IN THE SUPREME COURT OF NEW ZEALAND

SC37/2017
[2017] NZSC 190

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

Hearing:	10 and 11 August 2017
Court:	Elias CJ, William Young, Glazebrook, O'Regan and Ellen France JJ
Counsel:	M G Ring QC, C J Jamieson and D R Weatherley for Appellant D J Heaney QC and K B Dillon for Respondent
Judgment:	14 December 2017

JUDGMENT OF THE COURT

A **The appeal is allowed in part.**

B **The finding made in the High Court upholding the appellant's claim against the respondent is restored. The finding of the Court of Appeal that the appellant was contributorily negligent and that an award of damages should be reduced by 50 per cent is upheld. Judgment is entered accordingly. Leave is reserved to the parties to apply if any issues arise about the calculation of the judgment sum (including interest).**

C **The respondent must pay the appellant costs of $15,000 and reasonable disbursements to be determined by the Registrar if necessary. We allow for second counsel.**

D **The costs awards made in the Court of Appeal and in the High Court are set aside. If costs in those Courts cannot be agreed they should be set by the Court of Appeal and the High Court respectively in light of this judgment.**

REASONS

ELIAS CJ, O'REGAN AND ELLEN FRANCE JJ
(Given by Ellen France J)

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Introduction

[1] In 1999–2000 the appellant, the Southland Indoor Leisure Centre Charitable Trust (the Trust), had a stadium built in Invercargill to provide indoor sporting and recreational facilities for the Southland community. As constructed, the Southland Stadium comprised a foyer, amenities area and squash courts, two main events courts and five community courts.

[2] Problems were identified during construction with the roof over the community courts. Remedial work had to be undertaken in 2000 on the roof. Unfortunately, that work was defective with the result that on 18 September 2010 the roof collapsed under the weight of a snowstorm. Fortuitously, those in the stadium at the time escaped unharmed. A new and improved complex has been built to replace the collapsed building.

[3] The Trust subsequently brought proceedings against the respondent, the Invercargill City Council (the Council), in negligence and negligent misstatement in relation to the remedial work on the stadium. The Trust was successful in the High Court.[1] Dunningham J said that whether a duty of care was owed by the Council to the Trust was governed by this Court's decision in *Body Corporate No 207624 v North Shore City Council* (*Spencer on Byron*).[2] On this basis the Judge concluded the Council owed a duty of care to the Trust when issuing the code compliance certificate on 20 November 2000.[3] Dunningham J found that the Council was negligent in this respect[4] and that this negligence was causative of the loss.[5] In addition, there was a finding that the Trust was not contributorily negligent.[6] The Trust was awarded the sum of $15,126,665.35 reflecting the agreed cost of rebuilding less $750,000 for betterment.[7]

[4] The Council appealed successfully to the Court of Appeal.[8] In setting aside the High Court judgment, the Court of Appeal distinguished *Spencer on Byron*.[9] The Court unanimously found that the only possible basis for a claim was in negligent misstatement. That was because the only claim brought within time was that based

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1 *Southland Indoor Leisure Centre Charitable Trust v Invercargill City Council* [2015] NZHC 1983 (Dunningham J) [*Southland Leisure* (HC)].

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

3 *Southland Leisure* (HC), above n 1, at [94]–[99].

4 At [113]–[124].

5 At [139]–[148].

6 At [167]–[172].

7 The total judgment sum was $16,998,225.66 which included $85,826 for agreed loss of rental income and $2,035,764.31 in interest at five per cent per annum. That final judgment sum was less a negotiated $1,000,000 contribution from Mr Major: *Southland Leisure* (HC), above n 1, at [238].

8 *Invercargill City Council v Southland Indoor Leisure Centre Charitable Trust* [2017] NZCA 68, [2017] 2 NZLR 650 (Harrison, Miller and Cooper JJ) [*Southland Leisure* (CA)].

9 *Spencer on Byron*, above n 2.

on the negligent certificate of code compliance.[10] Harrison and Cooper JJ (in a judgment given by Harrison J) held there was no duty of care where the defects causing the collapse of the stadium were the result of the negligence of the Trust's agents, that is, the architect, engineer and builders, engaged by the Trust to construct the building.[11] Miller J said the Council owed a narrow duty, namely, to check that a suitably qualified person had provided "adequate evidence that the consent conditions had been met".[12] The Court of Appeal was unanimous that the cause of action in negligent misstatement failed for lack of specific reliance.[13] Finally, the Court would have found the Trust's actions in 2006 when it sought engineering advice on the roof amounted to contributory negligence.[14]

[5] Leave to appeal to this Court was granted on the question of whether the Court of Appeal was correct to reverse the High Court judgment.[15] The principal issue arising is whether the Court of Appeal was right to distinguish this case from the decision in *Spencer on Byron*.[16] That question also requires consideration of whether the Court of Appeal was right to characterise the claim based on the certificate of code compliance as a claim of negligent misstatement. The other principal issue arising on the appeal is whether the Trust's actions amounted to contributory negligence.

[6] We discuss these issues after setting out the background.

Background

[7] There is no dispute about the narrative of events leading to the collapse of the roof. The details are set out in the judgments in the High Court[17] and the Court of

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10 *Southland Leisure*, above n 8, at [72] per Miller J and at [164] per Harrison J (delivering the judgment of Harrison and Cooper JJ).
11 At [177]–[185].
12 At [98].
13 At [111]–[117] per Miller J and at [199]–[207] per Harrison J.
14 At [136]–[140] per Miller J and at [208]–[209] per Harrison J.
15 *Southland Indoor Leisure Centre Charitable Trust v Invercargill City Council* [2017] NZSC 81.
16 It was not argued the Court should re-visit *Spencer on Byron*, above n 2.
17 *Southland Leisure* (HC), above n 1, at [8]–[57]. Dunningham J also discusses the aftermath to the collapse: at [58]–[73].

Appeal.[18] We draw extensively on those descriptions in this summary of the factual background which follows.

The factual narrative

[8] Six community organisations, including the Council, decided to build a stadium.[19] They decided to establish the Trust to plan, build and run the stadium. Each of the organisations appointed a trustee and the trustees could choose up to six more trustees as they thought necessary to address the need for additional expertise and so on. The trustees were unpaid volunteers.

[9] The Council owned the land in Tay Street, Invercargill, on which the stadium was to be built. Under the project agreement between the Council and the Trust, the Council agreed to lease the land and to contribute to the project by undertaking the infrastructure and roading for entry into the stadium. The Trust agreed to build and operate the stadium.

[10] There were three phases of the project for which some detail is necessary.

The initial construction phase

[11] The initial phase began with the construction in June 1999. The Trust engaged the architect, McCulloch Architects Ltd; the engineer, Anthony Major; and the builder, Amalgamated Builders Ltd, to undertake the work required.

[12] Over the period of construction from June 1999 to the opening of the building on 25 March 2000, the Council issued building consents for various phases of the work. There were a number of inspections by the Council and a number of code compliance certificates issued. As part of this process, the Council relied on producer statements provided by the engineer, Mr Major.[20] Under the Building Act 1991 (the 1991 Act), a producer statement was a statement provided by an applicant for a building consent, or by a person who had been granted a building consent, that

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18 *Southland Leisure* (CA), above n 8, at [10]–[46] per Miller J and at [168]–[172] per Harrison J.

19 The other organisations were the Invercargill Licensing Trust, the Southland District Council, the Community Trust of Southland, the Southland Building Society, and Sport Southland.

20 Provision was made under s 43(8) of the Building Act 1991 for a local authority to rely on a producer statement when issuing a code compliance certificate.

certain work had been or would be done in accordance with particular technical specifications.[21]

[13] As Dunningham J records, the stadium as initially constructed "was a large, generally rectangular building".[22] The foyer, amenities area, squash courts and two large events courts were on one side. The five, smaller, community courts were on the other side of the building. The roof of the community courts had "a long span and a shallow pitch".[23] Welded steel trusses supported the roof across its span.

The first phase of remedial work

[14] While the stadium was being built, a Council inspector saw that several of the steel trusses in the roof over the community courts were sagging. Both the Trust and the Council were concerned. As part of the response, an independent structural engineer, Maurice Harris of Harris Consulting Ltd, was asked by the Trust to review the design.

