *Invercargill City Council v Hamlin*,[6] where a modest

---

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

4 *South Pacific Manufacturing Co, Ltd v New Zealand Security Consultant and Investigating Ltd* [1992] 2 NZLR 282 (CA).

5 *Body Corporate 188529 v North Shore City Council* [2008] 3 NZLR 479 (HC).

6 *Invercargill City Council v Hamlin* [1994] 3 NZLR 513 (CA).

residential house is the subject of inspections, nor is it a case where owners, including commercial owners, have purchased off a developer and where the Council has undertaken inspections. Instead, the Council argues the Trust is effectively "the developer" and has engaged its own experts, and it is those experts, not the Council, which have inspected the work and provided the information on which the Council has issued the CCC.

[84] Elaborating on the factual matrix which the Council says should exclude the existence of a duty of care in the present circumstances, the Council says the following considerations are relevant:

(a) The stadium is a community asset which is funded by the community, and which is insured against risk of loss, and the community should not have to "pay twice" by finding the Council liable.

(b) The terms of the lease with the Council are relevant, and point strongly to the Trust being responsible for building defects rather than the Council.

(c) Under the terms of the lease, the Council will either be the ultimate owner of the building through the provisions requiring vesting of the building in the Council at the end of the lease, or is already the owner as a consequence of the building being a fixture on the land. In this situation, the Council says, it cannot owe a duty of care to itself as the owner, or subsequent owner, of the stadium.

(d) The Trust had full control of the building process, engaging the relevant contractors and exercising active day to day control of the project, unlike the subsequent purchasers in cases such as *Sunset Terraces* and *Spencer on Byron*.

(e) The building consent process differed because the Council did not inspect the work itself, but the works were always to be the subject of a PS4 provided by the Trust's engineer. The Council's involvement and remuneration was negligible compared with the involvement and

remuneration of Mr Major and this should be reflected in determining whether it should owe a duty.

(f) Considerations of public interest should weigh in the mix. Here, because the Trust has protected itself with insurance, it says the public interest does not dictate that the community, via the Council, should in turn have to meet that cost.

[85] In this unusual factual scenario, the Council argues that there is no binding authority that a duty of care is owed and the question of whether it is reasonable to recognise a duty must be considered afresh, taking into account considerations of proximity and policy. While acknowledging that the Council was in close proximity to the Trust, the Council argues that, having regard to the policy factors considered by Tipping J in *Spencer on Byron*, there were a number of policy considerations which pointed against a duty of care being imposed.

[86] In *Spencer on Byron,* a factor telling in favour of a duty of care, was that it would be economically inefficient to require the owner of commercial premises to "have to engage a suitable professional to do exactly what the council is charged with doing under the Act", saying "it is not unreasonable for owners of any kind of building to be able to rely on the council not to be negligent. They should not have to pay twice to get that protection".[7] Here, the Council argues that, as Mr Major was engaged by the Trust for his services, including to observe the implementation of the remedial work, at a cost of around $80,000, and the Trust did not pay for any Council inspections, the same consideration of efficiency points against finding that the Council owed a duty.

[87] Secondly, the Council argues that it did not have control of the work, a factor which was central to the policy choices the Court made in *Spencer on Bryon.* Instead, the Council says that control was delegated to the Trust's certified engineer because the Council inspector did not have the skill and expertise to ensure that the structural engineer's design assumptions had been met during construction. This, too, points against finding a duty of care in these circumstances.

---

[7] At [32]-[33].

[88] The Council also placed some reliance on William Young J's dissenting judgment in *Spencer on Bryon* where he observed:

> [315] All in all the extension of the *Hamlin* duty to non-residential buildings seems to me to give rise to policy issues of a kind which the courts are not well-placed to assess and quite likely to get wrong …
>
> [316] … Given that commercial and industrial buildings are owned either by investors or owner/occupiers, any losses associated with defects in their construction are investment or business in nature and thus, are not of a kind that is obviously appropriate for spreading amongst the community, by territorial authority.

By analogy, in the unique factual circumstances, the Council argued this was a case where William Young J's reasoning should prevail as it was not appropriate for the community to bear the cost of rectifying defects in the Trust's construction project.

[89] Finally, the Council placed some reliance on the indemnity clause in the ground lease to the Trust which provided:

> The [Trust] shall indemnify and keep indemnified the [Council] from and against all actions, suits, claims, demands, proceedings, losses, damages, compensation, costs, charges and expenses whatsoever which may arise during construction, erection or operation of any authorised building or works or activity ….

[90] The Council says this is broadly enough worded to cover liability for negligence in its regulatory role and emphasises that no duty exists.

Why does the Trust say a duty of care is owed?

[91] The Trust, in response, relies squarely on the decision in *Spencer on Bryon,* where the Supreme Court, by a four to one majority, held that a territorial authority's building regulation duties apply to all premises, not just residential. There is nothing in the Court's decision in that case to suggest that any category of building was excluded from this duty. Rather, it held that "the duty of care is owed regardless of the nature of the premises".[8]

[92] The Trust says the same point is reached if the question of whether a duty should be recognised is approached afresh, applying the test of whether it is fair, just

---

[8] At [216].

and reasonable to impose the relevant duty on the defendant. Accepting that proximity is the threshold requirement, and is present in this case, then a duty should be recognised unless that would not be in the public interest.

[93] In this regard, the Trust points to the relevance of the statutory framework of the 1991 Act which is "to provide the owner with assurance of compliance. If, through want of care on the part of the Council, that system of assurance fails, then the owner is entitled to look to the Council for his loss".[9] That statutory framework points strongly to a duty in this case where the collapse which occurred is precisely the kind of sudden structural failure which the 1991 Act and the associated building code is intended to prevent.

Is a duty of care owed?

[94] I approach the question of whether a duty of care is owed on the basis that the Trust and the Council are separate legal entities and, at the point the damage occurred, the Council did not own the building. I address the Council's argument on the ownership issue separately, but conclude that the Trust did own the building when the damage was suffered.

[95] I also consider the terms of the lease separately. If the indemnity is to have the effect contended for by the Council, that would govern whether any liability the Council has should be met by the Trust, but not whether the Council owes a duty to the Trust and to subsequent owners or users of the stadium to take reasonable care when issuing a CCC.

[96] In the present case, the issue is whether there are any factors which put the Trust outside the finding in *Spencer on Byron* which recognised a duty of care "regardless of the nature of the premises". I do not think there are. The decision in *Spencer on Byron* was not confined to whether the duty of care owed by building regulators applied to a discrete category of buildings beyond residential homes. Rather, the question was whether such a duty was owed in respect of all buildings coming under the 1991 Act's regulatory regime.

---

9 *Spencer on Byron*, above n 3 at [14].

[97] In concluding that policy reasons supported a general duty of care, the Court made findings which contradict the policy arguments raised by the Council. In particular:

(a) The existence of the duty was not dependent on the relative level of payment made. The Supreme Court held that the imposition of the duty was intended to provide compensation for economic loss, without the plaintiff necessarily having to pay for this protection, noting in particular that subsequent purchasers were not distinguished from the first owner even though they had not directly paid for the services of the inspecting authority.[10] In any event, recognising a duty in tort does not cut across contractual obligations which, say, a supervising architectural engineer, may have to the first owner who employed their services.[11]

(b) The degree of control that entities such as the Trust exercise over the construction process, for example, by retaining their own architects and engineers, was held to be irrelevant to the imposition of a duty in both *Sunset Terraces* and in *Spencer on Byron*.

(c) Equally, the relative lack of "vulnerability" of commercial building developers, as compared with residential home owners, was also held to be irrelevant. First, there was no basis on which to assume that all residential owners are vulnerable, whereas owners of commercial properties are not. While the Court accepted that, in general, there was less reliance on the local authority with respect to commercial buildings, that was not a strong policy factor and, in any event, a plaintiff did not have to prove reliance as an element of the tort.[12]

(d) The argument that policy considerations pointed against transferring the cost to rate payers was answered by the joint judgment in *Spencer on Byron* which stated:[13]

---

10 At [191].
11 At [193].
12 At [196]-[201].
13 At [203].

> The burden has not been shifted to ratepayers but rather to councils, whose financial backing is much greater than virtually all commercial building owners. Local authorities may, in the event their officers are negligent, meet liabilities from insurance (if available), the income generated by carrying out inspection work, or, in the last resort, rates. Everybody contributes to rates, whether directly or indirectly. Since everybody uses buildings, everybody gains the benefit if, by imposition of a duty in tort, buildings are rendered safer and healthier.

[98] The Council sought to differentiate the stadium from the residential/commercial building discussion in these judgments. However, I can discern no rational basis for considering this as a different kind of building in respect of which the Council should not owe a duty of care. If anything, the fact the Trust was comprised of volunteers, proceeding with construction on the strengths of grants and donations, supports the recognition of a duty. It meant they were not in a comparable position to commercial building owners who William Young J, in his dissenting judgment, considered should carry any losses associated with defects in their construction as a business risk, rather than spreading it amongst the community via the territorial authority. Furthermore, the stadium was a community building constructed for the benefit of the public at large, and the case for the territorial authority to ensure its compliance with the building code, and to make good the owner's losses if it was not, are far stronger.

[99] In conclusion, there is nothing in the circumstances of the case which takes it outside the framework of obligations established in *Spencer on Byron* and I accept that the Council did owe the Trust a duty of care when deciding whether to issue a CCC for the remedial work on the stadium roof.

