Local Authority Liability in New Zealand for Defective Homes

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Abstract:
The liability of local authorities in New Zealand for the issue of building consents and inspection, in respect of domestic homes where the dwellinghouse or home unit is later proved to be faulty, is assessed. The law in this respect differs from that in the U.K. In *Invercargill City Council v Hamlin* (1996) the Privy Council accepted that the decision of the House of Lords in *Murphy v Brentwood District Council* (1991) declining to impose liability for economic loss did not apply in NZ. But the NZ courts have not extended the duty of care on councils to apply to buildings used for commercial purposes. Recently the Supreme Court of NZ in *North Shore City Council v Body Corporate* 188529 (Sunset Terraces & Byron Avenue), has confirmed that local authorities owe a duty of care to the owners of multi-unit dwellings in the issue of building permits, supervision, and code compliance certificates. The duty is owed to both existing and future home owners, but may be reduced by contributory negligence. A 10 year logstop from council approvals applies to claims. In the last decade, problems with leaky homes, through the use of untreated timber and monolithic wall cladding systems, poor design and workmanship, have given rise to a substantial number of claims against local authorities. The provision for claimants of a formal mediation service and adjudication process is assessed. A recent proposal by the Government to assume liability for 25 percent of repair costs, with local councils accepting a further 25 percent, is considered. Conclusions are drawn as to the legal and practical outcomes.
Keywords:
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1 Introduction

This paper sets out the legal position in New Zealand in 2011 concerning the liability of territorial local authorities (city and district councils) for defective homes.[1] The defects may arise from inadequate foundations and water leaks and other causes. The paper considers the history of the determination by courts of liability, issues relating to the limitation period for claims, and the divergence of New Zealand law from U.K. law.[2] The question of liability for other buildings used for commercial purposes, such as hotels and motels is considered. The question of central government responsibility is addressed. The most recent decisions of the Supreme Court of New Zealand in the *Byron Avenue* and *Sunset Terraces* cases (2010) are discussed.[3] Finally, the systems

[1] Local Government Act 2002 (NZ), s 5 (definition territorial authorities). The LGA establishes the governance structure under which district and city councils are consent authorities for urban building work under the Building Act 2004. Regional councils have limited functions in respect of dam construction. In the Auckland region, the former seven local authorities were amalgamated to form a single Auckland Council (super city) from 1 November 2010: Local Government (Auckland Council) Act 2009. As a unitary authority the Auckland Council is the consent authority for all building work in the region. It has inherited liabilities of the former local authorities.

[2] Until the Supreme Court Act 2003 (NZ), the Privy Council (UK) was the highest appellate body in the New Zealand judicial system. The Supreme Court of New Zealand replaced the Privy Council.

[3] *North Shore City Council v Body Corporate 188529 (Sunset Terraces)* [2010] NZSC 158, [2011] 2 NZLR 289 (incorporating Bryon Avenue decision).

available for mediating and determining liability under the Weathertight Homes Resolution Services Act are considered, together with a current proposal of government to share in the burden of repair costs.[1]

2 History of Local Authority Liability for Defective Homes

In 1972, in *Dutton v Bognor Regis Urban District Council*[2] the English Court of Appeal determined that a builder could owe a duty of care in tort law to a subsequent purchaser of a property which had defective foundations. The builder could be liable even though there was no immediate contractual relationship with the subsequent purchaser. More significantly, the Court determined that the local authority could also owe a duty of care to the subsequent purchaser for failing to carry out inspections with reasonable care. The council could be liable in negligence for this failure of duty. Assuming the builder remained solvent, the question of apportionment of liability between the builder and the local authority could be determined having regard to the degree of responsibility for the damage. Lord Denning, Master of the Rolls, was a driving force in the *Dutton* decision.

Within a short period, the *Dutton* decision was followed by the New Zealand Courts. In *Gabolinscy v Hamilton City*[3] the council was found to be liable to the purchaser of a dwelling erected on a former council refuse tip, for subsidence damage occurring ten years after construction. The property foundations were not adequate for the ground conditions.

The validity of the common law in the U.K. came before the House of Lords in *Anns v Merton London Borough Council*[4] being another case involving a claim for faulty foundations and subsidence damage. The Lords considered that on principle negligence liability should be approached in two stages. First, a question arose whether there was a sufficient relationship of proximity between the alleged wrongdoer and the person suffering damage, and secondly, if that proximity existed, it was necessary to consider whether or not there was a reason to exclude liability. This approach containing a presumption of liability advanced the scope of responsibility to a significant level where damage arose.

