SUPREME COURT DECISION SHOWS RELIANCE CUTS BOTH WAYS

Joel Scoberg-Evans

The Supreme Court has reaffirmed the "general reliance" all owners place in councils' building control functions under the Building Act 1991 and overturned the concept of a council's limited duty of care where a commissioning owner instructs and relies upon its own experts rather than a council.

However, where a commissioning owner has placed such reliance upon its experts rather than a council and the owner negligently fails to follow the expert advice, the courts are likely to make significant reductions to any

Facts

• Southland Indoor Leisure Centre **(Stadium)** was constructed between 1999 and 2000. The Southland Indoor Leisure Centre Charitable Trust (**Trust**) entered into a project agreement with the Invercargill City Council (**Council**) (and other parties) concerning the construction of the Stadium and instructed a team of expert consultants to design, project manage, and construct the Stadium.

• During construction, sagging was noticed to the Stadium roof and an independent engineer (Mr Harris) identified defects in the design of the roof. Mr Harris proposed a solution to the design defect that included works to support roof trusses (**Solution**). The Solution formed part of a remedial work building consent approved by the Council.

• The Council did not carry out any inspections for the remedial works but relied on Mr Major, the Trust's structural engineering expert, to undertake the inspections and provide a PS4 certifying that the remedial works were carried out in accordance with the Solution. The Council issued a code compliance certificate in November 2000 (**CCC**) and the Stadium was opened. However, Mr Major had not provided a PS4 at this stage.

• Mr Major finally issued a PS4 in January 2001, in which he said the remedial works were "generally" in accordance with the Solution. However, the remedial work had not been built in accordance with the Solution. The Council issued a final code compliance certificate in April 2003.

• Problems with the Stadium became apparent during its operation, including leaks to the roof, and Mr Harris was consulted in 2006. Mr Harris said the roof trusses would be adequate if constructed in line with the Solution and recommended that the truss welds and fixings should be inspected by a suitably qualified engineer. This was not done.

• As foreseen, the stadium roof collapsed following heavy snowfall in September 2010. It was common ground between the parties that had the roof design been remedied in line with the Solution, it would not have collapsed.

"General reliance" under review

The Trust sued the Council for the cost of repairing the roof arguing that the Council was negligent in issuing the CCC. The High Court agreed and awarded the Trust $15m. However, the Council was successful in its appeal, with the Court of Appeal agreeing that it was a negligent misstatement cause of action and because the owners had engaged and relied on their own agents and experts (and not the Council), the Council was not liable for the costs of repairing the roof.

The Supreme Court1 disagreed and held that the Council owed a duty of care in negligence simpliciter to the plaintiffs when issuing the CCC and were negligent when issuing the CCC (it was issued before the PS4 was received from Mr Major). The Supreme Court said that under the Building Act 1991 (**BA1991**), a territorial authority's duty of care "springs from" its regulatory role under that Act and there was no valid distinction in this context between physical inspections and the issuing of a code compliance certificate. They were both regulatory roles performed by a territorial authority under this duty of care and all owners (including commissioning owners) placed "general reliance" upon the council performing these functions without negligence.

However, the Supreme Court upheld the decision of the Court of Appeal that the Trust was contributorily negligent in the circumstances and reduced the Trusts' award of damages by 50%. The Trust had engaged experts that had provided advice and recommendations in respect of remedying the defects in the Stadium roof and the Trust had not adequately followed their expert's advice. The Trust were on notice of the need to inspect the roof trusses but they failed to do so.

Analysis: reliance cuts both ways

There is very limited discussion as to why the Supreme Court considered this was not a negligent misstatement case. Rather, the Court focussed generally on a council's role and responsibilities under the BA1991 and considered that issuing a code compliance certificate was no different to any other function such as issuing a building consent or carrying out physical inspections. The Court emphasised the control over the building process that a council has and the general reliance which present and subsequent owners place in the council as the rationale for why there was "no valid distinction" between any of the council's regulatory functions in terms of the Council's duty of care. The judgment is in keeping with how the courts have evolved and expanded the duty of care owed by territorial authorities under the BA1991 since *Hamlin*. Looked at in this light, the decision is not surprising.

The Court's recognition of the Trust's negligence for ignoring its expert's advice is significant; both financially (reducing their damages by 50%) and as a point of principle. The message should be clear, where a party has engaged a team of experts and has specifically relied upon those experts throughout the building project, its own conduct will be under scrutiny if it then ignores that advice and suffers loss as a result.

End Notes

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

ABOUT THE AUTHOR

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