IN THE COURT OF APPEAL OF NEW ZEALAND

CA441/2008
[2009] NZCA 374

BETWEEN	QUEENSTOWN LAKES DISTRICT COUNCIL Appellant
AND	CHARTERHALL TRUSTEES LIMITED First Respondent
AND	BLAIR & CO LIMITED Second Respondent

Hearing: 21 May 2009

Court: Chambers, Arnold and Ellen France JJ

Counsel: D J Goddard QC and D J Heaney SC for Appellant
I G Hunt and C J Jamieson for First Respondent
M E Parker and J Taylor for Second Respondent

Judgment: 25 August 2009 at 3 pm

JUDGMENT OF THE COURT

A The appeal is allowed.

B The first respondent's statement of claim against the appellant is struck out.

C The first respondent must pay the appellant costs for a complex appeal on a band A basis. We certify for two counsel.

REASONS OF THE COURT

(Given by Arnold J)

Introduction

[1] This case concerns the liability of a local authority to the owner of a commercial building who alleges that, as a result of the local authority's negligence in the course of the approval and building process, the building had a defect which ultimately caused the owner to suffer loss.

[2] The first respondent, Charterhall Trustees Limited (Charterhall), owned and operated an upmarket lodge which suffered damage by fire on 1 December 2003. The lodge had been built pursuant to consent granted by the appellant, the Queenstown Lakes District Council (the Council). The Council also conducted inspections during the building's construction and issued a certificate of code compliance upon its completion.

[3] Charterhall sued the Council and the second respondent, Blair & Co Limited (Blair & Co), who were the New Zealand architects for the project, alleging that the fire was caused by the defective design and/or construction of the lodge's chimney. In relation to the Council, Charterhall alleged that it had breached a duty of care 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.

[4] The Council applied to strike out Charterhall's claim against it. Fogarty J rejected that application: HC INV CIV 2007-425-000588 27 June 2008. The Council appeals against that decision. In essence, it submits that this case is governed by this Court's decision in *Te Mata Properties Ltd v Hastings District Council* [2009] 1 NZLR 460, a decision which post-dates Fogarty J's judgment.

Background

[5] Charterhall owns and operates Blanket Bay Lodge, a luxury lodge situated on Lake Wakatipu between Queenstown and Glenorchy. The lodge was built between June 1998 and December 1999. Two firms of architects (one based overseas and the other, Blair & Co, based locally) were involved in the preparation of plans and drawings for the lodge and in the oversight of its construction. In addition, Charterhall retained various other specialist advisers for the project. Among these were fire safety engineers, one of whom issued a producer statement confirming that the lodge's fire protection systems had been completed in accordance with the consent.

[6] The Council granted a building consent for the project on the basis of the architects' plans and specifications, carried out inspections as the building was constructed and, upon its completion, issued a code compliance certificate.

[7] The fire occurred on 1 December 2003. Charterhall alleges that it started in a rooftop tower which encased two exhaust flues from a large open fireplace in the lodge's guest lounge. Charterhall's allegation is that the design of the tower was defective and not code compliant as the flues terminated at the same level as the top of the tower rather than extending above it. As a consequence, hot embers coming out through the flues were able to accumulate in the cavities of the tower and come into contact with unprotected timber, thus creating the risk of fire. The fire at issue, Charterhall claims, started in this way.

[8] Charterhall alleges that Blair & Co were negligent in the preparation of the detailed drawings for the lodge. In relation to the Council, the current statement of claim alleges:

> 17. The Council owed [Charterhall] a duty to exercise reasonable care and skill in issuing and administering building consent 980371, which duty required the Council to:
>
> (a) Consider the detailed drawings with care, skill and due regard to the requirements of the Building Code;

(b) Apprehend that the design represented in the detailed drawings for the main tower did not comply with the Building Code;

(c) Apprehend that the design represented in the detailed drawings for the main tower did not comply with Acceptable Solution C1/AS1 and New Zealand Standard 7421:1990;

(d) Apprehend that the design represented in the detailed drawings for the main tower posed an inherent fire risk;

(e) Conduct inspections of the building work with sufficient diligence and frequency to satisfy itself on reasonable grounds that the building work complied with the conditions of building consent 980371 and with the Building Code;

(f) Issue a certificate of code compliance only when satisfied on reasonable grounds, that the building work to which the certificate related complied with the Building Code.

[9] Charterhall goes on to allege that the Council breached its duty because:

(a) in issuing the building consent it failed to detect that the design of the tower did not meet the requirements of the Building Code or other applicable standards and was unsafe;

(b) in carrying out its inspections it failed to detect that some of the fire protection detailed in the drawings which formed the basis for the grant of the building consent was not present; and

(c) at the time it issued the code compliance certificate it had no reasonable grounds to believe that the work had been carried out consistently with the Building Code or the building consent.

[10] Charterhall claims for the cost of repairs and of replacement chattels, and for loss of income while the lodge was closed. Before us the relevant amounts were stated to be $81,616.95, $16,062.31 and $207,332 respectively.

[11] The Council applied to have the claim against it struck out, essentially on the basis that:

(a) Charterhall was a commercial operator providing luxury accommodation on a commercial basis. Accordingly authorities relating to the liability of councils to owners of residential properties, in particular *Invercargill City Council v Hamlin* [1996] 1 NZLR 513 (PC), did not apply;

(b) Charterhall was in a position to, and did, retain and rely on its own expert advisors in relation to the design and construction of the lodge. Accordingly it was able to, and did, protect its commercial interests, and did not need to rely on the Council to do so;

(c) There were no policy reasons justifying the imposition of a duty of care on the Council towards Charterhall in the circumstances of this case. The Building Act 1991 did not support the imposition of such a duty, nor did the relevant authorities, in particular *Hamlin*.