Did the Council own the stadium, and if so, does this negate the imposition of a duty of care?

[100] Notwithstanding what might be the position if a building such as the stadium was separately owned, the Council says that the contractual relationship between the parties under the lease is relevant to whether or not there is a duty owed by the Council to the Trust in this particular circumstance.

[101] The Council is the owner of Surrey Park, which is the local purpose reserve on which the stadium is built. Once it was decided that Surrey Park was the most

suitable location for the stadium, a lease was entered into between the Council and the Trust to permit its erection on part of that reserve land.

[102] The key terms of the lease between the Council and Trust were as follows:

(a) The lease was for a term of 33 years commencing on the first day of July 1999.

(b) Clause 4 restricted the use of the land to a community building and recreational facility to ensure compliance with the Reserves Act 1977 which allowed the lease for that purpose only.

(c) Clause 6 prevented any assignment or sale of the land without the consent of the Council.

(d) Clause 8 required the Trust to keep the stadium in good repair, order and condition.

(e) Clause 17 required the Trust to insure all buildings and structures for fire in the name of both the Council and Trust.

(f) Clause 19 provided that there would be no compensation payable to the Trust on expiry of the lease. The stadium would revert to the Council and the Trust would not be entitled to compensation for those improvements.

(g) Clause 20 provided that the Trust had no right to acquire the fee simple of the land.

(h) Clause 23 provided that the Trust indemnified the Council against all actions, suits, claims, demands, proceedings, losses, compensation costs, charges and expenses which may arise during construction, erection or operation of the authorised building works.

[103] Subsequently, Stadium Southland Limited was incorporated for the purposes of managing the stadium. It was a company that was 100 per cent owned by the

Trust and, on 1 October 2005, the Trust and SSL entered into a sublease for the stadium and this was subsequently recognised in a variation of lease dated 2005.

[104] The Council argues that, when the stadium was constructed, it was affixed to the land and therefore belongs in law to the Council as the owner of the land. The subjective intention of the parties could not affect the position.[14] Consequently, the Council says the evidence relied on by the Trust to say the building was owned by the Trust, including Council minutes, media statements issued by the mayor, and assets schedules in the Council's Long Term Council Community Plan, is irrelevant. Because, the stadium is affixed to the land owned by the Council, and therefore, as a matter of law, is the property of the Council, the Council says it could not have owed a duty to the Trust.

[105] The Council says the terms of the lease agreement do not contradict that position. The provisions which confirm that the improvements effected by the lessee revert to the lessor without compensation, implicitly acknowledge the legal position as to ownership and there is no contractual provision in the lease which contradicts it.

[106] The Trust, in response, relies on *Lockwood Building Ltd v Trust Bank Canterbury Ltd*, which held that, notwithstanding the legal position as it might apply to third parties, in relation to questions which arise between the land owner and the person claiming an interest in the item affixed to the land:[15]

> [T]hose persons may regulate the issue between them as they see fit by contract or otherwise. In some cases an estoppel may arise preventing one of them from asserting the legal position.

[107] Here, the Trust says, it was acknowledged by both the Council and the Trust that the stadium needed to be owned by the Trust, a charitable organisation, in order to maximise access to grants and other community funding. The terms of the lease agreement confirmed this position in that they reflect that the Trust would continue

---

[14] *Elitestone Ltd v Morris* [1997] 1 WLR 687 (HL); *Melluish (Inspector of Taxes) v BMI (No. 3) Ltd* [1996] AC 454(HL).

[15] *Lockwood Building Ltd v Trust Bank Canterbury Ltd* [1995] 1 NZLR 22 (CA) at 29.

to own the stadium while the lease continued, but when the lease terminated, ownership of the stadium would pass to the Council.

[108] I accept that the evidence of the contractual arrangements between the Council and the Trust are consistent with the Trust owning the stadium during the term of the lease. In particular, the lease was of "the said land" only, and the buildings established on the land are referred to separately and have discrete obligations applying to them. Recognition of the Trust's ownership is also implicit in its obligations to maintain and insure the stadium, and in the need for an express provision to say that the stadium would revert to the Council without compensation being paid.

[109] This is consistent with the numerous statements in Council's official documents which acknowledge the Trust's ownership of the stadium, including in its agreement of 10 June 2009 regarding the structure of ownership, governance, management and operation of the stadium and the civic theatre, in its LTCCP, and in public information leaflets and media statements by the Council. Even Mr Cambridge, the Council's solicitor, accepted that the lease provided that the Trust would own the stadium until the lease terminated, and it was at that point that ownership would vest in the Council.

[110] In those circumstances there is no need to consider whether the Council is estopped from asserting that the Trust owns the stadium, which was the Trust's fallback position.

[111] However, even if it was not the case that the Trust owned the stadium, it enjoyed a range of proprietal rights under the lease which, in my view, were sufficient to support the existence of a duty of care owed by the Council to the Trust. Where that duty was breached it was reasonable to require the Council to meet a claim for damages, being the cost to put the Trust back in the position it was in under the lease where it had a fully functioning stadium available to provide recreational facilities to the public.

[112] Nothing in these arrangements detracts from the existence of a duty of care I have found was owed by the Council to the Trust, when carrying out its regulatory obligations under the 1991 Act.

Did the Council breach its duty of care to the Trust?

[113] The Trust says the Council was negligent in issuing the CCC on 20 November 2000 because the person who signed and issued it:

(a) did not have reasonable grounds to be satisfied that the works, as constructed, complied with the building code;

(b) was not in fact satisfied that the works, as constructed, complied with the building code;

(c) did so without the knowledge, consent or authorisation of Mr Tonkin, the chief building inspector in charge of the building consent team, or any other authorising source; and

(d) did not have compliance with condition 4 or condition 5 of the building consent.

[114] The Council, in response, says:

(a) Council officers did not have the requisite skill level to identify the welding defects and it was reasonable therefore to impose a requirement for a producer statement, rather than to inspect the work itself;

(b) it is reasonable for the Council to place reliance on a certificate from an experienced local structural engineer who worked in the same building as the architect on the job and was a member of IPENZ, as was the case here;

(c) while the Council accepts that at the time of issue of the CCC the Council did not have reasonable grounds for issuing it, by the end of

November 2001, when it had obtained the PS4 and the datum heights of the trusses, it would have had reasonable grounds to issue the CCC at that stage, and could have issued it non-negligently at that stage so any negligence in issuing it sooner was not causative of the loss; and

(d) in any event, at that stage, Council had still to issue the CCC for the overall stage 4 structural work and could have declined issue of that until it had the information sought under conditions 4 and 5 of the building consent.

The statutory framework for issuing a CCC

[115] Code compliance certificates are issued under s 43 of the 1991 Act. Relevantly, it provides:

> …
>
> (3) Except where a code compliance certificate has already been provided pursuant to subsection (2) of the section, the territorial authority shall issue to the applicant in the prescribed form on payment of any charge fixed by the territorial authority, a code compliance certificate, if it is satisfied on reasonable grounds that-
>
> (a) the building work to which the certificate relates complies with the building code; or
>
> (b) the building work to which the certificate relates complies with the building code to the extent authorised in terms of any previously approved waiver or modification of the building code contained in the building consent which relates to that work.
>
> …
>
> (8) Subject to subsection (3) of this section, a territorial authority may, at its discretion, accept a producer statement establishing compliance with all or any of the provisions of the building code.

[116] Section 2 of the 1991 Act defines producer statements as:

> "Producer statement" means any statements supplied by or on behalf of an applicant for a building consent or by or on behalf of a person who has been granted a building consent that certain work will be or has been carried out in accordance with certain technical specifications.

[117] Section 47 provides a list of matters which territorial authorities must consider in relation to the exercise of its powers, including under s 43. It says:

> **47 Matters for consideration by territorial authorities in relation to exercise of powers**
>
> In the exercise of its powers under sections 30 to 46 and 64 to 71 of, and Schedule 3 to, this Act the territorial authority shall have due regard to the following matters:
>
> (a) The size of the building; and
>
> (b) The complexity of the building; and
>
> (c) The location of the building in relation to other buildings, public places, and natural hazards; and
>
> (d) The intended life of the building; and
>
> (e) How often people visit the building; and
>
> (f) How many people spend time in or in the vicinity of the building; and
>
> (g) The intended use of the building, including any special traditional and cultural aspects of the intended use; and
>
> (h) The expected useful life of the building and any prolongation of that life; and
>
> (i) The reasonable practicality of any work concerned; and
>
> (j) In the case of an existing building, any special historical or cultural value of that building; and
>
> (k) Any other matter that the territorial authority considers to be relevant.

Standard of care

[118] It was not disputed that the Council had an obligation to exercise reasonable care in issuing the CCC. The required standard is objective, and is based on what would be expected from reasonably competent and experienced persons undertaking that role within a territorial authority.[16] However, that is not necessarily the same as what the general practice is in those organisations, as that may not be consistent with the legal standard of what a reasonable and prudent building inspector would do.

---

[16] *McLaren Maycroft & Co v Fletcher Development Co Ltd* [1973] 2 NZLR 100 (CA) citing *Sulco Ltd v E S Redit & Co Ltd* [1959] NZLR 45 (SC).

