IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2007-404-4090

BETWEEN	MT ALBERT GRAMMAR SCHOOL BOARD OF TRUSTEES Plaintiff
AND	AUCKLAND CITY COUNCIL First Defendant
AND	ADP ARCHITECTS LIMITED Second Defendant
AND	MF ASTLEY LIMITED Third Defendant
AND	ROY & SAM OSBORNE LIMITED Fourth Defendant
AND	CANAM CONSTRUCTION LIMITED Fifth Defendant
AND	STUDORP LIMITED First Third Party

CIV-2008-404-4551

AND BETWEEN	THE MINISTER OF EDUCATION Plaintiff
AND	ARGON CONSTRUCTION LIMITED First Defendant
AND	AUCKLAND CITY COUNCIL Second Defendant
AND	MIKE BARNS AND ASSOCIATES LIMITED Third Defendant
AND	MAURICE HARTLEY Fourth Defendant
AND	PAUL DAVID STYLES First Third Party

AND	STUDORP LIMITED (PREVIOUSLY JAMES HARDIE BUILDING PRODUCTS LIMITED) Second Third Party
AND	DAVID BRUCE GOODLEY TRADING AS CHALLENGE ROOFING Third Third Party

CIV-2008-404-6356

AND BETWEEN	THE MINISTER OF EDUCATION Plaintiff
AND	LAWTON BUILDING & DEVELOPMENT LIMITED First Defendant
AND	CROSSON CLARK CARNACHAN ARCHITECTS LIMITED Second Defendant
AND	AUCKLAND CITY COUNCIL Third Defendant

CIV-2009-404-1776

AND BETWEEN	THE MINISTER OF EDUCATION Plaintiff
AND	AUCKLAND CITY COUNCIL First Defendant
AND	ADP ARCHITECTS LIMITED Second Defendant
AND	M F ASTLEY LIMITED Third Defendant
AND	ROY & SAM OSBORNE LIMITED Fourth Defendant
AND	CANAM CONSTRUCTION LIMITED Fifth Defendant

Hearing: 15 May 2009

Appearances: B Dickey and L Hamilton for Plaintiffs
D Goddard QC and G Grant for Auckland City Council
E Turner for Studorp Limited
J De Lange for Argon Construction

Judgment: 25 June 2009 at 3:00 pm

JUDGMENT OF ASHER J

This judgment was delivered by me on 25 June 2009 at 3:00 pm
pursuant to Rule 11.5 of the High Court Rules

……..
Registrar/Deputy Registrar

……..
Date

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Introduction

[1] The New Zealand leaky building epidemic has now extended to schools. Mt Albert Grammar School, Te Kura Kaupapa Mäori o Maungawhau and Edendale Primary School, have recently constructed buildings that have alleged design and construction defects that have caused leaks. They have issued proceedings against various parties involved in the building. The Minister of Education is the plaintiff in respect of all schools. In respect of one school, Mt Albert Grammar School, the Board of Trustees has also filed separate proceedings. The defendants include builders, architects and the Auckland City Council ("the Council"). The Council seeks to strike out the claims against it. The other parties have not taken any active steps in relation to the application.

[2] The proceedings allege that the Council failed to exercise due skill and care in assessing the building consent documentation, in issuing building consents and carrying out inspections of works, certifying code compliance, and ensuring that the schools met public health and safety standards. The basis of the Council's application to strike out is that the Council owed no duty of care to the Minister of Education or to the Boards of Trustees of the various schools.

Approach to strike out

[3] Rule 15.1(1)(a) of the High Court Rules applies to this application. It provides that the Court may, at any stage of a proceeding, strike all or part of a pleading out, where a pleading discloses no reasonable cause of action or defence or other case appropriate to the nature of the pleading. The criteria for striking out has not been the subject of contention. The pleaded facts, whether or not admitted, are assumed to be true. The jurisdiction is to be exercised sparingly, and only in clear cases. It is accepted that the jurisdiction is not excluded where the application raises difficult questions of law, even if they require extensive argument.

[4] While the jurisdiction to strike out can only be exercised sparingly so as not to deprive a party of the opportunity of proving a claim in Court, there are good

reasons to strike out claims that clearly cannot succeed, to save litigation costs which are generally not fully recoverable. The competing considerations that must be balanced were referred to in *Attorney-General v Body Corporate 200200* [2007] 1 NZLR 95 (CA) ("*Sacramento*"). It was stated at [51]:

> On the one hand, the courts should not lightly deny plaintiffs the opportunity to proceed to trial on novel issues of law. Moreover, a trial will present a more favourable forum to assess the issues involved in establishing a duty of care. On the other hand, however, defendants ought not to be subjected to the substantial costs, much of which is usually unrecoverable, in defending untenable claims.

Strike out and novel duties of care

[5] The Courts have not hesitated to strike out claims which plead novel duties of care in appropriate cases: *Attorney-General v Carter* [2003] 2 NZLR 160 (CA); *Te Mata Properties Limited v Hastings District Council* [2009] 1 NZLR 460. The approach to considering whether a duty of care exists in a situation not covered by previous authority was set out in the majority judgment of *Couch v Attorney General* at [2008] 3 NZLR 725 (SC) at [78]:

> In short, whether a duty of care is owed has been determined on the basis of whether it is fair, just and reasonable to impose it. Proximity and policy are the two headings under which the courts have determined that ultimate question.

[6] In the majority judgment it was stated at [118]:

> But, also importantly, the case should be allowed to go to trial, unless as a matter of law the pleaded facts are incapable of giving rise to the duty of care asserted. Whether a duty of care did exist in the circumstances outlined is, of course, a matter of law.