Returning to New Zealand, the *Anns* decision was followed by the Court of Appeal in *Mount Albert Borough Council v Johnson*.[5] The Court considered the liability of a builder and the council in respect of a block of flats which had been erected on a former refuse tip site. The foundations were inadequate, the dwellings subsided, and the claim was made. The Court held the defendants were jointly and severally liable, and apportioned the damages award at 80 per cent against the builder and 20 per cent against the council. This ratio of apportionment has been commonly adopted in the later decisions. Where the builder is insolvent and recovery cannot be made, under the law the council may be liable to pay the full damages award, and to seek any remedy for recovery of the balance against the insolvent builder.

3 Divergence of New Zealand Law following Murphy decision

In 1984, the House of Lords in the *Peabody Donation Fund* case[6] reconsidered the principled approach to liability enunciated in the *Anns* decision. The Peabody Group was developing a housing estate through a building firm and permits had been obtained from the Lambeth London Borough Council. An error was made in respect of the use of rigid drainage connections. The Lords declined to find any liability against the local authority holding that in determining whether or not a duty of care was incumbent, it was material to take into consideration whether it was just

[1] Weathertight Homes Resolution Services Act 2006.
[2] *Dutton v Bognor Regis Urban District Council* [1972] 1 QB 373.
[3] *Gabolinscy v Hamilton City* [1975] 1 NZLR 150.
[4] *Anns v Merton London Borough Council* [1978] AC 728.
[5] *Mount Albert Borough Council v Johnson* [1979] 2 NZLR 234.
[6] *Governors of the Peabody Donation Fund v Sir Lindsay Parkinson and Co. Ltd* [1985] 1 AC 210.

and reasonable that a duty should arise.[1] Further, the Lords considered that as the loss was essentially economic, and not related to personal injury, that would be a ground for not imposing any duty of care.

Subsequently in *Murphy v Brentwood District Council*[2], another claim relating to defective foundations and economic loss came before the House of Lords. On this occasion, the Lords determined that the loss was purely economic and the council owed no duty of care in exercise of its statutory building bylaw functions. A duty could only arise in respect of foreseeable harm in the nature of injury to health or safety. Furthermore, liability in torts should be established on an incremental basis, and the statements in the *Anns* decision were generally disapproved.

With this background, in 1994 the New Zealand Court of Appeal was faced with conflicting authorities in the case of *Invercargill City Council v Hamlin*.[3] A dwelling had been constructed in 1972 on a boggy site. The depth of foundations was approved by the council but found to be inadequate for the site conditions. Within a short period cracks appeared. Finally in 1989, with the doors sticking, a claim was brought against the local authority for negligence in approving the shallow foundations on the plans and also in failing to carry out proper supervision under the bylaws. The Court noted the differing views expressed by the House of Lords in the *Murphy* decision, as against the earlier *Anns* decision. Cooke P stated "While the disharmony may be regrettable, it is inevitable now that the Commonwealth jurisdictions have gone on their own paths without taking English decisions as the invariable starting point. The ideal of a uniform common law has proved as unobtainable as any ideal of a uniform civil law".[4] The Judge noted that New Zealand did not have any equivalent of the Latent Damage Act 1986 (U.K.), and in 1991, a longstop claim limitation of 10 years from the approval of plans or supervision by the local authority had been introduced for future claims. That particular limitation did not apply to the *Hamlin* facts where the claim was brought before the enactment of the statutory limitation.

Another member of the Court, Richardson J, stated there were six distinct and longstanding features of the New Zealand housing scene which justified a duty of care being owed by the local authorities. First was the high proportion of occupier-owned housing. The second reason was that much of the housing construction was undertaken by small scale cottage builders for individual purchasers and these builders may require some supervision. The third reason was the nature and extent of government support for private home ownership with provision of low interest loans. The fourth ground was the surge in house building construction. The fifth ground was the wider central and local government support for private home building, through model bylaws and close supervision. The sixth reason was that there has never been a common practice for new house buyers, to commission engineering and architectural examinations or surveys of the building or proposed building before purchase. The Judge summed up that the question of whether it was just and equitable for the local authority to be under a wider duty of care had to be considered against this background which was special to New Zealand.[5] The Court held the duty of care could apply to pure economic loss and the council was liable for the cost of repairs. Because the building company had gone out of business and was insolvent, the council would be obliged to meet the full damages award.

That decision of the Court of Appeal then proceeded to the Privy Council.