[15] In his report of December 1999, Mr Harris identified an error by Mr Major in calculating loads on the trusses. This meant six of the trusses in the roof over the community courts had been designed for about half of the live load, that is, "the load in use, affected by wind and other environmental conditions".[24] There were other issues as well.[25]

[16] Mr Harris outlined in his report how the problems should be remedied. Miller J summarises the key proposals in this way:

> [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

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21 Section 2.
22 *Southland Leisure* (HC), above n 1, at [13].
23 *Southland Leisure* (CA), above n 8, at [15] per Miller J.
24 At [18].
25 The precast columns were designed for lighter loads and a lighter gauge than was designed was used in some of the chords ("the square steel beams along the top and bottom of the trusses"): *Southland Leisure* (CA), above n 8, at [18] per Miller J.

> 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.[26]

[17] The Council was also involved, advising the architect that a building consent amendment was necessary and that it must include a producer statement addressing the cause of the problem and rectification and including a peer reviewer's comments. An explanation was also sought by the Council from Mr Major along with an indication the Council might review its response to his producer statements. Mr Major responded. He accepted mistakes were made and he set out how the remedial work would resolve them. Mr Major also responded to a request from the Council that he give assurances about his procedures for quality control.

[18] On 7 January 2000, the Trust sought a building consent for the remedial work. The application attached a letter from Mr Harris of 4 January 2000 setting out how the work was to be done. There was also a producer statement from Mr Major, a PS1 which certified that the design complied with the relevant parts of the Building Code, and a PS2 from Mr Harris. The PS2 is a producer statement – design review. The PS2 was treated as a peer review. A building consent was issued. It is not suggested that issuing the building consent was negligent and nor that there was any problem with the design of the work to be undertaken.

[19] The terms of the consent required that Mr Major provide written confirmation that the precamber measurements on the community courts trusses matched those in the letter of 4 January 2000 from Mr Harris as well as a record of the individual truss measurements. Mr Major was also required to provide a PS4 – producer statement construction review – for the remedial work.

[20] The remedial work was undertaken in early 2000. There was no inspection by the Council. Rather, the Council relied on Mr Major to inspect and then certify as

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26 Graeme Coles, an engineer who gave evidence on behalf of the Trust, defined the "precamber" as "the distance that an engineer specifies that the mid span of a beam must be higher than its ends which gives a slightly arched profile. The pre-camber is built into the beam during fabrication. … the pre-camber reduces the amount the beam sags under the dead load".

required by the consent. Providing a PS4 required Mr Major to inspect the work. He did not do so. He also failed to provide both the PS4 and the truss measurements.

[21] As Miller J notes, the work was not in fact done in the way Mr Harris anticipated or in terms of the conditions of consent:[27]

> 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.

[22] The Council followed up with Mr McCulloch, the architect, in February 2000 in respect of the PS4, but there was no response. There was a final inspection of the last of the works on the stadium and then an interim code compliance certificate was issued. There were a number of outstanding issues noted in the interim certificate but none of them included the remedial work. The stadium was opened on 25 March 2000.

[23] The Council followed up again on the PS4 and the truss measurements with Mr McCulloch in October 2000 so that a final code compliance certificate could be issued. However, on 20 November 2000, before receiving the PS4, the Council issued a code compliance certificate for the remedial work. It is not disputed this was negligent because the Council did not know if the work did comply with the Code. It transpired at trial a clerk had issued the code compliance certificate without any reference (as would have been expected) to Simon Tonkin, the Council's chief building inspector.

[24] On 22 January 2001, Mr Major eventually provided a PS4 which said the changes had been "generally" constructed in accordance with the relevant drawings and associated specifications. He also gave the Council a letter setting out how the remedial work had been undertaken. The letter did not say that the precamber for the six trusses over the community courts was consistent with the letter from Mr Harris of 4 January 2000. What was said, as Miller J explained, was that:[28]

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27 *Southland Leisure* (CA), above n 8, at [27].
28 At [32].

> … measurements were taken to ensure the induced initial precamber was the same for truss one, with a visual check to ensure that the result was acceptable once the trusses were welded and the props removed.

[25] Mr Tonkin went back to Mr Major saying he was to confirm the trusses' precamber matched that in the letter from Mr Harris. He also noted the individual truss measurements were to be included. Mr Major did not re-submit his PS4 as he was asked. Mr Tonkin wrote to Mr Major on 23 July 2001 asking for the "datum heights of the community courts trusses" and then repeated that request on 12 September 2001, after a meeting with Mr Major on 10 September.

[26] On 28 November 2001, the architects provided the Council with a plan by Mr Major showing only the heights from the floor to the trusses.[29] There was no confirmation that the actual precamber measurements matched those in the letter from Mr Harris. There is no dispute that the precamber measurements were not in line with the letter. Only one truss in fact came close to meeting the required precamber.[30]

[27] The Council issued a final code compliance certificate for the last stage of the construction on 9 April 2003.

The investigation of further concerns about the roof

[28] There were ongoing issues with the stadium roof. The roof leaked and it moved considerably, as much as six inches, under wind loads. Graham Jones, an engineer with the Southland District Council, was volunteered by that Council's representative on the Trust to assess the leaks. The Trust also became concerned about the effect of a snowfall on the roof. That concern arose after there was publicity about the collapse of a stadium in Poland under snow.

[29] Advice was again sought from Mr Harris. We will come back later to the advice provided. For now, it is sufficient to note that the Trust took the view it could

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29 As Miller J explained at [33]: "The Judge found that it seemed the very precise requirements of Mr Harris' letter of 4 January 2000 had evolved into a mere request for truss heights" as a basis for checking future deflections.

30 At [35].

rely on Mr Harris' assessment that the design of the roof met the Building Code. Further, repairs undertaken resolved the leaks.

The roof collapses

[30] As has been foreshadowed, the roof collapsed under a snowfall in September 2010. The cause of the collapse is not in dispute. As Miller J explained, the collapse began:[31]

> … with the failure of truss one at the mid-span of the top chord, triggering a collapse sequence on trusses one to five. … the evidence is that but for the missing weld atop the mid-span of truss one the roof would have withstood the snow load.

It was also common ground that if the stadium had been built as it was designed, it should have withstood the snowfall so the collapse was not a result of a failure in design.

[31] The Department of Building and Housing instigated investigations into the collapse. We need only note that following on from the Department's report the Institute of Professional Engineers of New Zealand (IPENZ) brought an "own motion" complaint against Mr Major. Following an investigation, which concluded that issuing the PS4 was "unacceptable" in the circumstances, Mr Major was expelled from membership of IPENZ.[32]

Proceedings are brought

[32] The claim was filed on 19 November 2010. The Trust pleaded negligence in relation to various actions of the Council including issuing the building consent, inspecting the remedial work to the community courts' trusses and issuing a code compliance certificate for that remedial work. There was a further claim in negligent misstatement relating to the issuing of the code compliance certificate on 20 November 2000.

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31 At [42].

32 *Southland Leisure* (HC), above n 1, at [72].

[33] Mr Major was named as the second defendant in the claim. He played no active part in the proceeding.[33] Dunningham J records Mr Major agreed to contribute $1,000,000 to the Trust's claim against him. The Council cross-claimed against him seeking a finding it was entitled to a full indemnity if the Council was found liable.[34]

[34] The Council pleaded that claims relating to actions of the Council prior to 19 November 2000 were time-barred.[35] The Trust accepted that it could only maintain its claim against the Council in respect of the issue of the code compliance certificate on 20 November 2000. It was accepted the Trust could not rely on negligent acts or omissions prior to then.[36]

The judgments below

[35] In terms of the High Court judgment, it is helpful to set out excerpts from the summary of findings from the judgment.

The High Court

[36] Dunningham J summarised her findings as follows:[37]

> A. The Council owed a duty of care to the Trust when issuing the code compliance certificate (CCC) and there are no reasons to distinguish the … decision of the Supreme Court in *Spencer on Byron*, which held that a territorial authority's duties under the Building Act 1991 were owed to both original and subsequent owners "regardless of the nature of the premises".
>
> B. The Council was negligent in issuing a CCC on 20 November 2000, for remedial works to the stadium roof trusses, when it had no information before it on which it could have reasonably concluded the work complied with the building code.
>
> C. The Council's negligence was causative of the loss as there was no subsequent point where the Council could show that it could have properly issued the CCC and yet the damage would still have inevitably occurred. This is primarily because condition 4 of the building consent [the requirement that Mr Major certify as to the

33 At [73].
34 At [73].
35 Building Act 1991, s 91; and Building Act 2004, s 393 (both imposed a ten year limitation period).
36 *Southland Leisure* (HC), above n 1, at [80].
37 At "Summary of Findings".

measurements of the precamber on the six community court trusses] was never satisfied, and a reasonable and prudent Council would have required it to be before a CCC was issued. If it had been satisfied, it is likely that the defects would have been detected.