[119] One of the difficulties in the present case was that the Court was required to judge the Council on the standards of a territorial authority in the year 2000, not what is expected of a reasonable and prudent council in 2015, as the relevant standard is what a reasonable person in the defendant's position would have done at the time. For example, in *Askin v Knox*, when dealing with an inspection of diggings which had taken place 20 years earlier, the Court was conscious of applying a standard which would have been regarded as reasonable at the time.[17] It concluded that the building inspectors were not negligent, saying that, "acting according to the standards then regarded as reasonable, [they] may have been less conscious of the risk of subsidence that has been underlined by the litigation of more recent decades".[18]

[120] In this case, the Trust relied heavily on the comprehensive 2014 IPENZ guidelines on accepting producer statements, saying these represented the standard a prudent Council should have adopted when accepting a producer statement for the construction review of the remedial works. However, the Council argued it would be unfair to judge its staff by standards which have been developed with the experience of hindsight, including the lessons learned from Christchurch earthquakes, and from the revision of the Building Act in 2004.

[121] However, this issue only needs to be looked at in the context of causation, because it is only there that the adequacy of the PS4 which was provided arises. The PS4 was not provided until 2001, and there was no evidence, as originally suggested, that the Council relied on an "oral" PS4, or on a promise that a PS4 was "on its way".

Did Council breach its duty of care on 19 November 2000?

[122] The question of whether there was a breach of Council's duty of care on 19 November 2000, when it issued the CCC, can be disposed of easily. The evidence revealed that there was no considered decision made under s 43(3) of the 1991 Act as to whether the Council could be satisfied on reasonable grounds that the remedial work on the community trusses complied with the building code. In fact,

---

17 *Askin v Knox* [1989] 1 NZLR 248 (CA).
18 At 252.

the Council's building inspector, Mr Tonkin, did not consider whether to issue the CCC at all. It happened without his knowledge or authority. When that evidence came to light it made more sense of what occurred, as Mr Tonkin struck me as a conscientious and diligent Council building inspector. I believe he would not have issued a CCC without evidence before him, including a PS4, to satisfy him that it was appropriate to do so.

[123] The person who signed the CCC was not competent to make the required statutory decision, and it was unknown what grounds she relied on to make the decision. She did not have a PS4 or any other information on which she could reasonably form the view that the requirements of the building code were met so the statutory requirements of s 43 were not met. This was acknowledged by the Council's own expert witnesses, Mr Jordan, to be "surprising" and not acting as he would expect a prudent Council to act. I agree.

[124] Faced with the clear evidence of a breach at the time the CCC was issued, the Council was forced to resort to its fallback position based on causation. It argued that if it had been negligent in issuing the CCC in 2000, then, by the end of November 2001 when it had both the PS4 and the datum heights for the trusses, it could have issued the CCC non-negligently, and the loss would have ensued in any event. This approach shifts the focus on Council's negligence back to its reliance on the PS4 supplied by Mr Major, and on the provision of measurements relating to the height of the trusses, but without compliance with condition 4 of the building consent.

Was the negligent issue of the CCC in November 2000 causative of the Trust's loss?

[125] Despite my finding that it was clearly negligent to have issued the CCC in November 2000, the Council answered this saying the negligence was not causative of the loss because it would not have been negligent to issue a CCC in reliance on the information it had by 28 November 2001. That meant the collapse would have happened anyway, in the absence of negligence.

[126] To succeed, the Council must affirmatively show that the loss would still have happened without any negligence on its part. The Trust's submission emphasised that it was insufficient for the Council to show that the plaintiff's loss might still have occurred, but that it must positively show that despite its negligent act or omission, the loss would still have occurred.[19]

Would Council have breached its duty of care if it issued a CCC for the remedial works on 28 November 2001?

[127] By 28 November 2001, which was just over a year after the CCC was issued, the Council had the following information:

(a) a PS4 from Mr Major, along with an accompanying letter; and

(b) a plan showing the height of each truss in the community courts at its midpoint, above floor level.

[128] The PS4 had been provided in January 2001, and the covering letter dated 16 January 2001 provided a description of how the construction works for the remedial work at community court trusses was carried out. The letter said in relation to that work:

> Re-alignment of the Community Court trusses was done by propping Truss No. 1 at mid-span and quarter points, cutting the top chord at the prop locations, and jacking at mid-span to achieve the maximum precamber consistent with avoiding any excessive strain on the bolted purlin connections. Prior to plating, and making good the top chord, the quarter point props were adjusted to achieve an acceptably uniform truss profile. Once the truss had been fully welded and un-propped, the alignment was checked by viewing from the south boundary to confirm that the result was visually acceptable. The remaining trusses were similarly adjusted in sequence with the overall appearance of the roof from the south being the criterion for acceptability. The only measurements made were those required to check that the induced initial precamber in each truss was the same as the truss No. 1.

[129] The Council also continued to chase up provision of the measurement required by condition 4 of the building consent and was eventually provided with the

---

[19] See *Davis v Garrett* [1824-34] All ER Rep 286 (Comm Pleas); *Fletcher Construction Company Limited v Webster* [1948] NZLR 514 (SC).

heights of the trusses in November 2001 which it maintained, was sufficient compliance with that condition.

[130] The Council argued that, even if it had been negligent by issuing the code compliance certificate at an earlier stage, it could have issued the code compliance certificate in November 2001 without being held to be negligent, and thus the resulting collapse was not "caused" by the Council's negligence.

[131] In particular, it says that it was entitled to accept the PS4 provided by Mr Major at face value. He was an experienced professional engineer, who belonged to IPENZ and, despite the error in design of the trusses, there had been no reason to doubt his construction monitoring services. It was appropriate for the Council to have him monitor the construction work as he was familiar with the proposed design and specifications for the remedial work, whereas it was not within the expertise of the Council inspectors. Furthermore, the producer statement, when read in conjunction with the accompanying letter which described how the work was undertaken, was sufficient to satisfy the Council that he had in fact carried out construction monitoring services. At a time when the experts acknowledged that almost all councils did not require inspection records,[20] the combination of the PS4 and the letter would have satisfied a reasonably prudent Council in 2000.

[132] The Council also said that, while the provision of the datum heights for the trusses in November 2001 did not fulfil all the requirements of condition 4 to the building consent, this information was only required for aesthetic reasons and to provide a baseline of measurements for future monitoring of movement in the trusses. The information was therefore not critical for the Council to have in order to satisfy itself, on reasonable grounds, that the work complied with the building code.

[133] The Trust, on the other hand, says that the Council would still have been negligent in issuing the CCC in these circumstances. Neither the PS4 that was provided, nor the community court truss height measurements, either separately or in combination, were adequate in all the circumstances to mean the Council had

---

[20] The only evidence to the contrary being that Christchurch City Council, at the time, required inspection records to accompany a PS4.

reasonable grounds on which to determine that the remedial work complied with the building code.

[134] Specifically, the Trust argues that the Council should not have relied on the PS4 provided by Mr Major at face value. It says Mr Major was not a suitable person to supply the PS4 because:

(a) he had caused the original error in the truss design;

(b) the delays in responding to Council's request for an explanation of his design error, and the inadequacy of the response he ultimately gave, should have alerted the Council to his lack of reliability;

(c) there were reasons to question his construction monitoring skills, given he did not specify appropriate construction methodology for erecting the trusses in the first place, and the Council observed further matters of concern with the remedial work as recorded in their letters of 10 and 27 January 2000; and

(d) the language of his responses, both when providing an explanation for his previous mistake, and when providing his PS4, was sufficiently vague that Council should have sought clarification of it rather than relying on it. For example, his explanation that "almost without exception" he had had no problems in the past, and his statement that the works were completed "generally" in accordance with the details in the relevant drawings and specifications, were imprecise and should not have been relied on.

[135] There was a clear division between the expert witnesses over whether a reasonable Council, in 2001, would have been satisfied with the PS4 and accompanying letter, as being sufficient to satisfy the Council that the works had been carried out properly.

[136] The Trust made much of the fact that, in March 1999, the civil and structural engineering firm, Davis Ogilvie, undertook a technical review of Invercargill City Council for the Building Industry Authority. Among other things, the review recommended that the Council have a documented policy for the acceptance and use of producer statements and reviews. It transpired, in evidence, that at the time Christchurch City Council had what was described as a "field inspection philosophy" which required:

(a) the engineer to keep site visit records on site for inspection by the Council;

(b) the Council to undertake cursory inspections to ensure that the engineer was in fact carrying out his construction monitoring services; and

(c) the engineer's site visit records accompanied the PS4.

[137] The Trust says, had the Council required Mr Major to provide his inspection records, it would be apparent that he had not in fact conducted any inspections and so the PS4 could not be relied on.

[138] However, the Council's evidence was that, notwithstanding the lack of a written policy on acceptance of producer statements, they did have an unwritten policy that statements from engineers belonging to a professional body such as IPENZ, with its own disciplinary procedures, would be accepted and Mr Major came within that category. In any event, the Council had sufficient supporting evidence with the PS4 to make it reasonable for the Council to assume he had been carrying out those inspections and supervising the works properly, including:

(a) the explanation Mr Major had given in the site visit meeting in early January 2000 along with the architect, the builders and the Council about how the work was to be carried out;

(b) the provision of satisfactory answers, in the form of the architects' and the engineer's faxed responses of 9 February 2000, to the Council's queries about the construction work; and

(c) the advice in the letter which accompanied the PS4 regarding the procedure for carrying out the remedial work, which could only be interpreted as evidence of observation of that work.

Discussion

[139] It is important in assessing whether a regulatory authority had reasonable grounds to issue a CCC under s 43(3) of the 1991 Act to have regard to the particular building work which has been undertaken, and the circumstances which relate to it.