It was stated in the minority judgment at [2]:

> Whether the circumstances relied on by the plaintiff are *capable* of giving rise to a duty of care is the question for the Court. If a duty of care cannot confidently be excluded, the claim must be allowed to proceed. It is only if it is clear that the claim cannot succeed as a matter of law that it can be struck out.
>
> [original emphasis]

[7] The essence of the Council's submission is that circumstances relied on by the Minister of Education and the Board of Trustees are not capable of giving rise to a duty of care owed by the Council to the plaintiffs. It is submitted that no such duty of care owed by a Council to the owners of a school has been found to exist in any decision to date, and on the state of the present authorities cannot be found to exist. It is submitted for the Council that New Zealand Councils owe no duty of care to those who construct buildings, save for residential dwellings.

[8] The response of the defendants is that it is certainly arguable that the Council does owe such a duty. It describes its case as "squarely placed on a platform of risks to health and safety and educational impairment". It is submitted that the particular position of bodies who own schools is such to warrant a finding that there is a duty of care.

[9] The criteria to be applied in assessing whether there is a novel duty of care were considered in *Couch v Attorney General*. At [78] the majority observed that the established approach was to determine whether it is fair, just and reasonable to impose the duty of care. The two headings under which the Court determined that ultimate question were proximity and policy.

[10] In *Sacramento* at [37] the Court of Appeal observed in relation to proximity that foreseability is a necessary precondition for the imposition of a duty of care. It was stated that, in making the assessment as to whether there is sufficient proximity, amongst the matters to be considered is whether duties of care have been imposed in analogous cases, any vulnerability on the part of a plaintiff, and the potential burden on the defendant of taking precautions against the risk. In relation to policy issues in considering whether a public body owed a duty of care for its conduct in building matters, it was stated that there should be a focus on the particular statutory context, in that case the Building Act 1991 (*Sacramento* at [38]).

Core facts

[11] The background facts are straightforward. The three schools are owned by the Minister of Education or related bodies. The schools are administered by Boards

of Trustees appointed under the Education Act 1989. The various relevant building contracts were all entered into by the Minister. The Council granted building consents, carried out inspections in the course of construction, and issued Code Compliance Certificates. The design and construction were allegedly defective and did not comply with the requirements of the Building Code. The Council allegedly failed to identify the defects and non-compliance. The Minister has suffered or will suffer loss in remedying the defects.

The development of a duty of care owed by Councils to home owners

[12] In *Te Mata Properties Limited v Hastings District Council* at [21]-[31], Baragwanath J considered the historical starting point of the duty of care owed by councils to home owners. It is appropriate to refer to this briefly, to put the present issue in context.

[13] Following the development of the tort of negligence after *Donoghue v Stevenson* [1932] AC 562, in *Dutton v Bognor Regis Urban District Council* [1972] 1 QB 373 (CA), the English Court of Appeal considered those who could be held responsible to the owner of a house for the loss that arose when it fell down. Those persons included the Council. Lord Denning stated at p 398:

> They were entrusted by Parliament with the task of seeing that houses were properly built. They received public funds for the purpose. The very object was to protect purchasers and occupiers of houses. Yet they failed to protect them. Their shoulders are broad enough to bear the loss.

[14] In *Anns v Merton London Borough Council* [1978] AC 728 at 758, Lord Wilberforce held that Lord Denning MR had put the duty too high. In relation to public authorities or public bodies, a distinction was drawn between discretionary powers and operational powers. It was stated that the more operational a power or duty, the easier it would be to superimpose on it a common law duty of care: at 754. It was held that a local authority owed a duty of care to owners or occupiers who might suffer injury to health caused by defective foundations, to take care in inspecting the building. A plaintiff could recover the amount of expenditure necessary to restore the dwelling to a condition where there was no longer a danger to the health or safety of the persons occupying it.

[15] In New Zealand just before *Anns v Merton London Borough Council* was decided, the issue of liability for the defective construction of a dwelling was considered in *Bowen v Paramount Builders (Hamilton) Ltd* [1977] 1 NZLR 394 (CA). It was held that a builder who erected a house with inadequate foundations owed a duty of care to a subsequent purchaser of the building. The defective work was seen as a source of danger to occupiers, who were likely to suffer damage in the form of personal injuries or damage to property. However, the emphasis shifted in *Mount Albert Borough Council v Johnson* [1979] 2 NZLR 234 (CA), to being more on an owner of defective property recovering in tort for financial loss caused by negligence, although there was still an emphasis on the loss being associated with physical damage.

[16] The extension of negligence to liability for defective buildings was, however, checked in the United Kingdom in *Murphy v Brentwood District Council* [1991] 1 AC 398 (HL). A Council had approved a faulty design to the foundations of a house, and later after construction the house cracked and subsided. The house was sold for less than half of its market value and the owner sought to recover from the Council the amount of the diminution in value. The House of Lords unanimously held that the claim must fail and overruled *Anns v Merton London Borough Council*. The "danger to health" argument was rejected on the basis that it was illogical and lacked principle. It was held that there was no distinction that could be drawn between a defect of quality and a supposedly dangerous defect: at 470, 479, 484, 488 and 497.