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

[37] In addition, the Judge concluded that an indemnity in the lease between the Council and the Trust did not apply to indemnify the Council. Dunningham J also found that the agreed sum of the Trust's loss should be discounted by $750,000 by way of betterment. Finally, the Judge determined that GST should not be added to the judgment sum because it was a compensatory payment and should only reflect the Trust's loss.

[38] The Council appealed. The Trust cross-appealed challenging the findings on betterment and as to GST.

The Court of Appeal

[39] In allowing the Council's appeal, Harrison and Cooper JJ took as the starting point the fact that only the claim grounded on the negligent certificate of code compliance was within time.[38] That claim, Harrison J said, must be arguable only as a claim for negligent misstatement under which specific reliance must be proved.[39]

[40] Harrison J stated that this Court's decision in *Spencer on Byron* was not determinative in establishing whether there was a duty of care in this case.[40] He described the present case as "conceptually unique" because it concerned the owner of a building whose contractors were "alone responsible for creating the defects which caused its loss" seeking to recover the full amount of that loss from another party.[41] On this basis, Harrison J said that the decision in *North Shore City Council v Attorney-General* (*The Grange*) in fact provided the closest analogy.[42]

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38 *Southland Leisure* (CA), above n 8, at [164].
39 At [164].
40 At [165].
41 At [173].
42 *North Shore City Council v Attorney-General* [2012] NZSC 49, [2012] 3 NZLR 341 [*The Grange*].

[41] In determining whether it was reasonable to impose a duty of care, Harrison J focused on the role of the Trust's contractors. His Honour said it was not fair or reasonable to impose a duty where the Trust's own contractors had caused the loss. Those contractors, the architect, the engineer and the builder, were not agents in the "orthodox" sense.[43] Nonetheless, Harrison J stated, "different considerations" apply where the Trust, whose loss was caused by those contractors, asserts that the Council owes a duty.[44] The actions of the contractors, and so the loss, were to be attributed to the Trust.[45]

[42] Nor was there the requisite proximity where "a commissioning owner seeks damages … where it was clearly not relying on the Council to protect it against the claimed loss".[46] That factor distinguished the present case from that in this Court's decision in *North Shore City Council v Body Corporate 188529* (*Sunset Terraces*).[47]

[43] In the context of the proximity inquiry, Harrison J accepted the code compliance certificate was "notice to all interested parties", including the Trust, "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".[48] But, Harrison J said, the notion of the Council's control as a rationale for providing protection did not encompass "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".[49]

[44] Although not necessary to decide the matter, Harrison and Cooper JJ also concluded the Trust had not proved specific reliance.[50]

[45] In reaching the view the Council owed a limited duty to check "that an appropriately qualified person had supplied adequate evidence that the consent

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43 At [179].
44 At [179].
45 At [184]–[185].
46 At [191].
47 *North Shore City Council v Body Corporate 188529* [2010] NZSC 158, [2011] 2 NZLR 289 [*Sunset Terraces*].
48 *Southland Leisure* (CA), above n 8, at [189].
49 At [190].
50 At [199]–[207].

conditions had been met", Miller J also distinguished *Spencer on Byron*.[51] He too treated the claim as one in negligent misstatement on the basis the negligence claim was out of time.[52] Further, like Harrison and Cooper JJ, the Judge saw it as a distinguishing feature that other cases did not deal with what the Court described as "commissioning" owners.[53]

[46] Miller J identified a number of other distinguishing factors. First, it was arguable the project agreement between the Council and the Trust qualified or excluded "anticipated or actual reliance and so [affected] any duty of care in negligent misstatement".[54] Second, unlike *Spencer on Byron*, the present case was a negligent misstatement case, requiring specific reliance to be proved.[55] Third, while vulnerability was "discounted" in *Spencer on Byron*, that view was subsequently "cautiously qualified" in *Carter Holt Harvey Ltd v Minister of Education*.[56] Vulnerability was a question of fact and *Carter Holt* "may introduce" a commissioning owner's "control-in-fact" over the particular aspect of construction under the parties' contractual arrangements "as a relevant consideration when considering whether a duty was owed to that owner".[57] Finally, Miller J placed some emphasis on the fact this case involved producer statements. In particular, the Judge considered a PS4 showing code compliance might mean the local authority was not required to inspect the work itself.[58]

[47] Having distinguished *Spencer on Byron*, Miller J addressed whether a duty of care was owed on a "first principles" basis.[59] The Judge considered the various distinguishing factors identified and wider policy considerations and concluded as follows:

> [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

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51 At [98].
52 Miller J said that this Court in *Spencer on Byron* (and *Sunset Terraces*) "assumed that a claim on a code compliance certificate must be brought in negligent misstatement": at [72].
53 At [69].
54 At [70].
55 At [71]–[73].
56 At [74], citing *Carter Holt Harvey Ltd v Minister of Education* [2016] NZSC 95, [2017] 1 NZLR 78.
57 At [77].
58 At [83].
59 At [84].

> 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.

[48] In Miller J's view, the claim relying on a breach of the limited duty identified failed for want of causation. There was no reliance on the code compliance certificate when the Trust decided not to action the recommendations from Mr Harris.[60]

[49] The Judge went on to consider whether the Trust's omission amounted to contributory negligence. Miller J concluded it did and would fix the Trust's contributory negligence at 50 per cent.[61]

[50] All members of the Court agreed that the Trust's cross-appeal against the assessment of betterment should be dismissed.[62] As the parties indicated they hoped to resolve the GST issue, leave was reserved to bring that aspect of the cross-appeal back to the Court.[63]

Is this case distinguishable from *Spencer on Byron?*

[51] For the reasons which follow, we consider that Dunningham J was right that, in terms of whether a duty of care arises, there is no distinction between the present case and *Spencer on Byron*.[64] As there was no distinction to be made, the Judge was correct to conclude there was a duty. Apart from the question of contributory negligence, there is no dispute that if there is a duty of care, it was breached and the breach was causative of the loss. We set out our reasons for our conclusion by considering, first, the case as advanced by the Council in this Court and, secondly, distinguishing factors identified by the Court of Appeal that are not otherwise addressed by our analysis of the Council's arguments.

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60 At [117].
61 At [136]–[140]. Harrison and Cooper JJ agreed with Miller J on this aspect: at [209].
62 At [158].
63 At [159].
64 See above at [36].

The case for the Council

[52] In a case like the present, where the claim that is brought within time relates to the code compliance certificate and not physical inspections carried out by the Council, the principal proposition advanced by the Council is that the Trust, as a commissioning owner, cannot rely on the certificate of code compliance to recover against the Council absent proceeding on the basis of negligent misstatement. In the latter situation, the submission is that specific reliance is necessary.[65] Or, to put it another way, the Council says that the Trust cannot recover in negligence in the present case where there has been no "operational" blunder in the form of a physical inspection by the Council within the limitation period.[66] The Council points to the Trust's control over the building work through its engagement of the various contractors as another factor telling against the imposition of a duty. The Council says the Trust was a commissioning owner and it (or its agents) was responsible for fulfilling the conditions of the building consent underlying the code compliance certificate.

[53] It was also important for the Council's case that the Trust knew, either because it had actual knowledge or by attribution, that the code compliance certificate had been issued without the underlying conditions being complied with. While the Council issued the certificate carelessly, the Trust was aware of that and, in these circumstances, it would not be fair or reasonable to impose a duty of care.[67]

[54] Mr Heaney QC for the Council also relied on other policy and factual matters. In terms of policy considerations Mr Heaney submitted that a risk of not sheeting home responsibility to the commissioning owner was that the commissioning owner may take shortcuts and cut corners safe in the knowledge the ultimate responsibility will fall to the Council. The factual matters on which reliance

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65 It is a little unclear whether the proposition extended to any situation where the owner relied on a code compliance certificate or whether it was confined to the situation where there had been no physical inspections by the Council. On our analysis, any distinction between these two situations is immaterial.

66 As noted, above at [23], the Council accepts that the code compliance certificate was carelessly issued.

67 The case for the Council was put in varying ways so that the extent to which knowledge was an essential part of the case varied. On our approach whether or not knowledge was seen as an essential part of the argument is not relevant. In any event, the evidence about the Trust's knowledge was insufficient.

is placed included the project agreement between the Trust and the Council, under which the Trust agreed to comply with all statutes, regulations and bylaws in carrying out the works, and the fact that there was a PS4 which the Trust's agent had issued.