In *Invercargill City Council v Hamlin*[6], the Privy Council was faced with a relatively unique situation as to whether it should follow the decision of the House of Lords in *Murphy*, or affirm the traditional approach asserted by the New Zealand Court of Appeal. In giving judgment, Lord Lloyd of Berwick, noted that 17 years had passed between the construction of the dwelling and the later determination that the subsidence problems were due to the inadequate foundations. His Lordship

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[1] *Governors of the Peabody Donation Fund v Sir Lindsay Parkinson and Co. Ltd* [1985] 1 AC 210 at 241 (Lord Keith).
[2] *Murphy v Brentwood District Council* [1991] 1 AC 398.
[3] *Invercargill City Council v Hamlin* [1994] 3 NZLR 513 (CA).
[4] *Invercargill City Council v Hamlin* [1994] 3 NZLR 513 at 523.
[5] *Invercargill City Council v Hamlin* [1994] 3 NZLR 513 at 524-525.
[6] *Invercargill City Council v Hamlin* [1996] 1 NZLR 513.

noted the change to New Zealand law in 1991 imposing a longstop on claims of this nature.[1] It was acknowledged that the New Zealand judges were in a better position to decide on the appropriate divergence of the common law. It was also acknowledged that as the loss was economic loss, that no loss occurred until the defect was discovered or was so obvious to a reasonable owner that they would take action. On the facts, the claim was not time barred applying the claim period of 6 years from discovery of the cause of action. This important decision, accepting that in New Zealand a local authority could be liable for negligence in issuing a building permit, and in any failure of the inspection duty, has remained the legal position, but with an exclusion of liability in respect of commercial premises.

4 Limitation Period for Claims

An aspect of several of the earlier claims was the significant time between the construction of the faulty dwelling, and the possible visibility of the damage from subsidence. In the case of *Askin v Knox*, a dwelling was built in 1963 over an old creek bed with approval of inadequate foundations, and a successful claim was made against the council in 1986.[2] Similarly, in the *Hamlin* case, the claim was made 17 years after construction.

Following the *Askin* case, the variable bylaw standards applied by local authorities in respect of building permits, were replaced by a uniform building code for the whole country under the Building Act 1991. The existence of this Act was acknowledged in the *Hamlin* decisions, as being consistent with local authority liability for negligent inspections, and providing an assurance that the scope of liability would in time be capped by virtue of a longstop provision for all claims. Section 91 provided that in any proceedings arising from the construction, alteration, demolition of a building or the carrying out of supervisory functions, civil proceedings could not be brought against any person 10 years or more after the issue of the building consent or a building inspection or issue of a code compliance certificate upon completion. It may noted that had that longstop applied in the earlier *Hamlin* action, the case could not have succeeded.

That longstop provision has remained part of the law, and has been repeated in the replacement Building Act 2004[3]. The existence of that section can be taken as a statutory acknowledgment that civil proceedings are contemplated to be taken against a local authority, and this is a confirmation of the appropriateness of the *Hamlin* determination in the New Zealand context. Furthermore, under the Building Act 2004, a new provision imposes implied statutory warranties for building work in relation to household units.[4] A household unit is defined to mean a building or group of buildings that is used or intended to be used only or mainly for residential purposes and to be used exclusively as the home or residence of not more than one household but does not include a hostel, boarding house, or other specialised accommodation.[5]

The implied warranties state that the building work will be carried out in a proper and competent manner, in accordance with the plans and specifications of the contract, and in accordance with the relevant building consent; the materials used will be suitable for the purpose and will be new unless otherwise stated; the building work will be carried out in accordance with applicable laws and standards; the work will be carried out with reasonable care and skill; and the household unit will be suitable for occupation on completion. The owner of the building or land may take proceedings for breach of the warranties as if the owner were a party to the original building contract, and no provision in an agreement may take away the benefit of the warranty.[6] No time limit applies to the warranties but it would be expected the normal 6 year limitation period would apply.[7]

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[1] Building Act 1991 (NZ), s 91.
[2] *Askin v Knox* [1989] 1 NZLR 248 (CA) (liability found for approval of faulty foundations).
[3] Building Act 2004, s 393.
[4] Building Act 2004, s 397.
[5] Building Act 2004, s 7 (definition household unit).
[6] Building Act 2004, s 396-399.
[7] Limitation Act 2010.

5 Local Authority Liability for Commercial Buildings

In *Three Meade Street Ltd v Rotorua District Council*[1], the High Court was required to determine whether the council owed a duty of care to the purchaser of a motel which was found to have various construction defects in the building. Venning J considered the application of the *Hamlin* ruling and also the decisions in Australia, Canada, and in *Murphy v Brentwood District Council*. The judge concluded that although there may have been a proximity between the council and the defects in the building relating to inspections, there were policy considerations which determined that the council did not owe a duty of care in respect of ownership of a commercial building or work done on the building. The purchaser company should be able to protect itself by contractual arrangements with the developers, and in any purchase contract if being a subsequent owner. The Building Act should not be construed to give rise to any statutory cause of action. The council did not owe a duty of care to the shareholder of the ownership company.

