**By Frana Divich and Sarah Macky**

At the Senior Building Control Officer's Forum we convened a panel on the lessons that could be taken from the Stadium Southland case. The panel consisted of Sarah Macky (Partner of Heaney & Partners), Simon Tonkin (Chief Building Control Officer of Invercargill City Council), Peter Jordan (Expert Building Consultant and ex-Auckland City Council Building Inspector) and Professor Stephen Todd (from Canterbury University, an expert on the law of negligence).

The case concerned allegations of negligence brought by the lessees of the stadium, Southland Indoor Leisure Centre Charitable Trust (the Trust) against the Invercargill City Council (the council) for its involvement in approving the construction of the stadium in 2000.
In 2010 the stadium's roof collapsed under heavy snow.

The case went through a High Court trial which the council lost. The council appealed to the Court of Appeal and won. The Trust then appealed to the Supreme Court. The Supreme Court appeal was heard on 10 and 11 August 2017.
For lawyers, the Stadium Southland case has thrown up some interesting issues surrounding the duty of care owed by councils to those who have buildings constructed for them (as opposed to subsequent purchasers). The duty issues are the reason the case has progressed as far as the Supreme Court. However, whatever the outcome of the latest appeal, there are important practical lessons that councils can learn from the case.

## THE BACKGROUND

The Trust engaged a registered structural engineer, Mr Major. The council accepted a design for the stadium from Mr Major.
There were nine separate building consents for the stadium construction. The consent we are concerned with had a condition that the construction be observed by a registered structural engineer to confirm compliance with the Building Code. Mr Major was that engineer.

During construction sagging of the trusses by up to 240mm was noticed. The council required the sagging to be addressed. The Trust applied for an amended building consent for the remedial work to the sagging trusses. A producer statement design (PS1) was provided to the council by Mr Major together with a producer statement peer review (PS2) from an independent structural engineer, Mr Harris, in support of the amended consent application. The council relied upon the producer statements when issuing the amended consent.
In addition, the council was assured by both engineers that the sagging trusses was only a deflection issue and there was no issue of inadequate structural integrity which would be a cause for concern. The council was told that there was no threat of collapse.
The council issued an amended consent. Two of the consent conditions required:

- Mr Major to confirm in writing that the six trusses' pre-camber was in line with Mr Harris' letter enclosing his peer review producer statement with the pre-camber measurements of the individual trusses to be included; and
- Mr Major to provide a producer statement – PS4 – construction review for the remedial work.

In addition, the council wrote to Mr Major asking him what quality control measures he was putting in place so the council could be satisfied and have confidence in Mr Major's work in the future.

On 28 February 2000, Mr Major wrote to the council setting out the extensive quality control measures he had adopted.
The remedial work to the trusses was completed. The stadium had an opening date of 25 March 2000 which was attended by Helen Clark.

By this stage interim code compliance certificates had been issued but final code compliance certificates had not been issued as there were some outstanding issues. The outstanding issues were not significant and did not compromise the safety of people or to prevent the stadium from opening in March 2000.

In late October 2000, the Trust sought copies of the code compliance certificates for the stadium so that it could obtain an onsite liquor licence. In response, the council wrote to the Trust asking for Mr Major's PS4 and the truss measurements so that it could issue the final code compliance certificate (CCC) for the amended building consent to remedy the sagging trusses.

On 20 November 2000, the council issued the CCC for the amendment to the building consent to rectify the sagging trusses. Simon Tonkin (or any other qualified building inspector) had not approved the issue of the CCC. It was in fact issued by a council clerk without authority. As a result, the CCC was issued when the PS4 and pre-camber measurements had not been provided. Although the council knew at that time that Mr Major had observed the construction and the documentation would be forthcoming.

On 22 January 2001, the council received a letter from Mr Major enclosing the PS4. However, Mr Major had not provided the pre-camber truss measurements.
The council then wrote to Mr Major asking for the truss measurements.
Many months later, on 28 November 2001, the council received a letter from the architect enclosing the datum heights of the steel trusses and a drawing from Mr Major. At that time the council considered that it had all that it required, although the truss pre-camber measurements had not been provided.
Had the pre-camber measurements been provided and not just the datum heights of the trusses, they would have revealed the trusses sagged below Mr Harris' pre-camber requirement.
The High Court recognised that the lack of pre-camber measurements of itself was not a cause of the collapse. Rather, the provision of the pre-camber measurements would have revealed work had not been done correctly and other defects would have been identified such as the welding defects.