[17] *Murphy v Brentwood District Council* was not followed in *Invercargill City Council v Hamlin* [1994] 3 NZLR 513 (CA). The plaintiff had contracted with a builder for the construction of a house and the defendant Council had granted a building permit. Proceedings were issued long after the construction work against both the original builder and the Council. The Court of Appeal declined to apply *Murphy v Brentwood District Council*. The Court emphasised the social and historical context of home ownership in New Zealand. Richardson J at 524 identified six distinctive and long-standing features of the New Zealand housing scene at that time. These were in summary:

i) The high proportion of owner/occupier owned housing in New Zealand by people in all walks of life.

ii) Much housing construction, including low cost housing, was undertaken by small-scale builders for individual purchasers.

iii) There was government support for private home building and home ownership.

iv) There had been a surge in house building construction up to that point in time.

v) There was wider central and local government support for and interest in private home building.

vi) It had never been a common practice for new house buyers, including those contracting with builders, to commission engineering or architectural examinations or surveys of the building or proposed building.

[18] There was also reference to the research that led up to the Building Act 1991, and the expectations that New Zealanders had that there was some form of control to ensure that all buildings met certain essential requirements to safeguard them from risk. It was concluded at 527-528:

> Decisions of the House of Lords although afforded great respect are not binding on this Court. Ultimately we have to follow the course which in our judgment best meets the needs of this society. Those distinctive social circumstances must be taken to have influenced the New Zealand Courts to require of local authorities a duty of care to homeowners in issuing building permits and inspecting houses under construction for compliance with the bylaws. In none of the more than 20 such decided cases of any New Zealand Judge expressed any reservations concerning the imposition of a duty of care on local authorities.

It was held that there were now significant community expectations in relation to the existence of a duty of care in relation to the building of homes in New Zealand.

[19] All five of the Court of Appeal judgments in *Invercargill City Council v Hamlin* were grounded on the particular relationship between local building authorities and house owners in New Zealand. The Council appealed to the Privy Council, which was content to adopt the reasoning of the Court of Appeal on the duty of care issue: *Invercargill City Council v Hamlin* [1996] 1 NZLR 513. *Invercargill City Council v Hamlin* has been applied since 1994, and when the Building Act 1991 was replaced by the Building Act 2004 there was no legislative change or statement concerning the duty of care in tort of local authorities.

Authorities concerning the extension of this duty of care beyond house owners

[20] *Invercargill City Council v Hamlin* recognises the duty of care owed by builders and local authorities to owners and subsequent owners of dwelling houses. The duty is also owed by other persons whose negligence contributes to a building defect, such as developers, architects and engineers. In the Court of Appeal, Cooke P had left the question open of whether the duty of care would extend to commercial buildings: at 520. In subsequent decisions the Courts have declined to extend the duty of care enunciated in *Invercargill City Council v Hamlin* to buildings other than dwelling houses.

[21] In *Te Mata Properties Limited v Hastings District Council* the Court of Appeal considered the duty of care owed by a local authority to the purchasers of two motels that suffered from the leaky building syndrome. It was held that the duty of care of a local authority in inspecting buildings was an exception to the general rule that claims for pure economic loss were not recoverable in negligence. It was held at [73] by Baragwanath J, in an extract specifically approved in the majority judgment at [87]:

> I am satisfied at this stage that 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.

[22] In *Three Meade Street Limited v Rotorua District Council* [2005] 1 NZLR 504, it was held that a local authority did not owe a duty of care to the developer of a motel. Venning J noted that the owner of a commercial building could protect itself through contractual arrangements: at [50]-[53]. He left open the possibility that a

duty of care might arise in a commercial context: at [40]-[42]. However, he specifically noted that *Invercargill City Council v Hamlin* did not automatically extend to industrial and/or commercial property owners. The claim of the motel owner against the Council did not succeed.

[23] In *Body Corporate 188529 & Ors v North Shore City Council & Ors* [2008] 3 NZLR 479, where the Council was found liable, Heath J was careful to limit his finding of the existence of a duty of care to owners of properties intended to be used for residential purposes, at [220]. The same reservation was expressed by Venning J in *Body Corporate 189855 & Anor v North Shore City Council & Ors* HC AK CIV-2005-404-5561 25 July 2008, where a distinction was made between units bought for the personal occupation of the owner and units bought for investment purposes, at [22]-[24]. Both cases focused on the intended residential end use of the building in question.

[24] In *Kerikeri Village Trust v Nicholas* AK HC CIV-2006-404-0005110, 27 November 2008, Andrews J considered whether a Council owed a duty of care in respect of the building of a residential and medical care facility for the aged. The building was owned by a Trust which was a "not for profit" business organisation. The Council had granted a building consent and carried out inspections and issued an interim code compliance certificate. Andrews J found that the requirement of foreseeability was established, and found that on the basis of analogous cases to date that there was less support for imposing a duty of care on the Council than there was for rejecting such a duty of care. She also found that the plaintiff Trust was able to engage appropriate experts, and there was a lack of evidence of vulnerability. She found that policy considerations counted against the imposition of a duty of care. The strike out application was granted.

[25] However, rather against this trend, in *Charterhall Trustees Limited v Queenstown Lakes District Council and Blair & Co. Limited* HC INV CIV-2007-425-000588, 27 June 2008, Fogarty J, the Court refused to uphold a strike out application in relation to a commercial building damaged by fire. The allegation was that the fireplace chimney and tower had been defectively designed and there was an allegation of negligence against both the Council and architects. It was held that

there was a strong argument that the local authority and the owner of the lodge "were in proximity": at [21]. It was acknowledged at [50] that the "matrix of commercial contracts … creates an environment hostile to a duty of care in defect/economic loss cases". It was held that the Building Act 2004, as well as the Building Act 1991, could not be said to point conclusively against a common law duty of care. The case could be argued as a case of commission rather than omission. The application to strike out was refused: at [55]. This was not a leaky building case.

