

REASONS OF THE COURT

(Given by Baragwanath J)

[1] This is a leaky building case, concerning the liability of the appellant territorial authority where an independent building certifier has purported to certify compliance with the building code made under the Building Act 1991.¹ The building certifier, although duly appointed and authorised to certify compliance with a broad range of building work, could certify compliance with the Building Code's external moisture provisions only if the building complied with Approved Standard E2/AS1, which the respondents say it did not. Is there a residual liability on the authority under the principles stated in *Invercargill City Council v Hamlin*² and *Sunset Terraces*³ for negligence in the inspection or otherwise?

The scheme

[2] The Act forbade the performance of building work except in accordance with a building consent issued by the territorial authority.⁴ All building work was required to comply with the building code.⁵ Once it was completed the owner was required as soon as practicable to advise the local authority of that fact.⁶ The Act contemplated that a satisfactorily completed building would be the subject of a code compliance certificate (CCC) issued to the owner.⁷

[3] The Act provided two alternative means by which a CCC could be obtained. One was by paying the authority its charge for satisfying itself that the building work complied with the building code and so should receive a CCC, in which case the CCC was issued by the authority. In such case it was the responsibility of the authority to exercise reasonable care to satisfy itself that issue of the CCC was justified. That would require it either to carry out its own inspections or to receive

¹ Now repealed.

² *Invercargill City Council v Hamlin* [1994] 3 NZLR 513 (CA); [1996] 1 NZLR 513 (PC).

³ *Sunset Terraces* [2010] NZCA 64.

⁴ Section 32(1).

⁵ Section 7(1).

⁶ Section 43(1).

⁷ Section 43.

from a building certifier building certificates vouching for the due performance of the work. In the latter event the italicised portions of s 50 applied:

(1) A territorial authority shall accept the following documents as establishing compliance with the provisions of the building code:

(a) A building certificate or code compliance certificate to that effect issued by a building certifier under section 43 or section 56 of this Act:

...

[4] This Court has held that carelessness on the part of the authority in the issue of a CCC in respect of a habitation is actionable at the suit of the owner.⁸ But where the authority was required to accept the building certificate as establishing compliance with the code there could be no liability upon it for doing so.

[5] The other means of obtaining a CCC was for the owner to secure it from a building certifier authorised to certify work of the relevant kind. Building certifiers were listed on a register maintained by the Building Industry Authority (BIA).⁹ The register also recorded the parts of the Building Code in respect of which each building certifier was approved to certify.¹⁰ An approved certifier was empowered to issue its own CCC if satisfied on reasonable grounds that on the date of certification the building work complied with the building code.¹¹ If it did so the authority was bound by s 50(1) to accept that CCC as establishing code compliance. The Act contemplates liability on the certifier for civil liability arising from its carelessness in the issue of a CCC.¹² Since the authority was statutorily bound to accept the CCC it could not be liable for doing so.¹³

The issues

[6] Here however the certifier who issued an ostensible CCC certified compliance with Approved Standard E2/AS1 even though, according to the

⁸ *Sunset Terraces.*

⁹ Section 53(1).

¹⁰ Section 53(2).

¹¹ Sections 43 and 56.

¹² Section 57(2) prohibits a certifier from contracting to limit any civil liability which might arise from the certifier's issue of a CCC.

¹³ *Huang v North Shore City Council* HC Auckland CIV-2005-404-2991, 12 December 2005.

respondents, the building did not comply. As a consequence, the building certifier exceeded its authority. So the question here is: should what the certifier issued be characterised as a CCC so as to exempt the appellant Council from liability; or is the certificate to be treated as ineffectual because of the certifier's lack of authority? If the latter, should the Council be held liable for failing to explore whether or not the certifier lacked authority and to draw the lack of authority to the owner's attention?