[140] The mechanism by which the 1991 Act achieves compliance with the building code is through its requirement that anyone intending to carry out building work must apply for a building consent,[21] and then its requirement that they carry out that building work only in accordance with such a building consent issued by the territorial authority in accordance with the Act.[22] When the work has then been completed in accordance with the building consent, the owner must notify the territorial authority, who will then issue a CCC "if it is satisfied on reasonable grounds that … the building work to which the certificate relates complies with the building code".[23] Because the building consent confirms that work carried out in accordance with the approved plans, and any conditions imposed by the territorial authority, will comply with the building code, the primary check for the territorial authority is to be satisfied that the work has been completed in accordance with the building consent.

[141] In the present case, the Council approved the plans and specifications for the remedial work, but also placed two specific conditions on the building consent that were directly relevant to the proposed work. These were condition 4 requiring Mr Major to confirm in writing that the precamber measurements accorded with the

---

21 Section 33(1).
22 Section 32.
23 Section 43(3)(a).

recommendations by the peer reviewer of the remedial work design, HCL, and condition 5 requiring a PS4 from Mr Major.

[142] I accept that it was appropriate for the Council to delegate construction monitoring to Mr Major, when the Council acknowledged it did not have the in-house expertise to observe the work. However, the Council also included in condition 4 of the building consent the additional check which reflected the recommendation of the peer reviewing engineer in the letter accompanying his PS2.

[143] The letter from HCL was clearly considered to contain important information for the repair work because:

(a) Mr Harris specified that "a copy of this letter should remain attached to the producer statement"; and

(b) it concluded by saying "please contact us if … any aspects of the repair work do not comply with the deflections indicated".

[144] The Council's position, and that of its experts, was to suggest that HCL's requirements were imposed for aesthetic purposes only, and so compliance with them was not imperative to establish compliance with the building code. Mr Tonkin thought "it was more the future for us to say if there was anything that goes on we know what it [the precamber] was at that certain time". Mr Thornton too, said "it's really just a, it's a line in the sand to say … that the trusses have been raised from their sagging position" and that the primary concerns would be "visual".

[145] However, I consider that, because Mr Harris had specified the requirements for the precamber in the letter attached to his PS2, they did more than simply meet an aesthetic purpose. They were a way of checking that the work had been carried out correctly and would perform as expected. It was therefore appropriate to make compliance with those precamber measurements a condition of consent and, indeed, Mr Tonkin confirmed it was information he anticipated would be relevant to his decision under s 43 as to whether to issue a CCC.

[146] The actual truss measurements showed they varied anywhere from 31 millimetres to 139 millimetres. In other words, they sagged below the HCL precamber requirement. If that had been identified through compliance with condition 4, the evidence was that it should have prompted the Council to go back to Mr Harris and ask him for comment about the deviation. By referring these non-uniform measurements back to HCL, there is every prospect it would have prompted an inspection which would have revealed the defects. I am therefore satisfied that the Council was negligent in not requiring full compliance with condition 4 of the building consent and in not checking the information that it did get against the requirements of the HCL letter. It follows that if a CCC had issued at this later point in time, it would still have been negligently issued, because by failing to comply with condition 4, which was relevant to the s 43 decision, it missed an opportunity to pick up the defects in the remedial works.

[147] The Council has therefore failed to establish that the loss would have flowed in any event, notwithstanding Council's negligence. If the Council had required full compliance with condition 4 of the building consent, which I am satisfied that the Council, acting non-negligently, should have done, the problem in all likelihood would have been picked up. In those circumstances, I simply do not need to go on to consider whether it would have been negligent to rely on the PS4, as proffered, without direct supporting evidence of the inspections which had been carried out.

[148] It follows, therefore, that although I have discussed the Council's causation argument in the context of considering whether the Council breached its duty of care, the Council's argument that its negligence in issuing the CCC in November 2000, was not causative of the plaintiff's loss, must fail, as it has not demonstrated that the loss must have occurred in any event, even if the Council had non-negligently issued the CCC.

Was the Trust contributorily negligent?

[149] Even if questions of duty, breach and causation are determined in the Trust's favour, the Council argues that the Trust's damages should be reduced because, in 2006, the Council failed to take engineering advice to inspect the welding on the roof

trusses for deterioration or fatigue. If that had been done, the Council says that the visibly deficient welding would have been detected and remedied, well before the snow fall in September 2010.

What was the advice the Council says the Trust should have followed?

[150] The Council relies on the 9 June 2006 letter from HCL as placing an obligation on the Trust to have a suitably qualified person inspect the truss welds and support fixings. That letter was prompted by two separate concerns of the Trust.

[151] The first concern began as soon as the stadium opened, when the Trust experienced problems with the community courts roof leaking. These leaks were obviously of concern, as the puddles created posed a danger of injury to people using the facilities. On 30 October 2000, Council building inspectors recorded that there were serious leaks in the building, mainly from the glazed skylights over the community courts area. Further problems were reported in winter of 2001, when a player was injured during a game because of the leaks. The risk of injury became of sufficient concern that stadium management team members were authorised to order the vacation of the stadium if at any time they thought the leaks created safety concerns.

[152] Various repair options were attempted over the intervening years but, by early 2006, the leaks still persisted. The Southland District Council's representative on the Trust offered the services of that Council's engineer, Mr Graham Jones, to investigate. When his preliminary view was that the leaking problems stemmed from the level of flexibility in the roof, it was agreed the matter should be referred back to McCulloch Architects and Mr Major, to obtain their recommendations on what needed to be done to reduce the level of flexibility in the roof structure. Again, HCL was instructed to review the comments from Mr Major on roof movement.

[153] In May 2006, McCulloch Architects reported back to the Trust. They identified various avenues for investigation, including whether the leaks were occurring through the roof fixings, or through cracks in the glazing. They specified the re-fixing of the apron flashing and fasteners and the identification and repair of the leaks in the glazing as priorities for action. The report also noted that the roof

movement was not excessive and in line with calculated values. The stadium's builders and glaziers were then engaged to look at the issues which had been prioritised by the architects.

[154] While these issues were being addressed, the trustees became aware that a stadium in Poland had collapsed following a heavy snowfall, resulting in a number of deaths. Mr Smith, one of the trustees, wrote to HCL in early April 2006 referring to the Eastern European stadium collapse saying, prophetically:

> … we are concerned that a major snowfall, which Southland has not experienced for 12 years, is due … we have asked ourselves what the effect would be of a heavy snowfall that did not melt and its weight on the building.
>
> Currently Tony Major is looking at how he can prevent the uplift [of the roof under wind loads] occurring. Ray and I are more concerned with the loading on the roof through snow and the prevention of any accidents to people using the facilities. Would you give your assessment of the roof your attention, for we want to be sure the building is totally safe?

[155] A response was received from HCL on 9 June 2006. The letter addressed both concerns raised by the Trust, being the overall strength of the stadium roof and the high deflections that were believed to be contributing to the roof leaks. The letter listed the matters the Trust had required HCL to address more specifically as:

- A reassurance that the roof structure is able to support the ultimate loads specified in the New Zealand Loading Code NZS 4203. (These specifically include wind and snow loads).
- That the roof is safe.
- Maintenance issues that could be influenced by high serviceability deflections.
- Effects on structure, particularly bolted connections and welds where there is cyclic loading, high stresses and large deflections.

[156] The letter discussed the deflection issues, saying "[t]he roof truss deflections should not be affecting the performance of the roof cladding or the roof glazing provided the skylight glazing … is [correctly] fitted". However, it noted the deflection in the end bays was "higher than recommended" and could be contributing to "potential maintenance issues".

[157] HCL's recommendations for further investigation were listed as follows:

> a) Confirm where roof leaks are occurring or have occurred in the past and review roof fastening details particularly if the end bays are causing problems.
>
> b) Confirm that the roof light glazing has been installed with adequate clearance to the aluminium mullions.
>
> c) Check that the community court roof trusses have an upward camber at midspan when carrying the roof self weight only.
>
> d) That a visual inspection of the truss welds and support fixings is carried out by a suitably qualified person to determine if there are any signs of deterioration or fatigue.
>
> e) That suitable ties or props are installed at midspan of the trusses only if the roof movement is causing a problem with patrons and it is confirmed that maintenance issues are indeed caused by the roof deflections.
>
> f) That thermal effects on the roofing are checked to ensure these are not contributing to maintenance issues.

[158] The letter then went on to conclude:

> At this stage we confirm that the strength of the trusses over the community courts is adequate to support the design loads specified in the relevant codes when constructed.
>
> We have also had a look at the loads specified in AS/NZS 1170 the loading code now being used. The loading changes for both wind and snow are not critical.

[159] It is item 4 in this list of recommendations from HCL which the Council says is relevant. If that recommendation had been followed, the defects in the roof trusses would have been discovered and remedied, avoiding the collapse in 2010.

[160] However, the Trust says that its concerns about the stadium's capacity to cope with snow loadings was addressed by the final comments in the letter. The list of recommendations were all strategies for addressing the leaking roof issues, where deflections were thought to be a contributing factor.

[161] Work to modify the apron screw fixings and flashings on the roof was trialled in late June 2006. It was successful in addressing the leaks and so the balance of the roof apron flashings were modified in this way. In December 2006, 12 new panes of

skylight glass were also installed. As these steps satisfactorily addressed the leak problems, there was no need to undertake the other recommended actions. As there was no suggestion in the HCL advice that item 4 needed to be done to ensure the building's capacity to cope with anticipated snow loadings under the code, the Trust says it was not contributorily negligent by failing to undertake this recommended step.