[26] These cases, with the exception of *Charterhall Trustees Limited v Queenstown Lakes District Council and Blair & Co. Limited*, show a reluctance on the part of the Courts to allow cases to proceed against local authorities who have a supervisory and regulatory function based on a breach of a duty of care. As a matter of policy there is an unwillingness to impose a duty of care beyond that specifically owed to the owners of residential dwellings.

[27] The existence of a duty of care on the part of local authorities in the context of their regulatory function for buildings has been rejected generally in the United Kingdom in *Murphy v Brentwood District Council*. In Australia it was rejected in relation to a commercial building in *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* [2004] HCA 16. The High Court of Australia declined to hold that there was a duty of care on an engineer who designed a warehouse for a developer, who later sold it to a new owner. The lack of vulnerability of the plaintiff was emphasised. The majority interpreted the earlier decision of *Bryan v Maloney* [1995] HCA 17 at [13]-[15], as not supporting a bright line distinction between the construction of dwellings and the construction of other buildings: at [17].

[28] In Canada the position is different. It has been held that local authorities have a duty to take reasonable care to avoid dangerous defects in the context of commercial buildings: *City of Kamloops v Nielsen* [1984] 2 SCR 2; *Winnipeg Condominium Corp No. 36 v Bird Construction Co.* [1995] 1 SCR 85. That approach of containing liability to dangerous defects was considered without enthusiasm in *Rolls-Royce New Zealand Limited v Carter Holt Harvey Limited* at [79]. There is no New Zealand authority that adopts the approach of the Canadian cases.

Other analogous cases on extending the duty of care

[29] In *Sacramento* the Court of Appeal in a judgment of the Full Court considered whether the industry authority, the BIA, owed a duty of care to owners of homes to exercise reasonable care in connection with its statutory responsibilities. It was held that on a close examination of the Building Act 1991, the statutory scheme was inconsistent with the imposition of such a duty of care: at [80]. It was also held that from the point of view of public policy, the imposition of a duty of care as pleaded would be inconsistent with the role of the BIA as established by Parliament, at [81]:

> From the point of view of public policy, the imposition of a duty of care along the lines pleaded would require the BIA to "assume the role of code policeman", to adopt the words of Ms Scholtens QC. That is inconsistent with the limited role for the BIA established by Parliament.

[30] In *Attorney-General v Carter* the Court of Appeal declined to find a duty of care owed by the Maritime Safety Authority in relation to survey certificates that had been issued to the purchaser of a vessel. The issue was addressed in terms of proximity and policy: at [22]. Emphasis had been placed on the safety focus of the survey regime set out in the relevant legislation. It was held at [34]:

> It cannot reasonably be said that the MOT and M&I assumed or should be deemed to have assumed responsibility to the plaintiffs to take care in issuing the certificates not to harm their economic interests in the Nivanga. Hence the necessary proximity between the parties is absent. There are essentially two reasons for that conclusion, one more fundamental than the other; albeit each is fatal to the plaintiffs' case. The first and more fundamental problem the plaintiffs face is that, as we have discussed, the statutory environment is such that the purpose of the certificate was entirely different from the purpose for which the plaintiffs claim to be entitled to place reliance on it. The second is that in none of the capacities in which the plaintiffs claim to have suffered loss were they the person or within the class of persons who were entitled to rely on the certificates. They do not sue as passengers on the vessel or as crew or as other seafarers, damaged in a material way by the allegedly negligent certificates. In a sense the second problem can be viewed as a manifestation of the first. We mention it simply to exemplify the plaintiffs' essential difficulty in another way. For these reasons we hold that there was no relevant proximity between the parties so as to satisfy that criterion for the imposition of a duty of care.

[31] In *Rolls-Royce New Zealand Limited v Carter Holt Harvey Limited* [2005] 1 NZLR 324 (CA), the Court of Appeal declined to find a duty of care owed by Rolls

Royce who had designed, constructed and commissioned a plant, to Carter Holt Harvey, which had no direct contractual relationship with Rolls Royce. The contract that did exist between Carter Holt Harvey and the Electricity Corporation of New Zealand contained risk allocation provisions, which could not have been applied if there was a duty of care owed by Rolls Royce: [106], [107]. It was held that commercial parties were capable of looking after their own interests including the risk of insolvency of an intermediate party: at [118].

[32] *Sacramento* and *Attorney-General v Carter* show that the Courts are reluctant to impose a duty on a regulatory authority where that duty is not supported by the nature of the statutory role of the authority. *Rolls-Royce New Zealand Limited v Carter Holt Harvey Limited* shows the Court will be reluctant to impose a duty where the parties have chosen to govern a relationship by contract. To impose a duty in such a situation would undermine commercial certainty.

Submissions

[33] Mr Goddard QC for the Council placed particular emphasis on the decisions declining to extend the duty of care to regulatory bodies in *Attorney-General v Carter* and *Te Mata Properties Limited v Hastings District Council*. He submitted that there was not sufficient proximity between the Council and the schools, as proximity required a plaintiff who was vulnerable in relation to the defendant, or reasonably reliant on the defendant to take care to prevent the type of loss complained of. He pointed to the Council being removed several times from the direct cause of the loss, which was the negligent design and construction. He pointed to the fact that in a non-residential building the original owner/developers are able to retain experts to draw up plans that comply, and to supervise construction. In contrast, local authorities do not have any special skills or unique resources. If a school owner chose not to retain appropriate experts, that was a commercial choice and the consequences and costs of that choice should not be imposed on the Council and on local rate payers.

[34] He submitted that there was no relevant difference between conditions in New Zealand and those in England and Australia where a duty of care has been

rejected in comparable circumstances. He submitted that the statutory scheme of the Building Act 1991 confirmed that the responsibility of local authorities is focused on protecting the health and safety of users of buildings and not on protecting the economic interests of owners of buildings.

