

**IN THE HIGH COURT OF NEW ZEALAND  
AUCKLAND REGISTRY**

**CIV 2007-404-001625**

BETWEEN	BODY CORPORATE 205055 First Plaintiff
AND	LESLIE IVAN BROWN & BROWN TRUSTEES LIMITED & ORS Second Plaintiffs
AND	PRODESIGNERS ARCHITECTS LIMITED First Defendant
AND	FAR NORTH DISTRICT COUNCIL Second Defendant
AND	ERNEST HENSHAW Third Defendant
AND	W R MILLER Fourth Defendant

Hearing: 8 June 2009

Counsel: G D R Shand/A K Hough for plaintiffs  
D Goddard QC/M Cavanaugh for second defendant

Judgment: 31 May 2010 at 5:30pm

---

**JUDGMENT OF ASSOCIATE JUDGE ABBOTT**

---

*This judgment was delivered by me on 31 May 2010 at 5:30pm,  
pursuant to Rule 11.5 of the High Court Rules.*

*Registrar/Deputy Registrar*

Solicitors:  
Grimshaw & Co, PO Box 6646, Auckland 1141 for plaintiffs  
Heaney & Co, PO Box 105391, Auckland 1143 for second defendant

[1] The plaintiffs are the owners of the multiple unit holiday resort property known as Blue Pacific, located in Paihia, Northland. They allege that the building suffers from construction defects and related damage arising out of development of the property by the previous owner. The defendants had roles in the design, approval, conduct and management of the construction. The plaintiffs say that the defendants carried out their various roles negligently. They seek to recover the costs of repair and losses of income they were expecting from the property.

[2] The second defendant, The Far North District Council (the Council) is the local territorial authority for Paihia. It issued the building consent for the development, inspected the work during construction, and issued a code compliance certificate at the completion of the work. It has applied for the claims against it to be struck out, or for summary judgment against the plaintiffs, on the ground that it does not owe the plaintiffs a duty of care to protect them from the losses that they are claiming.

[3] The Council acknowledges that, in the limited circumstances identified in *Invercargill City Council v Hamlin*<sup>1</sup>, it owes a duty to owners of residential property when carrying out statutory functions under the Building Act. However, it says that that duty is owed only to individual owners in respect of their own homes. It contends that this was a commercial development, in which the plaintiffs acquired their units principally as investment properties to be managed on their behalf. It accepts that the units have a residential use, but says that this does not change the commercial nature of the development and is insufficient to found a duty of care. It also says that there is no legal basis for a duty based on health and safety.

[4] The plaintiffs say that the case comes within the *Hamlin* line of authority, because the property was developed for use as residential apartments, part of the time by themselves but otherwise to members of the public (to whom it is let on their behalf by a management company). They say they have arguable causes of action

---

<sup>1</sup> *Invercargill City Council v Hamlin*[1994] 3 NZLR 513 (CA); [1996] 1 NZLR 513 (PC)

based either on the residential nature of the properties, or on the Council's statutory responsibility to protect the health and safety of users of the building.

## **Background**

[5] The property is situated at 166 Marsden Road, Paihia. It was originally a two-storey building, constructed and operated as a motel. In April 2000 a development company Blue Pacific Limited (no longer in existence) applied to the Council for a building consent to convert the building into apartments. Blue Pacific engaged the first defendant to prepare the plans and specification. The Council issued a building consent on 28 June 2000.

[6] Blue Pacific Limited engaged the third defendant to carry out the construction work, and the fourth defendant to act as project manager. The work was carried out in the second half of 2000. The Council carried out inspections of the work during the course of construction. The fourth defendant issued a certificate of practical completion on 4 December 2000. The Council issued a final code compliance certificate on 19 January 2001.

[7] When the construction was completed, Blue Pacific Limited converted the property into unit titles. The completed building contained twelve principal units and two accessory units.

[8] The units were marketed as investment opportunities in a "quality serviced apartment resort" of "twelve managed apartments". The marketing brochure stated that the apartments would be managed on the owner's behalf, but that an owner could occupy the apartment whenever the owner liked and for as long as the owner wished, provided notice was given to the manager. An owner was to receive an agreed proportion of the rent received from letting of the apartment.

[9] The apartments were sold to the plaintiffs at various times (five of the plaintiffs agreed to purchase their units before the Council issued the code compliance certificate, the remainder did so afterwards). Each of the plaintiffs entered into a management agreement with a management company, 166 Marsden

Management Limited, under which the property was operated as holiday accommodation. The management agreements provided for unit owners to have a right to use their units on notice, and at a reduced rental (referred to as the owner-occupier levy).

### **Preliminary matters**

[10] The Council has also applied for leave to bring its application for summary judgment (it was filed outside the time provided by r 12.4(3)). The plaintiffs initially opposed leave being granted. However, they withdrew their opposition to leave before the start of the hearing.

[11] Counsel also asked that both applications be heard in open court (an application to strike out is usually heard in chambers, whereas an application for summary judgment is required to be heard in open court. The hearing proceeded in open court). However for the purposes of my jurisdiction (s 26J of the Judicature Act 1908) the application to strike out was heard in open court for chambers.

[12] Since the hearing counsel have drawn my attention to the release of relevant decisions both of this court and of the Court of Appeal in other leaky building cases.<sup>2</sup> Counsel have filed supplementary submissions in respect of the *Charterhall*, *Spencer on Byron* and *Sunset Terraces* decisions.

### **The claim against the Council**

[13] The claim is currently pleaded in a fourth amended statement of claim filed on 11 February 2009. The plaintiffs say that the building suffers from defects of design and construction, and does not comply with the building code. They say that

---

<sup>2</sup> *Mt Albert Grammar School Board of Trustees v Auckland City Council & Ors* HC Auckland CIV 2007-404-004090 (*Mt Albert Grammar School*), 25 June 2009, Asher J; *Queenstown Lakes District Council v Charterhall Trustees Ltd & Anor* [2009] NZCA 374 (CA) (*Charterhall*); *Body Corporate 207624 & Ors v North Shore City Council & Ors* HC Auckland CIV 2007-404-004837 11 November 2009, Potter J (*Spencer on Byron*); *North Shore City Council & Ors v Body Corporate 188529 2010* NZCA 64 (*Sunset Terraces*); *O'Hagan v Body Corporate 189855 2010* NZCA 65 (*Byron Ave*).

these defects have led to damage, and that the defects and damage pose a number of health and safety risks. They contend that the defects and damage will cost \$872,757 to repair, and that by reason of the defects/damage/repairs the owners of eleven of the apartments will suffer losses of rental income totalling \$260,778. The natural plaintiffs also claim general damages of \$25,000 each (a total of \$300,000).