Discussion

[55] It is helpful to begin by summarising the relevant aspects of the Court's earlier decisions in *Sunset Terraces*[68] and *Spencer on Byron*.[69]

[56] In *Sunset Terraces* the Court was asked to depart from the decision of the Privy Council in *Invercargill City Council v Hamlin*.[70] The Privy Council in *Hamlin* upheld the decision of the Court of Appeal in that case.[71] The Court of Appeal had affirmed the well-settled principle of New Zealand law that councils "were liable to original and subsequent home owners for loss caused by the failure of building inspectors to carry out the inspection functions with reasonable skill and care".[72] This Court in *Sunset Terraces* declined to depart from *Hamlin*, instead affirming that the duty the decision established was sound, a "firmly based principle of New Zealand law", and supported by the relevant policy considerations.[73]

[57] The Court in *Sunset Terraces* said that the *Hamlin* duty was not dependent on factors such as whether the dwelling was stand-alone or part of a block of dwellings. Rather, councils owed a duty of care "in their inspection role, to owners, both original and subsequent, of premises designed to be used as homes".[74] Elias CJ agreed that there was no principled basis to introduce restrictions on liability "according to the form of ownership, the type of residence or the value of the

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68 *Sunset Terraces*, above n 47.
69 *Spencer on Byron*, above n 2.
70 *Invercargill City Council v Hamlin* [1996] 1 NZLR 513 (PC).
71 *Invercargill City Council v Hamlin* [1994] 3 NZLR 513 (CA).
72 *Sunset Terraces*, above n 47, at [17] per Tipping J (for Blanchard, Tipping, McGrath and Anderson JJ). Tipping J noted that the Privy Council "added the explanation that in cases of latent structural defects which a council by negligent inspection had failed to prevent, the owner's loss was not the physical defect in the structure but loss either in the form of diminution of the market value of the property or the cost of repair, if that were reasonably possible": at [17].
73 At [26] per Tipping J. See also at [3] and [6] per Elias CJ.
74 At [51] per Tipping J.

building".[75] The Chief Justice considered that limiting the liability to owner/occupiers was "contrary to the policy of the legislation, which is concerned with protecting all users of buildings".[76]

[58] Tipping J said that the underlying rationale for the duty was the control which councils have over construction projects and the general reliance for which persons:[77]

> … acquiring premises to be used as a home place on the Council to have exercised its independent powers of control and inspection with reasonable skill and care and, in particular, to have exercised with reasonable skill and care its powers of inspection of features that will be covered up.

[59] In *Sunset Terraces* the Court left open the question of whether councils owed a duty of care to present and future owners of commercial buildings and other non-residential premises.[78] That question was answered "yes" in *Spencer on Byron*. The conclusion of the Court, William Young J dissenting, was that councils owe a duty of care in their inspection role to owners, both original and subsequent, regardless of the nature of the premises.[79]

[60] Importantly, for present purposes, *Spencer on Byron* confirmed the importance of the Council's role and responsibilities under the 1991 Act and the emphasis on statutory purpose.[80] The relevance of the statutory basis is apparent from the references to the interlocking regulatory framework,[81] the Council's control over the construction process and associated reliance,[82] and in the reference to the fact that the common law duty of care "marches in step with the statutory functions" Parliament imposed on local authorities and building certifiers.[83] As to the purpose,

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75 At [7].

76 At [7] with reference to the Building Act 1991, s 6(1)(a).

77 At [48].

78 At [9] per Elias CJ and at [51] per Tipping J.

79 At [22] per Elias CJ, at [26] per Tipping J, and at [215]–[216] per Chambers J (for McGrath and Chambers JJ).

80 Miller J observes that the judgments of Tipping J and of McGrath and Chambers JJ rest "primarily on the Council's statutory control of construction processes and building standards": *Southland Leisure* (CA), above n 8, at [59].

81 *Spencer on Byron*, above n 2, at [14], [16] and [17] per Elias CJ.

82 At [35] and [36] per Tipping J.

83 At [71] per Chambers J. See also at [185] and [193]. At [193] Chambers J noted that the obligations in tort, "whether of the inspecting authority or of any supervising architect or engineer, will be limited to the exercise of reasonable care *with a view to ensuring compliance with the building code*" (emphasis added).

that included, but is not limited to, protection of the health and safety of those using the building. The purposes are promoted by ensuring compliance with the building code as a minimum standard.[84]

[61] It is also significant that the Court in both *Sunset Terraces* and *Spencer on Byron* did not consider the involvement of other professionals in the construction process affected the Council's direct duty. In *Sunset Terraces*, Tipping J stated:[85]

> [50] Nor do we find persuasive the Council's argument that councils should not owe a duty of care in cases where professionals such as engineers and architects have been involved. This is not a viable proposition for several reasons. Purchasers are unlikely to know the extent of the instructions upon which the other professionals were engaged. … Fundamentally, the proposed distinction is not consistent with the rationale for the duty which councils owe, being essentially their power of control and the general reliance which is placed on their independent inspection role. The part played by other professionals should not absolve councils from liability; the proper way to reflect their involvement is to require them, if negligent in a relevant way, to bear an appropriate share of the responsibility for the ultimate loss.

[62] The exception from the approach in *Spencer on Byron* and *Sunset Terraces* contended for by the Council is very narrow but it is apparent that, even on that basis, the Council's case cannot sit with the principles emerging from these (and other earlier) authorities. The duty of care on councils under the 1991 Act springs from councils' regulatory role under that Act. That is a different role from commissioning the building work or undertaking the construction. The distinction the Council seeks to draw on the basis that the Trust was a commissioning owner is not one made in the legislative scheme.[86] In this context, as we shall explore further shortly, there is no valid distinction between the issuing of a certificate of code compliance and councils' other functions such as the granting of a building consent

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84 At [15]–[16] per Elias CJ, at [42], [44] and [47]–[48] per Tipping J and at [146] per Chambers J.

85 In *Spencer on Byron*, above n 2, Elias CJ stated at n 33: "the fact that others (such as developers, designers, builders and certifiers) may have primary responsibility does not absolve the Council of its direct duty to the owners … the statutory system is one of checks". See also at [195] per Chambers J, citing *Sunset Terraces*, above n 47, at [8] per Elias CJ and at [50] per Tipping J.

86 The authors of *The Law of Torts in New Zealand* note that the "special position of a building owner who actually commissions the building and who then sues the local authority for negligence in inspecting it needs separate consideration": Stephen Todd (ed) *The Law of Torts in New Zealand* (7th ed, Thomson Reuters, Wellington, 2016) at [6.4.05]. The authors note also that in *Spencer on Byron*, William Young J's approach, which would lay primary responsibility for compliance with the 1991 Act on the defaulting building owner, did not carry the day and "seemingly the first owner's position should continue to be determined on the basis of an assessment of the cause of the harm and of any possible contributory negligence".

or inspections. All of these functions, including the issuing of a code compliance certificate, are directed at ensuring buildings comply with the relevant building code. This means that the duty is not obviated by another party's negligence or knowledge, albeit the 1991 Act imposes obligations on owners, and there may be issues of contributory negligence. Further, as a matter of policy, the actions and knowledge of independent contractors have not been attributed to the owner.

[63] Applying this concept of the duty of the Council, the present case is not a negligent misstatement case and Dunningham J was correct to deal with the case on the basis of the cause of action in negligence.[87] Because of our view this is a negligence case, we do not need to deal with the requirements for negligent misstatement.

[64] In terms of the Council's submission that different principles arise when there is no physical inspection or "operational" blunder, as Mr Heaney put it, in the form of an inspection within the limitation period, it follows from what we have said that there is no distinction in this respect between the issuing of the certificate of code compliance and other functions.[88] These matters are all directed at ensuring compliance with the statutory functions.

[65] In terms of policy considerations, in support of the submission about the risks of not sheeting home responsibility to the commissioning owner, the Council relied on the decision of the House of Lords in *Governors of the Peabody Donation Fund v Sir Lindsay Parkinson & Co Ltd* (*Peabody*).[89] That case dealt with damage

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87 The Court of Appeal was also wrong to treat *Spencer on Byron* as authority for the proposition that a claim based on a code compliance certificate must be brought in negligent misstatement: *Southland Leisure* (CA), above n 8, at [72] per Miller J and at [166] per Harrison J. The primary point being made in *Spencer on Byron* was that while, on the approach of McGrath and Chambers JJ at least, the cause of action in negligent misstatement did not add anything it should not have been struck out: at [49] per Tipping J and at [219]–[222] per Chambers J.

