**IN THE HIGH COURT OF NEW ZEALAND**
**AUCKLAND REGISTRY**

**CIV 2007-404-4037**

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| BETWEEN | BODY CORPORATE NO. 207624<br>First Plaintiff |
| AND | CHIA LU SYLVIA CHEN & ORS<br>Second Plaintiff |
| AND | NORTH SHORE CITY COUNCIL<br>First Defendant |
| AND | A.D.C. ARCHITECTS LIMITED<br>Second Defendant |
| AND | H.F.C. HARRIS FOSTER CONSULTING LIMITED<br>Third Defendant (Struck Out) |
| AND | STEPHEN MITCHELL<br>Fourth Defendant (Struck Out) |
| AND | MULTIPLEX CONSTRUCTION (NZ) LIMITED<br>Fifth Defendant |
| AND | CHARCO LIMITED<br>Sixth Defendant |
| AND | J F SPEEDY<br>Seventh Defendant |
| AND | M BRANNIGAN<br>Eighth Defendant |

Hearing: 28 August 2009

Counsel: M C Josephson and D Brown for Plaintiffs (Respondents)
D J Goddard QC and S Mitchell for First Defendant (Applicant)

Judgment: 11 November 2009 at 2 p.m.

**JUDGMENT OF POTTER J**
**On first defendant's application to strike out pleading**
**or for summary judgment**

In accordance with r 11.5 High Court Rules
I direct the Registrar to endorse this judgment
with a delivery time of 2 p.m. on 11 November 2009.

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## Introduction

[1] The building known as "Spencer on Byron" is a multi-storey building on Auckland's North Shore which was erected in 2000-2001. It has weathertightness defects. The plaintiffs, who are owners of the unit titles for apartments in the building, and the Body Corporate, have issued these proceedings against North Shore City Council ("the Council") and various parties involved in the development and construction of the building seeking to recover the economic loss they claim to have suffered as the result of the defects in the building. The second plaintiffs, apartment owners, also claim general damages for stress.

[2] Against the Council, the plaintiffs allege negligence in the course of the approval and building process. The Council has applied to strike out the plaintiffs' claims against it or in the alternative that summary judgment be entered against the plaintiffs. The Council submits it owes no duty of care in tort to the plaintiffs, in essence because "Spencer on Byron" is a commercial building, a hotel, and the case is governed by the Court of Appeal authorities in *Te Mata Properties Limited v Hastings District Council* [2009] 1 NZLR 460 (CA) and *Queenstown Lakes District Council v Charterhall Trustees Limited & Anor* [2009] NZCA 374.

[3] The plaintiffs oppose the Council's application for striking out or summary judgment (while not opposing the granting of leave to bring an application for summary judgment). They say the building contains residential apartments and the Council owes a duty of care to the plaintiffs on the authority of *Invercargill City Council v Hamlin* [1996] 1 NZLR 513 (PC). They submit it would be premature to remove the Council from the proceeding before all the evidence is before the Court.

## Issue

[4] The central issue is whether the Council owed a duty of care to the plaintiff owners of the units to prevent the type of loss the plaintiffs seek to recover.

[5] The situation in which the duty of care is alleged is novel to the extent that the "Spencer on Byron" building comprises units used commercially and some units for residential use. While such a factual situation has been contemplated (see for example the discussion by Williams J at [69] in *Te Mata Properties Ltd & Ors v Hastings District Council & Ors* (unreported HC NAP CIV 2004-441-151, 17 August 2007) it has not been directly confronted in any previous judgment of the New Zealand Courts.

**Parties**

[6] The plaintiffs are the Body Corporate, various purchasers of hotel units, and three owners (two trusts and a company) of six residential apartments in the top two floors of the building.

[7] The defendants are:

(1) The Council;

(2) A.D.C. Architects Limited, the architects retained by the owners/developer to provide architectural services including design of the building and supervision of the site;

(3) H.F.C. Harris Foster Consulting Limited which has been struck out;

(4) Mr Mitchell, a consulting structural engineer engaged by the owner/developer to carry out certain design work in respect of the building. Summary judgment was entered in favour of Mr Mitchell against the plaintiffs on 6 April 2009;

(5) Multiplex Construction (NZ) Limited ("Multiplex"), the commercial construction company retained by the owner/developer to carry out the construction work;

(6) Charco Limited ("Charco"), formerly called Covington Spencer Limited, the original owner/developer of the building;

(7) Mr Speedy, a director of Charco who is alleged to have been responsible for project management of the construction of the building;

(8) Ms Brannigan, an architect who provided architectural services, possibly through A.D.C. Architects.

**Background facts**

[8] The facts pleaded in the fourth amended statement of claim must be taken to be capable of proof at trial for the purposes of the strike out application. For the purposes of the strike out application and the summary judgment application, undisputed background facts as set out in affidavits filed by both parties may be taken into account.

[9] "Spencer on Byron" is a building of twenty-three floors in Byron Avenue, Takapuna, comprising:

a) On the ground and first floors hotel lobby and foyer, administrative entertainment and catering areas;

b) On the second floor a recreation area including tennis court, gymnasium and swimming pool;

c) On the second to nineteenth floors a total of 249 studio and one-bedroom units ("the units");

d) On the twentieth and twenty-first floors six penthouses ("the penthouses");

e) A basement carpark.

There is common property as designated on the unit title plan.

Unit titles have been issued pursuant to the Unit Titles Act 1972 for the relevant areas, including individual unit titles for the units on the second to nineteenth floor and the penthouses on the twentieth and twenty-first floors.

[10] The property was acquired by Charco in 2000.

[11] Charco retained Mr Mitchell to carry out certain design work in connection with the development. He was later retained by Multiplex to carry out further design work.

[12] Charco retained A.D.C. Architects to provide architectural services in connection with the development.

[13] The Council granted staged building consents to Charco in 2000 for construction work. In each of the consents the building was described as "New Commercial/Industrial".

