

Councils' liability for leaky buildings- Is the *Dicks v Waitakere City Council* decision a big deal?

By Philippa Fee

Councils have had potential liability to owners of buildings for carelessly carrying out their functions for 30 years. But, the decision of the High Court in the leaky building case brought by Mrs Dicks against the Waitakere City Council ("WCC") has been hailed in the media as a landmark decision. This article examines its significance.

The Facts

Mrs Dicks bought a house which had been built by the first defendant, Hobson Swan Limited. The director of Hobson Swan, Mr McDonald, did the on-site building work. The house was built from a wood fibre insulating board known as "Triple S", on which was laid wire mesh and stucco. The court noted that stucco buildings have been built since the 9th century. From the 1940s stucco buildings have used metal flashings and cavities to prevent water damaging the wooden structure. Mrs Dicks' house as built had only head flashings on the windows. It was supposed to, but did not, have sealant at the joints.

The court noted that there was a conflict between the myriad of industry publications dealing with the window installation for this kind of construction. It concluded that the statutory environment required head flashings, but elsewhere proprietary seals are permissible if installed in accordance with accepted practice. A suitable silicon sealant, properly applied, would suffice.

Since the builder had failed to install any form of sealant at the joints he was found to be in breach of good practice¹.

As is often the case with claims of this kind, there were a number of contributory causal factors. The cladding was approved at the time the house was built, but had since been withdrawn from the market as being an unsuitable material. There was poor workmanship on the roof which led to floods in respect of which a number of insurance claims were made. Mrs Dicks' nephew did landscaping work which built up the ground level to such a level that this also resulted in water entry. However, with little analysis or discussion, the judge effectively disregarded these factors and

said the lack of seal around the windows was, by itself, enough to make the house uninhabitable.

WCC's Case

WCC contended that their duty of care was limited to:

- Exercising reasonable care and skill when issuing the building consent;
- Exercising reasonable care and skill when carrying out an inspection that they elected to perform.

WCC argued that there was no duty to carry out further inspections even where such inspections might be prudent. The duty to be careful only arises when an inspection is carried out. Deciding how many inspections there should be is a policy decision, which is not susceptible to liability.

The distinction between matters of policy, which do not generally give rise to liability, and matters of operation, which may, has long been a part of the law relating to local authorities' liability. While the courts will readily find councils liable for an act carelessly carried out, they are reluctant to find liability where the local authority makes a policy decision not to act. This recognises that councils must allocate their limited financial resources as they see fit.

Issue of Building Consent

The plans and specifications showed nothing about the fitting and sealing of aluminium windows. In fact, the specifications were to be used for a weatherboard house. But WCC argued the lack of detail was irrelevant because installation of a proprietary seal entailed no more than the purchase and application of silicon from a tube – clearly something that a reasonably competent builder would know how to do.

The court found that the absence of directions in the plans or specifications would not constitute negligence if WCC had a sufficiently robust inspection process to discern whether the work in critical areas was in fact up to standard. In



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[1] The case contains a discussion on the liability of the director for the faulty building work, which is not discussed in this article.

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other words, the court said that the application of sealant was such a crucial matter that if there is no specification of it in the plans or specifications, then proper inspections are needed to check that it had been applied.

Inspections

As was standard practice, WCC officers performed four inspections of the property. The third inspection was a "pre-lining" inspection; the fourth was the final inspection. None of the inspections were specifically for the purpose of checking that the sealant was properly applied. Indeed, at the time of the final inspection (by which time the sealant should have been applied) the property is likely to have been painted and so the sealant may not be visible.

The plaintiff's expert contended that while it was not the practice of councils at the time, WCC ought to have carried out an additional "pre-plaster" inspection since this was the only way that WCC could know whether the sealant had been applied and therefore that the house complied with the Building Code. This argument, if accepted, would require all councils to add an extra inspection to the four they already carry out.

With little discussion of the evidence or the legal principles, the court rejected all the exonerating circumstances relied on by WCC, namely that it complied with acceptable standards at the time; that councils had not completed the transition from the former prescriptive regime to the new permissive "performance-based" regime; and that the council's decision to handle new methods of construction with new skills was a policy rather than an operational decision.

"I reject the notion that councils were permitted to pay lip-service to the legislation. Rather their task was to implement it. The [decision of] Hamlin decides that the courts will enforce that obligation by providing injured parties with a cause of action in negligence."

An essential part of the judge's reasoning was that the cladding system used on Mrs Dicks' house relied on sealants as a substitute for cavities and flashings. Since sealant was therefore crucial to make sure the property was weather-tight, the inspection regime should check for this. The policy/operational dichotomy was side-stepped by the court also finding a breach at the operational level. An inspector carrying out the final inspection should have used a key to probe the joint to make sure sealants were present. Described in this way, WCC's breach was an operational one in that the final inspection was carried out in a negligent manner.

As is often the case, this decision raises more questions than it answers. It seems that the builder did not use *any* sealant on Mrs Dicks' house. But does the council have a duty to check the *adequacy* of the sealant? If so, what areas must be probed? Does the decision extend to other failures of simple workmanship, like the failure to hammer in a nail or properly secure a bolt? Is it implicit in the *Dicks* decision that the council has to identify what parts of a construction are "crucial" from those which are not crucial? If so, what is the basis for this differentiation?

Of course the law evolves in an incremental way and it is not possible to say how far this decision will be applied. What one can say is that the decision firmly rejects the notion that a council's statutory duty will be discharged by conforming to what all councils were doing at the time. It also demonstrates a willingness to find liability on the council's part where a policy decision is behind a negligent inspection regime. To this extent, the case is a big deal.

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