[35] As a matter of policy he submitted that local authorities' responsibilities to building users and occupiers should be limited to health and safety matters. He submitted there is no basis for concluding that they should be seen as insurers for the owners of commercial/public sector premises in respect of economic loss arising from building defects, or that compulsory insurance against building defects should be bundled into consent fees.

[36] Mr Dickey for the plaintiffs relied on the provisions of the Building Act 1991. He submitted that the Council has powers and duties of oversight and control that required it to ensure that building works complied with the Building Code prior to, during and after the completion of building works. He also submitted that the Court may by ordinary common law principles, extend *Invercargill City Council v Hamlin* by analogy to a case such as this where health and safety concerns were paramount. He referred to *Te Mata Properties Limited v Hastings District Council* and the decision of Baragwanath J where it was held that it was arguable that "leaky building claims" could be extended beyond their current scope if founded on public health considerations. He distinguished the plaintiff's position from that of a commercial entity solely concerned with the financial outcome. While the loss claimed was monetary, the duty was founded on the prevention of risks to health and safety and interference with education.

[37] Mr Dickey relied on the statutory duty of the Ministry to provide free primary and secondary education in New Zealand for school-aged children, and a corresponding duty to ensure their health and safety. He relied on the Ministry of Education National Administrative Guidelines, which set out the statements of desirable principles of conduct in schools. The Guidelines state that a Board of Trustees is required to provide a safe physical and emotional environment for students. He submitted that children had no choice in attending school, and they must do so even if there are health and safety risks. He also relied on the Canadian

authorities which he submitted supported the extension of liability to schools, where there was a public health and safety component.

Discussion

[38] In New Zealand the issue of whether a duty exists is approached in two stages. These are the two stages referred to in *Anns v Merton London Borough Council* at 751-752 (HL). The Court considers first whether there is a sufficient relationship of proximity or neighbourhood such that in the contemplation of a wrongdoer, carelessness on that wrongdoer's part may be likely to cause damage to the plaintiff. If that question is answered in the affirmative, the Court then considers whether there are any policy considerations which ought to negative, or to reduce or limit the scope of the duty or the class of persons to whom it is owed. This approach has been widely followed in New Zealand: *Connell v Odlum* [1993] 2 NZLR 257, 265; *Attorney General v Carter* at [22]-[32]; *Rolls Royce New Zealand Limited v Carter Holt Harvey Limited* at [58]-[65]; *Couch v Attorney General* at [78]. It must be noted, however, that the boundaries between proximity and policy are not clear, and overlap.

Proximity

[39] In considering proximity it is necessary to focus on the relationship of the parties. I consider that the following overlapping matters are relevant:

- the contractual and statutory regime within which the parties operate;
- the Council's ability to foresee loss in the event of negligence;
- the degree of reliance of the plaintiff on the defendant;
- the vulnerability of the plaintiff; and
- analogous cases.

[40] It must be recognised at the outset that there is no contractual relationship between the Council and the plaintiffs, and that their relationship is imposed by statute. They do not choose to be neighbours. Their relationship is of permit giver and permit seeker, and does not have the elements of mutual benefit and reliance typical of voluntary relationships.

[41] The parties accept that the relevant Act that applied at the time when the allegedly negligent acts took place is the Building Act 1991, (now repealed and replaced by the Building Act 2004). Section 6 sets out the purposes and principles of the Building Act 1991. Section 6 provides:

> **6 Purposes and principles (repealed)**
>
> (1) The purposes of this Act are to provide for—
>
> (a) Necessary controls relating to building work and the use of buildings, *and for ensuring that buildings are safe and sanitary* and have means of escape from fire; and
>
> (b) The co-ordination of those controls with other controls relating to building use and the management of natural and physical resources.
>
> (2) To achieve the purposes of this Act, particular regard shall be had to the need to—
>
> (a) *Safeguard people from possible injury, illness, or loss of amenity in the course of the use of any building*, including the reasonable expectations of any person who is authorised by law to enter the building for the purpose of rescue operations and fire fighting in response to fire:
>
> …
>
> (3) In determining the extent to which the matters provided for in subsection (1) of this section shall be the subject of control, due regard shall be had to the national costs and benefits of any control, including (but not by way of limitation) *safety*, *health*, and environmental costs and benefits.
>
> [emphasis added]

[42] Section 7(1) requires all building work to comply with the Building Code. A National Building Code is provided for in Part 6 of the Act. Part 4 of the Act sets out the functions and duties of territorial authorities, which include receiving and considering building consents, approving or refusing them, enforcing provisions of

the Building Code and regulations, and issuing code compliance certificates and compliance schedules.

[43] Section 32 provides that it is unlawful to carry out building work except in accordance with the building consent issued by the territorial authority. Section 34 requires the Council to grant or refuse an application for consent. Section 76 provides for inspections of building works by Council officers and requires the taking of all reasonable steps to ensure that the building work has been done in accordance with the building consent, and, at s 76(1)(c), "that buildings remain safe, sanitary, and have means of escape from fire…".

[44] Section 89 provides that no civil proceedings should be brought for an act done in good faith under the Act by a member of the Building Industry Authority, a building referee, or an employee of the Council. The Councils themselves are not exempt, a factor relied on by Mr Dickey.

[45] By these provisions the Act creates a relationship of proximity or neighbourhood between a Council, a person doing building work and building owners. They must interact during the building process, and Councils have ongoing duties once a building is constructed. It must be assumed that Parliament intended that Councils would do their work competently without negligence. However, there is nothing in the Act to indicate contemplation by Parliament of liability on Councils to compensate the owners of defective buildings for economic loss in the event of negligence.