Facts

[7] The respondents, the Messrs McNamara in their capacity as trustees of the P H McNamara Family Trust, purchased a recently-built property in Remuera in 2004. It leaked. The Council had overall responsibility for administering the Building Act and Code.¹⁴ The developer had engaged Approved Building Certifiers Ltd (ABC) to inspect and certify the property. At that time, as was noted on ABC's entry on BIA's register of building certifiers, ABC had general authority to issue CCCs in respect of domestic dwellings. But on 4 December 2002 the BIA restricted ABC's ability to certify compliance: it was not authorised to certify compliance with Code provision E2 (External Moisture) unless the means of compliance was to utilise E2/AS1. The BIA notified the restriction on its website and in its newsletter in April 2003. Nevertheless, during construction between December 2002 and April 2004 ABC inspected the property and on 16 April 2004 it purported to issue a CCC in respect of the property. ABC certified that the cladding system complied with E2/AS1 when, the respondents allege, it did not. On 7 September 2004 the BIA removed ABC from its register of building certifiers.

[8] The trustees' purchase of the property was subject to a Land Information Memorandum (LIM) condition. The LIM noted that no code compliance certificate had been issued. The Council accepted ABC's certificate as evidence of compliance and on its strength issued a LIM stating that a CCC had been issued. Once the trustees received ABC's certificate, the sale contract went unconditional. After the leaks appeared, the trustees repaired the property and now seek to recover the loss incurred.

¹⁴ Section 24.

Procedural history

[9] The trustees sued the Council and some 18 other defendants, although not ABC, in negligence in the High Court. The Council applied to strike out the claim against it, and in the alternative sought summary judgment against the trustees. Associate Judge Christiansen refused both applications.¹⁵

[10] The Council then appealed to this Court against the refusal of summary judgment. Because of a misunderstanding of the relevant procedure by the Council's solicitors, the Council applied out of time to the High Court for review of the Associate Judge's decision not to strike out the proceeding against it. Lang J granted an extension of time to seek review.¹⁶ The Council also sought an order transferring the application for review to this Court, to be heard alongside the summary judgment appeal. Venning J granted that application.

[11] The Council contends that the Associate Judge erred in refusing to strike out the proceeding against the Council, and alternatively in sending the case to trial rather than granting summary judgment to the Council.

Substance of the High Court's decision

[12] The trustees submitted that the Council owed a general duty of care to building owners whose properties were certified by a building certifier. They further submitted that the Council in this case owed a duty to them as it knew or ought to have known that ABC was not entitled to issue the certificate. The Council was under a duty to ensure compliance with the Building Code, which meant that, from 4 December 2002, it was under a duty to inspect the works and not to rely on ABC's certificate. There was evidence that the Council had no system in place for checking the registration and competence of building certifiers before accepting certificates under s 50.

[13] The main argument for the Council was that it was required by statute (s 50) to accept ABC's certificate. It accepted liability in other cases, where it had certified

¹⁵ *McNamara v Malcolm J Lusby Ltd* HC Auckland CIV-2006-404-002967, 3 July 2009.

¹⁶ *McNamara v Malcolm J Lusby Ltd* HC Auckland CIV-2006-404-002967, 4 August 2009.

the work, but submitted that ABC's engagement limited its responsibility and thus its liability: it was not obliged, nor was it able, to take the positive step of examining the certificate and ABC's authority to issue it. The Council further submitted that there had been no reliance on it; the trustees knew that ABC and not the Council had issued the CCC on which they relied.

[14] Associate Judge Christiansen rejected the Council's argument. He held that:

[49] The Act was not intended to supplant but rather to complement a [territorial authority]'s statutory obligations. Unless a private certifier is expressly authorised to certify items of building work comply with the building code then the duty remains with and reverts to the TA. A private certifier is either authorised to certify items of building work or not and if not, the duty remains with the TA.

...

[53] Therefore [the Council] could only accept approved certificates; it could not accept just any certificates and it could not accept a certificate for which there was no approval. Therefore a certificate under s 56 can only be that for which approval has been given by the BIA, for items not excluded and for provisions of the building code that are approved.