[14] Charco retained Multiplex to build the building in 2000-2001.

[15] The Council carried out inspections of the building in the course of construction and issued code compliance certificates. In each of these certificates for construction work the building was described as "New Commercial/Industrial".

[16] When the building was unit titled, Charco was the initial owner of all the unit titles. Charco granted ten year leases of the units to a hotel management company, NZ Castle Resorts & Hotels Limited. The leases provide for units to be let to members of the public.

[17] Charco then sold the units to various purchasers, subject in the case of the units (but not the penthouses) to the ten years leases to NZ Castle Resorts & Hotels Limited.

[18] "Spencer on Byron" is currently operated as a hotel.

[19] Under the ten year leases of the units, unit owners have the right to use their units on notice for a maximum of fourteen days each year and may be provided with alternative accommodation if their unit is unavailable. There are rights of renewal but no obligation on the unit owners to renew the lease after ten years. Some of the unit owners say in the affidavits filed, they believed that after ten years they could live in their unit if they wished. This would require a resource consent to be obtained from the Council. Residential resource consents have been granted in respect of sixteen units and there are current applications before the Council in relation to a further approximately eighty-seven units.

[20] It is alleged in the fourth amended statement of claim (to be taken as capable of proof at trial for the strike out application but disputed in relation to the summary judgment application) that:

a) The design and/or construction of the building was defective and did not comply with the requirements of the Building Code;

b) The Council failed to identify the alleged defects/non-compliance;

c) The Council would have identified the alleged defects/non-compliance if it had exercised reasonable skill and care in performing its functions;

d) The alleged defects/non-compliance have resulted in damage to the building;

e) The alleged defects/non-compliance do not satisfy reasonable health and safety standards;

f) The plaintiffs have suffered loss comprising the cost of remedial work on the building, lost rental income and associated costs.

**Claims against the Council**

[21] The first cause of action in the fourth amended statement of claim, which is against the Council, alleges negligence.

[22] It is alleged that the Council owed the plaintiffs a duty of care in performing its statutory functions under the Building Act 1991 and the Building Code in connection with the grant of building consents, carrying out inspections and issuing code compliance certificates.

[23] It is also alleged that the Council owed the plaintiffs further duties to exercise reasonable skill and care to protect their health and safety, to safeguard them from possible injury, illness or loss of amenity by ensuring all building work complied with the Building Code.

[24] It is alleged the Council breached its duties of care to the plaintiffs.

[25] The claims are for economic/financial loss. There is no allegation that any person has been or is likely to be harmed or injured as the result of the defects. It is not claimed that the health and safety risks pleaded to arise from the defects have caused injury or harm to the health or safety of the plaintiffs or any of them.

[26] The second plaintiffs ("the unit owners"), plead as a second cause of action in the fourth amended statement of claim that the code compliance certificates issued are statements by the Council that as at 13 July 2001 the Council was satisfied on reasonable grounds that the construction work authorised by the building consent complied with the Building Code, and that the Council owed the second plaintiffs a duty to exercise reasonable care and skill in making the statements.

[27] It is alleged the Council breached its duty of care to the second plaintiffs.

[28] The losses the plaintiffs seek to recover include:

a) The cost of remedial work to the building (including professional fees, storage, alternative accommodation, relocation and funding costs);

b) Lost rental income;

c) "Stigma" – i.e. loss in resale value for a "leaky building";

d) General damages for stress claimed by the second plaintiffs.

**Strike out principles**

[29] Rule 15.1(1) of the High Court Rules provides for the Court to order the whole or any part of a statement of claim to be struck out where it discloses no reasonably arguable cause of action; is likely to cause prejudice or delay; is frivolous or vexatious; or is otherwise an abuse of the process of the Court. The criteria for striking out are well established: *Attorney-General v Prince & Gardner* [1998] 1 NZLR 262 (CA):

a) Pleaded facts, whether or not admitted, are assumed to be true;

b) The cause of action must be clearly untenable, i.e. it cannot succeed;

c) The jurisdiction is to be exercised sparingly, and only in clear cases;

d) The jurisdiction is not excluded by the need to decide difficult questions of law, requiring extensive argument;

e) The Court should be particularly slow to strike out a claim in any developing area of law. The Supreme Court cautioned in *Couch v Attorney-General* [2008] 3 NZLR 725 at [32] against the summary disposition of cases involving allegations of duty of care in novel situations. The Court said the established approach to deciding whether a duty of care is owed in a situation not covered by previous authority is whether it is "fair, just and reasonable" to impose it.

> Proximity and policy are the two headings under which the Courts have determined the ultimate question: at [78].

[30] But defendants should not be subjected to substantial costs, often only partially recoverable, in defending untenable claims: *Attorney-General v Body Corporate 200200* [2007] 1 NZLR 95 at [51] (CA) ("*Sacremento*").

**Summary judgment principles**

[31] Rule 12.2 of the High Court Rules provides that the Court may give judgment against a plaintiff if the defendant satisfies the Court that none of the causes of action in the plaintiff's statement of claim can succeed. As stated in *McGechan on Procedure* at HR12.2.07:

> The defendant must be able to knock out the entire claim in order to be able to apply for summary judgment. If the defendant is only able to show that some of the causes of action cannot succeed, the proper course will be to apply for striking out.

**Submissions for the Council**

*Negligence – duty of care*

[32] The Council submitted that it does not owe a duty of care to the plaintiffs because the duty of care established by the *Hamlin* line of cases does not apply:

- These units are not private dwellings;
- The plaintiffs are not individual owner-occupiers;
- The units are not the homes of any of the plaintiffs (there is no pleading to this effect);

- The units were never intended as the homes of the plaintiffs who as investor purchasers have all entered into leases to enable the property to be operated as a hotel;

- The building was constructed as a hotel, and is operated as a hotel.