The *Three Meade* decision came before the Court of Appeal in *Te Mata Properties Ltd v Hastings District Council*.[2] In this case, the appellants were purchasers of two motels, and discovered that each suffered from the leaky building syndrome. The owner claimed against various parties including the district council for the cost of remedial works, the loss of value of the property, consequential losses and general damages. Allegations were made of negligence in granting the building permits, inspection of construction, and issue of certificating compliance. The Court of Appeal held that the earlier *Hamlin* decision did not extend beyond domestic dwellings and did not support the claim. A possible basis for liability could arise if health and safety issues had been pleaded, but the claim was for purely economic loss. The test of purpose of the building was the purpose stated in the building permit. Motels were not included as household units under the Building Act. Baragwanath J stated "So Parliament has treated owners of household units" and "dwellinghouses" as deserving special treatment: protection in respect of building quality, privacy and procedures for dealing with leaky building claims."[3]

After traversing the earlier decisions going back to *Dutton*, *Anns*, Baragwanath J observed "There are obvious policy reasons for confining tort liability to home owners on account of the special and distinctive value of the home in any society as giving effect to the basic right to shelter".[4] The Judge stated "I am satisfied at this stage 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".[5] The claim against the council was struck out.

In a subsequent decision *Queenstown Lakes District Council v Charterhall Trustees Ltd*[6], the issue concerned a chimney fault which caused a fire and damage to a luxury lodge. A claim was brought against the council for negligence in approval of the building plans and for failure of adequate inspection. On this occasion, a differently constituted Court of Appeal held the council did not owe a duty of care to the owner of a commercial building to prevent defects, including defects that affected the health and safety of occupants. Owners of commercial buildings were not vulnerable and dependent on councils to protect their interests but were able to engage their own advisers and manage risks through contractual arrangements. The claim was for financial loss. The Court held "In the result we accept …the Building Act does not seek to protect the value of buildings, or income streams from them, for commercial investors."[7] The Court noted again that the imposition of a duty of care in the context of commercial buildings had been rejected in the U.K. following *Murphy*.

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[1] *Three Meade Street Ltd v Rotorua District Council* [2005] 1 NZLR 504.
[2] *Te Mata Properties Ltd v Hastings District Council* [2009] 1 NZLR 460 (CA).
[3] *Te Mata Properties Ltd v Hastings District Council* [2009] 1 NZLR 460 (CA) at [12].
[4] *Te Mata Properties Ltd v Hastings District Council* [2009] 1 NZLR 460 (CA) at [36].
[5] *Te Mata Properties Ltd v Hastings District Council* [2009] 1 NZLR 460 (CA) at [73].
[6] *Queenstown Lakes District Council v Charterhall Trustees Ltd* [2009] 3 NZLR 786 (CA).
[7] *Queenstown Lakes District Council v Charterhall Trustees Ltd* [2009] 3 NZLR 786 at [44].

The conclusion is clear, that the liability of local authorities does not extend to defects in non-residential buildings or to residential type properties established as a commercial venture such as hotels, guest houses and motels.

6 Leaky Home Liability

In the past decade in New Zealand, a major problem has arisen from the construction of buildings which suffer from the ―leaky home syndrome". This problem is distinct from the question of faulty or inadequate foundations, and relates to a combination of approval of inadequate building methods through the former Building Industry Authority under the Building Act 1991, together with design changes and poor workmanship. The major causes of the property leaks have been the use of untreated timber for structural framing, the use monolithic wall cladding systems, with both standards formerly being approved by the Building Industry Authority. A design trend by architects or property developers of dwellings with flat roofs, and no overhanding eaves, has further contributed to the problems with building leaks. In addition, poor workmanship in failing to install flashings around metal windows and other joinery, and widespread use of plastic sealants which break down, have resulted in ingress of water. Further design changes removing any air separation space between the building framing and outside cladding, partly due to insulation requirements, have exacerbated the rotting of wooden framing where water has penetrated the structure. The mould problems and costs of remediation of leaky homes has affected thousands of dwellings and other buildings, and has affected the health and wellbeing of many residents.[1]

In principle, the question of liability of a local authority has been determined by the *Hamlin* decision, namely that a duty of care is owed in respect of residential properties in relation to building consents, inspections, and the issue of code compliance certificates. The liability of local authorities has been confirmed in two recent decisions by both the Court of Appeal and the Supreme Court. The decisions known as *Sunset Terraces* and *Byron Avenue*, involved the owners of two multi-unit developments which were affected by water tightness issues and suffered significant damage from water ingress.[2] The claims against the local authority, the North Shore City Council, were substantial, to the extent that claims against other parties and the apportionment of liability, including the building developers, architects and subcontractors, would not necessarily be met due to insolvency.

