IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2021-404-627
[2024] NZHC 640

	BETWEEN	CPB CONTRACTORS PTY LIMITED Plaintiff
	AND	WSP NEW ZEALAND LIMITED Defendant

Hearing:	2 to 6 October, 10 October 2023
Appearances:	K Quinn and M Gillard for Plaintiff AG Hazelton, M Holland and KE Weekly for Defendant
Judgment:	22 March 2024
Reissued:	8 April 2024

JUDGMENT OF JOHNSTONE J

This judgment was recalled and reissued by me on 8 April 2024
pursuant to r 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Solicitors:
Simpson Grierson Auckland
Hazelton Law, Wellington

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[1] In 2014, Waka Kotahi (the New Zealand Transport Agency) commenced the process of calling for tenders to design and construct an upgrade to State Highway 1, between Manukau and Papakura (the Southern Corridor Improvement (SCI) Project). The process included issuing documents setting out its design requirements (the Principal's Requirements).

[2] The plaintiff (CPB) is a construction company. The defendant (WSP) provides engineering and professional services. WSP assisted CPB by providing designs and other information for CPB to submit as part of its tender. CPB's tender, at a price of just less than $192 million, was successful.

[3] CPB proceeded to undertake construction of the SCI Project, WSP having further assisted by developing its tender designs to an "issued for construction" level of detail. CPB's evidence is that, in completing the project, it suffered a financial loss.

[4] In this proceeding, CPB alleges a breach of contract, or alternatively negligence, on the part of WSP, in failing to provide CPB with tender designs of pavements and surfacing that met the Principal's Requirements (PRs). CPB claims for loss that it says is appropriately quantified by reference to the larger price that it would have tendered had WSP not either breached the contract or acted negligently.

[5] WSP accepts that the tender pavement designs it provided did not meet the PRs. But it says:

(a) WSP was not obliged to provide CPB with compliant tender designs;

(b) CPB's claim for loss is not calculated correctly: it does not address the cost consequences of compliant design;

(c) CPB's claim is excluded by way of a contractual exclusion clause; and

(d) CPB's claim is time-barred under the Limitation Act 2010.

Summary of findings and structure of judgment

[6] On each of these points, I find in favour of CPB.

[7] To explain that finding requires discussion of much of the background to CPB's claim, and the way in which it has been particularised over time. I will:

(a) set out a broadly chronological account of the tender, the awarding of the SCI Project, and certain post-award dealings between CPB and WSP;

(b) set out the chronology and nature of CPB's claim; and

(c) address the issues, explaining why:

(i) WSP was contractually obliged to provide compliant tender designs;

(ii) CPB calculated its loss correctly; and

(iii) CPB's claim was neither excluded by the exclusion clause, nor time-barred.

Chronology of tender, project award, and post-award dealings

CPB looks at SCI Project

[8] From around 2006 to 2010, CPB (then named Leighton Contractors Pty Ltd) was the head contractor for the State Highway 20 Manukau Extension project in South Auckland. As part of its involvement in that project, CPB became aware from around late 2010 of Waka Kotahi's desire to widen State Highway 1 immediately south of the SH20 and SH1 interchange. In addition, as a regular attendee at the Waka Kotahi Industry Liaison Group meetings, CPB received a presentation from Waka Kotahi about future projects. One of those projects was the SCI Project.

[9] CPB started to develop its approach to its SCI Project tender in July 2014. Steven Knowles, a civil engineer with experience in project management and motorway design and construction, including at CPB since 1994, was appointed as CPB's Pre-Contracts Manager, responsible for co-ordinating resources in New Zealand including designers.

CPB and WSP come together

[10] Mr Knowles was aware that WSP (then Opus International Consultants Limited) was interested in working on the SCI Project, and would look to partner with a major construction contractor: either CPB or one of its competitors. A meeting between CPB and WSP was arranged.

[11] At that meeting, on 31 July 2014, WSP provided CPB with a written proposal, described as a Capability Statement, to provide design services in respect of the SCI Project. WSP's Capability Statement addressed its understanding of the project and described its proposed team, their skill and experience. It also expressed WSP's understanding that "successful Design & Construct projects are all about developing innovative solutions at the lowest cost which will meet the Principal's requirements".

[12] By 25 August 2014, WSP had executed the "confidentiality/exclusivity undertaking" that CPB had sought, indicating that the parties were minded to work together towards formal agreement over the services to be provided. Eventually, as appears to be customary, two agreements were entered: an agreement relating to the services to be provided at the tender stage (the Tender Services Agreement (TSA)); and an agreement relating to further services to be provided in the event CPB won the tender (the Design Services Agreement (DSA)). In August 2014, these agreements were contemplated but yet to be negotiated.

[13] On 1 September 2014, Waka Kotahi issued an advertisement on the Government Electronic Tenders Service seeking registrations of interest. With CPB having registered its interest on 25 September, Waka Kotahi advised on 20 October 2014 there was no shortlisting required for the tender.

The first draft Tender Services Agreement

[14] CPB sent WSP a draft TSA some time before 30 October 2014. On that date, WSP personnel indicated they were working through the draft. They requested a draft of CPB's standard contract for what would become the DSA (assuming the CPB/WSP bid was successful). This was needed for WSP to complete its review, because the draft TSA provided that subject to agreement, the DSA would be in the form of CPB's standard contract.

[15] The pre-30 October draft TSA contained the following clauses:

(a) Recitals clauses including the following:

> D. [WSP] represents to [CPB] that it has the requisite skills, expertise, experience and resources to perform the Preliminary Services and, if necessary, to perform the Services.
>
> E. In reliance upon the representations made by [WSP], [CPB] agrees to enter into this Agreement with [WSP].

(b) A definitions clause including the following:

> Main Contract means a contract between [CPB] and the Principal (and which may include other parties) for the design and construction (and possibly other aspects) of the Project.
>
> *Preliminary Services means all services to be performed and obligations to be fulfilled by [WSP] in accordance with this Agreement, including any services described in Schedule 1*.
>
> Services means all services to be performed and obligations to be fulfilled by [WSP] in connection with the Main Contract if:
>
> (a) [CPB] enters into the Main Contract; and
>
> (b) the Parties enter into the [DSA].
>
> (emphasis added)

(c) Clauses under the heading "2. Intent of the Parties" as follows:

> 2.1 [WSP] agrees to associate and cooperate with [CPB] and, to the extent required by [CPB] and relevant to [WSP]'s expertise:
>
> (a) …

(b) *provide design services relevant to the Tender* and otherwise assist [CPB] with other things reasonably necessary in connection with the Tender so as to derive economical solutions and maximise [CPB]'s chance of being awarded the Main Contract in accordance with [CPB]'s preferred construction methodologies and practices.

2.2 *[WSP] warrants that it has and will provide the requisite professional skill, expertise, experience and resources necessary to perform the Preliminary Services* and, if relevant, the Services.

2.3 …

2.4 [WSP] acknowledges and agrees that [CPB] has entered into this Agreement in reliance on [WSP]'s warranty and representations stated in this clause 2.

(emphasis added)

(d) Schedule 1, headed "Preliminary Services Scope" including:

1. General

The services and obligations described in this Schedule 1 are in addition to the services and obligations of [WSP] described elsewhere in this Agreement.

2. Design Services

The Preliminary Services include civil engineering *design services necessary for [CPB]* to submit or assist with the submission of any EOI and *to submit the Tender*. These include:

(a) roading

(b) pavement

(c) geotechnical; and

(d) structural design.

(emphasis added)

CPB and WSP start working together

[16] Tender design work commenced while the TSA remained under negotiation.

[17] On 5 December 2014, a "pre-bid workshop" was held involving WSP and CPB staff. Notes were circulated following the workshop, under two headings: "strategy

to win" and "competitor assessment". The "project specific themes" of the strategy included reference to "[u]nderstand[ing] Contract and Principal's Requirements".

[18] On 12 December 2014, Mr Knowles sent WSP a template for the form in which CPB sought that WSP would convey its design advice to CPB. The form described itself as a "Tender Advice Notification" (TAN). TANs are a regular feature of industry practice. The essence of WSP's work for CPB during the tender phase in the first half of 2015 saw it providing TANs, colloquially referred to as "pricing packs", intended to enable CPB to price its tender on the basis of WSP's designs. TANs were generally issued in a series of up to four steps ranging from "Initial" to "Final Issue".

[19] The final page of CPB's template contained the following:

SH1 – SOUTHERN CORRIDOER IMPROVEMENTS
TENDER ADVICE NOTIFICATION

Details of Design information			
Design information in this Advice Notification is provided solely for the submission of this tender. It is understood and agreed that the bid design documentation forming part of the Tender Services does not constitute a fully detailed and verified design. The detailed design under the Consultancy Agreement may contain differences (including quantities) from the Bid design documentation delivered as part of the Tender Services and LCPL will take this into account in preparing the Tender.			
Compliance with Tender Requirements / Approved Standards (select one)			
☐ This advice complies with the Tender Requirements and approved standards ☐ This advice DOES NOT fully comply with the tender requirements / approved standards in the following way: •			
Prepared by:		**Signed**	
Reviewed by:		**Signed**	

[20] Ken Boam, a civil engineer with extensive experience in designing and directing projects, and in team leadership and management, was appointed as WSP's Design Manager for the SCI Project in January 2015. Mr Boam was in the habit of keeping a journal. His journal indicates that, by 28 January 2015, it had become his task, amongst others, to progress WSP's agreement(s) with CPB over design services.

[21] On 29 January 2015, Mr Boam made journal notes confirming that WSP's "agreement(s)" with CPB were to be comprised of two aspects, the agreement for the "preliminary services" relating to the tender (what became the TSA), and the

"services" agreement related to services "post award" (the DSA). Mr Boam's journal entries indicate that he undertook a detailed review of the draft TSA on that day. In relation to the clauses of the draft TSA set out at [15], Mr Boam noted:

(a) in respect of clause 2.1, that he considered the phrase "to the extent required by [CPB]" to require definition; and

(b) in respect of Schedule 1, that clause 1 was "ok providing 2.1 dealt with", and that clause 2 should have the phrase "civil engineering" deleted and the disciplines "environmental" and "urban design" added.

[22] Mr Boam's evidence before me confirmed that his interest in these aspects was to ensure that the extent of WSP's work for CPB be properly defined. Mr Boam also noted in his journal, under the heading "needing to be covered somewhere", the topics "Limit of Liability", "Obligation to award Services on award". and "Success Fee", amongst others. A note purportedly of a conversation with Mr Knowles at around 2:30 pm on 29 January 2015 records that Mr Boam asked to meet Mr Knowles to discuss the agreement(s) between WSP and CPB "ASAP next week".

Request for Proposal documents issued and reviewed

[23] On Friday, 30 January 2015, Waka Kotahi issued the Request for Proposal (RFP) documentation for the SCI Project, including its Instructions for Tendering (IFTs) and the bulk of its PRs, on a series of USB memory drives. CPB downloaded these files onto CPB's servers. As the files were too large to attach to an email (they included detailed information, such as drawings and reports), Mr Knowles provided the USB memory drives to WSP so they could be uploaded to the WSP network.

[24] Clause 1.17.6 of the IFTs instructed that "(t)he Conceptual Design shall comply with the Principal's Requirements". By express incorporation of the definition set out in the PRs, the Conceptual Design was defined as the "Drawings, Specifications and other related documents forming part of the Contractor's tender submission."

[25] Part 5 of the IFTs addressed departures from standards or requirements of Waka Kotahi's tender documents. Waka Kotahi instructed that it would consider such

departures provided they did not change the project's scope. It instructed that departures "shall be submitted in a Departure Request form, available from [Waka Kotahi] on request", and that tenderers were to submit a "Departure Report".

[26] The IFTs also instructed each tenderer to provide a "Preliminary Conceptual Design", described as "Certificate A". Waka Kotahi instructed that it would respond to each tenderer's Certificate A, noting possible non-compliance or general concerns "on an information only basis".

[27] A note in Mr Boam's journal indicates that he began his review of the PRs set out in the RFP documentation prior to 5 pm on 30 January 2015. Five pages of notes in Mr Boam's journal under the heading "PRs" describe his more detailed review of the PRs, commencing shortly after 6 am on Sunday, 1 February 2015. When asked in cross-examination whether when doing so he was planning to meet his lead designers to get their feedback on what they thought of the PRs, Mr Boam agreed, and said:

> Might it be helpful for me to elaborate on why I did all of this and it was really for me as design manager to understand what was in the PRs. I mean I can't lead a team if I don't know what the rules of the game are, so this was for my information and then the design leads would refer to their particular PRs and design accordingly.

[28] A note in Mr Boam's journal dated 2 February describes the structure of the Referral for Tender documents, comprised of Waka Kotahi's IFTs and the PRs, amongst others. The note sets out Mr Boam's list of key dates, identifiable by reference to the IFTs, including those for the Departure Report (10 April), for Certificate A (13 April), and for submission of the tender itself (2 June).

[29] Also on 2 February 2015, Mr Boam emailed members of WSP's tender design team, copying in Mr Knowles, advising that Waka Kotahi's RFP documents were available. He observed that:

> There is a lot of documentation, but the key technical documents, comprised of the Principal's Requirements and appendices, are in [an identified, electronic] folder. Some reference material and drawings are in [another folder]. Please don't be distracted by the other documents, Steven Knowles and myself will be managing them.

