IN THE COURT OF APPEAL OF NEW ZEALAND

CA528/2015
[2017] NZCA 68

BETWEEN	INVERCARGILL CITY COUNCIL Appellant
AND	SOUTHLAND INDOOR LEISURE CENTRE CHARITABLE TRUST Respondent

Hearing:	10 and 11 August 2016
Court:	Harrison, Miller and Cooper JJ
Counsel:	D J Heaney QC and K B Dillon for Appellant M G Ring QC, C J Jamieson and D R Weatherley for Respondent
Judgment:	21 March 2017 at 3.00 pm

JUDGMENT OF THE COURT

A The appeal is allowed.

B The award of damages is set aside and judgment is entered for the Council on the Trust's claim.

C The cross-appeal is dismissed, with leave reserved to appeal to this Court on the issue of GST if the Trust should succeed on further appeal.

D The respondent must pay the appellant costs for a complex appeal on a band B basis with usual disbursements including disbursements on the cross-appeal. We certify for second counsel.

E Costs in the High Court are to be fixed there if counsel cannot agree.

REASONS

REASONS OF MILLER J

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Introduction

[1] Stadium Southland was erected in 1999–2000 to provide indoor sporting and recreation facilities for "all members of the Southland community". It was a complex comprising a foyer, amenities area and squash courts, two main events courts, and five community courts. It was erected under a project agreement and

lease between the appellant, the Invercargill City Council, which owns the land on which it stood, and the respondent, the Southland Indoor Leisure Centre Charitable Trust, which owned the building. The Trust, as we will call it, was established by six community organisations, one of them the Council, to build and operate the stadium.

[2] During construction the long and shallow mono-pitch roof over the community courts was seen to sag. The Trust's consulting engineer, Anthony Major, had erred when designing the steel trusses that supported the roof and, apparently with his approval, the Trust had opted for lighter gauge steel than his design called for. The Trust arranged for remedial work, which was competently designed by an independent engineer, Maurice Harris, and approved by Mr Major.

[3] The Council insisted that the Trust seek a building consent for the remedial work and it consented Mr Harris's design, requiring of the Trust that Mr Major should certify by producer statement that the completed work met specifications set by Mr Harris. Those specifications included a small upward camber for the trusses when props were removed after the remedial work was completed. The trusses were to exhibit at their mid-points a precamber, as the measurement is known, of 85 mm.

[4] The steel fabricators did not complete the remedial work as Mr Harris had designed it. Mr Major did not detect the defects, because he did not inspect their work. Nor did the Council, because it relied on Mr Major.

[5] The Council issued a code compliance certificate for the remedial work on 20 November 2000, before it received Mr Major's producer statement. He supplied a producer statement on 22 January 2001, but it omitted the required measurements. The Council pursued him. On 28 November 2001 he eventually supplied measurements, not of the trusses' precamber but of their heights from the floor. The Council did not check the height measurements. Had it done so it would have noticed that the trusses' heights varied by as much as 139 mm. The Council did not insist on precamber measurements either. Had it done so it would have learned that some of the trusses exhibited no precamber but actually sagged.

[6] In 2006 the Trust took advice from Mr Harris about the roof, worried about its flexibility under wind load and presciently concerned that it might collapse under heavy snow. He recommended an inspection that was to include welds and precamber measurements. The Trust did not follow his advice.

[7] On 18 September 2010 Invercargill experienced a heavy snowstorm. Because the remedial work was defective the roof over the community courts collapsed under the weight of snow. Fortunately, those inside escaped unharmed. A new and improved complex has been erected in its place.

[8] The Trust claims that the Council is liable in negligence and negligent misstatement for issuing the code compliance certificate on 20 November 2000. It also says that the Council had earlier failed in the exercise of an alleged inspection function for the remedial work, but a direct claim for these failings would be time-barred. It won in the High Court before Dunningham J, recovering $15,126,665.35, being the agreed cost of rebuilding the original structure, less $750,000 for betterment.[1]

[9] The Council appeals, saying that it owed the Trust no duty in tort in the circumstances, the rule in *Spencer on Byron* notwithstanding.[2] It also asserts that the lease excludes liability, and it denies causation and alleges contributory negligence. The Trust cross-appeals, challenging Dunningham J's betterment deduction and her treatment of GST.

Narrative

The stadium project

[10] The six community organisations which decided to build the stadium were the Invercargill Licensing Trust (which administers an alcohol monopoly in the city), the Council, the Southland District Council (which is the territorial local authority for

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1 *Southland Indoor Leisure Centre Charitable Trust v Invercargill City Council* [2015] NZHC 1983 [High Court judgment]. Dunningham J also awarded $85,862 for agreed loss of rental income and $2,035,764.31 in interest at 5 per cent per annum. The final judgment sum, $16,998,225.66, was less a negotiated $1,000,000 contribution from Mr Major.

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

most of the Southland region excluding Invercargill City), the Community Trust of Southland, the Southland Building Society, and Sport Southland. They chose to establish the Trust as an incorporated charitable trust to plan, build and run the stadium, with each organisation appointing one trustee and the appointees being permitted to elect up to six more trustees if they thought it desirable to redress any imbalance of skill, knowledge, and representation of various community interests. The trustees serve as unpaid volunteers.

[11] The chosen location was on Council-owned land at 550 Tay Street, Invercargill. The Council and the Trust entered a project agreement on 23 December 1999 under which the Council agreed to lease the land to the Trust and contribute to the project by undertaking the ground works. That was to be the full extent of the Council's financial exposure and it was capped at $760,000. For its part, the Trust agreed to build and run the stadium. At the end of the lease, which had a 33-year term with one right of renewal, the stadium would revert to the Council without compensation for improvements.

[12] The Trust was what I will call a commissioning owner; it commissioned the building, contracting the architect, McCulloch Architects Ltd, the engineer, Mr Major, and the builder, Amalgamated Builders Ltd.

[13] Construction began in June 1999 and was substantially completed by 25 March 2000, when the then Prime Minister opened the building. In its regulatory capacity the Council issued a series of building consents for phases of the construction. It undertook some 44 inspections during the original building work and it issued a number of code compliance certificates for parts of the work. In doing so it relied on producer statements provided by the Trust's engineer, Mr Major. Under the Building Act 1991 (1991 Act), a producer statement was a statement supplied for an applicant for building consent to the effect that certain work had been or would be done in accordance with certain technical specifications, and a local authority might rely on it when issuing a consent or a code compliance certificate.[3] More will be said about this later.

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[3] Building Act 1991 [1991 Act], s 43(3) and (8).

[14] We are concerned with the stage 4 building consent, which covered structural design. The application for consent was supported by a PS1 from Mr Major. A PS1 is a producer statement — design, certifying that the design complies with applicable requirements of the building code. A PS2 is a producer statement — design review, a PS3 is a producer statement — construction, and a PS4 is a producer statement — construction review.[4]

[15] The drawing at the end of the judgment illustrates the community courts' roof design sufficiently for my purposes. It will be seen that the roof had a long span and a shallow pitch. The design of the welded steel trusses used to support the roof across its span is also shown, as is the planned remedial work that I now go on to discuss.

Remedial work needed during construction

[16] During construction a Council inspector noted that the steel trusses sagged and drew the matter to the architect's attention. The Trust was naturally alarmed. The Chairman at the time, Ray Harper, wrote on 24 November 1999 to the architect, who also served as project manager, asking for written advice about the problem and the solution, and seeking assurances from the architect and Mr Major that the resulting structure was safe and complied with design standards and that both had adequate professional indemnity cover. He also insisted that an independent structural engineer be engaged to certify that the structure would be sound and would comply with acceptable design standards.

[17] Maurice Harris was appointed to review the designs. He corresponded with the architect and the Trust, which wrote to him on 7 December 1999, repeating its instructions and directing that he report to the Trust. It is evident that the Trust was concerned that the architect might share responsibility for the defects. Mr Harris met with one of the trustees, Greg Mulvey, and agreed that his report would extend to checking any items considered critical to the integrity and safety of the building.

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[4] As noted at [81] below, the term "producer statement" was defined in s 2 of the 1991 Act. The categories of producer statement that we list here have evolved as a matter of professional practice in the building industry. A description of the terms may now be found in a practice note: Institute of Professional Engineers New Zealand (IPENZ) *Practice Note 1: Guidelines on Producer Statements* (version 3, January 2014) at 6–8.

[18] Mr Harris issued a report dated December 1999 in which he confirmed that Mr Major had erred when calculating loads acting on the trusses. He characterised the faults as design problems attributable to lack of checking, failure to carry out sufficient seismic analysis, insufficiently detailed design input interconnections and member slenderness, failure to follow design codes, and pressure to reduce structural costs without detailed re-analysis. In the result, the six trusses over the community courts had been designed for approximately half the live load. ("Live" load means the load in use, affected by wind and other environmental conditions.) Foundations were satisfactory, but precast columns had been designed for the lighter loads. Further, 6 mm steel, a lighter gauge than designed, had been used in some chords (the square steel beams along the top and bottom of the trusses) as a cost-cutting exercise by the Trust.

[19] Mr Harris proposed that the trusses should be strengthened by propping them up, cutting them at three points and precambering them at prescribed levels before joining them and removing the supporting props. The objective of precambering was that under load the roof would assume its designed profile. The work involved cutting each of the top trusses' chords at three points, lifting them and adding spacer plates to achieve the designed precamber, re-welding them, and welding strengthening plates along the sides of the top and bottom chords at mid-span. Notably, the strengthening plates were to cover the middle of the three points where each of the top chords had been cut and re-welded. Beams and columns also needed strengthening, and truss connections to concrete columns needed modifying. Mr Major endorsed this solution.

[20] On 24 December 1999 the Council advised the architect that a building consent amendment must be sought, and it must be accompanied by a producer statement that addressed cause and remedy and included a peer reviewer's comments. The Council warned that it might ask that an independent engineer review the consulting engineer's report. The Council's Manager of Building Services, Simon Tonkin, also wrote directly to Mr Major, seeking an explanation and warning that after receiving his response the Council would review how it handled his producer statements. The Council followed up by letter of 2 February 2000. Mr Major responded with a detailed explanation of how the design errors had come

about, admitting that he had made some mistakes and detailing how the remedial work would address them.

[21] The Council sought assurances from Mr Major about his quality control procedures, asking for a written account. He responded on 28 February, explaining that he handled as many as 300 projects a year and that these projects were problem-free almost without exception. He assured the Council that he now intended to accept only commissions that allowed adequate time for design and documentation, to be more pedantic where savings in structural content were requested, to prepare calculations to a standard that would allow independent checking, and to engage an independent engineer to peer review his design philosophy and arithmetic for major or difficult or novel projects. The Council accepted these assurances by letter of 2 March 2000.

Building consent for the remedial work

[22] In the meantime, on 7 January 2000 the Trust had sought a building consent for the remedial work. Its application attached a letter dated 4 January 2000 from Mr Harris, in which he explained how the work was to be done and specified the precamber measurements together with the permissible range of movement under live load, as follows:

(a) The trusses were to be cut and set at an initial precamber measurement of 225 mm at midspan, meaning that they should be elevated by that much at that point.

(b) When props were removed so that the roof was carrying its full self-weight, the precamber should be 85 mm.

(c) Under live load in normal conditions the trusses should exhibit a net precamber of approximately 85 mm and under full live load a sag of 38mm. Future live load and snow load deflections should not exceed 123 mm and 99 mm respectively.

Mr Harris also specified that the contractor and supervising engineer should have copies of a drawing number 97139, which had been prepared by Mr Major, and his letter of 4 January.[5]

[23] The application was accompanied by a PS1 from Mr Major, in which he certified that the remedial work provided for in the drawing complied with the building code. Mr Harris supplied a PS2, which the Council treated as a peer review, noting that he was a registered engineer. On 14 January, the Council issued a building consent known as amendment number 1 to stage 4 building consent. There is no suggestion that the Council was negligent when issuing the consent, or that the design of the remedial work was inadequate.

[24] The consent specified that as consulting engineer Mr Major was to confirm in writing to the Council that the precamber on the six community court trusses was in line with Mr Harris's letter of 4 January 2000. Individual trusses measurements were to be included in the record. Mr Major was also required to provide a producer statement construction review or PS4 for the remedial work. It is not clear why Mr Major was nominated, presumably by the Trust, for this role.

Defective remedial work went undetected

[25] The remedial work was carried out between January and February 2000. The Council did not inspect the work, relying on Mr Major to inspect and certify it in accordance with the consent, although it did insist on written confirmation that the defects had been remedied and it did carry out inspections for stage 4 as a whole. When doing this latter work the inspectors drew the architect's attention to any issues they happened to notice with the building works.

[26] In order to issue the PS4 Mr Major would have had to inspect the work as it was being done. He did not inspect it. It seems that he accepted the steel fabricators' assurance that the work had been done properly.

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5 It is this drawing that is attached to the judgment.

[27] The remedial work was not carried out in accordance with Mr Harris's advice or the conditions of consent. Notably, cuts made in the chords to insert packers and achieve precamber ought to have been spliced with welds around all four sides, but the tops were not welded at all. Strengthening plates along the sides of the trusses ought to have covered the centre splices but did not, and stitch welds used to fix the strengthening plates to the chords were inadequate. Welds to the box section and packers had not penetrated adequately.

A PS4 and code compliance certificate eventually issued for the remedial work

[28] On 17 February 2000 Mr Tonkin wrote to the architect, recording his understanding that the remedial work was complete and asking the architect for Mr Major's PS4. He reminded the architect to include written confirmation that the precamber was in line with Mr Harris's letter, along with individual trusses measurements. There was no response. On 17 March Mr Watson, the Council building inspector, carried out a final inspection for stage 4, and the Council then issued an interim code compliance certificate, with a number of outstanding issues noted. The issues did not include the remedial work, and they did not stop the Trust opening the stadium on 25 March 2000, as it was very anxious to do.

[29] In the meantime, the Trust pursued recovery of the cost of remedial work from the architect. The evidence includes a summary of the minutes of Trust meetings (but not the actual minutes). At a meeting on 6 March 2000, the Trust was advised that apart from some small issues still to be resolved the remedial work had been completed to a satisfactory level. The Trust was told at a meeting on 3 July 2000 that the architect and engineer had lodged insurance claims, and a settlement was achieved some months later.

[30] The Trust did not obtain code compliance certificates from the Council in connection with the decisions just mentioned. It had requested certificates in March, but without providing Mr Major's PS4 or following up when the Council did not respond. It again requested them in October 2000, apparently because it needed them to get a liquor licence for the premises.

[31] The Trust's inquiry appears to have led the Council to repeat its request for Mr Major's PS4 and trusses measurements. On 20 November 2000, before receiving the PS4, the Council issued a code compliance certificate for amendment No 1. It is not now in dispute that this certificate was issued negligently, for the Council had no way of knowing that the work was in fact code-compliant. It became apparent at trial that a clerk issued it without reference to Mr Tonkin.

[32] When checking outstanding requirements on 17 January 2001 a Council inspector followed up the request for the PS4. On 22 January 2001 Mr Major finally supplied a PS4, certifying that the modifications has been generally constructed in accordance with the drawing 97139 and associated specifications. He also supplied a covering letter explaining how the remedial work had been carried out. He stated that:

> 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 was in each truss was the same as for Truss No 1.

It will be seen that Mr Major did not specify that the precamber for the six community court trusses was in line with Mr Harris's letter of 4 January 2000. Instead, he said that measurements were taken to ensure the induced initial precamber was the same as for truss 1, with a visual check to ensure that the result was acceptable once the trusses were welded and the props removed.

[33] The Council noted the omission. By letter of 30 January, Mr Tonkin reminded Mr Major that he was to confirm that the precamber was in line with Mr Harris's letter, and that individual truss measurements were to be included in the records. Mr Major was asked to resubmit his PS4. He did not. The Council followed up in September and a meeting was held with Mr Major, at which it was

agreed that he would follow up with the structural steel company for datum heights for the trusses. On 23 July 2001 Mr Tonkin wrote asking for the "datum heights of the community court trusses", and this request was repeated on 12 September. The Judge found that it seemed the very precise requirements of Mr Harris's letter of 4 January 2000 had evolved into a mere request for trusses heights as "a benchmark against which future deflections could be checked".[6]

[34] Mr Major eventually complied with this request. On 28 November the Council received a plan showing measured floor to trusses heights. The Council appears to have filed this plan without examining it. The plan disclosed what the Judge described as considerable variation (as much as 139 mm) in the finished heights.[7]

[35] In the result, Mr Major never supplied any precamber measurements. It is common ground that the actual precamber did not comply with Mr Harris's design. For example, truss two had a sag of 54 mm rather than the upward precamber of 85 mm that it ought to have exhibited under normal live load conditions. Only truss one came close to meeting the required precamber.