In the *Byron Avenue* case, involving a 14 unit block of residential apartments, the council carried out nearly 100 inspections of the property, but within 4 years, water ingress was occurring around windows and causing structural damage. The High Court had found the council had been negligent in carrying out the inspections, and there was a need to repair and re-clad the units. The fact that some of the owners may not have obtained a ―land information memorandum" from the council (prior to purchasing the unit) was not a bar to an individual claim, but could be relevant to a reduction in the award of say 25 per cent for contributory negligence. The Body Corporate would be treated as agent for the unit owners in respect of the common property, and could represent the owners in a collective action. In respect of *Sunset Terraces* case, the fact that the ownership structure of some property owners was through a company or trust would not affect the plaintiff's right to claim for what were essentially economic losses. The Court of Appeal upheld the liability of the council.[3]

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[1] In *North Shore City Council v Body Corporate 188529 [Sunset Terraces]* [2010] 3 NZLR 486 (CA), at [64], Baragwanath J refers to research that estimates that 80,000 houses built with monolithic cladding in the 1990s had leaked or would leak. The reference is to Howden-Chapman P, Bennett J, Siebers R (eds), *Do Damp and Mould Matter? Health Impacts of Leaky Homes* (Steele Roberts, Wellington, 2009).

[2] *North Shore City Council v Body Corporate 188529 (Sunset Terraces); North Shore City Council v Body Corporate 189855 (Byron Avenue)* [2010] NZSC 158, [2011] 2 NZLR 289 (SC). Affirming *O'Hagen v Body Corporate 189855 (Byron Avenue)* [2010] 3 NZLR 445 (CA); *North Shore City Council v Body Corporate 188529 (Sunset Terraces)* [2010] 3 NZLR 486 (CA).

[3] *O'Hagen v Body Corporate 189855 (Byron Avenue)* [2010] 3 NZLR 445 (CA); *North Shore City Council v Body Corporate 188529 (Sunset Terraces)* [2010] 3 NZLR 486 (CA).

On further appeal, the Supreme Court (in a judgment in December 2010) affirmed the divergence of New Zealand law in the *Hamlin* decision from the U.K. position. Elias CJ stated that she did ~~"n~~ot consider it would be principled to introduce restrictions on the liability of territorial authorities according to the form of ownership, the type of residence, or the value of the building".[1] The council argued that the *Hamlin* decision should no longer apply, but the remaining four Judges of the Court stated ~~"H~~Hundreds, if not thousands, of people must in the meantime have relied upon the proposition that the 1991 Act had not affected the common law position. For this Court to defeat that reliance retrospectively by holding that the true position was otherwise would represent an inappropriate use of our ability to depart from a previous decision of the Privy Council".[2]

The Court further stated ~~"T~~The duty affirmed in *Hamlin* is, in any event, a soundly and firmly based principle of New Zealand law. There are good policy reasons for it."[3] In response to a submission from the council that the duty should apply to single owner-occupied dwellings alone, and not multi-unit apartments that could be rented out to tenants, the Court stated ~~"T~~The duty affirmed in *Hamlin* is designed to protect the interest citizens have in their homes. As a matter of principle and logic that duty should extend to all homes, whatever form the home takes. Distinctions based on the ownership structure, size, configuration, value or other facets of premises intended to be used as a home are apt to produce arbitrary consequences. Furthermore the *Hamlin* duty must be capable of reasonably clear and consistent administration".[4]

The Court concluded ~~"F~~For these reasons we agree with the Court of Appeal that a building's intended use, in accordance with the plans lodged with the council, is the most appropriate determinant of the scope of the *Hamlin* duty. Councils owe a duty of care, in their inspection role, to owners, both original and subsequent, of premises designed to be used as homes".[5]

The fact that with reference to the *Byron Avenue* building, the council had not issued a code compliance certificate, did not negate the duty of care in respect of acts and omissions prior to that point in time. The Court observed that the term ~~"i~~inspection" was defined under the former Building Act to mean ~~"t~~the taking of all reasonable steps to ensure that any building work is being done in accordance with the building permit".[6]

Regarding a liability issue that could arise where a claim had been brought and determined, and then the property had been sold, the Court considered a number of situations. The potential for an accrual bar was born out and reduced by the longstop 10 year limitation. It was held the duty owed to a first owner would not be transferred to the second owner on sale nor would the loss. The duty would be independently owed to the second owner and in principle that owner should be able to recover loss in respect to any breach of duty owed to that person independently of the first owner's position.[7]

Where there was a reasonable possibility of intermediate examination by a purchaser, the omission to carry out an inspection could be relevant to a question of contributory negligence or failure to mitigate, but would not defeat the claim. Further, the law provides for a prospective owner to request a land information memorandum (LIM report) from the local authority which could possibly include information as to the property being a leaky home. Where a report was not obtained in this situation, the failure to obtain the report could amount to contributory negligence

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[1] *North Shore City Council v Body Corporate 188529 (Sunset Terraces); North Shore City Council v Body Corporate 189855 (Byron Avenue)* [2010] NZSC 158, [2011] 2 NZLR 289 (SC) at [7].