[14] In their first cause of action the plaintiffs plead that the Council issued a building consent for the apartments, carried out 15 inspections of various aspects of the work throughout the course of construction, and issued a code compliance certificate in respect of their consented building work. They plead that it was reasonably foreseeable to the Council that purchasers of the apartments would rely on the Council to administer properly the building controls under the Building Act 1991 in respect of the design and construction of the building, and would be adversely affected if the Council failed to use due skill and care. They also plead that the building:

- a) Comprises residential units intended for habitation by members of the public;
- ...
- c) Was constructed with defects which created the damage and risks to public health and safety ....

[15] The plaintiffs plead the duty of care in paragraph 43 of the claim. At the hearing counsel for the plaintiffs, Mr Shand, observed currently that the duty was pleaded only in relation to protection of health and safety, and sought to amend it to add further aspects. Mr Goddard, for the Council did not oppose the amendment. As a consequence, paragraph 43 is to read:

[43] In the circumstances the Council owed the plaintiffs duties to exercise reasonable skill and care:

- (1) To protect their health and safety/safeguard them from possible injury, illness, or loss of amenity by ensuring all building work at Blue Pacific complied with the building code;

- (2) In deciding whether to issue building consent;
- (3) In its inspection regime;
- (4) In deciding whether to issue a code compliance certificate.

[16] The plaintiffs then plead that the Council breached its duty by issuing a building consent despite deficiencies in the plans, by failing to identify defects during inspections of the building work and to require those defects to be rectified, and by issuing the code compliance certificate notwithstanding the defects. They plead that as a result the plaintiffs have suffered, or will suffer, the cost of the repair work, the losses of rental income, and the anxiety, stress and loss of enjoyment for which the general damages are sought.

[17] In a second cause of action against the Council, the five owners who agreed to purchase their units before issue of the code compliance certificates claim that the code compliance certificate was a statement by the Council that it was satisfied on reasonable grounds that the building was constructed in accordance with the building consent and building code. They say that the Council breached a duty of care to them by making that statement despite the presence of the defects. They allege that they settled the purchase of their units in reliance on that statement, and as a result of the Council's breach of duty have suffered the same losses as pleaded under the first cause of action.

### **The court's approach on strike out or summary judgment**

[18] The application for strike out is brought under r 15.1 of the High Court Rules under which the court may strike out all or part of a pleading in four prescribed circumstances. The Council relies on the first of these circumstances, namely that the pleading discloses no reasonably arguable cause of action or case appropriate to the nature of the pleading.

[19] The classic statement of principles that the court applies is to be found in *Attorney-General v Prince and Gardner*.<sup>3</sup> Mr Goddard summarised them as follows:

- a) The court usually assumes the facts pleaded are true, but it is not required to do so if the pleaded allegations are entirely speculative and without foundation;
- b) The causes of action must be so untenable that they cannot possibly succeed;
- c) The jurisdiction is to be exercised sparingly, and only in clear cases, where the court is satisfied it has the requisite material; and
- d) The jurisdiction is not excluded where the application raises difficult questions of law, requiring extensive argument.

[20] The need for caution when exercising summary jurisdiction has been emphasised by the minority judgment of the Supreme Court in *Couch v Attorney-General*<sup>4</sup>, where it was said that the court had to be certain that the claim cannot succeed.

[21] The courts are especially slow to strike out claims in negligence which assert novel duties of care (recognising “the factually sensitive nature of the inquiry”) but they must also take into account the competing consideration that a defendant ought not to be subjected to the substantial (and often unrecoverable) cost of defending untenable claims, particularly in public law negligence cases.<sup>5</sup>

[22] The application for summary judgment is brought under r 12.2 of the High Court Rules. A defendant seeking summary judgment must satisfy the court that none of the causes of action in the statement of claim can succeed. The difference

---

<sup>3</sup> *Attorney-General v Prince & Gardner* [1998] 1 NZLR 262,267.

<sup>4</sup> *Couch v Attorney-General* [2008] 3 NZLR 725 at [33].

<sup>5</sup> *Attorney-General v Body Corporate 200200* [2007] 1 NZLR 95 at [50]-[51].

between strike out and summary judgment is helpfully summarised in *McGechan on Procedure*:<sup>6</sup>

....A defendant's application [for summary judgment] is similar to a striking-out application in that the defendant has to show that the plaintiff cannot succeed. The difference between an application for summary judgment and an application to strike out is that the summary judgment application requires affidavit evidence to be provided. It will therefore be possible to obtain judgment on the basis of material other than that contained in the pleadings. As in the case of an application by the plaintiff, if there are material disputes of fact which cannot be resolved on affidavit, summary judgment will have to be refused.

The Courts have noted the similarity between the two types of application and the difficulty of succeeding where there is a material dispute of fact: *Ferrymead Tavern Ltd v Christchurch Press Ltd* (1999) 13 PRNZ 616. In *A-G v Jones* (2001) 15 PRNZ 347 (CA), the Court of Appeal adopted a robust approach to disputes of fact, and held that summary judgment ought to have been granted. The Privy Council overruled the Court of Appeal (*A-G v Jones* (2003) 16 PRNZ 715 (PC)) on the basis that there was a hypothetical scenario in which the factual differences might make a defence arguable. The decision emphasises the need to avoid factual disputes if judgment is to be obtained.

Summary judgment will not be appropriate where it is possible for the plaintiff to amend its claim so as to remedy the defects relied on by the defendant; it should be used only where the defendant has a clear answer to the plaintiff which cannot be contradicted: *Westpac Banking Corp v M M Kembla NZ Ltd* [2001] 2 NZLR 298; (2000) 14 PRNZ 631 (CA); *A-G v Jones* (2003) 16 PRNZ 715 (PC). Where the claim is untenable as a matter of law, it will generally be appropriate to apply to strike it out: *Bernard v Space 2000 Ltd* (2001) 15 PRNZ 338 (CA).

