IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV 2020-404-002282
[2024] NZHC 714

BETWEEN	TAURANGA CITY COUNCIL Plaintiff
AND	HARRISON GRIERSON HOLDINGS LIMITED First Defendant
	CONSTRUCTURE AUCKLAND LIMITED Second Defendant

Hearing: 1 - 4 May 2023

Appearances: A R B Barker KC, J L Libbey & N Speir for the Plaintiff
C T Walker KC & L G Cox for the First Defendant
D S McGill & K J Rowe for the Second Defendant

Judgment: 28 March 2024

JUDGMENT OF TAHANA J

This judgment was delivered by me on 28 March 2024 at 5.30pm
Pursuant to Rule 11.5 of the High Court Rules

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Registrar/Deputy Registrar

Solicitors/Counsel:
Rice Speir, Auckland
Andrew Barker KC, Barrister (Shortland Chambers), Auckland
Morgan Coakle, Auckland
Campbell Walker KC, Barrister, Auckland
Duncan Cotterill, Auckland

TABLE OF CONTENTS

PRELIMINARY ISSUES

[1] What was meant to be a transport hub for 550 cars and 250 bicycles in the centre of Tauranga was sold by Tauranga City Council (TCC) for $1 after the partially built structure defected. TCC says it lost over $20 million, which it now claims from the defendants.[1] The first defendant, Harrison Grierson Holdings Ltd (Harrison Grierson) designed the structure, and the second defendant, Constructure Auckland Ltd (Constructure) was engaged to review the structural design.

[2] The parties agree that the Court should determine as preliminary issues prior to trial, whether the liability of each defendant pursuant to any of the five pleaded causes of action[2] is limited by reason of limitations of liability contained in each defendant's terms of engagement with TCC and contained in producer statements issued by each defendant (the limitation clauses). The limitation clauses purport to limit each defendant's liability to a specified amount (the liability cap).

[3] Three of the causes of action (breach of a duty at common law, breach of a statutory duty under the Building Act 2004 (BA04) and breach of a contractual duty) allege a duty relating to compliance with the building code.[3] TCC says that the duty arises from the statutory requirements of the BA04 which include a requirement that building work comply with the building code.[4] That parties cannot contract out of the BA04 and the limitation clauses are therefore in breach of the BA04 and are illegal under the Contract and Commercial Law Act 2017 (CCLA).

[4] TCC also claims that statements by each defendant that the carpark as designed will comply with the relevant provisions of the building code were false; that the defendants therefore breached s 9 of the Fair Trading Act 1986 (the FTA) and engaged in negligent misstatement; and that the limitation clauses do not comply with the

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1 TCC quantifies its loss as including wasted costs of $20,598,807.31 plus GST, loss of land value of $5,350,000, investigation costs, and consequential losses as set out at [68] of its amended statement of claim dated 1 April 2021.

2 The Council pleads five causes of action: breach of a duty of care (negligence); breach of a statutory duty under the Building Act 2004 [BA04]; breach of a duty of care (negligent misstatement); breach of s 9 of the Fair Trading Act 1986 [FTA]; and breach of contract.

3 The nature of each duty as pleaded by TCC is set out at [57] to [61] of this judgment.

4 BA04, s 17.

requirements for contracting out of the FTA. TCC says it is entitled to rely on the producer statements and the limitation clauses contained therein do not apply.

[5] In their defence, each defendant relies on the relevant limitation clauses to limit their respective liability. The preliminary issues therefore require that I determine whether the limitation clauses are enforceable as a defence to each cause of action.

[6] TCC relies on the Supreme Court's decision in *Body Corporate 207624 v North Shore City Council* (*Spencer on Byron*) and says the Court has already made findings that support a party not being able to contract contrary to the statutory requirement that building work comply with the building code.[5] That case concerned building work subject to the Building Act 1991 (BA91) which also included a statutory requirement that building work comply with the building code.[6]

[7] TCC says the findings in *Spencer on Byron* apply to building work subject to the BA04 because it contains the same statutory requirement and purposes; and that limiting liability for breach of the duty arising from the statutory requirement is therefore in breach of the BA04 and is illegal and/or unenforceable under the CCLA.

[8] In response, the defendants say *Spencer on Byron* was not concerned with the enforceability of limitations of liability; that no Court has since held that an engineer cannot limit liability; and that for this Court to determine that the limitation clauses are unenforceable would therefore amount to a "revolution."

[9] The findings in *Spencer on Byron* are therefore pivotal to this case. I must determine whether those findings apply to building work that is subject to the BA04 and if so, whether they are relevant when determining whether the limitation clauses are illegal or unenforceable under the CCLA.

Questions to be answered

[10] In summary, I must determine the following issues:

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5 *Body Corporate 207624 v North Shore City Council* [2012] NZSC 83; [2013] 2 NZLR 297 [*Spencer on Byron*] at [193].

6 BA91, s 7.

(a) Liability for breach of a duty at common law, breach of a statutory duty and/or breach of a contractual duty by reason of a duty arising under the BA04:

(i) Does the BA04 give rise to any duty on each defendant?

(ii) If yes, is each limitation clause contrary to that duty and therefore in breach of the BA04?

(iii) If yes, does the object of the BA04 clearly so require that each limitation clause is illegal and/or unenforceable?

(iv) Alternatively, is each limitation clause contrary to public policy?

(b) Liability under the FTA: is each limitation clause enforceable under s 5D of the FTA such that liability under the FTA is limited?

(c) Liability for negligent misstatement: is each limitation clause enforceable as a defence to the claim for negligent misstatement?

[11] Before answering each of the above questions, I set out the relevant factual background.

Background

Engagement of Harrison Grierson

[12] On 10 March 2017, TCC invited two structural engineers to tender for the structural design of the carparking hub.

[13] On 14 March 2017, Harrison Grierson submitted its response and proposed that it engage with TCC on the terms of a standard short form agreement issued by the Association of Consulting and Engineering New Zealand (ACENZ) and the Institute of Professional Engineers New Zealand (IPENZ) (now Engineering NZ Te Ao Rangahau) (the SFA).

[14] After discussion between TCC and Harrison Grierson, Harrison Grierson agreed to engage on the terms of the long form agreement issued by Engineering NZ entitled "Conditions of Contract for Consultancy Services, 2009 3rd ed" (CCCS Terms). The CCCS Terms specify general conditions and include appendices and special conditions.

[15] On or about 28 March 2017, TCC approved the award of the contract to Harrison Grierson. The parties discussed the scope of the services and TCC's agent sent a copy of the draft special conditions and the general conditions of the CCCS Terms.

[16] The final agreement (the HG Contract) was not signed by TCC but it is accepted that the design work from April 2017 onwards took place on the basis of the HG Contract as executed by Harrison Grierson.

[17] The scope of the services to be provided by Harrison Grierson included that it produce a structural design and provide structural design services; prepare design drawings and specifications suitable for submission to TCC for consent purposes; and provide PS1 and PS4 (producer statements) for the project.[7]

[18] Harrison Grierson was required to use the degree of skill, care and diligence reasonably expected of a professional consultant providing similar service.[8]

[19] The general conditions provide for a limitation of liability to be specified in the special conditions as follows:[9]

> **6.2 Limitation of Liability**
>
> The maximum aggregate amount payable, whether in contract, tort or otherwise, in relation to claims, damages, liabilities, losses or expenses, is as specified in the Special Conditions.

[20] The special conditions specify the amount of the limitation of liability as follows:[10]

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7 Appendix A, cl 2.2, 2.5 and 2.6.
8 General conditions, cl 2.2.
9 General conditions, cl 6.2.
10 Special Conditions, Part A, cl 6.2

6.2 Limitation of Liability*

The maximum amount payable shall be:

Professional Liability: five times the fee with a minimum limit of $500,000 and a maximum limit of $2,000,000

Public Liability: $10,000,000 in aggregate

[21] The general conditions at cl 6.6 required that Harrison Grierson provide a certificate of insurance, which it did, specifying an indemnity limit of $2 million. That reflects the amount of the limitation of liability at cl 6.2.

[22] The agreed fee for Harrison Grierson's services was $250,000 excluding GST. The fees ultimately charged exceeded $400,000 so the liability limit of $2 million applies.

Engagement of Constructure

[23] On 17 November 2017, Constructure provided a fee proposal to TCC for a structural peer review of the proposed transport hub. Constructure proposed a fee of $15,000 plus GST and engagement conditions based on the SFA issued by ACENZ/IPENZ. The SFA contained one page of terms and conditions and a summary sheet which referred to the fee proposal for the scope of the services.

[24] The fee proposal described the scope of the services as:

1. Peer review of proposed car park structure.

2. Provision of Producer Statement – PS2 – and associated documentation (stamped drawings and peer review communications/queries log).

[25] The SFA terms include a limitation of liability as follows:[11]

The maximum amount payable, whether in contract, tort or otherwise, in relation to claims, damages, liabilities, losses or expenses, shall be five times the fee (exclusive of GST and disbursements) with a maximum limit of $NZ500,000.

[26] The SFA terms also required that:[12]

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11 SFA at [11].
12 SFA at [4].

> In providing the Services the Consultant shall exercise the degree of skill, care and diligence normally expected of a competent professional.

[27] TCC accepted the SFA terms, and the parties engaged on that basis (the Constructure Contract).

Preparation of design

[28] Between 20 March and November 2017, Harrison Grierson prepared the structural design and specifications for the carpark.

[29] On or about 24 November 2017, Harrison Grierson issued a "Detailed Design Features Report for the Harrington Street Carpark." At the same time, it issued its first producer statement (PS1) to TCC as owner to be provided to TCC as building consent authority.

[30] The PS1 was on a form copyrighted to ACENZ, IPENZ and NZIA and was issued to TCC as owner to be supplied to TCC as building consent authority in respect of the structural design of the carpark. The PS1 identified B1/VM1 and B2 as the relevant building code clauses.

[31] The PS1 contained the following statement:

> **I believe on reasonable grounds** that: a) the building, if constructed in accordance with the drawings, specifications, and other documents provided or listed in the attached schedule, will comply with the relevant provisions of the Building Code and that b), the persons who have undertaken the design have the necessary competency to do so. I also recommend the following level of construction monitoring/observation:

[32] The PS1 attached a letter indicating that Harrison Grierson was unable to provide a PS1 for clause B2 of the building code (structural durability) because "there is no effective verification method for B2 contained within the Building Code." However, Harrison Grierson confirmed the timber, concrete and mild steel structural elements.

[33] The PS1 also included a disclaimer and limitation of liability as follows:

> Note: This statement shall only be relied upon by the Building Consent Authority named above. Liability under this statement accrues to the Design Firm only. The total maximum amount of damages payable arising from the statement and all other statements provided to the Building Consent Authority in relation to this building work, whether in contract, tort or otherwise (including negligence), is limited to the sum of $200,000.

[34] On or about 28 November 2017, Harrison Grierson issued the building consent drawings for the carpark structure.

[35] On 30 January 2018, TCC applied for building consent.

[36] On 13 March 2018 Constructure issued a producer statement (PS2) confirming compliance with B1/VM1 of the building code. Constructure advised TCC it was unable to provide a PS2 for B2 of the building code and provided a B2 compliance statement. The PS2 included the disclaimer and limitation of liability on the same terms as set out in the PS1 issued by Harrison Grierson.

[37] On or about 25 May 2018, Harrison Grierson issued the structural drawings for construction.

[38] On 10 July 2018, TCC, as building consent authority, issued a building consent. This was subsequently amended, on TCC's application.

Construction of the carpark

[39] TCC engaged Watts & Hughes to construct the carpark.

[40] On 22 January 2019, Watts & Hughes emailed Harrison Grierson, concerned about part of the design relating to the pouring of concrete floors. Watts & Hughes queried the methodology due to "the steel beams not deflecting and ensuring minimal topping thickness" and asked Harrison Grierson to confirm the concrete pour methodology. Harrison Grierson confirmed that temporary support works/props were not needed for the pour.

[41] On 11 March 2019, Harrison Grierson issued a PS1 to TCC in respect of the "[s]tructural design of amendment to design including cranked foundation beams,

retaining walls, cantilever slab and wall panels to entry." This contained a limitation of liability in the same terms as for the 24 November 2017 PS1. This PS1 confirmed compliance with B1/VM1, VM4 and B2 of the building code and attached a B2 compliance statement. The next day Harrison Grierson issued a PS2 confirming compliance with B1/VM1 and VM4 of the building code and attaching a B2 compliance statement.

[42] On 12 March 2019, Constructure issued a further PS2 to TCC containing the same disclaimer and limitation of liability.

[43] On 29 March 2019, Watts & Hughes noticed that a structural beam had twisted following a concrete pour and informed Harrison Grierson attaching photographs of the twisted beam. Harrison Grierson then visited the site, reviewed the twisted beam, and ultimately advised that the twisted beam would need to be cut out and the remaining beams should be propped to stop the problem from reoccurring.

[44] This incident prompted a wider investigation into the suitability of the design. In May 2019, Harrison Grierson internally reviewed its design and identified an earthquake resistance flaw. They provided revised drawings to TCC and issued another PS1 and another PS2. The revised design required a consent amendment which was provided on 15 May 2019.

[45] TCC engaged Holmes Consulting Ltd (Holmes Consulting) to carry out a high-level structural design review of the redesigned carpark.

[46] On 31 May 2019, Harrison Grierson issued a PS1 to TCC in respect of the "structural design of amendment to design including ramp sliding joints, beam and connections and slab", for the purpose of an amended building consent application. It included a disclaimer and limitation of liability in the same terms as for the 24 November 2017 PS1.

[47] On 5 June 2019, Constructure issued a further PS2 in respect of Harrison Grierson's design containing the same disclaimer and limitation of liability.

[48] On 17 July 2019, Holmes Consulting reported design deficiencies to TCC.

[49] In September 2019, TCC instructed Watts & Hughes to cease construction because of the defective design. The basement level was almost complete, and the above ground structure was partially complete.

[50] That same month TCC appointed a team of expert consultants to identify and quantify the defective design. The team included technical advisor Kestrel Group Ltd (Kestrel Group) and Holmes Consulting.

[51] On or about 3 October 2019, TCC engaged an independent engineering peer reviewer, Aurecon New Zealand Ltd (Aurecon) to consider Harrison Grierson's remedial designs. Between October 2019 and June 2020, Harrison Grierson's design team (in conjunction with Aurecon) and TCC's team of consultants explored various remedial solutions.

[52] Arrangements to carry out remedial work continued into 2020.

[53] On 4 June 2020, TCC abandoned construction. The land was sold on 1 April 2021 for $1. TCC says the land effectively had no value because of the cost of demolishing the partly built structure.

[54] Having set out the relevant background, I now turn to each of the questions posed at [10] above.

PART ONE: LIABILITY FOR BREACH OF A DUTY UNDER THE BA04

Does the BA04 give rise to any duty on each defendant?

[55] As set out at [3] above, three of the causes of action allege a duty regarding compliance with the building code as required by the BA04. The defendants do not deny that a common law duty of care applies, but deny that any statutory duty arises by reason of the BA04 or that any common law duty arises which precludes the defendants from limiting their liability for breach of that duty.

[56] A key issue is therefore the nature of the duty that is owed by each defendant to TCC and whether that duty arises by reason of the BA04. That is relevant to whether a contract that may authorise a breach of that duty is an illegal contract under the CCLA. I therefore set out the pleaded duties and then consider whether the BA04 gives rise to any duty on each of the defendants.

Pleaded duties

[57] TCC generally pleads the same type of duty owed by each defendant. To the extent that the pleaded duty against Constructure is different to that pleaded against Harrison Grierson, this is specified.

[58] TCC pleads a common law duty of care as follows:[13]

> 70. Harrison Grierson, as structural engineer, [Constructure, as structural engineer peer reviewer] owed the council a duty of care to exercise reasonable skill and care in carrying out the HG Services [CAL Services]:
>
> a. to ensure that reasonable skill and care was exercised in carrying out the HG services [CAL Services];
>
> [in respect of Constructure only, to ensure that reasonable skill and care was exercised in the provision of the Producer Statement – PS2s and associated documentation ...]
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> b. to ensure that the Transport Hub was designed in accordance with and complied with the Design Standards[14] (in particular but not limited to the Building Code); and
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> c. to ensure that any remedial design to the Transport Hub was undertaken to a reasonable standard of skill and care and complied with the Design Standards (in particular but not limited to the Building Code).
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> 71. The above duty of care arises out of the following circumstances:
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> a. the council owned and was responsible for the Transport Hub;
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> b the Transport Hub was designed and/or monitored under the control of Harrison Grierson as structural engineer; [the structural design of the Transport Hub was peer reviewed

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13 Amended statement of claim at [70], [71], [95] and [96].

14 Amended statement of claim at [53] defines the Design Standards as: the functional and performance requirements of clauses B1 and B2 of the Building Code; the NZCIC guidelines; the specifications; and/or good trade practice including reasonable standards of skill and care.

under the control of Constructure as a structural engineer peer reviewer];

c. Harrison Grierson [Constructure] carried out its functions, including the HG Services [CAL Services], through its employees, subcontractors or agents;

d. Harrison Grierson [Constructure] was required to carry out the HG Services [CAL Services], in accordance with the Design Standards (in particular but not limited to [in the case of Harrison Grierson only, the NZCIC guidelines] and the Building Code); and

e Harrison Grierson [Constructure] knew that the Transport Hub was to be used as a public facility and knew, or ought to have known, that any failure to carry out the HG Services [CAL Services] with reasonable skill and care and in accordance with the Design Standards (in particular but not limited to the Building Code) could require repairs and/or cause loss to the council.

[59] TCC also pleads a statutory duty under the BA04, as follows:[15]

77. Harrison Grierson, as structural engineer, [Constructure, as structural engineer peer reviewer] owed a statutory duty to the council in carrying out the HG Services [CAL Services]:

a. to ensure that the Transport Hub was designed in accordance with and complied with the Building Code; and

[in respect of Constructure only, to ensure that the provision of the PS2s complied with the Building Code.]

b. [in respect of Harrison Grierson only] to ensure, by monitoring, that the Transport Hub was constructed in accordance with and complied with the Building Code; and/or

c. [in respect of Harrison Grierson only] to ensure that any remedial design to the Transport Hub complied with the Building Code.