88 For completeness, we note that in *Montgomery v Auckland Council* [2012] NZHC 1732, Associate Judge Bell declined to strike out a claim against Auckland Council in relation to a leaky building where the only action within the 10-year limitation period was the issuing of the code compliance certificate. We note also *Campbell v Auckland City Council* HC Auckland CIV-2009-404-1839, 10 May 2010 at [9]–[10] in which, in the context of a summary judgment application, Associate Judge Christiansen rejected a submission that "general or community reliance on the Council to properly exercise its regulatory functions does not apply to Code Compliance Certificates".

89 *Governors of the Peabody Donation Fund v Sir Lindsay Parkinson & Co Ltd* [1985] AC 228 (HL) [*Peabody*].

arising from an unsatisfactory drainage system constructed as part of a housing development. The owner-developers of the building site had statutory responsibilities to ensure the drains met the design approved by the local authority but had accepted the advice of their architects to install a different design. The House of Lords did not consider it was reasonable or just to impose liability on the local authority in these circumstances.

[66] As Mr Ring QC for the Trust submitted, the decision in *Peabody* pre-dated *Hamlin* and dealt with a different regulatory regime. It is clear from *Sunset Terraces* and *Spencer on Byron* and earlier authorities that although the agents of a commissioning owner, such as the architects in *Peabody*, may be negligent that liability does not absolve councils of liability.[90]

[67] In a similar vein, the Council in this case relied on observations of Tipping J in *The Grange* in which it was held that a third party claim by the North Shore City Council against the Building Industry Authority (BIA) was correctly struck out.[91] The Council's claim in *The Grange* was based on a report the BIA prepared for its responsible Minister, and copied to the Council, which made no recommendations for major changes to the approach taken by various councils, including the North Shore City Council, in relation to council functions concerning building consents and inspections.

[68] Subsequently, the North Shore City Council granted a building consent to a building known as "The Grange". The building was to be built with monolithic cladding over untreated timber. After it was built, the BIA provided another report to the Council, not dissimilar to the first report, but which set out various problems with the Council's operations. It transpired that The Grange was not weathertight. The property owners sued the Council and the Council joined the BIA as a third party. In essence the Council averred that the BIA, despite its special expertise, did

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90 See, for example, *Sunset Terraces*, above n 47, at [8] per Elias CJ and at [50] per Tipping J; *Spencer on Byron*, above n 2, at [195] per Chambers J; *Brown v Heathcote County Council* [1987] 1 NZLR 720 (PC); *Riddell v Porteous* [1999] 1 NZLR 1 (CA) at 6; and *Hamlin*, above n 70. See also *Stieller v Porirua City Council* [1986] 1 NZLR 84 at 93–94 where the Court of Appeal rejected the application of *Peabody* in that case on the basis that the New Zealand building control regime, unlike that in the UK, was not addressed solely to health and safety.

91 *The Grange*, above n 42.

not alert the Council to the problems with the Council's consenting and inspection regimes.

[69] Mr Heaney points to the observation of Tipping J that the Council was in essence claiming the BIA "must contribute to the losses [the Council] has suffered as a result of its own negligence".[92] That comment was made in a different context where the Council was saying that its responsibilities should be shifted to another regulatory body. The point made by Tipping J was that the Council's contention was not reasonable "in view of the legislative scheme".[93]

[70] Nor do we see, as Harrison J suggested, that *The Grange* reflects "the closest" analogy with the present case.[94] As the discussion of Tipping J's observation foreshadows, the approach in *The Grange* reflected the statutory provisions relating to the BIA. Accordingly, Blanchard J (writing for Blanchard, McGrath and William Young JJ) pointed to, amongst other matters, the inability of the BIA to control the operations of the Council and the fact the BIA was not set up to undertake checks on individual buildings.[95] That absence of control is a factor distinguishing the case from the present as is the fact that the majority in *The Grange* characterised the claim as one in negligent misstatement.

[71] We turn then to consider the submission based on the project agreement between the Trust and Council. The Council's submission is that the agreement allocated the responsibility for statutory compliance to the Trust and the Trust essentially seeks to re-allocate the risk. Mr Heaney relies in particular on cl 3.2 of the agreement under which the Trust "agrees that it will comply with all statutes, regulations and bylaws … in carrying out [the] works". The clause continued that, "without limitation", the Trust shall ensure that it complies with the relevant health and safety legislation.

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92 At [227].
93 At [227].
94 *Southland Leisure* (CA), above n 8, at [173] and see above at [40].
95 *The Grange*, above n 42, at [177]–[179].

[72] All that needs to be said on this aspect is that the clause is not sufficient to displace the Council's obligations. The Council cannot, except as permitted by the 1991 Act, contract out of those statutory obligations.[96]

[73] Next, the Council points to the fact it was intended the Council would rely on the PS4, the certificate from Mr Major as the IPENZ certified engineer, that he had supervised the work and that it met the design code B1 for structure and stability.[97]

[74] We can leave for another case consideration of the role of the producer statements including the PS4. That is because, as Dunningham J observed in the present case, the PS4 was not provided until 2001, after the code compliance certificate had been issued, and there was no evidence of reliance by the Council on an "oral" PS4, "or on a promise that a PS4" was coming.[98] Further, the Council did not withdraw the certificate or make further checks when the PS4 was inadequate and the measurements not compliant.

[75] Dunningham J also dealt with the Council's argument that the PS4 was relevant to causation. In particular it was said that, based on the PS4, the Council could have issued the code compliance certificate in 2001 without being found to be negligent meaning the collapse of the roof was not "caused" by the Council's negligence. Dunningham J was satisfied that the Council was negligent in not ensuring full compliance with condition 4 of the building consent (requiring written confirmation as to the precamber measurements) and in not checking the information with which it was provided against the requirements of the letter of 4 January 2000 from Mr Harris about the remedial work. That meant that, even if issued at the later time, the code compliance certificate would have been negligently issued.[99]

[76] That conclusion must be right because, as the Judge said, the precamber measurements were not simply a question of aesthetics but, rather, "a way of checking that the work had been carried out correctly and would perform as

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96 A similar point was made in *Spencer on Byron*, above n 2, at [39]–[40] per Tipping J.
97 See also *Southland Leisure* (CA), above n 8, at [83] per Miller J.
98 *Southland Leisure* (HC), above n 1, at [121].
99 At [146].

expected".[100] Not surprisingly, therefore, Mr Tonkin (the Council's chief building inspector) confirmed this was information he contemplated would be relevant to the decision as to whether to issue a code compliance certificate.[101] Further, at the least, Mr Major's statement in the PS4 that the works were completed "generally" in accordance with the details in the drawings and specifications warranted further inquiry.[102]

[77] This discussion leads into the remaining point in the Council's case we need to address, namely, the submission that the Trust knew that the code compliance certificate was issued without compliance with the conditions in the building consent (the producer statement and precamber measurements). Mr Heaney said that the Trust either had direct knowledge of that fact or knowledge could be attributed through the knowledge of the Trust's agent, Mr McCulloch, the architect who was also managing the stadium project.[103] This aspect of the Council's case fails on the facts.[104]

[78] In terms of direct knowledge, the Council relies primarily on a file note prepared by John Watson, the building code inspector, on 17 January 2001, nearly two months after the code compliance certificate had been issued.[105] That note refers to an on-site inspection with management of the stadium, the Trust and tradespersons. However, the file note does not assist in that at the outset, at least, it suggests an awareness that there are "outstanding requirements which are to be completed *in order to obtain the code compliance certificate*" (emphasis added).[106] Further, while the note stated that a Council representative informed the architects that they were waiting for the producer statements for the community court trusses, there is no evidence that the Trust was told about this in the note. In other words, it

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100 At [145].

101 At [145].

102 Mr Tonkin accepted that this language possibly should have raised a question mark in his mind but it did not at the time. Rather, at the time, he thought that it was acceptable.

103 Knowledge of the lack of the PS4 or the provision of the required measurements cannot be automatically equated to knowledge the building did not in fact comply with the plans.

104 We assume for these purposes that the argument is properly characterised as one of negligence, not contributory negligence.

