Spencer on Byron – the Council's duty of care

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The leaky homes saga which has been a feature of New Zealand legal battles for the better part of the last decade has had a new chapter opened following the recent Supreme Court decision in *Body Corporate No. 207624 v North Shore City Council (Spencer on Byron)*[1]. The consequences of this long anticipated decision will be far reaching as it provides authority for claims against Councils by all types of building owners, and not just residential home owners.

This article will cover the substance of the decision and examine the legal position that this landmark decision has now created. The ramifications for councils nationwide will be substantial as the Supreme Court has found that the scope of negligence claims in respect of the statutory responsibilities of councils in the inspection, approval, and compliance of building works will not be narrowed by the type of building erected.

Prior to this case, decisions of lower courts have held that a Council's duty of care did not extend to certain non-residential buildings such as schools,[2] charter lodges,[3] and a motel.[4] Following these decisions, plaintiffs with commercial properties have been reluctant to pursue claims against councils because of an apparent distinction between duties of care owed to residential and non-residential building owners. The effect of the Supreme Court decision will be to open the door to potential claims that parties have been unwilling to pursue against their local council.

It should be noted that limitation provisions still apply to claims against council in negligence. We have addressed limitation issues in a previous article and we encourage you to contact us for a copy if you are interested in accessing this information.

<u>The case of *Spencer on Byron*</u>

This case centres on the leaky 23 storey building known as Spencer on Byron which is located on Byron Avenue in Takapuna. The development was a mixed purpose construction with the majority of the premises to be used as a motel and six penthouse apartments as residential dwellings. The 249 hotel rooms were constructed and these were sold as unit titles to individual owners, 219 of whom, in conjunction with the body corporate, brought proceedings against the Council for breach of duty of care owed in relevant stages of the building's planning, construction, and code compliance under the Building Act 1991.

The Council applied for the claim to be struck out on the grounds that the building was not purely residential and was primarily a commercial venture and accordingly, no duty of care was owed. In the Court of Appeal the Council's application was successful, however, the owners appealed to the Supreme Court on this matter of considerable import.

The core issue for the court to determine was whether a duty of care, which has been accepted as existing for buildings of purely residential nature, should be extended to include

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[1] *Body Corporate No. 207624 v North Shore City Council* (SC 58/2011) [2012] NZSC 83

[2] *Mt Albert Grammar School Board of Trustees v Auckland City Council* HC (Auckland) CIV-2007-404-4090, 25 June 2009.

[3] *Queenstown Lakes District Council v Charterhall Trustees Ltd* [2009] NZCA 374, [2009] 3 NZLR 786.

[4] *Three Meade Street Ltd v Rotorua District Council* [2005] 1 NZLR 504

constructions of a commercial type. Submissions of counsel for the Council argued that the distinction between residential and non-residential buildings has a basis in *Hamlin*[5] and the liability should be confined on the basis of policy implications.[6] The Council submitted that the risk of defect or construction failures in non-residential properties should be borne by those primarily responsible for the build (i.e contractors, engineers, architects, etc).

In a majority decision (Elias CJ, Tipping, McGrath and Chambers JJ) the Court held that the Court of Appeal was incorrect to strike out the claim and that entering summary judgment for the Council was inappropriate in the circumstances.[7] The Courtôs judgment built from previous jurisprudence which has consistently found that local authorities owe a duty of care to residential building owners when inspecting their construction.[8] In the earlier Supreme Court decision in *Sunset Terraces*[9] it was confirmed that there is sufficient proximity (as required by the Building Act 1991) in the relationship between the Council and residential building owners that the duty of care is maintained. However, the judgment of *Sunset Terraces* was carefully delivered so as not to open the floodgates for commercial applicants whose cases would need to be considered for merits on a case by case basis. It was appreciated at the time that *Sunset Terraces* was being heard, that there was a likelihood that non-residential defective buildings were going to arise and pursue litigation.

