When are producer statements supplied in the course of construction actionable?

This article looks first at the nature of producer statements, then considers two High Court decisions which considered the actions brought in relation to them.

Producer statements

The Building Act 1991 section 2 defines a producer statement as:

> *… any statement supplied by or on behalf of an applicant for a building consent or by or on behalf of a person who has been granted a building consent that certain work will be or has been carried out in accordance with certain technical specifications:*

The statutory function of producer statements in the Building 1991 Act[1] was not carried over into the Building 2004 Act, nevertheless Councils continue to seek and rely on them. In *Body Corporate No 207624 v North Shore City Council*[2] Justice William Young stated[3]:

> *Under the 1991 Act, a decision to issue a building consent or a code compliance certificate turned on whether the territorial authority was satisfied, on reasonable grounds, as to compliance. The Act contemplated that such a decision might be on the basis of, inter alia, producer statements which were defined as meaning a statement supplied by or on behalf of an applicant for, or the holder of, a building consent that work would be, or had been, carried out in accordance with certain technical specifications. The 2004 Act (as currently in force) does not provide for the general use of producer statements but there is nothing in the Act to prevent territorial authorities from relying on them and they are regularly used. And under the 2012 amendments which are not yet in force, what are in effect producer statements (in the form of certificates by licensed building practitioners) are extensively provided for.*

Along with the new regime of 'certificates of design work' and 'records of work' introduced by the 2012 amendment to the Building Act 2004 came statutory exclusions of liability against civil action by building owners in respect to them[4].

The new regime does not mirror the old regime in other ways. The function of a certificate of design work appears to be different from a record of work and both are different to the producer statement.

The Building (Forms) Amendment Regulations 2011 introduce a prescribed form called a "Memorandum from licensed building practitioner (certificate of design work)" (for the

[1] Particularly in sections 33, 43 and 56 Building Act 1991
[2] [2013] 2 NZLR 297
[3] At para. [311]
[4] SS. 45(3A) and 88(4) Building Act 2004.

purposes of complying with sections 30C or 45 of the Building Act 2004) and a separate form called a "Memorandum from licensed building practitioner (record of building work)" (for the purposes of complying with section 88, Building Act 2004).

The Act provides that the certificate of design work must state that the design work complies with the Building Code. This is vey similar, but broader than the prior definition of the producer statement. By contrast the record of building work is simply a record of work with no additional statutory obligation to say that work is Code compliant, so distinguishing it from the producer statement which requires an affirmation that work has been done ".. *in accordance with certain technical specifications*".

To confound matters, Councils continue to seek producer statements from building contractors which go beyond mere affirmation of compliance with "*certain technical specifications*", but which statements affirm fulfilment of the Building Code performance requirements more generally.

It would seem that that 2004 Act as amended leaves open an unlegislated practice whereby Councils seek producer statements from contractors affirming that their work is Building Code compliant in addition to seeking the statutorily required certificate of design work and record of building work.

Unlike the Building Act 2004, the Building Act 1991 provided expressly that a council may accept a producer statement as establishing compliance with all or any of the provisions of the building code[5]. Despite the absence of an express statutory deeming of compliance, it is likely that councils will continue to seek them, and be supported by the Courts in their use, to enable themselves to be satisfied that the "reasonable grounds" test is met for the issue of building consents, certificates of acceptance and code compliance certificates pursuant to sections 49, 96 and 94 of the Building Act 2004.

More often than not, producer statements are produced by the contractor who will or did actually perform the building work. In that situation, the contractor verifies that their work "…*has been* [or would be] *carried out in accordance with certain technical specifications…".* Sometimes however, the statement is supplied by someone other that the party who did the physical work.

Future homeowners owners, more often than not, sue the original building contractors for their workmanship, rather than their producer statement. This raises the question - are producer statements separately actionable by future owners? The writer believes the answer lies partly in whether the statement is issued as part of the building of the house or after the house is built. The asserted difference is illustrated by the following High Court decisions.

The producer statement as 'building work'

The High Court's judgment in *Anderson v HML Nominees Ltd*[6] affirmed that a producer statement may be actionable where it forms part of the design for the house i.e. was part of the building of the house.

[5] Section 43(8) Building Act 1991
[6] [2014] NZHC 2073

The Andersons purchased a remediated 'leaky home', later discovering that the repairs leaked. The Andersons sued the Auckland Council who joined as third parties a company; BCCL and Dr W, the company's director, on the basis that BCCL supplied the Council with an opinion (authored by Dr W) that an aspect of the home's proposed cladding would meet the performance requirements of the Building Code. The Council maintained that it relied on this opinion when determining that it had reasonable grounds to issue the building consent.

In opposition to the strike out/summary judgment application against it, the Council contended:

- Firstly, that BCCL and Dr W owed a duty of care to the Council in negligent mis-statement.

- Secondly, that BCCL and Dr W also owed a similar duty of care to future owners of the property. This latter argument opened the door to a right of contribution or indemnity from BCCL and Dr W to the Council as joint or concurrent tortfeasors under section 17(1)(C) of the Law Reform Act 1936.

This article focusses on the second contention and the question whether and when a contactor in the position of BCCL and Dr W owe future home owners a duty of care. Before doing so it is useful to consider the nature of the opinion produced by BCCL and Dr W.

The Building Act 2004 was in force when the events occurred which, perhaps, explains why that the words 'producer statement' are not used in the Judgment. Notwithstanding, it is reasonably clear that the opinion would have constituted a producer statement under the 1991 Act.

BCCL and Dr W did not create the cladding design nor construct or supervise the construction of the cladding. Their 'service' was limited to supplying an opinion regarding the proposed design and use of the particular cladding detailed in the application for building consent. Their contribution was advisory in nature not physical.