78. The above duty to ensure that the structural design and/or monitoring complies with the Building Code [in the carrying out of the CAL Services] arises out of the Building Act 2004, including, but not limited to, the following provisions:

a. Section 14D of the Building Act 2004 records that a designer is responsible for ensuring plans and specifications are sufficient to result in building work that complies with the Building Code; and

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15 Amended statement of claim at [77], [78], [102] and [103].

b. Section 17 of the Building Act 2004 requires that all building work must comply with the Building Code to the extent required by the Act; and

c. Section 18(1) of the Building Act 2004 requires that a person who carries out building work must achieve performance as prescribed in the Building Code (and no more).

[60] TCC also claims that Harrison Grierson breached the HG Contract and that Constructure breached the Constructure Contract (as applicable) as follows:[16]

> 92. In breach of the terms pleaded above, Harrison Grierson [or Constructure] caused the Transport Hub to be designed and/or constructed otherwise than in accordance with the Contract [and in respect of Harrison Grierson only, the Design Standards (in particular but not limited to the building code)], including but not limited to being designed and/or constructed with the defective design.

[61] TCC pleads that the HG Contract contains terms including that Harrison Grierson is responsible for ensuring the design's compliance with the building code and relevant standards and codes of practice.[17] In respect of Constructure, TCC pleads that the Constructure Contract contains terms including that Constructure is responsible for peer reviewing the proposed transport hub structure, providing a producer statement and taking out insurance.[18]

[62] Constructure adopted the submissions of Harrison Grierson on the nature of the duty owed by each defendant. Mr Walker KC for Harrison Grierson submitted that the Courts have never recognised a statutory duty under the BA04 owed by engineers to non-residential building owners as pleaded by TCC. The only duty is therefore a duty at common law to exercise reasonable skill and care as recognised in 1977 by the Court of Appeal in *Bowen v Paramount Builders Ltd.*[19]

[63] Mr Barker KC for TCC acknowledged that the Courts have not crafted the duty as a statutory duty to ensure building code compliance as set out at [59] but asserts that the caselaw supports each defendant owing a duty to exercise reasonable skill and

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16 Amended statement of claim dated 1 April 2021 at [92] and [118].
17 Amended statement of claim at [91].
18 I note that the pleading does not include any contractual terms as to the standard of care required of Constructure in reviewing the structure and issuing producer statements.
19 *Bowen v Paramount Builders (Hamilton) Ltd* [1977] 1 NZLR 394 (CA) [*Bowen*].

care with a view to ensuring the design (and review of the design) complies with the building code.

[64] For the reasons set out at in this part of the judgment, I agree with Mr Barker that the caselaw supports each defendant owing a duty to TCC to exercise reasonable skill and care with a view to ensuing the design (or review of the design) complies with the building code. I set out my analysis of the courts' findings as from *Bowen* (when building controls were mandated by local councils in by-laws) to after New Zealand nationalised building controls under the BA91 and then the BA04. This part therefore considers the nature of the duty prior to the BA91, after BA91 and after the BA04.

Duty of care prior to the BA91

[65] The Court of Appeal in *Bowen* determined that a builder owed a duty to use reasonable care to prevent damage to a subsequent purchaser of a home. The subsequent purchaser brought a claim in negligence against the builder in respect of defective foundations. The house was built on peaty ground. The trust which sold the land to the commissioning owner had agreed to provide sub-foundations necessary for the owner's building plans. The commissioning owner and builder agreed that the builder would construct the house as per specifications which provided for normal foundations. The sand pad installed by the trust proved to be inadequate and the house subsided.

[66] In finding a duty of care, Richmond P considered that the duty was directed at preventing damage to persons whom they should reasonably expect to be affected by their work:[20]

> Quite clearly English law has now developed to the point where contractors, architects and engineers are all subject to a duty to use reasonable care to prevent damage to persons whom they should reasonably expect to be affected by their work.
>
> ...
>
> [F]or the purposes of the present case I go no further than to recognise that a builder is liable for the negligent creation of a hidden defect which is a source

[20] At 406.

> of danger to third persons whom he ought reasonably to foresee as likely to suffer damage either in the form of personal injury or injury to their property.

[67] The duty arose as a matter of law so that the existence of a contract between the commissioning owner and builder did not negate a duty of care owed by the builder to a subsequent purchaser.[21] The question being "whether an ordinary reasonably competent and prudent builder ought to have appreciated that there would be a real risk of danger if he proceeded with the design and erection of the building on the basis requested by [the commissioning owner]."[22]

[68] In *Bowen,* the Court acknowledged that the contract between the builder and commissioning owner may have "considerable relevance" in deciding whether the builder was negligent.[23] For example, the contract may dictate the scope of the work the builder had agreed to undertake.[24] The Court was not concerned with the enforceability of the contract as between the commissioning owner and builder nor with whether that contract was in breach of any statutory requirement so, it is not directly relevant to the issue this Court must ultimately determine.

[69] The duty in *Bowen* was not said to arise because of any statutory or regulatory requirement. It arose as a matter of common law in circumstances where a builder ought to reasonably foresee that a subsequent purchaser was likely to suffer damage to their property if they did not exercise reasonable care to prevent damage.

[70] The relevance of building controls was then considered by the Court of Appeal in *Mount Albert Borough Council v Johnson.*[25] The Court held that a developer owed a duty of care to a subsequent purchaser in relation to inadequate foundations and the Council also owed a duty of care in relation to its supervisory functions. The lower Court had held that the developer and Council were equally liable to the subsequent purchaser. The Council appealed.

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21 At 419.
22 At 408.
23 At 407.
24 At 407.
25 *Mount Albert Borough Council v Johnson* [1979] 2 NZLR 234 (CA) [*Mt Albert*].

[71] The Court noted that it was the builder's responsibility under the by-law to go down to a solid bottom.[26] The developer had engaged a builder as an independent contractor. The Court considered that the developer had a duty to see that proper care and skill were exercised in the building of the houses and that it could not be avoided by delegation to an independent contractor.[27]

[72] Turning to the Council, the Court referred to the observation in *Anns v Merton London Borough Council*[28] that the person responsible for construction in accordance with the by-laws is the builder, and that the inspector's function is supervisory.[29] Further, that it would be unreasonable to impose liability on the Council, if the builder, "whose primary fault it was", should be immune from liability.[30]

[73] The Court held that the Council was negligent in failing to exercise reasonable care to observe the inadequacy of the foundations upon inspection.[31] The Court did not consider that the Council's fault should be put on a par with the developer. The Court apportioned liability four-fifths to the developer and one-fifth to the developer.[32] That observation suggests that if a duty of care is owed by a council, a duty is also likely to be owed by the party undertaking the building work.

[74] The relevance of by-laws to any duty of care was also considered in *Stieller v Porirua City Council.*[33] The Council appealed and the Stiellers cross-appealed a decision holding the Council liable in negligence. The lower Court had found the Council liable because the building inspector ought to have seen and recognised the weatherboards did not meet the grading standards required by the by-laws and should also have discovered the defects in the drainage and guttering and ensured that they were remedied before the building was completed.

[75] The Court of Appeal noted that the English cases had been decided in the context of the statutory provisions in the Local Government Act 1963 (UK) which

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26 At 241.
27 At 241.
28 *Anns v Merton London Borough Council* [1978] AC 728, [1977] 2 All ER 492, 501.
29 *Mt Albert* at 241.
30 At 241.
31 At 241.
32 At 241.
33 *Stieller v Porirua City Council* [1986] 1 NZLR 84 (CA) [*Stieller*].

related to matters of public health. In contrast, in New Zealand, the statutory provisions covering the issue of building permits did not relate solely to matters of health or the safety of occupiers of premises and included defects to the exterior of the home.[34] The Court considered that the by-law making power conferred on councils was wide enough to cover the construction of soundly built houses and to safeguard persons who might occupy those houses against the risk of acquiring a substandard residence.[35] The construction of houses with good materials and in a "workmanlike manner" was a matter within the council's control and a council might therefore be liable for defects in exterior cladding even though questions of health and safety did not arise.[36]

[76] *Stieller* confirms that the Court was willing to enforce the standards imposed in by-laws by recognising a duty of care in negligence owed by territorial authorities to building owners when exercising their supervisory functions under those by-laws. This suggests that those actually undertaking the building work are also likely to owe a duty of care to building owners in relation to requirements imposed by building controls.

[77] The building control regime then changed with the introduction of the BA91, which applied to all building work in New Zealand.

Building Act 1991

[78] It is necessary to set out the history of the BA91 as this is the legislation relevant to the Supreme Court's finding in *Spencer on Byron*. It is also the predecessor to the BA04 so provides the whakapapa (history and links) to what became the BA04.

[79] The BA91 followed a decade of research and study which culminated in the 1990 Report of the Building Industry Commission to the Minister of Internal Affairs, "Reform of Building Controls" (the 1990 Report).[37] In considering the need for reform, the 1990 Report noted that while the building control regime was effective in

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34 At 93.
35 At 94.
36 At 94.
37 *Reform of Building Controls: Volume I: Report to the Minister of Internal Affairs* (Building Industry Commission, January 1990) [1990 Report].

producing buildings that did not endanger health and safety, it lacked innovation and efficiency and imposed heavy costs on consumers:

> 2.9 This complex system of control authorities, agencies and documents has ensured that buildings which endanger the health and safety of users are rare in New Zealand. All buildings have a potential for causing illness, injury, loss of life and damage to neighbouring property, yet the incidence of these events throughout the country is very low.
>
> 2.10 Concerns with the present system stem from other areas: requirements are complex and prescriptive; the system is unresponsive to technological change and inhibits innovation, and it absorbs large amounts of resources by central and local government in its administration, and by building producers in compliance, imposing heavy costs on the consumer.

[80] The above commentary highlights the tension between health and safety on the one hand and innovation and efficiency on the other. While the 1990 Report considered the former had been achieved under the building controls regime, the latter arguably had not, and reforms were considered necessary to achieve those additional objectives.

[81] Despite a desire to make building controls more efficient, the 1990 Report noted that controls remained necessary so that commercial objectives did not outweigh social objectives or defeat the purpose of achieving innovation. Insurance was considered important to protect against losses caused by negligence:

> 2.48 The Commission has concluded that insurance does not remove the need for regulatory building controls. Some regulatory controls are required to ensure that commercial objectives do not outweigh social objectives of building control – or defeat the purpose of reform by conservative attitudes to innovation. Insurance does, however, have a significant place in the overall control system by providing indemnification cover in the event of negligence and accident and property insurance.
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> …
>
> 2.70 The first criterion is that the regulatory control system must be limited to requirements that are essential to protect the people affected that cannot be assured by private arrangements.
>
> 2.71 Other criteria must also be used to assess the behaviour and effectiveness of the proposed system:
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> …
>
> - Building producers and owners need reasonable certainty as to whether or not their activities comply with control requirements.

> Equally, the general public requires reasonable certainty that control provisions are being complied with.

[82] The terms of reference to the 1990 Report are helpful in understanding the objective of the Government in reforming building controls. The terms acknowledged that building control should not be left to the laws of contract alone to regulate and that standards to protect safety are necessary:[38]

> Buildings have a number of features, however, which would be likely to result in undesirable decisions in some instances if the normal laws of contract were the only rules applied. …
>
> …
>
> There is a risk, therefore, that builders or owners, in order to save costs, would construct and operate buildings which were of lower standards in terms of safety or general amenities than would be desirable (taking into account both the costs of improved safety and the interests of all of the potential users). To prevent this requires that developers somehow be held financially (or criminally) responsible for the costs or risks they impose on others, or that there are some other forms of more direct restraints on their actions.

[83] The above passage indicates that holding parties financially (and potentially criminally) responsible was a mechanism that would assist in protecting against lower standards in terms of safety. The consequence of the 1990 Report was the introduction of the BA91.

[84] To the extent that the BA91 and BA04 share the same statutory framework and purposes, the background and purpose of the BA91 are relevant to whether any court findings regarding the BA91 apply when interpreting the provisions of the BA04. I therefore outline the key provisions of the BA91.

[85] The purposes of the BA91 were directed at imposing controls to achieve safety for building uses as set out in s 6:

> **6. Purposes and principles—**
>
> (1) The purposes of this Act are to provide for—

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[38] 1990 Report, Appendix 1, Terms of Reference for the Building Industry Commission: Economic Framework: Aligning Private Incentives with Community Interests at [3].

(a) Necessary controls relating to building work and the use of buildings, and for ensuring that buildings are safe and sanitary and have means of escape from fire; and

(b) The co-ordination of those controls with other controls relating to building use and the management of natural and physical resources.

(2) To achieve the purposes of this Act, particular regard shall be had to the need to—

(a) Safeguard people from possible injury, illness, or loss of amenity in the course of the use of any building, including the reasonable expectations of any person who is authorised by law to enter the building for the purpose of rescue operations and fire fighting in response to fire:

(b) Provide protection to limit the extent and effects of the spread of fire, particularly with regard to—

(i) Household units and other residential units (whether on the same land or on other property); and

(ii) Other property:

(c) Make provision in a building used for the storage or processing of significant quantities of hazardous substances to prevent significant adverse effects on the environment (whether within the immediate locality or otherwise) arising from an emergency involving fire within that building:

(d) Provide for the protection of other property from physical damage resulting from the construction, use, and demolition of any building:

(e) Provide, both to and within buildings to which section 25 of the Disabled Persons Community Welfare Act 1975 applies, means of access and facilities that meet the requirements of that Act to ensure that reasonable and adequate provision is made for people with disabilities to enter and carry out normal activities and processes in those buildings:

(f) Facilitate the efficient use of energy, in the case of new buildings, during the intended life of those buildings.

(3) In determining the extent to which the matters provided for in subsection (1) of this section shall be the subject of control, due regard shall be had to the national costs and benefits of any control, including (but not by way of limitation) safety, health, and environmental costs and benefits.

[86] Section 7 specified the standard for building work which required compliance with the building code as required by the BA91:

> **7. All building work to comply with building code—**
>
> (1) All building work shall comply with the building code to the extent required by this Act, whether or not a building consent is required in respect of that building work.
>
> (2) Except as specifically provided to the contrary in any Act, no person, in undertaking any building work, shall be required to achieve performance criteria additional to or more restrictive in relation to that building work than the performance criteria specified in the building code.

[87] Under s 24(e), the functions of a territorial authority included to "enforce the provisions of the building code and regulations."[39] The BA91 also provided for private building certifiers, who could issue a building certificate and a code of compliance if satisfied on reasonable grounds that the work complied with the provisions of the building code on the date of certification.[40]

[88] Building certifiers were prohibited from limiting their liability:[41]

> A building certifier shall not, in the terms of engagement, limit any civil liability which might arise from the issue of a building certificate or code compliance certificate by that building certifier.

[89] Civil proceedings against building certifiers were to be brought in tort and not in contract.[42]

[90] The BA91 also introduced a 10-year long-stop limitation for civil liability arising from the construction of any building or the exercise of any function under the BA91.[43]

[91] The BA91 comprised significant reform. It nationalised the performance standards into one building code and imposed a statutory requirement that all building work comply with the building code to the extent required by the BA91. The BA91 sought to incentivise innovation, efficiency and lower building costs while protecting the health and safety of building users.

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39 BA91, s 24(e).
40 Subsections 56(2) and 56(3).
41 Section 57(2).
42 Section 90.
43 Section 91.

[92] Harrison Grierson submits that the BA91 did not change the underlying common law duty and parties are able to contract contrary to that duty. TCC in contrast says that the courts have acknowledged that any duty at common law marches in step with the statutory framework such that a breach of that duty may in turn be a breach of the statute. It is therefore necessary to consider how the courts have approached the requirements of the BA91 in recognising any duty of care.

Duty of care under the BA91

[93] In *Invercargill City Council v Hamlin*[44] the Privy Council upheld the Court of Appeal's decision[45] that local authorities owe a duty of care to homeowners. While the case was not concerned with building work subject to the BA91, the Court of Appeal considered that the history to the BA91 and its provisions supported those involved in the building industry and in building controls owing a duty of care:[46]

> Importantly there is nothing in the legislation to preclude private damages claims in accordance with the existing New Zealand law for losses arising out of the negligent exercise of building control functions. On the contrary that may properly be regarded as part of the accountability at which the legislation is directed. More specifically s 91, which imposes a longstop limitation period of civil proceedings, recognises that those involved in the building industry and in building controls, including territorial authorities, will be liable for carelessly created or carelessly overlooked latent building defects.

[94] The Privy Council in upholding the Court of Appeal's decision considered that there was nothing in the BA91 to abrogate or amend the existing common law, as developed by New Zealand judges, so as to bring it into line with *Murphy v Brentwood District Council*.[47] In *Murphy*, the House of Lords had determined that local authorities did not owe any duty to homeowners. In circumstances where the BA91 contemplated private law claims for damages against local authorities, the common law duty of care should continue.[48]

[95] Whether the BA91 supported a duty applying to non-residential buildings was rejected in *Rolls-Royce New Zealand Ltd v Carter Holt Harvey Ltd*[49] and in that

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44 *Invercargill City Council v Hamlin* [1996] 1 NZLR 513 (PC) [*Hamlin (PC)*].
45 *Invercargill City Council v Hamlin* [1994] 3 NZLR 513 (CA) [*Hamlin (CA)*].
46 At 526.
47 *Murphy v Brentwood District Council* [1991] 1 AC 398 (HL) as referred to in *Hamlin (PC)* at 522.
48 *Hamlin (PC)* at 522.
49 *Rolls-Royce New Zealand Ltd v Carter Holt Harvey Ltd* [2005] 1 NZLR 324 (CA) [*Rolls-Royce*].

context, the Court of Appeal also rejected any separate duty being owed by *Rolls-Royce* to *Carter Holt Harvey Ltd* (CHH) by reason of the contract terms owed by Rolls-Royce to the head contractor. CHH could not rely on the terms of a contract (to which it was not a party) to establish a common law duty of care to enforce contract terms. Tort law did not recognise such a duty of care.[50]

[96] Despite being referred to by counsel, I do not consider that *Rolls-Royce* is directly relevant to the issues I need to determine. *Spencer on Byron* subsequently held that the BA91 did not draw a distinction between types of buildings and TCC is not relying on contract to support a duty of care. Further *Rolls-Royce* does not address contracting out of statutory requirements because it did not consider that the BA91 supported any duty of care being owed in relation to non-residential buildings.

Spencer on Byron

[97] *Spencer on Byron* is pivotal to this case because TCC argues that the Supreme Court's findings determine the issues, and I am bound by those findings. The defendants say that the Supreme Court was not concerned with the enforceability of a limitation of liability and that the findings regarding territorial authorities arise by reason of the control they exercised over the building process. I therefore consider the findings in *Spencer on Byron* to determine whether they are potentially relevant to building work that is subject to the BA04 regardless of whether the duty holder is the party responsible for that work or the territorial authority.

