

A council, a luxury lodge, and a fire – Te Mata applied?

In *Te Mata Properties Limited v Hastings District Council*, the court of appeal recently upheld the high court's decision to strike out a leaky building claim against the Hastings District Council. The court concluded that the council did not owe a duty of care to the owner of a motel as it was a commercial property. The court distinguished between cases relating to commercial properties, and cases involving low cost residential housing that fall within the principle established in *Invercargill City Council v Hamlin*. If the principle established by *Te Mata* is applied consistently a significant number of claims against councils are likely to be struck out or not started. This is because many plaintiffs do not fit within the *Hamlin* test. For example, defective building claims involving retirement homes, swimming pool centers, and so on, are all up for challenge. Taking a lead from *Te Mata*, the high court recently struck out weathertight claims of almost \$6 million against a territorial authority relating to three Auckland schools. The courts have still to decide whether what, if any, claims relating to defects in commercial properties can be brought against territorial authorities. Is a claim by the owner of a commercial building involving fire any different? The issue was recently put before the court of appeal in *Charterhall Trustees Limited v Queenstown Lakes District Council & Anor* (the *Blanket Bay Lodge* claim). *Charterhall Trustees Limited*, the owner/developer of the *Blanket Bay Lodge*, has

issued proceedings relating to a chimney fire in December 2003. The local territorial authority (Queenstown Lakes District Council) and the architect are named as defendants. The complaint is that the chimney was badly designed by the architect and that the council ought to have detected this when considering the application for building consent or during inspections.

Relying on the high court decision in *Te Mata*, the council applied for orders striking out *Charterhall's* claim against it on the basis that the council did not owe *Charterhall*, a duty of care.

In the high court Justice Forgeroy concluded that claims arising out of damage by fire ought to be considered differently from weathertightness claims. The council argued that *Te Mata* was the starting point and emphasised the court of appeal's findings in *Te Mata* that the general rule is that councils do not owe a duty of care in respect of performance of their statutory functions under the Building Act.

Charterhall and the architect argued that *Te Mata* could be distinguished from the facts of the *Blanket Bay Lodge* claim as the loss was physical loss as opposed to economic (unlike *Te Mata*), and that the defect in this case introduced a risk of fire and/or was a dangerous defect. *Charterhall's* allegations in respect of fire risk were highlighted by the fact that there was a fire that caused damage requiring repairs to the lodge.

In *Te Mata* Justice Baragwanath left open the possibility of claims against councils

by the owners of buildings based on "an interest in habitation and health". The majority of the court in *Te Mata* did not agree with Justice Baragwanath, accepting the council's submissions that here are serious legal difficulties with that proposition. The most obvious problem in this case is that *Charterhall* is a corporate entity that cannot possibly suffer harm to its "health and safety". The proper plaintiff in a health and safety case would be someone like a guest at the lodge who suffers from smoke inhalation. On a health and safety basis the proper plaintiff would not be the owner of the lodge or as in *Te Mata*, the owner of the motel. Further, no matter which way the health and safety cause of action is framed, *Charterhall* would still be seeking to recover the same loss: the cost of repairs to the lodge and lost income while the lodge was closed for repairs. The claim would not be for losses arising from harm to health and safety.

The Court of Appeal decision is not out yet. Despite the Auckland schools decision, councils are not quite out of the woods yet. A determination from the court on the *Blanket Bay Lodge* claim will have significant implications for councils in so far as commercial-type claims are concerned and it is hoped the court will provide much needed guidance on health and safety claims. Time will tell whether the court was ultimately convinced that the *Blanket Bay Lodge* claim is indistinguishable from *Te Mata*.



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