[36] On 9 April 2003 a code compliance certificate was issued for the entirety of stage 4, on the basis that all outstanding items affecting structural design had been resolved.

Poor roof performance noted but not remedied

[37] The stadium roof leaked persistently, and it also moved extensively — up to six inches — under wind loads. The Southland District Council's representative on the Trust volunteered the time of one of its engineers, Graham Jones, to assess the leaks. It was thought that movement in the roof might be a cause of the leaks. Following publicity about a stadium collapse in Poland, the Trust also became concerned whether the roof could withstand snowfall. At a meeting of the Stadium's management board on 28 March 2006 the manager reported that advice was being sought from Mr Harris, who had peer-reviewed the original design. It was resolved

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6 High Court judgment, above n 1, at [55].
7 At [56].

that due to "ongoing issues concerning the roof", management should order that the stadium be vacated if at any time they had safety concerns. At about the same time, the Trust received a report from Mr Jones, in which he expressed concern about the roof's flexibility. Mr Jones is reported as having said that while "the structure does meet all the building code requirements" there remained a problem to be corrected, which might involve steps to strengthen the trusses. The trustees resolved to refer the matter back to the architects in the expectation that "they would go back to their original consulting engineer and obtain recommendations on what would need to be done in order to reduce the level of flexibility in the roof structure that would lead towards solving the leakage problem".

[38] Acton Smith, the then deputy chairman of the Trust, then wrote to Mr Harris himself on 12 April 2006, as follows:

> Ray Harper and I have been working on the Stadium Southland extension and we are becoming increasingly concerned with the movement that is occurring in the roofline on the spans over the community courts.
>
> Following the collapse of roofs in Eastern Europe in this last year where a lot of people were killed and injured, we are concerned that a major snowfall, which Southland has not experienced for 12 years, is due. Having become aware that the roof is moving up to six inches under considerable wind loads, 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 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 certain that the building is totally safe?

[39] Mr Harris responded on 9 June 2006, confirming by reference to his design that the strength of the trusses over the community courts was adequate to support the design loads specified in the relevant codes, but advising that the Trust should investigate what was happening. After confirming that his design calculations were correct, Mr Harris said that:

> The strengthened trusses were precambered to ensure that the truss deflections due to the self weight of the roof did not result in any visible sag. This needs to be checked.

[40] He noted that the reported wind deflection of 106 mm (this appears to be an error; the Trust had reported deflections of six inches or approximately 150 mm) was higher than recommended and could contribute to potential maintenance issues. He recommended that the Trust should investigate the following items:

> 1. Confirm where roof leaks are occurring or have occurred in the past and review roof fastening details particularly if the end bays are causing the problem;
>
> 2. Confirming that the roof light glazing has been installed with adequate clearance to the aluminium mullions;
>
> 3. Check that the community court roof trusses have an upward camber at mid-span when carrying the roof self weight only;
>
> 4. That a visual inspection of the trust welds and support fixings is carried out by a suitably qualified person to determine if there are any signs of deterioration or fatigue;
>
> 5. That suitable ties or props are installed at mid-span 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 deflection;
>
> 6. That thermal effect on the roofing is checked to ensure these are not contributing to the maintenance issues.

Finally, Mr Harris offered to review any further work thought necessary after each of these recommendations had been investigated.

[41] The Trust did not act on these recommendations. The contemporaneous evidence indicates that Mr Harris's recommendations 3 and 4 were ignored. The minutes of a trustees' meeting of 2 August 2006 refer to a need to address water ingress but state that Mr Harris had said flexibility in the roof structure was acceptable and make no reference to his recommendations. The Trust's stance now is that it had no need to act, for Mr Harris had assured it that the roof was safe so long as it had been built according to his design and the Council and Mr Major had both certified the work.

Collapse attributable to defective remedial work

[42] It is not now in dispute that the collapse on 18 September 2010 commenced with the failure of truss one at the mid-span of the top chord, triggering a collapse

sequence on trusses one to five. Although it was far from the only flaw in the remedial work, the evidence is that but for the missing weld atop the mid-span of truss one the roof would have withstood the snow load.

The project agreement and lease

[43] The agreement, which was executed on 23 December 1999, recited that the Trust wished to "erect, construct, build" a leisure centre on Council land, and the Council had agreed to support the project by completing certain ground works and granting the Trust a lease in the form attached, subject to the Trust satisfying it that the Trust was able to complete the "project and arrangements" in Schedule 3. Schedule 3 stated that the Trust was "able to erect and build" an indoor leisure centre in accordance with plans and specifications provided in a resource management consent. The Trust also agreed to accommodate specified sports, namely softball, tennis, netball and soccer.

[44] The Trust and Council undertook to carry out the works respectively assigned to them under the agreement. The Trust declared that it was "fully able" to complete the works, and it agreed to comply with all statutes, regulations and bylaws affecting the land and "in carrying out works in … Schedule 3 made or imposed on it by any authority." The Trust indemnified the Council against any damage or injury resulting from the Trust building the stadium.

[45] The memorandum of lease attached to the project agreement had been executed on 7 July 1999. It contained an indemnity in similar terms at cl 23:

> 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.

The evidence is that the Council was already making a significant contribution by way of land and improvements and did not want to incur any additional liabilities for the construction.

[46] The land was a designated reserve which could be used only for limited purposes. For that reason the lease was limited to 33 years with one right of renewal and specified that the Trust could not acquire the fee simple. It further provided that the Trust was to insure the property and the Council could decide whether destroyed or damaged buildings would be reinstated, that the Trust was to take out public liability insurance for itself and the Council and, as noted earlier, that the property reverted to the Council on termination with no compensation for improvements.

The claim and defences

[47] The Trust sued the Council in negligence and in negligent misstatement. It pleaded that the Council owed it a duty of care when issuing building consents, when inspecting the works, when ensuring compliance with the consents and building code, and when issuing code compliance certificates. The misstatement claim rested on the code compliance certificate of 20 November 2000, alleging that the Council owed a duty to exercise reasonable care and skill when issuing it.[8] The Trust was said in both causes of action to have relied on the Council, which acted negligently, and to have suffered loss as a result.

[48] The Council's defence put the Trust to proof and denied, among other things, that it owed a duty of care and that the Trust relied on the Council. It advanced other defences, some of which do not now concern us. Several are of moment, however:

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[8] Neither the claim nor the defence invoked the later certificate of 9 April 2003, though steps taken by the Council before issuing that certificate assumed significance in the causation inquiry, as explained at [119]–[130] below.

(a) It pleaded limitation. It is common ground that limitation applied to all of the Council's actions before the issue of the code compliance certificate on 20 November 2000. The claim was filed on 19 November 2010, just within the statutory long-stop limitation period of 10 years.

(b) It sought a declaration that because it had indemnified the Council the Trust could not recover its losses, relying on cl 23 of the lease. It did not invoke cl 3.3 of the project agreement.

(c) It denied causation and pleaded contributory negligence, saying that the Trust's failure to follow Mr Harris' recommendations of 9 June 2006 caused its loss, because the inspection he recommended would have identified the welding defects.

(d) Finally, it pleaded betterment. At trial it quantified this sum at $1,542,002.

[49] Mr Major was also sued. He agreed to contribute $1 million and took no part in the trial. He has been struck off the roll of professional engineers.

The duty of care issue

[50] In the High Court the Council argued that *Spencer on Byron* could be distinguished on its facts because the Trust was effectively a developer; it controlled the project, relying on its own experts and supervising the project itself.[9]

[51] Dunningham J concluded shortly that the Council owed the Trust a duty of care, reasoning that *Spencer on Byron* had recognised a duty for all buildings subject to the 1991 Act's regulatory regime, regardless of their type.[10] Characteristics of the Trust as owner, such as its control over the construction process and relative lack of vulnerability, were irrelevant, as was the absence of any fee to the Council for

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9 High Court judgment, above n 1, at [83].
10 At [96].

inspecting and certifying the work.[11] The Judge noted that the trustees were volunteers reliant on grants and donations to fund the project, which placed them in a more vulnerable position than commercial building owners.[12]

[52] Counsel addressed the *Spencer on Byron* duty in written submissions, but shortly before the hearing Mr Heaney filed a memorandum accepting that we were bound to apply it and reserving his challenge for further appeal. He sought instead to have us distinguish *Spencer on Byron*. We asked counsel to argue the duty, however, taking the view that we had to examine the duty in order to respond to the invitation to distinguish it. The duty question was argued accordingly.

The rule in *Spencer on Byron*

[53] Actions are normally brought in negligence and in negligent misstatement, but the latter usually brings no additional relief because the local authority's negligent inspections are actionable in negligence,[13] which does not require proof either that the Council knew its work would likely be relied on without independent inquiry or that the plaintiff actually relied on it.[14] The authorities accordingly focus on negligence without distinguishing the negligent misstatement cause of action.

[54] The leading authorities are the Supreme Court judgments in *Sunset Terraces* and *Spencer on Byron*, which must be read together. In *Sunset Terraces* the Court affirmed and restated local authorities' duty of care to homeowners, both original and subsequent, for negligent consenting and inspection.[15] The plaintiffs owned apartments in two residential apartment blocks. They had not commissioned construction, although some had purchased from the developer. The Court rejected

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11 At [97].

12 At [98].

13 *Spencer on Byron*, above n 2, at [220] per McGrath and Chambers JJ.

14 Both of which are requirements in a misstatement claim: *Carter Holt Harvey Ltd v Minister of Education* [2016] NZSC 95, [2017] 1 NZLR 78 at [80]–[85]; *North Shore City Council v Attorney-General* [*The Grange*] [2012] NZSC 49, [2012] 3 NZLR 341 at [189]; and *Caparo Industries plc v Dickman* [1990] 2 AC 605 (HL) at 638.

15 *North Shore City Council v Body Corporate 188529* [2010] NZSC 158, [2011] 2 NZLR 289 [*Sunset Terraces*].

the Council's argument that the longstanding *Hamlin* duty should be abandoned in light of changed circumstances or confined to traditional stand-alone dwellings.[16]

[55] In *Spencer on Byron* the Court extended the duty of care to all premises regardless of nature.[17] The plaintiffs owned hotel rooms or apartments in a 23-storey building. The narrow question was whether the duty of care ought to be applied to premises containing a mixture of hotel and residential apartments.[18] The Council's alleged negligence was said to engage consenting, inspecting and certifying functions.

[56] The two judgments focused on building type because the defendant wanted to limit liability on that ground, among others, but the duty that emerges from these judgments is owed to owners. The plaintiffs in both cases were owners (including bodies corporate), and their economic loss was the cost of repairing the defects. In *Sunset Terraces* the principal judgment stated that a non-owner occupant can only be protected through a duty to the owner, who suffered the loss and can undertake the remedial action.[19]

[57] The Court in *Spencer on Byron* obliquely addressed the position of owners who commission construction, when addressing the Council's argument that to impose a duty of care was tantamount to a contractual warranty for which owners need not pay.[20] McGrath and Chambers JJ reasoned that New Zealand law has never drawn a distinction between first and subsequent owners.[21] They had in mind the opportunity that an owner who commissions construction has to contract with the inspecting authority for a fee.[22] The Court was not required to address the rights, as against a local authority, of an owner or contractor whose own carelessness was the

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16 *Invercargill City Council v Hamlin* [1994] 3 NZLR 513 (CA). The result and reasons were upheld in *Invercargill City Council v Hamlin* [1996] 1 NZLR 513 (PC).

17 *Spencer on Byron*, above n 2, at [215]–[216] per McGrath and Chambers JJ. Elias CJ and Tipping J agreed at [22] and [26] respectively.

18 At [63] and [67].

19 *Sunset Terraces*, above n 15, at [53]. See also *Spencer on Byron*, above n 2, at [187].

20 *Spencer on Byron*, above n 2, at [188]–[190].

21 At [191]. It may be noted that the plaintiff in *Invercargill City Council v Hamlin*, above n 16, was a commissioning owner.

22 *Spencer on Byron*, above n 2, at [191]. Tipping J also referred at [27] to the commissioning owner's payment of a fee to the Council, finding that it confirmed proximity.

direct cause of the loss. It did not examine authorities in which courts have excluded liability to such persons.[23]

[58] The majority in *Spencer on Byron* readily found that a local authority is in a proximate relationship to a building owner.[24] Policy considerations were neutral or favoured a duty.[25] In particular, the duty is not generally inconsistent with contractual obligations, essentially because the building code establishes a baseline; no one can contract to erect a building that is not code-compliant.[26]

[59] For the majority, the duty rests primarily on the Council's statutory control of construction processes and building standards.[27] Tipping J explained that:[28]

> It would be highly anomalous if proximity were held to exist in residential cases but not in those involving non-residential buildings. In each case the council controls the building process to ensure that it conforms with the building code. In each case the person involved pays a fee to the council for the inspection and other work it does under the relevant legislation. In each case it is eminently foreseeable that carelessness on the part of the council may cause loss to both the present owner and to subsequent owners. And although the cause of action is in tort, the relationship between the parties in each case is close to a contractual one.

[60] William Young J, dissenting, accepted that local authorities exercise control, but he saw that as a facet of foreseeability rather than the determinant of a duty, noting that in other settings regulatory control is not usually enough to sustain a duty to prevent foreseeable loss.[29]

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23 *Three Meade Street Ltd v Rotorua District Council* [2005] 1 NZLR 504 (HC) at [39]–[57]; *Brichris Holdings Ltd v Auckland Council* [2012] NZHC 2089 at [33]–[36] and [42]–[43]; and *J W Harris & Son Ltd v Demolition & Roading Contractors (NZ) Ltd* [1979] 2 NZLR 166 (SC) at 177–178. Compare *Ingles v Tutkaluk Construction Ltd* [2000] 1 SCR 298 at [39], in which it was held the negligence of an owner-builder does not absolve a council of its duties in respect of its powers of inspection.

24 *Spencer on Byron*, above n 2, at [10] per Elias CJ, [27]–[28] per Tipping J and [185] per McGrath and Chambers JJ.

25 William Young J, dissenting, doubted whether the authorities established proximity and preferred to focus on the policy considerations: at [292].

26 At [39] per Tipping J and [193]–[194] per McGrath and Chambers JJ.

27 At [34]–[38] per Tipping J, and at [97] per McGrath and Chambers JJ.

28 At [27]. McGrath and Chambers JJ referred at [185] generally to *Sunset Terraces*, above n 15, in which control was emphasised in the principal judgment delivered by Tipping J at [32] and [50].

29 *Spencer on Byron*, above n 2, at [247].

[61] Reliance was discounted as a determinant of the duty, the Court finding general reliance on the state of the law sufficient.[30] The term "general reliance" is something of a misnomer, because the Court's real point was that community expectations have reached the point where, as McGrath and Chambers JJ put it, "[a] plaintiff does not have to prove reliance as an element in the tort" and so need not show, for example, that the local authority's records were checked before the property purchase.[31]

[62] It is important to emphasise at this point that the Court analysed the case in negligence, finding it unnecessary to distinguish the claim in negligent misstatement. It recognised that in negligent misstatement the plaintiff must prove reliance-in-fact, which was termed "specific" or "actual" reliance.[32] For example, Tipping J held that "in misstatement cases reliance is necessary before there can be causation. That is not necessarily so in other cases of negligence such as the present."[33]

[63] The Court also discounted vulnerability. Tipping J characterised the concept as problematic,[34] and McGrath and Chambers JJ considered it an unreliable foundation for policy.[35] They treated vulnerability as a characteristic of the individual, pointing out that some home owners may be sophisticated and wealthy, while some commercial building owners may not. They held that vulnerability should not be introduced into New Zealand law.[36]

[64] The local authority's duty has long rested on a corrective justice rationale,[37] and that was affirmed in *Spencer on Byron*, Tipping J stating that the cost of liability for councils should incentivise them to take care.[38] The Court also relied on a distributive justice rationale, reasoning that losses are appropriately borne by

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30 At [35] and [38] per Tipping J, and at [199]–[201] per Chambers and McGrath JJ. See also *Sunset Terraces*, above n 15, at [48] and [50] per Tipping J.
31 *Spencer on Byron*, above n 2, at [201] and [220].
32 These terms were used by McGrath and Chambers JJ at [199] and [220].
33 At [34].
34 At [38].
35 At [197]–[198].
36 At [156].
37 *Invercargill City Council v Hamlin*, above n 16, at 524–525 and 527.
38 *Spencer on Byron*, above n 2, at [50] and [105].

ratepayers because the whole community benefits if buildings are made safe and healthy.[39]

Does the rule in *Spencer on Byron* apply here?

