

## High Court upholds engineers' limitation of liability clauses

### Engineers allegedly responsible for a defective design of a transport hub for the Tauranga City Council can rely on contractual terms limiting their liability to five times their fee in their defence of the Council's claimed losses of \$26m.

The Council had argued that the limitation of liability terms amounted to contracting out of the statutory requirement in the Building Act 2004 that all building work (including design work) meets the Building Code. The Council submitted that the terms were therefore in breach of the Building Act and illegal under the Contract and Commercial Law Act 2017.

The High Court disagreed.<sup>1</sup> It held that limitation of liability terms for non-residential builds are not illegal as they do not permit a breach of the Building Act, but are a lawful method of risk allocation between contracting parties in the event that the contractor breaches their statutory duty.

The Court found that the limitation of liability terms contained in the contracts between the engineers and the Council are enforceable. However, additional statements of limitation of liability included in producer statements were not considered to be part of the contract between the Council (as building owner) and the engineers and therefore were unenforceable.

### Factual background

The Council entered into a contract with engineers Harrison Grierson to design the structure of a transport hub in the centre of Tauranga.

Constructure Auckland Limited was engaged to peer review Harrison Grierson's design.

The design was defective. The Council abandoned the project and sold the land for \$1. It has now brought claims against Harrison Grierson and Constructure for

wasted costs of approximately \$26m, alleging negligence, breach of statutory duty, breach of contract, negligent misstatement and breaches of section 9 of the Fair Trading Act 1986.

### Engineering NZ CCCS Terms

The contract between Harrison Grierson and the Council was on the terms of the long form agreement issued by Engineering NZ "Conditions of Contract for Consultancy Services, 2009 3rd ed" (**CCCS Terms**).

The general conditions of the CCCS Terms provide:

#### 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.

The Special Conditions stated that the maximum amount payable for Professional Liability shall be:

...five times the fee, with a minimum amount of \$500,000 and maximum liability of \$2,000,000...

Harrison Grierson charged over \$400,000 so the \$2m cap applied.

### ACENZ/IPENZ Short Form Agreement

The contract between the Council and Constructure was the standard Short Form Agreement (**SFA**) issued by the Association of Consulting and Engineering New Zealand and the Institute of Professional Engineers New Zealand. The SFA contains the following limitation of liability:

The maximum amount payable, whether in contract, tort, 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 \$500,000.

<sup>1</sup> *Tauranga City Council v Harrison Grierson Holdings Ltd* [2024] NZHC 714.

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(continued)

### Producer Statements

Both Harrison Grierson and Constructure signed producer statements certifying that the design complied with the Building Code. The Council alleged that the producer statements were false and therefore brought claims alleging breaches of section 9 of the Fair Trading Act and negligent misstatement.

The producer statements contained the following term which the engineers sought to rely on to further limit their liability in relation to those causes of action:

...this statement shall only be relied on by the Building Consent Authority named above...the total maximum amount of damages payable from the statement and all other statements provided to the Building Consent Authority...is limited to the sum of \$200,000.

The High Court considered whether the engineers could rely on the limitation of liability terms in their defences as a preliminary issue.

### High Court findings

#### Limitation of liability in the CCCS Terms and SFA

The High Court found that limitation of liability terms are not inconsistent with the Building Act. They did not relieve the engineers of the duty to comply with the Building Code (which is a statutory duty, as well as a duty owed in contract and tort). Instead, the terms represent the commercial parties' negotiated allocation of risk in the event that the statutory duty was breached.

The CCCS Terms required Harrison Grierson to hold professional indemnity insurance up to \$2m – matching their maximum potential exposure. In essence the parties had agreed that the Council would self-insure for losses above \$2m. If engineers and other contractors were unable to limit their liability, the price of construction would no doubt be higher.

#### Limitation of liability in producer statements

The Court found that the limitations of liability in the producer statements could not be relied on to further limit the engineers' liability.

The Fair Trading Act cannot be contracted out of unless a specific exception is met. The exception requires a written agreement between parties in trade. The High Court found that while the limitation of liability terms in the CCCS Terms and SFA were clearly agreed upon by both parties, this requirement was not met in respect of the purported limitation in the producer statements. The producer statements were addressed to the Council as Building Consent Authority, not as principal or building owner and did not form part of the contractual terms.

The Court did not comment on whether the limitation of liability in the producer statements would limit the engineers' liability to the Council as Building Consent Authority.

### Takeaways

This decision provides certainty to parties in the construction industry relating to contractual limitation clauses, but does still leave a level of uncertainty in respect of producer statements.

Parties negotiating contracts should pay attention to limitations of liability and whether they are at a level that appropriately balances risk in the event that the contract is breached.

It is important to note that this decision does not apply to residential building contracts. The Building Act contains express restrictions against limitations of liability in residential builds.

### Want to know more?

If you have any questions about limitations of liability, please get in touch with one of our [Litigation and Dispute Resolution Team](#) or our [Construction Team](#).