[98] The majority of the Supreme Court (William Young J dissenting) held that a territorial authority owes a duty of care to present and future owners when inspecting and issuing code compliance certificates in respect of commercial and other non-residential premises.[51] Reasons were provided by Elias CJ, Tipping J, Chambers J (for McGrath and Chambers JJ), and William Young J (dissenting).

[99] The Spencer on Byron was a 23-floor building constructed in the early 2000s. It was initially to be used as a hotel. Each of the 249 units was individually owned

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50 At [66].

51 I refer to commercial and non-residential building work as simply non-residential building work.

and to be leased to the hotel for a minimum term of 10 years. There were a further six penthouse apartments that did not form part of the hotel. The Council (North Shore Council) granted the necessary consents for the building and issued a series of code compliance certificates under the BA91. The building subsequently leaked. The body corporate and the majority of the unit owners brought an action in negligence against North Shore Council. Some unit owners also alleged negligent misstatement.[52]

[100] North Shore Council applied to have both claims struck out on the basis that it did not owe a duty of care to the plaintiffs.[53] The High Court struck out the claims by the body corporate and the owners of the hotel units but permitted the claims of the three penthouse apartment owners to continue.[54] Both sides appealed. The Court of Appeal struck out both causes of action and entered summary judgment in North Shore Council's favour.[55] The Supreme Court granted leave to appeal.[56]

[101] The Supreme Court considered the relevance of the BA91 in considering whether North Shore Council owed a duty of care to the plaintiffs.

Relevance of statutory framework

[102] Elias CJ considered s 7 of the BA91 (requiring that all building work comply with the building code to the extent required by the BA91) and considered that it was both a standalone purpose and a purpose directed at ensuring the health and safety purposes of the BA91:

> [14] It is impossible to conclude on what is known at present that failure to meet the code standards in relation to water exclusion does not impact directly on the safety and sanitariness of the building. They are the conditions of the building affecting the health and hygiene of occupants which the owner is obliged to remedy if not compliant with the code. The scheme of the Act is to provide the owner with assurance of compliance. If, through want of care on the part of the Council, that system of assurance fails, then the owner is entitled to look to the Council for his loss.
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> [15] In any event, the concern of s 6(1) is not simply with ensuring that buildings are "safe and sanitary". As is relevant, s 6(1)(a) provides:

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52 *Spencer on Byron* at [59].
53 At [60].
54 At [61].
55 At [62].
56 At [63].

> **6 Purposes and principles** —
>
> (1) The purposes of this Act are to provide for —
>
> (a) Necessary controls relating to building work and the use of buildings, and for ensuring that buildings are safe and sanitary and have means of escape from fire; and …
>
> The "necessary controls relating to building work" are expressed as a distinct concern from ensuring that buildings are safe and sanitary. Again, such "necessary controls" are I think defined by s 7 and the requirement of code compliance (but no more than code compliance).
>
> (footnote omitted)

[103] The defendants in this case say that Elias CJ's comments regarding s 7 of the BA91 do not suggest that s 7 has the meaning contended by TCC namely, that liability cannot be limited. I agree that in considering s 7 in the passage above, Elias CJ was not concerned with whether it constrained contract but with whether a duty of care arose by reason of the obligation it imposed. Elias CJ went on to find that the effect of s 7 was to impose a minimum standard so building work contrary to that standard was contrary to the BA91:

> [16] The code, with which the Council certified compliance, is a minimum standard, as the legislation makes clear. Building work which is not code-compliant is contrary to the Act. The Act sets up an interlocking system of assurance under which all undertaking building work or certifying compliance with the code are obliged to observe the standards set in it. …
>
> (footnotes omitted)

[104] The above passage does not shed any light on whether a limitation of liability can be construed as a contracting out of the statutory requirement for building code compliance.

[105] Elias CJ noted the observation in *Hamlin* that Parliament had not taken the opportunity in the BA91 to change the common law and remove a duty of care on local authorities exercising supervisory functions over building work. Elias CJ also observed that the BA91 adopted tortious responsibility as an element of "the system of assurance of code compliance" which replaced the earlier and more open-ended responsibilities of councils to regulate the construction of buildings.[57] The statutory

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[57] At [8].

framework of the BA91 therefore supported a duty of care at common law continuing and replaced the open-ended responsibilities on territorial authorities with assurance of code compliance. The BA91 therefore confirmed a duty of care on territorial authorities which required the exercise of reasonable care to ensure code compliance.

[106] While the provisions of the BA91 governing territorial authorities are not relevant to the defendants, the Supreme Court's observations as to the interpretation of s 7 is relevant because s 7 applies to all building work.

[107] Tipping J also considered that the provisions of the BA91 were relevant when determining whether a duty in relation to non-residential buildings applied and said, "[t]he question whether the asserted duty is owed is *profoundly influenced* by the terms of the legislation".[58] Turning to s 7, Tipping J observed that the underlying premise of s 7 is that non-compliance with the building code has a health and safety connotation[59] and the fundamental policy goal of the BA91 was to ensure that all buildings are code compliant.[60] The BA91 therefore supported a common law duty to enforce that statutory requirement to achieve the purposes.

[108] Chambers J (writing for the majority) also considered the BA91 confirmed the existence of a duty at common law:[61]

> The Act was confirmatory of existing common law. *We accept that the Act did not impose "a wider duty" than had previously been recognised.* The appellants' argument does not depend, however, on our finding that the 1991 Act did "widen" the nature of the duty. The flaw in the Council's submission is, in our respectful view, the premise that the duty of care at common law at that time was limited to councils' supervision of the construction of houses and that they had no responsibilities at common law with respect to their approval of and supervision of the construction of other buildings.
>
> (emphasis added)

[109] The defendants rely on the above passage and say the Supreme Court did not widen the common law duty, so the duty was unchanged by the BA91. The above comment was made in the context of considering whether the BA91 introduced a

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58 At [29] (footnote omitted and emphasis added).
59 At [44].
60 At [48].
61 At [106].

change that extended obligations to non-residential buildings that did not previously exist. It had not, so to that extent, it did not widen the duty.

[110] Chambers J considered that the rationale for the duty is to encourage compliance with the BA91, which applies to all those responsible for construction of buildings, not just territorial authorities:[62]

> The underpinning rationale of the duty of care in this area is the need to provide encouragement to those responsible for the construction of buildings to use reasonable care in their respective tasks within that overall undertaking. Councils, operating under the Building Act 1991, were under a statutory duty to enforce the provisions of the building code. *The law of negligence stands behind this statutory duty by providing compensation* should the Council contribute to breaches of the building code through careless acts or omissions in supervising construction.
>
> (emphasis added)

[111] The majority also considered the underlying purpose of the BA91 in explaining why the duty of care also applies to non-residential buildings:[63]

> If a building is constructed other than in compliance with the building code, it will almost certainly not be a safe and healthy building. … The national building code, which replaced individual councils' by-laws, was pared back to what Parliament considered to be the essential requirements for health and safety.
>
> …
>
> A building which is constructed otherwise than in accordance with the building code will, arising from that fact, not be safe and healthy (as we are using that term) or, at the least, be at risk from a safety and health viewpoint. Because of the owner's responsibility towards users of the building, the owner is bound to repair. *If the cause of the non-compliance can be attributed to the negligence of one or more of those responsible for the construction of the building, then it is appropriate they (including a council, if responsible) should contribute to the cost of repair.* This Court settled this point in *Sunset Terraces*. This reasoning applies with as much force to the owners of commercial buildings as it does to the owners of residential homes.
>
> (footnote omitted and emphasis added)

[112] The statutory framework of the BA91 was therefore an important policy factor in the Supreme Court finding a duty of care:

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62 At [162].
63 At [171] and [187].

> [64] Whether the courts should recognise a duty of care in new circumstances is ultimately a matter for judicial evaluation of competing policy factors. Often an important policy factor is the relevant statutory framework within which the potential duty-bearer is working. The law in this area moves incrementally.
>
> (footnote omitted)

[113] This Court cannot therefore ignore the statutory framework (in this case, the BA04). The findings in *Spencer on Byron* indicate that to the extent the BA04 adopts a similar statutory framework, it is likely to support a duty of care on each defendant if design work is building work under the BA04.

[114] The Supreme Court also considered whether finding a duty of care would undermine contract and that analysis may assist in understanding the intersection between contract, tort and statutory requirements.

Undermining contract

[115] Tipping J did not consider that finding a duty of care undermined contract because of the framing of the BA91: first, because of the prohibition against private certifiers limiting their liability under s 57(2); and second, because of the requirement under s 7 that building work comply with the building code:[64]

> It is suggested that to recognise a duty of care for all buildings would tend to undermine relevant contractual relationships and loss allocation mechanisms or opportunities thereby provided. I regard this as an overstated problem. In the first place, private certifiers were unable under the 1991 Act to limit or contract out of liability. The position must implicitly have been the same for councils when they were performing the same functions. *In the second place, those performing functions under the Act or within the scope of the Act owed statutory duties not to breach the building code. So to that extent there was no capacity for anyone involved to limit their liability by contract.*
>
> I accept that in circumstances where the parties have allocated, or have had the opportunity to allocate, risks by contract, tort law should be slow to impose a different allocation from that expressly or implicitly adopted by the parties. *But because of the way the Act is framed* I do not see that proposition as being a significant feature of the present case.
>
> (footnote omitted and emphasis added)

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64 At [39] and [40].

[116] The above passage refers to those performing functions "within the scope of the Act" which would include all those undertaking building work. Tipping J describes the responsibilities as "statutory duties" not to breach the building code. It is that responsibility that then gives rise to his view that "there was no capacity for *anyone* involved to limit their liability by contract."[65]

[117] Tipping J acknowledges that ordinarily tort law should not undermine contract (which allows parties to negotiate as they see fit) *but* "because of the way the Act is framed" that is not a feature of the case. The "framing of the Act" must be a reference to s 57(2) and s 7 of the BA91 as Tipping J expressly referred to those statutory provisions immediately prior to referring to the way the BA91 is framed.

[118] The defendants say that Tipping J acknowledged that a private party could limit liability by contract and refer to the following observation:

> [32] The next point can be summarised as: do it once, do it right. If the owner of commercial premises cannot obtain redress when the council fails to do its job properly, then such owner, in order to obtain the necessary protection, will have to engage a suitable professional to do exactly what the council is charged with doing under the Act. The owner will then be paying two sets of fees, one to the council, with no prospect of redress if the council is negligent, and the other to the professional who will be liable for negligence, *absent any limitation or exemption.* …
>
> (emphasis added)

[119] The above observation was made in the context of considering the consequences of not recognising a duty of care and before Tipping J's subsequent consideration of the effect of ss 7 and 57(2), so the observation needs to be viewed in that context. While it does suggest that a party can limit liability, Tipping J then made observations to the contrary at [39] of his judgment.

[120] Whether liability can be limited may be clearer when considering the scope of the duty arising from the requirement for building code compliance:[66]

> The standard the duty requires is compliance with the building code. That is as clear and precise as the subject matter allows. There is no quality or commercial uncertainty as to what the duty requires. *The parties cannot*

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65 At [39] (emphasis added).
66 At [47].

> *bargain for a standard below code compliance in return for a lesser price.* The imposition of the duty leads to total clarity as to where the risk falls.
>
> (emphasis added)

[121] The above passage suggests that a contract for a lower standard than building code compliance would be contrary to the BA91 so to the extent a limitation of liability has this effect, it may be contrary to the BA91.

[122] Tipping J's observations also need to be considered alongside Elias CJ's comments that the BA91 is concerned with the minimum standard of code compliance, imposed by statute and that building work which is not code compliant is contrary to the BA91.[67] Those observations too suggest that contracting contrary to the statutory minimum standard may be in breach of the BA91. That however, does not provide any guidance on whether limiting liability amounts to contracting out.

[123] The majority also considered that contract was not undermined because of the requirement in the BA91 that building work comply with the building code. The tortious duty was simply enforcing the statutory standard by imposing a duty to take reasonable care to ensure compliance with it:

> [193] It is said that recognising a duty of care in the case of commercial buildings, which are likely to be much more complicated structures than residential homes, would cut across contractual relationships the developer has put in place. *We disagree. Recognising a duty in tort does not in any way cut across contractual obligations the inspecting authority assumed towards the first owner who employed their services. No one can be party to the construction of a building which does not comply with the building code.* The duty in tort imposes no higher duty than that: for example, the inspecting authority is not responsible for ensuring the building is constructed in accordance with the plans and specifications, which will inevitably go beyond building code requirements. 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)

[124] The finding that "no one can be party to the construction of a building which does not comply with the building code" indicates the majority were also of the view that any contract that authorised non-compliance with the building code was contrary

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[67] BA91, s 7.

to the BA91. While that was not an issue that the Supreme Court was required to determine, it was a significant reason for it finding that a duty of care was owed by the North Shore Council.

[125] The Supreme Court also considered the Court of Appeal's analysis in *Rolls-Royce* but the majority did not consider it relevant because the issue in *Rolls-Royce* was whether there was a duty in tort to perform a contract. That was obviously not relevant to inspecting authorities:

> [194] Thus, these cases do not give rise to the kinds of issues which arose in *Rolls-Royce New Zealand Ltd v Carter Holt Harvey Ltd*, a case cited by Mr Goddard. That was a case in which Carter Holt was attempting to argue that Rolls-Royce was under a duty to it in tort to take reasonable care to perform a contract between Rolls-Royce and the Electricity Corporation of New Zealand Ltd, a proposition the Court of Appeal rejected. The obligation falling on inspecting authorities is quite different. It marches hand-in-hand with its statutory obligation and requires of the inspecting authority no more than Parliament has imposed.
>
> (footnote omitted)

[126] Tipping J did not consider *Rolls-Royce* supported finding against a duty because the standard required by the BA91 was clear:

> [47] In *Rolls-Royce*, the Court of Appeal was concerned about how quality standards would be set if a duty were to be recognised. That may be a valid concern if the tort duty would be unclear as to the precise standard required. But in the present context there is no difficulty in this respect. The standard the duty requires is compliance with the building code. That is as clear and precise as the subject matter allows. There is no quality or commercial uncertainty as to what the duty requires. The parties cannot bargain for a standard below code compliance in return for a lesser price. The imposition of the duty leads to total clarity as to where the risk falls.
>
> (footnote omitted)

[127] The Supreme Court's findings therefore indicate that the requirements of the BA91, which included s 7, supported a duty of care owed by territorial authorities and did not undermine contract because Parliament had mandated a minimum standard. To the extent that the BA04 maintains the same statutory requirement, the Supreme Court's findings as to the effect of that statutory requirement will be directly relevant. Those findings may assist in determining whether a limitation of liability can be said to be contrary to that statutory requirement.

Class of building owners

[128] The Supreme Court rejected arguments that commercial building owners should be treated differently to residential building owners for the purposes of recognising a duty of care:[68]

> It does not make much sense for the law to assume all home owners are vulnerable and naïve and to assume the owners of commercial buildings are wealthy and sophisticated...The assumptions have too many exceptions to make them safe assumptions on which to build legal policy.

[129] The Court therefore accepted that no distinction should be drawn between types of building owners in deciding that a duty of care was owed by the Council. This finding suggests that potential plaintiffs should be viewed as a class unless there is a principled basis for treating them otherwise.

Economic consequences and societal interests

[130] The Court's observations as to why adverse economic consequences were not a reason for rejecting a duty may be relevant to the defendants' submissions that they will suffer adverse economic consequences if liability cannot be limited. I therefore briefly set them out.

[131] The Supreme Court considered that the economic consequences of finding a duty would be appropriately mitigated by insurance. Tipping J considered that premiums for insurance would incentivise councils to fulfil their statutory responsibilities and help fulfil the primary statutory purpose, namely the construction of buildings that do not pose health and safety risks to their occupants.[69]

[132] Tipping J acknowledged that there may be some retrospective effect but that any losses would fall on rate payers. The majority considered whether recognising a duty of care on councils would result in a shift of millions (if not billions) of dollars of losses from commercial building owners to ratepayers. Chambers J considered that this submission, was loaded with assumptions including that commercial building owners are wealthy and sophisticated, and that local authorities could not rely on

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68 At [198].
69 At [50].

insurance and the income generated from their inspection work. Rates would only be a last resort if insurance and income were insufficient. The Supreme Court was not concerned with ratepayers potentially bearing those costs in circumstances where everyone uses buildings and everyone gains the benefit if, by imposition of a duty in tort, buildings are rendered safer and healthier.[70]

[133] The Court acknowledged that in policy terms, those who cause loss should be required to compensate. The Court also stated that it should not deny a cause of action unless the wider interest of society mandates that denial.[71]

[134] The above observations indicate that adverse economic consequences may be tolerated where there is a wider interest of society that requires protection such as safer and healthier buildings.

[135] The majority also considered that any adverse economic consequences would likely be shared because local authorities will usually be sharing liability with others.[72] This would include those involved in providing building work. The fact of multiple co-defendants indicated a further sharing of adverse economic consequences.

[136] Despite this potential sharing of liability, the Court also acknowledged that in some cases others involved in the construction process have gone bankrupt or into liquidation by the time defects manifest themselves, but that this is not always the case. The Court said, "[t]he policy of the law in this area should not be determined from an assumption that the local authority stands alone as defendant."[73] The Court considered that if this was a concern, then legislative action to create a form of builders guarantee scheme might be a solution.[74]

[137] In summary, the Court considered: that insurance would provide protection against losses and incentivise compliance; that commercial building owners are not necessarily wealthy and sophisticated; that safer and healthier buildings were of wide

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70 At [203].
71 At [54].
72 At [204].
73 At [204].
74 At [204].

societal interest; and councils would be sharing liability with others involved in building work so the economic consequences for councils did not dictate against finding a duty of care.

[138] I accept Mr Barker's submission that the Court's reasoning is likely to apply when considering the potential adverse economic effects for engineers if they cannot limit liability but I also accept that the Court was not concerned with engineers as a class of defendants so did not consider any potential adverse market consequences for the provision of engineering services. So while helpful, the findings do not address all potential consequences that may arise when dealing with a different class of defendant, who do not share the same statutory functions as territorial authorities.

Special role of territorial authorities

[139] The defendants say that the findings in *Spencer on Byron* turn on the special role of territorial authorities. That is, the control that they exercise over the building process, as prescribed by the BA91. I accept that some of the Court's reasoning was directed to the statutory functions of territorial authorities under the BA91, but other aspects turned on the statutory requirement that building work comply with the building code. That latter requirement is not limited to the functions of territorial authorities. Should parties choose to engage in building work then the Court's findings as to the interpretation of s 7 of the BA91 are applicable.