The principles of contributory negligence

[162] Section 3(1) of the Contributory Negligence Act 1947 provides that:

> Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person … the damages recoverable in respect thereof shall be reduced to such extent as the Court thinks just and equitable having regard to the claimant's share in the responsibility for the damage.

[163] "Fault" is defined in the Act as meaning negligence, breach of statutory duty, or any other act or omission which gives rise to any liability in tort or which would, apart from the Contributory Negligence Act 1947, give rise to the defence of contributory negligence.[24]

[164] The onus is on the defendant to establish affirmatively the defence of contributory negligence.[25] The standard of care is the ordinary degree of care that is reasonable in the circumstances. While the plaintiff is not bound to anticipate and provide for the negligence of the defendant; "a prudent man will guard against the possible negligence of others when experience shows such negligence to be common". [26] However, equally, a plaintiff is normally able to assume that there has been compliance by the defendant with the law.

[165] More relevantly, in the New Zealand context, in *Morton and Douglas Homes Ltd*, Hardie Boys J said that a purchaser of defectively built flats was not at fault, in the sense in which that word is used in the Contributory Negligence Act 1947, if he did not obtain professional advice as to the quality of the building where there was a

---

24 Contributory Negligence Act 1947, s 2.

25 *Kenny v Dunedin City Corporation* [1920] NZLR 513 (SC and CA); *Goldstine v R* [1947] NZLR 588 (CA).

26 *Grant v Sun Shipping Co Ltd* [1948] AC (HL) 549 at 567.

"known background of building bylaws and the building permit and inspection procedure".[27]

[166] For contributory negligence to be established, the usual principles of causation and remoteness apply, so there must be a sufficient connection between the plaintiff's alleged fault and the damage the plaintiff suffered. It is not essential that the plaintiff's conduct contributes to the event which causes the damage, but simply that it contributes in some way to the damage he or she suffers. However, "it is not enough that such act or omission simply provided the opportunity for the occurrence of the loss".[28] Secondly, there must be some element of "moral blameworthiness" in a sense of a "degree of departure from the standard of the reasonable person" to support a defence of contributory negligence.[29]

Was the Trust contributorily negligent in these circumstances?

[167] While I accept that, had all the recommendations listed in the letter of 9 June 2006 been followed it is more probable than not that the deficiencies in the truss welding would be found, that, of itself, does mean there has been contributory negligence. In the context of trying to identify the cause of the truss deflections, the recommendation that the welds be checked for fatigue did not, in my view, indicate to the Trust that there may be workmanship defects in the trusses that could cause the building's collapse. Nobody averted to that possibility, including the Council. Thus it is not like the case in *Johnson v Auckland Council*, where the purchaser was held to be contributorily negligent when she was aware of the possibility that the house was a "leaky" building, but failed to take any steps to check that before committing to purchase the property.[30]

[168] Here, the recommendation by HCL was included in a list of matters to consider, in the course of identifying whether it was structural or maintenance issues which were causing leaks from the ceiling. It was not unreasonable for the Trust, having worked through the first two recommendations provided by its architects, and

---

27 *Morton and Douglas Homes Ltd* [1984] 2 NZLR 548 (HC) at 579.
28 *Price Waterhouse and Kwan* [2000] 3 NZLR 39 (CA) at [28].
29 *O'Hagan v Body Corporate 189855 [Byron Avenue]* [2010] NZCA 65, [2010] 3 NZLR 445 at [67].
30 *Johnson v Auckland Council* [2013] NZCA 662.

which appeared to resolve the leaks, to not incur expense on the balance of the recommendations. As Mr Jones said "we did locate the source of those leaks and … we did fix that problem without [resorting] to structural intervention".

[169] Even more importantly, the Trust's allied concerns about the building's ability to withstand snow loadings anticipated by the current building code were squarely addressed at the end of the HCL letter. The Trust was not alerted to the prospect that the welding-related construction work may have been defectively carried out and wrongly certified by the Council. Its failure to undertake an inspection for another purpose that, coincidentally, would have resulted in it discovering this, was no more than a missed opportunity to avoid the occurrence of the loss. It was not, in the circumstances, negligent.

[170] I do not overlook that Mr Jones accepted in cross-examination that "if a professional engineer's given these recommendations they're there for a very good reason. It would be worthwhile following through". However, that response took no account of the fact that the recommendations which were followed through with, were sufficient to address the leaky roof issues. It also does not assist with my assessment of what a prudent person would do, having received those recommendations in the context of a letter which also provided reassurance that the building was constructed to meet the relevant code for snow loading, and where the code requirements now being used had not changed in any critical way.

[171] The letter expressly responded to the Trust's concerns that the roof was built to code and was safe, including under snow. There was no caveat given that, in order to be satisfied that the roof was safe, it should be checked in any particular way.

[172] Accordingly, the claim that the Trust was contributorily negligent fails and I do not need to consider the issues of relative contribution.

Does the indemnity in the lease preclude the Trust's claim from succeeding?

[173] If the Council is found liable to the Trust, the Council has pleaded that the indemnity in the lease agreement means the Court should either:

(a) stay the proceedings on the basis that they are circular and an abuse of process; or

(b) accept the Council's counterclaim that it is entitled to an indemnity from the Trust for any sums it is found liable to pay in the proceedings including, but not limited to, its costs and any costs of the Trust that the Council is found liable for.

[174] Clause 23 of the lease says:

> a) The Lessee [Trust] shall indemnify and keep indemnified the Lessor [Council] from and against all actions, suits, claims, demands, proceedings, losses, damages, compensation, costs, charges and expenses whatsoever which may arise during construction, erection or operation of any authorised building or works or activity (clause 4), including permitted alterations, maintenance and additions and including but not limited to accidents or injuries of whatsoever nature or kind and howsoever sustained or occasioned (and whether resulting in the destruction of any property or not) escape of fire, leakage of water, inflammable liquid or other liquid AND notwithstanding that any such actions, suits, claims, demands, proceedings, losses, damages, compensation, sums of money, costs, charges and expenses shall have resulted from any act or thing which the Lessee may be authorised or obliged to do under these presents and notwithstanding that any time waiver or other indulgence has been given to the Lessee in respect of any obligation of the lessee under this Lease PROVIDED ALWAYS AND IT IS HEREBY EXPRESSLY AGREED AND DECLARED that the obligations of the Lessee under this clause shall continue after the expiration or other determination of this Lease in respect of any act, deed, matter or thing happening before such expiration or determination.

[175] The Council argued that the wording of the indemnity "could hardly be any wider" and "clearly embrace[s] claims that might be made against the Council during the construction process".

[176] The Council acknowledged that the House of Lords in *Smith v South Wales Switchgear*, approached the construction of indemnity clauses from the assumption that it was "even more inherently improbable that one party should agree to discharge the liability of the other party" than that such a party would agree to an exemption from liability.[31] However, it also emphasised that in *Photo Production*

---

[31] *Smith v South Wales Switchgear Co Ltd* [1978] 1 WLR 165 (HL) at 168.

Ltd v Securicor Transport Ltd, the Court accepted that parties are free to apportion risks as they see fit in the context of commercial contracts and where the parties are not of unequal strength, as was the case here.[32]

[177] I am satisfied that this issue turns on the proper construction of the indemnity clause in the lease. That includes the presumption that it is improbable that one party to a contract intends to assume responsibility for the other's negligence. It also means that the words of the indemnity, read in isolation, may have to yield to indications found in other parts of the contract. In other words, the language the parties have used must be read in the context of the document, as a whole, and of the surrounding circumstances.[33] Under that approach, the wider background and circumstances should always be considered, even if there is no ambiguity with the words used by the parties.

[178] In undertaking that exercise, evidence which does no more than say what individual parties subjectively intended or understood their words to mean, is not relevant.[34] For that reason, I give no weight to the evidence of Mr Cambridge, who was the solicitor for the Council and drafted the lease agreement, as to the scope of the indemnity clause. His evidence was to the effect that the Council sought to ensure "as far as possible as the law permitted … that it was the Trust that was building the substantial building [and] accepted the responsibility for the outcome". However, Mr Cambridge was unable to elaborate on the extent of the protection which he considered that the indemnity provided and he acknowledged that he had not advised the Council that it gave an immunity from any regulatory responsibility it had as a building regulator.

[179] The Council also sought to colour Mr Cambridge's evidence as also speaking for the Trust, as he was also a trustee of the Trust and was therefore in a "unique position of being able to tell the Court how the commercial risk was to be apportioned between the parties". However, there was nothing in his evidence to suggest that he had any insight into how the Trust wanted legal responsibilities to be apportioned, and he was not the lawyer acting for the Trust at the time.

---

32 *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 (HL).
33 *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5, [2010] 2 NZLR 444.
34 *Trustees Executors Ltd v QBE Insurance (International) Ltd* [2010] NZCA 608 at [32]-[34].