[65] We are asked to distinguish *Spencer on Byron* and disapply the rule that a local authority owes a duty of care to a commercial building owner.

[66] By way of introduction, I observe that *Spencer on Byron*, like *Sunset Terraces*, was decided on a strike-out application, so the facts were assumed, not found.[40] As a result, the facts recorded were quite limited and abstract. For example, the Supreme Court did not describe the network of contracts under which the building was constructed and the apartments sold to the plaintiffs. This matters because, of course, the doctrine of stare decisis holds that an inferior court called upon to distinguish a precedent must decide, by reference to the facts before it, what were the precedent's salient facts and whether they differ materially.

[67] Also by way of introduction, *Spencer on Byron* states a rule, meaning that the Court made an ex ante decision about what consequences will follow once certain facts are found. It is a characteristic of rules that the facts necessary to trigger them may be limited deliberately, the rule-maker reasoning that predictability and efficiency justify excluding other facts that might be thought relevant in any given case. This rationale was undoubtedly at work in *Sunset Terraces* and *Spencer on Byron*; it was one of the principal reasons for refusing to limit the duty by reference to considerations such as building type, size, configuration or value, or ownership

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39 At [52] and [203]. See *Invercargill City Council v Hamlin*, above n 16, at 525; and *Stieller v Porirua City Council* [1986] 1 NZLR 84 (CA) at 94.

40 Summary judgment had also been entered for the Council in this Court's judgment under appeal in *Spencer on Byron*, above n 2: *North Shore City Council v Body Corporate 207624* [2011] NZCA 164, [2011] 2 NZLR 744.

type or structure.[41] It rests on an assumption, empirical in nature, that the rule is generally accurate; put another way, that in operation it is not likely to produce many, or egregious, departures from what courts seised of the facts of later cases would do. As I see it, fidelity to the rule accordingly requires that an inferior court should employ a materiality threshold when deciding whether to distinguish *Spencer on Byron* on the facts.

[68] The facts that the Supreme Court found necessary to trigger the rule are few and plain; the plaintiff must be a building owner and the defendant local authority must have performed a statutory function in connection with the building's construction. As I explain below, under the 1991 Act the applicable functions were consenting and certifying.

[69] The first potential point of distinction, for purposes of this case, is that the Supreme Court was not dealing in either *Sunset Terraces* or *Spencer on Byron* with plaintiffs who were commissioning owners. It is clear that a local authority cannot defend a *subsequent* owner's claim by arguing that the commissioning owner could have secured protection, for itself and subsequent owners, in its contracts with professional advisers and other third parties; rather, courts require them to bear an appropriate share of the liability.[42] Contrary to Mr Ring's submission, the Supreme Court did not hold in *Sunset Terraces* that professional involvement is always irrelevant; put another way, that such involvement may never qualify the local authority's duty of care to the commissioning owner who engaged the advisers.[43]

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41 In *Sunset Terraces*, above n 15, the Court declined to limit the duty by reference to these considerations, reasoning both that there was no principled reason for doing so and (at [49]) that the "duty must be capable of reasonably clear and consistent administration". In that case, the intended use of the building was described at [54] as a "reasonably workable" test which best satisfied the "need for clarity of application". In *Spencer on Byron*, above n 2, the same difficulty in drawing workable distinctions arose; the narrow issue was whether the duty ought to be applied to buildings containing a mix of hotel and residential apartments. William Young J at [298]–[299] also explained that *Sunset Terraces* was based on reliance but for reasons of practicality liability does not depend on the level of reliance that each separate plaintiff can establish. The Court's reluctance to adopt vulnerability, as the Court interpreted that quality, may also be attributable to reluctance to have cases turn on the personal characteristics of plaintiffs.

42 *Sunset Terraces*, above n 15, at [50]. The Court's reasoning was adopted in *Spencer on Byron*, above n 2, at [9], [67] and [195].

43 This point was made by William Young J in his judgment in this Court in *North Shore City Council v Body Corporate 188529 [Sunset Terraces]* [2010] NZCA 64, [2010] 3 NZLR 486 at [150].

[70] Second, some of the judgments reason that a local authority's tortious liability will not clash with the contractual liability of contractors and advisers to the owner because no one can be party to a contract that does not comply with the building code. The point being made — a policy consideration — was that conflict between contract and tort could be discounted because the building code sets the same minimum standard for both. As a matter of fact, people can and sometimes do enter into particular contracts that do not oblige a supplier or subcontractor to achieve code compliance,[44] and this may not matter from a policy perspective so long as responsibility for code compliance is assigned to someone in the matrix, such as a head contractor or engineer. What matters for present purposes is that the Court was engaging in a policy discussion, not denying the possibility that contract and tort may clash on the facts in particular cases. On our facts, which are very unusual, the Council claims that its contract with the Trust exempts it from tortious liability for failing to police the building code. I deal with the Council's claim to an indemnity from [141] below. For present purposes, its significance is that whether or not that claim succeeds, the contract arguably may qualify or exclude anticipated or actual reliance and so affect any duty of care in negligent misstatement.

[71] Third, it will be recalled that the Trust brought its claim in negligent misstatement and in negligence but, as noted at [48] above, limitation applied to the Council's actions before 20 November 2000. Dunningham J accordingly proceeded on the basis — not in dispute on appeal — that the Trust's claim rested on the negligent issue of the code compliance certificate on that date and not upon any earlier acts or omissions, such as inspections.[45] (Antecedent negligence may be taken into account when deciding whether the code compliance certificate was carelessly issued, but that is a different point.)

[72] It follows that this is a negligent misstatement case, meaning that specific reliance must be proved. Here I follow *Spencer on Byron*, in which the Supreme Court assumed that a claim on a code compliance certificate must be

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44 This possibility is discussed in the judgment of William Young J in *Spencer on Byron*, above n 2, at [302]–[305], instancing a subcontractor assigned to build concrete foundations to a specified design that happened to be inadequate. For examples, see *Koria v Hardy* [2013] NZHC 3178; and *Auckland City Council v Grgicevich* HC Auckland CIV-2007-404-6712, 17 December 2010.

45 High Court judgment, above n 1, at [81].

brought in negligent misstatement: McGrath and Chambers JJ discussed code compliance certificates under the misstatement heading and Tipping J cited the Court's judgment in *Marlborough District Council v Altimarloch*, in which it was held that a claim may be brought in negligent misstatement upon a Land Information Memorandum (LIM).[46] The same premise is evident in *Sunset Terraces*, in which a code compliance certificate was never issued but the Court held that a local authority may be liable, independently of the certificate and in negligence, for inspections.[47]

[73] Perhaps courts might characterise a code compliance certificate as an act rather than a statement: it is a formal step supported by rights for information and of inspection, it may be a prerequisite to sale and some uses, and liability in negligence simpliciter may introduce no risk of indeterminacy. But we did not hear argument on this point and we lack the information needed to assess its wider implications. By way of illustration, an important theme of the Supreme Court judgments in *Sunset Terraces* and *Spencer on Byron* is that the Court was imposing on local authorities a liability for economic loss no more extensive than that borne by other participants, and if that principle is to be maintained their position must be considered too.[48] As just noted, Tipping J also drew a parallel with claims on LIMs. I proceed accordingly on the basis that a claim on a code compliance certificate alone — that is, a claim not founded on any antecedent inspections — must lie in negligent misstatement.[49]

[74] Fourth, the Supreme Court discounted vulnerability as noted above, Tipping J describing it as problematic and unnecessary (since control justified the duty), and McGrath and Chambers JJ holding that it should not be introduced into New Zealand law. In this respect the Court departed from the approach taken in, for example, *Rolls Royce New Zealand Ltd v Carter Holt Harvey Ltd* (*Rolls Royce*) and *Ministry of Education v Econicorp Holdings Ltd*, in which this Court had treated vulnerability

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46 *Spencer on Byron*, above n 2, at [219]–[222]; and *Marlborough District Council v Altimarloch* [2012] NZSC 11, [2012] 2 NZLR 726, cited in *Spencer on Byron*, above n 2, at [49].

47 *Sunset Terraces*, above n 15, at [60]–[62].

48 *Spencer on Byron*, above n 2, at [302].

49 At [49] and [219].

as a dimension of proximity.[50] The Supreme Court has since cautiously qualified its view of vulnerability in *Carter Holt Harvey Ltd v Minister of Education* (*Carter Holt*).[51] The Court there doubted whether it is realistic to expect those entering building contracts to secure full warranties and noted that, although the Minister of Education is a sophisticated property owner, she could not be expected to know of the latent defects in issue.[52] What matters for our purposes is that in that case the Court treated vulnerability as a relevant consideration and a question of fact for trial. It also recognised that the contractual matrix might preclude proximity, while not being persuaded that the point could be decided summarily — the case was another strike-out application — for the defendants.[53] It implicitly accepted that a "specifically designed" contractual regime, such as that in *Rolls Royce*, might exclude proximity.[54]

[75] Following *Carter Holt* the New Zealand position appears now to be that vulnerability is a relevant consideration when deciding whether a duty was owed to a building owner. Subsequent owners, and other owners who did not have a practical opportunity to protect themselves in contract, will likely be considered vulnerable as a class.[55] For those who commission construction, vulnerability is a question of fact to be decided at trial by reference to the contractual matrix.

[76] As I see it, this approach is reconcilable with *Spencer on Byron*, in which the principal judgment recognised that duty in "grey area" cases is always a question of judicial judgment.[56] Cases in which a court is dealing with a commissioning owner may turn out to exhibit features, such as a particular contractual matrix, that put them into the marginal or "grey area" category.

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50 *Rolls Royce New Zealand Ltd v Carter Holt Harvey Ltd* [2005] 1 NZLR 324 (CA) at [61]; and *Ministry of Education v Econicorp Holdings Ltd* [2011] NZCA 450, [2012] 1 NZLR 36 at [27], [44]–[45] and [91]–[96].

51 *Carter Holt Harvey Ltd v Minister of Education*, above n 14.

52 At [54]–[55].

53 At [26]–[28].

54 At [25].

55 Vulnerability is to be assessed in terms of a class: *Carter Holt Harvey v Minister of Education*, above n 14, at [54]; and *Spencer on Byron*, above n 2, at [197]–[198].

56 *Spencer on Byron*, above n 2, at [184] citing *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants and Investigations Ltd* [1992] 2 NZLR 282 (CA) at 294 and *The Grange*, above n 14, at [161].

[77] I accept, of course, that we are here dealing with a local authority and an owner, not, as in *Carter Holt*, the parties to a building contract. It is less likely that a local authority can exclude the relationship of proximity that ordinarily flows from its exercise of statutory functions, but vulnerability remains a relevant consideration. Notably, there may be circumstances in which the commissioning owner has through contract assumed specific control of the relevant risk, choosing not to rely on the local authority. The Council says this is such a case. By recognising that for some owners the duty may turn on contractual considerations, *Carter Holt* may introduce such an owner's control-in-fact over the relevant aspect of construction, pursuant to contracts actually entered, as a relevant consideration when considering whether a duty was owed to that owner.

[78] Finally, this case involves producer statements. In both *Spencer on Byron* and *Sunset Terraces* the local authority had handled the permitting, inspection and certifying functions itself. William Young J did remark upon producer statements when making a point that local authorities might respond to the duty of care by withdrawing some of their services:[57]

> Producer statements may permit a territorial authority to conclude that a building consent or code compliance certificate should be issued on a basis which does not depend on the building judgments of its own staff. In this way, practices around producer statements may enable territorial authorities to design approval systems which reduce the need for their front-line staff to engage in the sort of direct assessment exercises which carry substantial litigation risk. If this happens, it would represent the sort of partial withdrawal of services which an economist might see as a likely consequence of the imposition of liability.
>
> (Footnotes omitted.)

[79] The *Spencer on Byron* duty is closely linked to the relevant legislation, the Building Acts of 1991 and 2004.[58] Under s 24 of the 1991 Act, territorial authorities' functions included approving or refusing applications for building consents, enforcing the building code and regulations, and issuing project information memoranda, code compliance certificates, and compliance schedules. As the Supreme Court noted in *Spencer on Byron*, this supported the duty of care because

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57 *Spencer on Byron*, above n 2, at [313].
58 At [29] and [105].

territorial authorities had not previously been under a statutory obligation to issue permits and code compliance certificates.[59]

[80] A local authority was obliged to issue a consent or code compliance certificate if satisfied on reasonable grounds that the provisions of the building code respectively would be or had been met.[60] It was relieved of the obligation to satisfy itself of these things if provided with a building certificate or code compliance certificate issued by a building certifier under ss 43 or 56 of the 1991 Act, and it could not be held liable for anything done in good faith in reliance on such a document.[61] The idea, as the Supreme Court explained in *Spencer on Byron*, was to establish a competitive market for building certification.[62] To that end, the legislature sought to place building certifiers on the same footing as territorial authorities by providing (in s 90) that civil proceedings against a certifier for issuing a building or code compliance certificate were to be brought in tort and not in contract. This was intended to ensure that building certifiers could not contract out of their obligations.[63]

[81] The 1991 Act also provided for producer statements, which were defined as:[64]

> … any statement 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.

A territorial authority was authorised, at its discretion, to accept a producer statement "establishing compliance with all or any of the provisions of the building code".[65] Unlike a certificate issued by a building certifier, a producer statement did not relieve the authority of its obligation to satisfy itself on reasonable grounds that, for a consent, the building code would be complied with if the work was properly completed in accordance with the plans and specifications or, for a code compliance certificate, the completed work complied with the building code.

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59 At [105].
60 1991 Act, ss 34(3) and 43(3).
61 Section 50.
62 *Spencer on Byron*, above n 2, at [98].
63 Section 57(2).
64 Section 2.
65 Sections 33(5) and 43(8), the latter being inserted in 1992.

[82] We were not referred to any authority in which a court has had to decide when a local authority may rely on a producer statement to relieve it of the need to inspect building work before issuing a code compliance certificate.[66] If they are to mean anything, the statutory provisions allowing a local authority to accept a producer statement "establishing compliance" must envisage that such statement might afford reasonable grounds for the local authority to be satisfied that the code had been complied with. That gives a producer statement the status of evidence, on which the local authority might lawfully rely when deciding whether the work complied. For reasons given at [135] below, it is not necessary or appropriate in this case to catalogue what a local authority must do before relying on a producer statement.

[83] The cases often speak of the defendant local authority's consenting, inspecting and certifying functions. That is so because the older cases often turned on negligent inspections following the issue of building permits. Under the 1991 Act, however, inspection was not a statutory obligation in itself; rather, inspections might be necessary if the local authority was to perform other functions competently. The distinction matters in this case. A PS4 evidencing code compliance might relieve a local authority of the need to inspect the work itself at appropriate junctures before issuing a code compliance certificate.

[84] For these reasons, I am satisfied that *Spencer on Byron* may be distinguished in the circumstances of this case. I turn to consider from first principles whether a duty of care was owed in fact.

Did the Council owe the Trust a duty of care for the remedial work?

[85] The elements of the cause of action in negligent misstatement may be framed in this way:[67]

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66 *Body Corporate 326421 v Auckland Council* [2015] NZHC 862 suggested that it depends on the circumstances. Some cases address the liability in tort of the maker of the producer statement: *Kwak v Park* [2016] NZHC 530; *Pacific Independent Insurance Ltd v Webber* HC Auckland CIV-2009-404-4168, 24 November 2010; and *Judge v Dempsey* [2014] NZHC 2864.

67 *Caparo Industries plc v Dickman*, above n 14, at 638; *The Grange*, above n 14, at [189]; and *Carter Holt Harvey Ltd v Minister of Education*, above n 14, at [80]–[85].

