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NEWSLETTER

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LEAKY BUILDINGS & COUNCIL LIABILITY - THE FINAL WORD?

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In a landmark decision in 1994 the New Zealand Court of Appeal stated in the Hamlin case that home owners in New Zealand could look to their local Councils for damages caused by that Council's negligence in carrying out its statutory duties under the Building Act.

That decision was confirmed in 1996 by the Privy Council because New Zealanders rely on the service provided by the Council particularly in the issuing of Building Consents, the inspections performed by the Council during the building phase, and ultimately the issuing of a Code Compliance Certificate certifying that the Council is satisfied that the building work carried out was in accordance with the consent and the requirements of the Building Act.

Despite attempts to widen the eligibility of persons able to sue Councils, the New Zealand Courts have steadfastly adhered to the finding that only residential owners could look to the Council for damages. Commercial owners cannot.

Councils have a duty to subsequent owners as well. In 2010 the Court of Appeal was again asked to rule on the question of Council liability (*Sunset Terraces case*) and stated that:

(a) Local Bodies owed a duty of care in monitoring construction to all properties that were described in the Consent application and plans as being intended for residential use, and were known to the Council as such and it does not matter whether the building was large and complex or a single dwelling, whether it was owner occupied or rented or whether experts such as architects and engineers were involved;

(b) The right to sue the Council was not confined to the original owners of a property unless the subsequent purchaser had knowledge or the means of knowledge of the faults so that purchaser could be taken to have bought the building accepting its condition.

An appeal to the Supreme Court upheld the Court of Appeal's decision.

But what happens when a building consists of a mixture of commercial and residential properties such as an inner city block with retail on the ground floor, office space above that, and residential apartments on the upper levels, the "mixed use" building?

In April of 2011 the Court of Appeal was asked to decide just that in the case of a building known as "Spencer On Byron". That is a building run as a hotel with 249 rooms which are individually owned and rented almost exclusively to paying guests. The complex also included six residential apartments.

The majority of the Court stated that the Council did not owe a duty of care to any of the owners including those six residential owners since the original plans and Consent application described the building as "new commercial/industrial".

So it is finally settled … Councils owe a duty of care to owners of properties which were identified on the plans and Building Consent as "residential". This duty of care extends to subsequent purchasers of that property. If however you purchase a residential apartment in a building which was described on the plans and Consent application as commercial/industrial, at the moment you are out of luck. Any future developments in this area for mixed use buildings will be interesting.

A word of warning though, if you purchase a leaky home without first obtaining a LIM which would have put you on notice of the building's leaky status, the Council will be entitled to claim contributory negligence because you failed to take reasonable steps to protect your interest.