[180] Accordingly, I put Mr Cambridge's evidence about the Council's intentions to one side and approach the question of construction of the indemnity clause relying on the usual principles of interpretation. I start by observing that the form of the lease, including the indemnity clause, reflected the standard lease that the Council used when permitting any construction on reserve land. It is intended to govern the relationship between the Council, as the owner of the reserve land being leased, and the named lessor, undertaking the specified activities on the land, which in this case was the Trust. The material clauses of the lease all focus on regulating this relationship between the Trust and the Council. It deals with matters such as rental payment, how the land is to be used, and what obligations the lessee has in respect of the use of the land, including maintaining its improvements, complying with legislation applicable to the lessee's activities on the land, not assigning the possession of the lands or any parts of the building, and not carrying on, or permitting to be carried on, any nuisance on the land.

[181] The logical inference from this is that the indemnity clause is to be read as applying in the context of the contractual relationship between Council, as the land owner, and the Trust, as lessee of that land. The Council does not want to be held liable for claims brought by third parties against the Trust because, as owner of the reserve land, it has allowed the Trust to undertake activities on it. That is unexceptional. However, to the extent the clause is asserted to limit the liability of these parties against claims one might have against the other, in negligence, which are unrelated to the Council's role as land owner, brings into play the principle that a party will not have intended to exclude the other party's liability for negligence, unless clear and unambiguous language is used.[35] This is particularly so when the liability arises independently of the contractual relationship under the lease.

[182] The liability claimed in these proceedings does not arise because the Council owns the land. The liability arises because the Council is the building regulator under the 1991 Act. Where the liability arises independently of the contractual relationship, I consider express wording will be required to exclude it because

---

[35] *DHL International (NZ) Ltd v Richmond Ltd* [1993] 3 NZLR 10 (CA); *i-Health Ltd v iSoft NZ Ltd* [2011] NZCA 575, [2012] 1 NZLR 379 at [43]-[45].

otherwise, read objectively, the lease only governs risks and obligations created by entering into the contract and not those which arise independently from it.

[183] The Trust promoted two alternative arguments to counter the Council's claim that the indemnity precluded the Trust from making a successful claim against it. The first was that it was contrary to Parliament's intention that the Council could circumvent its regulatory obligations and functions under the 1991 Act by requiring a legally enforceable indemnity from the building owner. This is particularly so, given that Parliament specifically prohibited building certifiers from limiting their liability by contract, citing *Spencer on Byron*, where it was stated:[36]

> Since private certifiers are engaged by owners, the legislation provides that they … cannot contract out of such liability. The legislation achieves symmetry in liability between Councils and private certifiers.

[184] Alternatively, such an indemnity would be contrary to public policy given the strong and obvious public safety purpose of the 1991 Act.

[185] Strictly speaking, I do not need to consider this argument given my view that, on a plain reading of the lease, the indemnity provision does not extend to liability for negligence between the Trust and the Council, which arises independently of the lessor/lessee relationship. However, I accept the fact that, under s 57(2), a building certifier cannot limit any civil liability which might arise from the issue of a building consent or CCC issued by that building certifier, suggests that territorial authorities must be presumed to be unable to under the 1991 Act. Furthermore, given the general public safety purpose of the legislation, there are good public policy reasons for suggesting that a Council could not contract out of liability under the Act. While I accept that limiting liability to one party by contract will not limit the Council's tortious liability to other non-contracting parties, it would not facilitate achieving the purposes of the 1991 Act if contracting out was permissible.

---

[36] *Spencer on Byron*, above n 3 at [18].

Quantum

[186] The Trust claims damages for the cost of rebuilding the stadium after the collapse and for lost rent, including rent for portable seating it owned and hired out to stadium users.

[187] However, when it rebuilt the stadium, the Trust took the opportunity to expand and improve the stadium and not just replace what was lost. That meant a hypothetical exercise had to be undertaken to establish the cost of rebuilding the stadium to its pre-existing state.

[188] Sensibly, the parties' expert quantity surveyors were able to reach an agreed position on the cost of rebuilding the existing stadium. That cost was fixed at $15,126,665.35 excluding GST. They also agreed that the claim for lost rental totalled $85,826.00 excluding GST. That leaves the only quantum issues requiring judicial determination as:

(a) What deduction, if any, should be made for betterment from the reasonable cost in 2010 to reinstate the stadium to its pre collapse specification, plus any extra costs for additional work necessary to comply with 2010 regulatory requirements?

(b) Is GST payable and, if so, should it be applied before or after interest is added to the claim?

Is the Council entitled to a deduction for betterment?

The Council's position

[189] The Council says that it is entitled to a deduction from any damages award based on the cost of reinstating the damage to the stadium, to take account of "new-for-old" betterment to the Trust. The Council's pleadings did not quantify the deduction for betterment, but in reliance on expert evidence from its quantity surveyor, Mr Allan Green, it seeks a deduction of $1,542,002 for betterment based on the revised lifespan which each element of the rebuilt stadium would have as a consequence of being restored to new condition in 2010.

[190] However, it accepts the general principles applying to the assessment of betterment are:[37]

(a) each case has to be dealt with on its own facts;

(b) justice has to be done between the plaintiff and the defendant;

(c) the plaintiff should not over recover; and

(d) the defendant must pay to compensate the plaintiff for the inconvenience of incurring a cost earlier than the plaintiff would have anticipated.

[191] In the event I did not accept Mr Green's approach fully achieved those principles, the Council proposed three alternative methodologies to arrive at an appropriate deduction for betterment. These were:

(a) to combine and average Mr Green's and Mr Burrows' (the Trust's expert quantity surveyor) calculation for betterment to calculate a deduction for betterment of $1,185,000; or

(b) to make a percentage deduction from the overall cost of rebuilding the stadium in the order of 10 per cent, being $1,500,000; or

(c) to average the above two methodologies to give a deduction for betterment of $1,342,500.

[192] In terms of doing justice between the parties, the Council insists there should be no allowance made in this case for "involuntary additional or premature investment" because, the "inconvenience" of the collapse has allowed the Trust to build something that is even better for the community. As one trustee, Mr Smith, described it: "the option was either hero or zero, zero being just the replacement as it was or a hero option was a better, stronger, more reliable building than we had", and the Trust chose the latter option.

---

[37] See *J and B Caldwell Ltd v Logan House Retirement Home Ltd* [1999] 2 NZLR 99 (HC) at 106; *Gunton v Aviation Classics Ltd* [2004] 3 NZLR 836 (HC).

[193] Finally, the Council says that the fact that, under the lease, the building is to vest in the Council at the end of the lease should not tell against making an allowance for betterment. That is because the lease obliges the Trust to keep the improvements in good repair, order and condition during the term of the lease and it is the saving on this obligation which justifies a deduction for betterment.

The Trust's position

[194] The Trust's primary position is that the Council should not be entitled to a deduction in respect of any new-for-old betterment because:

(i) the Trust is being forced to incur capital expenditure to replace building elements that it would not otherwise have had to incur during the term of the lease; and

(ii) the Council will be the ultimate beneficiary of this expenditure because, at the end of the lease, the Council will acquire a newer stadium from the Trust than it would have had received otherwise, without having to pay the Trust any compensation.

[195] If it is determined that a deduction should apply, then the Trust says it should not be based on the "crude percentage discount" approach adopted by the Council but:

(a) must be limited to the betterment that the Council can show as increasing the Trust's revenue and/or reducing its expenses, as the newer items provide no corresponding pecuniary advantage to the Trust, such as an increase in value ultimately realisable on sale;

(b) must balance any such pecuniary advantage against the detriment to the Trust of an unexpected and unwanted capital payment that the Trust would never otherwise have had to make or, at least, would not have had to make until a much later date;

(c) must reflect the fact that the Council has not shown that the Trust will obtain any real pecuniary advantage from the new-for-old items, and nor has it made any allowance for the carrying cost incurred as a result of the advanced capital expenditure; and

(d) should be based on the depreciation rates that the Council applies to its own buildings and its asset management plan, and not the Trust stadium project list which was prepared in 2008 for a different purpose, and which does not bear a reliable relationship to what has actually been required in terms of maintenance or replacement.

[196] Applying these principles, a more realistic assessment of the deduction for betterment, if one is to be applied at all, is the figure of $828,373.32 calculated by the Trust's expert witness, Mr Burrows.

Legal principles applying to betterment

[197] There is no doubt that the Trust is entitled to be put back into the same position, so far as the money can do so, that it would have been in were it not for the Council's negligence. However, where, as here, there is no second-hand equivalent readily available, the plaintiff is forced by the defendant's negligence to substitute what was lost with something new.

[198] The Courts have regularly had to grapple with the dilemma that, where the plaintiff receives new-for-old, it may be overcompensated and have acquired a benefit at the defendant's expense. However, to give the plaintiff no more than the depreciated value of the original item which was lost may under-compensate the plaintiff by ignoring the economic burden of having to obtain an immediate and more expensive replacement. Thus, any deduction for betterment may need to be reduced to take account of any economic cost to the plaintiff of investing in new-for-old at a point in time when it would not otherwise have done so.