[33] Mr Goddard QC submitted the Court of Appeal in *Te Mata Properties* confirmed that there is no basis for recovery of financial/economic loss from a local authority in respect of motels/hotels or indeed any buildings other than owner-occupied private dwellings. He submitted that the rationale for imposing a duty of care in *Hamlin* does not justify the imposition of a duty of care in such cases, nor in this case. He submitted *Hamlin* was tied to special factors relevant to domestic dwellings of relatively low value and the presumed economic vulnerability of their owners, and cannot be extrapolated to non-residential property where the owners' interests are economic.

[34] He submitted *Te Mata Properties* confirms the basic rule that a local authority does not owe a duty of care to a building owner when performing its functions under building legislation, to protect the owner from financial loss. The exception established by *Hamlin* cannot be generalised beyond private homes "without demolishing the rule to which it is an exception": *Te Mata Properties* at [62].

[35] Mr Goddard submitted that the resultant reasoning in *Te Mata Properties* precludes:

- Any claim by the original owner/developer of the property, Charco; (no claim is pursued in this case);

- The plaintiffs' negligence claim;

- The plaintiffs' negligent misstatement claim, which depends on the existence of a duty of care owed by the Council to unit purchasers in respect of the grant of code compliance certificates.

[36] He submitted that it follows necessarily from the decision in *Te Mata Properties* that there is no such duty of care, referring also to *Attorney-General v Carter* [2003] 2 NZLR 160 (CA).

[37] Mr Goddard reasoned that if Charco had continued to own all the units and operate the hotel on its own account, *Te Mata Properties* would apply directly. So too, if Charco had sold all the units to another company to operate as an apartment hotel. He submitted the fact that the units were sold to a number of different investors could not change that result, as a matter of logic and principle. He also relied on the authority of *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515 which concerned a claim in negligence by a subsequent owner against engineers in relation to a commercial building. In that case the High Court of Australia held there must be an "anterior step", i.e. there must have existed a duty to the initial owners in order that such duty may be extended to subsequent owners: at 531-532.

[38] In oral submissions, Mr Goddard placed significant reliance on the judgment of the Court of Appeal in the *Charterhall* case which had been issued only days before the hearing of the Council's application, and was not referred to in the written submissions of the parties.

[39] He said that judgment is directly relevant to the plaintiffs' health and safety claims but also to the general duty of care alleged by the plaintiffs against the Council. He submitted the judgment in *Charterhall* confirms *Te Mata Properties*, that the duty of care in the *Hamlin* line of cases was not to be extended. He referred to the statement by the Court of Appeal that the features identified by Richardson J in *Hamlin* apply to residential properties built for typical New Zealand home-owners, but they have little or no relevance in a commercial context (citing *Three Meade Street Ltd v Rotorua District Council* [2005] 1 NZLR 504).

[40] He noted the Court's observation that the question of commercial context assumed particular significance in *Te Mata Properties*, following which the Court continued at [24] and [25] of *Charterhall*:

> Turning then to *Te Mata Properties*, we begin by reiterating that no party suggested that the case was wrongly decided. The appellants, having purchased two motels, discovered that both suffered from leaky building syndrome. They sued (among others) the HDC for the cost of the necessary remedial works, the loss of value of the properties, consequential losses and general damages. The appellants alleged that the HDC was negligent in performing its obligations under the Building Act, which included granting the relevant building permits, inspecting the properties as they were constructed and issuing certificates of compliance on completion. They relied principally on *Hamlin*.
>
> All members of the Court of Appeal agreed that the claim as formulated could not succeed. They considered that *Hamlin* was distinguishable, on the basis that it applied to the owners of domestic dwellings and not to the owners of commercial buildings, even if used for accommodation, and that the *Hamlin* principle should not be extended into the commercial context.

[41] Mr Goddard submitted there is no policy need for local authorities to assume responsibility in relation to commercial developments, where there is no "expertise vacuum". He said that if the claim against the Council is dismissed the plaintiffs have a number of other remedies. They have claims against the architects, the builder and the project manager as well as claims against the original owner/developer including warranty claims. The original owner/developer, he said, was well able to retain the necessary expertise upon which reliance could reasonably be placed and to whom the plaintiffs should be looking to recover any economic loss they have suffered. He submitted it is not for local authorities to effectively provide insurance against any inability to recover. It is not plausible, he said, to suggest that the plaintiffs could reasonably look to the Council to manage their financial risk and protect the value of their investment in this commercial venture.

[42] Counsel also referred to two recent High Court decisions: *Body Corporate 188529 & Ors v North Shore City Council & Ors* [2008] 3 NZLR 479 and *Body Corporate 189855 & Ors v North Shore City Council & Ors* CIV 2005-404-005561 25 July 2008, Venning J, identified respectively as the *Sunset Terraces* case and the *Byron Avenue* case. The High Court held in both cases that the owners of apartments in a multi-unit residential development, who purchased their apartments for investment purposes, were owed a duty of care by the Council. In reaching that determination the Court identified as the decisive factor the intended use of the building. Heath J in the *Sunset Terraces* case adopted a "bright line" test, holding that the duty of care of a council is limited to buildings where the intended use is

"disclosed as residential in the plans and specifications submitted with the building consent application or is known to the council to be for that end purpose": at [220].

[43] Mr Goddard noted some difficulties with the "bright line" test if rigidly applied and submitted that to the extent the "bright line" test would lead to liability beyond owner-occupied private dwellings, these two decisions are inconsistent with, and must be treated as overruled by, *Te Mata Properties* and *Charterhall*. (Both decisions have been appealed and judgment is awaited from the Court of Appeal).

[44] In any event, Mr Goddard submitted, these two decisions as they stand, point in favour of the absence of a duty of care in this case because:

a) The application and consents in this case identified the work as "New Commercial/Industrial";

b) The building was to the Council's knowledge designed and constructed as a hotel;

c) The development was carried out by a commercial property developer;

d) Based on the descriptions in the building consent applications and consents issued, the Council would expect that it did not owe a duty of care and the consents would have enabled purchasers of the units to predict this outcome.