[23] Mr Goddard, for the Council, acknowledged that for the purposes of the present applications the court should proceed on the basis that the following matters were capable of proof at trial (strike out) or were in dispute and could not be determined at this summary stage (summary judgment):

- a) The design and/or construction of the building was defective and did not comply with the requirements of the building code;
- b) The Council failed to identify the alleged defect/non-compliance;

---

<sup>6</sup> *McGechan on Procedure* [HR12.2.07(1)].

- c) The Council would have identified the alleged defect/non-compliance if it had exercised reasonable care and skill in performing its functions;
- d) The alleged defect/non-compliance had resulted in damage to the building, and risks to the health and safety of people using the building; and
- e) The plaintiffs have incurred loss comprising the cost of remedial work on the building and lost rental income.

The Council contends that these matters are not material to the present application as it does not owe a duty of care to these plaintiffs.

### **The Council's argument**

[24] Mr Goddard, for the Council, submitted that the plaintiffs' claims were untenable because the plaintiffs were not able to establish a legal basis for their contention that the Council owed them a duty of care to protect them from the financial losses they are claiming. He argued:

- a) Although the plaintiffs contend that their claim is analogous to a line of case authority both reflected in and following *Invercargill City Council v Hamlin*, under which local authorities have been held to owe a duty of care to protect purchasers of residential property from economic loss, that line of cases is confined to buildings that are private dwellings. The building in this case clearly does not fall within that description (in the sense of a home) but is of a commercial nature.
- b) The duty of care established under the *Hamlin* line of cases is not based on a Council's statutory responsibilities under the Building Act in respect of health and safety. There is clear authority that statutory obligations placed on a public authority do not impose a duty of care

on the authority to protect persons from economic loss,<sup>7</sup> and that a local authority does not owe such a duty to owners of commercial buildings by reason of its statutory responsibilities under the Building Act 1991 to protect users of the building from risks to health and safety, even if the building is used for accommodation.<sup>8</sup> There is no basis for arguing for an imposition of that duty in light of those authorities and relevant policy considerations.

[25] Mr Goddard relied heavily on the decision of the Court of Appeal in *Te Mata Properties Ltd* where the Court of Appeal upheld a decision in this court striking out claims by the owner of a motel. He referred to the statement by Baragwanath J (delivering the principal judgment) that *Hamlin* claims could be justified “only as an exceptional response to the claims of residence in domestic accommodation”<sup>9</sup> and the finding that there was no justification for extending the *Hamlin* cause of action beyond the specific limits of private dwellings.<sup>10</sup>

[26] He said that this limitation was unsurprising given the underlying rationale of *Hamlin* that the duty was tied to special factors (identified in the judgment of Richardson J)<sup>11</sup> giving rise to a presumed economic vulnerability. He argued that the *Hamlin* exception could not be extrapolated to cover the building at issue in this case, which he described as an apartment hotel originally owned by a company and subsequently split into unit titles and sold to investor owners. He submitted that the *Hamlin* exception could not be generalised beyond private homes without undermining the principle to which it was the exception.<sup>12</sup>

[27] Mr Goddard also submitted that, if it was necessary to do so, the present case could be distinguished from the recent decisions of this court in *Sunset Terraces v North Shore City Council & Ors*<sup>13</sup> and *Body Corporate 189855 v North Shore City*

---

<sup>7</sup> *Attorney-General v Carter* [2003] 2 NZLR 160 (CA).

<sup>8</sup> *Te Mata Properties Ltd* at [84] – [86]; *Charterhall* at [42] – [44].

<sup>9</sup> At [62].

<sup>10</sup> At [73].

<sup>11</sup> *Invercargill City Council v Hamlin* [1996] 1 NZLR 513 at 524.

<sup>12</sup> *Te Mata Properties Ltd* at [57], [62], [84].

<sup>13</sup> *Sunset Terrace v North Shore City Council* [2008] 3 NZLR 479 (HC; [2010] NZCA 64 (CA)).

*Council*.<sup>14</sup> He referred to Heath J's *bright line* test in *Sunset Terraces* that the decisive factor is the intended use of the building as identified in the application for building consent or known to the Council as the end purpose,<sup>15</sup> and submitted that the present case clearly fell on the commercial side of the divide:

- a) in *Sunset Terrace* and *Byron Avenue* the intended use of the building was described in the application to the Council as "residential", whereas in this case the uncontested facts were that the work to be undertaken was described (in the documents accompanying the application) as "alterations and additions to existing motel";
- b) although the application for building consent in this case referred simply to "apartments" it did not distinguish between residential or commercial, and the commercial nature was confirmed by other documents submitted with the application;
- c) he referred to evidence that Blue Pacific, the developer company, was known to the Council as a commercial accommodation provider, and that the Council was aware that purchasers were entering into management contracts for letting of their units; and
- d) he relied on evidence that the Council issued its consent and conducted its inspection process on the basis that the building was to be used for commercial accommodation (referring in particular to accessibility conditions imposed by the Council, which would not be required for a private residence).

[28] Turning to the plaintiffs' claim for a duty based on health and safety risks, Mr Goddard submitted that this arose out of comments made by Baragwanath J in *Te Mata Properties Ltd* that a duty of care might be arguable, but was not advanced in that case.<sup>16</sup> He submitted, however, that the majority in *Te Mata Properties* had

---

<sup>14</sup> *Body Corporate 189855 v North Shore City Council* HC Auckland CIV 2005-404-005561, 25 July 2008; [2010] NZCA 105 (CA).

<sup>15</sup> *Sunset Terraces* (HC): at [220].

