Aon LASS Presentation

21 February & 1 March 2018

Future Legal Risks

Frana Divich

Heaney & Partners are a boutique litigation practice whose lawyers have defended local government from liability claims for more than 30 years. Three of the five partners of the firm have put together a presentation on claims trends and future risks for local government.

We have divided the presentation into three topics and split them between 3 of the partners.

I am speaking first on coastal hazards. I have defended councils against a variety of claims both internally (as an in house counsel) and externally (in private practice) for more than 16 years. Last year I settled a particularly difficult High Court claim involving a sea wall that had been found by another court to have caused erosion to an adjoining land owner.

Shyrelle will speak today on the current thinking about prevention of flooding given changes to weather patterns because of climate change. Shyrelle acts for councils and insurers in relation to defective building claims. She also heads our real estate practice.

She is looking after the Bay of Plenty Regional Council in respect of a threatened class action by the people of Edgecumbe in relation to the flooding that occurred there last year. Don't be alarmed when Shyrelle disappears at the conclusion of her presentation. She is heading to the airport to visit the council in Gisborne.

Paul Robertson will discuss recent trends in building defects focussing on foundations, and what councils can do to minimise their liability. Paul will also discuss the role and liability of engineers, and the worrying developments in relation to fire and structural related claims.

He has wide experience of building related disputes and has recently been involved in a High Court case where a council was found not to be liable for problems with the foundations of a house.

Coastal Hazards

New Zealand has 15,000km of coastline, making it the ninth longest in the world.

As an island nation with a very long coastline we are particularly vulnerable to the rising level of the sea.

In December 2017 the Ministry for the Environment released the Coastal Hazards and Climate Change Guidance (available at www.mfe.govt.nz). It is a major revision of the 2008 edition and it is intended that it to be used by local government in future planning, and by those who provide services and infrastructure to coastal areas.

Central government has estimated that there are 68,000 buildings, 133,000 people effected, 5 airports, over 1,500 wharves and jetties, over 2,000km of road and 46 kms of railway vulnerable to the effects of storm damage. The total replacement cost of all buildings within this zone has been assessed at $19 billion in 2011. This does not account for the infrastructure.

As a result of the warming of the seas coastal erosion, storm surges and more frequent and intense storms are predicted. By 2050-2070 one in 100 year types of storm events, will occur at least once per year.

The report warns that we need to prepare for erosion, flooding, changes in groundwater and drainage levels, saltwater intrusion and liquefaction. In fact we have seen the impact of such storms already this year on Tamaki Drive in Auckland, along the Coromandel Peninsula, in Tasman and on the West Coast.

So what are the risks?

There is a lot of very expensive council infrastructure on the coast. Water pipes and sewer lines are laid there. Communities who lose water or whose water is contaminated in an event or whose property is affected by raw sewerage may look to the council in negligence or nuisance.

Local government needs to be careful when it comes to consenting the subdivision of coastal land and cliff top land. If such resource consents are approved then thought ought to be given now to whether the houses can be moved and how future owners can be warned of the dangers (and Sarah will be talking about that).

Local government needs to carefully manage the consultation it is obliged to undertake with its ratepayers over the noting of LIMs with sea level rise warnings. There has been litigation and vocal protest over this in Kapiti and Christchurch.

If councils consent buildings in circumstances where it is satisfied that adequate provision has been made to protect the land and building work from inundation by the sea this must be noted on the title of the property at the time the building consent is issued. If it does not insurers, property owners and banks might look to the council for damages for failing to warn them.

Councils need to have good records so that planning requirements are taken forward at building consent stage. We see a few cases every year of planning requirements like floor level heights and building positioning were not being carried forward to the building consent file. This will cause a house to be built in the wrong place and flooded. The council will be sued and it is usually a costly mistake.

There is also potential for on-site protection structures such as sea walls to be consented under the BA. Issues with this includes inconsistency with the New Zealand Coastal Policy Statement 2010 and that sea walls may protect property A but cause an increase in erosion of property B as the “end effect” occurs at the end of the protective structure. Property B might sue the council for permitting something that caused them land damage.

Finally the council needs to be mindful of public works it undertakes and the possible adverse effects it may have on others. I have recently been involved in a case where the council was found by the Environment Court to have caused damage to a coastal property owner when it installed a groyne (a type of sea wall) to halt the growth of a sandspit. The EC found that the groyne had caused the sandspit to strengthen and grow and its growth had caused erosion to the coastal property owner’s land. The land owner then sued the council in the High Court for damages and the council could not argue it wasn’t responsible.

Shyrelle Mitchell

Making Room for the River

Background

I am going to talk a little bit more about the risks associated with management of floodway's given the more frequent and damaging storm or cyclone events we are seeing as an effect of climate change.

The potential damage caused by such events was perhaps most recently seen when ex cyclone Debbie hit the Bay of Plenty region causing flooding in the small township of Edgecumbe. I would just like to acknowledge that we do have council colleagues here from the BOPRC.

Steps taken in response to that event have included consideration of potential long term strategies for river / floodway management.