[140] The similarity in function between territorial authorities and private certifiers was a reason for Tipping J's comments that liability could not be limited because of s 57(2) of the BA91. The similarity in function does not however, apply to engineers or suggest that s 57(2) was directed to all those engaged in building work. This view is consistent with the 1990 report which noted that if territorial authorities could not limit liability neither should an approved certifier:[75]

> 4.92 When a building producer is at fault - be that the architect, engineer, builder or any other member of the building team - the owner has a right of action for damages or for breach of contract. If the fault lies with the builder in common with the TA [Territorial Authority] and/or the Approved Certifier, there is no reason why liability should not fall upon any one or more of them where it belongs, in accordance with the general law.

[75] 1990 Report.

> 4.93 A builder can evade liability by bankruptcy or winding up, but a TA cannot. The purpose of insisting upon an Approved Certifier having adequate insurance cover is to protect the owner from any exercise of this means of avoiding liability.

[141] The reason for s 57(2) appears to have been because building owners should not be disadvantaged by the privatisation of certification functions to approved certifiers. The above passage expressly acknowledges that claims against building producers may be for breach of contract but does not comment on contract as a means to "evade liability." The inference is that only private certifiers should be prohibited from limiting their liability because they were in effect, undertaking a public function.

[142] However, the Court's findings regarding s 7 are directly applicable to building producers and were a reason for the Court's observation that no one can contract contrary to the statutory requirement. That the Court considered its findings applied to all building work is supported by the following observations:[76]

> The Act sets up an interlocking system of assurance under which *all undertaking building work* or certifying compliance with the code are *obliged to observe the standards set in it*.
>
> …
>
> those performing functions under the Act *or within the scope of the Act* owed statutory duties *not to breach the building code*. So to that extent there was no capacity for anyone involved to limit their liability by contract.
>
> …
>
> *No one can be party* to the construction of a building which does not comply with the building code.
>
> (footnote omitted and emphasis added)

[143] I accept the defendants' submission that one limb of the Court's reasoning related to the special role of territorial authorities and private certifiers and does not therefore apply to the defendants. But the other limb of the Court's reasoning relied on the interpretation of s 7 of the BA91. That statutory requirement was not limited to territorial authorities and applied to all building work, so the Court's reasoning is likely to be relevant.

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[76] *Spencer on Byron* at [16], [39] and [193].

[144] It is helpful to also consider the dissenting judgment of William Young J because it discloses the issues that were known to, and considered by, the Court but ultimately rejected by the majority. The dissent raises the same issues that the defendants seek to raise in this case and illustrates that the Court had to consider whether contract was undermined by finding a duty, that being a significant reason for the Court both finding for (and against) a duty of care.

Dissenting judgment

[145] William Young J considered health and safety carried less weight in relation to commercial or industrial buildings because of the statutory powers of territorial authorities to address insanitary or dangerous buildings.[77] Occupational health and safety requirements also applied to commercial and industrial buildings so that there were other mechanisms to enforce those requirements outside of the BA91.[78]

[146] William Young J also noted that the legislature in the BA04 had now provided for different types of building consents and had differentiated between simple residential building consents and commercial building consents (ss 52G-52Y of the BA04 as introduced by s 17 of the Building Amendment Act 2012 but not yet in force).[79]

[147] William Young J was reluctant to impose a duty on territorial authorities because he considered it would offend the important principle that contractual undertakings should not be infringed. To find a duty of care on territorial authorities would require corresponding duties on others and this would undermine contract:

> [302] It has always been recognised that it would be neither just nor practical to impose duties of care on territorial authorities which are not matched by corresponding duties of care imposed on others involved in the construction process. The courts must of course, be careful to ensure that such duties are not imposed in a way which cuts across the underlying contractual undertakings. In practical terms, the more complex the building (and thus the greater the responsible participants in the construction process), the greater the risk that the imposition of tort liability will infringe this principle.

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77 At [301(f)].
78 At [301(f)].
79 At [301(c)].

[148] The above passage indicates that if a duty is imposed on territorial authorities, justice and practical considerations would likely require that corresponding duties apply to building participants. In William Young J's view, that would undermine contract, particularly in the context of complex commercial buildings. This view contrasts with the findings of the majority that there was no scope to undermine contract because no one was entitled to bargain for less than the minimum standard required by the BA91.

[149] Further, William Young J considered that the reasons given by the majority, that the duty of care is addressed to the objective standard of the building code, did not acknowledge that the primary responsibility must lie with the building owner:

> [305] Imposing a duty of care which is not limited to the contractual commitments of the defendant must have the potential to disrupt what may be perfectly natural and perhaps very efficient decisions as to the allocation of risk and responsibility. For instance, the level of supervision provided by an architect or engineer will be determined by contract. The practical ability of that supervisor to detect and report on deviations from the building contracts as to compliance with the building code is likely to be associated with the extent of the supervision that the building owner is prepared to pay for. In this context, the imposition on that supervisor of a free-standing tortious duty of care to future owners may involve some tension with the contractual relationship. …

[150] The above passage indicates that the Supreme Court was alive to the issue of contractual allocation of risk. William Young J's dissent was predicated on a view that building owners should be free to negotiate allocation of risk as this is reflected in pricing. The majority however, considered that the statutory minimum standard was paramount (given the health and safety purpose) and any right to allocate risk could not undermine the minimum standard. This is relevant to the BA04 in so far as it maintains the statutory minimum standard and maintains the same statutory framework. In this regard, the Court briefly considered whether the position was likely to be the same under the BA04.

Application to the BA04

[151] The Court expressly reserved its position as to the requirements under the BA04, noting that:[80]

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80 At [217].

> The Building Act 2004 came into force on a variety of dates; for the most part on 31 March 2005. It is likely that the conclusions we have reached in this decision will also apply under the 2004 Act, but we reserve our position in that regard as we have not had detailed argument as to the effect that Act may have had in the area under discussion here.
>
> (footnote omitted)

[152] William Young J in his dissent observed that the BA04 was unlikely to impact the relevance of the majority's findings:[81]

> This is because, at least to my current way of thinking, the scheme under the 2004 Act is insufficiently different from the previous scheme to justify a different result. Given what is inherent in litigation associated with latent defects and the operation of limitation rules, this judgment will establish scope for liability which will extend (both backwards and forwards) for some decades. All involved in the building process (including territorial authorities, building owners and end-purchasers) will act on that basis, with consent and inspections practices, fees and presumably insurance arrangements organised or set up accordingly. …

[153] The above comments suggest that the Court would likely also find a duty of care was supported by the BA04. The observations do not however, assist in so far as the Court was not concerned with whether a limitation of liability is contrary to s 7 of the BA91 or with illegality under the CCLA.

Summary of findings

[154] I summarise the Court's findings to help identify their potential application to the BA04, as follows:

(a) The statutory framework of the BA91 was directly relevant to the finding that territorial authorities owe a duty of care to owners of non-residential buildings. The statutory requirements of the BA04 are therefore directly relevant to whether the defendants owe any duty of care to TCC.

(b) Section 7 of the BA91 imposed a minimum standard on building work (compliance with the building code to the extent required by the BA91) and the purpose of that minimum standard was to protect the health and safety of building users. Building work that does not comply with that

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81 At [308].

statutory requirement is contrary to the BA91. By reason of s 7 of the BA91, parties cannot bargain for a standard below building code compliance. The Court's findings as to the interpretation of s 7 of the BA91 are therefore likely to be relevant when interpreting the BA04 if the BA04 imposes the same minimum standard and has the same purposes.

(c) The standard of the duty of care is the exercise of reasonable skill and care to ensure that building work complies with the building code.

(d) The BA91 recognises tortious responsibility as the mechanism by which its requirements are enforced. Tortious responsibility is therefore likely to continue to be the mechanism for enforcement unless the provisions of the BA04 indicate otherwise.

(e) The duty of care owed by territorial authorities does not undermine contract because of the way the BA91 is framed. To the extent that the BA04 is framed in a similar way to the BA91, the Court's findings are likely to be relevant when interpreting the BA04.

[155] The above findings were subsequently reinforced by the Supreme Court in *Southland Indoor Leisure Centre Charitable Trust v Invercargill City Council.*[82] The Court upheld an appeal by Southland Indoor Leisure Centre Charitable Trust (the Trust) and considered the Court of Appeal had been wrong to distinguish *Spencer on Byron* and to find that the Council did not owe a duty of care to the Trust. The Trust had built a stadium in 1999-2000 with remedial work undertaken on the roof in 2000. In 2010, the roof collapsed under the weight of a snowstorm.

[156] The Court of Appeal distinguished *Spencer on Byron* and held that the only basis for a claim was negligent misstatement. In the Court of Appeal, Harrison and Cooper JJ (in a judgment given by Harrison J) held that there was no duty of care where the defects causing the collapse of the stadium were the result of the negligence

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82 *Southland Indoor Leisure Centre Charitable Trust v Invercargill City Council* [2017] NZSC 190, [2018] 1 NZLR 278. [*Southland Indoor Leisure Centre (SC)*].

of the Trust's agents (the architect, engineer and builders).[83] Miller J said that 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".[84] The Court of Appeal held that the cause of action in negligent misstatement failed for lack of specific reliance.[85]

[157] The Supreme Court considered the Court of Appeal had taken insufficient account of the fact that the duty "springs from the Council's regulatory role under the 1991 Act" and there was no valid distinction between physical inspections and the issue of a code compliance certificate.[86] The Supreme Court noted that *Spencer on Byron* confirmed the importance of the Council's role and responsibilities under the BA91 and the statutory purpose of ensuring compliance with the building code as a minimum standard.[87]

[158] The Supreme Court also briefly considered the relevance of an indemnity in the lease between the Trust and the Council. The Trust had leased the land from the Council and that lease contained an indemnity under which the Trust agreed to indemnify the Council against all claims of any nature arising out of any building works on the land.

[159] The High Court had held that the lease governed claims between the Trust and Council as tenant and landlord and not claims against the Council as the territorial authority responsible for building controls. The High Court went on to consider whether the provisions of the BA91 precluded the Council from relying on the indemnity and accepted that because of s 57(2) of the BA91 (prohibiting limitations of liability for private certifiers) and the general public safety purpose of the legislation, there were good public policy reasons for suggesting that a Council could not contract out of liability under the BA91:[88]

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83 *Invercargill City Council v Southland Indoor Leisure Centre Charitable Trust* [2017] NZCA 68, [2017] 2 NZR 650 [*Southland Indoor Leisure Centret (CA)*] at [177]–[185].

84 At [98].

85 At [111]-[117] per Miller J and [199]-209] per Harrison J.

86 *Southland Indoor Leisure Centre (SC)* at [87].

87 At [60].

88 *Southland Indoor Leisure Centre Charitable Trust v Invercargill City Council* [2015] NZHC 1983 at [185].

> While I accept that limiting liability to one party by contract will not limit the Council's tortious liability to other non-contracting parties, it would not facilitate achieving the purposes of the 1991 Act if contracting out was permissible.

[160] The Court of Appeal agreed that the indemnity was not relevant but did observe that if relevant, its enforceability would be decided under the Illegal Contracts Act 1970 (the predecessor to the CCLA):[89]

> [145] Mr Ring also argued that it would be contrary to public policy to allow a local authority to circumvent it obligations under the 1991 Act by requiring an indemnity from building owners. I accept that courts may find contrary to public policy, and so illegal, agreements that significant statutory duties need not be performed. It is only a modest extension of this principle to say that a court may refuse to allow the duty-bound party to insist that potential plaintiffs execute an indemnity before doing what the legislation requires, so eliminating the principal remedy for any breach. That said, I need not take that course here, because indemnity did not extend so far. I add that the lease and project agreements served a proper purpose and any invitation to sever a specific clause for illegality would presumably be decided under the remedial provisions of the Illegal Contracts Act 1970, which the Trust did not invoke.

[161] The observations above acknowledge that contract may not allow a party to avoid a statutory duty. The question in this case is whether any duty requires that liability not be limited. I consider that question when considering whether the limitation clauses are enforceable.

[162] The Supreme Court also accepted the indemnity was not applicable but nevertheless observed that "the Council cannot, except as permitted by the 1991 Act, contract out of those statutory obligations."[90]

[163] *Southland Indoor Leisure Centre* therefore affirms the significance of the underlying statutory framework which gives rise to a duty on those who are subject to it. While the Court did not have to consider the legality of the indemnity, the courts observations (at all levels) support a prohibition on contracting out of statutory obligations arising under the BA91.

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89 *Southland Indoor Leisure Centre (CA)* at [145].
90 *Southland Indoor Leisure Centre (SC)* at [72].

[164] The above authorities relate to the BA91. It is therefore necessary to set out the background to the BA04 to identify whether there are any material differences in its purpose and statutory framework.

Building Act 2004

[165] New Zealand's experience with "leaky homes" or "weathertightness" issues prompted a review of the building control regime. A Government Committee report identified that there was a "systemic failure" of the building industry and "too greater reliance on market competitiveness."[91] The review identified that there was an adequate framework for building control, but procedural and technical controls were in part faulty in design and the building industry needed to be accountable.[92]

[166] The changes were intended to build on, rather than replace, the BA91:[93]

> We are building on the foundation of the Building Act 1991. All of the consultation that has been carried out so far … indicates that the Building Act 1991 is not fundamentally flawed. Rather, it needs to be strengthened in a number of ways to be effective.
>
> …
>
> These proposals place emphasis on improving the quality of inputs into the building industry – better guidance on best-practice design, methods and products, and more capable people. At the same time we are proposing to make it clearer where the responsibility lies for quality and workmanship – with the people actually doing the work – and there will be much more stringent monitoring and enforcement of the Building Code.

[167] Against the backdrop of the above objectives, the BA04 was enacted.

Purposes

[168] The purposes of the BA04 capture the same purposes prescribed in s 6 of the BA91:[94]

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91 *Weathertightness of Buildings in New Zealand: Report of the Government Administration Committee's inquiry into the weathertightness of buildings in New Zealand* (Government Administration Committee, March 2003) at 15.

92 At 15.

93 *Ministry of Economic Development: Discussion Document: Better Regulation of the Building Industry in New Zealand* (Ministry of Economic Development, March 2003) at 2.

94 BA04, s 3, as at 24 August 2004.

> **3 Purpose**
>
> The Act has the following purposes:
>
> (a) to provide for the regulation of building work, the establishment of a licensing regime for building practitioners, and the setting of performance standards for buildings, to ensure that—
>
> (i) people who use buildings can do so safely and without endangering their health; and
>
> (ii) buildings have attributes that contribute appropriately to the health, physical independence, and well-being of the people who use them; and
>
> (iii) people who use a building can escape from the building if it is on fire; and
>
> (iv) buildings are designed, constructed, and able to be used in ways that promote sustainable development:

[169] Both the BA91 and the BA04 have the purpose of protecting the safety of persons who use buildings by providing for "performance standards" (BA04) or "necessary controls relating to building work" (BA91). The BA04 therefore retains the underlying object of the BA91 in protecting the health and safety of users of buildings and retains the same mechanism for achieving this — compliance with the building code.

[170] The explanatory note of the Building Bill 2003 identified a further objective of the BA04 which was not captured within the BA91:[95]

> There is a further objective, which is to assist owners in the event that buildings fail or building practitioners fail. This is to be achieved by providing for implied warranties to form part of all contracts for building work in relation to household units.

[171] The above objective directly addresses rights and indicates a Parliamentary intent to protect owners of household units but not necessarily other types of building owners.

[172] A further purpose was added when the BA04 was reviewed in 2009. The Minister, in announcing the review, indicated the "very definite results" he wanted

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95 Building Bill 2003 (explanatory note) at 22.

from the review, which included "removal of building regulation that adds cost and little benefit," and "a shift of responsibility back towards builders, away from councils" and "better information for consumers."[96]

[173] The 2009 review identified a desire for more efficient and less complex regulation while also holding those responsible to account:[97]

> The response to the problems of the 1990s has made some parts of the system overly cumbersome and costly. Without cutting corners, we need to get rid of unnecessary red tape that adds cost without adding value. We also need to have everyone involved in building taking a fair share of responsibility for getting the job done right first time, and for fixing any problems that may arise.

[174] Efficiency, however, was not to come at the expense of health and safety or financial security of New Zealanders. Accountability of those involved remained a clear objective:[98]

> The Government has no interest in deregulating at the cost of the health, safety, or financial security of New Zealanders. *Quality of building work must come first—that is the fundamental purpose of the Building Act 2004*. …
>
> I will now outline the key changes contained in the Building Amendment Bill (No 3). They cover three broad areas: clearer accountability, more efficient regulation, and improving skills and knowledge. These areas are all interrelated. We cannot make regulation more efficient without first getting accountability clear, and both depend on people having the necessary skills and knowledge. *The Building Act 2004 will be amended to make it clearer that the buck stops with the people doing the work. Builders and designers must make sure their work will meet building code requirements; building owners must make sure they get the necessary approvals and are accountable for any decisions they make*, such as substituting specified products; and building consent authorities are accountable for checking that plans will meet building code requirements and inspecting to make sure plans are followed.
>
> (emphasis added)

[175] An additional purpose was then added to the BA04 to reflect the desire for greater accountability as follows:[99]

> This Act has the following purposes:

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96 Hon Maurice Williamson "Announcement on Building Act Review and Licensed Building Practitioner scheme" (28 August 2009) New Zealand Government <beehive.govt.nz>.

97 Building Amendment Bill (No 4) (explanatory note).

98 (9 December 2010) 699 NZPD 16053.

99 BA04, s 3(b). Replaced on 13 March 2012 by s 4 of the Building Amendment Act 2012 (2012 No 23).

…

(b) to promote the accountability of owners, designers, builders, and building consent authorities who have responsibilities for ensuring that building work complies with the building code.

[176] This additional purpose supports the BA04 being interpreted in a manner that promotes accountability of owners, designers, builders and building consent authorities who have responsibilities for ensuring that building work complies with the building code. The overall purposes have therefore remained the same but with a greater emphasis on accountability and with an additional purpose of providing increased protection for owners of residential buildings.

Building code compliance

[177] The requirements in s 7 of the BA91 that building work comply with the building code remains in ss 17 and 18 of the BA04:[100]

17 All building work must comply with Building Code

All building work must comply with the building code to the extent required by this Act, whether or not a building consent is required in respect of that building work.