<sup>16</sup> *Te Mata Properties Ltd* at [70]-[77].

rejected<sup>17</sup> any such duty to owners of commercial buildings, having regard to the reasoning in *Attorney-General v Carter*<sup>18</sup> in respect of owners of commercial buildings. Further, a duty based on health and safety concerns was pleaded by the owner of a commercial property and rejected by this court, in *Kerikeri Village Trust v Nicholas*.<sup>19</sup>

[29] In addition to his argument that a duty of care could not succeed based on these authorities, Mr Goddard submitted that proximity and policy factors both pointed away from any possible development of a duty to commercial property owners, that would otherwise entitle them to recover costs of remedial work and consequential commercial losses. He submitted that the only basis for such an argument would be in respect of the costs of rendering the building safe, but such an argument was untenable:

- a) There is a statutory mechanism for ensuring health and safety risks are remedied once identified;<sup>20</sup>
- b) The rationale of funding repair work needed to render the building safe is fallacious: there is no guarantee that a successful plaintiff will spend the money on the remedial work.<sup>21</sup> Even Baragwanath J, in *Te Mata Properties Ltd*, recognised the need for some legislative intervention to address this point: a general obligation to meet the costs of repair of all unsafe buildings was a matter for legislation rather than extension of the common law.
- c) Imposition of a duty of care would have the common law advance beyond legislation (the legislature had not adopted this in the Building Act 2004 where it had made specific provision for a statutory warranty, but confined to “household units”). Again Baragwanath J

---

<sup>17</sup> *Te Mata Properties Ltd* at [84].

<sup>18</sup> *Attorney-General v Carter* [2003] 2 NZLR 160.

<sup>19</sup> *Kerikeri Village Trust v Nicholas* HC Auckland CIV 2006-404-005110, 25 November 2008.

<sup>20</sup> *Te Mata Properties Ltd* at [74].

<sup>21</sup> *Murphy v Brentwood District Council* [1991] AC 398 (HL).

in *Te Mata Properties Ltd* noted<sup>22</sup> that the common law should develop in tandem with statute law.

[30] In summary, Mr Goddard submitted that the plaintiffs' claim for a duty of care based on health and safety risks to building users was properly analysed as a claim for financial loss for building owners. He submitted that the plaintiffs were not within the class of persons (users) who might be entitled to claim the benefit of such duty, and the losses they were claiming were not the kind of losses for which such a duty might be imposed.

[31] Mr Goddard also submitted that the plaintiffs' second cause of action (negligent misstatement) could not succeed, irrespective of the arguments in respect of duty of care, because on the incontrovertible facts the plaintiffs could not be said reasonably to have relied on the alleged misstatement in the code compliance certificate. He pointed out that the plaintiffs claimed that they settled their purchases, rather than agreed to buy the units, in reliance on the code compliance certificate. He submitted that this argument could not succeed as they were committed to settle at the time of the issue of the code compliance certificate. He referred to provisions in the agreements requiring settlement 5 business days after receipt of the certificate of practical completion, and noted that although the vendor had given a contractual undertaking to provide a code compliance certificate, the contract expressly provided that that was not a pre-condition to settlement.

[32] Finally, Mr Goddard submitted that a duty of care would not be found for this kind of building, as a matter of policy, because there were other remedies available to the plaintiffs. These were the claims against persons primarily responsible for ensuring that the building was properly designed and constructed (the architect, the builder and the project manager), and also a claim against the original owner/developer. He submitted that the fact that Blue Pacific Limited had been struck off the register and was not worth pursuing was not reason to impose a duty on the Council.<sup>23</sup> In support of this submission he argued:

---

<sup>22</sup> *Te Mata Properties Ltd* at [6].

<sup>23</sup> *Kerikeri Village Trust v Nicholas* HC Auckland CIV 2006-404-005110, 25 November 2008, at [73].

- a) The plaintiffs obtained some contractual warranties from Blue Pacific Limited and it had been open to them to seek more (in particular he referred to an assignment of rights that Blue Pacific had against parties involved in the construction, including a five year building guarantee).
- b) Blue Pacific Limited had retained experts to prepare plans and supervise. It was relying on them to protect its interests, just as the plaintiffs were relying on Blue Pacific under the agreements. Neither Blue Pacific nor the plaintiffs can reasonably say they were relying on the Council.
- c) It would not be reasonable for the plaintiffs to look to the Council to manage their financial risk, or protect the value of their investment, in this commercial venture. There is no basis for viewing them as economically vulnerable in a commercial or investment context. It is not the role of local authorities to act as insurers of commercial building development.

### **Arguments for the plaintiffs**

[33] Mr Shand submitted that it was at least arguable that the Council owed a duty of care to the plaintiffs by analogy to the *Hamlin* line of cases. He traced the history of local authority liability for the cost of remedying defective buildings from early English authorities (based on health and safety)<sup>24</sup> and through New Zealand cases<sup>25</sup> leading to *Hamlin*. He noted that *Hamlin* marked the point where New Zealand common law departed from English law (where local authority liability for economic loss has been curtailed)<sup>26</sup> by holding that a local authority was liable to an owner/developer of a residential property (and to subsequent owners) for defects caused or contributed to by the negligence of a building inspector. He referred to the

---

<sup>24</sup> *Dutton v Bognor Regis UDC* [1972] 1 QB 373 CA; *Anns v London Borough of Merton* [1978] AC 728 (HL).

<sup>25</sup> *Mt Albert Borough Council v Johnson* [1979] 2 NZLR 234 (CA); *Mt Albert City Council v NZ Municipalities Co-operative Insurance Co Ltd* [1983] NZLR 190 (CA); *Stieller v Porirua City Council* [1986] 1 NZLR 84 (CA).

underlying rationale for the *Hamlin* departure, being the legislative control given to local authorities under building legislation and community expectations in the context of the New Zealand housing scene at the time.<sup>27</sup> He submitted that it was either within, or a logical extension to, the *Hamlin* line of cases that the Council should owe the plaintiffs a duty of care in respect of their units at Blue Pacific on the basis of their residential nature.

[34] Mr Shand developed his argument with particular reference to the *bright line* test and adopted in the Court of Appeal in *Sunset Terraces*. He emphasized:

- a) The fundamental expectations that a member of the public buying a home is likely to have (reflecting the objects of the Building Act and the provisions of the building code), namely that the building was structurally sound, that the building work was durable, and that the building was watertight.<sup>28</sup>
- b) The relationship between the Council's functions in determining whether to grant a building consent, carrying out inspections and certifying code compliance, and the need for an independent body to assess the quality and nature of the workmanship involved and to provide a degree of assurance to members of the public that the completed work complies with the code.<sup>29</sup>
- c) The fact that prospective owners of units in multi-unit developments have the same potential of vulnerability as prospective owners of single dwellings.<sup>30</sup>
- d) The intention of the Weathertight Homes Resolution Service Acts of 2002 and 2006 to protect those who rely on systemic safeguards when acquiring a residential unit.<sup>31</sup>

---

<sup>26</sup> *Murphy v Brentwood District Council* [1991] AC 398 (HL).