*Penthouses*

[45] The Council rejects the plaintiffs' proposition that the owners of the penthouses which are not part of the hotel operation, are in a different position and that as residential property owners they are clearly owed a duty of care by the Council. The Council contends that the penthouse owners are not owed a duty of care by the Council to protect them from financial loss, whether on the *Sunset Terraces* "bright line" approach, or the *Te Mata Properties*/*Charterhall* approach.

[46] On the "bright line" approach the decisive factor is the description in the building and consent applications and consents granted, which was "New Commercial/Industrial". On that basis, counsel said, the Council could reasonably proceed on the basis that it did not owe a duty of care and the penthouse owners being on notice of this could not place reliance on the Council.

[47] On the *Te Mata Properties/Charterhall* approach:

a) An essential element of a *Hamlin* claim is that the defective property is the private dwelling of the plaintiff owner;

b) There is no pleading to that effect in this case; in fact at paragraph 42 of the fourth amended statement of claim it is pleaded that "Spencer on Byron":

> Includes residential units intended for habitation by members of the public.

c) From the identity of the owners (a company and two trusts), the penthouse apartments are not the private dwellings of the plaintiff owners;

d) No evidence has been filed in opposition to the summary judgment application to suggest it is arguable that the penthouses are private dwellings.

[48] It was submitted that as a matter of principle, the owners of the penthouses are no more vulnerable and no more reasonably reliant on the Council than the hotel unit holders. Further, there was no "expertise vacuum" to be filled by the Council. It is not appropriate, Mr Goddard submitted, for either class of unit owner to look to the Council to compensate for financial losses resulting from deficiencies in the input of the experts who were in fact retained by the property developers.

*Health and safety risks*

[49] Counsel noted that in *Te Mata Properties*, Baragwanath J at [70]-[77] considered it might be open to a plaintiff to argue for a duty of care by a local authority to ensure that buildings provide safe conditions for those who occupy them. This proposition was not supported by the majority.

[50] Mr Goddard submitted that in *Charterhall* the proposition was disposed of. The Court said at [42]-[44]:

> [42] Nor do we see the new cause of action based on health and safety as affecting the analysis. Clearing the Building Act does have a purpose of protecting the health and safety of those who use buildings, as Mr Goddard accepted: see Venning J in *Three Meade Street Ltd* at [48]-[49] and Asher J in *Mt Albert Grammar School Board of Trustees v Auckland City Council* HC AK CIV 2007-404-4090 25 June 2009 at [41]-[47]. But the fact that a body has statutory responsibility for a task (even in the form of a statutory duty) does not necessarily mean that it will be liable at common law for damages anyone who suffers loss as a result of its careless performance of the task: see Todd *The Law of Torts in New Zealand* (5ed 2009) at [6.6]. and even if the imposition of a duty of care in relation to health and safety was consistent with the policy of the Building Act, Charterhall does not, as we have already noted, sue as a person whose health and safety has been jeopardised. It sues as an entity which has suffered financial loss, in part through property damage but principally through loss of income.
>
> [43] There was a similar situation in the *Mt Albert Grammar* case. There the Minister of Education and the Board of Trustees of Mt Albert Grammar School advanced the health and safety argument in support of their claim against the Auckland City Council for damages resulting from the construction of school buildings which suffered leaky building syndrome. In the course of striking out the claim, Asher J noted that if the focus of the building legislation was on health and safety, the Minister and the Board were not the correct parties: at [50]-[51] and [63]. The Judge noted that the loss was purely financial and that there were other mechanisms for ensuring that health and safety obligations were met: at [66]-[67].
>
> [44] In the result, we accept Mr Goddard's submission that the Building Act does not seek to protect the value of buildings, or income streams from them, for commercial investors. In short, as was the case in *Carter*, the losses claimed are not ones against which the Building Act seeks to protect.

[51] Mr Goddard said that as in the *Charterhall* case, the plaintiffs in this case do not sue as persons whose health and safety have been jeopardised, there being no pleading to that effect, but rather for economic or financial loss they have suffered.

*Conclusion*

[52] The Council submitted that the authorities provide no support for a duty of care in this case, and that accordingly, the claim against the Council should be struck out, or alternatively, summary judgment entered against the plaintiffs.

**Submissions for the plaintiffs**

*Negligence – duty of care*

[53] The plaintiffs submitted this case is covered by existing Privy Council authority in respect of the residential units of which they say there are twenty-two (six residential from the outset - the penthouses - and a further sixteen which have subsequently received a resource consent for residential occupancy following application to the Council at the end of 2006).

[54] They rely on *Hamlin*. They submitted that the *Hamlin* duty of care is based on control by the Council and general reliance by the community. In support of that submission Mr Josephson referred to a number of decisions which pre-dated *Hamlin* including *Bowen v Paramount Builders* [1977] 1 NZLR 394 (CA), *Mt Albert Borough Council v Johnson* [1979] 2 NZLR 234 (CA), *Stieller v Porirua City Council* [1986] 1 NZLR 84 (CA), *Brown v Heathcote County Council* [1986] 1 NZLR 76 (CA).

[55] The plaintiffs say the Council has control of the building process now, as it did in the 1980s when these cases were decided. At the time "Spencer on Byron" was built the Council retained control under the Building Act 1991, and now does so under the Building Act 2004.

[56] It was submitted that the situation in this case in respect of the twenty-two residential units, is distinguishable from that in *Te Mata Properties*, because the premises in issue in that case were commercial motels. It was further submitted that the Council should owe a duty in respect of all the units at "Spencer on Byron" for reasons of uniformity and to avoid injustice. In this respect, the plaintiffs noted that all the units except the six penthouses are subject to a ten year lease to a hotel management company, but after ten years there is no obligation to renew and therefore the unit owners have the option to reside in the units after the expiration of ten years.