(a) Proximity: the parties must be in a relationship of proximity, or a "special relationship". This requires that the adviser knew for what purpose the advice was wanted, knew the advice would go to the plaintiff or an ascertainable class that included the plaintiff, and knew the advice would likely be acted on without independent inquiry. Knowledge may be imputed, the court having found that the adviser ought in the circumstances to have known or foreseen what would likely happen.[68]

(b) Policy: wider policy reasons must not exclude a duty of care in the circumstances.[69] For example, a court may exclude a duty for risk of indeterminacy, or for conflict with some other duty or the public interest.[70]

(c) The ultimate question: whether, having regard to (a) and (b), a duty is fair, just and reasonable.[71]

(d) Specific reliance and loss: the plaintiff actually relied on the advice and suffered loss in consequence.[72]

The second limb is not always isolated from the first when analysing claims — for example, the Supreme Court did not do so in *Carter Holt*[73] — but it may be appropriate when considerations external to the parties' relationship affect the decision. As Blanchard J explained in *The Grange*,[74] it is also convenient when, as is usual in building cases, the claim is brought in both negligence and negligent misstatement; that was so in *The Grange*, where the Supreme Court did not distinguish between the causes of action when answering the duty question for strike-

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68 *Carter Holt Harvey Ltd v Minister of Education*, above n 14, at [80]; *The Grange*, above n 14, at [189]; and *Caparo Industries plc v Dickman*, above n 14, at 638.

69 *Carter Holt Harvey Ltd v Minister of Education* [2015] NZCA 321, (2015) 14 TCLR 106 at [115].

70 Cherie Booth and Daniel Squires *The Negligence Liability of Public Authorities* (Oxford University Press, Oxford, 2006) at [3.31], [3.39] and [3.64].

71 *The Grange*, above n 14, at [160].

72 *Spencer on Byron*, above n 2, at [34] and [199]. See also *Boyd Knight v Purdue* [1999] 2 NZLR 278 (CA) at [58]–[60]; and *Price Waterhouse v Kwan* [2000] 3 NZLR 39 (CA) at [30].

73 *Carter Holt Harvey Ltd v Minister of Education*, above n 14, at [78]–[85].

74 *The Grange*, above n 14, at [156].

out purposes. I observe also that reliance arises at two points in this framework: the defendant's expectation of reliance forms an element of the duty and the plaintiff's actual reliance affects causation. Sometimes the two are combined, with actual reliance being treated as part of the duty analysis, but for reasons that will become apparent I prefer to separate them here.[75]

[86] When examining the duty I focus, as Dunningham J did, on the particular consent for the remedial work and the code compliance certificate that is said to have caused the Trust's losses.[76] Put another way, the circumstances of the remedial work may be sufficiently distinctive to exclude a duty owed for other work, such as the foundations, that the Council inspected and certified in the usual way.

[87] I turn to the circumstances, beginning with proximity. The Council's knowledge of the code compliance certificate's purpose and audience is not contentious. It chose to assume a degree of responsibility, having insisted the Trust seek consent for the remedial work. But anticipated reliance is in issue. The Trust's engineer, Mr Major, was being relied upon to supply the evidence needed to certify the work as code-compliant. Accordingly, the Council expected that the Trust would have the work inspected for code compliance by an engineer who was independent of the Council. To that extent, this is analogous to a "reasonable opportunity for intermediate inspection" case.[77] The Council also knew that the Trust had been told in the conditions of consent that the Council was relying on a PS4, so would not inspect the work itself. However, the Council must be taken to have known that the Trust expected it to insist on Mr Major supplying a PS4 confirming that the work was code-compliant and to insist on evidence that the conditions of consent had been met.

[88] Next, the Trust was not vulnerable, as between itself and the Council. It is true that, as Dunningham J found, the trustees were volunteers and the Trust was not in the business of building.[78] However, that is to focus exclusively on personal

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75 *Caparo Industries plc v Dickman*, above n 14, at 638.
76 High Court judgment, above n 1, at [139].
77 *Sunset Terraces*, above n 15, at [76].
78 High Court judgment, above n 1, at [98].

characteristics. The correct question is a practical one: could the Trust reasonably be expected to control its risk by contract? As to that:

(a) The Trust was not in the business of building, but in the project agreement it had stated that it was capable of completing the project. Whether or not the indemnity that it granted the Council extends to liability for negligence in the performance of statutory functions, the agreement confirms that as between the parties the Trust knew it was responsible for completing the building, meaning that it should engage such assistance as it required to ensure the work was done properly.

(b) The remedial work was a very specific project of narrow scope, undertaken in circumstances where the Trust knew something had gone wrong. So it was realistic to expect the Trust, with the assistance of its advisers, to identify and manage the risk that the work might be badly designed or executed.

(c) The Trust did identify those risks and it addressed them in targeted contractual arrangements. Realising that its own agents might have been negligent, it engaged Mr Harris to design the work. Knowing what had gone wrong, it engaged Mr Major to certify the work in a producer statement. Anticipating a risk of further trouble, it relied on assurances that those concerned (including Mr Harris) held adequate insurance cover.

[89] Next, the Trust was the commissioning owner, party to the principal contracts with the architect and engineer and builder. As just explained, it used its position to assert control over the remedial work.

[90] Next, the Council relied on a PS4 tendered by Mr Major. As noted above, that does not preclude a duty. Responsibility for issuing the consent and the code compliance certificate remained with the Council. However, a producer statement supplied by the owner's suitably qualified agent might nonetheless count against a

duty where, as in this case, it was made clear that the local authority would not inspect the work itself but would rely on the producer statement.

[91] The Council charged a fee of $245 for the consent, but it did not charge for inspection or the code compliance certificate. A fee evidences proximity.[79] Its absence for the relevant work here is consistent with the evidence that, to the Trust's knowledge, the Council relied on Mr Major to certify that the work had been done correctly.

[92] I turn to wider policy considerations. They overlap analysis of the parties' relationship and I will not repeat what I have already said. No direct conflict arises between tortious liability and the contractual allocation of risk between the Trust and its contractors, because the Council was not a party to those contracts and the remedial work was intended to achieve code compliance; the Trust did not contract for something less, or more, than that.[80] (I say "direct" because the local authority's duty of care may affect the contractual allocation of risk by relieving owners of the need to pay for appropriately intensive supervision.[81]) That being so, tortious liability of the Council to the Trust can coexist with those contracts. Nor is the standard of care difficult to fix on the facts, for the requirements of Mr Harris's design were very specific.

[93] Under the 1991 Act the commissioning owner bore a responsibility for code compliance.[82] The authorities establish that this responsibility is not in itself a defence for a local authority, though it may sound in an allowance for the owner's contributory negligence.[83] However, efficiency is a relevant consideration, as

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79 *Spencer on Byron*, above n 2, at [28].

80 This distinguishes *Rolls Royce New Zealand Ltd v Carter Holt Harvey Ltd*, above n 50; and *Ministry of Education v Econicorp Holdings Ltd*, above n 50, as the Court noted in the latter case at [61(b)]. Note that I deal at [141] below with the contractual relationship between the Council and the Trust.

81 *Spencer on Byron*, above n 2, at [305] per William Young J.

82 This is implicit in ss 7 (all building work, as defined, to comply with the code whether or not a consent was required), 33 (owner must seek consent), 34 (authority must be satisfied on reasonable grounds that code would be met), 42 (owner could be given notice to rectify for code compliance) and 43(1) (owner must advise the authority that building work has been completed) of the 1991 Act. See also *Spencer on Byron*, above n 2, at [304], although William Young J may have had the Building Act 2004 in mind.

83 In respect of overlapping liabilities, see *Spencer on Byron*, above n 2, at [9]; *The Grange*, above n 14, at [62]; and *City of Kamloops v Nielsen* [1984] 2 SCR 2 at 15. In respect of the contributory negligence point, see *Johnson v Auckland City Council* [2013] NZCA 662 at [25]

Tipping J explained ("do it once, do it right") in *Spencer on Byron*.[84] It may affect the duty in that, as between the Council and a commissioning owner, the owner ought to be able to avoid the risk at least cost by imposing quality control mechanisms in its contracts with the builders, architects and engineers whom it must engage in any event.[85] Local authorities experience an incentive to manage potential liability by imposing additional costs on building owners as a class, as William Young J pointed out.[86] It is also open to local authorities to disengage so far as the legislation allows, opting, for example, to rely on producer statements from professionals engaged by the owner. That is what happened in this case, albeit because the Council lacked the skill to evaluate the work rather than for liability reasons. Mr Ring's submission that if the Council lacked the necessary skills it ought to have engaged its own expert nicely illustrates the potential for duplication of effort, at the expense of the applicant owner or of applicants or ratepayers generally.

[94] Of course, this point about efficiency applies only to a commissioning owner. Subsequent owners — including those who buy, sometimes off the plans, from a developer — lack the same opportunity to control construction quality, and for them the alternative to local authority liability may involve insuperable transaction costs, in the form of investigations (of the design and construction) and negotiations (to secure protection, ultimately from the commissioning owner or head contractor or designer). These difficulties were mentioned in *Spencer on Byron*.[87]

[95] Corrective justice considerations justify a duty of care here, but unusually, distributive justice considerations do not. Because the Southland District Council was involved, the Trust appears to be more representative of the community served by the stadium than is the appellant Council. The City's ratepayers are not alone in using the stadium and benefiting from code compliance.

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and [68]; and *Sunset Terraces*, above n 15, at [61] and [79].

84 *Spencer on Byron*, above n 2, at [32].

85 In respect of overlapping liabilities, see *Spencer on Byron*, above n 2, at [9]; *The Grange*, above n 14, at [62]; and *City of Kamloops v Nielsen*, above n 83, at 15. In respect of the contributory negligence point, see *Johnson v Auckland City Council*, above n 83, at [25] and [68]; and *Sunset Terraces*, above n 15, at [61] and [79].

86 *Spencer on Byron*, above n 2, at [310].

87 At [32].

[96] I turn finally to consider whether it is fair and reasonable to impose a duty. Mr Heaney focused his argument on this ultimate question, conceding that on the authorities a finding of proximity is almost inevitable.[88]

[97] A local authority ordinarily owes a duty of care to an owner, and, as Mr Ring submitted, the Council insisted on a building consent. Its relationship to the Trust was proximate, and having regard to the discussion of *Spencer on Byron* above, good reason would be needed to displace a duty.[89] I accept that by insisting on a consent, the Council assumed an obligation to satisfy itself that Mr Harris's design complied with the building code, meaning that the work would be code-compliant if completed in accordance with the plans. There is no dispute that it complied with that duty, reasonably relying on the producer statements provided by Mr Harris and Mr Major.

[98] In my opinion, the Council should not be taken to have assumed a duty to inspect the work to ensure that it complied, as built, with the code; to the Trust's knowledge it relied on the Trust's agent, Mr Major, as the legislation allowed. The Trust accordingly knew that the Council could not certify of its own knowledge that the work actually complied with the building code. Rather, the Council assumed a different and lesser responsibility, that of checking that an appropriately qualified person had supplied adequate evidence that the consent conditions had been met. There is nothing unfair or unreasonable about the imposition of a duty to do that much. I consider that the Council owed the Trust a duty to take care to that extent.

[99] In some cases this narrow duty formulation would excuse the local authority on the facts. In this one, as I now go on to explain, it does not.

Breach of duty

[100] It is not now in dispute that the Council negligently issued the code compliance certificate of 20 November 2000. In the absence of Mr Major's PS4 it had no way of knowing that the work complied with the conditions of consent. This was to breach the limited duty of care that the Council owed to the Trust for the

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88 It has been so considered in *Spencer on Byron*, above n 2, at [54] and [232]; *The Grange*, above n 14, at [218]; and *Rolls Royce New Zealand Ltd v Carter Holt Harvey Ltd*, above n 50, at [58].

89 *Spencer on Byron*, above n 2, at [25].

remedial work. It had the consequence, as I now go on to discuss, that the Trust lost an opportunity to investigate the work and decide what to do next.

Causation

[101] The Council is not primarily to blame for the collapse on 18 September 2010. That distinction belongs to Mr Major and the contractors who actually did the remedial work and created the defects. The Council's liability rests on the proposition that but for its negligence, the Trust would have identified and remedied deficiencies in the work.[90]

[102] The Trust's theory of causation is accordingly that the Council's negligent statement that the remedial work complied with the building code was an effective cause because it caused the Trust to not take action to avoid the loss. Specifically, the Trust placed both general and specific reliance on the certificate, the certificate was false because the remedial work was substandard, and this want of compliance was a substantial cause of the collapse.

[103] The Council's theory of causation is that the Trust must prove that had the Council refused to certify the building without the measurements an inspection that revealed the defects would have followed. The Trust did not prove these things: no witness deposed that Mr Harris (the most likely candidate) would have inspected the work, or that such inspection would have revealed the critical missing weld at the mid-span of the top chord on truss one. The Council does not say that the Trust's failure to have the trusses inspected in 2006 was so egregious as to break the chain of causation.[91]

[104] At trial, and before us, the Trust characterised the Council's defence as a claim that the loss would have happened anyway, regardless of its negligence. It argued that a defendant who advances such a claim must prove it, citing *Davis v*

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90 *Ministry of Education v Econicorp Holdings Ltd*, above n 50, at [38].

91 The plaintiff's own conduct may become the real cause of the damage: *Sunset Terraces*, above n 15, at [83]; *Queenstown Lakes District Council v Charterhall Trustees Ltd* [2009] NZCA 374, [2009] 3 NZLR 786 at [40]; and *Bowen v Paramount Builders (Hamilton) Ltd* [1977] 1 NZLR 394 (CA) at 412–413.

Garrett and *Fletcher Construction Company Ltd v Webster*.[92] These cases are authority that a defendant cannot answer a claim for damages by raising a bare possibility that the loss would have happened anyway.

[105] The Judge accepted this characterisation of the defence, holding that:[93]

> 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.
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> 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.

[106] She then went on to hold that the Council had not discharged the onus:[94]

> 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.

[107] I accept Mr Heaney's submission that this was an error, albeit an understandable one because the Trust's ingenious attempt to reverse the onus of proof confused the causation inquiry. The Council did not speculate that some other cause would have intervened to inflict the same loss. The roof collapsed from the primary cause — the welding defects — which was there all along. The Council simply denied that its own negligence was a contributing cause. As part of that defence, it denied that the Trust ever relied on the code compliance certificate. In particular, it denies that the certificate played any part in the Trust's decision not to inspect the trusses in 2006.

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92 *Davis v Garrett* (1830) 130 ER 1456 (Comm Pleas) at 1459; and *Fletcher Construction Company Ltd v Webster* [1948] NZLR 514 (SC) at 518–519. The Trust also referred to *Atlas Properties Ltd v Kapiti Coast District Council* CA30/02, 20 June 2002 at [9]; and *Easton Agriculture Ltd v Manawatu-Wanganui Regional Council* [2013] NZCA 79 at [121].

93 High Court judgment, above n 1, at [125]–[126] (footnote omitted).

94 At [147].

[108] Had this been a timely claim in negligence simpliciter, with no intervening need for inspection, this latter stance would not have availed the Council. General reliance would have sufficed. But it is necessarily a claim in negligent misstatement, meaning that specific reliance must be proved.[95]

[109] I record at this point that when addressing causation counsel focused on what happened in June 2006, when the Trust elected not to have the roof inspected and precamber measurements checked. The Trust did not claim before us to have done anything specific in reliance on the code compliance certificate at any earlier time. (I nonetheless review the evidence below, because it helps to explain what happened in 2006.)

[110] Having regard to the Judge's approach, we must decide for ourselves whether the Trust proved causation. Fortunately, counsel examined the evidence in some detail. I address the issues as follows: did the Trust rely on the code compliance certificate to decide to do nothing in response to Mr Harris's advice of 9 June 2006;[96] would such inspection have revealed the defects in compliance with Mr Harris's design, in particular the missing welds; and the defects having been revealed, would the Trust have remedied them?

Did the Trust rely on the code compliance certificate?

[111] I begin by examining the evidence about reliance pre-2006. The facts are that:

(a) In 1999, on learning of the defects the Trust demanded assurances from the architect and Mr Major both that the structure was safe and that they had adequate professional indemnity cover. It then engaged Mr Harris to find out what had gone wrong, to design remedial work, and to certify that the work would be sound and would comply with acceptable design standards.