By way of a brief background:

- On 3rd April 2017 Met Service issued a severe weather watch for the region.
- On 4th April 2017 it issued its first severe weather warning.
- On 5th April the potential for a major flood was forecast.
- On 6th April 2017 at approximately 8.30am the Rangatikei River breached the stopbank at College Road.

15 houses were rendered permanently uninhabitable.

Some 250 houses required repairs at a level which necessitated their being evacuated for a reasonable significant amount of time. People had to find alternative accommodation for weeks and even months.

As you will all know, following that event the Bay of Plenty Regional Council commissioned an independent review panel.

The panel was chaired by Sir Michael Cullen and had two technical experts as members, a river and stormwater engineer (Kyle Christiensen) and a geotechnical and civil engineer (Charlie Price).

The general terms of reference for the panel was to understand the circumstances that lead to the breach of the Rangatikei River stop bank of College Road.

The panel heard from a significant number of people including experts and consultants – some 11 organisations and 75 individuals.

The panel also looked at long term river management strategies and design philosophies given historical and future changes to climate conditions.

In respect of the Rangatikei River it was noted that, like many other New Zealand waterways, the location and general arrangement of the key Rangatikei River Flood Management Assets were set in place quite some time ago – in the case of the Rangatikei River in the late 1960s through the work of the Bay of Plenty Catchment Commission.

At that time the focus was on the confinement of river systems, particularly aggrading gravel bed rivers, in an attempt to "flush" sediment through to the coast as well as maximising areas of "protected land". River flow was to be controlled, so that the most could be made of existing and reclaimed farm/agriculture lands.

These types of river schemes exist across New Zealand and the Panel considered that over the past 10 years it has become more apparent that a wide ranging review of their ongoing sustainability is needed as climate change, water quality, cultural values and the desire for access to rivers come to the forefront in public policy and best practice.

The Panel considered that ad hock piecemeal patch-up of assets that were constructed over 50 years ago and that are limited by the current location of these assets, was unlikely to provide a sustainable long term solution.

It suggested that if there is a reluctance to consider relocating existing stopbanks further away from the river, there will inevitably be the need for higher stop banks to manage larger future, climate change influence, floods. And if that is the only available option, there needs to be an appreciation that the increased confinement will increase the hazard within these rivers during floods and also lead to higher consequences in the event of a stop bank failure.

Long Term Strategy Recommendations

The panel considered that the regional council needed to give high priority to developing and implementing long term sustainable flood risk management solutions for the Rangatakei Plains to manage the effects of climate change as well as providing ecological and cultural value to the wider community.

This arguably needs to be a priority for all councils.

Depending on the particular location and the composition of river banks/soils, stop bank raising may be a poor option. This will be particularly so where there are geotechnical complexities of the underlying geology.

In respect of the Rangatikei River spill compartments were considered an option which should be the subject of the feasibility study as well as additional outlets from existing floodways.

The panel in looking at the longer term, concluded that the historic framework which has governed the development of the Rangatakei River Control Scheme (and arguably other schemes throughout New Zealand), is at or near the end of its useful life.

Looking at overseas examples, frame works which are now being more widely adopted look towards allowing greater room for rivers to move. This change is underlined by the near certainty that climate change is leading to more severe and more frequent extreme weather events.

Councils are encouraged to be thinking about what this climate change means for the future shape of living with and by rivers such as the Rangatakei River.

There is a perceived need to adopt an approach which “makes room for the river” rather than seeks to confine and direct the river.

Of course in some situation/locations it may be impossible to implement such a “managed retreat”. Every situation will be unique – a function of how big the neighbouring community is, its proximity to the water, the practicable ability to give the river more room rather than heighten flood wall protection mechanisms.

There are always competing interests – management of rivers/waterways must involve community consultation, however arguable not to the point where the council becomes unable to act – communities expect and require leadership from their councils.

What has become clear is that the river flood water protection mechanisms adopted 60 to 100 years ago will not be suitable given the impact that climate change is having on weather patterns and river water flows.

The risks associated with wholly relying on those systems have become clear.

Paul Robertson

Foundations, **engineers** and **fire**

The number of building disputes relating to weathertightness is tracking down. However, we have noticed a significant number of claims relating to foundations problems, the involvement of engineers is proving problematic, and fire / structural problems are also a reoccurring problem.

Foundations

Let's talk about foundations.

Hamlin was a case about foundations in a group housing project in Invercargill.

The foundations failed, the council was found liable and the case went all the way to the Privy Council.

Susan Thodey, who is still with Heaneys, represented the council.

Since then councils have focussed on foundations. You might think that with all that attention, foundation problems would no longer cause liability.

Unfortunately you would be wrong.

A council is liable for inadequacies with its own inspections

A council is potentially at risk where (a) council inspections fail to detect areas of weakness in the ground, or the council (b) fails to ensure that the foundations are adequately designed.

Looking first at inspections, the standard required by the courts is high, but claims can be defended.

Gordan v Curry [2015] NZHC 2917

In this Southland case the lounge floor caved in and it was alleged that the builder and the council had been negligent in relation to the foundations.