[46] Section 89 makes certain persons including Council members or employees exempt from civil proceedings. However, the fact that Councils do not enjoy such an exemption does not suggest, as Mr Dickey submitted, that liability for economic loss for Councils is contemplated. Obviously Councils and other bodies are susceptible to civil proceedings, at the very least judicial review proceedings. The section is intended to exempt certain individual persons from such established areas of exposure to liability, no more.

[47] Section 6 shows that Councils as participants in the Act's processes must ensure that buildings are safe and sanitary. If Councils were regularly issuing consents to plans which contained a feature that was dangerous or unsafe, an appropriate interest group could bring a claim for judicial review. But this should not be seen as showing an intention on the part of Parliament to impose liability on Councils for economic loss arising from the fact that the building is leaking. While leaks may well mean that the building is unsafe or will become unsafe, it is the users of the building who are implicitly identified as those who need protection. The owners who may seek economic redress for rectifying the defects are not identified in the Building Act 1991 as in need of protection.

[48] Thus, while the Building Act 1991 creates a relationship where there is interaction and proximity between a Council and a building owner seeking the necessary permissions and certificates to build, there is nothing to indicate the contemplation of a specific duty of care in relation to economic loss arising from defective design or construction. There is foreseeability in that it can be foreseen that negligent Council consent or certification could fail to stop the construction of defective work, which work will cause loss. However that is not harm that the Council actually causes. Rather it is harm that the Council fails to stop.

[49] The imposed relationship of Council and building owner has to be seen also in the context that the Council is not the party who takes the primary responsibility for the quality of the building work and design. Those responsible contractually for the design and building must be seen as those who have the most proximate relationship. They, after all, voluntarily by contract assume that task, and do the design and building work. The Council is not the originator of the design or the doer of the work. Its statutory function is to check, to permit, and to certify. It is a less proximate task than the tasks of those who do the work which they check, the designers and builders.

[50] While the focus of the legislation is to protect the health and safety of those who use buildings, I accept Mr Goddard's submission that if this is a claim based on health and safety responsibilities, the Minister of Education and the Board of Trustees are not the correct parties. The users are the persons who could bring a

claim requiring local authorities to meet such obligations. The safety provisions protect them. The Minister and the Board of Trustees are not claiming compensation for a diminution of their safety and welfare. They are only claiming for the economic loss resulting from the defects. Their claim, in terms of the analysis in *Invercargill City Council v Hamlin*, must be based on the loss of value to the building.

[51] There is no direct correlation between the need to keep or make the building safe and the damages claim. The Minister can be expected to keep the building safe whether damages claims succeed or fail. The claim is not related in any direct way to the safety of those who will occupy the building. The claim relates only to matters of money; the diminished value of the building because of the defects, or the cost of rectifying those defects.

[52] There is a measure of reliance, the owner naturally expecting the Council to do its job properly. In any event, reliance is pleaded, and can be assumed. However, a government minister or board of trustees can be expected to have professional advisors on issues of design and building quality. The primary reliance can be expected to be on these persons, who are contractually chosen.

[53] In relation to vulnerability, Mr Dickey submits that the fact that the plaintiffs had these stringent statutory responsibilities makes them vulnerable to exposing school children to health and safety risks and impairing their education. He also points to the fact that the children have a duty to attend school (ss 20 and 25 Education Act), and that parents have a duty to ensure their children enrol and attend (ss 24 and 29 Education Act). Thus, children have no choice as to whether to attend school, and the Minister has no choice but to provide schools.

[54] However, despite their duties to school users, it is difficult to categorise government ministers and boards of trustees as particularly vulnerable. They can be expected to have considerable resources, compared to the domestic home owner, and to have their own advisors. Such expert advisors, chosen to assess and manage the design and construction, should protect them sufficiently. This is developed at [58] - [59]. If they do not, the owners can be expected to have the resources to fix the

problem. I have referred to analogous cases at [20] – [31], the trend of which is against extending the duty of care beyond residential dwelling cases.

[55] In summary, there is a degree of proximity between Councils and the owners of schools, but the neighbourly relationship is one imposed by statute, and has various statutory limitations and bounds. Any reliance by owners of schools is in the context of them having the resources to have their own professional advisors on matters of building design and build. There is no particular vulnerability. A residential home owner, in contrast, is likely to have a more proximate relationship. The inequality in resources and available expertise that lies behind *Hamlin* does not as a general proposition arise between Councils and school owners. There may be cases where some specific reliance or vulnerability increases proximity and a Court's willingness to impose a duty, but no such special factors exist here.

Policy

[56] The *Anns* approach requires a Court to reach a judicial view of policy in determining whether a duty of care should be found to exist. A Court does so by drawing heavily on past decisions which set out policy markers, and by an analysis of the relevant statutory regime, if there is one. It also considers the practical need for and implications of such a duty if it is found to exist.

[57] The recent cases on the subject discussed at [20] – [32] show an unwillingness as a matter of policy to impose a duty of care on a statutory body charged with allowing, supervising or certifying certain activities. Perhaps the strongest appellate expression of this is in *Attorney-General v Carter* where it was observed at [18] that there was no suggestion that the relevant regulatory regime was intended by Parliament to be relied on by anyone when commercial decisions were made, and that protection of commercial interests was not a purpose of the relevant legislation. Tipping J in considering whether the Martime Safety Authority had a duty in respect of the survey certificates it issued to the purchaser of a vessel in relation to economic loss arising from the unseaworthiness of the vessels, stated at [35]:

> There is a legitimate public interest in regulatory bodies being free to perform their role without the chilling effect of undue vulnerability to actions for negligence. Whether it be a case of failing to issue or of issuing a survey certificate, the threat of legal liability for economic loss might subject the survey authority to inappropriate pressures to the detriment of the overall public interest.