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95 *Caparo Industries plc v Dickman*, above n 14, at 638; *The Grange*, above n 14, at [189]; and *Carter Holt Harvey Ltd v Minister of Education*, above n 14, at [80]–[85].

96 This being the only occasion on which the Trust argued for specific reliance.

(b) The Trust did not propose to seek a building consent. Left to its own devices it would have pressed on with the remedial work without involving the Council.

(c) The Trust chose to rely on Mr Major to verify that the remedial work had been completed as Mr Harris had designed it, and did so knowing that the Council would rely on Mr Major to certify the work for code compliance purposes. The consent gave the Trust no reason to expect that the Council would inspect the remedial work itself.

(d) The Trust had no particular need of a code compliance certificate. It was not a developer, building for purpose of sale. It seems likely that not until it needed a liquor licence did it pursue the Council for a certificate.

(e) The Trust settled claims against the engineer and architect at about the time the certificate was issued, but there is nothing to suggest that the two events were connected.

Accordingly, the evidence indicates that before 2006 the Trust did not rely on the Council's code compliance certificate for assurance that the work complied with the building code. It relied rather on its own agents.

[112] I turn to what happened in 2006. The Judge did not find specific reliance then. Indeed, her findings are inconsistent with it, for she found that Mr Harris's advice did not clearly put the Trust on notice that it needed to check the trusses. She cited his recommendation that a visual inspection be carried out for signs of deterioration or fatigue,[97] and (when dealing with contributory negligence) found that the recommendation did not warn the Trust that there might be workmanship defects.[98]

[113] In my respectful opinion, the finding that the Trust was unaware of a need to inspect the trusses closely is unsustainable. I have recorded the narrative in some

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97 See point 4 at [40] above.
98 High Court judgment, above n 1, at [167]–[171].

detail at [10]–[42] above. It shows that the Trust worried about structural integrity, as a result of the roof being seen to flex disconcertingly under wind load, that its concerns extended specifically to snow load, that Mr Smith told Mr Harris that the Trust worried about collapse and wanted confirmation that the stadium was safe; and specifically, that Mr Smith wanted reassurance that the roof's flexibility under wind load did not signal a structural problem. The tenor of his letter of 12 April 2006 is one of anxiety. And lastly, at two points in his letter Mr Harris said the precamber measurements — the very departure from design requirements that the Trust relies upon to argue that the Council ought to have identified the welding issues — should be checked.

[114] To say this is to recognise that I must assess the evidence of reliance for myself. Mr Ring pointed to the evidence of Mr Smith, who deposed that:

> I should emphasise that neither I nor my fellow trustees are people who are experts in large scale construction or engineering. We were at all times reliant on the advice we received from the contractors and advisers we engaged. When we received the appropriate assurances and certificates from those experts and from the Council, we relied on them as establishing that the building had been properly constructed. That was especially so because of the scrutiny that I knew had been brought to bear on the original design mistakes. Accordingly, when the stadium opened, I believed that the stadium was sound, safe, and compliant with all the relevant standards.

[115] There is no reason to doubt Mr Smith's credibility and reliability, but this passage is notable for what he did not say; he did not say that because of the code compliance certificate the Trust decided not to inspect the trusses in June 2006. This is not evidence of specific reliance.

[116] In my opinion, the Trust did not rely on the code compliance certificate in 2006. Rather, the Trust and the stadium's management were alarmed at the behaviour of the roof under wind load and decided that investigation and remedial action were warranted *despite* code compliance. As I have noted at [37] above, the minuted advice from the District Council engineer, Mr Jones, was that the roof was too flexible and needed attention. Code compliance seems to have been relied upon only to assure the management board that the stadium could continue to operate in the meantime. Mr Smith's letter to Mr Harris does not suggest reliance on the code compliance certificate either. It is noteworthy that the Trust never involved the

Council in its investigations. Finally, nothing in Mr Harris's letter gave the Trust reason to believe it might rest on the code compliance certificate. He did not dismiss the problems being experienced, recommending rather that they should be investigated and specifically addressing the trusses in two of his recommendations.

[117] Accordingly, I am satisfied that the Trust did not specifically rely on the code compliance certificate when deciding not to action Mr Harris's recommendations. It follows that its claim ought to have failed at trial for want of causation.

[118] In case I should be wrong in this, I go on to consider whether an inspection would have identified defects and led to them being remedied.

Would the recommended inspection have revealed the defects?

[119] I introduce this topic by remarking that the question whether inspection would have revealed the defects and ultimately averted the collapse requires an answer at two different points in the narrative:

(a) The first is in November 2001, when the Council received the plan from Mr Major recording the trusses' heights. It is said that the Council ought to have insisted on strict compliance with conditions of the building consent, and that had precamber measurements been taken an inspection must have ensued.

(b) The second is in 2006, when, as I have just discussed, the Trust was advised to take precamber measurements and inspect the trusses, but did not follow that advice.

The circumstances differ — notably, the reason for inquiry was not the same on each occasion — but the question does not. It is whether an inspection that included precamber measurements would have led to remedial work that averted the collapse.

[120] I observe that to frame the question in this way is to reject Mr Heaney's submission that the Trust must prove an inspection would have identified welding defects — specifically, the missing weld atop the midspan of truss one — that

triggered the collapse. Rather, the Trust must show that inspection would have identified defects that would have resulted in further remedial work that would have averted the collapse. The distinction matters because there were several defects, some obvious and some not.

[121] The Judge did not establish what would have happened had the Trust inspected the trusses in 2006; as noted, she found rather that it was not on notice of a need to inspect. But she did make findings about what would have happened had the Council insisted on precamber measurements in 2001.

[122] Before addressing what an inspection would have revealed, I clear away a factual question about what the Council ought to have done when it finally extracted the trusses plan from Mr Major in November 2001. At that point the Council knew Mr Major had not certified that the trusses precamber was in line with Mr Harris's design, as the building consent had specified and the Council had insisted in its letter of 30 January 2001.

[123] The Judge found that the Council ought to have insisted on having the precamber measurements checked.[99] I did not understand Mr Heaney to challenge this finding. (His point rather was that an inspection would not have revealed the defective welds, and the absence of precamber would not in itself have been thought to warrant further remedial work.) I record my agreement with the Judge that the Council ought to have insisted on precamber measurements. It had made them a condition of consent, faithfully following Mr Harris's recommendation, and it does not claim to have made an informed decision that precamber did not matter after all.[100] As Mr Ring remarked, the fact that Mr Major did not have the measurements to hand ought to have excited concern. Had they been taken, they would have shown that the trusses did not meet Mr Harris's design precamber measurements. Far from exhibiting a uniform precamber, some of them still sagged. Having learned that, the Council ought to have inquired further, insisting that an engineer inspect the trusses and confirm the roof structure was safe.

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99 High Court judgment, above n 1, at [146]–[147].

100 Its stance at trial, with hindsight, was that the precamber measurements were required for aesthetic reasons only.

[124] Lack of precamber was not in itself a cause of the collapse. Rather, it is said that precamber measurements would confirm whether the work had been done properly and an investigation must have revealed the other defects. The Judge found that inspection would have led "in all likelihood" to the welding defects being discovered.[101] She did not elaborate on that conclusion, which falls short of a finding on the balance of probabilities that precamber measurements would have averted the loss.

[125] Mr Harris did not give evidence, although the remedial work was his design and both parties appear to agree that had further investigation been required, he, rather than Mr Major, would have been engaged to do it. As noted earlier, Mr Major did not give evidence either. The parties relied on expert witnesses: for the Trust, Graeme Coles, a structural engineer, Clark Hyland, a structural engineer, Charles Wheeler, a welding inspector, and Edward Saul, a building consultant; and for the Council, Adam Thornton, a structural engineer.

[126] There was much common ground among the experts about the defects and their causal effect. Apart from the missing top welds, the chords were visibly misaligned, the side strengthening plates were not continuous across the top chord splices, stitch welds used to fix the side plates to the chords were inadequate, and weld preparation, including grinding, had been unsatisfactory. All in all, the work was seriously substandard.

[127] Discontinuity of the side strengthening plates across the welded splices was a critical defect, because it left the structure wholly dependent on the quality of welding at points where the chords had been cut and packed. Mr Hyland explained that one of these points, the midpoint of the top chords, was the most highly loaded part of the trusses, vulnerable to compression failure, and Mr Coles agreed that the trusses were prone to buckle at that point.

[128] The engineering and welding experts conferred. They were asked to advise whether the defects would have been visible on inspection. They agreed that an engineer inspecting the trusses would not have been content to do so from the

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[101] High Court judgment, above n 1, at [147].

ground. This disposes of Mr Heaney's submission that an inspection might have been limited to a view from ground level. In any event, side-plate discontinuity and chord misalignment were obvious from the ground. For these reasons I am satisfied that an engineer would have used access equipment such as a scissor lift to examine the trusses closely. That conclusion finds support in the evidence of Mr Hyland, who stated that a competent engineer inspecting the welding in the first place would have examined the welds "up close" or had a welding expert do so. The experts agreed that on close inspection an engineer "would have seen enough to raise the alarm and require full inspections by [a] welding inspector". Such inspection would have revealed defects in preparation and penetration of welds. The experts also agreed that the missing top welds might not have been observable but an engineer "would know if [you] can't see it then you can't weld it".

[129] This evidence satisfies me that an inspection would indeed have led to the defects being discovered. Even if the missing top welds were not identified on close inspection, which I think implausible, the remaining defects, notably the discontinuous side strengthening plates, would have led to the conclusion, upon which the experts also agreed, that the work did not comply with Mr Harris's design, or relevant industry standards, or the building code. Further remedial work must have been recommended.

[130] This conclusion is as true of an inspection conducted in 2006, when the Trust was advised to have the precamber measured and welds checked, as it is in 2001, when the Council ought to have insisted on precamber measurements.

Having learned of the defects, would the Trust have attended to them?

[131] I accept that, the defects having been identified, the Trust would have attended to them.[102] The defects seriously compromised the roof's structural integrity and the trustees were alive to safety concerns.

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[102] The Trust must establish on the balance of probabilities that it would have taken action to avoid the risks: *Benton v Miller and Poulgrain (a firm)* [2005] 1 NZLR 66 (CA) at [48]–[49].

Conclusions on causation

[132] The Trust proved on the balance of probabilities that precamber measurement would have led to an inspection that revealed the defects, or enough of them to identify a pressing need for further remedial work, and that it would have remedied those defects.

[133] However, the claim lies in negligent misstatement and the Trust failed to prove that it specifically relied on the code compliance certificate at any relevant time. That being so, the claim must fail on causation grounds.

The Trust's attempt to support the judgment on other grounds

[134] Anticipating that the Council might show it would not have been negligent to issue the certificate in reliance on Mr Major's PS4 and trusses measurements, so curing its earlier default, Mr Ring sought to support the judgment on other grounds. He submitted that the Council was negligent not to have a pre-prepared code compliance checklist and a PS4 acceptance policy, and not to have identified discrepancies between Mr Harris's design and the as-built work during its other inspections. (It will be recalled that the Council did not inspect the remedial work but its inspectors were on site for other purposes.)

[135] In my opinion, we need not decide these issues, and lacking evidence of current practice affecting producer statements, I prefer not to do so. Producer statements are still used under the 2004 Act, but without specific legislative authority, and as the Judge noted, industry standards have moved on since 2000.[103] But I do remark on one matter. Mr Ring argued that the Council was negligent to accept a PS4 from Mr Major given his proven unreliability. Dunningham J rejected this argument, reasoning the Council lacked the in-house expertise to inspect the work.[104] I agree with her, but for different reasons. Mr Major was qualified as an engineer and subject to the disciplinary control of a professional body (the Institute of Professional Engineers New Zealand), and the Council had taken what seemed at the time reasonable steps to remind him of his responsibilities and secure assurances

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103 High Court judgment, above n 1, at [119]–[120].
104 At [142].

that he would comply in future. Given his unsatisfactory past performance on this particular project, the Council ought to have insisted on full and timely compliance with the conditions of consent, but that is only to confirm that the Council ought to have required precamber measurements.

Contributory negligence

[136] I here assume that, contrary to my conclusions above, the Council is liable in negligent misstatement and record my conclusions about the defence of contributory negligence. The Contributory Negligence Act 1947 provides that:[105]

> Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but 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…

"Fault" is defined to mean "negligence … or other act or omission which gives rise to a liability in tort".[106] This has been interpreted as a failure by the plaintiff to take ordinary care to look after itself and its property.[107] The assessment is objective, and it examines both relative blameworthiness and causative potency.[108] The loss cannot be too remote.[109] Ultimately the decision is one of fact and impression.

[137] The Council invokes the defence for the Trust's inaction following Mr Harris's advice of 9 June 2006, not for anything the Trust did beforehand. So, for example, Mr Heaney did not argue that the Trust was negligent to nominate Mr Major, rather than Mr Harris, as the expert who would certify the work in a PS4. This means the Council does not say that the Trust's conduct mitigates its own blameworthiness for negligently issuing the code compliance certificate; it says

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105 Section 3(1).

106 Section 2.

107 *Helson v McKenzies (Cuba Street) Ltd* [1950] NZLR 878 (CA) at 920; *Johnson v Auckland City Council* [2013] NZHC 165 at [13]; and *O'Hagan v Body Corporate 189855 [Byron Avenue]* [2010] NZCA 65, [2010] 3 NZLR 445 at [76]–[77].

108 *Gilbert v Shanahan* [1998] 3 NZLR 528 (CA) at 534; *Byron Avenue*, above n 107, at [67]; *Johnson v Auckland City Council*, above n 107, at [16]–[17].

109 *Price Waterhouse v Kwan*, above n 72, at [28].

rather that several years later the Trust passed up an opportunity to identify the primary cause, the building defects, and so avoid the loss.

[138] Mr Heaney argued for as much as 75 per cent contribution, while Mr Ring contended, as will already be apparent, that the Judge correctly found the Trust was not at fault at all. Her reasoning, as explained above, was that Mr Harris's advice of 9 June 2006 did not put the Trust on notice that it ought to inspect the precamber and welds.

[139] I have taken a different view of the facts, finding that the Trust ought to have had an engineer inspect the trusses and inspect the welds, as Mr Harris recommended. The Trust was squarely on notice of his recommendations, which were directed to safety concerns, and it knew, as the Council seemingly did not, that the roof's performance might evidence a structural problem. In my opinion, nothing distinguishes the moral blameworthiness or causative potency of the Trust's conduct in 2006 from that of the Council in 2001. The Trust did not rely on the code compliance certificate when choosing not to inspect, so it cannot justify inaction on that ground. Inspection in 2006 would have revealed the defects and avoided the loss, just as surely as the Council's insistence on precamber measurements in 2001 would have done.

[140] I would fix the Trust's contributory negligence at 50 per cent.

The Council's claim to an indemnity in contract

[141] The Council pleaded that under the lease the Trust agreed to indemnify it from all actions, claims and costs whatsoever that might arise during the building's construction, erection and operation. It sought to enforce the indemnity if found liable for negligently issuing the code compliance certificate.

[142] The first question is whether the indemnity reaches the Council's liability qua regulator, as a matter of construction. Exclusion clauses are narrowly construed, but the interpretation adopted should reflect the parties' presumed mutual intention.[110] I

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[110] *Trustees Executors Ltd v QBE Insurance (International) Ltd* [2010] NZCA 608, (2010) 16 ANZ Insurance Cases 61-874 at [40].

have quoted cl 23 of the lease at [45] above. It extends to "all actions, suits, claims … whatsoever". I find this language apt to include negligence. The question is whether it ought to be confined to the parties' relationship as lessor and lessee.

[143] As to that, I agree with Dunningham J that in context the indemnity should be limited to liability arising from the lessor-lessee relationship.[111] It extends to the construction and operation of buildings on the land, but such liabilities might arise in that relationship. It follows that the indemnity need not extend to regulatory obligations having nothing to do with the parties' contractual relationship. I find it improbable that the parties meant to exempt the Council from liability of that kind.[112]

[144] Mr Heaney argued that the project agreement addressed allocation of risk, because the Trust there agreed that it would keep the Council indemnified against any damage arising from the stadium works. He invited us to read the lease with the project agreement, which attached a copy of the lease as a schedule. But as noted, the project agreement was not pleaded. In any event, I very much doubt that it extends to liability qua regulator either.