[2] *North Shore City Council v Body Corporate 188529 (Sunset Terraces); North Shore City Council v Body Corporate 189855 (Byron Avenue)* [2010] NZSC 158, [2011] 2 NZLR 289 (SC) at [23].

[3] *North Shore City Council v Body Corporate 188529 (Sunset Terraces); North Shore City Council v Body Corporate 189855 (Byron Avenue)* [2010] NZSC 158, [2011] 2 NZLR 289 (SC) at [26].

[4] *North Shore City Council v Body Corporate 188529 (Sunset Terraces); North Shore City Council v Body Corporate 189855 (Byron Avenue)* [2010] NZSC 158, [2011] 2 NZLR 289 (SC) at [49].

[5] *North Shore City Council v Body Corporate 188529 (Sunset Terraces); North Shore City Council v Body Corporate 189855 (Byron Avenue)* [2010] NZSC 158, [2011] 2 NZLR 289 (SC) at [51]. The Court left open for later decisions application of the duties of care to particular premises.

[6] *North Shore City Council v Body Corporate 188529 (Sunset Terraces); North Shore City Council v Body Corporate 189855 (Byron Avenue)* [2010] NZSC 158, [2011] 2 NZLR 289 (SC) at [62]. Building Act 1991, s 76(1)(a).

[7] *North Shore City Council v Body Corporate 188529 (Sunset Terraces); North Shore City Council v Body Corporate 189855 (Byron Avenue)* [2010] NZSC 158, [2011] 2 NZLR 289 (SC) at [72].

and reduce the liability.[1] A council may be liable for negligent errors or omissions in the content of a LIM report.[2]

In summary, the Court confirmed that the *Hamlin* decision was correctly made; councils owe a duty of care in their inspection role to owners, both original and subsequent, of premises designed to be used as homes; subsequent purchasers of such premises are not barred from claiming for breach of the duty owed to them solely by reason of a cause of action having accrued to a predecessor in title. As noted, the duty of care is owed in respect of a property erected as a residential property or home (including a unit rented out or leased), but does not extend to a property erected for a commercial purpose, such as a hotel, motel, school, or industrial purpose.

7 Liability for Actions of Independent Certifiers

The former Building Act 1991 (repealed 2004) provided for developers a choice to use independent certifiers for approval of building plans, inspections, and the issue of a code compliance certificate. A limited number of private companies or persons were approved as certifiers for this purpose. A condition was that the certifier should have adequate insurance cover for public liability claims. The Building Industry Authority was empowered to approve the use of the independent building certifiers, in place of a local authority. Where the certifier approved building plans, carried out the building inspections, and issued a code compliance certificate, the local authority had no discretion to reject the approvals.[3]

In all cases where a local authority is the building consent body, involving a defective building or leaky home syndrome, the local authority would be one of the primary defendants, as the local authority would have sufficient resources to pay the full amount of any damages award. However, where a private certifier is involved in the whole approval and inspection process, the local authority has no legal liability or responsibility. That outcome has been upheld in the Court of Appeal. Consequently, where the certifier has gone into liquidation and the builder is also insolvent (being a not uncommon feature), a property owner may be unable to succeed on a claim or recover any damages awarded.[4]

8 Liability of Central Government (Crown)

Under the Building Act 1991, the Building Industry Authority was constituted with the function of making determinations on the accreditation of building products and processes, to the effect that where an accedited process was used, that standard would be the maximum standard required under the building code. Where the standard applied, a local authority was not entitled to impose a higher standard. The use of untreated pine timber for framing was part of an approval issued by the Building Industry Authority, together with the use of fixed faced monolithic cladding systems over the untreated timber. It became common ground from 1998 that this approval, given in 1995, was the basis of the growing leaky building syndrome complaints. Further, the approval of an independent certifier by the Building Industry Authority required the latter body to be satisfied that the certifier carried reasonable insurance cover in case of any liability.[5] With this background, the liability of the Crown for the actions of the Building Industry Authority itself became important, especially in a situation where an independent certifier had been employed but was insolvent, and the builder might also be insolvent.