105 See above at [23].

106 The other correspondence relied on by the Council does not advance the question of the Trust's direct knowledge. John Acton Smith, at the time a trustee and later chairperson of the Trust, said he did not look at the certificate so his evidence also did not assist in terms of the Trust's direct knowledge.

is not clear that the representatives of the Trust present were made aware that the code compliance certificate had been issued prior to compliance with the building consent conditions.

[79] As such, it was not established on the evidence whether at the time the Trust obtained the certificate it knew that there was outstanding material to be provided to meet the requirements of the Council.

[80] As to the submission that knowledge can be attributed through Mr McCulloch, the file note referred to above supports the view that Mr McCulloch was aware of the need for further documentation. He was aware the code compliance certificate had been issued. There is also other correspondence over September and October 2001 which is evidence Mr McCulloch was aware the required information had not been supplied. For example, Mr McCulloch wrote to Mr Tonkin at the Council on 30 October 2001 stating that they were still waiting on dimensions for the datum for the steel trusses.

[81] We do not consider Mr McCulloch's knowledge can be attributed to the Trust. The Council's submission on this aspect was not developed in great detail but, in essence, the argument was that the obligation of the owner undertaking building work is to comply with the Building Act, apply for a building consent and carry out the work in accordance with that consent. In this case, as Mr McCulloch signed on behalf of the Trust for the building consent, it was contended he took on these legal responsibilities on behalf of the Trust, making him their agent.

[82] This argument fails as a matter of policy and on the facts. As to the policy considerations, Mr Heaney relied in this respect on *Peabody* which, for the reasons already discussed, does not assist.[107] The rationale for rejecting the notion the commissioning owner is in a different position is also relevant. In terms of the facts, there is little evidence about the detail of the relationship between Mr McCulloch

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[107] See the discussion of *Peabody* above at [65]–[66]. Reflecting similar policy considerations in a discussion in the context of a builder or architect giving advice to a purchaser as to the soundness of a building, in *O'Hagan v Body Corporate 189855* [2010] NZCA 65, [2010] 3 NZLR 445 the point was made that while the actions of a solicitor in not checking on a Land Information Memorandum will be attributed to a client, the actions of architects and engineers will not: at [99]–[100] per Baragwanath J, at [145] per William Young P, and [190] per Arnold J.

and the Trust, other than that he was acting as a "project manager" and signed off the application for the building consent. But the Council did not point to any evidence about matters such as the extent of Mr McCulloch's relationship with the Trust and of his responsibilities.

[83] In any event, as Mr Ring submitted, by November 2001 the Council was satisfied that the stadium was safe, having by then accepted the measurements provided. That was prior to the collapse in 2010. It would be a little odd if, nonetheless, the Trust was fixed with the earlier knowledge of its agent, the high point of which was that documentation had not been provided to show that the building complied with the plans and the consent.

Other issues

[84] It is necessary to briefly address two other points both of which arise out of the judgments in the Court of Appeal.

[85] First, the Court placed some emphasis on the fact a number of the decisions on the duty of care, including *Spencer on Byron* and *Sunset Terraces*, were decisions on a strike-out.[108] That does not, however, appear relevant to the question of the basis for the duty of care. That basis is the same here, after trial, as it was in *Spencer on Byron* and in *Sunset Terraces*. Or to put it another way, nothing has emerged at trial to alter the position.

[86] Secondly, some reference needs to be made to vulnerability. Miller J suggested that as a result of this Court's judgment in *Carter Holt Harvey Ltd v Minister of Education*[109] "vulnerability is a relevant consideration when deciding whether a duty was owed to a building owner".[110] There is, however, nothing in *Carter Holt* to suggest that the position in relation to the consideration of the Council's liability in the present case has changed. The Court in *Carter Holt* said no distinction had been drawn in *Spencer on Byron* "on the basis that the question of vulnerability must be looked at not in relation to the plaintiff in the case at hand but

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[108] *Southland Leisure* (CA), above n 8, at [66] and [74] per Miller J and at [191] and [194] per Harrison J.

[109] *Carter Holt*, above n 56.

[110] *Southland Leisure* (CA), above n 8, at [75].

in relation to likely plaintiffs as a class".[111] We note also that *Carter Holt* was decided in relation to the Building Act 2004.

Conclusion

[87] The effect of our approach is that the Council's case there was no duty of care must fail and the Court of Appeal was wrong to distinguish *Spencer on Byron*. Essentially the Court took insufficient account of the fact that the duty springs from the Council's regulatory role under the 1991 Act and there is no valid distinction for these purposes between physical inspections and the issuing of a code compliance certificate. The claim should accordingly have been considered as a negligence case and not as one of negligent misstatement. It follows also that the Court of Appeal was not correct to rely on the roles undertaken by the Trust's contractors nor on the notion that commissioning owners are in a different category. The only issue remaining is whether the Trust's actions amounted to contributory negligence.

Contributory negligence

[88] A brief introduction as to how this question arises is helpful.

How the issue of contributory negligence arises

[89] In April 2006 the Trust sought advice from Mr Harris, of Harris Consulting Ltd, in relation to the ongoing issues with leaks in the roof over the community courts. The Trust's request for advice from Mr Harris was also prompted by reports of a stadium in Poland collapsing under a snowfall. In a letter of 9 June 2006 Mr Harris confirmed "that the strength of the trusses over the community courts is adequate to support the design loads specified in the relevant codes when constructed". The advice from Mr Harris included various recommendations, including a recommendation that the truss welds and support fixings should be visually inspected "by a suitably qualified person to determine if there are any signs of deterioration or fatigue".

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[111] *Carter Holt*, above n 56, at [54]. See also Stephen Todd "Personal liability, vicarious liability, non-delegable duties and protecting vulnerable people" (2016) 23 TLJ 105 at n 24.

[90] No visual inspection was undertaken. Dunningham J found that if all of the recommendations in the letter from Mr Harris, including that relating to an inspection, had been followed it was "more probable than not that the deficiencies in the truss welding would be found".[112] However, the Trust's position was that its concern was principally with the design. Mr Harris confirmed there was no issue with design and the repairs undertaken fixed the leaks so that the Trust was reassured nothing further was required. Before us, the focus of the Council's case was that the Trust's omission in this respect amounted to contributory negligence.

The High Court judgment

[91] The High Court found that the Trust's omission did not amount to contributory negligence. Dunningham J considered that it was important that the recommendations to check for deterioration or fatigue of the truss welds and support fixings did not indicate to the Trust that there could be workmanship defects that could cause a collapse.[113] Dunningham J stated:[114]

> It was not unreasonable for the Trust, having worked through the first two recommendations … which appeared to resolve the leaks, to not incur expense on the balance of the recommendations.

[92] And, more significantly, the Judge said that the Trust's associated concerns about the ability to withstand a snowfall were "squarely addressed" in the letter.[115] Dunningham J noted that the Trust was not "alerted to the prospect that the welding-related construction work may have been defectively carried out and wrongly certified by the Council".[116] The Judge saw the omission to undertake a visual inspection for another purpose that, as it happened, would have resulted in it discovering the defects as "no more than a missed opportunity to avoid the occurrence of the loss".[117] Finally, Dunningham J emphasised that there was no qualification in the letter that, in order to be satisfied the roof was safe, it should be checked in any specific way.[118]

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112 *Southland Leisure* (HC), above n 1, at [167].
113 At [167].
114 At [168].
115 At [169].
116 At [169].
117 At [169].
118 At [171].

The Court of Appeal judgment

[93] The Court of Appeal however found that the Trust's failure to follow up on Mr Harris' recommendations amounted to contributory negligence. Miller J took a different view from Dunningham J and found that the Trust was aware that there was a need to inspect the trusses closely.[119]

[94] He considered it was important, first, that the Trust had concerns about the building's structural integrity:[120]

> … as a result of the roof being seen to flex disconcertingly under wind load, that its concerns extended specifically to snow load, that Mr [Acton] Smith told Mr Harris that the Trust was worried about collapse and wanted confirmation that the stadium was safe; and specifically, that Mr [Acton] Smith wanted reassurance that the roof's flexibility under wind load did not signal a structural problem.