This, of course, was not a building case, as the Court of Appeal was careful to record. However, it is relevant that the Court of Appeal noted that the safety focus of the regime was a policy reason pointing away from the imposition of the duty of care to guard against economic loss: at [36].

[58] In the context of schools, owners are in a position to manage risk of loss through contracts which contain warranties and guarantees and other protections. It is reasonable to expect the body that owns the school to look first to the builder, its engineers and architects and any other parties involved directly in the construction. They are the ones who have specifically undertaken to provide professional services and they will have obtained payment for those services. The owners will be able to select the builders, engineers and architects, and they will have an opportunity to select the owners they wish to work for.

[59] The Council is in a different position from the contractors. It is involved in the process because the statute imposes duties on it. Whereas when a contract is negotiated, the owner and builder and other professionals can factor in the risks of defects and the amount they pay or charge, a Council has no such option. The fees charged by the Council for the processing of consents and subsequent inspections and compliance certificates are inevitably inhibited by economic realities and public expectations, and are not negotiated between contracting parties.

[60] There are a number of matters specific to the fact that a school is involved. Mr Dickey emphasised that schools are not commercial in the sense that an office building or factory is commercial. He referred to the statutory duty under the Education Act 1989 to provide free primary and secondary education to New Zealand school-aged children, and a corresponding statutory duty to ensure the health and safety of the children at the school (s 3 Education Act 1989). The School Property Occupancy document, gazetted under s 70 of the Education Act, governs

the relationship between the Ministry of Education and the Board of Trustees. That document confirms that the Health and Safety Code of Practice is mandatory and also requires a Board of Trustees to "identify, eliminate, isolate and/or minimise hazards that arise at the school" (Clause 15). The Ministry of Education National Administrative Guidelines, gazetted under s 70 of the Education Act, set out statements of desirable principles of conduct in schools. Clause 5 states:

> Each Board of Trustees is also required to:
>
> (i) provide a safe physical and emotional environment for students;
>
> …
>
> (iv) comply in full with any legislation currently in force or that may be developed to ensure the safety of students and employees.

[61] He points to the fact that in relation to one of the schools, Te Kura Mäori O Maungawhau, there are multiple school buildings affected by leaks and rot. Indeed there was a danger of implosion or explosion of a number of walls. There are limited options in Auckland for schools where Te Reo Mäori is the principal language of instruction, and therefore parents in the area who wish their children to learn Te Reo will have little alternative but to send their children to that school. For these reasons Mr Dickey characterises the claims as being more than about solely economic loss. They are about incentivising prevention of harm by setting and maintaining acceptable standards of behaviour.

[62] There are four difficulties with these arguments. First, insofar as there is a policy reason to make schools safe by imposing a duty of care on Councils in relation to buildings, that is a matter that could have been dealt with in the relevant building or education legislation. In fact, as already outlined, no such duty was imposed. If there is a breach of a statutory requirement, then the remedy will usually be through prosecution or administrative law action, rather than through tort. There is no tort of negligent breach of statutory duty: *Attorney-General v Carter* at [40]-[43]. I agree with the observation of Venning J in *Three Meade Street Limited v Rotorua District Council* at [48]:

> A reading of the Act and the code leads inevitably to the conclusion that it is primarily concerned with the broad policy goals of promoting public safety and health rather than the protection of economic interests.

[63] Second, there is a disconnect in giving the Minister of Education and School Boards the ability to make such negligence claims, when those who directly suffer from health and safety issues are not the owners of schools, but those who use them.

[64] Third, the three schools involved in these proceedings are all owned by the government. Schools in New Zealand are not commercial in the sense that they are generally owned by the government, or non-profit organisations. They perform a vital public service in educating children. However, public schools have the resources of the state behind them, and while there is no evidence as to the circumstances of private schools, generally they will be institutions with significant capital assets and yearly income. It is inconceivable that the Minister or any Board of Trustees would allow children to occupy school rooms that were unsafe or a danger to health because of leaks.

[65] Finally, such an argument could be used to impose a duty of care on Councils in relation to all buildings, as virtually all buildings are used by people, whose safety and health can be affected by defects. The fact that Boards of Trustees have a duty to provide a safe environment for students does not mean that they are in a different position from any other building owner who provides accommodation to others. School children, who generally only occupy a school during the day, are perhaps less vulnerable to ill health from leaks than those who occupy rest homes day and night, or those who occupy hospitals. The statutory scheme gives no indication that Councils are to become effectively the insurers of public sector owned buildings, and that such insurance should be financed by consent fees or rates. The use of tort law is not the right way to ensure that schools are safe.

[66] It is difficult to see any policy reason why such compensation or reimbursement of costs should be recoverable against the Council. The issue is purely financial. It cannot be said that recovery will ensure that remedial action is taken to remove the risks to health and safety. The money recovered might well be spent on something other than repairing the building. Some of the repairs appear from the pleadings to have already been done. Allowing damages claims by government and other school owners would be a very uncertain way of ensuring such a vital management of risk. Making Councils school owners' insurers could

lead to them cutting corners on contractual arrangements, secure in the knowledge that the Council could be made to pay to fix things up if they are unable to sue the builders and architects.