[57] Alternatively, the plaintiffs submitted that if the Court is not prepared to assert the existence of a duty of care by the Council in favour of all the plaintiffs, then this is a novel duty situation which should not be dealt with at an interlocutory stage but should be left to be determined at a full hearing when all the facts are before the Court.

[58] Mr Josephson emphasised that the second cause of action in which the plaintiffs, apart from the Body Corporate, bring claims in negligent misstatement, is a distinct and different tort from negligence. He said this cause of action relies on the contention that the Council had the power and a duty to issue code compliance certificates and/or notices to rectify. The tort involves specific reliance on the statements issued by the Council as distinct from general reliance in the *Hamlin* negligence tort. It was submitted there is no existing authority to the effect that these claims should be struck out.

[59] In relation to the elements of control and reliance claimed to underpin the *Hamlin* duty of care, the plaintiffs referred to a passage cited with approval in *Hamlin* at 516, from *Mt Albert City Council v New Zealand Municipalities Co-Operative Insurance Co Limited* [1983] NZLR 190 at 196:

> The local authority's control of building in its district has been held to carry a duty to take reasonable care in performing statutory functions.

[60] As to the element of reliance in establishing a duty of care in economic loss cases, reference was made to *Williams v Mount Eden Borough Council* (1986) 1 NZBLC 102,544 in which Casey J said at 102,551 (cited in *Hamlin* at 517):

> Having had these powers in relation to the construction of the buildings conferred on it, the reasonable local authority would no doubt have expected that they were intended to be exercised for the protection of those members of the public concerned with those buildings, whether as owners, occupiers or users.

[61] Counsel submitted that this element of community reliance places the focus upon the upkeep of buildings and building standards rather than on the circumstances of the plaintiffs. Thus, he submitted vulnerability is not the flip-side of control. He suggested that notions of vulnerability as the basis for the imposition of a duty of care appear to have their genesis in the Australian authority of *Woolcock.*

[62] He submitted it is incorrect to apply the principles of *Woolcock* to cases involving local authorities in New Zealand because:

a) That case involved an attempt by a subsequent purchaser to claim against an engineer who, it was submitted, could never have been under a general duty of care such as that owed by a public authority;

b) In *Hamlin* the focus is largely upon the position of the defendant local authority whereas in *Woolcock* and other cases that emphasise vulnerability, the focus is upon the plaintiff;

c) New Zealand law "has gone its own way": *Hamlin* (PC);

d) Even if vulnerability is a consideration, the unit owners at the "Spencer on Byron" building, purchasing usually just one unit, are vulnerable in ways that the purchaser in *Woolcock* was not.

[63] It was submitted that the High Court is bound to apply the principles of *Hamlin* strictly and those principles concern the control exerted by the Council in carrying out the exercise of its regulatory functions, together with the general reliance of the community on the Council, which together give rise to a duty of care.

[64] The plaintiffs submitted that on the authority of *Hamlin* the Council owes a prima facie duty of care in respect of the six units which have been residential from the outset and the sixteen which have subsequently been "re-categorised" following application to the Council.

[65] Reference was made to affidavit evidence filed by some of the unit owners, that they purchased believing that they could occupy the units upon the expiry of the ten year lease, there being no obligation on either party to extend the lease. Counsel also referred to affidavit evidence that a lease was found on the Council file. Also to an article published in the "North Shore Times" on 26 January 2001 where in an item under the heading "Topping off our tallest tower", there is a report of the roof being laid on the $50m "Spencer on Byron" hotel in Takapuna and that the hotel will have two hundred and forty-nine hotel suites, six penthouse apartments and conference, restaurant and other facilities. Then the Mayor is reported as saying that investors can buy a room which will be used as a hotel suite for at least ten years and that after this they can choose to move in themselves if they wish. So, it was submitted, the Council was on notice of the potential for the units to be used for residential purposes.

[66] It was then submitted that the Council should owe a duty to all the unit owners at "Spencer on Byron" which includes:

a) The six penthouse units that were residential from the outset;

b) Sixteen units that have subsequently been granted permission for use as residential units;

c) A substantial number of units currently subject to ten year leases which allow the lessors to live in the units on the termination of the leases;

d) A further number of units (approximately eighty-seven) where application has been made to change the use to residential.

[67] In support of that submission the plaintiffs noted the following:

a) It remains possible that further units will be converted to residential use;

b) Owners of existing residential units, the penthouses, will potentially be unfairly penalised if, for example, a duty of care by the Council exists only in respect of the six residential units. This would impact upon and potentially compromise common property issues affecting the building as a whole.

[68] In summary, it was submitted that the property at issue here is not a commercial property in the *Te Mata Properties*, *Charterhall* or *Three Meade Street* sense. There is a "sufficient" residential component. The property is not owned by a single commercial entity; individual owners are the claimants. It so happens that many of the units are currently managed by a management company but that, it was submitted, does not transform each plaintiff into a hotelier. *Hamlin* remains binding on New Zealand Courts and therefore the focus should be on control and general reliance, and not vulnerability and reasonable reliance. It was submitted that the Council should owe a duty at least in respect of any property that "having been built, has at any stage a residential use".

*Health and safety risks*

[69] The plaintiffs offered no submissions in opposition to the contention of Mr Goddard, that *Charterhall* has disposed of this cause of action. However Mr Josephson did not formally concede the point.

*Negligent misstatement*

[70] The plaintiffs rely on *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 and *Caparo Industries Plc v Dickman* [1990] 2 AC 605, and the elements of the tort recorded by the House of Lords in *Caparo* at 638:

(a) Advice is required for a purpose ... made known, actually or inferentially, to the advisor at the time when the advice is given;

(b) The advisor knows, either actually or inferentially, that his advice will be communicated to the advisee, either specifically or as a member of an ascertainable class, in order that it should be used by the advisee for that purpose;

(c) It is known, either actually or inferentially, that the advice communicated is likely to be acted upon by the advisee for that purpose without independent inquiry; and

(d) It is so acted upon by the advisee to his detriment.