He noted that for the purposes of a strike out application, he had to accept the facts as pleaded. On that basis he could not confidently exclude the claim.¹⁷ Likewise, he refused the summary judgment application as the Council could not prove that the trustees would not succeed.

Submissions in this Court

[15] Mr Goddard QC for the appellant Council submitted that the Associate Judge was wrong to refuse to strike out or grant summary judgment. He first submitted that the Judge was wrong to find that the certificate was arguably invalid. Mr Goddard analysed closely s 56, under which building certifiers may issue building certificates which certify that any designs or plans *will* comply with the Building Code if completed to specification, and CCCs, which certify that all work carried out is complete and *does* comply with the Code. He submitted that any limitations on a building certifier's ability to certify compliance applied only to the certifier's ability to issue building certificates. A certifier was able to issue a CCC in

¹⁷ At [23], citing *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725.

respect of any work relying, for example, on others' building certificates in respect of which the certifier could not issue a building certificate. Thus, there was no limitation on ABC's approval to issue the CCC, even if its approval to issue building certificates had been curtailed.

[16] Mr Goddard next submitted that even if ABC's certificate was invalid, the statutory scheme required the Council to treat it as valid and accept it on its face. It could not be liable in negligence for acting as required by statute.

[17] He further submitted that s 50(3) precluded a claim against the Council. Section 50(3) states:

For the avoidance of doubt, no civil proceedings may be brought against a territorial authority or a building certifier for anything done in good faith in reliance on a document set out in subsection (1) or subsection (2) of this section.

Mr Goddard argued that since the Council acted in good faith in accepting the certificate, it could not be sued in negligence.

[18] Finally, Mr Goddard submitted that the original owners and their successors cannot have reasonably relied on the Council, having chosen to rely instead on ABC. The trustees' predecessor in title elected against relying upon the Council to perform the inspections needed for it to satisfy itself that it should issue a CCC. By doing so it saved itself the charge otherwise payable to the Council under s 28(1)(b) of the Act for the issue of a CCC. It relieved the Council from the obligation of inspection which, as Mr Goddard accepted, is necessary for an authority to be able to satisfy itself in terms of s 43(3) where it is the issuer of a CCC. Instead the predecessor in title accepted, no doubt for a suitable fee to the certifier, that the certifier would carry out the inspections necessary to issue its own CCC.

[19] The BIA limited ABC's authority as certifier on 4 December 2002, permitting it to certify only:

Ordinary residential, commercial and industrial buildings excluding multi-unit dwellings and in respect of all dwellings, any cladding outside E2/AS1.

E2/AS1 refers to the BIA's "Approved document for New Zealand Building Code "External Moisture" Clause E2. It includes "Acceptable Solution E2/AS1" which stipulates certain criteria for the cladding and pitch of roofs.

[20] It was conceded by the Council, for the purposes of the appeal only, that it had information that at the time it issued the CCC the certifier lacked approval in respect of claddings other than those falling within E2/AS1. Counsel were not briefed to explain the detail of the particular non-compliance of the cladding with E2/AS1.

[21] Mr O'Callaghan for the respondent trustees supported the approach of the Judge.

[22] Since the claim is for strike-out or summary judgment we assume, for the purposes of this appeal only, that certain drawings provided to the Council at a preliminary stage in support of an application under s 30 for a project information memorandum, dealing with such matters as compliance with the Resource Management Act 1991, would if examined have disclosed to an expert builder or certifier the fact of non-compliance.

The legislation

[23] The Council's general functions under s 24 included the administration of the Act; receipt and consideration of applications for building consents; enforcing the building code and regulations; issuing project information memoranda and code compliance certificates; and performing:

- (g) Any other function specified in the Act.

Those other functions included:

- (a) receiving and acting upon building certificates issued by approved certifiers;¹⁸

¹⁸ Section 50.

