

Building defects and council liability

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Councils are often sued for defects in building work in circumstances where they have received and relied upon the expertise of other professionals when assessing whether they have reasonable grounds to conclude that building work will, or does, comply with the building consent and the building code.

In dealing with many claims against councils around the country, we wonder if there is a perception, possibly fuelled by the leaky building litigation over the past two decades, that councils are bound to be liable if a building is built with defects.

Whether or not a council will likely be exposed to liability depends on what type of defects the claim involves and whether they are patent or latent. Building defects come in all shapes and sizes. Some are simple, some are complex. Some cannot even be seen with the naked eye.

Take the placement of reinforcing steel in pre-cast concrete tilt panels. The pre-cast panels are typically manufactured in purpose-built factories completely remote from the building site where the panels will be used in construction. In most cases, the property owner's structural engineer will have detailed in the structural design plans the specifications for the pre-cast concrete panels.

Often the council will receive a Producer Statement – PS1 – Design from the structural engineer in support of the building consent application.

The council may also receive a certificate from the pre-

cast concrete manufacturer stating the pre-cast panels have been manufactured in accordance with the relevant industry standards.

The council may also receive a Producer Statement – PS4 – Construction Review from the building owner's structural engineer certifying the compliance of the structural elements in the building construction.

A claim made against a council in the above circumstances simply should not succeed. Councils do not inspect the manufacture of pre-cast concrete panels at purpose built factories. Councils are entitled to rely upon the expertise and capability of the concrete manufacturer, that the concrete has been manufactured to the requisite standard.

Councils are entitled to rely on those manufacturers' certificates. Councils are entitled to rely upon structural engineers in preparing the structural design and in providing their producer statements for the design and construction review.

Furthermore, council officers do not have x-ray vision so do not have the ability to detect any defects in the placement of structural steel in the pre-cast panels.

The Building Act 1991 specifically provided that councils may in their discretion, accept producer statements when assessing whether they have reasonable grounds to consider building work complies with the building code.

Even though the Building Act 2004 does not refer to producer statements specifically, councils should continue to accept and rely upon producer statements from professionals who have the relevant expertise and experience to certify the relevant building work.

The courts have recognised the practice as acceptable on numerous occasions over recent years in the cases of *Southland Indoor Leisure Centre Charitable Trust v Invercargill City Council* [2015] NZHC 1983, *Body Corporate 3264 v Auckland Council* [2015] NZHC 862 and *Body Corporate 160361 v BC2004 Limited* [2015] NZHC 1803.

In those cases, the courts have also endorsed the practice in circumstances where councils do not have the relevant expertise in-house.

Despite this recognition by the courts, councils are still being sued in circumstances where they relied upon producer statements from appropriately qualified professionals.

Nevertheless, we encourage acceptance of producer statements for specialist areas such as structural engineering, geotechnical engineering, fire engineering, and other aspects of work that a council is unable to properly observe during its usual council inspections during construction. **LG**