<sup>27</sup> Identified by Richardson J at pp 524-5.

<sup>28</sup> *Sunset Terraces* HC) at [172].

<sup>29</sup> *Sunset Terraces* (HC) at [182].

<sup>30</sup> *Sunset Terraces* (HC) at [211].

<sup>31</sup> *Sunset Homes* (HC) at [211].

[35] He submitted that, when considered in that context, the local authority owed the plaintiffs a duty of care as purchasers of units whose intended use (as described in the application for building consent or as known to the Council) were residential:

- a) The application for building consent, the project information memorandum and the building consent all specified the property use or intended use as apartments.
- b) This was an indication of residential use, sufficient to establish a duty of care on the *bright line* test.
- c) It did not matter whether plaintiffs had bought their units for personal occupation or investment/commercial purposes if the units were residential (relying on the statements of Venning J in *Byron Avenue* that the existence of a duty of care did not depend on this, and his allowing claims for lost rental by investor owners).<sup>32</sup>

[36] Mr Shand submitted that the plaintiffs were no different to the successful plaintiffs in *Sunset Terraces* and *Byron Avenue*. They were the owners of residential apartments. He submitted that the cases where a duty of care had been rejected on a finding that the intended use was commercial should be distinguished:

- a) The plaintiffs were always vulnerable to the Council's negligence (they were unable to negotiate contractual protection with the designers and builders);
- b) The rejection of a duty of care in *Three Meade Street Ltd v Rotorua District Council*<sup>33</sup> can be explained by the fact that the plaintiff was the developer and builder of the motel that was the subject of the claim. It did not matter whether the individual owner or some other person was to be residing in the units. Further, the court expressly

---

<sup>32</sup> *Byron Avenue* (HC) at [21]-[22], 394.

<sup>33</sup> *Three Meade Street Ltd v Rotorua District Council* [2005] 1 NZLR 504.

declined to rule that a Council could not owe a duty to a commercial property owner in any circumstances.<sup>34</sup>

- c) In *Te Mata Properties v Hastings District Council* the property was a dedicated motel, owned by one entity as distinct from individual owners of a unit title development, and the Court of Appeal specifically left open the possibility of a cause of action based squarely on health and safety.
- d) The hospital wing and administration block that were the subject of the decision in *Kerikeri Village Trust v Nicholas* cannot be compared to a set of twelve residential apartments. Although there was a claim for duty of care based on health and safety issues, the plaintiff trust clearly was not able to bring that claim (it could not be regarded as an occupant).

[37] In summary, Mr Shand submitted that the plaintiffs came within the *Hamlin* exception. They satisfied the *bright line* test through the description as an apartment, and the Council's knowledge that they were to be used for residential purposes. They were owners of individual units (rather than of the whole complex), and the fact that they are managed by a management company does not transform the plaintiffs into a motelier (as in *Three Meade Street Ltd* and *Te Mata Properties Ltd*). He relied on the fact that plaintiffs were able to terminate the management agreements, and to occupy units personally. He referred to a consistent theme of evidence from the plaintiffs that it was their understanding that it was their choice whether or not to live in the properties (this understanding being based on promotional material available at the time that the duty of care is said to have arisen). He also relied on the Council's admission in its pleading that the Council issued a building consent for the construction of eleven new residential apartments.

[38] He also said that further inquiry was required as to the Council's knowledge at the time (the Council's general manager, Mr Schofield, was able to produce documents from the Council's file but had only commenced employment with the

---

<sup>34</sup> At [40].

Council in 2004 and could not give any direct evidence as to the Council's knowledge in 2000).

[39] Turning to the plaintiffs' case for a duty of care based on health and safety risks, Mr Shand submitted that *Attorney-General v Carter* does not determine the issue in this case. He referred to the court's comment that "the New Zealand building inspector cases are sui generis"<sup>35</sup> and submitted (based on the reservations expressed by Baragwanath J in *Te Mata Properties Ltd*)<sup>36</sup> that there is a basis for an argument based on health and safety risks. He submitted that the plaintiffs' pleading included that basis for the duty (although not pleaded as a separate cause of action), and that there was an evidential foundation for it in a notice to fix issued by the Council on 21 September 2006 (referring to subsidence and concerns about the safety of certain balconies as a result). He submitted that the claims should not be determined at this preliminary stage.

[40] Finally, in respect of the plaintiffs' claim for negligent misstatement, Mr Shand submitted that the claims rested on established law, and should not be excluded summarily before all evidence was tested. He argued that reliance could be found in the expectation that a code compliance certificate would be issued, and this was a trigger for their decision to settle the purchases. He did not address directly the Council's argument that issue of a code compliance certificate was not a precondition to settlements, and therefore could not be a basis for reliance.

### **Issues arising**

The central issue in this case, therefore, is whether, at the time that it exercised its functions, the Council owed a duty of care to the owners of the units to prevent the types of losses which the plaintiffs are seeking to recover. This has to be considered in two respects. The first is whether the plaintiffs can bring their claim

---

<sup>35</sup> *Attorney-General v Carter* [2003] 2 NZLR 160 (CA) at [35].

<sup>36</sup> *Te Mata Properties Ltd v Hastings District Council* [2009] 1 NZLR 460 at [70] – [78].

within the *Hamlin* exception. The second is whether it is arguable that the Council owed the plaintiffs a duty of care based on its statutory obligations under the Building Act or the building code in respect of health and safety.

[41] There is also a further issue in relation to the five plaintiffs' ability to establish the necessary reliance for their claim for negligent misstatement.

### **The reach of the *Hamlin* exception**

[42] This case is made difficult by the fact that the building in question is neither clearly a residential building, as one is commonly understood, nor exclusively a commercial building. While it is operated as short stay resort accommodation (similar to a motel), the owners can use the apartments as their residence if they so wish. As such, neither the building nor the owners fall neatly onto one side of the present commercial/residential divide in the field of local authority liability for negligence.