CPB and WSP continue work together

[30] From around this time, Mr Knowles and at least one other CPB employee were based with Mr Boam and his design team at WSP's office in Manukau. On occasion, Mr Knowles and Mr Boam attended meetings together with Waka Kotahi. At trial, there was a difference of opinion between Mr Knowles and Mr Boam over the extent to which CPB contributed to development of the tender design. Mr Boam's view was that CPB played a passive role during the tender stage, receiving TANs and undertaking pricing at its head office in Sydney.

[31] Appendix A09 of the PRs, dealing with pavement and surfacing, were not issued until 3 March 2015. Mr Knowles received Appendix A09 and provided it to Mr Boam that day. Waka Kotahi proceeded to issue a series of revisions to Appendix A09, each of which Mr Knowles forwarded on to Mr Boam either upon receipt or the following day.

[32] I return to specific aspects of Appendix A09 below. But here I observe that the first substantive clause of Appendix A09 (clause A9.1.1) required pavement design and construction to comply with the requirements of the Austroads Guide to Pavement Technology (AGPT02-12) as modified by the NZTA supplement (2007), and all relevant NZTA standards, specifications and guidelines. Austroads is the Association of the Australian and New Zealand transport agencies.

[33] Minutes of a design governance meeting at the Manukau office on 4 March 2015, at which Mr Knowles and Mr Boam were present, confirm that the "pavement PRs" had just been issued and were still being reviewed. There were "(n)o other technical issues". Team culture was described as involving "good team interaction and spirit", with "team briefs held every Monday". The TSA was largely agreed, and Mr Knowles had issued a draft DSA for comments from WSP. The draft DSA would require further consideration after Waka Kotahi had provided its response to CPB's Certificate A. As Mr Boam wrote in his brief of evidence:

> Everyone was clear that the TSA was to cover the design work for CPB to make use of in its tender to NZTA. If CPB was successful, then a DSA was to be entered into to cover the detailed design.

[34] On 24 March 2015, WSP's lead pavement designer, Michael Haydon, emailed Mr Knowles and another CPB employee, copying Mr Boam and an employee of CPB's pavement subcontractor, Higgins Contractors Limited. Mr Haydon wrote that the "preferred pavement type" is "non-complying with the PR(s)… in respect of the asphalt thickness require(d)". Mr Haydon observed that "we are preparing a departure to go below 175mm". This departure request was made the next day. It was declined by Waka Kotahi's advisor on 3 April 2015.

The second draft Tender Services Agreement – signed 14 April 2015

[35] Also on 24 March 2015, following a discussion that day with Mr Boam about the TSA, Mr Knowles sent him a further draft. The clauses set out at [15] above were unchanged, except that the list of "design services" at clause 2 of Schedule 1 was no longer confined to "civil engineering" design services, but expanded to include "environmental" and "urban design and landscaping" design services.

[36] Reflecting Mr Boam's other concerns described at [21]–[22] above:

(a) a new clause 15.15, headed "Limitations on Liability" was added; and

(b) Schedule 2, dealing with WSP's fee, was substantially developed including:

(i) new clauses under the heading "2. Tender Budget and Tender Costs", including:

> 2.1 The parties shall agree a detailed description of the scope of the services that will form the Preliminary Services to be undertaken within the estimated Tender Cost.

(ii) and provision made for CPB to pay WSP a success fee if awarded the Main Contract.

[37] This was substantially the form in which the TSA was signed for both CPB and WSP on 14 April 2015. Despite the new clause 2.1 of Schedule 2 (see [36](b)(i)), it was common ground in the evidence at trial that no detailed description of the scope of services forming the Preliminary Services was ever agreed.

[38] At the point the TSA was signed, the draft DSA remained under negotiation.

Certificate A

[39] In the meantime, CPB submitted its Certificate A as required on 13 March 2015. The certificate was branded with the logos of both CPB (then Leighton) and WSP (then Opus). The inside front cover bore Mr Boam's signature, under the words "Approved for Issue", and above his description as "Design Manager". The following was stated in the introduction:

> Our preliminary conceptual design is predicated in part on Departures from the Principal's Requirements. … Our approach is to assume these requests will be granted while recognising that some changes to our concepts will be required if this is not the case.
>
> Meeting the Principal's expectations is intrinsic to our preliminary conceptual design. …

[40] The introduction, and subsequent sections of the certificate, proceeded to describe the various aspects of the conceptual design, repeatedly highlighting its compliance with the PRs, but also identifying several aspects, such as those relating to drainage and bridges, where departures had been requested and either granted or were under consideration by Waka Kotahi. In respect of "Pavements and Surfacing", the certificate stated:

> 8.5 Design Standards and Guidelines
>
> The design approach followed for this conceptual design is in accordance with the Principal's Requirements and the following documents:
>
> □ AGPT02-12 Austroads Guide to Pavement Technology Part 2: Pavement Structural Design
>
> □ 2007 New Zealand Supplement to the 2004 Austroads Guide
>
> □ NZTA Standard Specifications (as provided in Cl. A9.1.1).

Tender Advice Notification (TAN) 057

[41] On 23 April 2015, WSP provided CPB with a Tender Advice Notification labelled TAN057. It contained a preliminary design relating to pavements and surfacing. It described its status as "Initial Issue", and its purpose as "For Pricing".

Post-TSA correspondence on scope of 'detailed design services' (for DSA)

[42] On 17 May 2015, Mr Boam emailed Mr Knowles and another CPB employee, Greg Edwards, attaching a "draft copy of the scope of detailed design services for [their] review and discussion". That document referred to various stages of completeness as applicable to certain aspects of the project, albeit not pavements: a "design philosophy (30%)" stage, a "design freeze (50%)" stage, and final design stages such as the "Issued for Construction (IFC)" stage. And it included the following passage:

> For all disciplines it has been assumed the Detailed Design will develop the same concepts shown in the Tender Design and that no revisiting or innovation of the Tender Design Concepts are required. It has also been assumed that Design Development, including construction input will be complete by the 50% stage, following this no further Design Development will be undertaken.

[43] Under the heading "exclusions", the same document noted that "it [is] incumbent on the design team to inform [CPB] of any non-compliance with the PR's or specifications prior to agreeing the design freeze".

[44] Mr Edwards responded by email dated 19 May 2015. His response included the following:

> No Optimisation from Tender design prior to design freeze at 50%?/ Don't understand this concept from (WSP) as we should have the opportunity to Optimise design up to the Freeze point as well as ensuring we have the correct design based on NZTA scope.

[45] Mr Boam in his evidence also reported various discussions around this time with CPB personnel, including intensive scrutiny on the part of Mr Edwards, about WSP's proposed fee for the detailed design services to be contracted under the DSA, should CPB's tender be successful. These discussions appeared to have been resolved when Mr Edwards responded to a further fee proposal made by email on 27 May 2015, observing this was "a good outcome".

[46] The Design Services Agreement (DSA) between CPB and WSP was not formally entered until much later. On 2 March 2016, Peter Wiles of WSP prompted Mr Knowles for a response to proposed amendments. Mr Knowles responded by sending a version discussed earlier, referring to a list of exclusions that had been

discussed, and adding "the design scope is the Principal's Requirements with the exclusions listed (as discussed) the only areas of the design that are not completed by (WSP)".

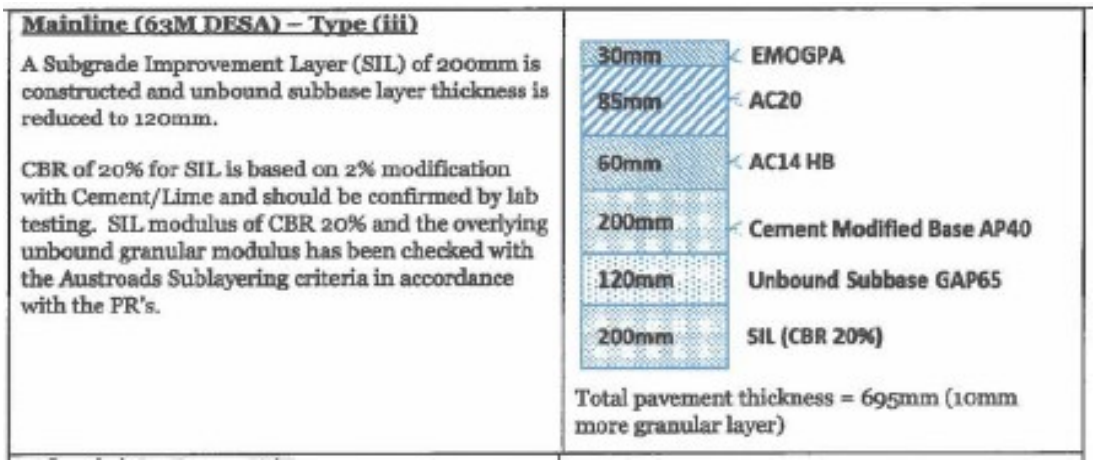
[47] The DSA was eventually signed on 1 July 2016. Amongst other things, it described the "Services" to be provided by WSP, at Annexure C, as follows:

> The Services include engineering design work required for the development and refinement of the tender design concepts in accordance with the Principals Requirements for the following elements of the Main Contract Works. Each of the design outputs listed below will be issued three times at an appropriate level of detail:
>
> - 50% stage for review by [CPB]
>
> - 85% stage for external review
>
> - For Construction.

[48] The extensive list of "design outputs" that were described in following pages included "pavements and surfacing".

Tender Advice Notification (TAN) 110

[49] On 20 May 2015, WSP provided CPB with TAN110, its "Motorway Pavement and Surfacing Final Pricing Package", superseding TAN057. It described its status as "Final Draft", and its purpose as "Final Pricing". As might be expected, it is a dense document, replete with highly technical information. Amongst other things, it provided a design of the pavement and surfacing of the mainline motorway, by reference to the following diagram:



[50] Similar diagrams, depicting the same order and composition of layers but with varying thicknesses, were provided for pavement and surfacing of the on- and off-ramps, and the local roads (parts of Great South Road and Spartan Road), which formed the balance of the SCI Project.

[51] TAN110 explained the pavement model that had been used in developing the design, by reference to the PRs. Referring to the fourth version of the PRs (issued on 7 May 2015) set out in Appendix A09, it observed that clause A9.2.2(b) specified that "heavy duty structural asphalt" pavements were to be formed and comprised of a minimum thickness of structural asphalt over a minimum thicknesses of either:

(a) cement stabilised granular material; or

(b) unbound or granular material (which might have small quantities of binders added while still maintaining the properties of unbound granular material).

[52] The "option to price" (that is, the pavement model) adopted by TAN110 was the latter. The mainline pavement design was thus to be formed by:

(a) structural asphalt, comprised of:

(i) the surface (Epoxy Modified Open Graded Porous Asphalt (EMOGPA)) layer; and

(ii) intermediate (Asphalt Concrete with 20 mm aggregate (AC20) and High Bitumen Asphalt Concrete with 14 mm aggregate (AC14HB)) layers; over

(b) unbound or granular material, comprised of a cement modified base layer, an unbound subbase layer, and a subgrade improvement layer (SIL).

[53] The description of the "cement modified base layer" as such might require clarification: this layer was not to be so heavily modified by cement as to amount to a

cement stabilised layer. Instead, it was regarded as a layer of "unbound or granular" materials, with the relatively small quantity of cement to be added, maintaining its properties as such, in line with the qualification noted at [51](b) above.

Assumption concerning subgrade strength

[54] The California Bearing Ratio (CBR) of the subgrade over which a pavement is built is a measure of that subgrade's strength. WSP regarded the PRs to require a CBR testing method which understated the SCI Project's in situ subgrade. The significance was that the stronger the assumed subgrade, the lesser the required thicknesses of pavement layers.

[55] TAN110 noted that the PRs limited the subgrade CBR allowed in design to a range of 3.5 to 5 per cent, and that a departure from this requirement had been sought but declined. TAN110 further noted that WSP would try to have the required testing method changed in the event of a successful tender, but that "there [was] a risk that the PRs will prevail forcing a design requiring sub-grade improvement".

Re-drafting of TAN110

[56] WSP had made the departure request concerning subgrade CBR on 13 May 2015. The response on behalf of Waka Kotahi declining the departure request was received only on 18 May 2015, two days prior to TAN110 being issued.

[57] These late developments required WSP to amend a draft of TAN110 which had been prepared anticipating approval of the CBR departure request. The attestation section of the draft of TAN110, which Mr Haydon had signed while the document remained in draft,[1] accordingly contained a reference to WSP's "pending departure", as follows:

[1] The draft did not, for example, yet include any diagrams of the type shown at [49].

Compliance with Tender Requirements / Approved Standards (select one)			
☑ This advice complies with the Tender Requirements and approved standards – subject to agreement to our pending departure regarding method of test for subgrade CBR. ☐ This advice DOES NOT fully comply with the tender requirements / approved standards in the following way:			
Prepared by:	**Michael Haydon**	**Signed**	**[Redacted]**
Design Manager Approval:	**Ken Boam**	**Signed**	
Reviewed by:		**Signed**	

[58] When TAN110 was amended to account for the CBR departure being declined, there was no change made to the above attestation, except that Mr Boam added his signature before TAN110 was issued to CPB.

[59] Despite this potential source of confusion, it is clear that WSP professed that the version of TAN110 that was issued to CPB on 20 May 2015 specified designs that complied with the PRs, including in respect of subgrade CBR:

(a) As with the draft attestation, the second of the two options was left unchecked.

(b) As noted at [55], TAN110 commenced by noting that WSP's CBR departure had been declined. The upshot was that, for the time being, TAN110 specified construction of a 200 millimetre subgrade improvement layer (as can be seen in the diagram at [49]), for all roading sections.