18 Building work not required to achieve performance criteria additional to or more restrictive than Building Code

(1) A person who carries out any building work is not required by this Act to—

(a) achieve performance criteria that are additional to, or more restrictive than, the performance criteria prescribed in the building code in relation to that building work; or

(b) take any action in respect of that building work if it complies with the building code.

(2) Subsection (1) is subject to any express provision to the contrary in any Act.

[178] The defendants accept that s 17 was simply a reenactment of s 7(1) of the BA91 and s 18(1) was a reenactment of s 7(2). In those circumstances, the findings of the Supreme Court as to the interpretation of those provisions are relevant unless other provisions of the BA04 provide a basis for a different interpretation.

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[100] Section 17 remains unchanged since first included in the BA04.

Responsibilities

[179] The BA04 introduced new provisions describing the responsibilities on building participants (owner, owner-builder, designer, builder, building consent authority, product manufacturer or supplier) as set out in ss 14A to 14G. This is consistent with the object of increased accountability.

[180] Relevant to this case, is the responsibilities of TCC as owner and each defendant as a designer. The responsibilities of an owner are specified in s 14B as follows:

> **14B Responsibilities of owner**
>
> An owner is responsible for—
>
> (a) obtaining any necessary consents, approvals, and certificates:
>
> (b) ensuring that building work carried out by the owner complies with the building consent or, if there is no building consent, with the building code:
>
> (c) ensuring compliance with any notices to fix.

[181] The responsibilities of a designer are specified in s 14D as follows:

> **14D Responsibilities of designer**
>
> (1) In subsection (2), designer means a person who prepares plans and specifications for building work or who gives advice on the compliance of building work with the building code.
>
> (2) A designer is responsible for ensuring that the plans and specifications or the advice in question are sufficient to result in the building work complying with the building code, if the building work were properly completed in accordance with those plans and specifications or that advice.

[182] Section 14A outlines how the responsibilities are to be interpreted:

> **14A Outline of responsibilities under this Act**
>
> Sections 14B to 14G—
>
> (a) are not a definitive and exhaustive statement of the responsibilities of the parties but are an outline only:
>
> (b) are for guidance only, and in the event of any conflict between any of those sections and any other provision of this Act, the latter prevails:

(c) do not reflect the responsibilities of the parties under any other law or enactment or any contract that may be entered into between them and are not intended to add to the existing responsibilities of the parties.

[183] Section 14A is particularly relevant when considering whether a party can contract contrary to the responsibilities in the BA04, which I consider when considering illegality.

[184] I now turn to consider how the courts have interpreted these new provisions when determining whether building work subject to the BA04 gives rise to any duty of care.

Duty of care under the BA04

[185] In *Carter Holt Harvey Ltd v Ministry of Education*[101] the Supreme Court referred to the findings in *Spencer on Byron* and held that it was arguable that a manufacturer of building products (CHH) owed a duty of care in negligence because of the requirements under the BA04 applying to building materials.[102]

[186] The Supreme Court also considered whether recognising a duty of care would cut across the law of contract, and risk creating commercial uncertainty and incoherence in the common law. It was argued that imposing a duty of care would provide the respondents with greater legal protection than those who purchased cladding sheets and cladding systems directly from CHH, and who could therefore rely on their contractual rights against CHH. The Court did not consider that CHH's arguments as to the contractual framework were decisive when considering whether a duty of care should be imposed and considered that the issue could be fully explored at trial.[103]

[187] The Court held that *Rolls-Royce* was "readily distinguishable."[104] The contractual regime in *Rolls-Royce* was specifically designed for that particular project. The parties were legally advised throughout. They chose how the risks and

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101 *Carter Holt Harvey Ltd v Ministry of Education* [2016] NZSC 95, [2017] 1 NZLR 78.
102 At [40].
103 At [72].
104 At [25].

responsibilities would be allocated. The Court considered it appropriate to determine issues relating to contractual arrangements at trial.[105]

[188] The Supreme Court also noted the observation in *Spencer on Byron* that potential plaintiffs should be viewed as a class and did not accept arguments that owners of non-residential buildings were necessarily able to protect themselves by contractual measures.[106]

[189] *Carter Holt Harvey Ltd v Ministry of Education* therefore reinforces the relevance of the statutory framework to the duty of care and the Supreme Court's view that there is no distinction between types of building owners when considering whether such a duty should be recognised.

[190] The defendants refer to *Andrews Property Services Ltd v Body Corporate 160361*[107] in submitting that the duty is not one out of which a party cannot contract. Andrews Property Services (APS) had undertaken remedial works under the direction of Babbage (the architect and engineer). It was alleged that APS had failed to ensure that Babbage had first adequately surveyed the building to detect the extent and nature of remedial work required.

[191] Babbage was obliged to obtain a survey of the building under its contract with the building owner. APS was then required to do what Babbage directed in respect of the remedial work.

[192] The Court of Appeal held that APS did not owe a duty to the building owner to take steps to require Babbage to undertake the survey. The Court of Appeal considered that the requirement for APS to meet the standard of a competent builder did not impose on it an obligation to require Babbage to perform an obligation Babbage had contracted with the owners to perform.[108]

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105 At [26] to [28].
106 At [54].
107 *Andrews Property Services Ltd v Body Corporate 160361* [2016] NZCA 644, [2017] 2 NZLR 772 [*Andrew Property Services*].
108 At [119].

[193] By not recognising a duty on APS to undertake the survey, the Court gave effect to the contract as to the allocation of responsibility for the survey. APS could not be held liable for responsibilities it had not contractually agreed to perform. It suggests that the courts will give effect to contracts that allocate responsibilities between parties for different aspects of building work. The case does not however, address the issue of whether a party who has responsibility for building work may contract to limit its liability so to that extent it does not assist.

[194] The role of contract and whether a duty of care applies in a commercial context was also considered by this Court in *Capital and Coast District Health Board v Beca Carter Hollings & Ferner Ltd.*[109] The Court noted the observations in *Spencer on Byron* and considered that the Supreme Court had identified a "baseline duty" regarding code compliance out of which a party could not contract:

> [258] In *Spencer on Byron*, where the Supreme Court was dealing with a strike-out application by the Council, the majority held that imposing a duty would not be generally inconsistent with contractual obligations, essentially because the Building Code establishes a baseline, and no one can contract to erect a building that is not code-compliant. The Court rejected any distinction between residential building and commercial building owners in the context of deciding the extent of the duty of care owed by the Council.
>
> (footnotes omitted)

[195] The Court acknowledged the importance of commercial certainty and sanctity of contract in considering whether a contract could negate a duty and considered that it could *but* only to the extent that the duty went *beyond* the duty recognised in *Spencer on Byron*:

> [302] It seems to me that in most major building projects such as this, where the contractor and the commissioning owner have gone to considerable lengths to spell out the contractor's obligations in detailed contract documents, it is unlikely to be fair, just or reasonable to impose on the contractor obligations to the commissioning owner in tort *going beyond* the "base" obligation to exercise proper skill and care to ensure that the building work complies with the Building Code (i.e. the duty recognised by the Supreme Court in *Spencer on Byron*).
>
> …
>
> [305] In coming to that view I acknowledge that the Court of Appeal considering the application in *Blain* to set aside third party notices did say that

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109 *Capital and Coast District Health Board v Beca Carter Hollings & Ferner Ltd* [2018] NZHC 24.

> the question of whether a duty of care is owed by a builder to a commissioning owner of a commercial building is unsettled. *But it seems to me that the existence of a duty to exercise at least reasonable care to ensure compliance with the Building Code was acknowledged by the Supreme Court in Spencer on Byron (with no distinction between commercial and residential owners), as a duty one cannot contract out of.* I think I am dealing here with the narrower question of whether a wider tort duty should be recognised (which would appear to be co-extensive with FCC's existing contractual duty).
>
> (footnotes omitted and emphasis added)

[196] The above passage reinforces the existence of a baseline duty of care as recognised in *Spencer on Byron* which arises because of the statutory requirement that building work comply with the building code. *Capital and Coast District Health Board* supports the baseline duty being one out of which no one can contract, but it does not address the issue of a limitation of liability and whether that would amount to contracting out.

[197] *Minister of Education v H Construction North Island Ltd* further reinforced that the BA04 supports a duty of care being owed by a builder to a non-residential building owner (a school).[110] While the building work was governed by the BA91, the Court considered that the BA04 supported recognising a duty of care:

> [36] Overall, the trend is clear. A preponderance of authority recognises a builder owes a tortious duty of care to owners – both immediate and later, and irrespective of whether the building is residential or otherwise. This conclusion is consistent with the Building Act 2004 and its predecessor, the Building Act 1991.
>
> [37] Section 7 of the 1991 Act required all building work to comply with the Building Code, irrespective of whether a building consent was necessary. That Act established a "system of assurance under which all undertaking building work" were obliged to observe Building Code standards. As Tipping J observed in *Spencer on Byron*, "imposition of the duty is … wholly consistent with the fundamental policy goal of the Act, namely to ensure that all buildings are code compliant."
>
> [38] The 2004 Act maintains embracing obligations in relation to Code-compliance. [The Court then set out ss 17 and 18 of the BA04]
>
> ...
>
> Subpart 4 was added to Part 1 of the Act on 13 March 2012. Although for "guidance only", it outlines the following responsibilities:
>
> [The Court then set out ss 14B to 14E]

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110 *Minister of Education v H Construction North Island Ltd* [2018] NZHC 871 [*H Construction*].

…

[40] These responsibilities are self-evidently consistent with the imposition of a duty of care.

(footnotes omitted)

[198] Downs J noted this approach is also consistent with the Supreme Court's observations in *Hotchin v New Zealand Guardian Trust Co Ltd* that:[111]

> In a typical New Zealand case, the owner of a leaky building will have claims against the builder (which New Zealand courts accept can be brought in tort). As against the builder, the claim in tort will be based on breach of a duty of care associated with compliance with the Building Code. As against the local authority, the claim will be for breach of a duty of care associated with its inspection and certification functions.

[199] Downs J also considered the contract with H Construction (referred to in the judgment as Hawkins). The relevant contract was a construction only contract. It provided that the architect was responsible for design, and Hawkins was obliged to perform the works "diligently" and to the architect's satisfaction. Under the contract, Hawkins was not liable for loss or damage caused by design defects. The architect was to inspect defective works during the defects liability period. If satisfied these had been remedied, the architect was to certify that. Similarly, the architect was to certify practical completion. The contract included an indemnity for damage due to any act or omission of the Ministry, architect or contractor employed by the Ministry. Hawkins was required to provide guarantees, including a weathertightness warranty for a minimum period of two years.[112]

[200] The Court rejected a submission that recognition of a tortious duty on Hawkins would be contrary to the contract, first, because the contract was silent as to any tortious liability, and second, because:[113]

> The proposition sits awkwardly with the Building Acts, which are directed to the world at large. As Tipping J said in *Spencer on Byron,* those performing functions "within the scope of the Act owed statutory duties not to breach the building code".
>
> (footnote omitted)

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111 At [34] citing *Hotchin v New Zealand Guardian Trust Co Ltd* [2016] NZSC 24, [2016] 1 NZLR 906 at [198].

112 At [41].

113 At [44].

[201] Further, there was nothing in the contract that implied that the parties intended to preclude a duty of care on the part of Hawkins vis-à-vis building code compliance.[114] Downs J noted that Hawkins could have negotiated an express exclusion of tortious liability but did not.[115] While Downs J noted the potential for excluding tortious liability, he was not required to consider how such an exclusion is to be reconciled with the requirement for code compliance in s 17 so the comment on its own does not take the issue any further. I acknowledge that it suggests that a party is free to exclude tortious liability by contract.

[202] Downs J also considered the relevance of *Rolls-Royce* and held that it involved issues relating to a different duty (allegedly owed by Rolls-Royce to CHH to take reasonable care in performing Rolls-Royce's contract with ECNZ). Further, the building code did not feature in *Rolls-Royce*:[116]

> As observed, it [the Building Code] is directed to the world at large, and creates statutory obligations of compliance. In any event, Rolls-Royce's vitality in this context is not free from doubt. In *Carter Holt Harvey Ltd v Minister of Education,* the Supreme Court observed:
>
> > It will also need to be determined at trial how much of the analysis in *Rolls-Royce* continues to apply after this Court's decision in *Spencer on Byron.*
>
> (footnote omitted)

[203] Downs J concluded that a duty of care was not excluded by the terms of the contract.

[204] *H Construction* therefore reinforces a duty of care arising from the requirements of the BA04 and suggests that contract may be used to exclude liability for tortious responsibility. There however, was no need for the Court to consider the legality of any exclusion or limitation of liability so it does not assist in addressing that latter issue.

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114 At [49].
115 At [43].
116 At [54] citing the Court's comment in footnote 26 of *Carter Holt Harvey Ltd v Minister of Education* [2016] NZSC 95, [2017] 1 NZLR 78.

[205] The caselaw indicates that the courts have accepted that parties who undertake building work under the BA04 owe a duty of care at common law which is directed at the statutory requirement of building code compliance. It is also reasonably clear that the courts have considered that *Spencer on Byron* requires the recognition of a duty of care at common law in relation to both residential and non-residential buildings.

[206] *Andrews Property Services* suggests that parties may allocate responsibilities for different aspects of building work between them, and any duty of care will be considered subject to those contractual arrangements. The courts have not yet determined whether a limitation of liability would be contrary to the requirement of building code compliance such that it would be in breach of the BA04.

[207] Despite the above findings, the defendants argue that design work is not building work within the meaning of the BA04 and therefore the statutory requirement of building code compliance does not apply to design work. I therefore consider this issue before considering whether a limitation clause is in breach of the BA04.

Is design work building work?

[208] The definition of building work indicates that it is to be interpreted in the context within which it is used:[117]

> **7 Interpretation**
>
> (1) In this Act, unless the context otherwise requires,—
>
> …
>
> **building work**—
>
> (a) means work that is either of the following:
>
> (i) for, or in connection with, the construction, alteration, demolition, or removal of a building:
>
> (ii) on an allotment that is likely to affect the extent to which an existing building on that allotment complies with the building code; and
>
> (b) includes sitework; and

[117] BA04, s 7.

(c) includes design work (relating to building work) that is design work of a kind declared by the Governor-General by Order in Council to be restricted building work for the purposes of this Act (*see* subsection (2)); and

(d) in Part 4, and the definition in this section of supervise, also includes design work (relating to building work) of a kind declared by the Governor-General by Order in Council to be building work for the purposes of Part 4 (*see* subsection (2)); and

(f) includes the manufacture of a modular component.

…

[209] The above definition for building work at s 7(1)(a) captures work for, or in connection with, the construction of a building. Construct includes to design[118] so building work includes work for the design of a building.

[210] Building is defined in s 8, as follows:

8 Building: what it means and includes

(1) In this Act, unless the context otherwise requires, building—

(a) means a temporary or permanent movable or immovable structure (including a structure intended for occupation by people, animals, machinery, or chattels); and …Work for or in connection with the design of a building therefore falls within the plain meaning of the definition. Building is defined as follows:[119]

[211] A carpark, being a structure, is therefore a building for the purpose of the BA04. The design of a carpark therefore falls within the meaning of building work as set out in s 7(1)(a) of the definition building work. This interpretation was confirmed in *Carter Holt Harvey Ltd v Genesis Power Ltd (No 8)*, where Randerson J stated:[120]

> [59] It follows that design work on buildings is incorporated in the definition of building work by its inclusion in the element of construction. On that basis, building work includes general design work in connection with buildings as well as the two specific types of design work identified in s 7(c) and (d).

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118 BA04, s 7.
119 BA04, s8(1).
120 *Carter Holt Harvey Ltd v Genesis Power Ltd (No 8)* HC Auckland CIV-2001-404-1974, 29 August 2008.

[212] *Building Law in New Zealand* also notes that building work includes design work beyond the kinds of design work in subss 7(1)(c) and 7(1)(d) of the definition of building work:[121]

> "Building work" as defined includes not only the particular kinds of design work identified in (c) and (d) of the definition but also includes design work in general. That is because the word "construct" is defined as including "to design": *Carter Holt Harvey Ltd v Genesis Power Ltd (No 8)* HC Auckland CIV-2001-404-1974, 29 August 2008.

[213] Despite the finding in *Carter Holt Harvey Ltd v Genesis Power Ltd (No 8),* the defendants argue that building work only includes the kind of design work referred to in subss 7(1)(c) and 7(1)(d) because logically, reference to those subsections in the definition is redundant if all design work is intended to fall within the definition.

[214] It is therefore helpful to identify the type of design work that falls within subss 7(1)(c) and 7(1)(d) definition of building work to determine whether there is any merit in the defendants' submission.

[215] Subsection 7(1)(c) captures design work that is restricted building work. The kind of design work declared as restricted building work for the purposes of s 7(1)(c) is design work relating to the primary structure of a house or small-to-medium apartment building or any external moisture-management system for those types of buildings.[122]

[216] Turning to the other kind of design work, subs 7(1)(d) of the definition of building work applies to Part 4. Part 4 relates to regulation of licensed building practitioners. The kind of design work declared for the purposes of Part 4 is design work (relating to building work) for, or in connection with, the construction or alteration of a building.[123] It also includes the definition of supervise:[124]

> **supervise**, in relation to building work, means provide control or direction and oversight of the building work to an extent that is sufficient to ensure that the building work—
>
> (a) is performed competently; and

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121 *Building Law in New Zealand* (online ed, Thomson Reuters) at [BL7.15.01(b) Design work].
122 Building (Definition of Restricted Building Work) Order 2011, r 6(2).
123 Building (Design Work Declared to be Building Work) Order 2007, r 3.
124 BA04, s 7(1).

(b) complies with the building consent under which it is carried out.

[217] The kind of design work captured by subs 7(1)(d) is therefore broad and is not limited to particular types of buildings and includes design work for the alteration of a building.

[218] I reject the defendants' assertion that building work is limited to design work captured by subss 7(1)(c) and s 7(1)(d) of the definition. Design is clearly captured in the definition of "construct" and the purpose of expressly confirming that design work captured by subss 7(1)(c) and s 7(1)(d) is included within building work is likely to clarify that where the BA04 seeks to limit (in the case of subss 7(1)(c)) or broaden (in the case of subss 7(1)(d)) the kind of design work captured by specific parts of the BA04, there is no intention that those kinds of design work be excluded from the definition of building work. Whether they are included is to be ascertained from the context of the relevant part of the BA04.

