COLLINS & MAY | LAW

NEWSLETTER

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LEAKY BUILDING & COUNCIL LIABILITY— THE FINAL WORD!

In July 2011 I wrote a newsletter with the same heading as this but with a question mark at the end.

In that newsletter I wrote that while home owners in New Zealand could look to their local Councils for damages caused by the Council's negligence in carrying out its statutory functions under the Building Act, a recent Court of Appeal decision (the Spencer on Byron case) had confirmed that there was a difference between residential owners and commercial owners even where they were a part of the same building, and that the difference in Council liability was based on whether the original plans submitted to the Council for consent specified whether the building was "residential" or not. I noted at the time that the law on the subject now seemed to be settled but that any future developments would be interesting.

There have indeed been some interesting developments. The Court of Appeal's decision in Spencer on Byron was appealed to the Supreme Court which overturned it late last year.

Spencer on Byron is a tower block in Takapuna comprising mainly of hotel rooms (each with its own title) but with half a dozen penthouse apartments. When the plans were submitted to the Council for building consent, the project was noted as being "commercial/industrial". When the building exhibited signs that it leaked the owners sued the Takapuna Council for negligence over its building inspections. The Council applied to the Court to have the case thrown out on the basis that the common law at the time said that Councils only owed a duty of care to residential owners and not to commercial owners. The Court of Appeal agreed and struck out the owners' claim. This seemed an unfair result given that at least part of the building (the penthouse apartments) were residential and it was arguable that at least some of the hotel rooms could also be residential as they were on individual titles. However the law at the time seemed clear – unless the plans specified that the purpose of the building was "residential" the Council owed no duty of care to the future owners, and it was that law that the Court of Appeal followed.

The owners appealed to the Supreme Court. The Supreme Court has decided that there should be no real difference between the duties owed by the Council to residential owners and the duties owed by the Council to commercial owners – they both rely on the Council to carry out its functions properly after all, and they should both be able to enforce that reliance. The Building Act itself makes no distinction between residential and commercial properties so why should the Courts?

Given that the Supreme Court is our highest Court (apart from Parliament itself) it now seems absolutely settled that Councils owe the owners of buildings a duty of care when issuing building consents, any work carried out by the council leading up to the issuing of a code compliance certificate including building inspections, and the issuing of the code compliance certificate itself;and it doesn't matter whether the building is residential or commercial.

Or at least it is absolutely settled unless or until Parliament decides to amend the statutes in some way to remove or restrict Council liability. We will wait and see.