In *Spencer on Byron*, McGrath and Chambers JJ state, after referring to the *Sunset Terraces* decision:

The effect of this decision is to remove the qualification to proposition (2), namely "designed to be used as homes". The duty of care is owed regardless of the nature of the premises.[10]

The Privy Council decision of *Hamlin,* relied upon by the Council in this instance, was distinguished by the Court as correctly decided prior to the introduction of the Building Act 1991 and the Court declined to review the case in any substance.[11]

The judgment stops short of finding any breach by the Council, thereby leaving the plaintiffs to pursue their claim in the High Court at a later date. It appears likely that now the scope of the Councilôs duty of care has been established that the claim will proceed to establish breach and consequent damages. The decision has confirmed that the duty of care extends to owners past and present as in this case many unit owners sold their interests for a considerable loss when the building was discovered to be leaky. The scope of this finding also enables subsequent purchasers to sue for breach of the owed duty by reason of the cause of action having accrued to a predecessor in title.[12]

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[5] *Invercargill City Council v Hamlin* [1996] 1 NZLR 513 (PC)

[6] *Body Corporate No. 207624 v North Shore City Council* (SC 58/2011) [2012] NZSC 83 at [10]

[7] *Body Corporate No. 207624 v North Shore City Council* (SC 58/2011) [2012] NZSC 83 at [5].

[8] *Body Corporate No. 207624 v North Shore City Council* (SC 58/2011) [2012] NZSC 83 at [215]-[218].

[9] *North Shore City Council v Body Corporate 188529* [2010] NZSC 158, [2011] 2 NZLR 289 (Sunset Terraces)

[10] *Body Corporate No. 207624 v North Shore City Council* (SC 58/2011) [2012] NZSC 83 at [216].

[11] *Body Corporate No. 207624 v North Shore City Council* (SC 58/2011) [2012] NZSC 83 at [126].

[12] *Body Corporate No. 207624 v North Shore City Council* (SC 58/2011) [2012] NZSC 83 at [215] citing *Sunset Terraces* at [85].

Unfortunately, the Court restricted the duty to claims arising out of the Building Act 1991 recognising that whilst the same conclusions are likely in respect of the 2004 Act, the position is reserved. McGrath and Chambers JJ states:

This decision, like Sunset Terraces, is restricted to work done by councils while the Building Act 1991 was in force. The Building Act 2004 came into force on a variety of dates; for the most part on 31 March 2005. It is likely that the conclusions we have reached in this decision will also apply under the 2004 Act, but we reserve our position in that regard as we have not had detailed argument as to the effect that Act may have had in the area under discussion here.[13]

Even though the judgment has refrained from making a determination on that point it is our considered opinion that the duty of care will arise under the 2004 Act due to the continued obligation for building works to comply with the performance requirements of the Building Code, and the approval, inspection and Code Compliance Certificate regime confirming the same in the 2004 Act. McGrath and Chambers JJ indicate as much when they state:

One of the primary purposes of code compliance certificates is to provide assurance to building users that the building was built properly and accordingly does not have any hidden defects. The fact that Parliament provided that all construction was to be subject to the code compliance certificate regime and that such certificates were to be publicly available strongly suggests that Parliament assumed inspecting authorities' liability for negligent error was not to hinge on the nature of the particular building being constructed.[14]

In light of the views of the Supreme Court, the legal position on the matter of Councils obligations when fulfilling its statutory role of inspecting building plans, construction inspection, and code compliance, is now sufficiently settled to include both residential and non-residential buildings. It is our view that plaintiffs may proceed with bringing claims in negligence against their councils, subject however to time limitations not having elapsed. Given that this new window of opportunity for non-residential building owners has just opened, we are likely to see a flourish of activity as potential claims are tested and resolved.

[13] *Body Corporate No. 207624 v North Shore City Council* (SC 58/2011) [2012] NZSC 83 at [217].

[14] *Body Corporate No. 207624 v North Shore City Council* (SC 58/2011) [2012] NZSC 83 at [222].