

# Claim against the building industry authority

On 14 September 2002 the unit owners of a multi-unit complex known as "The Grange" issued proceedings against the North Shore City Council (the council) and a number of other parties for the costs associated with fixing their "leaky building".

The unit owners complain that the council was negligent when it undertook the consenting and inspection processes on the Grange in 1999/2000.

As part of that proceeding the council has issued third party proceedings against the Attorney General as the successor of the assets and liabilities of the Building Industry Authority (the BIA).

The council's claim against the BIA relates to the BIA's reviews of the council's consenting and inspection processes in 1995, 2001 and 2003, and the reports it issued following those reviews. According to the BIA's own literature, these reviews/reports were undertaken to assist the council in the performance of its functions under the 1991 Building Act

The council says that the BIA owed it a duty of care when it undertook the 1995 review and provided the council a report on its findings (the review process). The council claims that the BIA breached that duty of care because it negligently failed to identify any concerns regarding the council's approach to processing consents and carrying out inspections in respect of

monolithic clad buildings. This was despite including in the review process, a building that used a monolithic cladding system similar to that used at the Grange. The council says that if the review process had been carried out with reasonable care, these issues would have been identified and drawn to the council's attention and then addressed by the council.

The council also complains that from 1998 to 2000 the BIA received information which made it aware of serious weathertightness issues in respect of monolithic face fixed cladding, but negligently failed to pass that information onto the council until 2003 by which time the Grange had already been built.

In summary the council claims that the BIA's negligence resulted in the council failing to address what has now been found to be deficiencies in its consenting and inspection regime.

The BIA has applied to have the council's claim struck out. At issue, it says, is whether a novel duty of care should be imposed on the BIA, a small regulatory authority with confined statutory roles, to protect councils from liabilities to home owners, when the court has already found that the BIA itself owes no duty of care to homeowners.

The council has opposed the BIA's application and is arguing that the court should not strike out the council's claim unless the duty of care alleged by the

council against the BIA can confidently be excluded. It says that striking out the claim in this case would risk injustice to the council and its ratepayers. The council argues that the matter should go to a full hearing so that the court can: 1) assess the relative expertise and ability of the BIA and the council to have identified and managed issues relating to code compliance (including weathertightness risks); 2) the extent of the council's relationship with and reliance on the BIA; and 3) the inter relationship of the roles of the BIA and the council.

The BIA's strike out application was first heard by Andrews J in the Auckland High Court on the August 29-30, 2008.

After hearing arguments from both sides Her Honour dismissed the BIA's application saying that "the court was left in the position that both policy and proximity factors were equivocal as to whether a duty of care should be imposed". Andrews J went on to conclude that "It cannot therefore be said that the Council's claim that it is owed a duty of care by the BIA are "so untenable" that the Council's third party notice should be set aside".

The BIA appealed the High Court's decision. The appeal was heard by three judges in the Court of Appeal on February 2-3 of this year. The Court of Appeal's decision is not expected before May 2010. The Court of Appeal's decision will obviously be of interest to all councils in New Zealand.

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