[145] Mr Ring also argued that it would be contrary to public policy to allow a local authority to circumvent its obligations under the 1991 Act by requiring an indemnity from building owners.[113] I accept that courts may find contrary to public policy, and so illegal,[114] an agreement that significant statutory duties need not be performed.[115] It is only a modest extension of this principle to say that a court may refuse to allow the duty-bound party to insist that potential plaintiffs execute an indemnity before doing what the legislation requires, so eliminating the principal remedy for any breach. That said, I need not take that course here, because the indemnity did not extend so far. I add that the lease and project agreement served a proper purpose and any invitation to sever a specific clause for illegality would presumably be decided

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111 High Court judgment, above n 1, at [181]–[185].

112 Such indemnities have been described as "inherently improbable": *Smith v South Wales Switchgear Co Ltd* [1978] 1 WLR 165 (HL) at 168.

113 *i-Health Ltd v iSoft NZ Ltd* [2011] NZCA 575, [2012] 1 NZLR 379 at [39]; and JF Burrows and RI Carter (eds) *Statute Law in New Zealand* (4th ed, LexisNexis, Wellington, 2009) at 35–36 and 38–39.

114 Illegal Contracts Act 1970, s 5.

115 *i-Health Ltd v iSoft NZ Ltd*, above n 113, at [34]–[37] and [39].

under the remedial provisions of the Illegal Contracts Act 1970, which the Trust did not invoke.[116]

Betterment

[146] I turn to the Trust's cross-appeal. It argues that Dunningham J ought not to have allowed for betterment. On the view I take of the case this issue does not arise, because we intend to set aside the award of damages. I address it in case I should be wrong in my earlier conclusions.

[147] The parties agree that the Trust's only realistic option was to rebuild, meaning that it got a new building in lieu of a decade-old one. This put betterment in issue. As noted, the Council sought a deduction of $1,542,002. That represented a quantity surveyor's estimate of depreciation on building components that would need maintaining or replacing during the lease term.[117] The Trust denied betterment, saying that it had been forced to incur capital expenditure prematurely and that the Council will be the ultimate beneficiary of the expenditure when the stadium reverts to its ownership at lease end.

[148] Dunningham J rejected the argument that the Trust benefited by getting a more valuable building, noting that it cannot sell the building and will not be paid for it at lease end, and she did not accept that the Council would benefit by getting a newer building at lease end either.[118] The Trust held the building, and the Council would do so in time, for community recreation purposes and not for sale. Her conclusions on this point are not in dispute on appeal.

[149] However, the Judge accepted that the Trust will benefit by saving some of the cost of refurbishing or replacing building components, as the lease requires, when they wear out during the term.[119] She declined to quantify savings by applying a rate of depreciation to such items, pointing out that the Trust would not need to replace

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116 Illegal Contracts Act, ss 6 and 7(1); *Edwards v O'Connor* [1989] 3 NZLR 448 (HC); and Thomas Gault (ed) *Gault on Commercial Law* (online looseleaf ed, Thomson Reuters) at [IC7.04].

117 It appears to have been common ground that the assessment should be based on a single term.

118 High Court judgment, above n 1, at [202]–[203].

119 At [204].

those having a lifespan of more than 33 years.[120] For example, the exterior steel cladding had an estimated lifespan of 35 years; that being so, no allowance should be made for it notwithstanding that it would have depreciated by 28 per cent in 2010.

[150] The Judge held rather that an allowance could be made for any item for which the Trust avoided a maintenance cycle during the term because of the rebuild. The evidence did not allow the Judge to quantify betterment on this basis, for there was no agreed or reliable maintenance schedule. The Council relied on a "stadium project list" prepared by the Trust in 2008 to aid analysis of capital replacement, maintenance and operational costs, but the Judge accepted that the list's projections were exaggerated and had not been borne out in practice. Accordingly, she approached the assessment as a matter of impression. She was satisfied that there would be some maintenance savings, and she decided that an allowance of five per cent of the rebuild cost was a reasonable estimate.[121] She rounded the resulting figure to $750,000. She declined to adjust it for any carrying costs of premature expenditure, noting that the Trust is funded by external grants.

[151] The object of damages is to restore the plaintiff to the position it would have occupied but for the defendant's wrongdoing. Betterment is a tool used to achieve that objective where, as here, the defendant's negligence forces the plaintiff to replace property with something of greater value.[122] Any deduction for betterment is net of an allowance for any disadvantages associated with the untimely and unavoidable nature of the plaintiff's investment.

[152] Counsel agreed that the Council must prove quantum or value of betterment, which can take the form of savings resulting from deferred spending on replacement or maintenance during the lease term.[123] They differed on the requirements of proof. Mr Ring contended that proof of a "real pecuniary advantage" here requires a component-by-component approach, in which each of the major building elements is analysed separately, and if there is no evidence of quantum, so that betterment is

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120 At [209].
121 At [217].
122 *J & B Caldwell Ltd v Logan House Retirement Home Ltd* [1999] 2 NZLR 99 (HC) at 106–108.
123 At 109.

"virtually impossible" to assess, the Court can make only a nominal allowance.[124] He submitted that the Judge's conclusion was speculative, largely because she did not identify which stadium components would benefit from a maintenance saving. Mr Heaney responded that the Judge need only make a fact-specific assessment and attempt to put a financial figure on it as best she could.[125] For that proposition he cited *Battersby v Foundation Engineering Ltd* and *Gunton v Aviation Classics Ltd* (*Gunton*).[126]

[153] I accept Mr Heaney's submissions on this point. If the plaintiff proves that it suffered a substantial loss, a court will not refuse an award, or allow only nominal damages, because the loss is difficult to quantify, and this principle must apply equally to any adjustment for betterment, the only difference being that betterment is the defendant's to prove, not the plaintiff's to eliminate.[127] As Fisher J put it in *J & B Caldwell Ltd v Logan House Retirement Home Ltd*, still the leading New Zealand authority on betterment, courts will do their best to assess damages using such evidence as they have.[128] And in *Gunton*, Chambers J held that there are no hard and fast rules and an in-the-round assessment is appropriate.[129]

[154] For the Council, Allan Green, the quantity surveyor, gave evidence about maintenance savings, relying on his experience and the Trust's stadium project list to identify items that would need replacing within the lease term. The Trust itself had estimated that a substantial number of items would want replacing and Mr Green's list (with estimated replacement cost, before depreciation) included floor finishes and protection ($762,000), ceiling tiles ($301,000), fire and smoke detectors ($265,000), and some electrical fittings ($193,000). The estimated lifespans may have been conservative, but it seems plausible that some of these items, such as the floors (for

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124 *Voaden v Champion (The Baltic Surveyor and Timbuktu)* [2002] EWCA Civ 89, [2002] 1 Lloyd's Rep 623 at [84]–[85].

125 *Voaden v Champion (The Baltic Surveyor and Timbuktu)*, above n 124, at [86]; and *Gunton v Aviation Classics Ltd* [2004] 3 NZLR 836 (HC) at [216]–[221].

126 *Battersby v Foundation Engineering Ltd* HC Auckland CP 26/97, 5 July 1999 at 29–30; and *Gunton v Aviation Classics Ltd*, above n 125.

127 *Wilson & Horton Ltd v Attorney-General* [1997] 2 NZLR 513 (CA) at 524 citing *Chaplin v Hicks* [1911] 2 KB 786 (CA) at 792 and 795.

128 *J & B Caldwell Ltd v Logan House Retirement Home Ltd*, above n 122, at 105. The Court was clearly here with damages generally, but this principle applied equally to betterment: see the list of principles at 110–111.

129 *Gunton v Aviation Classics Ltd*, above n 125, at [213].

which the Trust had projected a lifespan of 2–15 years depending on floor type) would need replacing within the term.

[155] The Trust's quantity surveyor, Mark Burrows, was not called but a schedule he prepared in conjunction with Mr Green was in evidence. He also calculated betterment by depreciating replacement cost for the items listed by Mr Green, using rates representing the percentage of useful life expired as at 2010. He appears to have adopted different periods for life expired. His rates of depreciation resulted in a number of items being near the end of their lives at lease end, such as the steel cladding, but only one (the carpet in the amenities block) in need of replacement within the term. He estimated maintenance savings at $828,373 on a depreciation basis.

[156] On the evidence it was proper to infer that the rebuild resulted in maintenance savings that must have been substantial. Quantifying these savings was a matter of judgement, using the available evidence. The Judge might have used depreciation rates for all of the items in Mr Green's schedule, and it was open to her to use a percentage of the rebuild cost as a proxy. The evidence I have discussed above satisfies us that the deduction of $750,000 was reasonable. In short, I am not persuaded that Dunningham J was wrong.

[157] It follows that in my view the cross-appeal on betterment fails for two reasons. First, it is redundant, there now being no award of damages to discount for betterment. Second, if the award was correct, the Judge did not err in her assessment of betterment.

Result

[158] The Court being unanimous in the result, the appeal is allowed. The award of damages is set aside and judgment is entered for the Council on the Trust's claim. We do not disturb the result in the High Court on the Council's counterclaim.

[159] As noted earlier, the Trust also cross-appealed Dunningham J's decision that GST is not payable on damages or interest. This too is redundant, but the parties hoped to resolve the issue and asked us to reserve it for further argument before us if

necessary. Accordingly, the parties have leave to bring the issue on for argument should the Trust succeed on further appeal and the parties require a decision. The cross-appeal is otherwise dismissed.

[160] The Council, having succeeded overall, will have one set of costs for a complex appeal on a band B basis with usual disbursements including disbursements on the cross-appeal. We certify for second counsel. Costs in the High Court should be fixed there if counsel cannot agree them.

REASONS OF HARRISON AND COOPER JJ

(Given by Harrison J)

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Introduction

[161] The Trust asserts not only that the Council owed it a duty to exercise reasonable skill and care when issuing the code compliance certificate (the certificate) on 20 November 2000. It asserts also that the scope of the duty extended to protecting and thus indemnifying the Trust against the financial consequences of defects in the stadium's construction created by the negligence of the Trust's own building contractors, engineer and architect, which was the direct cause of that loss. In our judgment this case is untenable.

[162] The Trust's case must fail for a number of complementary reasons. To invert the orthodox two-staged approach of successively considering the factors particular and external to the relationship, the first reason is that such a result would not be fair, just and reasonable in what is ultimately a policy-laden inquiry.[130] The second reason arises from the proximity inquiry into the particular relationship: it cannot be said that the Council issued the certificate for the purpose or with the expectation of the Trust's reliance upon it for the financial protection it now seeks. In this respect, the law does not deem the Council to have assumed a responsibility to the Trust of that scope. The third reason is that we are not satisfied the Trust did in fact rely upon the Council in the manner pleaded.

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130 *The Grange*, above n 14, at [156] per Blanchard, McGrath and William Young JJ.

[163] Without doubt, the Council owed a statutory duty to a wide range of entities, including the Trust, to exercise reasonable skill and care when issuing the certificate. Without doubt also, the Council was negligent in performing its obligations. But duties of care do not exist in a vacuum and those two affirmative answers beg the underlying question of whether the Council owed a common law duty of care to the Trust of the scope for which it now contends. That question is to be determined by identifying the kind of damage, if any, for which the law might attribute responsibility to the Council.[131]

[164] The Trust pleaded alternative causes of action in negligence and negligent misstatement. In the High Court and before us it was common ground that all the Trust's allegations of negligence relating to the Council's statutory functions of issuing building consents and carrying out inspections were time barred. Only the claim based on the negligent certificate remains within time and must be arguable solely as one for negligent misstatement requiring proof of specific reliance.[132] We will confine our analysis to that cause of action alone.

[165] In our judgment the Supreme Court's decision in *Spencer on Byron* is not determinative. It stands as authority for the rule that, when exercising its statutory function of inspecting construction of a building which combines commercial and residential uses, a local authority arguably owes the same duty of care in general negligence to all owners regardless of status.[133] The decision also reaffirms that proof of specific reliance is not a necessary element of the tort of general negligence but remains an essential prerequisite of a claim for negligent misstatement.

[166] In *Spencer on Byron* McGrath and Chambers JJ held that the owner's alternative claims based on code compliance certificates ought to be considered under the tort of negligent misstatement.[134] On the assumed facts, where the alleged negligence included both inspections and consents, the Judges were satisfied that such a claim was redundant because the claimants may face the additional hurdle of

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131 *Boyd Knight v Purdue*, above n 72, at [53] applying *Caparo Industries plc v Dickman*, above n 14, at 651 per Lord Oliver.

132 See [72] above.

133 *Spencer on Byron*, above n 2, at [215]–[216] per McGrath and Chambers JJ, [22] per Elias CJ and [26] per Tipping J.

134 At [219].

demonstrating reliance without receiving any additional relief.[135] McGrath and Chambers JJ later discussed the purpose of the certification regime to emphasise that liability in general negligence "is not to hinge on the particular nature [that is, commercial or residential] of the building being constructed".[136] Tipping J accepted that it was "not a long step" from imposing liability for negligently issued LIMs to imposing a duty of care in negligent misstatement when certifying code compliance but he cautioned "[t]hat duty must of course be tailored to the exact form in which [such] certificates are designed to be issued".[137]

Facts

[167] Given their centrality for our findings on liability, the facts relevant to the Trust's negligent misstatement claim and pleaded reliance on the certificate justify recitation in a little detail.

[168] The material events preceding the Council's decision to issue the certificate on 20 November 2000 are as follows:

(a) On 4 January 2000 Mr Harris prepared a PS2 for its design review of the remedial work on the trusses, accompanied by written advice about implementing the proposed remediation. Two days later Mr Tonkin met on site with the Trust's engineer, architect and builders to discuss the proposed works. The Council was advised an application for an amended building consent would follow.

(b) On 14 January 2000 the Council issued a building consent for amendment 1 for the remedial work to the trusses, subject to a number of conditions. Among them were that, Mr Major in his capacity as the Trust's engineer must (1) confirm in writing to the Council that the precamber of the six trusses was in line with Mr Harris' letter dated 4 January 2000, including individual truss measurements; and (2) provide a PS4 of construction review for the remedial work.

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135 At [220].
136 At [222].
137 At [49].

(c) On both 17 and 21 February 2000 Mr Tonkin wrote to Mr McCulloch in his capacity as the Trust's architect advising of his understanding that work on the trusses was complete; and reminding Mr McCulloch of the conditions of the building consent requiring Mr Major's provision of a PS4 and written confirmation about the precamber measurements.

(d) On 1 March 2000 the Trust submitted to the Council its "Advice of Completion of Building Work" for the remediation work required under the building consent for amendment 1, triggering the Council's assessment of code compliance under s 43(1) of the 1991 Act. This advice was wrong, as subsequent events proved.

(e) On 10 March 2000 Mr McCulloch wrote to the Council advising of the Trust's desire to resolve all outstanding issues prior to opening at the end of that month.

(f) On 24 March 2000 the Council issued a number of interim certificates for the sole apparent purpose of enabling the Trust to proceed with the formal opening of the stadium by the then Prime Minister the following day. The interim certificate for structure and plumbing included a non-exhaustive list of conditions requiring the Trust's satisfaction before a final certificate could be issued. Crucially, as Miller J has noted,[138] the interim certificates did not include any reference to the building consent for the remedial work.

(g) On 31 October 2000 the Council wrote to Mr McCulloch noting again that a final certificate could still not be issued because of the Trust's failure to satisfy the conditions imposed earlier on the building consent. In particular, the Council repeated its requests for Mr Major to provide written confirmation that the precamber of the six trusses aligned with Mr Harris' letter dated 4 January 2000 and his PS4. The Council's letter concluded: "When the work is completed, please

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138 See [28] above.

contact the consents clerk to arrange a further inspection." This activity had apparently been generated by the Trust's requirement for a final certificate to enable it to obtain an onsite liquor licence.

(h) On 16 November 2000 the Council again wrote to Mr McCulloch, enclosing a copy of its letter dated 17 February 2000 about the trusses and reminding him that no reply had been received.