(c) Further, TAN110 contained the following advice:

placed on all lanes across the carriageway in lane widths, with the joint at the edges of lanes.

Compliance With PRs
This advice has been prepared in accordance with the following sections of the PR's: Appendix A09 – Pavements and Surfacing.
Departures
Required: Obtained: None

(d) Mr Boam sent CPB a follow-up email within minutes of TAN110 being issued, referring to the CBR departure request having been declined, and adding:

> While we will try again post award to get common sense to prevail the implications if we don't succeed is that sub-grade improvement will be required. The attached TAN 110 provides information for you to make an appropriate allowance for this contingency.

(e) And Mr Boam's evidence at trial was that:

> [A]t the conclusion of the tender it was firmly my belief that we had produced a design that met the PRs and that stood the best chance of being part of a winning tender. It was up to CPB to decide how it priced the job and the risks attendant with that including taking account of the information that it had and knowing that substantial design work remained to be undertaken.

CPB's tender

[60] CPB used the tender pavement designs set out in TAN110 as inputs for its price estimating software, known as CATS (computer aided tendering system). Other inputs included the prices of materials to be provided by CPB's pavements subcontractor, Higgins Contractors, the road's geometric design (and thus the quantities of materials required), and the other costs of installation. This process generated an overall estimate of cost to CPB of installing the SCI Project's pavements.

[61] This cost was collated with the project's other estimated costs. CPB then allowed for contingency in its pricing, including in relation to pavements, by setting out its analysis of risk and opportunities arising from the likelihood of there being a variance between the circumstances assumed for the purpose of the tender and the

actual circumstances yet to be experienced. The risk and opportunities schedule, provided internally to CPB's managing director as part of a package of documents so that he might authorise its proposed tender, allocated a contingency of $2,650,000 as the "most likely" value of the "100%" probability of "design growth/scope growth".

[62] On 2 June 2015, CPB submitted its tender to Waka Kotahi, stating a tender price of $190,845,111.61, excluding GST. In doing so, it allowed a total of $24,231,351 for works relating to construction of the pavement of the motorway and other roads.

[63] On 20 July 2015, CPB was nominated as the preferred tenderer, which permitted exclusive discussions between CPB and Waka Kotahi to resolve certain aspects, unrelated to pavements, by increasing the tender price by $1,000,000.

Review of other tenderers' designs

[64] In accordance with the agreed rules of the tender, CPB as preferred tenderer received the estimate of Waka Kotahi's own engineer, together with the tender designs that had been submitted by the other three tenderers. CPB requested WSP to review the others' tender designs. Mr Boam explained to his team by email dated 29 July 2015 that:

> … [CPB] is reviewing whether they have missed anything in their pricing which has given them a tender price significantly less than the Engineer's estimate. Their review of the other tenderer's designs is they are generally more conservative than ours, e.g. thicker pavements, more piling, etc. which gives them some confidence they are in the right ballpark, but want to double check they have got everything covered.

[65] Mr Boam's journal records that he met Mr Knowles and others involved in the design process on 30 July 2015, and that, in respect of pavements, those present observed that the CPB/WSP design provided for a lesser thickness of asphalt. Other tenderers were "using full depth in lieu of in-situ stabilisation". Mr Boam's recollection given in evidence was that nothing significant regarding pavements was found. Mr Knowles' overall summary was recorded as being that he "[did]n't see anything we have missed".

CPB's tender formally accepted

[66] On 12 August 2015, Waka Kotahi issued its formal acceptance notice to CPB, confirming its tender price of $191,845.111.61, excluding GST. Again in accordance with the tender rules, Waka Kotahi provided CPB with pricing information relating to the other, unsuccessful tenders, including that the next lowest tender price was more than $67,500,000 higher.

[67] The acceptance notice indicated that, in deciding to award the SCI Project to CPB, the grading process for tender had identified a "supplier quality premium", informed by non-price grades afforded to each tender by virtue of the experience and skills of each contractor and designer, and the methodology employed by each tender. The experience and skills of CPB as contractor and WSP as designer, and their methodology, were such that their tender had not been afforded a quality/non-price premium. However, the maximum quality/non-price premium was stated as $16,720,000.

[68] I take from this that CPB's tender could have been up to around $50,000,000 higher, and would likely still have been accepted.

WSP's fee for tender design services

[69] Mr Boam stated in evidence that WSP charged CPB a total of $1,780,148 for the preliminary services it provided under the Tender Services Agreement, excluding its success fee and win bonus. The spreadsheet he cited in support of that evidence provides the following breakdown: $1,087,133.93 for the submission of Certificate A; and $693,013.61 for WSP's "remaining services". I understand these figures exclude GST.

Exploration of full depth asphalt alternative design

[70] After CPB was awarded the SCI Project, work re-commenced as had been contemplated, with WSP developing more detailed designs. Part of this work included investigation into whether the "deep asphalt" pavement option that an unsuccessful tenderer had proposed might offer cost benefits to CPB.

[71] By 6 January 2016, CPB had advised WSP that its preference was to proceed with a deep asphalt design, rather than the design it had tendered. At the end of April 2016, WSP reported to CPB on the three deep asphalt models it had developed for the mainline. In doing so, it summarised the design phases that had occurred to date. And it observed that "at the time of tender, [WSP] prepared, under direction/agreement, the most economic, effective, pavement design to meet the Principal's Requirements".

[72] By the end of May 2016, CPB had reviewed the cost implications of WSP's deep asphalt designs. By email dated 29 May 2016, CPB advised WSP to "go back to the tender design as soon as we can".

Concern regarding "vertical elastic modulus"

[73] By the end of September 2016, CPB's "design checker" (Bartley Consultants Ltd) had identified a concern related to the tender design. For the purpose of its design calculations, WSP had adopted a "vertical elastic modulus" for the modified base layer of 750 megapascals (MPa), it appears in reliance on clause A.9.3.5(c) of Appendix A09 (the PRs relating to pavements and surfacing). This modulus is a measure of the stiffness of an elastic layer such as the modified base layer specified in the tender design. Clause A.9.3.5(c) is stated to apply only to "granular pavements", not to the "heavy duty structural asphalt" pavements that the SCI Project required. The checker's view was that the figure adopted should not have exceeded 210 MPa, a figure specified in Austroads' Guide to Pavement Technology.

[74] WSP suggested to CPB that the issue should be raised with Waka Kotahi's principal advisor. Following a meeting on 18 October 2016, the advisor accepted that clause A9.3.5(c) was intended to apply, so as to "limit the maximum strength of the modified material to a maximum of 750 MPa".

"Issued for Construction" designs

[75] WSP completed its designs and issued its IFC (Issued for Construction) Design Report on 31 July 2017.

Variations to scope of SCI Project

[76] Also following the award of the SCI Project to CPB, in the period from late 2015 to 2017, Waka Kotahi agreed on two substantial variations to the project's scope:

(a) The first variation related to the Takanini interchange, which had been designed as diamond-shaped. The variation provided for the northbound on-ramp to maintain its original loop shape. Waka Kotahi agreed to pay an additional $28,059,560 for this variation, and to extend completion by 317 days.

(b) The other substantial variation involved replacing, rather than widening, two motorway bridges due to structural problems identified during investigative works. Waka Kotahi agreed to pay an additional $17,450,000 for this variation, there being no agreed time extension.

SCI Project pavements constructed and invoiced (at a loss)

[77] As might be expected, construction by CPB of the SCI Project's pavements and surfacing in accordance with WSP's IFC design took time. By 30 November 2019, CPB had invoiced for the entire sum of $24,231,351, excluding GST, which it had allowed for that work.

[78] Mr Knowles' evidence was that:

(a) CPB incurred an overall loss on the SCI Project in the order of $42 million; and

(b) in constructing the project's pavements, CPB actually spent around $12 to $15 million more for that work than it had allowed, excluding variations and cost fluctuations for the purpose of proper comparison.

Chronology and nature of CPB's claim

WSP's Tender Pavement Review

[79] Concern about the scale of pavement construction costs was raised with WSP in early 2019. In response, WSP issued CPB with a memorandum headed "Tender Pavement Review" dated 1 April 2019. In the introduction to that memorandum, WSP asserted:

> In respect to the pavement design, [WSP] produced a compliant tender design to the Principal's Requirements, limited tender data available, instructions from CPB on preferred options based upon CPB's inputs of constructability, value and risk, plus asphalt mix design information provided by Higgins Contractors Limited, who were also engaged by CPB during the tender phase.

[80] However, WSP's memorandum made other observations which captured CPB's attention:

(a) It indicated that the 200 millimetre subgrade improvement layers specified in each of the TAN110 pavement designs were modelled on the basis they would generate a CBR of 15 per cent.

(b) It confirmed a matter discussed at a meeting on 20 March 2019: WSP had been unable to locate the CIRCLY models it had produced when generating the TAN110 designs.

CIRCLY modelling

[81] An introduction to CIRCLY modelling is required.

[82] CIRCLY is elastic layer analysis software. It was developed by MINCAD Systems Pty Ltd, of Melbourne, Australia, and has been in widespread use since 1988, both in Australia and overseas. CIRCLY adopts a mechanistic approach to flexible pavement design, using a mathematical model with inputs of engineering properties and outputs derived from material performance data. Pavement design was previously empirically based.

[83] The evolution of the CIRCLY software has been heavily linked to the development of the Austroads flexible pavement design method. CIRCLY was officially adopted for flexible pavement design by Austroads in 1987. As noted at [32], the PRs (at Appendix A09) required the tender pavement design to comply with the Austroads Guide to Pavement Technology (AGPT02-12) as modified by the NZTA supplement (2007), and all relevant NZTA standards, specifications and guidelines.

[84] CIRCLY's mechanistic design method involves a calculation of pavement damage, using an empirical equation

$$N = \left[\frac{k}{\varepsilon}\right]^{b}$$

where N is the predicted life (repetitions of ε), k is a constant reflective of the material being used, b is the damage exponent of the material, and ε is the load-induced strain. The parameters k and b are determined by calibrating the design method against observed performance of test pavements or of pavements in service.

[85] CIRCLY further adopts the concept of a Cumulative Damage Factor (CDF) as the primary means of presenting results. The CDF is the outcome of a calculation that takes account of pavement damage against traffic loadings and the pavement's desired (design) life. The pavement being modelled is presumed to reach its design life when the CDF reaches 1.0. If the CDF is less than or equal to 1.0, the pavement has sufficient capacity, and the CDF value represents the proportion of pavement life consumed by the anticipated traffic loading. Conversely, if the CDF is greater than 1.0, the pavement is deemed to be unacceptable and must be modified in the next trial so that the deficiency is overcome. This might mean, for example, an increase in pavement thickness or a modification to pavement material stiffness. The process is repeated iteratively until a satisfactory result is achieved.

[86] The CIRCLY model for a particular pavement design records the full suite of assumed engineering property inputs used in respect of each pavement layer, including the subgrade, and identifies outputs so as to generate an identified CDF for each layer.

EIC's Pavement Design Review for CPB

[87] CPB commissioned an external consultant, David Barker of EIC Activities Pty Ltd, to review WSP's tender designs. EIC's Pavement Design Review dated 4 April 2019 identified various deficiencies.

[88] First, EIC observed that TAN110 did not specify the design parameters WSP had used, and that WSP did not provide its CIRCLY models when issuing TAN110. EIC therefore could not repeat WSP's pavement design calculations with absolute certainty. However, WSP's Tender Pavement Review of 1 April 2019 had provided sufficient information for EIC to reproduce WSP's tender design calculations with some confidence. EIC's Pavement Design Review of 4 April 2019 therefore commenced by setting out EIC's back-calculation of the pavement profiles, parameters, and modelling that it expected WSP to have adopted when generating its tender designs. This back-calculation was set out in tabular form as follows:

Layer Number	Layer Description	Layer Thickness (mm)	Stiffness Modulus / CBR	Performance Constant, k	CDF
1	EMOGPA (Vb=10%)	30	500MPa	0.0071	5.02E-06
2	AC20 Intermediate (Vb=10.7%)	85	3350MPa	0.003791*	4.21E-02
3	AC14 High Bitumen Base (Vb=13%)	60	3150MPa	0.005043*	7.59E-01
4	Cement Modified M/4 AP40 Basecourse (2% cement)	200	750MPa	N/A	N/A
5	Unbound Granular GAP65 Subbase	120	250MPa	N/A	N/A
6	Modified Subgrade (2% Lime-cement)	Infinite	15% (150MPa)	0.0093	4.84E-04
Notes: * These values were back-calculated to match the reported CDF values. Actual values should be 0.003813 and 0.004648 for the AC20 and AC14 respectively for the modulus and binder content values indicated and based on Austroads (2012).					

[89] As can be seen, EIC's back-calculation worked backwards from the CDF values stated in WSP's Tender Pavement Review dated 1 April 2019, and gave rise to concern that WSP had adopted incorrect performance constants for each of the AC20 and AC14 intermediate pavement layers.

[90] However, EIC's review then proceeded on the basis that "[i]f we ignore concerns we have with the AC20 and AC14 performance constant values" there were two significant issues with the WSP tender designs:

(a) First, EIC observed that the calculations did not seem to allow for design tolerance adjustments required by clause A9.3.1(b) for the "critical" AC14 layer, and by clause A9.3.4(a) for the EMOGPA layer.

(b) Second, EIC asserted that the "stiffness modulus/CBR" of 15 per cent adopted for what it described as the "infinite", "modified subgrade" layer, did not comply with Appendix A09.