Secondly, Miller J noted that at two points in his June letter Mr Harris said that 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 have been checked.[121] On this basis, Miller J found that the Trust was "squarely on notice" of Mr Harris' recommendations and ought to have had an engineer inspect the trusses and welds.[122] This would have revealed the defects and avoided the loss.[123] The Judge said he would fix the Trust's contributory negligence at 50 per cent.[124]

[95] Harrison and Cooper JJ agreed with Miller J for the reasons he gave that, if the Council was liable, the award of damages should be reduced by 50 per cent to reflect the Trust's contributory negligence to its own damage in 2006.[125] Harrison J also suggested the Council could have pleaded contributory negligence on the basis it was arguable "that the Trust contributed substantially to its own damage through

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119 *Southland Leisure* (CA), above n 8, at [113].
120 At [113].
121 At [113].
122 At [139].
123 At [139].
124 At [140].
125 At [209].

its agents' negligence".[126] This approach was open because, it was said, the agents' "fault was attributable to the Trust on the principles … earlier discussed".[127]

The factual narrative

[96] The starting point for present purposes is the meeting of the Trust on 24 March 2006. Graham Jones, the engineer whose assistance was provided to the Trust by the Southland District Council, was present to report on his investigation of the "problem in the main stadium building". The minutes of that meeting record as follows:

> [Mr Jones] advised that the initial problem with sagging and leakage in the community courts roof had been corrected. However, there still remained some leaks from the roof area that needed to be addressed.
>
> [Mr Jones] has reviewed the roof structure and believes some repairs need to be made. He also expressed some concern about the level of flexibility in the roof which has been creating these leaking problems. While the structure does meet all the building code requirements there still remains a problem to be corrected which may involve the installation of temporary/permanent poles to support the roof structure or to strengthen the existing trusses. This work would be done in order to reduce the level of flexibility in the roof.

[97] We interpolate here that in his evidence at trial Mr Jones said the scope of his investigations was solely on the leaks and that in carrying out that work, there was nothing of a structural nature which caused him any concern.

[98] The Board resolved to investigate the matter further. The minutes of the Board meeting of 24 March 2006 record an agreement to refer the matter back to McCulloch Architects with the expectation they would go back to their original consulting engineer "and obtain recommendations on what work 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".

[99] Mr Acton Smith accordingly wrote to Mr Harris on 12 April 2006 asking him to investigate the roof structure of the stadium. The letter explained that Mr Acton Smith and Ray Harper (then the chairperson of the Trust) had been

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126 At [208].
127 At [208].

working on the stadium extension and they had become "increasingly concerned with the movement" in the roof over the community courts. The letter continued:

> 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.

[100] Mr Acton Smith also explained that the engineer, Mr Major, was looking at how the movement could be prevented. However, he said, he and Mr Harper were "more concerned with the loading on the roof through snow and the prevention of any accidents to people using the facilities". He asked Mr Harris to give an "assessment" of the roof "for we want to be certain that the building is totally safe?". Subsequently, at a meeting on 19 May 2006, the Trust noted that Mr Jones had discussed the roof issues with McCulloch Architects. The minutes of that meeting note that while the Board understood that the movement in the roof was at an acceptable level in terms of building code limits, further steps would be taken to reduce the flexibility and that this would "also help to reduce or eliminate the leaks".

[101] Mr Harris responded to the Trust by letter dated 9 June 2006. He said that the roof structure and various details about the roof had been reviewed. The letter noted that the Trust's "concerns and requirements generally include" a number of matters. In particular, Mr Harris noted:

> - A reassurance that the roof structure is able to support the ultimate loads specified in the New Zealand Loading Code NZS 4203. (These specifically include wind and snow loads)
>
> - That the roof is safe.

[102] The letter recorded the figures as to deflections due to live loads, snow loads and wind uplift. Mr Harris said:

> 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*.

> The truss deflections due to wind are within the suggested serviceability limits for deflections as outlined in NZS 4203:1992, the code used when the building was designed.
>
> (emphasis added)

[103] The letter went on to set out Mr Harris' recommendations as to the items to be investigated. These recommended checks included:

> 3) Check that the community court roof trusses have an upward camber at midspan when carrying the roof self weight only.
>
> 4) That a visual inspection of the truss welds and support fixings is carried out by a suitably qualified person to determine if there are any signs of deterioration or fatigue.
>
> 5) That suitable ties or props are installed at midspan of the trusses only if the roof movement is causing a problem with patrons and it is confirmed that maintenance issues are indeed caused by the roof deflections.

[104] Mr Harris confirmed that the "strength of the trusses over the community courts" was "adequate to support the design loads specified in the relevant codes" when built. The letter concluded in this way:

> Once each of our recommendations have been investigated we are happy to review any further work that is thought to be necessary.

[105] Following receipt of the letter from Mr Harris, the Trust's minutes of 2 August 2006 stated that Mr Harris' advice had confirmed that the "flexibility in the roof structure is acceptable but that further work needs to be carried out on improving the flashings and gutters". Finally, in terms of the records, in the Trust Board minutes of 5 September 2006, there was discussion of the expenditure for repairing the roof to "try and eliminate the … leaks".

[106] At trial Mr Acton Smith's evidence was, in essence, that the Board's concerns about the roof structure were alleviated by the June 2006 letter from Mr Harris. Mr Acton Smith maintained that the Trust's concern was principally as to design, not construction. In addition, he said that the repairs undertaken had fixed the leaks and neither Mr McCulloch nor Mr Major had reported back on any other matter. Mr Acton Smith believed that the Trust's "responsibility was discharged

when we gave it to our professional people to conduct the work for us and we relied entirely on their ability to do that".

Submissions

[107] The Council seeks to uphold the decision of the Court of Appeal. It argues the Trust was contributorily negligent in not following up on the recommendations made by Mr Harris. The Council also says the Trust, through its agents, should have followed up on those recommendations.

[108] The arguments for the Trust can be considered under three key propositions. First, the Trust's actions did not amount to contributory negligence because they did not undertake what was an apparently unnecessary inspection of the trusses. Mr Ring submits that the recommendation was made for the purpose of identifying the cause of the leaks. As the leaks were remedied, the recommendations became redundant. Secondly, the Trust adopts the characterisation of Dunningham J, namely, that this was just an opportunity for the occurrence of the loss not a material and substantive cause of the loss. Again, it is submitted that the inspection was for an unrelated purpose and of no merit for that purpose albeit, coincidentally, it would have revealed the defects. Finally, it is submitted that the Trust was reasonably entitled to rely on its investigation team.

Discussion

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

> Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person 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: …[128]

[110] We agree with Miller J that the Trust should have asked an engineer to inspect the trusses and the welds, as recommended by Mr Harris.[129] In not doing so,

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128 "Fault" means "negligence … or other act or omission which gives rise to a liability in tort": Contributory Negligence Act 1947, s 2.

129 *Southland Leisure* (CA), above n 8, at [139].

and in ignoring the recommendation about checking the precamber measurements, the Trust was contributorily negligent.

[111] The primary focus of the Trust may have been on design and the Trust may not have focused on construction. But the Trust clearly was concerned about safety – that was one of the instructions to Mr Harris.[130] Importantly, the reference by Mr Harris to deterioration and fatigue was clearly referable, without the need for further explanation, to a safety concern particularly where the Trust was aware Mr Harris had not himself inspected the trusses and the welds. There was therefore no reassurance from Mr Harris in this respect. This inspection was not therefore unrelated to the Trust's concerns. Added to that, there was the background of ongoing issues over the roof including its movement. Mr Harris' recommendation the precamber should be checked to ensure there was no sag has to be viewed with this factual matrix in mind.

[112] We acknowledge Mr Jones' evidence was that he had no concerns about the structure of the roof.[131] But the material before the Trust did at least advert to this possibility.

[113] Against this background the Trust should have, at least, made some inquiry of its investigative team. It could not, reasonably, rely on its investigative team to have raised any concern in terms of the recommendations.[132] In this respect, the Trust did have control over what work was carried out. The Trust asked for and was given the report from Mr Harris. The failure to make these further inquiries accordingly amounted to contributory negligence.

[114] It is common ground that if the Trust is contributorily negligent, the damages should be reduced by 50 per cent to reflect that contribution.

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130 See above at [99]–[100].

131 Compare *Southland Leisure* (CA), above n 8, at [139] per Miller J.

132 Mr Jones accepted the recommendation to inspect was "worthwhile" following through, although he stated that he did not believe that Mr Harris' fourth recommendation could have been relevant to the leaking issue.

Result and costs

[115] For these reasons, the appeal is allowed in part. The finding made in the High Court upholding the appellant's claim against the respondent is restored. The finding of the Court of Appeal that the appellant was contributorily negligent and that an award of damages should be reduced by 50 per cent is upheld. Judgment is entered accordingly. As we have noted, the judgment sum in the High Court was calculated with a deduction for betterment, an inclusion for rental and interest.[133] We did not hear argument about the calculation of the judgment sum depending on the outcome of the appeal so reserve leave for the parties to apply if any issues arise about the calculation of that sum, including interest.