[199] Resolving these tensions is highly dependent on the particular facts and circumstances of each case.[38] Where the plaintiff had "no reasonable choice but to replace" a damaged building, that may be a factor counting against any significant deduction for betterment.[39] It is then for the defendant to prove the value and extent of any betterment.[40]

[200] The relevant principles to consider when deciding whether to allow a deduction for betterment were articulated in *Voaden v Champion (The Baltic Surveyor and the Timbuktu)* where Rix LJ said:[41]

> I suspect … that the true principle is that in the relevant cases the betterment has conferred no corresponding advantage on the claimant. Take the ordinary case of the repair of some part of a machine. Where only a new part can be fitted or is available, the betterment is likely to be purely nominal: for unless it can be posited that the machine will outlast the life left in the damaged part just before it was damaged, the betterment gives the claimant no advantage; and in most cases any such benefit is likely to be entirely speculative. So in the case of replacement buildings: the building may be new, but buildings are such potentially long-lived objects that the mere newest of a building may be entirely by the way … Even where the replacement is of a moderately bigger size … in the absence of any reason for thinking that the bigger size is of direct benefit to the claimant, he has merely mitigated as best he can. If, however, it were to be shown that the bigger size (or some other aspect of betterment) were of real pecuniary advantage to the claimant, as where, for instance, he was able to sublet the 20 per cent extra floor space he had obtained in his replacement building, I do not see why that should not have to be taken into account. It is after all a basic principle that where mitigation has brought measureable benefits to a claimant, he must give credit for them. …

How should the principles apply in this case?

[201] There is no dispute that the only practicable option for the Trust was to rebuild the stadium and so it received a new building in place of a 10 year old building. The real issue is whether it can be said to have received any real pecuniary advantage or benefit from having to incur the cost of replacing the stadium, when under its lease arrangement with the Council, it is precluded from gaining any commercial benefit from the newer building, either through sale, or through a compensatory payment on termination of the lease.

---

38 *Hyder Consulting (Australia) Pty Ltd v Wilh Wilhelmsen Agency Pty Ltd* [2001] NSWCA 313 at [107].

39 *Hyder Consulting (Australia) Pty Ltd*, above n 38 at [49].

40 *J and B Caldwell Ltd v Logan House Retirement Home Ltd,* above n 37 at 109.

41 *Voaden v Champion (The Baltic Surveyor and the Timbuktu)* [2002] EWCA Civ 89.

[202] I am satisfied that, because of the terms of the lease between the Trust and the Council, the Trust receives no benefit simply because it has a newer, and therefore more valuable, building. The only value of the building to the Trust was that it enabled the Trust to provide a certain level of facilities and amenities to the public of Southland, for a finite period of time. A new building gives no practical benefit to the Trust in the delivery of that outcome, over and above a well maintained 10 year old building, and of course, no pecuniary advantage to the Trust, because it cannot sell it.

[203] Equally though, I reject the idea that any benefit to the Trust in terms of having a new building should be cancelled out by the benefit to the Council in that, when the building vests in Council, it, too, will receive the benefit of a 10 year younger building. When the building vests it will either be a 23 year old building as opposed to a 33 year old building, or a 56 year old building as opposed to a 66 year old building. Not only do I have no evidence by which I can quantify the difference in value of what Council will receive, but it, too, presumably, will hold the building for community recreation purposes, rather than for sale as an asset and will receive no pecuniary benefit from having a newer building vest in it.

[204] However, there is merit in the submission that by replacing the 10 year old stadium with a new stadium, the Trust will benefit from some reduction in the cost of meeting its obligation to replace or refurbish components of the stadium in order to keep it in good repair. However, quantifying that saving is more difficult.

[205] The first problem in quantifying the saving is that the time period over which the saving is made is uncertain because there is a right of renewal in the lease, but it is unknown whether that will be taken up. I consider, therefore, that I should only have regard to savings which are achieved in the first 33 year term of the lease, as that is the only period where there is reasonable certainty of tenure.

[206] The second problem is there is no certainty over how to quantify what pecuniary advantage the Trust receives based on the potential to avoid one replacement or refurbishment cycle for some stadium components.

[207] The Council's quantity surveyor, Mr Green, endeavoured to quantify this on a component by component basis by calculating the difference in value of having a new component over a partly depreciated component. To do this, his evidence relied, at least in part, on a document described as a stadium project list. This document was prepared in 2008 to help analyse the capital replacement, maintenance and operational costs required for the running of the stadium, in order to provide an indication of its future funding requirements. The list categorised the various components of the stadium structure and then estimated how often that item would need to be replaced or refurbished, and at what cost. For example, the floor of event court one was predicted to require replacement each 10 years at a cost, in 2010, of $93,591. It would also need resurfacing every two years, in between replacement, at a cost of $18,718. The exterior roof needed repainting every 20 years at a cost of $218,380, but replacement in 2040, when it was 40 years old, at a cost of $960,871.

[208] Mr Green's assessment took the estimated life for each component, at which stage it would have depreciated 100 per cent, and determined what "benefit" the Trust had received by receiving a new component, rather than a partly depreciated component. For example, the exterior steel cladding was assumed to have a 35 year lifespan. Thus, at 10 years old, when 28 per cent of its lifespan had been spent, it was assumed to have depreciated 28 per cent. He then calculated what 28 per cent was of the new price of the cladding to calculate the financial benefit of the "betterment" that the Trust had received by having the 10 year old cladding replaced with new cladding.

[209] I consider, though, that Mr Green's approach fails to take account of the unusual context of this case. His approach can be applied to a normal commercial building, where either the existing owner gains the benefit of the extended life of the component, or where it can be reflected in the value of the building, if sold. Here, though, the finite period of the Trust's ownership skews such benefits. For example, if a component does not need replacing in the term of the lease, because its expected lifespan is more than 33 years,[42] then the Trust has had to incur the cost of replacing a component which it would not otherwise have had to replace. However, by replacing other components, it may have deferred a maintenance obligation, such as

[42] Such as the exterior cladding.

repainting the roof. Depending on the timing of the maintenance cycle, that may have saved the Trust one occurrence of such expenditure during the term of the lease.

[210] Determining whether a maintenance cycle, or replacement cycle, has been avoided by the Trust through rebuilding the stadium, would be possible to calculate, if there was an agreed maintenance schedule. However, the reliability of the stadium project list, which attempted to provide such a maintenance schedule, was hotly disputed by the Trust. The stadium manager, Nigel Skelt, pointed out that in the period 2008-2010, the schedule predicted expenditure of $1,700,000 but the accounts showed that only a fraction of that expenditure had been incurred. The Trust argued that that put in question the reliability of the stadium project list as a maintenance schedule, particularly when Mr Skelt's evidence was that the building was well maintained, and the shortfall in expenditure was not as a consequence of deferring necessary maintenance or letting the stadium fall into a state of poor repair.

[211] Thus, as Mr Green acknowledged in cross-examination, and I accept, the stadium project list could not be relied on to determine when items would need to be refurbished or replaced.

[212] Equally, Mr Burrows' evidence does not provide a practical assessment of the maintenance savings achieved by the Trust as a consequence of having to rebuild the stadium. He, too, approaches the assessment of betterment in a similar way to Mr Green, but using the different (and generally lower) depreciation rates which are used by the Council itself, to calculate his betterment figure of $828,373.32.

[213] In the absence of an agreed maintenance and replacement schedule, and given my view that the approach taken by the quantity surveyors does not accurately reflect the Trust's loss, I am compelled to take a more impressionistic approach to the quantification of betterment.

[214] This is not unusual. In the *Caldwell* case, Fisher J emphasised "the need for a broad and robust judgment on such evidence as was available"[43] and, in *Gunton*,

---

[43] *J and B Caldwell Ltd*, above n 37 at 113.

Chambers J observed that "flexibility must be maintained to accommodate the facts of each particular case".[44]

[215] Here, I am satisfied that the defendant has established there will be a level of pecuniary benefit to the plaintiff, through avoiding one cycle of refurbishment or replacement on some components of the building. I do not, however, accept that it has received a benefit simply through the comparative "newness" of the components, as has been calculated in different ways through Mr Green's and Mr Burrows' evidence. However, some of their evidence does, in effect, take account of that, particularly where an item at or near the end of its life, is replaced through the rebuilding process.

[216] I also do not accept that an allowance should be made for any carrying cost the Trust has incurred. Again the facts of this case differ from those which involve a normal commercial entity. I have been given no evidence that the Trust itself has had to borrow funds or forgo interest as a result of the early expenditure. Instead the evidence has been that it relies on external grants and funding to meet its expenses as they arise.

[217] In the end, I consider a deduction for betterment of five per cent of the rebuild cost reflects a reasonable estimate of the cost savings in maintenance that the Trust will achieve through the term of the lease by having a rebuilt stadium. That translates to a figure of just over $750,000, and which I consider should be rounded to that figure. If I take the average of Mr Green's and Mr Burrows' calculations for betterment for "newness" of the components, which is $1,185,188, then $750,000 reflects approximately two-thirds of that figure. I am satisfied that figure reasonably reflects the proportion of the betterment factor calculated by the quantity surveyors that can be attributed to reduced maintenance costs as opposed to simply the "newness" of the items. Accordingly, I make a deduction for betterment of $750,000.

---

44 *Gunton*, above n 37 at [175].

Is GST payable on the damages award?

[218] The final issue is whether or not the Trust is entitled to GST on the rebuild cost and, if so, whether GST is payable on the damages including or excluding interest.

[219] The issues arise because this is a subrogated claim brought by the Trust, as plaintiff, at the request of its insurer, IAG, under the terms of the policy. Thus any judgment sum will be payable in the first instance by the Council to the Trust. However, any recovery by the Trust will ultimately be paid over to IAG, which must account for GST on that sum.[45] There is therefore an obvious interest in IAG arguing that the Trust, too, should have GST added to its claim.

Why the Trust says GST should be added to the damages award

[220] The Trust says that it will have to account for GST on the judgment sum once it received payment from the Council, as a consequence of s 5(13) of the Goods and Services Tax Act 1985 (the GST Act). In order to be fully compensated by the award of damages, the Trust must therefore recover the judgment sum, plus GST, from the Council.