CPB's original statement of claim

[91] On 13 April 2021, CPB filed its statement of claim, just over one month short of six years from when WSP issued TAN110 on 20 May 2015.

[92] CPB's statement of claim set out a first cause of action, for breach of contract, and a second cause of action in negligence, founded upon alleged deficiencies in WSP's tender design. At paragraph 12, the first cause of action alleged non-compliance as follows:

> 12. [WSP's] Tender Pavement Design did not comply with the Principal's Requirements including (but not limited to) in the following respects:
>
> **Particulars**
>
> 12.1 Appendix A09 of the Principal's Requirements set out the requirements for pavement and subsurfacing. [CPB] relies on the Principal's Requirements as if set out here in full.
>
> 12.2 Clause A9.3.3 of Appendix A09 specified, among other things, that:
>
> (a) The in situ subgrade layers are to be assumed to be infinite thickness in the pavement design; and
>
> (b) The California Bearing Ratio (CBR) value for in situ sub-grades is to be limited in the pavement design to a maximum of 5% CBR.
>
> 12.3 In breach of the requirements of Appendix A09 [WSP's] Tender Pavement Design assumed a CBR value of 15% for

the in-situ subgrade layer, and applied that CBR value for the infinite subgrade layer.

12.4 [WSP's] breach of the requirements of Appendix A09 resulted in the Tender Pavement Design being too thin to comply with the Principal's Requirements.

[93] At paragraph 19, the second cause of action alleged non-compliance, not with "the Principal's Requirements", but with "the technical and design requirements of the Project". In all other respects, the alleged breach in negligence was substantively identical to the alleged breach of contract, including the entirety of the stated particulars.

[94] As can be seen, the alleged non-compliance was expressed to "include" but not be "limited to" non-compliance of the design assumption made relating to "in situ subgrade layers" (the ground upon which the SCI Project's pavement layers were to be constructed).

[95] In each case, the statement of claim pleaded that CPB suffered loss as a consequence of the design deficiency. That loss was alleged to be the cost of increasing the thickness of the constructed pavement in order to achieve compliance with the Principal's Requirements.

CPB's amended statement of claim

[96] CPB filed an amended statement of claim dated 10 June 2022.

[97] CPB's amended statement of claim sought to add a third cause of action, relating to WSP's "issued for construction" (IFC) design, but that cause of action was later abandoned.

[98] CPB's first and second causes of action were structured in substantially the same way as its original statement of claim, alleging non-compliance of WSP's tender pavement design with the PRs, and with the technical and design requirements of the SCI Project. But the particulars of the way in which the design failed to comply were amended:

(a) Reference to the design assuming a CBR for in situ subgrades of 15 per cent rather than five per cent, and in that way failing to comply with clause A9.3.3, was removed.

(b) Reference to the design failing to comply, in various respects, with clauses A9.3.1(a) and (b), A9.3.4, and A9.2.2 and A9.3.5 (in combination), and (therefore) A9.2.3(a), was added.

[99] The detail of the various modes of non-compliance that were added is explored below. At this stage, I observe only that they relate to the design of the pavement layers to be constructed over the "in situ subgrade". The allegation that WSP had assumed a stronger subgrade than it should was accordingly, by means of CPB's amended statement of claim, withdrawn.

[100] Again, the first and second causes of action pleaded that CPB suffered loss as a consequence of the design deficiency. However, that loss was no longer alleged to be the cost of increasing the thickness of the constructed pavement to achieve compliance with the Principal's Requirements. Instead, the loss was alleged to be the difference between the price CPB would have tendered, on the basis of compliant tender designs, and the price that it did tender (and which Waka Kotahi accepted).

WSP's affirmative defence under the Limitation Act 2010

[101] WSP filed a statement of defence dated 1 July 2022 to CPB's amended statement of claim, affirmatively pleading that CPB's first and second causes of action as set out in that document were time-barred under s 10(1) of the Limitation Act 2010.

WSP's mainline CIRCLY modelling is discovered

[102] By letter dated 26 November 2021, WSP's solicitors provided CPB's solicitors with a copy of the CIRCLY output model said to have been created during 13 to 20 May 2015 and used in WSP's mainline carriageway tender design. WSP's earlier position, that none of the CIRCLY modelling for any of WSP's tender designs could be located, had proved to be incorrect. Nevertheless, the CIRCLY modelling for the

on- and off-ramp and local road, pavement designs, remained (and remains) outstanding.

[103] Notably, the mainline carriageway CIRCLY modelling discovered in November 2021 assumed engineering inputs as follows:

(a) for the EMOGPA surface layer, a thickness of 30 millimetres;

(b) for the AC20 intermediate layer, a thickness of 85 millimetres;

(c) for the AC14HB intermediate layer, a performance constant of 0.005043;

(d) for the cement modified layer, a vertical elastic modulus of 750 megapascals; and

(e) for the subgrade, a CBR of 5 per cent.

[104] The model generated a Cumulative Damage Factor for the AC14HB layer of 0.98, indicating the pavement's design life would exceed 25 years.

CPB's second amended statement of claim

[105] CPB's second amended statement of claim dated 17 March 2023 abandoned the third cause of action, relating to WSP's "issued for construction" design, set out in the amended statement of claim.

[106] The particulars set out in relation to CPB's first and second causes of action, describing the way in which the design failed to comply with the PRs, were unchanged.

Mr Bowman's evidence that WSP's pavement designs were non-compliant with the PRs

[107] As stated above, CPB's original and amended statements of claim alleged that WSP's tender pavement designs set out in TAN110 failed to comply with the PRs in various respects. WSP's statements of defence largely denied these allegations.

[108] Accordingly, CPB called expert evidence from Allan Bowman, an experienced consultant pavement engineer, setting out the basis for his opinion that WSP's mainline, ramp and local road tender pavement designs did not comply with the PRs.

[109] In the course of Mr Hazelton's opening submissions for WSP, made after CPB had concluded its case, he observed that "WSP does not dispute that the PRs were not met by its tender design as contained in TAN110. Mr Bowman's evidence is not challenged in that regard".

[110] Despite that concession, and because the topic has relevance to an aspect of WSP's limitation defence discussed below, it is necessary to summarise the ways in which Mr Bowman considers the tender designs to be non-compliant. These mirror the modes of non-compliance set out in the amended, and second amended, statements of claim:

(a) in breach of clause A9.3.4 of Appendix A09, the EMOGPA surface layer stated in the pavement designs was not reduced from the nominal 30 millimetre layer that had been modelled;

(b) in breach of clause A9.3.1(a)(ii), the AC20 intermediate layer was not rounded up by 5 millimetres;

(c) in breach of clause A9.3.1(b), an additional 10 millimetres was not added to the AC20 intermediate layer;

(d) in breach of clause A9.1.1(a), the performance (fatigue) constant for the AC14HB layer was incorrectly calculated, otherwise than in accordance with ASGP02-12;

(e) in breach of clauses A9.2.2 and A9.3.5, the vertical elastic modulus of 750 megapascals for the cement modified layer was that specified by A9.3.5 as applicable for "granular pavements", whereas it should have been that specified by A9.2.2 for "heavy duty structural asphalt" pavements (in this regard, Mr Bowman considers the concession made on behalf of Waka Kotahi at [74] to be ill-advised); and

(f) as a consequence of the above, in breach of clause A9.2.3(a), WSP's tender designs had a design life of significantly less than 25 years.

[111] As Mr Hazelton's limited concession implies, WSP continues to challenge Mr Bowman's other evidence. A description of that evidence, and my findings relating to WSP's challenge, are set out further below.

Did the Tender Services Agreement (TSA) between CPB and WSP require WSP to provide tender designs that met the Principal's Requirements?

CPB's position

[112] In its second amended statement of claim, CPB referred to the wording of the TSA and claimed that:

> 8. The [TSA] required that the Services performed by [WSP] would comply with the technical and design requirements of the Project, including the tender documents and the Principal's Requirements (**Tender Design Compliance Requirement**).
>
> **Particulars**
>
> 8.1 The proper interpretation of the [TSA] requires [WSP] to comply with the Tender Design Compliance Requirement; or
>
> 8.2 In the alternative, the Tender Design Compliance Requirement is an implied term of the [TSA].

[113] In his closing submissions for CPB, Mr Quinn also referred to the wording of the TSA, and in particular to the emphasised passages set out at [15](c)] and [15](d)] above. As may be recalled, those passages provided that:

(a) WSP agreed, to the extent required by [CPB] and relevant to [WSP's] expertise, to provide design services relevant to the Tender (clause 2.1);

(b) WSP warranted that it had and would provide the requisite professional skill, expertise, experience and resources necessary to perform the Preliminary Services (clause 2.2);

(c) Preliminary Services meant all services to be performed and obligations to be fulfilled by [WSP] in accordance with the draft TSA, including any services described in Schedule 1 (the definitions clause); and

(d) The Preliminary Services included design services necessary for CPB to submit the Tender (Schedule 1, clause 2).

[114] Mr Quinn submitted that, accordingly, the key issue for determination is the proper construction of WSP's obligation to "provide design services necessary to submit the Tender". Relying on the need to interpret contracts by reference to the context in which they were made, confirmed by Tipping J in the Supreme Court in *Vector Gas Ltd v Bay of Plenty Energy Ltd*,[2] Mr Quinn submitted that the proper, contextual construction of "necessary" in clause 2.2 and in clause 2 of Schedule 1 (see [113](b)] and [113](d)] above) is that the design services had to comply with the Principal's Requirements. Alternatively, if it were thought that this "construction/interpretation" route did not resolve the issue, a term requiring compliance with the PRs should be implied.

[115] Given the above pleading and Mr Quinn's submissions, I interpret his assertion earlier in his closing, that "[t]he TSA lacks an express clause requiring compliance with the Principal's Requirements", to concede only that the above TSA clauses do not employ that specific wording. The broader submission he made was indeed that compliance with the PRs was fundamentally what the TSA, properly interpreted, required.

WSP's position

[116] For WSP, Mr Hazelton submitted that the issue whether the TSA required WSP to provide compliant tender designs was "not about interpretation but implication".

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2 *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5, [2010] 2 NZLR 444 at [19].

On that basis, he submitted that the circumstances before the Supreme Court in *Vector Gas* are not analogous to those of this case. Instead, the Court would be required to consider the test, discussed in *Bathurst Resources Ltd v L & M Coal Holdings Ltd*,[3] for whether a term should be implied.

[117] Mr Hazelton submitted that the draft TSA did not contemplate that WSP's tender design had to comply with the PRs "because it is silent in this regard". He sought to contrast the TSA's requirements with those of the Design Services Agreement, including:

(a) the explicit reference to the PRs in Annexure C of the DSA (see [47] above); and

(b) that WSP's fee under the DSA was much larger at $11,752,566, plus hourly rates for additional work instructed, of which $8,027,394 related to "detailed design".

[118] Mr Hazelton observed that under cross-examination Mr Knowles:

(a) agreed CPB could have included a clause in the TSA specifically requiring the PRs to be met, but did not; and

(b) accepted it was up to CPB to price the risk associated with the project, including a risk that the PRs might not be met.

[119] Mr Hazelton submitted that the TSA and the DSA should be considered together as a single transaction. In doing so, he relied on the observation of Isac J in *LMCHB Ltd v Buller Coal Ltd*, where his Honour discussed the interpretation of contracts, and continued:[4]

> [59] As I have noted, the real issue in this case concerns the relationship between a suite of related contracts. Those contracts gave effect to a single transaction but also created an ongoing commercial relationship which the parties expressly modified from time to time to reflect changing circumstances.

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3 *Bathurst Resources Ltd v L & M Coal Holdings Ltd* [2021] NZSC 85, [2021] 1 NZLR 696.
4 *LMCHB Ltd v Buller Coal Ltd* [2023] NZHC 633, [2023] 2 NZLR 680 (footnote omitted).

> [60] A "whole contract" or holistic approach to interpretation proceeds on the basis that, as Lord Mustill said in *Charter Reinsurance Co Ltd v Fagan*, the words used by the parties in the contract in question "must be set in the landscape of the instrument as a whole".

[120] And where Isac J further cited from *Burrows, Finn and Todd on the Law of Contract in New Zealand* as follows:[5]

> When there is a conflict between two provisions in a contract, the court must read down the apparent scope or effect of one (or both) in order to resolve it. This may result in both provisions having effect within their respective spheres, or in one of the provisions being read so that i[t] has no effect at all.

[121] Mr Hazelton submitted that as the TSA did not provide for the PRs to be met, when read on its own, the usual inference arising from *Bathurst Resources*, that no contractual provision had been made for PR compliance, would apply. But reading the TSA and DSA together made it clear that contractual provision had been made, requiring compliance with the PRs only once the tender was successful and the main contract awarded. Until then, WSP was, during the tender phase, required only to apply "professional skill, expertise, experience and resources" as stated in clause 2.2 of the TSA.

[122] Mr Hazelton concluded on this issue by submitting that if any term were to be implied it would be that the risk of non-compliance with the PRs was for CPB to bear until the 50 per cent design freeze.

Legal principles

[123] The Supreme Court in *Bathurst Resources Ltd v L & M Coal Holdings Ltd* affirmed the proper approach to the interpretation of written contracts. In short, it is an objective task which gives primacy to the words in the contract, but also recognises the importance of considering the broader commercial context.

[124] The objective approach had earlier been expressed by the Supreme Court in

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5 At [61] citing Jeremy Finn, Stephen Todd and Matthew Barber *Burrows, Finn and Todd on the Law of Contract in New Zealand* (7th ed, LexisNexis, Wellington, 2022) at [6.3.4(b)] (footnotes omitted) [*Burrows*].