[71] It was submitted that in negligent misstatement, specific reliance is a component of the cause of action, which is significantly different from a claim in ordinary negligence; that the claims under this cause of action rest on established law and should not be excluded summarily before all the evidence is tested.

**Authorities**

[72] I first consider the two important Court of Appeal judgments in *Te Mata Properties* and *Charterhall*.

***Te Mata Properties***

[73] The appellants in *Te Mata Properties* were the purchasers of two motels in Havelock North which were discovered to be leaky buildings. *Te Mata Properties* sued, among others, the Hastings District Council in the High Court for the cost of remedial works, the loss of value of the properties, consequential losses and general damages. It claimed the Council was negligent in performing its obligations under the Building Act 1991 including the grant of building permits, inspection of construction and issue of certificates of compliance with the Building Code.

[74] The Court of Appeal, upholding the High Court, struck out Te Mata Properties' claim. The Court 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, but this exception could not be

generalised beyond the case of the public interest in secure residential property for habitation, without demolishing the rule to which it was the exception. The Court held that interests of habitation and health and presumed economic vulnerability meant that a Council owed a duty to the owner of a dwellinghouse. A motel owner's interest was outside the requirements that the premises be the plaintiff's place of habitation and contain potential risk to health.

[75] Baragwanath J extensively reviewed relevant authorities both before and after *Hamlin* which considered the duty of care of a local authority to avoid economic loss to a property owner by reason of physical damage. They included those authorities pre-*Hamlin* cited by the plaintiffs in support of their submission that control and reliance are the essential factors underpinning the *Hamlin* duty of care.

[76] At [2] the Court of Appeal described the nub of the decision in *Hamlin* to be as stated in the judgment of the Privy Council at 519 (endorsing the comment by Cooke P in the Court of Appeal reported in [1994] 3 NZLR 513):

> ... whatever may be the position in the United Kingdom, home-owners in New Zealand do traditionally rely on local authorities to exercise reasonable care not to allow unstable houses to be built in breach of by-laws.

[77] The Court of Appeal said at [36]:

> 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.

[78] At [57]:

> *Hamlin* did not turn on the issue of habitation. Its focus was rather on protection of the investment in property. But it can be rationalised as an exceptional and practical response to the position of an average domestic home owner, justified by a presumed economic vulnerability.

[79] At [62] Baragwanath J said:

> I am satisfied that, the public health issue aside, *Hamlin* claims can be justified only as an exceptional response to the claims of residence and domestic accommodation. They provide no basis for extrapolation to non-residential property. Outside such a context a claim for purely economic loss encounters the obstacle that damages for loss are generally irrecoverable in negligence.

[80] At [73] Baragwanath J stated his conclusion with which at [87], the majority (O'Regan and Robertson JJ) agreed:

> 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.

***Charterhall***

[81] Charterhall owned and operated an upmarket lodge which suffered damage by fire in December 2003. The lodge had been built pursuant to consent granted by the appellant, the Queenstown Lakes District Council. The council also conducted inspections during the building's construction and issued a certificate of code compliance upon its completion. Charterhall sued the council and the architects for the project. In relation to the council, Charterhall alleged that it breached a duty of care owed to it by failing to identify that the chimney was defective both in design and construction and did not comply with the building code, and by failing to require compliance with the code. Charterhall claimed for the cost of repairs to the lodge and for loss of income while the lodge was closed for repair.

[82] The council applied to have the claim struck out essentially, on the basis that:

a) Charterhall was a commercial operator providing luxury accommodation on a commercial basis. Accordingly *Hamlin* and related authorities did not apply;

b) Charterhall was in a position to, and did, retain and rely on its own expert advisers in relation to the design and construction of the lodge. It did not need the council to protect its commercial interests;

c) There were no policy reasons justifying the imposition of a duty of care on the Council towards Charterhall in the circumstances. Neither the Building Act 1991 nor relevant authorities, in particular *Hamlin*, supported the imposition of such a duty of care.

[83] The Court of Appeal at [19] set out the six distinctive features of housing in New Zealand identified by Richardson J in the Court of Appeal judgment in *Hamlin* at 524-525, in explaining why New Zealand Courts had consistently held that local authorities owed duties of care to home owners in carrying out building inspections:

a) The high proportion of occupier-owned housing;

b) The high proportion of housing construction undertaken by small-scale cottage-builders for individual purchasers;

c) The nature and extent of government financial support for private house building and home ownership;

d) The surge in house building in the 1950s and 1960s;

e) The high level of central and local government support for private home building through the promulgation of building standards, by-laws and such like; and

f) The fact that it was not common practice for new house-buyers to commission building surveys or seek other expert assistance. Rather, local authorities were expected to provide a degree of expert oversight.

[84] The Court observed at [23]:

> As will be immediately apparent, the features identified by Richardson J go to residential properties built for typical New Zealand home-owners. They have been held to justify the application of the *Hamlin* duty in respect of residential dwellings other than houses (see *Body Corporate 188529 v North Shore City Council* [2008] 3 NZLR 479 (HC) especially at [220], which concerned residential units in a townhouse development), even where dwellings are owned by investors rather than occupiers (see *Body Corporate No 189855 v North Shore City Council* HC AK CIV 2005-404-005561 25 July 2008, especially at [24]). But they have little or no relevance in a commercial context ... The question of commercial context assumed particular significance in *Te Mata Properties*.

[85] Turning to *Te Mata Properties*, the Court said at [25] that the Court of Appeal in that case considered that *Hamlin* was distinguishable:

> ... on the basis that it applied to the owners of domestic dwellings and not to owners of commercial buildings, even if used for accommodation, and that the *Hamlin* principle should not be extended into the commercial context.

[86] The Court then dealt with what was described as the health and safety claim, and dismissed it. (Refer [50] above).