- (b) receiving from owners advice of completion of work together with a CCC issued by a certifier;¹⁹
- (c) receiving notification from a certifier or owner if the certifier became unable to inspect all or any items specified in its terms of engagement; and thereupon to amend the building consent and make such inspections and issue such notices to rectify as it considered necessary;²⁰
- (d) issuing LIMs recording whether or not a CCC had been issued.²¹

They did not in terms include monitoring information as to the scope from time to time of the authority of the certifier or whether a particular building work fell outside the certifier's authority.

Discussion

[24] The clear pattern of the Act is to give the owner an election between the use (in whole or in part) of a certifier and the use (in whole or in part) of the territorial authority. Where the certifier was retained by the owner to perform the whole task, the authority's role was limited to the administrative function of receiving and, no doubt retaining at least a record of, the owner's advice of completion at the end of the works together with the certifier's CCC.²² Only if the certifier or owner gave notification under s 57(3) did the Act enliven an obligation of inspection on the part of the territorial authority.

[25] It is impossible to infer a statutory purpose that territorial authorities should act as long-stop guarantor to certifiers that issue a CCC in respect of building work, here the construction of a domestic dwelling, which performed in one way fell within the certifier's authority but performed another way fell outside that authority.

¹⁹ Section 43(1)–(2).

²⁰ Section 57(4).

²¹ Such function attracts the protection of s 41 of the Local Government Official Information and Meetings Act 1987 discussed by this Court in *Vining Realty Group Ltd v Moorhouse* [2010] NZCA 104.

²² Section 43.

Certifiers were issued their authority by the BIA which could amend or withdraw it. The Act stipulated that certifiers be subject to a scheme of insurance approved by the BIA.²³ So a certifier which issued a certificate beyond its capacity or which approved defective work, would be liable in negligence to the owner and that liability would, it was contemplated, be backed by an approved insurer. There is no suggestion in the Act that an authority should provide a further backstop for default by the certifier which was in direct competition with the authority for the business of inspection and issue of CCCs.²⁴

[26] Nor are we prepared to create a common law obligation of the kind for which the trustees contend. The owner having turned its back on the territorial authority and chosen and paid another certifier, and thereby freed itself from the obligation to pay the authority the charges it would otherwise have received for assuming the inspection obligation, cannot reverse that election without giving the statutory notification under s 57. The common law seeks to act in accordance with the public policies expressed by Parliament,²⁵ especially where it is asked to operate within or near the borders of legislation.

[27] No doubt the case could be different if a council well knew that a certifier was issuing certificates which it had no right to do. The purpose of the notification under s 57 would have been served and the territorial authority might be expected to set about performing the obligations cast upon it by that section. But that scenario is not suggested in this case.

[28] The *Hamlin* line of authority was created by the courts to deal with breach by councils of an obligation they had undertaken – inspection and certification of building work where the owner could reasonably expect to rely on its exercise of care when any defects would be covered up as the work proceeded. Here there was no assumption of responsibility by the Council; only by ABC. For the trustees' claim to succeed would require us to create a liability for damages in public law for

²³ Section 51(3)(b).

²⁴ The Council charged \$130 rather than the \$6,588 it might have charged for inspecting code compliance (HC judgment at [60]).

²⁵ See JF Burrows and RI Carter *Statute Law in New Zealand* (4th ed, LexisNexis, Wellington, 2009) at 535–542.

the failure, in exercise of its limited s 24 functions, to oversee the performance by the certifier of:

- (a) its (and the owners') s 27 obligation to notify the Council of the limitation of the certifier's authority;
- (b) the performance of the obligation which the owner had deliberately confided to the certifier instead of to the Council.

[29] Such argument stands on its head the principle that liability in this sphere follows assumption of responsibility. We are satisfied that the trustees' argument is without merit. Rather than simply strike out the claim we have concluded that the Council is entitled to the substantive relief of summary judgment, which is entered in its favour.

[30] The Council is entitled to costs on a band A basis and usual disbursements in this Court. We reverse the costs order in the High Court and award costs on a 2B basis and disbursements in that Court to the Council.

Solicitors:
Heaney & Co, Auckland for Appellant
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