

# INSIGHT



**ISSUE 002: May 2008 Greg Jones & Richard Tosh**

## **Council's and Designers' Liability For Leaky Buildings – Is there now certainty?**

**On 30 April 2008, Mr Justice Heath handed down a 172 page decision in *Body Corporate 188529 & Ors v. North Shore City Council & Ors*. Whilst providing clarification on some important areas relating to the liability of councils and designers for leaky buildings, it is fair to say that the decision leaves a number of issues “up in the air”.**

### **Facts**

“Sunset Terraces” is a residential complex of 21 townhouses. The developers conceived the townhouse development and were responsible for supervising the construction work. They commissioned the designer to prepare plans and specifications to obtain a building consent. Construction began in late 1997 and continued into 1998. The council undertook between 77 and 120 inspections, issuing a final code compliance certificate on 11<sup>th</sup> September 1998. The body corporate and a number of individual owners sought damages against the developers, the council and the designer in negligence. Their claims were based on weathertightness defects.

### **Causes of Water Ingress**

A total of 19 defects were identified by the plaintiffs, but having heard the evidence, the court assessed that about 75% of the damage caused by water ingress occurred through the failure to waterproof the balconies/decks adequately and about 20% could be attributed directly to the lack of weathertightness at the top of the parapet wing walls. The balance of 5% could be attributed to lower level ingress caused by a number of issues.

The fact that the court adopted this approach and did not deal with each defect individually was possible because all of the parties were arguably involved in all of the damage.

### **The Issues**

A number of important issues were considered by the court and we comment on some of these below.

### **The Council**

Is a duty of care in negligence owed to “homeowners”?

The court confirmed that a council continues to owe a duty of care in negligence to an owner or successor in title of a dwelling, despite the changes in the socio-economic conditions and building legislation in New Zealand since the *Hamlin* decision on this issue in 1996. This is of course good news for the insurers of the other parties to leaky building litigation because it means that if the council had an involvement, it is potentially “in the gun” and liable to make a contribution.

The commercial/residential divide

The courts have in two previous cases declined to impose duties of care in relation to buildings constructed or made for commercial purposes. The court in this case decided that in order to determine whether a duty of care was owed by a council, the focus should be on the intended end use of the building, as stated in the plans and specifications submitted in support of the application for a building consent. This is important because what it means is that if a unit was originally intended for residential use but was subsequently sold and used for a commercial purpose, the council will in principle owe a duty of care to the new commercial owner.



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The court did not consider what would be the situation in a “mixed use” development where the end use was intended to be residential for some units and commercial for others.

## What is the nature and extent of the council’s duty of care to “homeowners”?

The court stated that the council’s duty is to take reasonable care in performing the three regulatory functions entrusted to it, namely deciding whether to grant or refuse a building consent application, inspecting the construction to ensure compliance with the building consent issued and certification of compliance with the Building Code. The Council is required to be satisfied on reasonable grounds of these issues.

## The effect of “manifested damage”

The court stated, in a somewhat puzzling section of the judgment, that a purchaser (or subsequent purchaser) of a unit is not removed from the scope of the council’s duty, or barred from suing on it, merely because he acquires the unit after damage has manifested itself. This would appear to mean, for example, that if damage became “reasonably discoverable” in 2004 and the subsequent purchaser bought the unit in 2008, the council would owe this person a duty of care but the purchaser would be required to issue proceedings by 2010 to avoid them being time-barred under the Limitation Act. But the court said that this purchaser may not be entitled to recover as a result of failing to inspect the unit, failing to make inquiries about the extent or nature of visible damage or contributory negligence.

## Does the council owe a duty to lessees and assignees?

It is interesting to note that the court did not see a problem in principle with a duty of care being owed to a lessee or a cause of action being assigned from an owner to a subsequent purchaser, although it was decided that the lessee and assignee could not succeed in their claims on the facts of this case.

## **The Designer**

The designer was sued on the basis that he was negligent in preparing the plans and specifications and in issuing practical completion certificates.

In relation to the plans and specifications, the court decided that despite a lack of detail, the units could have been constructed in accordance with the Building Code from them if the builders had referred to known manufacturers’ specifications. The court had held that to be an appropriate assumption for council officials to make when issuing the building consent and it decided that the same tolerance ought also to be given to the designer. The fact that the designer was only paid around \$12,000 to prepare the plans and specifications and obtain a building consent appears to have weighed in favour of the designer’s argument that he only had a limited role in the development.

Turning to the practical completion certificates, the evidence established that the letters sent by the designer to the developer’s solicitors were for the purpose of releasing monies from financiers to meet costs incurred in the course of the development. There was only evidence that one owner received a copy of a certificate of practical completion, but that owner did not give evidence, in explicit terms, that he relied upon the certificate to complete his acquisition of the unit. As a result the court decided that the “proximity” between the owner and the designer was insufficient to give rise to a duty of care and, in any event, any loss suffered would be too “remote” to be claimable. The court stated that unlike the council’s obligations to inspect and to certify code compliance, there could be no “community expectation” on a designer to certify practical completion. Thus, it is necessary to prove actual reliance in order to establish that any loss has been suffered as a result of negligence of a designer in these circumstances.



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## The Capacity of the Body Corporate to Sue

The court decided that, applying the Unit Titles Act 1972, the body corporate only had standing to sue for losses caused to common property, not in respect of damage done to individual units. This is an important limitation on the ability to sue because the body corporate is often used as a vehicle for attempting to claim for damage to individual units in circumstances where the actual owner is precluded from making a claim because, for example, they bought with knowledge of defects.

### Contribution

Allegations of contributory negligence against a number of the individual owners were rejected. In terms of contribution, the court apportioned responsibility 85% to the developer, and 15% to the council. Naturally, this favourable apportionment will only assist a council when the developer is solvent and will meet its share of the judgment.

### Overall Result and Comment

The court has provided clarification in some areas, but uncertainly remains in relation to others with the court leaving issues open or making it clear that how they are to be determined will depend on the facts of the particular case. That said, the decision does provide a great deal of clarity on a number of key issues: for example, the council's duty to owners of "commercial" units, the liability of designers and the body corporate's right to sue.

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## Best People... Best Practice...

We wish to announce the appointment of **Bradley Alcorn** who joins Jones Fee from working for an Auckland firm which specialises in mortgage security and debt recovery work. Upon joining Jones Fee he will work for Craig Langstone and Philippa Fee assisting in commercial litigation work.

Another recent addition to the team is **Hannah Stanley**. Hannah is currently studying Professionals and will be admitted in September this year. Hannah provides support for the partners in a number of different fields, including insurance and commercial litigation.