[43] Since the 1970s it has been regarded as settled law in New Zealand that builders and local authority building inspectors may be liable to owners and subsequent purchasers of residential buildings for defects caused or not prevented by them through negligence: see *Bowen v Paramount Builders (Hamilton) Limited*,<sup>37</sup> *Mount Albert Borough Council v Johnson*,<sup>38</sup> and *Invercargill City Council v Hamlin*.<sup>39</sup>

[44] It is also firmly established, however, most recently by the Court of Appeal in *Queenstown Lakes District Council v Charter Hall Trustees Limited*,<sup>40</sup> that a local authority will owe a duty of care to the owners of a commercial building only in rare circumstances. This is because there is not the same degree of vulnerability between a commercial property owner and a local authority as was found in *Hamlin* to exist between a residential home owner and a local authority. Moreover, there are no policy factors that would justify a duty of care being imposed in respect of a

---

<sup>37</sup> [1977] 1 NZLR, 394.

<sup>38</sup> [1979] 2 NZLR, 234.

<sup>39</sup> [1994] 3 NZLR, 513 (CA); [1996] 1 NZLR 513 (PC).

commercial property: the class of persons to whom the duty was owed would be wide, the local authority is not the party in the best position to protect the plaintiffs' interests, the local authority should not become insurers for building owners against the negligence of the contractors, and there is weighty overseas authority against imposition of a duty of care.<sup>41</sup>

[45] In recent time, the courts have been called upon to consider where the line is to be drawn when a building cannot be characterised as obviously residential or commercial. The problem is exemplified by the buildings at issue in *Te Mata Properties* (a motel which included a residence for the operator), and *Sunset Terraces* and *Byron Avenue* (multi-unit residential apartment developments which were both occupier and investor owned), and *Spencer on Byron* (a high rise hotel/residential apartment building with a combination of commercial, residential and investor ownership).

[46] In *Te Mata Properties* the Court of Appeal upheld the finding of this court that the Hastings District Council did not owe a duty of care to the owner of the motel for the reason that:

...there is no justification for extending the *Hamlin* cause of action, based as it is on economic loss, beyond the specific limits of private dwellings.<sup>42</sup>

[47] In *Sunset Terraces* and *Byron Avenue* the Court of Appeal has recently upheld the findings in this court that North Shore City Council owed a duty of care to subsequent purchasers of residential apartments built by commercial developers, and that it was immaterial that some of the apartments had been purchased as investments rather than for personal occupation.<sup>43</sup>

---

<sup>40</sup> [2009] NZCA, 374.

<sup>41</sup> *Murphy v Brentwood District Council* [1991] 1 AC, 398, 475.

<sup>42</sup> *Te Mata Properties Ltd* at para [73].

<sup>43</sup> [2010] NZCA 64; [2010] NZCA 65.

[48] In the first instance decision in *Sunset Terraces*, Heath J placed emphasis on the need to determine the range and scope of the duty of care in a principled and predictable manner. He held:

The nature and scope of a duty of care imposed on a territorial authority must be principled, capable of being expressed simply, predictable in its future application and result and a just and reasonable allocation of risk between parties who are not in any contractual relationship.

....

Predictability provides a level of assurance that is needed by the Council to determine the extent of its potential liability and to take steps to guard against risks.<sup>44</sup>

[49] The learned judge took the view that the nature of the building and the actual use of a unit in it were not determinative factors nor a particularly useful means of analysis when deciding whether a *Hamlin* type duty of care would be imposed, and that the intended end use of the units, as known at the time of construction, provided a predictable basis from which to start any analysis. He considered that this intended use would be as disclosed in plans and specifications submitted with the application for building consent. By this approach he considered that both the Council and intended home purchasers would have the ability to take reasonable steps to protect their own positions. He also said that the duty would also arise where it was, notwithstanding what was disclosed an application for building consent, or the accompanying plans and specifications, the residential purpose was obvious.<sup>45</sup>

[50] Heath J concluded with what is now being termed the *bright line* test:

[220] In my judgment, a territorial authority owes a duty of care to anyone who acquires a unit, the intended use of which has been disclosed as residential in the plans and specifications submitted with the building consent application or is known to the council to be for that end purpose. The duty is to take reasonable care in performing the three regulatory functions in issue: deciding whether to grant or refuse a building consent application, inspecting the premises to ensure compliance with the building consent issued and certification of compliance with the Code. The existence of such a duty reflects the need to balance a home-owner's moral claim for compensation for avoidable harm against the Council's moral claim to be protected from an "undue burden" of legal responsibility. Put in that way, the duty takes account of the changed statutory framework and avoids tying the duty to the practices of a bygone era.

---

<sup>44</sup> At para [205], [207].

<sup>45</sup> At para [220].

[51] This approach was approved so first by Venning J in *Byron Avenue*, by Potter J in *Spencer on Byron* and (in a slightly modified form) by the Court of Appeal in both cases. Baragwanath J, in *Sunset Terraces*, focused on the *Hamlin* exception as applying to a claim in respect of a leaky building “used as a private habitation”.<sup>46</sup> He said that such buildings could be characterized as different in kind from the motel in *Te Mata properties Ltd* or the lodge in *Charterhall*. He referred to the distinction in building legislation between “household units” and “dwellinghouses” and other buildings. William Young P, with whom Arnold J agreed, referred to the desirability of drawing a bright line in deciding whether the *Hamlin* exception applies, and preferred a simple approach of saying it applied to “residential developments”.<sup>47</sup>

[52] In addition, Venning J held at first instance in *Byron Avenue* that it did not matter if residential home owners had purchased units in an apartment block purely for investment purposes. The finding was accepted (but was not determinative) in *Spencer on Byron* and was upheld by the Court of Appeal in both *Sunset Terraces* and *Byron Avenue*.

[53] The Court of Appeal’s comments in *Rolls-Royce New Zealand Limited v Carter Holt Harvey Limited*<sup>48</sup> in regard to finding of a duty of care in a novel situation are also worth noting at this point. After stating that the ultimate question was whether it was just and reasonable that a duty be imposed, the Court of Appeal referred to the two broad fields of inquiry, namely the proximity of the parties and any policy considerations, and commented in relation to proximity that it was the nature of the parties, rather than a simple question of foreseeability, that was important, and said:

[60] The proximity inquiry can be seen as reflecting balance of the plaintiff’s moral claim to compensation for avoidable harm and the defendant’s moral claim to be protected from undue restrictions on its freedom of action and from an undue burden of legal responsibility. That necessarily involves a consideration of how close the nexus is between the defendant’s alleged negligence and the plaintiff’s loss and the degree of harm to the plaintiff. It also involves considering the burden on the defendant of taking precautions against proportion to its fault – see *South Pacific Manufacturing* at pp 306 – 308 per Richardson J., Stephen Todd (ed)

---

<sup>46</sup> *Sunset Terraces* (CA) at [21].