[87] The Court said it was satisfied that the effect of the decisions of the Court in *Te Mata Properties* and *Carter* was that Charterhall's claim against the council could not succeed and must be struck out. The Court held at [37]:

> The imposition of the [*Hamlin*] duty essentially reflects a value judgment that seeks to recognise the particular housing arrangements that have developed in this country. As we have said, those considerations have little relevance in a commercial context. This is exemplified by the present case. Here Charterhall retained two firms of architects as well as various other specialist advisers, including fire protection engineers. Accordingly, unlike the house-owners discussed by Richardson J in *Hamlin*, Charterhall was not dependent on the council to protect its interests – it was able to, and did, take steps to do that.

[88] Again on the "vulnerability" factor the Court said at [39]:

> ... Charterhall cannot be characterised as "vulnerable" in the same as house-owners. As is to be expected, it had its own advisers. It was able to, and presumably did, manage the risk of errors by its contractors through the contractual arrangements which it made with them. This tells against the imposition of a duty of care: see *Rolls Royce New Zealand Ltd v carter Holt Harvey Ltd* [2005] 1 NZLR 324 (CA), especially at [59]-[64].

[89] The Court went on to observe at [40] that the loss which Charterhall suffered was not the direct result of the council's actions in the sense that the council did not itself physically damage the lodge. The Court did not see the type of physical damage suffered in Charterhall as justifying a different approach to that taken in *Te Mata Properties*.

[90] The Court accepted that the Building Act does not seek to protect the value of buildings, or income streams from them, for commercial investment. Referring to

the authority of *Carter*, the Court held the losses claimed were not ones against which the Building Act seeks to protect.

[91] The Court summarised at [45] the considerations against a finding of proximity in the circumstances of the Charterhall case, of the sort that exists in relation to the owners of residential dwellings:

a) The duty of care would be owed to all users of commercial buildings which is a wide class. Its width tells against the imposition of a duty.

b) While the Council exercised some control in relation to the lodge (for example a building consent was required), the party best placed to protect Charterhall's interests was Charterhall itself. It was able to, and did, retain architectural and other experts. It is to them that Charterhall should look to recover its losses.

The Court said:

> ... As a matter of principle, we see no justification for requiring councils (in effect) to act as insurers for building owners against the negligence of their contractors, or against the possibility that those contractors will become insolvent ...

c) The Building Act provides little or no support for the imposition of a duty in such a case. In *Hamlin* the duty of care was justified in respect of home-owners essentially on the basis of public expectation, house-owner reliance and practice, but there is no policy justification for an imposition of a duty of care in the circumstances of the Charterhall case.

d) The imposition of a duty of care in the context of commercial buildings has been rejected in the United Kingdom (*Murphy v Brentwood District Council* [1991] 1 AC 398 (HL)) and in Australia (*Woolcock*). There was no reason that New Zealand should adopt a different approach in the commercial context.

## Discussion

### *Negligence – duty of care*

[92] The Court of Appeal in *Te Mata Properties* and *Charterhall* has firmly rejected the extension of the *Hamlin* duty of care in the context of commercial buildings. An essential element for a *Hamlin* claim is that the defective property is the private dwelling of the plaintiff owner. (I do not find in the Court of Appeal judgments reference to the description "owner-occupied" adopted by Mr Goddard in his written submissions; the requirement is that the dwelling should be the private home of the plaintiff, not necessarily tied to an occupation factor: see for example *Sunset Terraces* and *Byron Avenue*).

[93] The factors underpinning the recognition in New Zealand of the *Hamlin* duty of care include those identified by Richardson J, referred to at [83] above. As Casey J said at 530 of the Court of Appeal judgment in *Hamlin*, the obtaining of surveyor's or engineer's reports by house purchasers was virtually unknown in New Zealand and the only check on compliance with reasonable building standards was that carried out by local body inspectors.

[94] The Court of Appeal in *Charterhall* placed significant reliance on what is described as the "vulnerability" factor, rather than emphasising the factors of control and community reliance espoused by the plaintiffs in this case. The Council has a measure of control in the issuing of building consents and code compliance certificates but it is a limited measure of control confined by its statutory obligations and duties. A much greater measure of control is available to a commercial operator in a commercial construction venture, such as Charco, to protect its own interests by contracting for such expertise as is required, including architects, engineers and builders. It is not appropriate for local authorities to be called upon to act as fallback insurers in situations where those capable of protecting their own interests either have failed to do so or are unable to recover.

[95] Spencer on Byron is a major multi-storeyed hotel, clearly a commercial building, developed and operated as such. None of the factors identified by Richardson J in Hamlin applies in the context of this case. Prima facie, on the authority of *Te Mata Properties* and *Charterhall* the Council owes no duty of care to the plaintiffs.

[96] It can make no difference that the plaintiffs happen to be individual investors who have acquired interests in the building from Charco, the original developer. Their individual ownership of unit titles is simply the legal ownership structure selected by the developers as most suitable for ongoing investment in the commercial building and hotel enterprise. In *Te Mata Properties* the plaintiffs were companies who acquired the motels from the original owner/developer. In this case the plaintiffs are individuals who acquired unit titles in the building. A structure could have been selected by which the plaintiffs owned shares in a company which held the title to the "Spencer on Byron" property or they could have held their interests as tenants in common in equal or unequal shares, or by some other means. The ownership structure selected cannot give rise to or impact upon any duty of care owed by the Council in relation to a commercial building developed and constructed by commercial operators, well able to protect their own interests.

[97] Nor, in my view, can the possibility that in future some of the units may be used for residential purposes create or impact upon any duty of care by the Council to the plaintiffs. The duties and obligations of the Council under the Building Act 1991 arose at the time the consents and code compliance certificates were issued. The intended use of the building was clearly identified as New Commercial/Industrial in the applications to Council and in the certificates issued, and "Spencer on Byron" was constructed as, and operates as, a hotel. This was its intended, and is its actual, use (with a reservation in respect of the penthouses to which I shall subsequently refer). That there may be potential in future (following expiration of the leases in favour of the hotel management company after ten years or any subsequent term, and dependent upon changes in resource consents), for the units or some of them to be used for residential purposes, cannot impact on any duty of care the Council might have arising from the issue of building consents and code compliance certificates. After all, changes in use of buildings from

commercial/industrial to residential and vice versa, are far from uncommon. The potential for changed use, is not a factor which varies the nature of the property in issue here, which is clearly commercial.