[169] On 20 November 2000 the Council issued a final certificate for the remedial work without the Trust's confirmation of its completion in accordance with the Council's building consent conditions or a further inspection. Nevertheless, the document purported to certify unconditionally the Trust's compliance with the terms of the original consent and the building code. No additional fee was charged. The certificate stated it was issued pursuant to s 43(3) of the 1991 Act, which materially provided:

> **43 Code compliance certificate**
>
> (1) An owner shall as soon practicable advise the territorial authority, in the prescribed form, that the building work has been completed to the extent required by the building consent issued in respect of that building work.
>
> …
>
> (3) *Except where a code compliance certificate has already been provided pursuant to subsection (2) of this 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.

(Our emphasis.)

[170] Mr Tonkin's evidence-in-chief at trial was that the certificate represented the Council's satisfaction on reasonable grounds that the remedial building work complied with the building code and the building consent. However, in cross-examination by Mr Ring, Mr Tonkin admitted that the certificate was issued and signed by an unauthorised consents clerk in the Council's building regulations services team. The certifier had acted without Mr Tonkin's knowledge or any input from the Council's building specialists. In Mr Tonkin's view, the likely reason for the premature certification was to enable the Trust to secure the onsite liquor licence; he said it was not unprecedented for Council employees to accommodate advance requests from trusted applicants.

[171] These subsequent exchanges between the parties are relevant also:

(a) On 15 January 2001 the Council again advised the Trust of its ongoing failure to satisfy the building consent for amendment 1 by providing the PS4 and related confirmation from Mr Major. The next day Mr Major advised the Council of the work taken to ensure realignment of the trusses. On 17 January, John Watson, a building code inspector, noted that "the building in general is getting very close to final Code Compliance Certification stage" but that the Council was still waiting on producer statements for the trusses. That same day Mr Major produced a PS4 to certify "as a suitably qualified and independent design professional … that the modifications have been generally constructed in accordance with the details shown [in Mr Harris' design drawing]". That statement, made on the Trust's behalf, was materially untrue.

(b) On 30 January 2001, following meetings between the Council building inspector and the Trust's professional advisers, Mr Tonkin wrote to Mr Major acknowledging receipt of his PS4 but confirming

that one further condition of the original consent remained for satisfaction — Mr Major had not delivered written confirmation that the precamber of the six trusses aligned with Mr Harris' letter, nor had he included individual truss measurements.

(c) On 23 July 2001 Mr Tonkin wrote to Mr McCulloch, confirming again that a certificate could not be granted because the consented work had not been completed. He noted six outstanding requisitions, including that the datum heights of the trusses were required to allow for the future monitoring of deflection.

(d) On 12 September 2001, following a meeting with Mr Major, Mr Tonkin wrote to Mr McCulloch recording their agreement that Mr Major "will check with the structural steel company for datum heights for the community court trusses". As Dunningham J noted in the High Court, the stringency of the fourth condition to the building consent (see [22]–[24] above) had evolved in its interpretation by the Council into a mere request for the heights of the trusses as a benchmark against which future deflections could be checked.[139] But there was no independent notification of relaxation of the Council's original requisition for Mr Major's certification.

(e) On 30 October 2001 Mr McCulloch provided the Council with measurements for the steel trusses showing the heights from floor level to the underside of each truss but without confirming the compliance of the precamber measurements according to Mr Harris' letter. As Dunningham J found, there was a considerable variation in the height shown on the plan.[140]

(f) On 28 November 2001 Mr McCulloch wrote to the Council with advice on various outstanding items, expressing on behalf of the Trust

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139 High Court judgment, above n 1, at [55].
140 At [56].

> the expectation that the answers were satisfactory and that the Trust was "await[ing] code compliance to be issued for [the stadium]".

[172] On 9 April 2003, some 29 months after the nominally final certificate had been issued by the unauthorised consents clerk, the Council issued a final code compliance certificate for the original building consent.

Duty of care

Introduction

[173] This case is conceptually unique. The owner of a building whose contractors were alone responsible for creating the defects which caused it loss seeks to recover the full amount of that loss from another party. Of the Supreme Court's recent decisions in this area, *The Grange* offers the closest analogies.

[174] In *The Grange* the North Shore City Council sought indemnity from the Building Industry Authority (BIA), the statutory supervisor of the regulatory system for building work, by asserting that the BIA owed a duty of care reviewing the Council's operations under the 1991 Act.[141] The Council claimed that a report of that review, of which the BIA had given it a copy, was negligently prepared and had lulled it into a false sense of security, leading in turn to its failure to rectify its existing practices of issuing negligent building consents and code compliance certificates. The Council sought to recover from the BIA the losses which it agreed to pay in settlement of claims by property owners. Its counsel realistically accepted, however, that the claim should be one for contribution rather than for full reimbursement given the Council's exposure on a defence of contributory negligence.

[175] The majority in *The Grange* emphasised throughout that the Council's proper claim lay in negligent misstatement, not in general negligence. In that context, Blanchard J (writing also for McGrath and William Young JJ) reinforced the conventional two-stage inquiry common to both species of the tort, based first upon considerations of foreseeability and proximity and then the policy question of

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141 *The Grange*, above n 14, at [95] per Blanchard, McGrath and William Young JJ.

whether it was fair, just and reasonable to impose a duty.[142] However, a critical feature of distinction within the first stage is that a court must be satisfied in a negligent misstatement claim of the existence of a special relationship between the parties from which it can be said one party has assumed a responsibility as a matter of law to the other party for the quality of its work.[143]

[176] Tipping J's explanation of the appropriate approach is directly material to these facts:

> [220] For a duty of care to be reasonable as between the parties, the loss or damage involved must have been reasonably foreseeable. If it was not, it would not be reasonable to impose a duty. But the fact that the loss is foreseeable does not of itself make it reasonable to impose a duty. In a case involving an asserted liability for words it will seldom, if ever, be reasonable to impose a duty on the speaker or writer, unless that party ought reasonably to have foreseen that the other party would rely on what was said or left unsaid. Furthermore, any such reliance must itself have been reasonable. Hence the concept of foreseeable and reasonable reliance usually lies at the heart of whether it is reasonable to impose a duty of care in a case involving words negligently written or not written, customarily called a case of negligent misstatement. A feature of the foregoing analysis that is particularly important in the present case is that it is not usually reasonable for a party to whom words are addressed for one purpose to rely on them for a different purpose.[144]

Policy: whether it is reasonable to impose a duty

[177] Our starting point is with the policy inquiry relevant to the asserted duty of the Council to protect the Trust against financial loss caused by the fault of its contractors who created and failed to remedy the physical defects in the building. Tipping J viewed this inquiry — "whether it is reasonable to impose a duty" — as "the ultimate question" for a court to determine when assessing a duty of care.[145]

[178] In his seminal speech in *Anns v Merton London Borough Council (Anns*), Lord Wilberforce treated it as axiomatic that a territorial authority did not owe a duty of care when exercising its statutory powers "to a negligent building owner, the

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142 At [156].
143 At [188].
144 *Attorney-General v Carter* [2003] 2 NZLR 160 (CA) at [26].
145 *The Grange*, above n 14, at [218].

source of his own loss".[146] As a matter of principle, we are satisfied that such an exemption extends to the negligence of the owner's agents.

[179] We accept that the Trust's architect, engineer and contractors were not agents in the orthodox sense. They were independent contractors engaged to perform specific tasks for the Trust through separate contractual chains. In that situation, the rules of attribution — the law's treatment of one party's acts or omissions as those of another — would not normally apply. Different considerations prevail, however, where a claimant, whose loss is directly caused by those contracted experts, asserts that a territorial authority nevertheless owes it a duty when performing its statutory functions to protect it against the same loss. One critical factor is the degree of integration of the acts or omissions of a formally independent contractor into the construction project, particularly if they involve the sort of work which would otherwise be carried out by an employee.[147] The statutory language and policy all assume importance in this respect.

[180] In *Byron Avenue* an issue arose about the relevance of a solicitor's failure to obtain a LIM to the Council's defence of contributory negligence.[148] This Court held that the professional's omission was attributable to the owner on the basis that the negligent local authority should not be worse off where a solicitor had failed to make the necessary inquiries than where the fault was the purchaser's own negligence.[149] Liability should attach where the function entrusted to the professional is that of representing a person with the result that the service performed consists in standing in the owner's place and assuming to act in the owner's right, not in an independent capacity.[150]

[181] As the Supreme Court affirmed in *Hickman v Turn and Wave Ltd*, attribution in law is ultimately a question of policy, taking into account any relevant

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146 *Anns v Merton London Borough Council* [1978] AC 728 (HL) at 758.

147 *Bartle v GE Custodians* [2010] NZCA 174, [2010] 3 NZLR 601 at [242] per William Young P applying *Davie v New Merton Board Mills Ltd* [1959] AC 604 (HL) at 646 per Lord Reid.

148 *Byron Avenue*, above n 107.

149 At [99]–[100] per Baragwanath J and [145]–[146] per William Young P.

150 At [92] per Baragwanath J quoting *Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Co-operative Co of Australia Ltd* (1931) 46 CLR 41 at 48–49 per Dixon J.

legislation.[151] The 1991 Act itself imposed responsibilities on all parties to the consenting process for its efficient operation. Where a complex building is being constructed, both the quality of the building professional's performance and of the information produced for the owner and supplied to the local authority will directly affect the certification process. In this case, it was the owner which triggered the compliance process by advising the local authority under s 43(1) that the work has been performed to the extent required by the building consent. The owner entrusted performance of that obligation — and of the underlying obligation under s 32 to carry out the building work only in accordance with the building consent — to its contracted third parties. We see no difficulty in attributing their acts or omissions to the Trust. Within a policy inquiry, a negligent act or omission by a building professional engaged by the commissioning owner to carry out its own statutory requirement ought to be attributable to that owner.

[182] The House of Lords decision in *Governors of the Peabody Donation Fund v Sir Lindsay Parkinson & Co Ltd* (*Peabody*) illustrates the point.[152] A commissioning owner had engaged an architect to ensure compliance with regulations relating to drains. Lord Keith reviewed the allocation of responsibility and risk within the statutory framework, concluding that the "person who puts in train a house building project" must bear responsibility for the economic loss flowing from reliance on the advice of its architects, engineers and contractors.[153] It would, he said, "be neither reasonable nor just, in these circumstances, to impose on [the local authority] a liability to indemnify … against loss" because of the authority's omission to take steps to stop the installation of drains with rigid joints which ultimately required replacement.[154] In short, the House of Lords attributed the architect's negligence in failing to ensure compliance to the owner.[155] The rationale is that it is normally incumbent on the building owner to ensure compliance with the relevant statutory

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151 *Hickman v Turn and Wave Ltd* [2012] NZSC 72, [2013] 1 NZLR 741 at [91]–[99].

152 *Governors of the Peabody Donation Fund v Sir Lindsay Parkinson & Co Ltd* [1985] AC 210 (HL).

153 At 241.

154 At 241.

155 In *Stieller v Porirua City Council*, above n 39, this Court distinguished both the decisions in *Anns*, above n 146, and *Peabody*, above n 152, but not on this point; *Stieller* was a claim by a subsequent purchaser in negligence not by a building owner for negligent misstatement.

provisions. The local authority should not be liable to an owner who, with the benefit of and reliance upon professional advice, is in breach of these provisions.[156]

[183] The Trust through its building contractors, engineer and architect — who we will now refer to collectively as the Trust's "agents"[157] — breached a similar duty in failing to carry out the remedial work only in accordance with the building consent and then in advising the Council incorrectly that the work had been so completed with the intention that the Council should accept its accuracy and reliability.

[184] In *The Grange* Blanchard J expressly approved this Court's earlier statement that in the building and related fields "a duty of care does not extend to protect a person who brings about his or her own loss by negligence".[158] The defects which caused the stadium to collapse were created solely by the negligence of the Trust's agents. They were directly responsible for the design, construction and oversight of the original and remedial work. They brought about the Trust's loss and the consequences of their fault must be attributed to the Trust, which cannot assert that the Council owed it a separate duty of care to protect it against the same negligence and indemnify it against the same loss.

[185] Such a result would not be fair, just or reasonable. In our view, the claim must fail on this policy ground alone. However, the issue of proximity cannot be left to one side if the alleged duty of care is to be comprehensively addressed. While Mr Heaney conceded the proximity point in regard to general negligence, we are well placed to review the relationship between the Trust and the Council in light of the evidence adduced in the High Court.

Special relationship

[186] We are satisfied that the same result is independently justified by applying the settled principles governing a specific claim for negligent misstatement, which were authoritatively reviewed in *The Grange.* The majority approached the proximity

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156 *Investors in Industry Commercial Properties Ltd v South Bedfordshire District Council* [1986] 2 WLR 937 (CA) at 958–960. See also *Three Meade Street Ltd v Rotorua District Council*, above n 23, at [50].

157 We adopt this term merely as convenient shorthand. See [179] above.

158 *Wellington District Law Society v Price Waterhouse* [2002] 2 NZLR 767 (CA) at [74] quoted in *The Grange*, above n 14, at [182].

inquiry by examining first whether the complex statutory structure was sufficient to give rise to a duty, concluding that inquiry in the negative.[159] This case is different in that we accept s 43(3) effectively deems a relationship of proximity in the general sense. Mr Ring emphasised the Chief Justice's statement in *Spencer on Byron* that a code compliance certificate is a council's assurance of the owner's compliance with the building code and the conditions of consent; where that assurance fails, "the owner is entitled to look to the Council for his loss".[160]

[187] But that authoritative statement was, we emphasise, made within the general reliance context and does not answer the critical question of whether in the circumstances of this particular relationship, where specific reliance is in issue, the certificate was issued to protect the Trust against the harm which it later suffered, or whether it was entitled to rely on the certificate to protect itself against the negligence of its agents. We accept that the Council negligently certified to the Trust on 20 November 2000 its satisfaction on reasonable grounds that the remedial building work for amendment 1 complied with the building code. On its face, as Mr Ring emphasised, the document certified to the Trust the Council's assurance of compliance. But that factor of itself is not enough to justify imposing a duty of care. The statutory proximity must be sufficient in the particular circumstances to give rise to a special relationship of the type alleged.

[188] *The Grange* and the Supreme Court's later decision in *Carter Holt* affirm the elements of that special relationship:[161] it must be of such a nature that (a) the Council knows inferentially that the Trust will use the certificate for the purpose of satisfying itself that the stadium complied with the code; (b) the certificate would likely be acted upon by the Trust for that purpose without independent inquiry; and (c) the Trust must in fact have acted in that way. The test is whether it was objectively reasonable for the Trust to rely on the certificate as it now says it did.[162] As we have foreshadowed, the question is whether the statutory duty assumed by the Council under s 43(3) extended to avoid causing the Trust damage of the kind which

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159 *The Grange*, above n 14, at [170]–[186] per Blanchard, McGrath and William Young JJ.

160 *Spencer on Byron,* above n 2, at [14] per Elias CJ.

161 *Carter Holt Harvey v Minister of Education*, above n 14, at [80] applying *The Grange*, above n 14, at [189] and *Caparo Industries plc v Dickman*, above n 14, at 638.

162 Compare *The Grange*, above n 14, at [190]–[196] per Blanchard, McGrath and William Young JJ and see [220] per Tipping J.

it has sustained. Or, to put it another way, what was the scope of the duty embraced by s 43(3)?

[189] To answer the latter question first, the purpose of a code compliance certificate is beyond doubt.[163] It is notice to all interested parties — including the owner — of the Council's reasonable satisfaction that the building has been constructed in accordance with the building code, reflecting a territorial authority's ultimate control over the building process. Its primary objective is to protect the health and safety of those who use the certified building. It also exists for the secondary purpose of protecting financial interests, particularly subsequent and prospective owners, insurers and financiers. The logic for extending an actionable duty to both physical and economic categories is that in neither situation will such parties have any control over the construction process nor any means of protecting their interests.

[190] However, that rationale does not extend to protecting the economic interests of a commissioning owner which has chosen to protect itself against physical damage and economic loss by engaging professional advisers and contractors. The Trust's engineer designed the remedial work which its specialist contractor was engaged to carry out. The Trust employed another engineer to oversee the work and authorised him to confirm to the Council the Trust's satisfaction of the building consent conditions, including provision of a PS4 to be accepted by the Council pursuant to s 43(8). By engaging these third parties, the owner has assumed direct control over the design and construction functions. Control is the effective corollary of reliance; the owner relies for all intents and purposes on those whom it appoints to control the construction process.