Firstly, an unusual material (marble sized stones known as pea gravel) was used to support the concrete floor.

It was argued that pea gravel is prone to settling and was pressed into the soil leaving the concrete floor unsupported.

Next there were complaints about organic matter under the foundations that ought to have been removed. The allegation was that a grassy layer rotted away leaving the floor unsupported.

However, at trial we established that the subsidence was **mainly** caused by something else, an undetected (and difficult to detect) layer of ‘blue pug’ that had slumped.

The Council was found not liable because:

(a) the ‘defect’ in the foundations, the presence of the blue pug, would **not** have been apparent to council inspectors; and

(b) The council’s alleged negligence (that is allowing use of the pea gravel and not ensuring that grass etc was removed) had **not** caused the loss.

The lesson is ...

Liability is not strict, there needs to be a causative link between negligence and damage. Sometimes it is worthwhile for a council to ‘dig in’ and defend a claim.

Councils can’t by inspection see everything

Turning to engineers, councils are **entitled** to rely on experts, such as engineers when assessing foundations.

For subdivisions, ground conditions are briefly checked by a soils specialist, a geotechnical engineer, who provides a report to the council.

Where ground conditions are unusual, the practice is then to have a different kind of engineer, a structural engineer, design the foundations.

The structural engineer provides Producer statements to the council.

Councils rely upon the producer statements to confirm that the design and construction of the foundations is adequate.

What should happen if the builders discover a layer of blue pug or a soft spot because of organic material?

Whether or not pug is discovered when should a geotechnical engineer be reengaged during construction to confirm the site conditions specific to the house in question?

Councils traditionally rely upon the structural engineer to call in a geotechnical engineer as necessary.

We have a number of claims where the complaint is that **the council** should have required an additional report from a geotechnical engineer.

Is that right?

The courts are likely find that a council is **not** required to second guess the advice of an engineer. The court **will** focus on whether the council verified the assumptions made by the engineer.

I can think of two court decisions where a council was found liable for not doing this.

I was involved in a Dunedin case where the engineer assumed certain ground conditions, but there was no verification of actual ground conditions by anyone. [1]

The council was found liable, and the engineer escaped liability.

More recently, in the *Southland Stadium* decision, the pre-camber in roof beams was supposed to be checked / confirmed by the engineer to confirm some design assumption, but was not.

The council was held liable for failing to ensure that the measurements had been taken.

And the lesson is...

This is very much a systems and desktop checking exercise;

- What assumptions have been made by the engineers;
- Have those assumptions been tested; and
- Where is the paper trail?

Claims can be avoided by having good systems in place and adequate training.

[1] *McLeary v Littleton & Anor*

‘Mind the gap’ - information

It’s not only negligent inspections that cause problems.

Liability is often caused by an information gap. That is where **all** the information held by a council is not brought to bear.

A common example is where information held by the planning team is not communicated with building inspector. For foundations this may mean that Consent notices warning of poor site conditions are not shared. [2]

And the lesson is...

Councils need to coordinate their activates.

Managers need to identify, and root out the silo’ing of information. It can help to have managers appointed over a range of council activities so that they can see the bigger picture.

‘Mind the gap’ - $$

Focusing again on engineers, if an engineer makes a mistake, then they should pay. However, how much can they afford?

In *Southland Stadium* the engineer was found liable for 90% of the loss. His insurance company paid out only $1m towards a claim that ended up being for over $10m.

Even where a council engages a second engineer to carry out a ‘peer review’, their terms and conditions will usually limit their liability **to the council** severely.

And the lesson is...

(a) Especially for larger projects, ensure that engineers have enough insurance in place; and

(b) Check the terms and conditions of engineers engaged by the council.

Fire is the new water

Next I will talk about structural and fire related claims.

[2] *Bronlund v Thames Coromandel District Council*

Until recently structural and fire prevention issues were not a commonly the main cause of loss - the focus was on weathertightness problems. Any structural / fire issues were resolved in the course of repairing the cladding.

We are increasingly encountering problems with compliance with parts B1 (structural) and C3 (fire) of the building code.

There is particularly ugly cross over with weathertightness issues.

In the course of remedial work caused by water damage, the cladding is removed and this can reveal problems with passive fire protection measures and the structural integrity of the building.

An example is the ‘fire collar’ placed around pipes that pass through common walls.

The collars are designed to slow down the spread of fire between units.

Once 1 or 2 problems are found, then the council inspectors need to consider whether **all** the fire collars must be replaced.

In a multiunit building this can significantly increase the cost to the owners, and if the council is on the hook for weathertightness, the cost to the council.

Solution

For new building work councils need to take care when accepting producer statements from fire engineers.

For existing buildings it may be possible to meet the performance requirements of the building code by other means, such as by requiring additional fire alarms.

That concludes our presentation. Thank you very much for your attention and to Aon for inviting us to speak. You are very welcome to ask us any questions. Otherwise please feel free to call us anytime if you need guidance or advice. Our details are on our website www.heaneypartners.com