<sup>47</sup> *Sunset Terraces* (CA) at [170].

<sup>48</sup> *Rolls-Royce New Zealand Limited v Carter Holt Harvey Limited* [2005] 1 NZLR, 324.

*The Law of Torts in New Zealand* (3<sup>rd</sup> ed, 2001) pp 142 – 151 and John A Smillie “The Foundation of the Duty of Care in Negligence” (1989) 15 Monash UL Rev 302, 00 328 – 330. As Cardozo CJ said in the oft-cited case of *Ultramares Corporation v Touche, Niven & Co*, 174 NE 441 (NY, 1931) at p444, the Courts are concerned to limit the risk of exposing defendants to “a liability in indeterminate amount for an indeterminate time to an indeterminate class”.

[54] Taking the facts as pleaded and the unchallengeable facts as disclosed from the Council’s file, the building at issue in this case does not fall naturally within a class of building for which a duty has or has not been found. It continues to operate as motel type accommodation, but is able to be used as a residence. Some of the unit owners have used it for themselves, or intend to do so (although there is no suggestion of any permanent use).

[55] Neither the building consent application and supporting information, nor any other information available to Council at the time it was making its inspections, indicate clearly and unequivocally that the building was intended to be used as a private habitation or residence (as distinct from having short term residential use). Although the application for building consent and project information memorandum refer to the use of the building as “apartment” or “new apartments”, and the word ‘apartment’ is suggestive of a residential use of some form, I do not regard that as indicating a residential development as contemplated William Young P in *Sunset Terraces*, nor private habitation as discussed by Baragwanath J in *Te Mata Properties* and *Sunset Terraces*. To the contrary, the supporting documents, and correspondence with Council at the time, indicate that primary use of the building both as a whole and as separate apartments was intended to be as a hotel/motel complex rather than for private dwellings:

- a) It was a motel before its development (Blue Pacific Limited purchased the motel business as well as the land).
- b) The application to Council for building consent described the property use as apartment (despite the form giving illustrated uses of residential/commercial/residential), but the specification was for building extensions and a producer statement provided by the designer stated that it was for “Alterations and additions to existing motel”.

- c) Drawings and correspondence from the designer to Council also refer to “Alterations and additions to Blue Pacific Motel”.
- d) Council required disabled access facilities to be provided for two of the eleven units. This is a requirement for commercial (or industrial) buildings, but not for residential dwellings. Council’s inspection records have provision for inspection of “Access for disabled” and “Facilities for disabled” but with the notation “Commercial only”. These items have been checked in November and December 2000.
- e) The apartments were marketed as serviced apartments and investment opportunities, with unit owners having the right to use their units on notice and for a reduced rental charge: such limitations are not characteristic of a private residence.
- f) Agreements for sale and purchase of the units contained a term that they were for “sale of a business as a going concern”.

[56] Further facts subsequent to the issue of the code compliance certificate confirm the commercial use:

- a) Since it was developed Blue Pacific has operated as a provider of holiday accommodation.
- b) After completion of the building work Blue Pacific’s solicitors wrote to Council confirming that all apartments “in the resort” were being managed as holiday rental, under an agreement with the separate owners, and that Blue Pacific Limited was considering an application under s 23 of the Rating Act 1988 on the basis that:

... all of the apartments in the resort will be occupied by the same ratepayer, i.e. the management company under the lease, and all units in the resort will be used jointly as a single property, contiguously”.

[57] In addition to placing emphasis on the residential connotations of “apartment” Mr Shand relied on the fact that the building was converted to unit titles, and units were sold to individual owner investors. I regard that as equivocal in terms of finding of a residential use for the purpose of the *Hamlin* exception. It was dismissed as a relevant factor in *Spencer on Byron*.<sup>49</sup>

The ownership structure selected cannot give rise to or impact upon any duty of care owed by the Council in relation to a commercial building developed and constructed by commercial operators, well able to protect their own interests.

[58] Nor is the possibility of occupation by unit owners for short periods, either whilst leased to the management company or afterwards, a reason to distinguish *Te Mata Properties* and *Charterhall*. The existence of the duty is to be determined at the time that the Council perform its functions. The key question is whether the units are intended at that time to form part of the commercial accommodation operation.<sup>50</sup> The duty cannot spring into existence at a later time because an individual owner decides to make greater personal use.

[59] I find that at the time that any duty of care would have to have arisen (between the time of processing the building consent and the time of issue of the code compliance certificate), the intended use of the building was not stated to be residential nor was it known by Council to be for that end purpose, as contemplated by the *Hamlin* exception. The designation of the building as “apartments” was not enough to characterise the development as residential. The intended use, as appearing from the contemporaneous documents, was commercial.

### **Any duty in respect of health and safety of occupants**

[60] The plaintiffs claim that the Council owed them a duty to safeguard them from possible injury, illness or loss of amenity or by insuring that the building work complied with the building code. They do not allege that they have suffered any actual health or safety related injury or effect although they claim that their health and safety has been jeopardised. They claim that by reason of the Council’s breach

---

<sup>49</sup> *Spencer on Byron* at [96].

<sup>50</sup> *Spencer on Byron* at [97].

of duty to protect their health and safety, they are entitled to recover losses incurred in ameliorating risks to their health and safety. They rely on Baragwanath J's obiter comments in *Te Mata Properties*<sup>51</sup> that there may be room for owners of a commercial building to recover pure economic loss from a local authority if there is something about a building that is a danger to health. The other members of the Court of Appeal did not comment on the point because the claim had not been pleaded and the appeal was decided solely on whether owners of commercial buildings could come within the *Hamlin* exception.