[116] Costs should follow the event. The appellant has succeeded on the liability issue but not on contributory negligence. The usual costs award should therefore be halved. Accordingly, in this Court, the respondent must pay the appellant costs of $15,000 together with reasonable disbursements to be determined by the Registrar if necessary.[134] We allow for second counsel.

[117] The costs awards made in the Court of Appeal and in the High Court[135] are set aside. If costs in those Courts cannot be agreed they should be set by the Court of Appeal and the High Court respectively in light of this judgment.

WILLIAM YOUNG AND GLAZEBROOK JJ
(Given by William Young J)

[118] We agree with the reasons of the majority, save as to contributory negligence.[136]

[119] In issue is whether the Invercargill City Council (the Council) was contributorily negligent in not acting on engineering advice to check the welds, support fixings and the precamber of the roof trusses over the community courts.

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133 Above at [3] and n 7.
134 A day and a half hearing.
135 *Southland Indoor Charitable Trust v Invercargill City Council* [2016] NZHC 41.
136 See the majority above at [88]–[114].

[120] The background was that there was a persistent problem with water leaking through the roof onto the courts below. This was thought to be associated with flexing of the roof. The minutes of the meeting of the Southland Indoor Leisure Centre Charitable Trust (the Trust) on 24 March 2006 record:

> REPORT ON COMMUNITY COURTS – LEAKING ROOF
>
> Mr Graeme Jones, the Resource Engineer from the Southland District Council, was in attendance to report on his investigation of this problem in the main stadium building.
>
> He advised that the initial problem with sagging and leakage in the community courts roof had been corrected. However, there still remained some leaks from the roof area that needed to be addressed.
>
> He has reviewed the roof structure and believes some repairs need to be made. He also expressed some concern about the level of flexibility in the roof which has been creating these leaking problems. While the structure does meet all the building code requirements there still remains a problem to be corrected which may involve the installation of temporary/permanent poles to support the roof structure or to strengthen the existing trusses. This work would be done in order to reduce the level of flexibility in the roof.
>
> Following a full discussion it was moved that this matter be referred back to McCulloch Architects who designed the original Stadium Southland building. We would expect them to go back to their original Consulting Engineer and obtain recommendations on what work 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.

[121] Soon afterwards, one of the trustees,[137] Mr John Acton Smith, learnt of the collapse of a stadium in Poland which had caused loss of life. He became concerned whether the flexing of the roof might signify a design or building defect which could result in a catastrophic failure. So he wrote to Mr Maurice Harris, a structural engineer, in these terms:

> 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.

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[137] Mr Acton Smith was elected chair at a meeting on 2 August 2006.

> 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?

[122] There followed investigation into the movement of the roof and the extent to which roof movement could be correlated to the leaks. The position as it was at 19 May 2006 was summarised in the minutes of a meeting of the Trust in this way:

> REPORT ON COMMUNITY COURTS ROOF REPAIRS
>
> Since our last meeting Mr Graham Jones has discussed this issue with McCulloch Architects who have since prepared a progress report on the roof investigation. This report was tabled at the meeting which identified some actions to be taken to help correct the leaks and also to determine a method of reducing movement in the roof. We understand that the movement is at an acceptable level and it is not outside of the building code limits expected for a structure of this size.
>
> Trustees discussed this issue at length and agreed that it was now best to request an independent report from [Maurice] Harris of Harris Foster Consulting on the roof movement. It is envisaged that this report will provide some indication of what expenditure, if any, needs to be spent on reducing the flexibility in the roof structure which will also help to reduce or eliminate the water leakage problem that currently exists.
>
> Following a full discussion it was moved that the report be received and the actions taken be confirmed.

[123] Mr Harris' reply letter of 9 June 2006 (accompanied by a report) was relevantly in these terms:

> 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.
>
> The truss deflections due to wind are within the suggested serviceability limits for deflections as outlined in NZS 4203:1992, the code used when the building was designed.
>
> …
>
> We understand that a measurement of the actual roof movement under measured wind speeds have been carried out and that these confirm the calculated deflections for maximum serviceability loads are in the "right order".
>
> The roof movement due to wind should be upward as the roof is at a very low pitch. Obviously, however the roof movement will go up and down as the wind gusts. If this movement is considered disturbing to the building

users then ties could be installed as suggested by A S Major to reduce the roof deflections.

If these ties were installed they would need to be designed to resist the full design wind load. We have had a preliminary look at the footing required and in order to resist the uplift load, the footing/pile would be quite significant.

At this stage, we would recommend that the following items are investigated.

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 problems.

2) Confirm 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 midspan when carrying the roof self weight only.

4) That a visual inspection of the truss welds and support fixings is carried out by a suitably qualified person to determine if there are any signs of deterioration or fatigue.

5) That suitable ties or props are installed at midspan of the trusses only if the roof movement is causing a problem with patrons and it is confirmed that maintenance issues are indeed caused by the roof deflections.

6) That thermal effects on the roofing are checked to ensure these are not contributing to the maintenance issues.

At this stage we confirm that the strength of the trusses over the community courts is adequate to support the design loads specified in the relevant codes when constructed.

We have also had a look at the loads specified in AS/NZS 1170 the loading code now being used. The loading changes for both wind and snow are not critical.

Once each of our recommendations have been investigated we are happy to review any further work that is thought to be necessary.

[124] Recommendations 3 and 4 were not implemented. The finding of Dunningham J in the High Court was that, had they been implemented, it is more probable than not that the defects in the trusses which resulted in the collapse would have been detected.[138] Remedial work could then have been carried out and the roof would not have collapsed.

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[138] *Southland Indoor Leisure Centre Charitable Trust v Invercargill City Council* [2015] NZHC 1983 (Dunningham J) at [167].

[125] The reasons for non-implementation were not fully documented at the time but it seems reasonably clear that it was because:

(a) The Trust's concerns about the flexing of the roof were allayed by, amongst other things, Mr Harris' report; this on the basis that the movement was within design tolerances.

(b) Mr Harris had confirmed that "the strength of the trusses over the community courts is adequate to support the design loads specified in the relevant codes when constructed".

(c) By the end of 2006, the leaking problem had been resolved.

(d) The particular issues which had initially given rise to Mr Acton Smith's concerns about safety having thus been resolved, there was no occasion for further implementation.

[126] In her judgment, Dunningham J said:

> [167] While I accept that, had all the recommendations listed in the letter of 9 June 2006 been followed it is more probable than not that the deficiencies in the truss welding would be found, that, of itself, does mean there has been contributory negligence. In the context of trying to identify the cause of the truss deflections, the recommendation that the welds be checked for fatigue did not, in my view, indicate to the Trust that there may be workmanship defects in the trusses that could cause the building's collapse. Nobody averted to that possibility, including the Council. Thus it is not like the case in *Johnson v Auckland Council*, where the purchaser was held to be contributorily negligent when she was aware of the possibility that the house was a "leaky" building, but failed to take any steps to check that before committing to purchase the property.[139]
>
> [168] Here, the recommendation by [Mr Harris] was included in a list of matters to consider, in the course of identifying whether it was structural or maintenance issues which were causing leaks from the ceiling. It was not unreasonable for the Trust, having worked through the first two recommendations provided by its architects, and which appeared to resolve the leaks, to not incur expense on the balance of the recommendations. As Mr Jones said "we did locate the source of those leaks and … we did fix that problem without [resorting] to structural intervention".

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139 *Johnson v Auckland Council* [2013] NZCA 662.

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

[127] The point the Judge was making was that the recommendations now relied on by the Council were made in the particular context of a safety concern on the part of Mr Acton Smith which had been triggered by leaks and the flexing of the roof. Once he was satisfied that the flexing of the roof was within design tolerances and the leaks were stopped, his safety concern was adequately addressed. Mr Harris' recommendations were firmly founded in Mr Acton Smith's concerns about the leaks and flexing of the roof. There was nothing else related to the building which could reasonably be seen as warranting investigation of the kind proposed in recommendations 3 and 4. Thus, with leaks resolved and the assurance that the flexing was within design tolerances, the non-implementation of the recommendations is not fairly seen as contributory negligence.

[128] In short, we see no error on the part of Dunningham J and are content to resolve this aspect of the case on the basis of the reasons that she gave.

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