[221] Section 5(13) of the GST Act provides that where "a registered person receives a payment under a contract of insurance … the payment is … deemed to be consideration received for a supply of services performed by the registered person", and it must account for GST on that payment. The Trust argues that in this context, the words "under a contract of insurance" have a broad meaning, and do no more than require some causative relationship between the contract and the payment. It says this does not have to be a direct relationship. For example, the plaintiff may have to account for GST despite the fact that it was not a party to any relevant insurance contract, such as a plaintiff who receives a payment from its tortfeasor's liability insurer by virtue of its charge on the insurance monies under the Law Reform Act 1936, s 9(1).[46]

---

45 Goods and Services Tax Act 1985, s 5(13B).

46 *Pegasus Group Ltd v QBE Insurance (International) Ltd* HC Auckland CIV-2006-404-6941, 24 September 2010 at [12].

[222] The Trust argues that the claim was brought by the Trust as a consequence of its obligations to IAG under the express terms of the policy which, at clause GC10, provides:

> The Insured shall at the request of and at the expense of the Insurer take such action as may be necessary or reasonably required by the Insurer for the purpose of enforcing any right and remedies, or of obtaining relief or cover from other parties to which the Insurer shall be or would become entitled or subrogated upon paying for or making good any loss under this policy whether before or after being paid by the insurer.

[223] As a consequence, the Trust argues that any judgment sum the Council is required to pay the Trust as a consequence of such proceedings is captured as a payment which is "under a contract of insurance", albeit indirectly, and GST is payable by virtue of s 5(13).

[224] The Trust then also says that, because the amount the insurer receives from the Trust as a result of exercising its rights of subrogation under the contract of insurance is a taxable supply under s 5(13B) of the GST Act, it makes sense that the Council's payment to the Trust should also have GST applied to it. It says that would achieve consistently between the provisions of s 5(13) and s 5(13B), allowing the one payment to flow through to the other.

Why the Council says GST should be excluded from the damages award

[225] The Council, on the other hand, argues that the position of the insurer is irrelevant to whether GST is payable as between the Trust and the Council. That question must be determined using the standard enquiry as to whether the payment of damages represents a taxable supply by the Trust to the Council which attracts GST under the GST Act. The Council says it does not, as it is a claim for compensation, which is not a taxable supply. Furthermore, as in *Gunton v Aviation Classics Ltd*,[47] any GST the Trust expended in repairing the stadium was able to be claimed back by the Trust and so GST should be excluded from the calculation of damages, to avoid overcompensating the Trust.

---

47 *Gunton v Aviation Classics Ltd*, above n 37.

Should GST be added to the award of damages?

[226] I first consider whether GST would be payable on any damages I award to the Council, leaving aside the question of the insurer's obligation to pay GST under s 5(13B) and the question of whether s 5(13) changes the position.

[227] In the present circumstances, I am satisfied that the GST position is analogous to that in *Gunton*, where Chambers J held that, because the plaintiff was able to deduct the GST charged on the repairs as input tax, if GST was then to be included as part of the damages, the plaintiff would be overcompensated. To fully compensate the plaintiff, it only required an award which equalled the net cost of the repairs.

[228] The same approach has been adopted in a decision of the New South Wales, Court of Appeal in relation to the application of GST to an award of damages. In *Gagner Pty Ltd (t/as Indochine Café) v Canturi Corporation Pty Ltd*, Campbell JA said: [48]

> [151] In summary, as the GST legislation currently stands, if the plaintiff in an action for tort is registered for GST purposes, and stands to receive an input credit for any GST payments incurred in making good its damage, and there is no impediment to the plaintiff receiving the full benefit of the input credit, that GST amount should be excluded from the quantum of damages recoverable.

[229] Like the plaintiffs in *Gunton* and *Gagner,* the Trust is GST registered and its loss is therefore the cost of repairs, and of its lost rent, net of GST.

[230] I also accept the Council's argument that the damages award here does not constitute a taxable supply for GST purposes because there is no reciprocal supply by the other party. Instead the payment is compensatory in nature and is intended to put right the loss caused by the defendant's negligence.

[231] The Trust's next argument is that, whatever the position might normally be, s 5(13) alters it because, at least in an indirect way, any payment received from the Council and paid to the Trust is a "payment under the insurance contract" for the

---

[48] *Gagner Pty Ltd (t/as Indochine Café) v Canturi Corporation Pty Ltd* [2009] NSWCA 413, (2009) 262 ALR 691.

purposes of that section, because it results from the insurer exercising its rights of subrogation under the policy.

[232] The Council's argument turns on a question of statutory interpretation and whether it is correct to categorise a damages award payable to the Trust in these proceedings as payment under the insurance contract.

[233] I consider that the only logical reading of s 5(13) is that it only captures payments made by the insurer to a person entitled to the benefit of the payment, whether or not the recipient is a party to the insurance contract. While the section specifies (as Winkelmann J noted in *Pegasus Group Ltd*),[49] that the recipient of the payment need not be the insured, that does not justify broadening the scope of the clause to encompass payments which are not made by the insurer and which the insured would be entitled to receive independently of the insurance contract. Put another way, the Trust would be entitled to sue the Council regardless of whether it was insured. Thus the payment it receives from the Council is not "under a contract of insurance". The fact that the Trust has contractually bound itself to seek such payment, and then pass it back to its insurer, does not alter the position that the payment by the Council relates to a separate set of obligations and not obligations under the policy of insurance. Section 5(13) should be read as encompassing only a payment which an insurer is obliged to make under a contract of insurance, whether or not the recipient is the insured party.

[234] I therefore am satisfied that s 5(13) does not apply to the damages payment the Council is to make to the Trust and my conclusion that GST is not payable on the damages awarded does not alter.

Should GST be added to the interest inclusive, or interest exclusive, judgment sum?

[235] Because of my conclusion that GST is not payable on the damages, I am satisfied that this issue does not arise for consideration.

---

[49] Above n 46.

[236] However, I do not ignore that the Trust (or perhaps, more accurately, the Trust's insurer) argues that, because the insurer is obliged to account for GST on payments received when it exercises rights acquired by subrogation under a contract of insurance, there should be a commensurate application of GST to the entirety of the judgment sum, including interest.

[237] I do not accept that reasoning. First, as I have found above, there is no requirement for GST to be added to the compensatory damages awarded in favour of the Trust. Second, the payment that will be made to IAG, the Trust's insurer, is received in a different context. IAG is in the business of providing insurance cover. It receives insurance premiums and it pays out on claims. Sometimes it also recovers money through its rights of subrogation. The latter is deemed a taxable supply by virtue of s 5(13B) and it must account for GST on the amount received. Because the payment is not compensatory in the hands of the insurer, but simply an additional source of revenue from its business activity, there is no reason to marry up the GST position as between the Council and the Trust, and as between the Trust and its insurer. Section 5(13B) operates independently to oblige the insurer to account for GST, and does not affect the position as to whether GST should be a component of the damages awarded as between the Council and the Trust.

Summary of quantum award

[238] The calculation of the damages claim based on my findings above is as follows:

(a) notional cost in 2010 of reinstating stadium to 2000 specifications	$15,126,665.35
(b) less allowance for betterment	$750,000.00
(c) plus agreed loss of rental income	$85,826.00
(d) plus interest at 5 per cent per annum from 1 February 2013 to 20 August 2015	$2,035,764.31
(e) total of damages plus interest	**$17,998,225.66**

(f) less settlement sum received from second defendant	$1,000,000.00
(g) judgment sum	**$16,998,225.66**

Indemnity as between the First and Second Defendant

[239] The Council has a cross claim against Mr Major which he has not defended. While such a claim may be of little practical benefit to the Council given the size of the claim, it is understandable that the Council seeks a finding of how liability should be apportioned between it and Mr Major.

[240] The findings of the Department of Building and Housing investigation, and of the IPENZ investigation, are clear. Mr Major had the primary responsibility to monitor construction of the remedial work and to provide written confirmation, through a PS4, that the work had been carried out in accordance with the plans and specifications and in compliance with the building code. He did not undertake that monitoring negligently. He simply did not undertake it at all. Instead he relied on the steelwork fabricator's word that the work was done correctly. That was a serious abdication of his professional responsibilities, particularly when he knew the Council was relying on his PS4 to be satisfied that the work was code-compliant. The provision of the PS4 was the primary reason the defective welding work was not identified and a CCC was issued. Furthermore, not only did he provide a misleading PS4, he did not provide the other information the Council required from him pursuant to the conditions of the building consent and that, too, was negligent. However, the Council's failure to insist on provision of that information remained an operative cause of the failure as well.

[241] I therefore apportion liability 90 per cent to Mr Major and 10 per cent to the Council in terms of the cross claim between these two defendants.

Costs

[242] Costs, as requested by the parties are reserved. If costs cannot be agreed:

(a) the Trust is, within 20 working days of receipt of this judgment to file any memorandum on costs;

(b) the Council is to file any memorandum on costs within 30 working days of the date of this judgment;

(c) the Trust may file any memorandum in reply within 35 working days of the date of this judgment.

[243] Costs will be determined on the papers unless I require assistance from counsel.

Solicitors:
Young Hunter, Christchurch
Heaney & Partners, Christchurch
Eagles Eagles & Redpath, Invercargill
McElroys, Auckland