Firm PI 1 Ltd v Zurich Australian Insurance Ltd as follows:[6]

> … the proper approach [to contractual interpretation] is an objective one, the aim being to ascertain "the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract".[7]

[125] Indeed, the Supreme Court has recognised that an examination of the commercial or other context of a contract is essential to its objective interpretation. In *Vector Gas Ltd v Bay of Plenty Energy Ltd*, the Court held that:[8]

> … The necessary inquiry … concerns what a reasonable and properly informed third party would consider the parties intended the words of their contract to mean. The court embodies that person. To be properly informed the court must be aware of the commercial or other context in which the contract was made and of all the facts and circumstances known to and likely to be operating on the parties' minds.

[126] There need not be an apparent ambiguity before the Court is entitled to look outside the terms of the contract; rather it is entitled to do so as a matter of course:[9]

> [23] The proposition that a party may not refer to extrinsic evidence "to create an ambiguity" is at least potentially misleading. It does not mean context is irrelevant unless there is a patent ambiguity. Context is always a necessary ingredient in ascertaining meaning. You cannot claim to have identified the intended meaning without reference to context. Hence it is always permissible to go outside the written words for the purpose of identifying the context in which the contract was made and its objective purpose.

Analysis

[127] I start by considering the "background knowledge" of the parties. Perhaps the most important form of background knowledge is the parties' understanding of what it was that needed to be designed.

[128] As observed at [24] above, Waka Kotahi required tender designs that complied with its Principal's Requirements. Both parties fully understood this. Mr Boam of WSP referred to the PRs as "the rules of the game".

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6 *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015] 1 NZLR 432 at [60].
7 *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 (HL) at 912 per Lord Hoffmann.
8 *Vector Gas Ltd v Bay of Plenty Energy Ltd*, above n 2, at [19].
9 *Vector Gas Ltd v Bay of Plenty Energy Ltd,* above n 2, per Tipping (footnote omitted).

[129] Indeed, the PRs were deeply embedded within the parties' understanding as minimum specifications to be observed throughout the tender design process, and indeed the subsequent "issued for construction" design process. At the tender design stage, this is demonstrated by:

(a) CPB's template Tender Advice Notification form of 12 December 2014, containing an attestation block (see [19] above) which dogmatically required check-box acknowledgment of either compliance or non-compliance with "Tender Requirements and approved standards". The phrase "Tender Requirements" would have been understood as a clear, albeit anticipatory, reference to what Waka Kotahi's Instructions for Tender, once issued on 30 January 2015, described as "Principal's Requirements".

I note the reference in the attestation block to the "bid design" not constituting a fully detailed and verified design, and to CPB preparing its tender so as to take into account the prospect of differences in the detailed design. While post-award design development was of course to be expected, the attestation block serves to demonstrate that such development was regarded as capable of occurring independently of the question of compliance with the PRs.

(b) Mr Boam's email disseminating Waka Kotahi's Request for Proposal documentation to WSP's design team, copied to Mr Knowles, observing that for them the key technical documents were the Principal's Requirements and appendices (see [29] above). He asked them not to be distracted by the other documents describing what the tender would require.

(c) The representations made to Waka Kotahi in CPB's Certificate A of 13 March 2015, upon the authority of WSP (provided by Mr Boam), about the importance of its tender designs complying with the PRs (see [39]–[40] above).

(d) The existence and operation of the apparatus for obtaining approved departures from the PRs, in respect of tender designs as much as IFC designs. WSP participated in that process, as the observations it made in TAN110 confirm (see [55]–[58]).

[130] Turning to the wording of the TSA, I note that the first operative clauses in the TSA appeared under the heading "1. Definitions and Interpretation". The clauses appearing under the heading "2. Intent of the Parties" were, by dint of their placement and their description, and in my view as a consequence of their significance, at the heart of the TSA.

[131] Putting aside surplus wording, clause 2.1 contained WSP's agreement, "to the extent required by [CPB] and relevant to [WSP]'s expertise, [to] provide design services relevant to the Tender". In my view, bearing in mind the background knowledge of the parties entering the TSA, clause 2.1 expressed WSP's agreement to provide tender designs which complied with the PRs. Design services which offered tender designs that failed to meet the principal's minimum specifications for tender designs were not regarded, and could not reasonably have been regarded by an objective observer, as having relevance to the tender.

[132] Similarly, WSP warranted at clause 2.2 that it would "provide the requisite professional skill, expertise, experience and resources necessary to perform the Preliminary Services", which were defined at clause 2 of Schedule 2 to include "design services necessary for (CPB) to submit the Tender". Again, bearing in mind the parties' background knowledge, I take the view that clause 2.2 expressed WSP's promise to provide, amongst other things, tender designs which complied with the PRs. Designs that failed to meet the principal's minimum specifications for tender designs were not regarded, and could not reasonably have been regarded by an objective observer, as fulfilling the tender's design requirements.

[133] In short, properly interpreted, clauses 2.1 and 2.2 meant that WSP would, amongst other things, provide tender designs that complied with the PRs. The substance of those other things, which would be things "reasonably necessary… so as to derive economical solutions and maximise [CPB's] chance of being awarded the

Main Contract" (refer clause 2.1, at [15](c)]) might be capable of further debate between the parties. But the PRs provided a baseline, establishing an essential quality of the design services WSP was contractually obliged to provide.

[134] In taking this view, I recognise that clause 2.1 of Schedule 2, which was introduced during negotiation of the TSA in the period following Mr Boam's review of the first draft on 29 January 2015 (see [21]–[22]), required "[t]he parties to agree a detailed description of the Preliminary Services". This clause, and the fact that the parties did not in the end reach that agreement, do not affect my conclusion that the Preliminary Services had to meet the PRs. Consistently with my interpretation as outlined above, the new clause provided for agreement on the extent of the Preliminary Services that WSP would provide, not their essential quality as design services compliant with the PRs.

[135] Similarly, the ongoing discussions between CPB and WSP personnel about the design services that WSP would provide, in particular its detailed designs to be provided in the event CPB won the tender and was awarded the main contract, do not undermine my view. Those discussions, about the level of design detail required at the so-called "design philosophy (30%)", "design freeze (50%)" and final design stages, were all premised upon an expectation that WSP's designs, at every stage, would comply with the PRs, or be the subject of approved departure requests. And I consider the conflicting evidence of each of the various experienced engineers from whom I heard, as to the level of detail to be expected in designs at certain design stages, to be treated appropriately as resolving in unison around this point.

[136] On that basis, Mr Knowles' observations under cross-examination (see [118] above) to the effect that CPB could have required a more clearly worded contractual guarantee of compliance, and should, as an experienced and responsible commercial entity, have identified the risk WSP would fail to comply with its obligations, were fairly made. But I disagree with Mr Hazelton's submission that they undermine the existence of WSP's obligation.

[137] And I do not accept that Mr Boam's assertion that WSP had to meet the PRs at the 50 per cent "design freeze" stage implies that WSP did not also have to meet the

PRs at all other stages. Mr Hazelton's submission that CPB bore the risk of non-compliance until the design freeze stage appears to be based upon such an implication being drawn. It contradicts the balance of his submissions about when it might be appropriate to imply terms into a contract, and is rejected.

[138] Contrary to WSP's position:

(a) WSP's obligation to provide compliant tender designs arises as a matter of interpretation, not implication.

(b) The TSA is not silent on the issue of design compliance. Clauses 2.1 and 2.2 required WSP to provide "design services relevant to the tender" (which I interpret as compliant design services), being those "necessary... for [CPB] to submit the tender".

(c) Considering the TSA and the DSA as a single transaction yields the same result. The wording of the DSA as to design compliance is perhaps clearer. But no "conflict" arises if both contracts are interpreted to require designs, at whatever stage of development, to comply with the PRs.

Conclusion

[139] WSP was obliged pursuant to clauses 2.1 and 2.2 of the TSA to provide compliant tender designs, including when providing its tender designs set out in TAN110 as the basis upon which CPB might price its tender in respect of pavements and surfacing.

How has CPB calculated its loss?

[140] CPB claims that as a consequence of WSP's pavement tender design failing to meet the Principal's Requirements, it has suffered a loss of $5,308,666.77. The manner in which it has calculated that loss requires explanation.

The Bowman Design

[141] First, CPB instructed its expert witness, Mr Bowman, to adjust the pavement designs specified in TAN110 so as to make them compliant with the PRs, ensuring that the adjustments make the "minimum change … necessary" to do so. Mr Bowman's evidence presented his adjusted pavement designs alongside WSP's tender designs. For example, he presented his adjusted design for the mainline carriageway (under the column "ABA") alongside WSP's mainline tender design as follows:

Pavement Layer	**WSP**	**ABA**	**Pavement Material**
Surfacing Course	30 mm	30 mm	EMOGPA
Intermediate Course	85 mm	**190 mm**	AC20 **[2 layers]**
Base Course	60 mm	60 mm	AC14HB
Upper Subbase	200 mm	200 mm	Cement Modified Base AP40
Lower Subbase	120 mm	120 mm	Unbound Subbase GAP65
SIL Layer	200 mm	200 mm	SIL (CBR 20%)
Total	**695 mm**	**800 mm**	

[142] As can be seen, Mr Bowman's adjustment required the AC20 intermediate layer of the mainline carriageway to be 105 millimetres thicker than what WSP had designed. His adjusted designs for the on- and off-ramps and local roads also required thicker structural asphalt courses, for the most part the AC20 intermediate course, in amounts ranging from 40 to 70 millimetres.

[143] Mr Bowman's above reference to "[2 layers]" is intended to signify that in the case of this design, as with each of his others for on- and off-ramps and local roads, the thicker AC20 intermediate course, being more than 100 millimetres, would require placement in two layers.

Delay estimation

[144] Next, CPB instructed another expert witness, Geoffrey Bell, a mechanical engineer with experience in the fields of delay, disruption, delay costs and project management, to provide opinions on two aspects said to be relevant to calculation of the price CPB would have tendered had WSP presented it with the Bowman Design as the basis for tender. Mr Bell's opinion, given in evidence, was that:

(a) If at the time of its tender CPB were to have planned to construct the Bowman Design, the forecast date for completion of the entire SCI Project would have been 9 November 2018, nine working days later than it actually planned. This delay would have arisen from the increased thickness of the AC20 layer of the mainline motorway pavement. Further, placement of the AC20 layer would have required an additional 94 days during the construction process, a matter which would see it incur additional costs for temporary traffic management and other monitoring or controls, such as erosion and sedimentation maintenance.

(b) The period during which CPB planned to require traffic management activities during construction was 634 working days.

[145] For the purpose of offering his opinion, Mr Bell worked with the version of CPB's construction programme, set out in an extremely detailed spreadsheet, which featured a so-called "data date" of 12 August 2015. Mr Bell chose this programme from the three he had been provided with. The other, similarly detailed, programmes each professed data dates of 13 August 2015. Mr Bell said that the others were very similar to the programme he chose, the latter being the version likely to require the least modification for the purpose of analysis and therefore, most suitable as a baseline.

[146] When Mr Bell was cross-examined, he accepted that he had not been provided with evidence that CPB actually used any of the three construction programmes upon which he based his analysis, and that they all bore data dates subsequent to 2 June 2015, the date of CPB's tender.

[147] In light of that cross-examination, Mr Quinn applied for leave to re-call Mr Knowles, prior to closing CPB's case. I granted leave, taking the view that there appeared to be a lacuna in the evidence which the overall interests of justice favoured being remedied, and Mr Holland as counsel for WSP opposing but not being in a position to identify any prejudice to his client that might arise.

[148] When re-called, Mr Knowles explained that:

(a) The version Mr Bell selected, with its data date of 12 August 2015, had had that date amended to reflect the formal awarding of the SCI Project to CPB on 12 August 2015.

(b) All three programmes bore the same thinking and logic in terms of activities and durations, in particular in respect of pavement tasks which were identical for each programme.

(c) They each show CPB's programme as at tender time (20 May 2015).

Price calculation

[149] Finally, CPB instructed a third expert witness, Stephen Abbott, a construction consultant with experience in contracting and assessing contractual claims including for rectification costs, to calculate the additional price CPB says it would have tendered had WSP presented it with the Bowman Design as the basis for tender. CPB makes this claim because its instructions to Mr Abbott were to use the same input prices and quantities that CPB assumed when using its CATS (computer aided tendering system) programme to price the pavement component of its tender, based on WSP's tender design as set out in TAN110.

[150] Mr Abbott's opinion was founded in part upon an assumption that Mr Bell's opinions, as to additional planned days to project completion and total planned traffic management days, are correct.

[151] Mr Abbott's opinion, he having engaged in discussion with WSP's expert in this area, Ms Bashforth, was that CPB would have added $5,308,666.77 to its tender price.

Summary of loss calculation

[152] In summary, CPB calculated its loss by:

(a) adjusting WSP's tender designs to the minimum extent necessary to make them compliant with the PRs;

(b) considering what effect those adjustments would have had upon its planned construction timetable; and

(c) re-pricing its tender using the same method and the same other inputs that it used for its actual tender pricing.

[153] This exercise generated a difference, CPB's loss calculation, of $5,308.666.77.

Is CPB's loss calculation proper?

CPB's position

[154] For CPB, Mr Quinn submitted that CPB's loss calculation was both proper and very simple. He submitted the evidence showed that if CPB had been provided with a compliant design, it would have priced it using CATS in exactly the same way that it priced TAN110. Doing so would have resulted in a tender price that was (approximately) $5.3 million higher, and CPB would have therefore agreed with Waka Kotahi upon a lump sum payment for the SCI Project that was that much higher. That, he said, is the measure of CPB's loss.