[219] The defendants also refer to *Building Law in New Zealand* which notes that there are examples in the BA04 where building work refers not to building activities but to the result of those activities (a building).[125] Section 17 is provided as an example where the building work refers to the object resulting from that activity (a building), which is required to comply with the building code.[126]

[220] Section 17 must be read consistently with the purpose in s 3(2), "to promote the accountability of owners, designers, builders, and building consent authorities *who have responsibilities for ensuring that building work complies with the building code*."[127] If designers had no responsibility to ensure building work complies with the building code the language in s 3(2) is redundant. That is clearly not Parliament's intent.

[221] Section 14D assists in explaining how a designer meets the obligation under s 17, which is consistent with the purposes of the BA04 to protect health and safety and

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125 *Building Law in New Zealand* (online ed, Thomson Reuters) at [BL7.15.01(b) Design work].
126 *Building Law in New Zealand* (online ed, Thomson Reuters) at [BL7.15.01(a) General].
127 Emphasis added.

to hold designers to account. I therefore consider that design work is included within the definition of building work at ss 17 and 18.

Conclusion — does the BA04 give rise to any duty on each defendant?

[222] For the reasons set out above, it is settled law that the BA04 gives rise to a duty at common law owed by those who undertake building work to owners of commercial or non-residential buildings to exercise reasonable skill and care with a view to ensuring that building work complies with the building code. That duty is owed by reason of the statutory requirement in s 17 of the BA04 and is supported by the responsibilities prescribed in s 14D. In my view, that duty applies to each defendant because:

(a) design work is captured within the definition of building work under s 7 of the BA04;

(b) a duty of care is consistent with the purpose of ensuring that people who use buildings can do so safely and without endangering their health;[128]

(c) a duty of care is consistent with the purpose of promoting the accountability of designers "who have responsibilities for ensuring that building work complies with the building code;"[129]

(d) a duty of care is consistent with a designer being responsible for ensuring that the plans and specifications, or the advice in question are sufficient to result in the building work complying with the building code, if the building work were properly completed in accordance with those plans and specifications or that advice;[130] and

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128 BA04, s 3(a).
129 BA04, s 3(b).
130 BA04, s 14D.

(e) a duty of care is consistent with a designer being responsible for ensuring that building work complies with the building code when all building work must comply with the building code under s 17.

[223] Because the duty arises by reason of the statutory requirements of the BA04 a breach of that duty, may in turn, constitute a breach of the BA04 such that a contract that authorises such a breach may be an illegal contract under the CCLA. I now consider that issue.

When is a contract illegal under the CCLA?

[224] In reply to the defendants' reliance on the limitation clauses, TCC submits that the limitation clauses are illegal or unenforceable under the CCLA. It is therefore necessary to set out the requirements that must be met before finding that a contract is illegal.

[225] Section 73 of the CCLA provides that an illegal contract is of no effect:

> **73 Illegal contracts have no effect**
>
> (1) Every illegal contract is of no effect.
>
> (2) No person is entitled to any property under a disposition made by or under an illegal contract.
>
> (3) This section and section 74 apply—
>
> (a) despite any rule of law or equity to the contrary; but
>
> (b) subject to the provisions of this subpart and of any other enactment.

[226] An illegal contract is defined in s 71:

> (1) In this subpart, **illegal contract**—
>
> (a) means a contract governed by New Zealand law that is illegal at law or in equity, whether the illegality arises from the creation or the performance of the contract; and
>
> (b) includes a contract that contains an illegal provision, whether that provision is severable or not.
>
> …

[227] Illegality may arise from performance of a contract if the performance is in breach of an enactment as provided in s 72:

> **72 Breach of enactment**
>
> A contract lawfully entered into does not become illegal or unenforceable by any party because its performance is in breach of an enactment, unless the enactment expressly so provides or its object clearly so requires.

[228] For TCC's argument to succeed, the limitation clause must be in breach of the BA04, and the object of the BA04 must *clearly so require* that the limitation clauses are illegal or unenforceable because there is no express provision in the BA04 to this effect.

Is each limitation clause contrary to the duty and therefore in breach of the BA04?

Limitation clauses

[229] It is helpful to again set out the full terms of the limitation clauses:

> [HG Contract:]
>
> **6.2 Limitation of Liability**
>
> The maximum aggregate amount payable, whether in contract, tort or otherwise, in relation to claims, damages, liabilities, losses or expenses, is as specified in the Special Conditions.
>
> …
>
> **6.2 Limitation of Liability***
>
> The maximum amount payable shall be:
>
> Professional Liability: five times the fee with a minimum limit of $500,000 and a maximum limit of $2,000,000
>
> Public Liability: $10,000,000 in aggregate
>
> [Constructure Contract:]
>
> The maximum amount payable, whether in contract tort or otherwise, in relation to claims, damages, liabilities, losses or expenses, shall be five times the fee (exclusive of GST and disbursements) with a maximum limit of $NZ500,000.
>
> [Producer Statements (PS1 and PS2):]

> Note: This statement shall only be relied upon by the Building Consent Authority named above [Tauranga City Council]. Liability under this statement accrues to the [Design Firm or Design Review Firm] only. The total maximum amount of damages payable arising from this statement and all other statements provided to the Building Consent Authority in relation to this building work, whether in contract, tort or otherwise (including negligence), is limited to the sum of $200,000.*

[230] The language of each liability clause provides a limit on the maximum amount payable whether "in contract, tort or otherwise." I accept that the drafting indicates a clear intention that the limitation will apply to *all* types of liability and therefore liability for all the causes of actions pleaded by TCC. The words "or otherwise" indicate that the source of any liability is not constrained to causes of action in contract or tort.

[231] The issue is whether each limitation clause is in breach of the BA04. Before answering that question, it is helpful to set out the relevant legal principles to assist in determining whether a contract to restrict rights can give rise to a breach of a statutory requirement.

Relevant legal principles

[232] TCC refers to the Court of Appeal decision in *i-Health Ltd v iSoft NZ Ltd*[131] which considered whether a party could contract out of the right under s 87 of the Judicature Act to receive interest at the statutory rate on any judgment sum. The Court of Appeal considered that the ability to waive or contract out of a statutory right is essentially a matter of statutory interpretation:[132]

> Regard must be had to the purpose and text of the relevant statutory provisions. Matters which are purely procedural may more readily be waived or limited but the courts will be less ready to accept that substantive rights may be waived or that parties may agree that significant statutory duties need not be performed.

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131 *i-Health Ltd v iSoft NZ Ltd* [2011] NZCA 575, [2012] 1 NZLR 379.
132 At [39].

[233] *Burrows and Carter: Statute Law in New Zealand* summarise the law as being "generally said that parties can only contract out of a statutory provision if public policy is not thereby affected".[133] As a consequence:[134]

> Where it appears that the mischief which Parliament is seeking to remedy is that a situation exists in which the relations of the parties cannot be left to private contractual regulation … a party cannot contract out of such a statutory regulation (albeit exclusively in his own favour), because so to permit would be to reinstate the mischief which the statutory provision was designed to remedy, and render the statutory provision a dead letter.

[234] The key issue here is whether the right to recover damages for a breach of a common law duty of care is a substantive right or a right that must be protected to ensure the purposes of the BA04 are achieved under the BA04. That requires consideration of the statutory framework and the extent to which it indicates any Parliamentary intention as to the rights of non-residential building owners.

[235] I must consider what mischief s 17 of the BA04 is seeking to remedy and whether a limitation of liability can be said to reinstate that mischief.

Do the findings in Spencer on Byron determine the issue?

[236] It is helpful to again set out the observations of the majority in *Spencer on Byron* which provide some guidance on what the Court considered may offend the statutory requirement of building code compliance and why, as follows:

> [193] It is said that recognising a duty of care in the case of commercial buildings, which are likely to be much more complicated structures than residential homes, would cut across contractual relationships the developer has put in place. We disagree. Recognising a duty in tort does not in any way cut across contractual obligations the inspecting authority assumed towards the first owner who employed their services. *No one can be party to the construction of a building which does not comply with the building code.* The duty in tort imposes no higher duty than that: for example, the inspecting authority is not responsible for ensuring the building is constructed in accordance with the plans and specifications, which will inevitably go beyond building code requirements. *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.*

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133 Ross Carter *Burrows and Carter Statute Law in New Zealand* (6th ed, LexisNexis, Wellington, 2021) at 41.

134 At 42, citing *Johnson v Moreton* [1980] AC 37 (HL) at 69 per Lord Simon of Glaisdale.

(footnote omitted and emphasis added)

[237] The above passage suggests a designer cannot contract to provide building work that does not comply with the building code. It does not address whether a limitation of liability constitutes such an agreement.

[238] While Tipping J made observations which suggest limiting liability would be in breach of the statutory requirement, the observations were made in the context of the statutory framework under the BA91, as follows:[135]

> It is suggested that to recognise a duty of care for all buildings would tend to undermine relevant contractual relationships and loss allocation mechanisms or opportunities thereby provided. I regard this as an overstated problem. In the first place, private certifiers were unable under the 1991 Act to limit or contract out of liability. The position must implicitly have been the same for councils when they were performing the same functions. In the second place, those performing functions under the Act or within the scope of the Act owed statutory duties not to breach the building code. So to that extent there was no capacity for anyone involved to limit their liability by contract.
>
> [40] I accept that in circumstances where the parties have allocated, or have had the opportunity to allocate, risks by contract, tort law should be slow to impose a different allocation from that expressly or implicitly adopted by the parties. *But because of the way the Act is framed I do not see that proposition as being a significant feature of the present case.*
>
> (footnote omitted and emphasis added)

[239] The above observations highlight the importance of the statutory framework so do not in my view determine the issue without an analysis of the statutory framework under the BA04.

[240] That the statutory framework is relevant is supported by the recent findings in this Court that limitations of liability may be enforceable if the statute is not concerned with the private allocation of risk. In *CBL Insurance Ltd (in liq) v Harris*[136] the Court held that a limitation of liability was to be distinguished from an agreement to undertake the prohibited conduct. The Court held that there was no express or implied prohibition under the Insurance (Prudential Supervision) Act 2010 (IPSA) against limiting liability.

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135 *Spencer on Byron* at [39] and [40].
136 *CBL Insurance Ltd (in liq) v Harris* [2021] NZHC 1393.

[241] In *CBL*, PricewaterhouseCoopers and its employees applied to strike out claims against them based on exclusion and limitation of liability clauses in the firm's engagement contract to provide actuarial services. The plaintiff (an insurer) argued that such exclusion and limitation clauses were precluded under the IPSA.

[242] In considering whether it was possible to limit or exclude liability, Gault J noted that it turned on construction of the statute:[137]

> It is common ground, that whether it is possible to limit or contract out of civil liability for breach of that duty also depends on construction of the statute.
>
> (footnote omitted)

[243] The starting point for any analysis is therefore the statutory framework of the BA04.

[244] Gault J accepted the claim was novel and he had not been referred to a case that considered whether any duties in the IPSA gave rise to a private right of action. The history of the BA04 is clearly different in that the courts have accepted that the statutory requirements under the BA04 (and its predecessor, the BA91) give rise to a tortious right of action against those engaged in building work. The claim in negligence to take reasonable care to comply with the building code is not novel but well accepted by the courts. The BA04 is therefore different to the IPSA in that it is settled law that it gives rise to a private right of action on the part of building owners.

[245] In the context of the IPSA, the Court went on and held:[138]

> parties are free to contract as they see fit in the absence of clear statutory words or necessary implication. Statutes that prohibit or constrain contracting out or limitation of liability use express language to do so. There is no such prohibition or constraint in relation to the engagement of actuaries expressed in IPSA. …
>
> [87] I consider there is no necessary implication in IPSA or the Solvency Standard [a type of regulation] that appointed actuaries are prohibited from agreeing with the licensed insurer to limit their civil liability to the insurer – whether for breach of contract or negligence (having already determined there is no right of action for breach of statutory duty).
>
> (footnotes omitted)

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137 At [82].
138 At [86] and [87].

[246] The observation in *CBL* at [86] above, notes that statutes that prohibit or constrain contracting out or limitations of liability use express language to do so suggests that in the absence of express language, a party is free to contract out and/or limit liability. Section 72 of the CCLA however, provides that a contract may be illegal or unenforceable in the absence of an express prohibition if the object of the enactment clearly so requires. The subsequent passage in CBL at [87] indicates that the Court did nevertheless consider whether the prohibition could be implied under the IPSA or the Solvency Standard and went on to consider the object of the IPSA and the statutory context. I accept that express language is not required but the object must "clearly so require" if it is to be implied.

[247] The Court in *CBL* distinguished between a party contracting out of the performance of its statutory duty entirely, and an agreement to limit a right to recover civil damages for breach of that duty. The former was not permissible as the statutory scheme is not for the contracting parties' sole benefit. However, that element of wider public interest was not present when all that was being contractually limited was one contracting party's right to recover damages from the other. That was simply an issue of private risk allocation.[139]

[248] The decisions in *CBL* and in *Spencer on Byron* indicate that whether an agreement to limit liability is unenforceable because it offends the statute very much depends on the relevant statutory framework.

[249] I therefore consider the statutory framework under the BA04.

Statutory framework under the BA04

Purposes

[250] As set out at [168] to [178] above, the purpose of ensuring safe and healthy buildings remains. There is the additional purpose of promoting accountability of designers who have responsibilities for ensuring that building work complies with the building code.[140]

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139 At [85].
140 BA04, s 3(b).

Responsibilities of parties

[251] Unlike the BA91, the BA04 includes ss 14A to 14G which provide guidance on responsibilities under the Act. Section 14A provides guidance on how those responsibilities are to be interpreted:

> Sections 14B to 14G—
>
> (a) are not a definitive and exhaustive statement of the responsibilities of the parties but are an outline only:
>
> (b) are for guidance only, and in the event of any conflict between any of those sections and any other provision of this Act, the latter prevails:
>
> (c) do not reflect the responsibilities of the parties under any other law or enactment or any contract that may be entered into between them and are not intended to add to the existing responsibilities of the parties.

[252] Mr Walker says that s 14A(c) indicates an intention to allow parties to contract contrary to s 14D, which would include allowing limitations of liability. Mr Barker says that s 14A must be interpreted consistently with s 17 and the purposes in s 3, which would be undermined if a building owner could restrict its rights to recover damages. Certainly, if there is any inconsistency between ss 14D and ss 3 and 17, the latter are to prevail by reason of s 14A(b).

[253] It is helpful to ascertain Parliament's intentions in enacting these provisions. The policy intent was explained in the explanatory note to the Building Amendment Bill (No 3), as follows:[141]

> **Responsibilities under the Act**
>
> … The policy intent behind clause 10 is that a person should be responsible for their role, and their work, in the construction business. We note that these provisions are not intended to be comprehensive statements of responsibility, and that coordination and supervision of tradespeople are matters usually covered in contracts.

---

[141] Explanatory note to the Building Amendment Bill (No 3), version two (253-2), reported from the Local Government and Environment Committee on 28 June 2011.

[254] A report of the Department of Building and Housing (DBH Report) provides further insight into why Parliament included an outline of responsibilities in the BA04 and notes the intention was not to codify the common law:[142]

> The responsibilities are not changed, the provisions simply bring them together in one place in the Act and the Bill does not and cannot codify the common law, which is determined/decided by the Courts. New consumer protection provisions proposed to be included in the Building Amendment Bill (No 4) will help hold people to account for their responsibilities.
>
> …
>
> These provisions are not intended to be comprehensive statements of responsibility. Coordination and supervision are matters usually covered in contracts and case-specific so are not able to be described in the Act.
>
> …
>
> Further clarity will be provided in consumer protection provisions that are intended to be included in the Building Amendment Bill (No 4) to be introduced later in 2011. However, it is not possible to be absolutely definitive as that would require codification of the common law.
>
> The proposed sections 14A to 14F only apply to the various parties listed in those provisions and won't apply to any other persons involved in building work.
>
> The policy intent is for contracts to be able to override subpart 4.

[255] Mr Barker submits that the above confirms that responsibilities were not intended to be changed so to the extent they existed prior to the BA04, they continue.

[256] I agree that the intention as expressed above is not that the provisions would confer or change responsibilities but rather that they would provide greater clarity. The intention being to clarify responsibilities and in particular the role of contract in relation to those responsibilities. The common law had only observed that contracts that authorised building work that did not meet building code compliance would be contrary to the BA04 but it had not considered whether limiting rights to recover damages fell within that same category.

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142 *Building Amendment Bill (No 3): Report of the Department of Building and Housing to the Local Government and Environment Committee* (Department of Building and Housing, 17 May 2011) at 39–41.

[257] Mr Barker acknowledged that s 14A could create some confusion but the BA04 affirms the duty to comply with the building code and ss 14B to 14G attempt to outline which parts of the building code each participant is responsible for ensuring compliance. I understand Mr Barker's argument to be that s 14A acknowledges that the responsibilities as between different participants may be subject to contract but to the extent a party is responsible for its aspect of the building work, the BA04 affirms liability.

[258] The wording of s 14A does suggest that parties are free to contract contrary to s 14D but I agree that such right must be interpreted consistently with s 17 and the purposes of the BA04. The comments of public officials that further clarification will be contained in consumer protection provisions, also indicates that those provisions are relevant to a party's right to contract.

Consumer protection regime

[259] The Building Amendment Act 2013 introduced a new Part 4A prescribing consumer rights and remedies. In Part 4A, building work does not include design work[143] so it does not apply to the defendants. Consumer rights under the FTA or Consumer Guarantees Act 1993 (CGA) however, are not affected by Part 4A.[144] To the extent the defendants' services are governed by the FTA or CGA, they will continue to be subject to those respective consumer protection regimes.

[260] Part 4A protects consumers in relation to residential building work by:[145]

(a) requiring certain information to be provided before a residential building contract is entered into; and

(b) prescribing minimum requirements for residential building contracts over a certain value; and

(c) implying warranties into residential building contracts; and

(d) providing remedies for breach of the implied warranties; and

(e) requiring defective building work under a residential building contract to be remedied if notified within 1 year of completion; and

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143 BA04, s 362B(1).
144 Section 362C.
145 Section 362A.

(f) requiring certain information and documentation to be provided on completion of building work under a residential building contract.