His Honour began analysis of the possibility of a duty of care as between BCCL and Dr W and future purchasers by observing the general rule established by the Court of Appeal in *Bowen v Paramount Builders* that:

> "*… those involved in building work in New Zealand such as builders, architects, roofing contractors and so on do owe duties of care to future owners of the property on or in relation to which they carry out their work*"[7].

With respect to liability for design of proposed building work, the Court in *Bowen* referred with approval to the following statement of Windeyer J in the High Court of Australia judgment in *Voli v Inglewood Shire Council*[8]:

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[7] Judgment para. [64] citing *Bowen v Paramount Builders (Hamilton) Ltd* [1977] 1 NZLR 394 (CA), by way of example at 406. *Bowen* is extensively referred to and affirmed by the Supreme Court in *Body Corporate No 207624 v North Shore City Council* [2013] 2 NZLR 297 and *North Shore City Council v Body Corporate 188529 (Sunset Terraces)* [2011] 2 NZLR 289.

[8] (1963) 110 CLR 74

> *. . . neither the terms of the architect's engagement, nor the terms of the building contract, can operate to discharge the architect from a duty of care to persons who are strangers to those contracts. Nor can they directly determine what he must do to satisfy his duty to such persons. That duty is cast upon him by law, not because he made a contract, but because he entered upon the work. Nevertheless his contract with the building owner is not an irrelevant circumstance. It determines what was the task upon which he entered. If, for example, it was to design a stage to bear only some specified weight, he would not be liable for the consequences of someone thereafter negligently permitting a greater weight to be put upon it.*

The analysis in *Anderson* moved to consideration of the definition of 'building work' in section 7 of the Building Act 2004 which provides that it is work:

> *… for or in connection with … the alteration … of a building … on an allotment that is likely to affect the extent to which an existing building on that allotment complies with the Building Code*.

His Honour determined that the opinion produced by BCCL and Dr W was arguably 'building work' for the purposes of the Building Act[9], especially as design work expressly comes within the broad definition in section 7. And that this was relevant in considering the distinction between negligent mis-statement and negligence simpliciter[10]. His Honour concluded that it is 'at least arguable' that a negligent opinion which causes a property owner damage and which qualifies as 'building work' under the Building Act, should supply a cause of action in negligence simpliciter in addition to the cause of action in negligent mis-statement available to anyone who reads and relies on the opinion.

The writer harbours misgivings about the proposition that if an activity in connection with construction of a building falls within the broad Building Act definition of 'building work', then such activity is converted from a statement into a physical act, in turn, converting the related cause of action from negligent mis-statement into one for negligence simpliciter.

Nevertheless, the writer considers His Honour was on safe ground once he determined that the Council relied, even in part, on the opinion of BCCL and Dr W in its decision to issue the building consent. This is because, and critically, the opinion represented BCCL's and Dr W's imprimatur or adoption of the cladding design, so and notwithstanding that it was not their design creation – it effectively became their own. The Council's reliance resulted in the consent being issued which meant the design was given effect in the building work that followed with the result that the design and related opinion fell into the category of work for which a duty of care is owed to future owners according to the authority in *Bowen v Paramount Builders*.

What would the position have been had BCCL's/Dr W's opinion followed only after construction was completed? The question is no mere curiosity, because it is common for councils to seek producer statements following final inspection (i.e. after construction has finished) and immediately before issuing a code compliance certificate. This leads on to consideration of the second High Court case.

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[9] Judgment para. [67]
[10] Judgment para. [79]

Producer statements subsequent to completion of the 'building work'

The High Court's judgment in *Pacific Independent Insurance Limited v Webber*[11] also involved an action based on a producer statement, and so, provides a useful contrast to the decision in *Anderson*.

Pacific purchased a leaky home, then sued MPTL and Mr K, that company's director, in relation to a producer statement they issued to the Council in respect to the cladding.

The Court held that the producer statement was prepared for the developer of the property, a prior owner to Pacific, for supply to the Council. Therefore MPTL and Mr K could not reasonably have foreseen that subsequent purchasers might also place reliance on it[12].

His Honour noted as significant that the producer statement was not produced by reason of any contractual relationship with Pacific and did not create any physical defect in the building[13]. His Honour pointed out the key distinction between the unavoidably community reliance placed on code compliance certificates issued by territorial authorities as compared with producer statements for which there is no such general community reliance[14].

Ultimately, the plaintiff's case rested on establishing actual reliance on the producer statement when making the decision to purchase the property[15]. And because there was no actual reliance, there was no casual connection between the allegedly negligent statements and any loss suffered, hence the plaintiff's claim was dismissed[16].

Conclusion

A position emerges from the decisions that a producer statement may be actionable in different ways by different parties depending on when it is issued and how it is used notwithstanding that it may contain essentially the same assurances.

The writer concludes that if the producer statement relates to pre-construction design, then it may be actionable by home owners (current or subsequent) in negligence simpliciter and by the Council in negligent mis-statement if relied on for issue of the building consent. But where the statement is issued post-construction it may only be actionable by a home owner in negligent mis-statement if it shows actual reliance. It will also be actionable by the Council by way of a contribution claim in negligent mis-statement.

Andrew Steele
Barrister

Princes Chambers, 3 Princes Street, Auckland 1010. 021 673 252 09 974 5483

[11] Unreported HC Auckland CIV-2004-404-4168, 24 November 2010 per Lang J
[12] Judgment para. [40]
[13] Judgment para. [41]
[14] Judgment para. [43]
[15] Judgment para. [47]
[16] Judgment para. [51]