[155] Mr Quinn submitted there was support for this approach in the usual principles relevant to the assessment of contractual damages, and in the application of those principles in *Costain Ltd v Charles Haswell & Partners Ltd*.[10]

WSP's position

[156] For WSP, Mr Hazelton submitted that CPB's loss calculation was improper. He noted there was no evidence of CPB incurring additional costs during construction for the purpose of correcting any deficiency in WSP's tender design. In the absence of such evidence, he submitted that CPB cannot be regarded as having suffered a loss.

[157] Similarly, Mr Hazelton observed that the Bowman Design was not constructed, Mr Bell did not refer to actual delay, and Mr Abbott did not refer to actual costs.

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[10] *Costain Ltd v Charles Haswell & Partners Ltd* [2009] EWHC 3140 (TCC), (2009) 128 ConLR 154 [*Costain*].

Mr Hazelton described the evidence of CPB's experts as hypothetical. And he submitted that CPB's claimed loss was hypothetical.

[158] Mr Hazelton submitted that how CPB's subcontractor, Higgins, would have priced laying the thick asphalt pavement "is certainly relevant". He noted, however, that CPB's experts were instructed simply to assume the same cost structure that CPB adopted when pricing WSP's tender design.

[159] Mr Hazelton further submitted that CPB's approach to loss calculation is artificial, unfounded by authority, and wrong at law, because:

(a) A claim based on CPB's expectation interest would acknowledge that CPB expected to construct WSP's tender design, not the Bowman Design, at a stated price, but then had to build something different, at a greater stated cost.

(b) The Court of Appeal in *Bevan Investments Ltd v Blackhall & Struthers (No 2)* found that the prima facie measure of damage for defective design is the cost of reinstatement.[11] On the authority of that case, CPB's claim should account for the cost of constructing the Bowman Design.

(c) CPB's reliance on *Costain* is flawed. Understood correctly, it and other authorities actually support WSP's position.[12]

[160] Mr Hazelton also addressed the matter in terms of causation, drawing in aid the Court of Appeal's observation in *Sew Hoy & Sons Ltd (in rec & in liq) v Coopers & Lybrand*, that when considering whether there is a causal connection between a defendant's default and a plaintiff's loss:[13]

> … the answer to this question will not be resolved by the application of a formula but by the application of a Judge's common sense. The Judge needs

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11 *Bevan Investments Ltd v Blackhall & Struthers (No 2)* [1978] 2 NZLR 97 (CA) at 129, per Casey J [*Bevan Investments*].

12 *Van Oord UK Ltd* v *Allseas UK Ltd* [2015] EWHC 3074 (TCC); and *H Infrastructure Ltd (in rec and in liq) v Worley New Zealand Ltd* [2022] NZHC 1316.

13 *Sew Hoy & Sons Ltd (in rec & in liq) v Coopers & Lybrand* [1996] 1 NZLR 392 (CA) at 408–409.

> to stand back from the case, examine the facts closely, and then decide whether there is a causal link between the default and the loss in issue which can be identified and supported by reasoned argument.

[161] Mr Hazelton developed his point by submitting that CPB might recover damages for a loss only where the breach was the effective or dominant cause of any proven loss, which he asserted should require proof of "actual loss" rather than "hypothetical loss".

[162] Finally, Mr Hazelton observed that CPB might have couched its claim as one for the loss of a chance. He framed such a claim as one involving loss of the chance to earn a profit on additional work undertaken to build a compliant design. And he submitted that this claim would similarly have required CPB to adduce evidence to quantify that profit, which it did not. Further, that in any event, a claim for loss of profit would have been excluded under the limitation clause addressed below.

Legal principles

[163] As the learned authors of *Burrows, Finn and Todd on the Law of Contract in New Zealand* observe, the question of what exactly it is that a plaintiff has lost is often a subtle one, and for this purpose it can be useful to use the terminology popularised by a famous article by Fuller and Perdue, conveniently summarised by Fisher J in *Newmans Tours Ltd v Ranier Investments Ltd*:[14]

> Following a breach of contract the innocent party may have:
>
> (i) a *restitution interest*, namely the right to restoration of a valuable benefit conferred on the other party, the object being to prevent unjust enrichment;
>
> (ii) a *reliance interest*, namely the right to compensation for loss due to steps taken by the innocent party in reliance upon the existence of the contract, the object being to restore the innocent party to the position which he or she would have occupied had the contract not been made; and/or
>
> (iii) an *expectation interest*, namely the right to compensation for loss of the bargain, the object being to financially restore the innocent party to the position which he or she would have occupied had the contract been performed.

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[14] *Burrows,* above n 5, at 823 citing *Newmans Tours Ltd v Ranier Investments Ltd* [1992] 2 NZLR 68 (HC) at 86.

[164] Upon which of these bases the plaintiff calculates its loss is a matter for it to choose.[15] While the policy grounds for vindicating the innocent party's restitution and reliance interests are stronger, the primary basis for calculating contractual damages is by reference to the plaintiff's loss of bargain (expectation interest):[16]

> The reports are full of statements that the plaintiff is entitled to be put into the position he or she would have been in if the contract had been performed.

[165] The correctness of a plaintiff's loss calculation is a matter of fact.[17]

[166] Frequently, in light of the circumstances, it may be difficult or indeed impossible to calculate the quantum of an award that would put the plaintiff into the position they expected. In such a case, for example where a plaintiff agrees to buy an oil tanker wrecked on a reef, and later finds both oil tanker and reef not to exist, the better measure of damages may reflect the plaintiff's restitution interest, comprised of the price paid for the wreck, or their reliance interest, comprised of the expenses incurred in gearing up for the wreck's salvage, or both.[18]

Costain

[167] In my view, CPB is correct to draw in aid the principles of loss calculation as applied by Richard Fernyhough QC, sitting as a Deputy Judge of the Queen's Bench Division (Technology and Construction Court) of the High Court of England and Wales, in *Costain*.

[168] In that case, Costain, a construction contractor, claimed damages for breach of contract against a firm of consulting engineers. It had engaged the engineers to advise it in relation to the design and construction of suitable foundations for a water treatment works. The principal's specifications were conveyed to the design engineers. The engineers recommended the use of conventional foundations, after

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15 *Ti Leaf Productions Ltd v Baikie* (2001) 7 NZBLC 103,464 (CA).

16 *Burrows*, above n 5, at 823 citing, for example, *Stirling v Poulgrain* [1980] 2 NZLR 402 at 419; *Coxhead v Newmans Tours Ltd* (1993) 6 TCLR 1 at 13; *Bloxham v Robinson* (1996) 7 TCLR 122 at 133; *Attorney-General v Blake* [2000] 3 WLR 625 at 635; and *One Step (Support) Ltd v Morris-Garner* [2018] UKSC 20, [2019] AC 649 at [31]–[32].

17 *Marlborough District Council v Altimarloch Joint Venture Ltd* [2012] NZSC 11, [2012] 2 NZLR 726 at [24].

18 As in *McRae v Commonwealth Disposals Commission* [1951] HCA 79, (1951) 84 CLR 377.

surcharging (overloading, then prior to construction removing the overload) of the project's subsoil for the purpose of stabilisation. Costain tendered based on the engineers' recommendations, and was awarded the main contract. Following the award, the engineers abandoned that recommendation, which had been attempted but found to be inadequate, in favour of foundations constructed by way of piling.

[169] After finding the engineers' pre-tender design to have failed to meet their contractual duty to exercise reasonable care and skill, the Deputy Judge turned to the topic of Costain's claims for damages, brought under six heads, three of which merit discussion.

"Cost of piling"

[170] Under the so-called "cost of piling" head, Costain claimed a sum representing the costs of carrying out the piling. The Deputy Judge observed that:[19]

> As a matter of principle, Costain is entitled to be put into the same position it would have been in, so far as money is capable of doing that, had [the engineers] advised competently at the pre-tender stage. [The engineers] should have advised that a piled solution was appropriate for this site in which case Costain would have included the cost for piled foundations in its tender. *It would then have recovered that sum, and only that sum, once the piling work was carried out, regardless of what it actually cost Costain to do it. Accordingly, the task of the court is to discover what sum Costain is likely to have included in its tender on that basis.*
>
> (emphasis added)

[171] In undertaking this task, the Deputy Judge had the advantage of being informed not only of Costain's actual costs, established when it eventually carried out the piling, but also of Costain's assessment of what those costs were likely to be, made months earlier and relatively soon after winning the tender for the purpose of proposing an acceleration of the works, prior to it becoming known that in fact piling would be required.

[172] The Deputy Judge awarded the earlier, assessed (but not yet incurred) costs, on the basis these amounted to a better prediction of what Costain would have tendered than the actual costs established a considerable period following the tender. In doing

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19 *Costain,* above n 10, at [221].

so, the Deputy Judge favoured hypothetical assessment of how Costain would have chosen to price its tender, assuming a compliant design. He did so because "what it actually cost Costain to do it" was not relevant, given the context of the tender.[20]

[173] I note that the Deputy Judge's use of the word "cost" here should not be permitted to mislead. Clearly, in respect of Costain's actual costs, the word is used to refer to eventual costs "to it".[21] When referring to the earlier, "assessed" costs,[22] it appears the word is used simply to describe the amount Costain proposed to charge the principal for accelerating the works by installing piled foundations. In this sense, the Deputy Judge is better described as having awarded the "price of piling".

[174] In summary, in *Costain*, the contractor in a design and construction project had its claim for reimbursement of costs incurred remedying a defective tender design rejected. Such actual costs were regarded as irrelevant given the context of the tender, because, once bound to the tender, the contractor was entitled to be paid its tender price, and only that price. Instead, the Court enquired into the hypothetical question of how the contractor would have priced its tender had it received a compliant tender design, and having determined that issue, awarded the amount of the price increase.

[175] I intend to adopt the same approach in this case.

Prolongation costs

[176] In addition to its (rejected) claim for actual costs of piling, Costain similarly claimed for wider project costs incurred due to the extended period in which piled foundations were being designed and constructed. However, the Deputy Judge found on the facts there to have been many different causes of delay. And that in the absence of analysis of the interrelationship between them, it was not possible for the Court to be satisfied that the assumption of delay caused by faulty design advice was correct.[23]

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20 At [221].
21 At [220].
22 At [223].
23 At [185] and [235].

[177] Clearly, the Deputy Judge was not presented with an analysis of what prolongation costs Costain would have factored into its overall tender price, had it been presented with a compliant design. Indeed, the evidence indicated that tendering for piled foundations would have accelerated the timeline anticipated at the time of the tender (see [171] above). And this suggests any such analysis might have supported a reduction in the correct calculation of damages, adopting the correct methodology relating to the so-called "cost of piling" as outlined at [170]–[174] above.

[178] In summary, Costain's claim for actual prolongation costs was rejected for want of proof. The better measure, of what wider, anticipated delay costs might have informed the tender had Costain received a compliant tender design was simply not made the subject of enquiry.

Additional construction costs

[179] When setting out to consider Costain's claims under this head, the Deputy Judge observed that had proper advice been given, Costain would have tendered for piled foundations, and not for a scheme of prior ground treatment. Thus, the Deputy Judge considered that:[24]

> … (subject to any recovery from [the principal] under the Contract) Costain would be entitled to recover as damages all of its costs incurred in placing the initial 4m of fill, then raising it a further 1m in height and finally in removing it since none of these costs would have been incurred if [the engineers] had not advised incorrectly that ground treatment works were appropriate.

[180] In this regard, the Deputy Judge was approving of an additional claim intended to respond to Costain's reliance interest, as described above at [163]. But in the event, only two forms of additional construction costs were found to be recoverable. Instead, most of the claims Costain chose to make under this head were found on the evidence either not to involve costs incurred as a consequence of the faulty design, or costs which had been on-charged to the principal and paid.

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[24] At [206].

Summary

[181] In summary, the reasoning in *Costain* uniformly supports CPB's case. I reject Mr Hazelton's submission to the contrary.

Van Oord

[182] Amongst the authorities called in aid by Mr Hazleton for WSP was that of Coulson J, also sitting in the Queen's Bench Division (Technology and Construction Court) of the High Court of England and Wales, in *Van Oord UK Ltd* v *Allseas UK Ltd*. In giving judgment, Coulson J said that "a claim for breach of contract would require evidence of damages, which could only be properly measured by actual losses suffered by [the plaintiffs]."[25]

[183] However, I consider that comment not to provide assistance in the present case. The defendant in *Van Oord* was a contractor engaged to lay a gas pipeline, and the plaintiffs were subcontractors. The plaintiffs claimed on the basis of matters for which they said the defendant should take responsibility. Justice Coulson's comment was made in circumstances where the plaintiffs claimed an entitlement to additional payments without presenting evidence of "actual loss". I note the phrase used refers to loss, not costs.

[184] The circumstances in *Van Oord* were markedly different to those of the present case. The plaintiffs' contractual price had not been set by tender, in reliance on statements of the defendant for which they sought that the defendant should take responsibility. The plaintiffs thus could not rely, in making their claims as to loss, on arguments that they would have tendered a different, higher price, and that their later-observed actual costs would accordingly be irrelevant to loss calculation. Had they been in a position to do so, Coulson J might well have regarded evidence establishing the likelihood of a higher tender price in the same way I do: as evidence of "actual loss".

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25 *Van Oord UK Ltd* v *Allseas UK Ltd,* above n 12, at [219].