[261] Section 362I provides for implied warranties for building work in relation to household units, as follows:

Implied warranties for building work in relation to household units

(1) In every contract to which this section applies, the following warranties about building work to be carried out under the contract are implied and are taken to form part of the contract:

(a) that the building work will be carried out—

(i) in a proper and competent manner; and

(ii) in accordance with the plans and specifications set out in the contract; and

(iii) in accordance with the relevant building consent (if any):

(b) that all building products to be supplied for use in the building work—

(i) will be suitable for the purpose for which they will be used; and

(ii) unless otherwise stated in the contract, will be new:

(c) that the building work will be carried out in accordance with, and will comply with, all laws and legal requirements, including, without limitation, this Act and the regulations:

(d) that the building work will—

(i) be carried out with reasonable care and skill; and

(ii) be completed by the date (or within the period) specified in the contract or, if no date or period is specified, within a reasonable time:

(e) that the household unit, if it is to be occupied on completion of building work, will be suitable for occupation on completion of that building work:

(f) if the contract states the particular purpose for which the building work is required, or the result that the owner wishes the building work to achieve, so as to show that the owner relies on the skill and judgement of the other party to the contract, that the building work and any building products used in carrying out the building work will—

(i) be reasonably fit for that purpose; or

(ii) be of such a nature and quality that they might reasonably be expected to achieve that result.

(2) Subsection (1) has effect despite any provision to the contrary in any contract or agreement, and despite any provision of any other enactment or rule of law

[262] Section 362K prohibits agreements that purport to restrict the implied warranties in s 362I, as follows:[146]

> **362K Person may not give away benefit of warranties**
>
> A provision of an agreement or instrument that purports to restrict or remove the right of a person to take proceedings for a breach of any of the warranties set out in section 362I is of no effect in so far as the provision relates to a breach other than a breach that was known, or ought reasonably to have been known, by the person to exist at the time the agreement or instrument was executed.

[263] In a report published in June 2014 looking at liability of multiple defendants, in a chapter dedicated to the building sector, the Law Commission noted that the BA04 drew a distinction between residential buildings and commercial buildings when it introduced the consumer protection provisions:[147]

> The 2004 Act also introduced specific contract-based protections for purchasers of household units, and subsequent owners. Sections 396 and 397 implied a number of standard warranties into contracts for building work relating to household units or the sale of such units by a developer. Unsurprisingly, there are no similar or equivalent provisions in respect of non-residential building contracts.
>
> There is therefore a reasonably strong inference under the Building Act 2004 that residential or household units, or buildings containing them, are different in character from other buildings, or their owners and users are deserving of direct statutory protections, whereas parties to commercial building contracts can be expected to adopt self-help. The Act acknowledges that different principles may apply to residential and commercial building work and the parties involved or affected by such work.
>
> These differences may not be enough by themselves to justify different outcomes on liability for residential and commercial cases, especially regarding building consent authority liability. It might still be expected that Parliament would deal with the matter more expressly if that had been the intention. Weight might be given to the fact that sections 397 to 399 define and amend the relationship between the immediate contractual parties (and subsequent owners), and have nothing at all to say about local authorities. And it can be argued that little should be read into these express liability provisions

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146 Section 362K.

147 Law Commission *Liability of Multiple Defendants* (NZLC R132, 2014) at [7.23] to [7.25].

> dealing only with the residential and household sector, because clear consumer protection provisions such as these will typically apply only in "consumer" situations. Nevertheless, the scheme of the Building Act 2004 exhibits a much clearer and stronger residential consumer protection focus, in addition to the overall health and safety focus of the statute. This additional focus and emphasis is in contrast to the Building Act 1991, and it is reasonable to infer that consumer householders and commercial parties need not necessarily receive identical treatment as to whether building consent authorities may be liable to either group.

[264] Parliament has now clarified that a specified class of owners are deserving of statutory protection that is not available to other types of owners. The findings in *Spencer on Byron* need to be considered in the context of the BA04 which now carries this distinction.

[265] Mr Barker says the consumer protection provisions are not relevant because they do not apply to designers. Section 362C acknowledges that nothing in Part 4A derogates from the provisions CGA. Design services are subject to that consumer protection regime. Consumer protection in the context of designers cannot therefore be considered without regard to the CGA. The CGA and Part 4A of the BA04 indicates that Parliament considers building owners who are subject to those respective regimes are deserving of statutory protection that is not available to other building owners, which includes non-residential building owners. There is therefore a distinction between different types of owners that did not apply under the BA91. I cannot ignore that distinction in considering the statutory framework under the BA04.

[266] Mr Barker also submits that the consumer protection provisions go further than the duty prescribed by s 17 so cannot be read as implying an intention to change the existing duty owed under s 17. The existing duty under s 17 is a duty to exercise reasonable skill and care to ensure building code compliance. I agree that there is no intention to change that duty, but the duty as articulated by the courts is silent as to whether a building owner may restrict its rights to recover damages for breach of that duty. A contract to that effect can only be illegal or unenforceable if it is in breach of s 17 *and* the object of the BA04 clearly so requires.

[267] Section 362I(1)(c) imposes an implied warranty that a builder will comply with all laws and legal requirements, including, without limitation, the BA04. That includes an implied warranty as to compliance with s 17. The right to claim civil

damages for breach of a duty to exercise reasonable skill and care with a view to ensuring building code compliance arises under s 17 (the s 17 duty).

[268] Section 362K therefore squarely addresses the issue of whether an owner can restrict or remove rights that may arise under s 17. Section 362K indicates that Parliament considered that only a specified class of owners are afforded statutory protection against contracts that may purport to restrict or remove rights that arise under s 17.

[269] Section 362K also indicates Parliament has turned its mind to the issue of rights arising under the BA04 and whether those rights can be restricted by contract. By expressly protecting some owners (but not others) from restricting rights, Parliament impliedly intends that owners who do not fall within the specified class do not have any such statutory protection.

[270] Mr Walker says the consumer protection regime is relevant to the enforceability of limitations of liability and refers to *George Grant Engineering Ltd v Fabrication & Pipe Services Ltd*[148] where this Court observed that:

> [35] The law recognises the validity of exclusion clauses (and limitation of liability clauses) unless there is some form of statutory limitation or exception; for example, consumer protection legislation. Here, the parties contracted on a commercial basis and no consumer protection legislation applies. Mr Bowler did not contend otherwise. Accordingly, a court will enforce an exclusion clause if it is determined that, on an objective view of the interpretation of the relevant clause, it can be said to reflect the parties' intentions.
>
> (footnotes omitted)

[271] The above passage indicates that counsel for the plaintiff did not contend that s 17 and/or the purposes of the BA04 gave rise to a statutory limitation or exception on the use of exclusion or limitation clauses. The Court in *George Grant Engineering* was not directed to the observations in *Spencer on Byron,* to which this Court has been directed, so to that extent, the Court did not consider the arguments advanced by TCC in this case. The case is helpful in that it indicates a consumer protection regime is often directly relevant to whether Parliament intended that non-consumers be entitled

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148 *George Grant Engineering Ltd v Fabrication & Pipe Services Ltd* [2021] NZHC 1281.

to protection. It generally indicates that the statutory regime is not aimed at protecting non-consumer rights as negotiated by contract. It also suggests that Parliament was not concerned with holding designers to account for full liability when a non-residential building owner agrees that liability can be limited. The purpose of promoting accountability of designers and the consumer protection regime should be read consistently to the extent that they can.

[272] The findings in *Spencer on Byron* turned on the purpose of safe and healthy buildings which applies to all types of buildings. It is therefore unlikely that Parliament intended that the consumer protection regime justified a different standard for non-residential buildings. The key issue is therefore whether limitations of liability seek to reinstate the mischief of unsafe and unhealthy buildings which s 17 is directed at avoiding.

[273] To determine this issue, it is helpful to first consider the purpose and function of limitations of liability as they are used in the market and the potential consequences if they are prohibited.

[274] Mr Barker says policy considerations such as the potential impact on engineers are not relevant because the Supreme Court has determined the issue. The Supreme Court was not concerned with the provisions of the BA04, the liability of designers or the illegality of contract under the CCLA. It is therefore helpful to review the market evidence as to the current use of limitations of liability and the potential implications if they are found to be illegal or unenforceable. That is relevant to determining whether they can be said to be in breach of s 17 of the BA04.

Market evidence — limitations of liability

[275] Mr Arthur Park, a recently retired structural engineer, gave expert evidence for Harrison Grierson. Mr Park had been in practice for 42 years and has extensive experience in construction contracts and liability insurance through his senior roles in professional bodies like ACENZ and the Consulting Engineers Advancement Society (CEAS).

[276] Mr Park explained the two types of standard form agreements, being the SFA and CCCS Terms. Both contain default limitation clauses. Engineers maintain insurance cover so that they are able to meet the liability cap should they be negligent.

[277] Mr Park said building owners are free to negotiate the standard form agreements and acknowledged that in 2017 it was not common for a maximum limit above $2 million to be negotiated, but there was (and is increasingly) some demand for it.

[278] Mr John Walton gave evidence for TCC. He is an experienced barrister, mediator, and arbitrator of construction disputes. He also has extensive experience negotiating large and complex construction agreements. When cross-examined, Mr Walton acknowledged he is typically only involved in consultancy contracts for large infrastructure projects, and that on those projects the $2 million limit (if it is proposed) is changed by him.

[279] Mr Walton said in practice, the standard form agreements are often presented to building owners without legal input, and signed on the basis that they are standard practice. He said that there is therefore limited scope to amend terms, and generally only in respect of specific issues. Mr Walton noted that by using standard form agreements, liability limits are set by reference to what the industry is prepared to pay for insurance, and not by reference to the potential consequences of the industry's negligence. Mr Walton says the consequence is that too much risk is left uninsured. In Mr Walton's opinion, this is inconsistent with how construction contracts are ordinarily negotiated offshore.

[280] The evidence of both Mr Park and Mr Walton indicates that limitations of liability are widely used. While limitations of liability may be negotiated, the evidence is that they are not routinely negotiated although this is changing. The evidence also indicates that the value of any liability cap is linked to the insurance cover held by the engineer so there is a direct link between limitations of liability and insurance.

[281] Mr Park's evidence is that if liability could not be limited, it is likely that there would be increased insurance premiums with the cost passed on to clients and insurers

refusing to provide cover for certain types of building work. Mr Park also said professional indemnity premiums have increased significantly over the past few years.

[282] Mr Walton's evidence is that the construction industry is already exposed to unlimited liability so that this risk is already insured.

[283] Two insurance brokers, Mr Nigel Grantham (for Harrison Grierson) and Mr Deane Moyle (for TCC), also gave expert evidence. The brokers generally agreed that limitations of liability are a material consideration for insurers when considering whether to provide professional indemnity insurance. Alternative ways of insuring against professional negligence, such as project-based insurance and project specific limits, are costly and have limited availability in New Zealand. This suggests that there is no, or a very limited, market for building owners to obtain insurance in place of engineers' professional indemnity insurance.

[284] The brokers generally agreed that the potential consequences if liability could not be limited include increased premiums, limited insurance cover and/or a withdrawal of insurance.

[285] Mr Park opines that the potential ramifications for engineers are:

(a) engineers avoiding certain types of work, particularly for more complex or high value projects, where the risk to their business is considered too great;

(b) lack of innovation as engineers seek to avoid liability by relying on approved solutions or by producing very conservative designs; and

(c) engineers using special purpose vehicles for projects, rather than contracting through their main operating companies as is currently the standard position.

[286] In circumstances where engineers already face exposure to unlimited liability (to subsequent purchasers), I do not consider it likely that insurance would be withdrawn. I accept that insurance costs would likely increase as more engineers

would seek to increase their insurance cover. That in turn could impact pricing for engineering services and increase the barriers to entry to the market. It may also lead to a lack of innovation to avoid the risk of liability.

[287] The evidence is relevant to understanding the purpose of limitations of liability and whether they can be said to authorise design work that does not meet building code compliance so as to breach s 17 of the BA04. The evidence indicates that their purpose is to set the level of insurance cover for negligence. They are not negotiated with regard to compliance with the building code but with regard to the consequences of non-compliance and how risk is to be allocated should that non-compliance eventuate.

[288] Building owners could negotiate an increased liability cap (and in turn, engineers would likely increase their insurance cover and prices). That suggests that it is the way the market is operating and not the use of limitations of liability, that is causing what in Mr Walton's view appears to be under insurance.

[289] The practical effect of each limitation clause is that each defendant's conduct is still to be assessed against the same standard (exercise of reasonable care with a view to ensuring building code compliance). The parties have not agreed a lower price for a lower standard but arguably a lower price for lower insurance cover.

[290] The allocation of risk (and in turn, the insurance cover available if the risk is realised), is not the mischief s 17 of the BA04 is directed at removing. Section 17 is directed at the standard (building code compliance) and not the consequences for breaching that standard. Parliament has also now indicated that only building owners subject to consumer protection regimes (whether under the BA04 or under the CGA) are to be afforded statutory protection against contracts that restrict their rights. That suggests that Parliament considers that the level of insurance available is a private matter as between non-residential building owners and building providers.

[291] I acknowledge Mr Barker's argument that a limitation of liability may reduce the deterrent effect of civil damages in incentivising compliance with the building code. This is because those who are responsible for compliance do not bear the full

consequences of the losses. The argument assumes that only unlimited liability will incentivise compliance. That same argument would suggest there is no incentive on any contracting party to comply with its terms if there is a limitation of liability. That proposition is not supported by the fact of their common use which is aimed at setting the insurance level and not at the standard of performance.

[292] By agreeing to a liability cap, the non-residential building owner is in effect agreeing to share the financial consequences (above the value of the liability cap) if the building provider is negligent. Those consequences include ensuring the building ultimately meets the statutory standard. This is consistent with s 17 which is silent as to who is responsible for compliance.

[293] I therefore do not consider that the limitation clauses agreed by TCC can be said to be in breach of the BA04. If I am wrong, I consider whether the object of the BA04 clearly so requires that the limitation clauses be illegal and/or unenforceable.

Does the object of s 17 of the BA04 clearly so require illegality?

[294] It is settled law that any duty of care in relation to building code compliance arises by reason of s 17 of the BA04. For a limitation of liability to be illegal, the object of s 17 of the BA04 must clearly so require that it is illegal or unenforceable.

[295] The objects of the BA04 include to ensure people who use buildings can do so safely without endangering their health and to promote the accountability of designers who have responsibilities for ensuring that building work complies with the building code.[149]

[296] The Supreme Court in *Spencer on Byron* held that the statutory requirement of building code compliance is directed at the object of ensuring safe and healthy buildings. I accept that the statutory requirement also now seeks to promote the accountability of designers who have responsibilities under s 17.

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149 BA04, s 3.

[297] Whether the objects of s 17 clearly so require that liability not be limited to achieve the health and safety and accountability objectives must be assessed taking into account the other provisions of the BA04. Those other provisions indicate either expressly or impliedly the extent to which Parliament considers designers should be held to account for building work.

[298] The introduction of the consumer protection regime and the application of the CGA to design work implies that Parliament intends that different classes of building owner be treated differently when considering their rights and remedies under the BA04. This implies that Parliament is less concerned with accountability to those building owners who are not subject to the statutory protections in the consumer protection regimes if those building owners have agreed to restrict their rights. The purpose of promoting accountability does not therefore clearly so require that limitations of liability be prohibited.

[299] A limitation of liability does not undermine the objective of safe and healthy buildings because the building owner is in effect agreeing to be financially responsible for remediating the building (to the extent recovery of damages to the value of the liability cap is insufficient to meet building code compliance).

[300] I therefore do not consider that the objects of s 17 of the BA04 clearly so require that the limitation clauses are illegal or unenforceable.

Overall conclusion — liability under the BA04

[301] The Supreme Court in *Spencer on Byron* was concerned with determining whether territorial authorities owe a duty of care to non-residential building owners. It determined that they did. In reaching that conclusion, the Court held that the statutory requirement that building work comply with the building code imposes a minimum standard that applies to both residential and non-residential buildings. That the purpose of that minimum standard was to protect against unsafe and unhealthy buildings. The statutory regime therefore supported territorial authorities owing a duty of care to all building owners to exercise reasonable skill and care with a view to ensuring that building work complies with the building code. Building owners are entitled to recover civil damages for breach of that duty.

[302] In reaching the above conclusions, the Supreme Court observed that parties could not contract contrary to the statutory standard because to do so would undermine that standard and put the object of safe and healthy buildings at risk. The statutory standard and purpose therefore supported recognition of a duty of care.

[303] The statutory requirement that building work comply with the building code remains in s 17 of the BA04. The purpose of ensuring safe and healthy buildings remains in s 3 of the BA04. The courts have accepted that providers of building work owe a duty to non-residential building owners to exercise reasonable skill and care with a view to ensuring building work complies with the building code. The scope of the duty of care has not changed. I am satisfied that design work is included within building work such that the defendants are also subject to s 17 of the BA04 and therefore the duty of care as defined.

[304] There has been a change in the statutory framework as to the rights and remedies of building owners. Unlike the BA91, the BA04 contains provisions providing guidance on the responsibilities of those involved in building work. The BA04 also prescribes a consumer protection regime while acknowledging the consumer protection regime under the CGA is not affected.

[305] Limitations of liability are aimed at setting the level of "insurance" (by prescribing a liability cap) available to the building owner if the s 17 duty (and therefore the minimum standard) is breached. The limitation clauses are not aimed at undermining the requirement for building code compliance. That standard remains by virtue of s 17 applying to all building work.

[306] The effect of a limitation of liability is that the building owner shares the financial responsibility (above the value of the liability cap) for remediating the building, so the building ultimately meets building code compliance. The level of "insurance" (liability cap) is a matter to be negotiated between the engineer and the building owner. A limitation of liability does not therefore undermine the minimum standard.

[307] Section 72 of the CCLA requires that in the absence of an express prohibition, the object of the BA04 must clearly so require that a limitation of liability is unenforceable or illegal. I do not consider that I can so find when there is an inference by the introduction of a consumer protection regime that Parliament did not intend to afford any statutory protection to a non-residential building owner if it agrees to restrict its right to civil damages. The fact of the consumer regimes prescribed by Part 4A and the CGA to protect consumers of engineering work indicates that Parliament considers that non-residential building owners are not deserving of the same protection.

[308] For the reasons set out above, I am not satisfied that the limitation clauses are in breach of s 17 and/or that the object of s 17 clearly so requires that they are illegal or unenforceable. The liability of each defendant for breach of a duty to exercise reasonable skill and care with a view to ensuring building work (which includes design work) complies with the building code would therefore be limited to the amounts specified in the limitation clauses in each of the HG Contract and the Constructure Contract.

[309] For the same reasons as apply to illegality, I do not consider that the limitation clauses are contrary to public policy.

PART TWO: LIABILITY UNDER THE FAIR TRADING ACT 1986

Is each limitation clause enforceable under the FTA?