The Trust issued proceedings in the High Court one day shy of the ten year anniversary of the CCC being issued. The claim was therefore limited to the negligence in the issuing of the CCC.

## THE LESSONS

**Sarah Macky – lawyer**

Councils must be vigilant when it comes to being satisfied that building consent conditions have been fulfilled. They must ensure that the information they ask for is in fact provided.

Check the wording of all producer statements to make sure they cover the consent condition and do not attempt to limit the scope of the engineer's work to something other (or less) than what was required.

The Supreme Court was comfortable with the proposition that councils without in-house expertise to inspect certain types of construction may opt out of inspecting and accept a producer statement. Hopefully that is expressed in the judgment.

**Simon Tonkin – council officer**

The Stadium Southland case has helped Invercargill City Council to check PS4s more carefully when they are received to ensure that the correct documents have been referenced by the engineer (such as the right plans and specifications) and that there are no qualifications. If there are qualified statements we will ask why and consider how it impacts on whether the council can be satisfied that code compliance has been achieved.
If there is a difference between the wording of the producer statement and what was envisaged at the outset of the project, but the council deems it appropriate to accept the producer statement then file note the decision in a detailed manner. Simon was cross examined for two days about the council's involvement and the council's practices some 15 years after the event. If something goes wrong you may be put under the spotlight. It is hard to remember many years after the event but good record keeping can help piece things together and the Court likes contemporaneous records.
Post Stadium Southland, the council has also put in place an improved checking system to ensure that producer statements are on the file before a code compliance certificate can be issued.

**Peter Jordan – expert on council practices**

It is important for councils to realise that the Courts will scrutinise the steps taken by councils in approving building construction. The issues that all councils face in terms of funding, staffing and lack of time when inspecting building construction will simply fall by the wayside and will not be taken into account when the Court comes to assess whether the council acted reasonably in any given situation.

When considering producer statements make sure the author has appropriate qualifications and experience.

**Professor Stephen Todd - academic**

The High Court Judge found that the council owed a duty of care to the Trust.
However the findings of the Court of Appeal are very interesting. Only one of the three appellant Judges found that a duty was owed and it was only a very limited duty because the Trust itself arranged for the stadium to be built and in doing so relied upon its own architect and engineers. This Judge went on to find that although the council owed a duty, it had not in fact caused any loss to the Trust because the council did not rely upon the council's CCC rather it relied upon its own experts.

The other two Court of Appeal judges found that the council did not owe a duty of care.

## SUPREME COURT

Heaney & Partners were the council's solicitor in the Supreme Court. The five Supreme Court Judges have reserved their decision. We expect a judgment later this year.

The last important lesson that can be taken from the Stadium Southland case is that litigation is a very uncertain process. The council was found liable to the Trust in the High Court on the basis that the council owed the Trust a duty of care and that it breached that duty of care in not requiring Mr Major to provide the pre-camber measurements for the trusses. That resulted in the council being found liable for in excess of $15 million which is a substantial sum for Invercargill.

In the appeal to the Court of Appeal the Court overturned the High Court judgment in its entirety by finding the council was not liable to the Trust. There was complete flip flop in outcome between the two levels.
We think that if the Supreme Court finds the Trust was not owed a duty of care by the council, then it will be on the basis of a very limited exception to the general rule due to the specific facts of the case. Those specific facts are that the Trust was a commissioning owner i.e. it had the stadium built for it; that the only claim was limited to the council issuing the CCC (because all other council involvement was time barred due to the ten year limitation in the Building Act); and because the Trust did not appear to rely upon the issue of the CCC.

It could go either way.

If you are interested in hearing the result of the appeal please email Sarah Macky at sarah.macky@heaneypartners.com and she will send you the judgment and a summary of it, when it is released.