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[1] *North Shore City Council v Body Corporate 188529 (Sunset Terraces); North Shore City Council v Body Corporate 189855 (Byron Avenue)* [2010] NZSC 158, [2011] 2 NZLR 289 (SC) at [76]-[84]. See also Local Government Official Information and Meetings Act 1987, s 44A (provision to obtain LIM report from council as to factors affecting a property).

[2] *Vining Realty Group Ltd v Moorhouse* [2010] NZCA 104 (error in recording water permit for rural property).

[3] Building Act 1991, ss 51-57. The system was a partial privatisation objective of the government. The Building Act 2004 has omitted the provision for private certifiers.

[4] *Auckland City Council v McNamara* [2010] 3 NZLR 848 (local authority under no liability for actions of independent certifier). Independent certifiers had a minor share of the building consent process.

[5] Building Act 1991, ss 7, 51, 56, 59.

In *Attorney-General v Body Corporate 200200*[1] the body corporate representing the 153 unit owners of the Sacramento complex claimed damages against the Building Industry Authority, together with other defendants, for damages for repairs estimated at approximately $20m (10m pounds). The Attorney-General, on behalf of the Crown and the Building Industry Authority moved to strike out the cause of action against the BIA. The Court of Appeal noted the background causes of the leaky building syndrome which applied to the Sacramento complex, and considered the issue of principle as to whether the BIA could owe a duty of care to the building owners in addition to a duty of care owed by the building certifier company. The Court determined that policy considerations pointed against a duty of care, namely that the roles of the BIA were of a quasi-judicial or legislative nature, and where building certifiers were involved their certificates were conclusive.[2] Imposing a duty on the BIA would have significant resource implications for the BIA and its management of the Building Act 1991. The Court stated that maladministration by a public body was not in itself a ground for awarding damages. Importantly, proximity considerations pointed against any situation or duty to the building owner.

Likewise, the Court could not find that any duty of care would be owed to the building owner in the approval of a private building certifier, who subsequently went into liquidation and would be unable to meet any damages claim. The Court concluded that the relationship between the BIA and the building owners was extremely limited and matters of proximity and remoteness and causation were not able to be established. The claim against the BIA (and the Crown) was struck out.[3]

In considering the justice of this decision, it may be noted that, having regard to the earlier decisions and criticisms of the inadequacies of the Building Act 1991, the government moved to reform the law and practice by enacting the comprehensive Building Act 2004.[4] The Building Industry Authority was disestablished and replaced by an approval system under a new Department of Building and Housing. The provision for independent certifiers was abolished. A system of licensed building practitioners is established to improve the quality of specified work.[5] Although the Crown is presently under no liability directly for the leaky home crisis, the Crown is offering a partial grant of up to 25 percent of repair costs (without any admission of liability) under pending legislation (considered below).[6]

The present situation remains that the local authority will continue to be the building consent authority, and potentially liable for negligence in the approval of building plans, inspections, and issue of code compliance certificates, in respect of residential properties. Further, to the extent that in many claims the original architects, builders, subcontractors and other persons who may have a primary or secondary liability, may no longer be solvent or able to undertake remedial work, the local authority will be the "last man standing" and may be liable for the whole of the losses and damages established.

9 Weathertight Homes Resolution Services

Recognising the major and serious problems with the substantial number of leaky home claims arising, and the fact that ordinary household insurance policies do not usually cover losses arising from building deterioration or water ingress from normal rainfall, the government enacted the Weathertight Homes Resolution Services Act 2002. The Act established a process whereby a claim could be made to the Service for an assessment of the remediation costs, and for mediation if

[1] *Attorney-General v Body Corporate 200200* [2007] 1 NZLR 95 (CA) (Sacramento complex).
[2] *Attorney-General v Body Corporate 200200* [2007] 1 NZLR 95 (CA) at [62]-[69] .
[3] See also *Attorney-General v North Shore City Council* [2010] NZCA 324 (The Grange) (further claim by council of duty of care owed by BIA struck out).
[4] Hunn D, Bond I, Kernahan D, "Report of the review group on the weathertightness of buildings to the Building Industry Authority" 31 August 2002 (report critical of performance by BIA).
[5] The Building Act 2004, part 4 (system of licensed building practitioners to undertake or supervise specified works) .

[6] Weathertight Homes Resolution Services (Financial Assistance Package) Amendment Act 2011.

possible of the liability. Due to the volume of claims and increasing complexity of issues, the Act was replaced in 2006.