Context for assessment of loss — CPB's position upon receipt of compliant tender design

[185] As indicated at [167] above, I intend to adopt the approach taken in *Costain*, by considering how CPB would have priced its tender had it received compliant tender designs from WSP. I do so because I consider that approach, taken in the context of a design and construction tender, will best reflect the particular context in which CPB too was operating, and known to WSP to be operating.

[186] Rather obviously, the context was that CPB was seeking design advice for pricing. If successful with its tender, its tender price was to function as a revenue ceiling against which CPB would be bound to deliver the SCI Project. There was every expectation CPB would encounter, indeed seek out, opportunities during the development of detailed designs and then the construction of those IFC designs to secure cost efficiencies and thus to enhance such profit-margin as the tender price might permit, subject to compliance (thought at the time to be ongoing compliance) with the Principal's Requirements. But all such opportunities, which might be perceived also as risks, were for CPB.

[187] Here, I disagree with Mr Hazelton's submission that a claim based on CPB's expectation interest would acknowledge CPB expected to construct WSP's tender design, not the Bowman Design, at a stated price, "but then had to build something different, at a greater stated cost". Instead, a claim based on CPB's expectation interest would simply place it in the position it would have occupied at tender time, had WSP fulfilled the TSA. At that time, CPB would have expected to construct whatever compliant tender design it received from WSP, at the price it would have tendered, assuming it were to succeed in the tender. CPB did not receive from WSP the Bowman Design. Nor, at tender time, did it receive the "Issued for Construction" IFC Design. At tender time it simply could not be known that what would be built would be substantially different from WSP's tender design. Much less, that it would cost more. Indeed, that latter point is simply not established on the evidence.

[188] Mr Hazelton's submission asserts that at tender time CPB should have expected to build to a different design, at a different cost (which he assumes, for the purpose of favouring his argument, would be greater). It is misconceived. Adding the

rider about actual costs serves to enhance his argument, but amends the claim from one for CPB's expectation interest, to one for CPB's reliance interest. CPB has not chosen to frame its case that way, and is entitled to its choice.

The expert evidence

[189] I referred at [151] to Mr Abbott's opinion, following discussion with WSP's expert in this area, Ms Bashforth, that CPB would have added $5,308,666.77 to its tender price, had it priced Mr Bowman's adjusted tender price, in line with Mr Bell's amended construction programme.

[190] The contest between Mr Abbott and Ms Bashforth was notably more philosophical than mathematical. Mr Abbott's approach is outlined at [149] above. Ms Bashforth's approach to valuing the impact of WSP's faulty tender designs was to insist on examination of the costs CPB actually incurred, she said for the purpose of ensuring proper comparison as between the cost of the tender design and the cost of the design actually constructed. She rejected the nature of Mr Abbott's tender price estimate as "hypothetical", and refused to engage with the task of assessing the price CPB would have tendered upon an assumption it would have used the cost estimates that it actually applied to that task at tender time.

[191] In line with the *Costain* approach, which I find mandated by the context in this case, I consider Ms Bashforth's approach to have been unhelpful. The authorities demonstrate that hypothetical assessment of the expectation measure of loss is frequently the only proper means of assessment. Recourse to the actual cost of an IFC design that was not tendered contradicts the commercial realities of the tender process. Those actual costs could not be known until after the tender had been won, and CPB's price set. CPB was required to estimate its costs based on WSP's tender designs. It would in time, prove to be advantaged or disadvantaged if it estimated its costs inaccurately, but that would be a financial outcome for it, not WSP. In order to measure the quantum of CPB's loss arising from WSP's breach of contract, the Court (assisted by those experts minded to assist it, here Mr Abbott) is required to assess what different tender price CPB would have submitted, based on its then estimates of cost, had WSP not breached its contract.

[192] This is not to say that the Court should ignore the potential impact of a variance in CPB's *estimated* costs, as at tender time.

[193] If the likely effect of CPB tendering upon a compliant tender design was such as to lead to inflated expected costs at a level that meant its tender price was no longer competitive, the Court would need to consider the possibility of the principal rejecting CPB's tender. If the re-priced tender would more likely than not have been rejected, CPB would be seen to suffer no expectation loss. As discussed at [68] above, rejection of the hypothetically re-priced tender in this case was most unlikely.

[194] Similarly, if the likely effect of a compliant tender design was such as to lead to CPB realising that its costs, as estimated at tender time, were unrealistic, that too would require the Court's consideration. There was dispute in the evidence over whether CPB's tender was always under-priced, or was simply observed to be under-priced once construction began. I do not need to resolve that dispute. That is because there is, in any event, no basis in the evidence upon which I could conclude that CPB would likely have withdrawn from the tender had it received compliant tender designs from WSP.

[195] Beyond these matters, the profit or loss CPB would actually have encountered had it constructed either WSP's tender design, or the Bowman Design, neither of which it actually constructed, would not only be extremely difficult to calculate, but irrelevant.[26] To regard CPB's profit or loss as relevant, would be to seek to redistribute the parties' commercial expectations as to which entity would enjoy, or suffer, the consequence of CPB's successful tender.

No evidence of re-design costs being passed on

[196] The above observations are subject to a qualification that requires noting: costs incurred for the purpose of remedying a faulty tender design would be relevant if the contractor proved able to pass them on to its principal.

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[26] Except for the purpose of considering the exclusion clause: see below, commencing at [210] below.

[197] There was a suggestion of this having occurred, made in the course of the evidence at trial. Referred by Mr Hazelton to extensive and heavily redacted line items attached to an invoice dated 31 December 2021, Mr Knowles confirmed that CPB was paid $386,600.75, excluding GST, for a variation labelled "VO 118 Deep Lift Asphalt". It may be recalled that Mr Bowman's remedial tender designs specified a much thicker intermediate asphalt layer than did WSP's tender designs.

[198] However, when asked whether CPB's claim included an amount reflecting the price of the deep lift asphalt constructed in the particular area addressed by that variation, Mr Knowles said he did not know, adding "it might have been outside of the boundaries". The evidence went no further than that.

[199] Accordingly, I do not consider it appropriate that I should deduct any amount from Mr Abbott's loss calculation to recognise remedial invoicing of CPB's principal.

Bevan Investments

[200] The circumstances before the Court of Appeal in *Bevan Investments* provide a further example (see [166] above), where calculation of a plaintiff's expectation interest was difficult, if not impossible. There, a company with an interest in land at Porirua, entered a construction contract for the erection of a recreation centre. Construction commenced, but was halted due to the deficiency of the design that had been provided by an architect and an engineer. The recreation centre could only be completed in accordance with a modified design.

[201] At first instance, the trial Judge found the project's architect owed an implied contractual duty to the company, and the project's design engineer owed an implied contractual duty to the architect, to use reasonable care and skill. The engineer and therefore the architect had breached those obligations. The Judge awarded damages calculated by reference to the cost of the work required to make the centre "conform to the contract", together with "consequential losses" including an estimate of the centre's lost profits due to its delayed public opening. More particularly, the cost of making the centre conform to the contract was calculated by:[27]

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[27] See *Bevan Investments,* above n 11, at 102.

(a) adding together the incurred costs of the partial construction that had been completed and the forecasted costs of completing the centre in accordance with the modified design; and

(b) subtracting the original construction contract price.

[202] On appeal, the Court of Appeal rejected the submission of counsel for the engineer that the basic liability of the engineer was merely to indemnify the architect, and indirectly the company, against moneys uselessly expended on a futile enterprise — the company's reliance interest.[28]

[203] This, then, is the context in which Richmond P agreed with the trial Judge that the quantum of damages should be assessed upon a "reinstatement basis",[29] and Casey J agreed with both the trial Judge and Richmond P that the proper basis of damages was "replacement cost".[30] In that context, the broad intent was to put the plaintiff company in the position it would have been in had the architect and engineer observed their obligations, that is, met the company's expectation interest. The company had anticipated obtaining a constructed recreation centre at a particular cost, and it required to be awarded damages that could only broadly, in the circumstances, be quantified by reference to what would have been the additional cost of obtaining a recreation centre.

[204] Moreover, the fact that the modified design specified a significantly different (and it seems better, or at least more expensive) building type, required that some adjustment be made when considering the additional cost of obtaining a notional, equivalent recreation centre. This was the basis upon which Richmond P considered it appropriate to estimate, and to deduct from the appropriate calculation of damages, the additional construction costs that the company would have approved had it originally been provided with a proper design.[31]

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28 At 109, with Woodhouse and Casey JJ agreeing.
29 At 114.
30 At 129.
31 At 112.

[205] Upon that analysis, it can be seen that the trial and appeal courts in *Bevan Investments* responded to the circumstances of that case by seeking as best they could to vindicate the plaintiff company's expectation interest. And that there is no particular magic in the reference in that case to the so-called "costs" of "reinstatement" or "replacement". They were simply touchstones, descriptions of the amounts that the plaintiff owed for work that had been done, and was (notionally, albeit not yet actually) required additionally to pay, for the purpose of obtaining the recreation centre it had bargained for, in respect of which the Court recognised deductions should be made because the plaintiff would, when entering that bargain, have been prepared to pay more than it had agreed to pay, for the sake of the sound, modified, but apparently more expensive, design.

[206] Further, the fact that much of this process of calculation was hypothetical did not trouble the Court of Appeal:

(a) It could not be known, after the event, how much more the plaintiff company would have been prepared originally to approve if provided with an adequate design. The Court estimated, and deducted, that amount anyway.

(b) At the time of trial, the recreation centre had not been completed in accordance with the modified design. It could not be known what cost of completing the centre in accordance with that design would actually require to be paid. The Court simply accepted that completing the centre was what was intended at the time of trial.[32] Indeed, it was informed that in fact the building was completed as an ordinary commercial building of some kind. But in the absence of information as to the costs involved or the reasons for that design change, its decision as to the hypothetical loss calculation it had approved was unaffected.

[207] In light of this analysis, I do not accept the premise of Mr Hazelton's submissions regarding *Bevan Investments*: that it implies CPB's claim should account

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[32] At 119.

for the costs it incurred in completing the SCI Project in accordance with the amended "issued for construction" design prepared following its success in winning the tender. Doing so would not best place CPB in the position it would have occupied at the time of WSP's breach of the TSA, had the TSA instead been performed by WSP providing compliant tender designs. Instead, it would re-cast the nature of CPB's endeavour as tenderer, offering to construct the SCI Project at a fixed price, and consequently committing to accepting (or indeed enjoying) the negative (or positive) construction cost fluctuations it could expect as a consequence of post-award experience, such as the issue of a more detailed IFC design.

[208] As discussed above, CPB can in this case best be placed, by way of damages, in the position it would most likely have occupied had WSP performed the TSA, by calculating damages by reference to the price it would have tendered in reliance upon WSP providing a compliant tender design. To the extent that is the real tenor of *Bevan Investments*, I intend to observe it.

Conclusion

[209] CPB's loss calculation invoked the proper approach to assessing the quantum of CPB's expectation interest in being put into the position it would have occupied had WSP observed the TSA. Accordingly, it was correct.

Is CPB's claim caught by the exclusion clause?

[210] Clause 15.16 of the TSA,[33] inserted following Mr Boam's review for WSP of CPB's draft, headed "Limitations on Liability", reads as follows:

> The following limitations on liability apply:
>
> a) Where a Party breaches this Agreement, the liable Party is liable to the other Party for *reasonably foreseeable claims, damages, liabilities (including any liability of the other Party to a third party), losses or expenses caused directly* by the breach. The liable Party shall not be liable for the other Party's *indirect, consequential or special loss, or loss or profit, however arising, whether under contract, in tort or otherwise*.

[33] The final signed Tender Services Agreement dated 14 April 2015. Clause 15.16 was previously cl 15.15 in the revised draft TSA.

> b) The maximum aggregate amount payable, whether in contract, tort or otherwise, in relation to claims, damages, liabilities, losses or expenses, shall be five times the Fees paid and payable to the Consultant.
>
> c) Neither Party shall be liable for any loss or damage occurring after 6 years from the completion of the Services.
>
> d) If either Party is found liable to the other (whether in contract, tort or otherwise), and the claiming party and/or a third party has contributed to the loss or damage, the liable Party shall only be liable to the proportional extent of its own contribution.
>
> (emphasis added)

WSP's position

[211] Referring to clause 15.16(a), Mr Hazelton submitted that:

(a) CPB's claim could not be reasonably foreseeable, and was not caused directly by the breach;

(b) the appropriate measure of reinstatement would be CPB's direct costs, about which there is no evidence; and

(c) CPB's only possible remedy is for loss of profit, which is specifically excluded.

[212] Referring to clause 15.16(d), Mr Hazelton submitted that it qualifies any contractual claim by CPB to the extent CPB was contributorily negligent, and that the Court would need to consider:

(a) underbidding by CPB applying incorrect costs via CATS; and

(b) CPB choosing during the tender phase to base only two of its team at WSP's office.

Legal principles

[213] As stated by Asher J for the Court of Appeal in *Dorchester Finance Ltd v Deloitte*:[34]

> The approach to interpreting a limitation clause is like any other contractual interpretation exercise. The interpretation of the contract involves an inquiry as to what a reasonable and properly informed third party would consider the parties to mean. The overall commercial context may be relevant.
>
> Given the premise that an exclusion clause will enable a party to escape liability for a breach of a contractual promise, it will be assumed that a party will not have intended to limit liability unless clear and unambiguous language is used. A Court will ordinarily look for clear language or necessary implication before concluding that the right to claim for damages is extinguished. Such an intention will not be lightly attributed. The ultimate objective is to ascertain what the parties intended their words to mean in the particular factual context in which the contract was made.