[61] Baragwanath J's reasoning was that the Building Act 1991 (which was not in force at the time of the decision in *Hamlin*) placed great emphasis on health. He considered that such a focus was inconsistent with the theme of vulnerability in *Rolls-Royce*.<sup>52</sup> Whilst he was adamant that a *Hamlin*-style protection was not to be extended to commercial buildings, he stated:<sup>53</sup>

[77] It is in my opinion arguable that the public interest in ensuring that the building stock meets the 50-year life span warrants a cause of action founded squarely on the statutory health and safety considerations. It might indeed be that a judicial response, aimed at ensuring that those responsible for creating leaky buildings which place public health at risk are held liable for the cost of funds received be applied to restoring the building, so that later occupants are not exposed to hazard.

[62] However, a claim to a duty of care based on health and safety concerns was dismissed by the Court of Appeal in *Charterhall*. The primary reason was that the plaintiff was not suing as a person whose health and safety had been put at risk, but rather as an entity whose economic interests had been injured. The Court considered that a claim to loss of income (one of the components of the alleged damage) highlighted the fact that the claim was for damage to economic interests.<sup>54</sup>

---

<sup>51</sup> At [70] – [77].

<sup>52</sup> *Rolls-Royce New Zealand Limited v Carter Holt Harvey Limited* [2005] 1 NZLR, 324.

<sup>53</sup> *Te Mata Properties Ltd* at para [77].

<sup>54</sup> *Queenstown Lakes District Council v Charterhall Trustees Ltd & Anor* [2009] NZCA 374 (CA).

[63] Mr Shand argued that *Charterhall* could be distinguished on the basis that it was clearly a commercial party, as distinct from the private investors in the present case. However, the significant aspect is that the plaintiffs are not suing as people who have suffered from a health or safety problem (and for losses associated with that) but rather for the cost of repairing defects that have now been identified and for economic losses suffered pending repair. Such losses have been categorised as purely economic:

I believe that these principles are equally applicable to buildings. If a builder erects a structure containing a latent defect which renders it dangerous to persons or property, he will be liable in tort for injury to persons or damage to property resulting from that dangerous defect. But if the defect becomes apparent before any injury or damage has been caused, the loss sustained by the building owner is purely economic. If the defect can be repaired at economic cost, that is the measure of the loss. If the building cannot be repaired, it may have to be abandoned as unfit for occupation and therefore valueless. These economic losses are recoverable if they flow from breach of a relevant contractual duty, but, here again, in the absence of a special relationship of proximity they are not recoverable in tort.<sup>55</sup>

[64] I find that the plaintiffs' losses are indistinguishable in nature from the losses of the plaintiff in *Charterhall*, and cannot succeed.

### **Negligent misstatement**

[65] The claims by the five owners who had agreed to purchase units before issue of the code compliance certificate, cannot succeed in light of my finding that the Council cannot owe them a duty of care.

[66] In addition, I find that these owners are unable to establish the necessary reliance because they were already obliged to settle before the code compliance certificate was issued:

- a) all plead that they entered into their agreements ahead of the issue of the code compliance certificate;

---

<sup>55</sup> *Murphy v Brentwood District Council* [1991] 1 AC 398, 475, adopted in *Invercargill City Council v Hamlin* [1994] 3 NZLR 513, 529

- b) the agreements provided for settlement 5 business days after receipt of the certificate of practical completion or later availability of title; and
- c) the agreement provided an express vendor warranty to provide a code compliance certificate by, or within a reasonable time of settlement, but not as a pre-condition to settlement.

### **Other remedies**

[67] For the sake of completeness (in terms of assessing policy factors bearing on the imposition of a duty), I note that dismissal of the plaintiffs' claim against the Council does not leave them without remedies. They still have their claims against the persons with primary responsibility for ensuring the building additions and alterations were properly designed and constructed (the architect, the builder and project manager). There are also contractual claims against the original owner/developer, Blue Pacific Limited. The plaintiffs were able to, and did in some respects, contract for warranties from Blue Pacific Limited, and had the ability to take assignments of its rights (for example under suppliers' guarantees). The fact that those rights are now not worth pursuing because Blue Pacific Limited has been struck off is not a reason to impose a duty of care on the Council: *KeriKeri Village Trust*.<sup>56</sup> The presumed economic vulnerability which underlies the *Hamlin* exception is absent in the commercial and investment context.

### **Decision**

[68] I am not persuaded that any more evidence can assist on the critical question of the intended use of this building. The best evidence is to be found in the Council's file, and the marketing documents produced up to the time that any duty of care came to an end (upon issue of the code compliance certificate). The Council's file has been disclosed, and the parties have produced such documents as they hold related to intended use of the building. Mr Shand argued that the plaintiffs should be given opportunity to explore this question further. It is difficult to see what further

---

<sup>56</sup> *Kerikeri Village Trust v Nicholas* HC Auckland CIV 2006-404-005110, 25 November 2008 at [73].

information could still emerge (this claim has been running for some three years). In my view the plaintiffs cannot succeed on any of their causes of action against the Council.

[69] In the event that I am wrong, I also find that the plaintiffs cannot succeed because they cannot establish a tenable legal basis for their claims. They have already amended their pleading on four occasions. If there was a way of pleading their claims to make them tenable, it could be expected that they would have done so by now. The primary basis for my finding on the strike out application is that the loss which the plaintiffs are claiming is economic loss which cannot be recovered as the plaintiffs cannot bring themselves within the *Hamlin* exception. I do not make a finding on whether or not there could be circumstances in which a local authority could owe a duty of care to an individual occupier or user of a building in respect of health and safety matters.

[70] I grant leave to the Council to apply for summary judgment, and give summary judgment in favour of the Council against the plaintiffs on the causes of action pleaded against the Council. In the alternative, the plaintiffs' causes of action against the Council are struck out.

[71] Counsel did not address me on costs, apart from the fact that in his written submissions Mr Goddard sought costs for two counsel. I see no reason to depart from the usual approach that the successful party should be entitled to costs. In view of the amount of material that had to be prepared and presented, I accept that this is an appropriate case for costs in respect of two counsel. However, as the central issues have largely been determined in line with previous decisions, I do not see any need to award costs other than on a 2B basis. I leave it to counsel to endeavour to agree costs. If they cannot do so, counsel for the Council are to file a memorandum within 15 working days, and counsel for the plaintiffs are to respond within a further 5 working days.

---

**Associate Judge Abbott**