[191] Mr Ring sought to counter Mr Heaney's emphasis on this point by reference to the Supreme Court's decision in *Sunset Terraces*: in giving judgment for the majority, Tipping J affirmed that the likelihood of an owner's engagement of building professionals did not negate the existence of a duty of care where general reliance was in issue.[164] However, the context of that observation — in yet another

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163 See *Spencer on Byron*, above n 2, at [187] and [222] per McGrath and Chambers JJ.

164 *Sunset Terraces*, above n 15, at [50]–[51].

Supreme Court decision on an application to strike out — was the protection of purchasers who would place general reliance on the Council's independent inspection role. It was not aimed at situations in which a commissioning owner seeks damages in circumstances where it was clearly not relying on the Council to protect it against the claimed loss. In a negligent misstatement case, which has proceeded to trial and on which evidence has been heard, the proper inquiry is whether it was reasonable and foreseeable that the other party would rely and whether there was in fact specific reliance.[165]

[192] The Trust knew the Council was not continuously present on site. Its agents controlled the day-to-day performance and oversight of the remedial work. It knew that the Council relied largely on its agents' advice about the nature and quality of that work. The Council cannot be taken to have understood that the Trust would either use the certificate for satisfying itself that the stadium complied with the code or act upon it for the alleged purpose without independent inquiry. In negligent misstatement terms, it was objectively unreasonable for the Trust to rely on the certificate for the purpose it now seeks. Moreover, as the evidence discloses, the Trust itself continued through its agents to participate in an ongoing process designed to satisfy outstanding compliance issues after the certificate had been issued.

[193] Blanchard J made the same point in *The Grange*: within the traditional two-stage inquiry, he described the concept of proximity as a means of identifying whether the defendant was someone most appropriately placed to take care to avoid the plaintiff's loss.[166] By engaging specialist agents, the Trust was the party most appropriately placed for this purpose. As Richardson J had earlier highlighted in this Court, a balance is required between the plaintiff's claim for compensation for avoidable harm and the defendant's claim to be protected from an undue burden of legal responsibility.[167] This factor is of particular concern where a finding of liability

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165 *The Grange*, above n 14, at [219]–[220] and [227]–[230] per Tipping J.

166 At [158] paraphrasing Stephen Todd (ed) *Law of Torts in New Zealand* (5th ed, Brookers, Wellington, 2009) at 143.

167 *Fleming v Securities Commission* [1995] 2 NZLR 514 (CA) at 532 and *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd*, above n 56, at 306.

will create disproportion between the defendant's negligence and the plaintiff's form of loss.[168]

[194] This case starkly illustrates the possible extent of such disproportionality. For an entitlement to charge relatively nominal fees, the Council has been visited with liability for more than $16 million. The effect of the High Court judgment is that the Council has warranted or underwritten the cost of remedying the damage created by the negligence of the Trust's agents. In *Spencer on Byron* the majority rejected arguments about economic consequences when deciding that a duty of care was arguably owed in general negligence to all owners.[169] In the defining context of a strike-out application, it did not accept that owners of commercial property should be barred from recovery for the reason that they were likely to be able to guard against the adverse financial consequences of a third party's negligence.

[195] However, that approach must yield where the evidence given at trial establishes that the commissioning owner entered into contracts with its agents for the very purpose of guarding itself against these adverse consequences by what it considered was an appropriate allocation of risk to those who should accept responsibility for it. Mr Ring emphasised Dunningham J's finding that the Trust was comprised of volunteers, was reliant on grants and donations and was thus a more deserving candidate for a duty than a commercial building owner carrying losses associated with defective construction as a business risk.[170] While that statement is true, it cannot be advanced as a proposition of vulnerability. The Trust's current chairman, Acton Smith, who had been a trustee since 1996, deposed that the trustees were community and business leaders — representatives from banks, retail, local government and the Community Trust of Southland. Mr Smith is himself a prominent and successful business leader. Another trustee was Warwick Cambridge, a leading commercial lawyer in Invercargill. The Trust also had access to independent legal advice. With the benefit of this relatively sophisticated

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168 *The Grange*, above n 14, at [159] per Blanchard, McGrath and William Young JJ.

169 *Spencer on Byron*, above n 2, at [187]–[195] and [202]–[204] per McGrath and Chambers JJ but contrast [302]–[304] per William Young J (dissenting).

170 High Court judgment, above n 1, at [98]–[99].

governance, the Trust was a party to complex construction agreements with its agents for the purpose, among other things, of allocating risk.[171]

[196] It is not in dispute that the Trust had and exercised rights of recourse against its engineer. It had similar rights against the contractor and, in all likelihood, the architect. It was in a position to require the engineer and other parties to carry sufficient insurance cover to indemnify them against the full extent of their liabilities. It was also able to buy material damage insurance. The Trust would, of course, have had to pay for this cover. The premiums would have been substantial, reflecting the risks associated with a complex construction project. But if the Trust has failed to protect itself in this way, the consequences should not be transferred to the Council and its ratepayers.

[197] In our judgment the Trust has, with the benefit of hindsight, sought to reallocate the risk of its major project to the Council. The Trust is the party primarily responsible for the damage, which should bear the financial consequences. That is a powerful ground, whether in the proximity or policy inquiry, for rejecting the claim.

[198] When all those factors are considered together, the requirement of proximity is not established here. While the damage may have been foreseeable to the Council, foreseeability is no more than a screening process and does not answer the more difficult question of whether there was a special relationship, one which was sufficiently proximate to justify imposition of a duty.[172] We are not satisfied that such a relationship existed here.

Reliance

[199] If the Council did owe a duty of care of the type pleaded, we are not satisfied that the Trust has proved specific reliance on the certificate. The factual narrative establishes that it was throughout indifferent to whether a final certificate was issued or not. It elected to open the stadium to the general public without obtaining a code compliance certificate for the remedial work. The terms of the building consent for

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171 *The Grange*, above n 14, at [180] per Blanchard, McGrath and William Young JJ.
172 At [158] per Blanchard, McGrath and William Young JJ.

amendment 1 remained unsatisfied. If the Trust was indifferent to the primary purpose of building safety, it is implausible to assert that it relied on the certificate for an extraordinary or ancillary purpose.

[200] The evidence shows that the Trust's primary, indeed sole, reliance was placed in its own experts — its architect, engineer and contractors – whom it entrusted to carry out and control all the work. The Trust did not rely on the Council for anything material when it decided to open the stadium for public use on 25 March 2000 other than for the interim certificates, which expressly did not certify compliance with the building consent for the relevant remedial work.

[201] Mr Ring emphasised that the remedial work warranted special attention. That was because the Council was putting its trust for the proper completion in the hands of the person whose mistakes made the remedial work necessary, despite further doubts about his construction monitoring which prompted letters of reassurance. His submission rather exposes the irony in the Trust's position which itself elected to place primary reliance on Mr Major for the same purpose — even though his preceding negligence had already caused the Trust considerable cost and inconvenience. And the Trust alone made the decision not to engage Mr Harris to oversee the remedial works, despite his unquestioned expertise.

[202] Mr Ring also emphasised Mr Smith's evidence. He was apparently involved throughout the construction process. He confirmed the trustees' concern following discovery in late 1999 of Mr Major's defective engineering design. Mr Smith said this in his brief of evidence:

> 20. The trustees wanted an assurance from Mr McCulloch and Mr Major that the current structure had integrity, was safe, complied with acceptable design standards, and would remain intact for the expected life of the building. We also asked that an independent engineer certify that the structure, following the remedial action, would be sound, would comply with acceptable design standards and could be safely accepted by the trustees. I suggested that Mr McCulloch engage Maurice Harris as I had used him previously on an unrelated job and thought he did good work.

[203] Mr Smith's evidence detailed the steps taken by the Trust to ensure the necessary remedial work on the trusses was properly designed, constructed and overseen by its own agents. Mr Smith said:

> 34. From the Trust's perspective, we were concerned to ensure that the appropriate regulatory and expert approval was given to the work and was delivered. From my point of view I was satisfied that Harris' review had been thorough, that he had peer reviewed the design of the truss modification and found it satisfactory, and that his and Mr Major's certificates were conclusive on that point. Similarly, the Council certified that the construction, including the community court trusses, complied with the New Zealand building code and sent this to the Trust. I, and the other trustees, had no reason to look behind those certificates and assurances, and we believe that we had a stadium which had been properly designed and constructed.

[204] Mr Smith referred to the stadium's opening on 25 March 2000 and his assumption that it was accordingly ready and able for use given the Trust's receipt from the Council of 10 interim code compliance certificates relating to various discrete aspects of the code, as well as a building statement of fitness. He concluded by noting that:

> 37. … *We were at all times reliant on the advice we received from the contractors and advisers we engaged.* When we received the appropriate assurances and certificates from those experts and from the Council, we relied on them as establishing that the building had been properly constructed. That was especially so because of the scrutiny I knew had been brought to bear on the original design mistakes. Accordingly, when the stadium opened, I believe that the stadium was sound, safe, and compliant with the relevant conditions.
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> (Our emphasis.)

[205] In our judgment Mr Smith's evidence is significant in confirming the Trust's election to open formally and immediately begin using the stadium on 25 March 2000 without obtaining certification for the defective trusses. His evidence confirms that the Trust had engaged the steel fabricator to ensure the remedial work was expertly carried out, as well as Mr Major (who was responsible for issuing the PS4) to inspect the work, ensure compliance with Mr Harris' remedial design and confirm completion to the Council accordingly. But it decided to open and operate without certificates from the Council for the relevant remedial works. The Trust cannot plausibly assert that it relied on the certificate for the particular purpose of protection from the financial consequences of defects at the time the stadium was opened.

[206] The evidence supports these additional findings on reliance:

(a) The Trust and its agents were indifferent throughout to compliance with its obligations under the certification process. In particular, after the Council issued the interim certificate of code compliance with the conditions of consent for building work other than the remedial work on 24 March 2000, the Trust lost interest in obtaining the Council's final certification for amendment 1. The Trust opened and operated the stadium as a public facility for at least six months without obtaining the relevant certificate of code compliance and was apparently content to treat the interim certification process, which excluded the remedial work, as sufficient for its purposes. The Trust took no steps to satisfy the Council's requisitions subsequent to 25 March 2000. Instead, it was the Council which in fact continually reminded the Trust of its failure to comply. The Trust's request for a final certificate was simply generated by its desire to satisfy liquor licensing purposes.

(b) The Trust and the Council did not treat what purported to be the final certificate as final in fact. Both parties treated it as a further interim or pro forma step. The Trust knew of its continuing failure to comply with the conditions of the building consent despite the certificate being issued. And we infer that it did not rely on the document in any meaningful way. The Trust then followed the same desultory practices as before. Contrary to its pleaded case, we are satisfied that the Trust did not place any actionable reliance on the certificate but simply treated it as an immaterial part of a technical continuum.

(c) When applying for the certificate on 1 March 2000, the Trust had wrongly advised that the building work had been completed "to the extent required by [the] building consent … [for the remedial work]". Not only was the work not completed to that standard (as the subsequent collapse proved) but the Trust also knew that it had failed continually to satisfy the conditions of consent, including Mr Major's

obligation to confirm the precamber alignment and provide a PS4 for the remedial work.

[207] Together these findings of fact lead us to the conclusion that the Trust did not rely in fact on the Council's certificate for the purpose of avoiding financial loss resulting from the building defects caused by its agents' negligence.

Contributory negligence, indemnity and betterment

[208] We add two points on contributory negligence. First, it is surprising that the Council did not plead a defence of contributory negligence relating to the Trust's claim based on its provision of the certificate. In the event that the Council was held to owe a duty of care to the Trust, it would have been entitled to argue that the Trust contributed substantially to its own damage through its agent's negligence — their fault was attributable to the Trust on the principles we have earlier discussed. In terms of causal potency and relative blameworthiness, which engage the same factors which we have addressed within our duty and reliance analysis, the Trust would have been exposed to a contribution finding in excess of 50 per cent.

[209] Second, we agree with Miller J for the reasons he gives that, if the Council was liable, an award of damages should be reduced by 50 per cent on account of the Trust's contributory negligence to its own damage in 2006.[173]

[210] Finally, in the event that we are wrong on liability, we agree with Miller J that the Council's claim to contractual indemnity is unsustainable and that the Trust's cross-appeal against Dunningham J's allowance for betterment should be dismissed.[174]

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173 See [140] above.
174 See [141]–[157] above.

Result

[211] For these reasons we agree that the appeal and cross-appeal should be determined as set out in the judgment of Miller J with the consequences he has described.[175]

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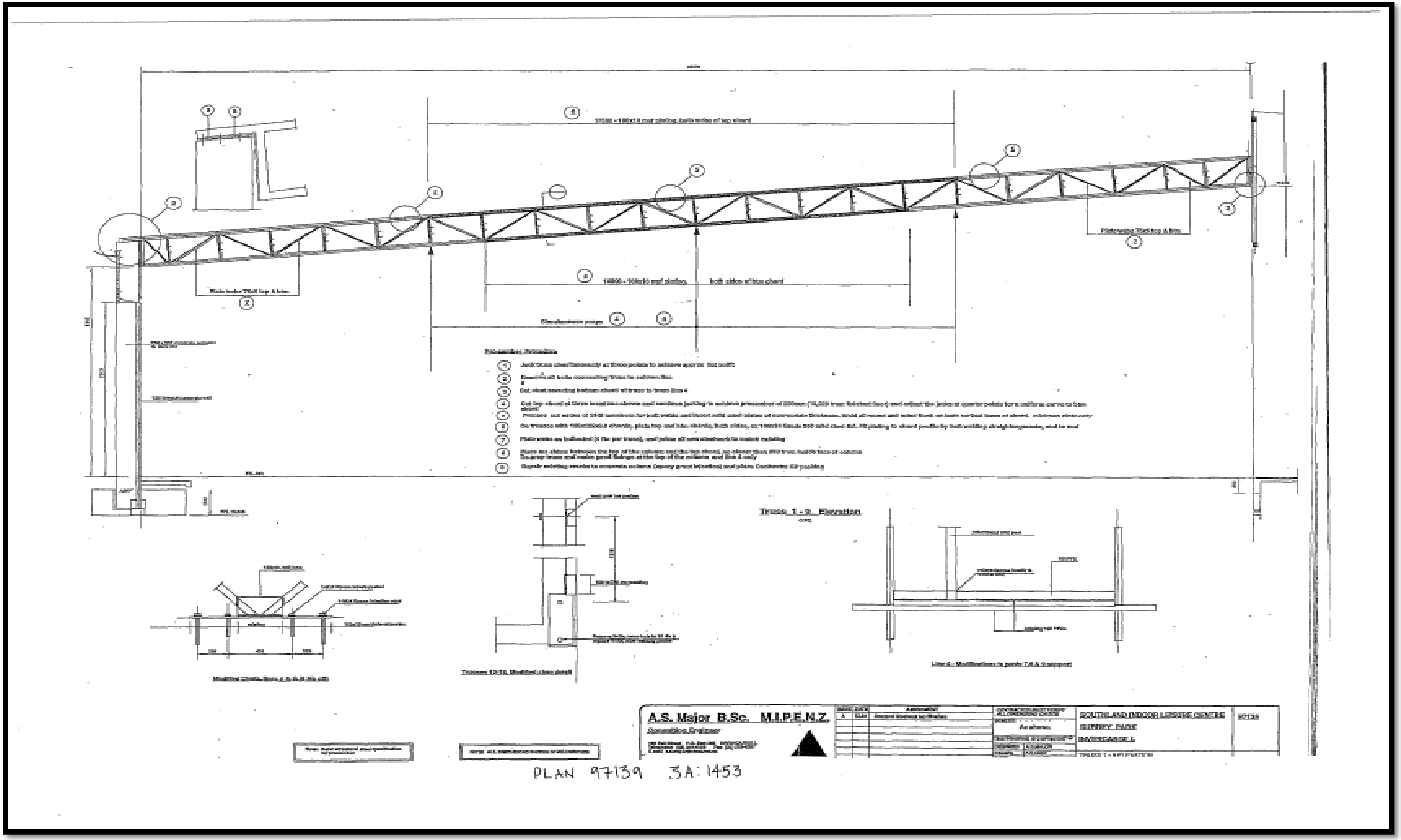
[175] See [158]–[160] above.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