Analysis

[214] At first sight, the two sentences of clause 15.16(a), set out at [210], might be regarded as at least partially contradictory. Broadly, they purport simultaneously to provide for:

(a) liability for a wide range of outcomes, including "losses", caused directly; and

(b) non-liability for outcomes described as "indirect, consequential or special loss, or loss or profit [sic]".

[215] For example, losses caused directly by a breach are, in terms of plain English, losses that are consequential. But clause 15.16 cannot be interpreted to provide at once for liability and non-liability of such losses.

[216] Similarly, the rule in *Hadley v Baxendale*, traditionally regarded as establishing a distinction between directly caused losses and reasonably foreseeable (and therefore non-remote) losses,[35] cannot be relied upon to provide a coherent explanation of the joint function of clause 15.16's two sentences.

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34 *Dorchester Finance Ltd v Deloitte* [2012] NZCA 226 at [32]–[33] (footnotes omitted).
35 *Hadley v Baxendale* (1854) 9 Exch 341; 156 ER 145 at 354.

[217] Consistently with the approach outlined in *Dorchester Finance*, and the need to identify a cohesive interpretation of both sentences, I consider that clause 15.16 provides for liability for losses arising "directly" from a particular breach, and for the exclusion from liability of losses which upon examination, are better described as arising "indirectly" from the breach. Separating the forms of outcome contemplated by clause 15.16 into two distinct categories — direct outcomes and indirect outcomes — is in my view the only proper way in which the clause can be made to make sense.

[218] The question, then, is whether CPB's claimed loss arose directly or indirectly?

[219] In my view, CPB's claimed loss arose directly. It was the entirely reasonably foreseeable loss that arose immediately upon its receipt on 20 May 2015 of TAN110, the point at which CPB proceeded to price its tender erroneously relying upon its contractual entitlement to TAN110 meeting the Principal's Requirements. On the evidence, that price was calculated within only a matter of days, before being assimilated into the entire suite of tender documents which were provided to CPB's managing director for authorisation, and then issue on 2 June 2015.

[220] I find it unlikely that WSP was paid for its defective tender design advice prior to 2 June 2015. On that basis, it cannot be said that CPB's restitution interest damages (the price it paid for substandard advice) arose any more directly than its expectation interest damages.

[221] Similarly, it cannot be said that CPB's reliance interest damages (the proportion of CPB's SCI Project actual losses which were caused by WSP's advice, which I have found CPB is not constrained to identify, much less quantify and claim (if less than nil)), were any more direct.

[222] And if all of these losses were indirect, WSP's agreement to provide design advice compliant with the Principal's Requirements would have been meaningless. In line with my earlier findings relating to the meaning of the TSA, that was not the case.

[223] Further, I note in response to Mr Hazelton's submission that CPB is claiming for loss of profit, that I have rejected his argument that CPB should account for its

costs. CPB's claim is accordingly not for lost profit, but lost revenue. Given the scale of CPB's eventual losses, both overall and in respect of pavements and surfacing, no amount of that lost revenue could, after the event, now be correctly described as lost profit.

[224] Referring to Mr Hazelton's submission regarding clause 15.16(d) and contributory negligence, I observe only that there is no evidence CPB was a contributor to the defects identified in TAN110. That being the case, and it being TAN110 which is the sole source of the loss for which CPB claims, CPB cannot be regarded as having contributed to that loss.

Summary

[225] CPB's claim is not excluded by clause 15.16 of the TSA.

Does WSP have a defence to CPB's claim under the Limitation Act 2010?

The Limitation Act 2010

[226] Section 11(1) of the Limitation Act provides that it is a defence to a money claim if the defendant proves that the date on which the claim is filed is at least six years after the date of the act or omission on which the claim is based. However, that defence does not apply if the claimant has "late knowledge" of the claim. In that case, it is a defence if the defendant proves that the date on which the claim is based is at least three years after the late knowledge date.[36]

[227] A claim's late knowledge date is the date, after expiry of the above six-year period, on which the claimant gained knowledge, or (if earlier) ought reasonably to have gained knowledge, of essential aspects of the claim described in s 14(1) of the Act.

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[36] Limitation Act 2010, s 11(2) and (3).

WSP's position

[228] Drawing in aid Lester AJ's judgment in *Body Corporate 355492 v Queenstown Lakes District Council*,[37] Mr Hazelton submitted that CPB's amended statement of claim dated 10 June 2022 opened an "entirely new area of factual enquiry", and amounted to a new cause of action brought more than six years after the alleged breach. Clause A9.3.3 of Appendix A09, the Principal's Requirements, pertained to the in situ subgrades: the ground on which the pavement layers would be built. By contrast, the clauses relied upon in the amended statement of claim's particulars of breach all pertained to the pavement layers.

[229] Further, Mr Hazelton submitted that CPB could not rely on late knowledge. He pointed to WSP's Tender Pavement Review memorandum of 1 April 2019, and to the memorandum CPB obtained from EIC Activities Pty Ltd dated 4 April 2019. And he submitted that those documents identified or put CPB on notice of all of the alleged breaches particularised in CPB's first and second amended statements of claim (and later explained in Mr Bowman's evidence).

CPB's position

[230] Mr Quinn submitted that CPB's amended statements of claim "essentially … further particularise[d] WSP's failure to comply with the Principal's Requirements", and was not "essentially different" from the initial statement of claim.

[231] If that submission were not accepted, Mr Quinn submitted that CPB could rely on late knowledge: it was not until WSP provided discovery, on 10 November 2022, of a document known as the "CIRCLY output", which WSP used for its mainline motorway design, that the particulars pleaded in CPB's amended statements of claim were known to or discoverable by CPB and its advisors.

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[37] *Body Corporate 355492 v Queenstown Lakes District Council* [2022] NZHC 678.

Legal principles

[232] In *Commerce Commission v Visy Board Pty Ltd*, the Court of Appeal observed that:[38]

> [141] The applicable principles to determine whether an amendment creates a fresh cause of action are summarised by this Court in *Transpower New Zealand Ltd v Todd Energy Ltd*:[39]
>
> > (a) A cause of action is a factual situation the existence of which entitles one person to obtain a legal remedy against another (*Letang v Cooper* [1965] 1 QB 232 at 242–243 (CA) per Diplock LJ);
> >
> > (b) Only material facts are taken into account and the selection of those facts "is made at the highest level of abstraction" (*Paragon Finance plc v D B Thakerar & Co (a firm)* [1999] 1 All ER 400 at 405 (CA) per Millett LJ);
> >
> > (c) The test of whether an amended pleading is "fresh" is whether it is something "essentially different" (*Chilcott v Goss* [1995] 1 NZLR 263 at 273 (CA) citing *Smith v Wilkins & Davies Construction Co Ltd* [1958] NZLR 958 at 961 (SC) per McCarthy J). Whether there is such a change is a question of degree. The change in character could be brought about by alterations in matters of law, or of fact, or both; and
> >
> > (d) A plaintiff will not be permitted, after the period of limitations has run, to setup a new case "varying so substantially" from the previous pleadings that it would involve investigation of factual or legal matters, or both, "different from what have already been raised and of which no fair warning has been given" (*Chilcott* at 273 noting that this test from *Harris v Raggatt* [1965] VR 779 at 785 (SC) per Sholl J was adopted in *Gabites v Australasian T & G Mutual Life Assurance Society Ltd* [1968] NZLR 1145 at 1151 (CA)).
>
> [142] The question is therefore whether the amendment to the pleadings changes the claim against the defendant so that it is something essentially different from what it was before the amendment. A change of that nature can, as is clear from paragraph (c) of the passage from *Transpower* above, occur as a result of an alteration in matters of fact. ...

[233] The Court in *Commerce Commission v Visy Board Pty Ltd* noted that:[40]

> … in order for an amendment to amount to a new cause of action, there must be a change to the legal basis for the claim. That can, in theory, occur through the addition of new facts, *but only if the facts added are so fundamental that they change the essence of the case against the defendant. If the basic legal*

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38 *Commerce Commission v Visy Board Pty Ltd* [2012] NZCA 383.

39 *Transpower New Zealand Ltd v Todd Energy Ltd* [2007] NZCA 302 at [61] (referring to *The Ophthalmological Society of New Zealand Inc v The Commerce Commission* CA168/01, 26 September 2001 at [22]–[24]). Leave to appeal refused: *Transpower New Zealand Ltd v Todd Energy Ltd* [2007] NZSC 106.

40 *Commerce Commission v Visy Board Pty Ltd*, above n 37, at [146].

> *claims made are the same, and they are simply backed up by the addition or substitution of a new fact, that is unlikely to amount to a new cause of action*.
>
> (emphasis added)

[234] Associate Judge Lester expressly relied on these principles when deciding *Body Corporate 355492 v Queenstown Lakes District Council*.[41] In that case, the plaintiffs had sued in respect of weather tightness and structural issues discovered in an apartment building soon after construction was completed in June 2006. The claims were of what Lester AJ described as "standard causes", relating to balconies, roof and barge junctions, service penetrations of external walls, cladding cavities, defective fire systems, and tilt slab walls panels, but also including "structural and/or fire and/or acoustic and/or other defects to be particularised".[42]

[235] In a sixth amended statement of claim dated 22 February 2019, they claimed in respect of deficiencies in "bathroom pods" that had been constructed off site and craned into location.

[236] Associate Judge Lester accepted the submission of counsel that the complaints in respect of the bathroom pods were wholly unconnected to previously pleaded defects, observing that they amounted to an entirely new area of factual enquiry. The Judge added that the catch-all pleading of defects "to be particularised" did not avoid the question whether the essential nature of the claim had changed:[43]

> To accept that submission would be to signal that the [relevant statutory limitation period] can be avoided by the inclusion of such catchall in a pleading.

Did CPB's amended statement of claim allege what amounted to new causes of action?

[237] In my view, the essential nature of the claim by CPB against WSP, pursuant to the first and second causes of action pleaded in its original statement of claim, was that WSP had failed to observe an obligation it owed to CPB to provide tender pavement designs that complied with the Principal's Requirements. The particulars of that non-compliance included "but [were] not limited to" a particular related to the

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41 Above n 36, at [24], [26] and [77].
42 At [8] and [7(f)].
43 At [34].

strength of the in situ subgrade, to be assumed in the course of the process of generating compliant pavement designs. As a consequence of that failure, CPB had suffered loss.

[238] CPB's amended, and second amended, statements of claim did not change that essential nature. In the terms used in *Commerce Commission v Visy Board Pty Ltd* (see [233] above), the same basic legal claims were made, backed up simply by the substitution of new facts: in particular, the non-compliance of WSP's tender designs with other parts of the PRs relating to pavements and surfacing, with which compliance was required.

[239] The use of the phrase "not limited to" in CPB's pleading can, and should, be distinguished from the ineffective "catchall defects pleading" in *Body Corporate 355492 v Queenstown Lakes District Council*. The former phrase serves to introduce particulars that provide an illustration of the ways in which CPB alleges WSP's tender pavement designs were defective, by failing to comply with stated requirements. The latter phrase came at the end of a list of allegedly defective construction elements of an apartment building, and was found to be ineffective to cover defective components constructed off site and craned into location. The latter pleading was found to be ineffective to overcome the relevant limitation period by reserving an entitlement to add a fresh cause of action based on an entirely new area of factual enquiry. The former pleading does not seek to do so.

[240] Further, the amendment to the way in which CPB chose to calculate its loss, moving from a loss to be calculated by reference to the cost of constructing a thicker pavement, to a loss calculated by reference to the price it would have tendered in reliance upon a compliant tender design, does not change the essential nature of CPB's claim. The claim remained that CPB had suffered a quantifiable loss as a consequence of WSP's failure to provide tender pavement designs that complied with the Principal's Requirements.

Conclusion

[241] I conclude that the first and second causes of action set out in CPB's amended statements of claim (and thus its second amended statement of claim) were not

essentially different from CPB's original statement of claim. Therefore, CPB's claims are not time-barred under the Limitation Act.

Post-script regarding late knowledge

[242] In case I am found to be wrong in this conclusion, I note that I would not have found that CPB could rely on late knowledge.

[243] This is because EIC's Pavement Design Review dated 4 April 2016 made known, or at least should reasonably have made known, to CPB all of the modes of non-compliance alleged in CPB's amended, and second amended, statements of claim. WSP did not discover the actual mainline CIRCLY modelling it had used until November 2021, but this simply confirmed WSP's use of incorrect engineering inputs such as the AC14HB performance (fatigue) constant that EIC had been able to back-calculate. Indeed, CPB was able to re-state its particulars of WSP's non-compliance with the PRs without having received the mainline CIRCLY modelling. They have not been amended since.

[244] For this reason, CPB did not have late knowledge of the essential aspects of its claim.

Result

[245] I grant judgment against WSP, in favour of CPB, and award:

(a) damages in the sum of $5,308,666.77; and

(b) interest upon such of that sum as remains unpaid, at the rate of 5 per cent from 17 March 2023 (that being the date of CPB's second amended statement of claim and in my view the date upon which CPB's claim was first quantified) until the date of payment, pursuant to s 24 of the Interest on Money Claims Act 2016.

[246] CPB appears entitled to costs. If costs cannot be agreed:

(a) CPB may file a memorandum no more than five pages long, setting out its claim to costs, within 15 working days; and

(b) WSP may file a memorandum no more than five pages long, setting out its response, within a further 10 working days.

[247] I would then deal with the issue of costs on the papers.

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Johnstone J