The Weathertight Homes Resolution Services Act 2006 states the purpose, namely "The purpose of this Act is to provide owners of dwellinghouses that are leaky buildings with access to speedy, flexible, and cost-effective procedures for assessment and resolution of claims relating to those buildings".[1]

Several types of claim are stipulated. A dwellinghouse claim relates to a property built before 1 January 2012, and within a period of 10 years. The claimant must own the house and the claim can be brought where "water has penetrated it because of some aspect of its design, construction, or alteration, or of materials used in its construction or alteration; and the penetration of water has caused damage to it". Provision is also made for claims in respect of single dwellings in a multi-unit complex, and a multi-unit complex, and common area only claims, in respect of a complex.[2]

Provision is made for common representation in respect of multi-unit complexes. The procedures apply to a dwellinghouse which is leaking, and by definition, a dwellinghouse includes an apartment, flat, or unit and any attached garage or shed, but "does not include a hospital, hostel, hotel, motel, rest home, or other institution".[3]

Where a dwellinghouse owner has an eligible claim, the Resolution Services will arrange for an assessment to be made of the extent of the claim and estimated cost of remediation of the damage.[4] That assessment can then be taken to mediation with limited cost to the applicant. The mediators have powers to require other responsible parties to join in the procedure.[5]

Where a settlement is reached, and the local authority is the consent authority, it will probably be required to contribute to the award, in a proportion in the vicinity of 20-30 per cent responsibility. Where other parties found to liable default, the local authority may be required to meet a greater share of the liability.

If mediation is not succesful, the parties may take the matter to the Weathertight Homes Tribunal for compulsory adjudication. The Tribunal has the powers of a court to act in an appropriate manner in finding responsibility and apportioning liability. The claim may be for any remedy available in a court of law, and may include a claim for general damages to cover mental distress. A determination can be the subject of an appeal to the High Court.[6]

Local authorities (and their insurers) have continued to be concerned about assuming the principal financial burden for the ongoing liability under leaky homes claims. In 2010, after consultation, the Government agreed, despite being not technically liable, to contribute towards claims by a qualifying claimant. The Weathertight Homes Resolution Services (Financial Assistance Package) Amendment Act 2011 provides that the Crown and the participating territorial authority will each provide 25 per cent direct payment for agreed repair costs. Where the territorial authority was not the consent authority but an independent certifier was used (pre 2004), the territorial authority will not be liable but the Crown will continue its offer of 25 per cent. If the home owner accepts the offer, the home owner must agree not to claim further against the territorial authority (or the Crown), but will be able to pursue legal action against other parties for the remaining 50 per cent of the remediation costs. Where the scheme applies, the third parties will not be able to claim back against the territorial authority for any additional contribution.[7]

This Financial Assistance Package has been enacted into law in 2011. In effect, central government accepts a moral responsibility for part of the leaky home problem. An advantage to local authorities

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[1] Weathertight Homes Resolution Services Act 2006, s 3. The WHRSA is administered by the Department of Building and Housing.
[2] Weathertight Homes Resolution Services Act 2006, ss 13-18.
[3] Weathertight Homes Resolution Services Act 2006, s 8.
[4] Weathertight Homes Resolution Services Act 2006, ss 31-51.
[5] Weathertight Homes Resolution Services Act 2006, ss 77-88.
[6] Weathertight Homes Resolution Services Act 2006, ss 57-76, 89-96, part 2, sch 3 (procedure). For lower value claims, the proceedings may minimise the use of lawyers. For an appeal, see *Findlay and Sandelin v Auckland City Council*, HC, Auckland CIV-2009-404-6497, 16 September 2010 (Ellis J) (damages apportioned 80:20 between builder and council – general damages of $25,000 for mental distress, reduced to $17,000 for contributory negligence).
[7] Weathertight Homes Resolution Services (Financial Assistance Package) Amendment Act 2011. The Minister may, on behalf of the Crown, give a guarantee or indemnity for a loan to meet the balance of the repair costs, and may recover any debt arising.

of a contribution agreement is that their share will be pegged to 25 per cent with no risk of paying a higher amount if other parties are liable but do not pay respective contributions. In relation to all real estate valuations and transactions, much greater awareness is acknowledged throughout the country as to the need to obtain checks before purchasing houses and apartments.

10 Conclusion and further research

The history of legal liability in New Zealand of local authorities in respect of defective properties illustrates the adaptability of the common law to local circumstances. The liability is limited to residential properties, and does not extend to commercial properties. A 10 year longstop for claims applies from the date of approvals and actions of local authorities. The recent offer by central government to provide up to 25 per cent contribution towards the repair costs of leaky homes, in conjunction with a matching offer from local authorities, is regarded by local authorities and the wider community as a reasonable outcome. In the longer term, further research to achieve improvements in design and building standards should reduce the scale of claims for defective residential premises. The demarcation for liability between a commercial building and a residential building remains problematic.