[98] If the "bright line" test adopted by Heath J in *Sunset Terraces* is adopted, then the intended use of "Spencer on Byron" is clearly identified by the designation of "New Commercial/Industrial" in the applications to the Council and certificates issued.

[99] I do not need to deal with the "anterior step" argument advanced by Mr Goddard on the basis of *Woolcock*. It is common ground that Charco has no claim for breach of a duty of care against the Council. But if the building had been residential, then on the *Hamlin* principle a subsequent owner may well have been able to claim a duty of care by the Council, as held in the *Sunset Terraces* and *Byron Avenue* cases. That is not the case. The building is commercial, which is determinative.

[100] With the reservation that follows in respect of the penthouses, there can be no duty of care on the Council in this case and the plaintiffs' claim in negligence against the Council cannot succeed.

*Health and safety risks*

[101] The plaintiffs' claim based on health and safety risks cannot succeed on the authority of *Charterhall*.

*Negligent misstatement*

[102] The pleading in negligent misstatement mirrors that considered by the Court of Appeal in *Charterhall* at [9](c); that "at the time it issued the code compliance certificate [the council] had no reasonable grounds to believe that the work had been carried out consistently with the Building Code or the building consent".

[103] In *Carter*, a case considered by the Court of Appeal in *Charterhall*, interim certificates of survey under the Shipping & Seamen Act 1951 had been issued by the Ministry of Transport in relation to a vessel. The certificates were subsequently renewed on two occasions by entities that took over the Ministry's responsibilities. The plaintiffs subsequently purchased the vessel. They then discovered the vessel was effectively a write-off and they had lost the purchase price paid for it. They claimed the survey certificates had been issued negligently and issued proceedings against the Ministry and a successor company to recover financial losses said to have been incurred as a result of relying on the allegedly negligent and erroneous survey certificates.

[104] The Court of Appeal said at [26]:

> ... If a statement is made for a particular purpose, it will not usually be reasonable for the plaintiff to rely on it for another purpose.

The Court continued at [34]:

> It cannot reasonably be said that the [Ministry and the company] 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 [vessel]. Hence the necessary proximity between the parties is absent ... the statutory environment is such that the purpose of the certificate [maritime safety] was entirely different from the purpose for which the plaintiffs claim to be entitled to place reliance on it [protection against economic loss]. ... 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 are entitled to rely on the certificates.

[105] On the same basis, the plaintiffs claim in negligent misstatement against the Council cannot succeed. The plaintiffs are claiming protection against economic loss stemming from their reliance on a code compliance certificate, which is a purpose different from that for which the certificate was issued under the Building Act 1991.

[106] On the authority of *Charterhall* and *Carter* there can be no duty of care for negligent misstatement owed by the Council to the second plaintiffs. This cause of action must also fail.

[107] The legislative purpose in the Building Act 1991 underlying the requirement for the certificates, is not to protect owners of non-residential property against financial loss, or indeed the owners of any property against financial loss. In short, as the Court said in *Charterhall*, the losses claimed are not ones against which the Building Act seeks to protect.

*Penthouse Plaintiffs*

[108] The penthouses were apparently purchased as residential units and are not subject to ten year leases in favour of the hotel management company as are the units on the lower floors. While I am satisfied that the existence of these residential units on the top two floors of the twenty-three level "Spencer on Byron" building, cannot and does not affect the designation of the building as a commercial building, the possibility cannot reasonably be excluded that the three plaintiffs who are the owners of the penthouses, may succeed in establishing against the Council a duty of care based on the *Hamlin* principle.

[109] While the fourth amended statement of claim pleads at paragraph 42(a) that "Spencer on Byron" "Includes residential units intended for habitation by members of the public", it would seem to be the situation that the penthouses have at all times been treated differently from the hotel units and have not been under hotel management or operated as part of the hotel.

[110] If the "bright line" approach in *Sunset Terraces* is the appropriate test, then any claim against the Council by the penthouse owners would fail because the description of the building in consent applications and certificates was "New Commercial/Industrial". It is fair to say, on that description, the Council could reasonably proceed on the basis that it did not owe a duty of care to any owner or owners in relation to the building generally.

[111] These plaintiffs may also be in difficulty in relation to the "vulnerability" factor and the absence of any expertise vacuum, in relation to which they are in the same situation as all unit holders. Nevertheless, if the penthouses are the private dwellings of the three plaintiffs who own them (and it cannot be fatal to such a claim

that ownership is in the name of a company or a trust for, particularly in the case of trusts, that would be so with many private dwellings), I consider the situation in respect of any duty of care to be at least arguable. It would therefore be inappropriate to strike out the claims of these three plaintiffs except under the health and safety head of claim (which cannot succeed on the authority of *Charterhall*).

**Result**

[112] In the result I consider the appropriate course is to strike out all the plaintiffs' claims against the first defendant, the Council, except the claims of the three plaintiffs who are the owners of the penthouses.

[113] The Council's application is therefore granted to the following extent:

a) The plaintiffs' causes of action against the Council are struck out except as follows:

b) The causes of action against the Council by the three plaintiffs who are owners of the penthouses are struck out only in respect of the claims based on health and safety risks. The fourth amended statement of claim should be amended to exclude these claims.

[114] Leave to apply is reserved should further clarification of these orders be required.

**Costs**

[115] The Council is entitled to costs. I did not receive submissions on costs. If costs cannot be settled by agreement the parties may file memoranda, the Council within 21 working days and the plaintiffs within 14 working days thereafter. I will then determine costs on the papers.