[67] Rather, as was identified in *Te Mata Properties Limited v Hastings District Council* at [74], there are other mechanisms in the Building Act 2004 to ensure health and safety risks are recognised and remedied. These are more direct ways of ensuring compliance with standards. Section 124 empowers Councils to take action if they are satisfied that a building is dangerous, earthquake-prone or insanitary. The Council may, for example, give notice that work must be carried out on the building (s 124(1)(c)) or put up a fence around the building (s 124(1)(a)). Under s 126, if the owner fails to carry out the work required by a notice, the Council may apply to the District Court for an order authorising it to do the work. In that situation the owner is liable for the costs incurred by the Council in carrying out the work.

[68] Councils are elected bodies and accountable to their constituencies for their performance. Any intention on the part of Parliament to further incentivise Councils to carry out their duties of inspection and certification properly, could be achieved by the imposition of specific statutory duties, with specific penalties. None have been imposed.

[69] Mr Dickey draws support from the observations of Baragwanath J in *Te Mata Properties Limited v Hastings District Council* at [77], that it is arguable that the public interest that building stock meets an appropriate life span warrants a cause of action founded squarely on statutory health and safety considerations. He stated:

> It might indeed be that a judicial response, aimed at ensuring that those responsible for creating leaky buildings which place public health at risk are held liable for the cost of making them good, could be supplemented by a legislative requirement that net funds received be applied to restoring the building, so that later occupants are not exposed to hazard.

He would have given leave to the appellant to consider repleading to reflect such a consideration: at [78]. The majority did not join in these observations and stated that conjecture beyond the pleaded points as to possible causes of action was

inappropriate in a case where both parties were capably represented and the claim had been carefully formulated: at [88].

[70] For the reasons given, I cannot accept that this is not a case about economic loss, but about making buildings safe for an acceptable life span. That would be tantamount to making Councils guarantors of the life and safety of buildings. It must be assumed that those who own schools will keep them safe for children whatever disasters unfold. That is their responsibility, and not that of the Council. This case is about school owners seeking monetary compensation for the cost of fulfilling that task. It is about the recovery of financial loss.

[71] The Privy Council in *Hamlin* at 522 observed that the fact that Parliament did not seek to change the common law when it enacted the Building Act 1991 could be seen as indicating that if Parliament did not see fit to change the existing law as to duties of care, it would hardly be appropriate for the Courts to do so by judicial decision. It is relevant, then, that when the Building Act was repealed and re-enacted in 2004, there was no change or extension to the common law duties of Councils. The limitations of *Hamlin* had been clearly expressed in the judgment, and the legislature did not see fit to extend the duty of care beyond the bounds of *Hamlin* when it replaced the Act in 2004.

[72] In the 2004 Act, the legislature at ss 396-399 imposed statutory implied warranties in relation to building contracts for household units, but there are no such warranties relating to schools. It is also significant that the Weathertight Homes Resolution Act 2006 and its 2002 predecessor provided a new regime to assist the resolution of leaky building claims in respect of dwellinghouses and multi-unit dwellinghouses, but did not extend that regime to other types of buildings. It does not apply to schools. The legislature appears to accept, therefore, the distinction between dwellings and other buildings in relation to claims by owners of leaky buildings. This may be seen as reflecting a perception by Parliament of a distinction in terms of the reliance and vulnerability of those who own dwellinghouses, and those who own other types of buildings.

[73] It is useful to return to the six factors relied upon by Richardson J in finding that there should be a duty of care owed by Councils to the owners of residential dwellings. They are all specific to such owners, and none of them would apply to schools. In relation to the first, third and fifth factors, ordinary New Zealanders do not own schools. Schools, rather, are owned by the government or private bodies such as religious institutions, and run on commercial lines, like the rest home in *Kerikeri Village Trust v Nicholas*. In relation to the second factor, schools are not generally built by small-scale cottage builders for individuals. Rather, they involve substantial buildings, and it can be safely assumed that it would tend to be larger building companies who do such work. But most importantly, in relation to Richardson J's sixth factor, those who build schools are not like new house buyers who cannot afford and will not consider obtaining their own expert advice. It can be expected that those who seek to have schools built will be in receipt of expert advice from architects and engineers. That must be the case in relation to these schools, owned as they are by the Minister or related government bodies. It is not, to use the phrase of Richardson J, in the "spirit of the times" for local authorities to provide a degree of expert oversight to assist such bodies. Unlike the situation in relation to private dwellings, public authorities can expect those who build schools to take full responsibility and engage experts.

Conclusion

[74] I conclude that the circumstances relied on by the plaintiffs are not capable of giving rise to a duty of care, and that such a duty can be confidently excluded. There is proximity between the plaintiffs and the Council, but not the same degree of proximity that exists between the Council and owners of residential homes, where, as outlined in *Hamlin*, plaintiffs are more reliant and vulnerable. There are good policy reasons not to extend the duty of care, when Parliament in the Building Acts of 1991 and 2004 has chosen not to do so. Schools are generally owned by the state or by charitable trusts or institutions that can be expected to have the resources to properly fund the design and build of substantial structures. They can be expected to use professional assistance to ensure that proper standards are applied.

[75] The most closely analogous cases, *Te Mata Properties Ltd* and *Kerikeri Village Trust* reject an extension of the *Hamlin* duty of care beyond the owners of residential homes. It is better to leave it to the parties involved in contracting for the building to allocate risk, and for Parliament to direct any imposition of risk on third parties, beyond the sphere of contract. And it is better not to cut across the contractual arrangements that the parties have negotiated in a commercial context.

Result

[76] The application is granted, and the causes of action in these proceedings directed against the Auckland City Council are struck out.

[77] The Auckland City Council has been successful and is entitled to costs on a 2B basis. This costs order will lie in Court for 14 days, and will not take effect if any party files submissions seeking a different costs order in that time. If such a submission is filed, the other party must file submissions in reply within 14 days.

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Asher J