Five times the fee:

High Court upholds limitation of liability clauses in transport hub design dispute

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For design consultants and their insurers, limitation of liability clauses are a crucial component of risk allocation and are often relied on in defending claims.

In a significant recent judgment the High Court determined that the limitation of liability clauses in the ACENZ/IPENZ CCCS and SFA standard form consultant agreements operated to limit liability arising under the Building Act 2004, the Fair Trading Act 1986 (FTA), and for negligent misstatement

(Tauranga City Council v Harrison Grierson Holdings Ltd & Constructure Auckland Ltd [2024] NZHC 714).

Judicial consideration of these widely used standard form agreements is rare, and so the case provides helpful guidance for construction industry participants. It confirms that the limitation clauses will be enforced on their own terms. It also cautions against relying on limitation clauses in producer statements, as these will be subordinate to the terms of the consultant agreement and any limitation clauses they contain. The case reinforces that parties should carefully consider the terms and adequacy of the limitation clauses in standard form agreements.

Background

Tauranga City Council (TCC) engaged Harrison Grierson (HG) to produce the structural design of a transport hub under ACENZ/IPENZ's Conditions of Contract for Consultancy Services (CCCS). HG was also to provide PS1 (Design) and PS4 (Construction Review) producer statements. Clause 6.2 of the CCCS limited HG's liability to "*five times the fee, with a minimum amount of $500,000 and maximum liability of $2,000,000 [for professional liability]*".

TCC also engaged Constructure Auckland (Constructure) to peer review HG's structural design and provide a PS2 (Design Review) producer statement under an ACENZ/IPENZ Short Form Agreement (SFA). Clause 11 of the SFA limited Constructure's liability to "*five times the fee (exclusive of GST and disbursements) with a maximum limit of $NZ500,000.*"

All HG's PS1s and Constructure's PS2s contained a standard limitation clause:

This statement shall only be relied upon by the Building Consent Authority named above … 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 … is limited to the sum of $200,000.

Substantial re-design work was required due to issues encountered during the delivery phase of the works. TCC abandoned construction and sold the site to the main contractor for $1. It brought proceedings against HG and Constructure, seeking over $26 million in damages. TCC advanced five causes of action: negligence, breach of contract, breach of duty under the Building Act 2004, breach of the FTA, and negligent misstatement. HG and Constructure relied on the limitation clauses in the CCCS, SFA and the producer statements. The effect of the limitation clauses was determined as a preliminary issue.

Decision

Liability under the Building Act 2004

Three of TCC's causes of action (negligence, breach of contract, and breach of statutory duty) alleged a failure of the design to comply with the Building Code, as required by s 17 of the Building Act 2004. The Court determined that s 17 of the Act imposed a duty on those who undertake building work (including design work) to building owners to exercise reasonable skill and care to ensure their work complies with the Building Code (at [222]). Each defendant owed this duty to TCC in respect of its design (and design review) work.

While a designer cannot contract out of the duty imposed by the Act, the Court considered that the limitation clauses in the CCCS and SFA did not have that effect. They did not concern compliance with the Building Code, but the consequences of non-compliance and how that risk is to be allocated (at [287]). The clauses did not permit a lesser standard of building work than compliance with the Building Code.

The clauses were therefore not in breach of the Act. However, even if they were, the clauses were not contrary to public policy and the objects of s 17 did not "*clearly so require*" that the clauses were determined to be illegal or unenforceable (at [300] and [308]).

Liability under the Fair Trading Act 1986

The Court noted that the FTA specifically prohibits contracting out, with s 5D creating a limited exception for parties in trade. Following an earlier High Court decision (Tadd Management Ltd v Weine [2023] NZHC 764, (2023) 24 NZCPR 1), the Court considered that the limitation clauses in the

CCCS and SFA fell within the prohibition on contracting out. Their conclusiveness therefore rested on the application of s 5D.

The Court determined that the s 5D exception applied because: there was an agreement in writing; the parties were in trade and agreed to contract out; and, having regard to all the circumstances, it was fair and reasonable for TCC to be bound by the clauses (at [314]–[338]). Each defendant's liability for breach of s 9 of the FTA was therefore limited to the amount in the relevant clause.

The s 5D exception did not apply to the limitation clauses in the producer statements because each statement did not amount to an "agreement" (at [320]–[322]).

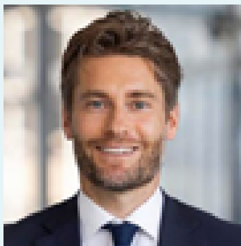
Liability for negligent misstatement

The Court held that any liability arising from each defendant issuing a producer statement was governed by the relevant contract, not the terms of the producer statement itself. First, the producer statements did not create separate contracts between TCC and each defendant (at [341]). Second, the limitation clauses in the producer statements were directed to TCC as the building consent authority, not to TCC as the building owner (at [342]).

This meant the limitation clauses in the producer statements were unenforceable against claims by TCC as the building owner. They did not override the limitation clauses in the CCCS or SFA. Each defendant's liability for negligent misstatement was therefore limited to the amount in the relevant contract clause.

MinterEllisonRuddWatts has extensive experience advising consultants, designers, contractors and principals on construction-related contracts, projects and disputes. Please contact us if you have any questions or would like to discuss how the implications of this case might impact your organisation.

About the authors:



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