Relevant provisions of FTA

[310] The FTA contains a general rule of no contracting out, as set out in s 5C of the FTA:

> **5C No contracting out: general rule**
>
> (1) The provisions of this Act have effect despite anything to the contrary in any agreement.
>
> (2) A provision of an agreement that has the effect of overriding a provision of this Act (whether directly or indirectly) is unenforceable.
>
> (3) Subsections (1) and (2) are subject to subsection (4) and section 5D.

(4) Nothing in subsection (1) or (2) applies in respect of a provision that—

(a) imposes a stricter duty on the supplier than would be imposed under this Act; or

(b) provides a more advantageous remedy against the supplier than would be provided under this Act.

(5) In this section and section 5D, agreement includes any contract, arrangement, or understanding.

[311] For the purposes of s 5D, an agreement therefore includes a contract, arrangement or understanding.

[312] Section 5D prescribes the exception to the general rule against contracting out, as follows:

5D No contracting out: exception for parties in trade

(1) Despite section 5C(1) and (2), if the requirements of subsection (3) are satisfied, parties to an agreement may include a provision in their agreement that will, or may (whether directly or indirectly), allow those parties to engage in conduct, or to make representations, that would otherwise contravene section 9, 12A, 13, or 14(1); and in that case,—

(a) the provision is enforceable; and

(b) no proceedings may be brought by any party to the agreement for an order under section 43 in relation to such a contravention of section 9, 12A, 13, or 14(1).

(2) A provision of the kind referred to in subsection (1) includes, for example,—

(a) a clause commonly known as an entire agreement clause:

(b) a clause that acknowledges that a party to the agreement does not rely on the representations or other conduct of another party to the agreement, whether during negotiations prior to the agreement being entered into, or at any subsequent time.

(3) The requirements referred to in subsection (1) are that—

(a) the agreement is in writing; and

(b) the goods, services, or interest in land are both supplied and acquired in trade; and

(c) all parties to the agreement—

(i) are in trade; and

(ii) agree to contract out of section 9, 12A, 13, or 14(1); and

(d) it is fair and reasonable that the parties are bound by the provision in the agreement.

(4) If, in any case, a court is required to decide what is fair and reasonable for the purposes of subsection (3)(d), the court must take account of all the circumstances of the agreement, including—

(a) the subject matter of the agreement; and

(b) the value of the goods, services, or interest in land; and

(c) the respective bargaining power of the parties, including—

(i) the extent to which a party was able to negotiate the terms of the agreement; and

(ii) whether a party was required to either accept or reject the agreement on the terms and conditions presented by the other party; and

(d) whether the party seeking to rely on the effectiveness of a provision of the kind referred to in subsection (1) knew that a representation made in connection with the agreement would, but for that provision, have breached section 12A, 13, or 14(1); and

(e) whether all or any of the parties received advice from, or were represented by, a lawyer, either at the time of the negotiations leading to the agreement or at any other relevant time.

(5) To avoid doubt, nothing in this section—

(a) prevents the Commission from bringing proceedings for an offence under this Act (including an offence under section 12A, 13, or 14(1)) against a party to the agreement referred to in subsection (1):

(b) limits the application of subpart 3 of Part 2 of the Contract and Commercial Law Act 2017.

[313] For each limitation clause and disclaimer to meet the requirements of s 5D(3):

(a) there must be a contract, arrangement or understanding in writing;

(b) the parties must be in trade;

(c) the parties must agree to contract out of s 9; and

(d) it is fair and reasonable that the parties are bound by each limitation clause.

Is there a contract, arrangement or understanding in writing?

[314] The HG Contract and the Constructure Contract are both in writing, so this requirement is met for each limitation clause contained in those contracts.

[315] Harrison Grierson says that the limitation clause in each producer statement is enforceable by way of contract because TCC agreed under cl 2.6 in Appendix A of the HG Contract that Harrison Grierson will:

> Provide all necessary Certificates and Producer Statements including a coordination statement to fulfil Council requirements. Provide a PS1 and PS4 for the project.

[316] Harrison Grierson argues that the reference to PS1 and PS4 in the HG contract should be interpreted to refer to producer statements issued on the IPENZ/ACENZ standard form. Those standard form producer statements contain the limitation clause so by referring to the standard form, Harrison Grierson says that TCC agreed that each producer statement would contain the limitation clause.

[317] Mr Park gave evidence on the history of the PS standard forms. The forms have, since inception, been known as PS1 (Design) and PS4 (Construction Review). The forms were revised in 2007 and 2013 and the form of the limitation clause remains unchanged from 2007. Witnesses for Harrison Grierson (Mr Bradley Cooper and Mr David Napier) confirmed that they understood PS1 and PS4 to be referring to the IPENZ/ACENZ standard form.

[318] Mr Jason Addison, architectural designer at Xigo New Zealand Ltd (Xigo) acted as project manager for TCC and gave evidence that the standard form agreement was used "without any discussion at any time about the amount of the limitation of liability or the level of insurance." There is no evidence that Harrison Grierson discussed the reference to PS1 and PS4 with TCC, nor any evidence that TCC understood that by referring to PS1 and PS4 in cl 2.6 of Appendix A it had agreed to

the limitation clause notwithstanding that the HG Contract contained its own limitation clause.

[319] I do not consider that I should infer that TCC agreed (or understood that it had agreed) to the limitation clause in the producer statements simply because the HG Contract refers to "PS1 and PS4" without more. In circumstances where the limitation clause in the HG Contract has a different liability cap ($2 million) to the liability cap ($200,000) in the producer statement, I do not consider it can be inferred that TCC understood that any liability of Harrison Grierson under the FTA would be limited to an amount that differed to what was specified in the HG Contract.

[320] For the same reasons as set out above, I am not satisfied that there was any contract, arrangement or understanding that any liability of Constructure under s 9 of the FTA would be subject to a liability cap that is less than that specified in the Constructure Contract.

[321] I am satisfied that the limitation clauses in the HG Contract and Constructure Contract meet the requirement of an agreement in writing.

[322] I am not satisfied that the limitation clauses in the producer statements amount to a contract, arrangement or understanding between TCC and each of the defendants. It is not therefore necessary to consider the other requirements under s 5D(3) in relation to the limitation clauses in the producer statements.

Are the parties in trade?

[323] TCC says that it is not in trade and that the producer statements cannot be characterised as a good or service that was acquired in trade. Trade means any trade, business, industry, profession, occupation, activity of commerce, or undertaking relating to the supply or acquisition of goods or services or to the disposition or acquisition of any interest in land.[150]

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150 Fair Trading Act 1986, s 2.

[324] In engaging each defendant, TCC was acquiring a service (a structural design service and peer review of a structural design). The terms of the HG Contract required Harrison Grierson to issue any necessary certificate including a coordination statement to fulfil Council requirements and Constructure's proposal (included in the Constructure Contract) required it to provide producer statements and associated documents.[151] The producer statements were therefore issued pursuant to those contracts as part of the services provided by Harrison Grierson and Constructure to TCC. The acquisition of engineering design services is an activity of commerce and is in trade. I therefore consider that this requirement is met.

Did the parties agree to contract out of s 9?

[325] Constructure argues that s 5C(2) does not apply because the limitation clause does not seek to override Constructure's obligations under s 9 nor allow it to otherwise engage in misleading or deceptive conduct. Constructure says that the limitation of liability is relevant to the Court's exercise of discretion under s 43 of the FTA and can be considered when granting relief.

[326] Harrison Grierson says that the limitation clause in the HG Contract indirectly allows the parties to engage in conduct, or to make representations, in contravention of the relevant sections of the FTA, by limiting their liability in the event they do. The same argument would support a limitation of liability being contrary to s 17 of the BA04. For the reasons set out above, I do not consider that a limitation clause authorises conduct contrary to the statutory requirement. Rather it authorises recovery of losses that are contrary to the rights that arise from the statutory requirement. While it may be a contracting out, it is only a contracting out in relation to the rights of recovery and not as to the required conduct.

[327] I consider how the courts have interpreted limitations of liability and the extent to which they amount to a contracting out of the FTA or are more appropriately considered under s 43.

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[151] Clause 2.6 of Appendix A of the HG Contract, and cl 1 of the Constructure Contract.

[328] In *Adventurer Hobson Ltd v Cockery* the Court held that a limitation clause was relevant when awarding damages under s 43.[152] In that case, the party seeking to rely on the clause was not a party to the contract within which the clause was contained so could not rely on s 5D.

[329] In *About Image Ltd v Advaro Ltd*, the Court noted that the relevant clause must allow the conduct either expressly or by implication.[153] In considering whether there was 'agreement' the Court noted that simply allowing conduct without more does not necessarily indicate agreement:[154]

> [68] A provision allowing particular conduct, without more, is not necessarily the parties' agreement to contracting out, merely because the conduct would otherwise be in contravention of the Act. Parties are not to be taken to have agreed to contract out of s 9 simply because conduct allowed by the contract is misleading and deceptive; that would leave subpara (ii) with nothing to do.
>
> [69] On the evidence before me, I cannot construe the MRA's relevant provisions as the parties' agreement to contract out of s 9, and the provisions say nothing at all about allowing misleading or deceptive conduct.

[330] "Subpara (ii)" is a reference to s 5D(3)(c)(ii) which requires that the parties agree to contract out of s 9.

[331] In *Tadd Management Ltd v Weine* while finding that the conduct was not misleading or deceptive, Gwyn J considered the effect of the limitation of liability clause in the standard IPENZ/ACENZ short form agreement.[155] The Court found that the broad wording of the limitation clause captured a claim under the FTA:

> [359] Although cl 11 does not specifically mention the FTA, the wording of the clause is very broad, capturing an extensive range of potential claims, damages, liabilities and losses against [the engineer]. The ordinary and natural meaning of the words "whether in contract, tort or otherwise" is in my view broad enough to capture a claim under the FTA, and limits NZCEL's liability to five times the amount paid by the Trust under the Agreement.

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152 *Adventurer Hobson Ltd v Cockery* [2020] NZHC 675, [2020] 2 NZLR 544.
153 *About Image Ltd v Advaro Ltd* [2018] NZHC 3002 at [67].
154 *About Image Ltd v Advaro Ltd* [2018] NZHC 3002.
155 *Tadd Management Ltd v Weine (as trustees of the Ruth Weine Family Trust)* [2023] NZHC 764, (2023) 24 NZCPR 1.

[332] The above indicates that while the limitation of liability may not necessarily authorise the contravening conduct, it impliedly evidences an agreement that should the conduct occur, liability is to be limited to the value of the liability cap. *Tadd Management Ltd* therefore supports the limitations of liability indicating an agreement to contract contrary to s 9 because ordinarily liability would not be limited. I am therefore satisfied that the parties have agreed to contract out of s 9.

Is it fair and reasonable that the parties are bound by the limitation clause?

[333] In considering whether it is fair and reasonable, the Court must take account of all the circumstances of the agreement, including the matters specified at s 5D(4)(a) to (e):

> (a) the subject matter of the agreement; and
>
> (b) the value of the goods, services, or interest in land; and
>
> (c) the respective bargaining power of the parties, including—
>
> (i) the extent to which a party was able to negotiate the terms of the agreement; and
>
> (ii) whether a party was required to either accept or reject the agreement on the terms and conditions presented by the other party; and
>
> (d) whether the party seeking to rely on the effectiveness of a provision of the kind referred to in subsection (1) knew that a representation made in connection with the agreement would, but for that provision, have breached section 12A, 13, or 14(1); and
>
> (e) whether all or any of the parties received advice from, or were represented by, a lawyer, either at the time of the negotiations leading to the agreement or at any other relevant time.

[334] In *About Image Ltd* the Court was unable to determine whether it was fair and reasonable because it had insufficient information before it on a preliminary issues basis to consider the s 5D(4) mandatory considerations.[156] TCC argues that this Court should also decline to determine the issue at this preliminary stage. I disagree that more evidence is required.

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[156] *About Image Ltd v Advaro Ltd* [2018] NZHC 3002.

[335] While the Court in *Tadd Management Ltd v Weine* found that the engineer was not liable under the FTA, so that its comments on the application of s 5D were obiter, the analysis supports Harrison Grierson's position as to how the factors are to be considered:[157]

> The Agreement was an established, widely used, standard form contract; Ms Weine was an experienced business person, engaged in the ownership and management of commercial properties; she had engaged NZCEL on the same terms of contract on two other occasions; NZCEL received $2,540 (excluding GST and disbursements) under the Agreement, in contrast to the sale price of $1,227,000 for the Property received by the defendants.
>
> [363] In my assessment the parties had equal bargaining strength and the defendants were not a relatively vulnerable party in entering into the Agreement. I conclude that it is fair and reasonable that the parties be bound by the limitation of liability clause.

[336] This case does not concern an entire agreement clause and the representation arose in the course of each defendant providing services to TCC, so occurred after the HG Contract and Constructure Contract were executed. I do not consider that the Court needs further evidence to be able to assess the factors in s 5D(4)(a) to (e).

[337] The agreement concerned the procurement of engineering services. The value of the services was reasonably low for Constructure ($15,000) and reasonably high for Harrison Grierson (over $400,000). This is not a case of unequal bargaining power. TCC is a large local council with access to legal advice. TCC did negotiate with Harrison Grierson by proposing use of the CCCS Terms in place of the SFA and proposing some amendments.

[338] Having regard to all the circumstances of the HG Contract and the Constructure Contract, it is fair and reasonable for TCC to be bound by the limitation clauses.

Conclusion — liability under the FTA

[339] I am satisfied that the limitation clauses in each of the HG Contract and Constructure Contract meet the requirements of s 5D of the FTA for contracting out of the FTA. Any liability of each defendant for breach of s 9 of the FTA is therefore

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[157] *Tadd Management Ltd v Weine (as trustees of the Ruth Weine Family Trust)* [2023] NZHC 764 at [362] and [363].

limited to the amount specified in each liability clause in the HG Contract and Constructure Contract.

PART THREE: LIABILITY FOR NEGLIGENT MISSTATEMENT

Is each limitation clause enforceable as a defence to the claim for negligent misstatement?

[340] In finding that each defendant's issuing of a producer statement is governed by the HG Contract and Constructure Contract respectively, it follows that any liability for negligent misstatement is also subject to each of those contracts and the limitation clauses contained therein.

[341] I reject Mr Walker's argument that the producer statement constitutes a separate contract between TCC and Harrison Grierson or that the producer statement cannot be relied on unless the limitation clause contained therein also applies.

[342] I agree with TCC that the limitation clause in the producer statement is directed to TCC as the building consent authority and not to TCC as owner. This is because the limitation clauses in the HG Contract and Constructure Contract respectively govern the relationship between TCC as owner and each of the defendants. The limitation in each producer statement cannot restrict TCC's claim in its capacity as owner.

[343] I also accept that TCC is entitled to rely on the statements contained in the producer statement because each producer statement is expressly addressed to it, in its capacity as owner of the carpark. TCC as owner has engaged each defendant to provide the producer statements and therefore the terms of engagement are directly relevant.

[344] TCC says that the enforceability of the limitation clauses should be determined at trial when the Court has evidence as to the circumstances in which the producer statements were issued. I disagree in circumstances where I have found that each of the HG Contract and Constructure Contract govern the relationship between TCC and

each defendant such that the limitation clause in each producer statement cannot override the limitation clause in the relevant contract.

[345] Liability is therefore limited by each of the limitation clauses in the HG Contract and the Constructure Contract and the limitation clauses in the producer statements are unenforceable against TCC as building owner.

OVERALL CONCLUSION

[346] I thank counsel for their comprehensive, detailed, and helpful submissions.

[347] It is perhaps surprising that this issue has not previously come before the courts for determination given the BA04 has been in force for nearly two decades. Certainly, the evidence indicates that the market has behaved as though limitations of liability are enforceable.

[348] I agree with Mr Barker that the findings and observations in *Spencer on Byron* support contracts that contravene the statutory requirement for building code compliance being unenforceable. What is less clear from those findings is whether a limitation of liability constitutes contracting out of that statutory requirement.

[349] While there is merit in the arguments advanced by TCC given the findings in *Spencer on Byron*, I consider that the statutory framework under the BA04 distinguishes between different classes of building owner. The consumer protection regime indicates that Parliament impliedly does not intend that non-residential building owners be afforded statutory protection if they agree to limit their right to recover damages for breach of the s 17 duty. A limitation of liability does not undermine the statutory purpose of ensuring safe and healthy buildings because the building owner will bear the financial responsibility (above the value of the liability cap) to ensure the building is remediated to achieve building code compliance (or the building is abandoned to protect the health and safety of building users). The limitation of liability does not therefore contravene s 17 of the BA04 and the object of the BA04 does not clearly so require that liability be limited. A limitation of liability is not therefore illegal under the CCLA.

[350] I have set out my reasons in part two and part three for finding that the limitation clauses in the HG Contract and Constructure Contract are enforceable so as to limit liability: under the FTA; and for negligent misstatement.

[351] The limitation clauses in the producer statements are unenforceable against TCC as building owner because the relationship between each defendant and TCC is governed by their respective contracts and not by the terms of the producer statements. While TCC was entitled to rely on statements made in the producer statements, it is not bound by the limitation clauses contained therein.

[352] For the reasons set out above, I answer each of the agreed preliminary issues as follows:

(a) Would any liability of Harrison Grierson pursuant to any of the first to fifth causes of action be limited, to a maximum of $2 million in the aggregate, by the pleaded limitation clause pleaded at paragraphs 6(p) and 75 of Harrison Grierson's amended statement of defence dated 15 November 2021?

The answer is "yes."

(b) Would any liability of Constructure pursuant to any of the first to fifth causes of action be limited, to a maximum of five times the fee (exclusive of GST and disbursements) with a maximum limit of $500,000, by the limitation clause pleaded at paragraphs 12.2, 97.2 and 100 of the second defendant's amended statement of defence dated 15 November 2021?

The answer is "yes."

(c) Would any liability of Harrison Grierson pursuant to the third and fourth causes of action be limited, to a maximum of $200,000 in respect of each producer statement or in the aggregate in respect of all such

statements, by the limitation pleaded at paragraphs 11(b), 21(b), 33(b) and 78?

The answer is "no."

(d) Would any liability of Constructure pursuant to the third and fourth causes of action be limited, to a maximum of $200,000 in respect of each producer statement or in the aggregate in respect of all such statements, by the limitation pleaded at paragraphs 20.4, 29.4, 46.4, and 103?

The answer is "no."

[353] Leave is granted to TCC to amend its claim within 20 working days from the date of this judgment.

Costs

[354] If the parties are unable to agree costs, leave is granted for the parties to file costs memoranda of no more than five pages. The defendants are to file any costs memorandum with TCC then filing a memorandum in response within 10 working days thereafter.

Tahana J