[12] As we have said, Fogarty J declined the Council's application. He summarised his views at [55] as follows:

> In brief, and without attempting a comprehensive summary, the reasons which stand out against a strike out are:
>
> - The plaintiff can rely on a proximity analysis of damage, causation and foreseeability, linking it to the [Council].
> - The legislative environment cannot be said to point conclusively against a common law duty of care.
> - The building defect/economic loss and negligent misstatement cases can be distinguished.
> - This can be argued as a case of commission rather than omission.

[13] After Fogarty J delivered his judgment, this Court gave its decision in *Te Mata Properties*. We discuss that decision below. For present purposes it is enough to say that the Court upheld the decision of Williams J striking out claims in negligence against the Hastings District Council (HDC) by the purchasers of two motels which suffered from leaky building syndrome. Mr Goddard QC submitted that the present case is indistinguishable from *Te Mata Properties* and that, as there was no challenge to that decision, the appeal had to be allowed. Mr Hunt for

Charterhall and Mr Parker for Blair & Co argued *Te Mata Properties* could be distinguished, for reasons which we discuss below. Finally, we note that, prior to the hearing, Mr Hunt submitted a draft amended statement of claim which adds a further cause of action against the Council. We deal with that below also.

Discussion

[14] We comment first on the principles to be applied in relation to a strike out application in this context. We will then move on to the substance of Charterhall's claim against the Council.

Strike out principles

[15] The principles applicable on a strike-out application under r 186(a) of the High Court Rules were summarised by this Court in *Attorney-General v Prince and Gardner* [1998] 1 NZLR 262 at 267. They are well-known, and do not require repetition.

[16] However, Mr Hunt drew our attention to the observations of Elias CJ and Anderson J in *Couch v Attorney-General* [2008] 3 NZLR 725 at [32] (SC), where the need for caution in summarily disposing of cases involving allegations of duties of care in novel situations was recognised. Caution is required "both to prevent injustice to claimants and to avoid skewing the law with confident propositions of legal principle or assumptions about policy considerations, undisciplined by facts". The point is not a new one, and obviously we bear it in mind. But we are also conscious that defendants should not be subjected to substantial costs, often only partially recoverable, in defending untenable claims: see *Attorney-General v Body Corporate 200200* [2007] 1 NZLR 95 at [51] (CA) (*Sacramento*).

Claim against the Council

[17] There are two decisions of this Court which require discussion – *Te Mata Properties* and *Attorney-General v Carter* [2003] 2 NZLR 160. And to put *Te Mata Properties* in its proper context we must first briefly discuss *Hamlin*.

[18] Mr Hamlin contracted a builder to build a house for him. It was completed in 1972. In 1989 Mr Hamlin learnt that the foundations were defective and did not comply with the relevant by-laws. He sued the local council (along with the builder, who can be ignored for present purposes) for the cost of repair. He succeeded, on the basis that the council had breached its duty of care to him by negligently carrying out inspections intended to ensure compliance with the relevant by-laws (there was also a limitation point, which is irrelevant for our purposes): [1993] 1 NZLR 374 (HC). That decision was upheld in this Court, which declined to follow the decision of the House of Lords in *Murphy v Brentwood District Council* [1991] 1 AC 398 to contrary effect: [1994] 3 NZLR 513. It was also upheld on further appeal to the Privy Council: [1996] 1 NZLR 513.

[19] In this Court Richardson J explained why New Zealand courts had consistently held that local authorities owed duties of care to house-owners in carrying out building inspections. He identified six distinctive features of housing in New Zealand (at 524 – 525):

(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.

The Judge summarised this point by saying at 525:

> The bylaws and the question of whether it was just and equitable for the local authority to be under a duty of care to the owner (and successors in title) in discharging responsibilities in relation to the inspection of houses under construction, have to be considered against that background which was special to New Zealand of the times.

[20] Cooke P expressly adopted Richardson J's analysis on this point. He said that "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 the bylaws. … The linked concepts of reliance and control have underlain New Zealand case law in this field from [*Bowen v Paramount Builders (Hamilton) Ltd* [1977] 1 NZLR 394 (CA)] onwards": at 519. Cooke P left open the question whether the duty of care would extend to the owners of commercial buildings: at 520.

[21] Returning to Richardson J's judgment, having set out the distinctive features of housing in New Zealand the Judge went on to consider both the lengthy background to the enactment of the Building Act 1991 and the Act's provisions. On this aspect he concluded at 527:

> The point of all this is that over a period of ten years building controls were the subject of detailed consideration, quite dramatic changes in approach were taken reflecting a particular economic and philosophical perspective, but without questioning the duty of care which the New Zealand Courts have required of local authorities in this field. While it may be going too far to characterise the Building Act 1991 as a ringing legislative endorsement of the approach of the New Zealand Courts over the last 20 years, there is nothing in the recent legislative history to justify reconsideration by this Court of its previous decisions in this field.

[22] In the Privy Council it was accepted that the special features of housing in New Zealand, together with the fact that there was a divergence of views among Commonwealth jurisdictions, justified this Court's refusal to follow *Murphy*: at 520 – 521.

[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 the 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. So, in *Three Meade Street Ltd v Rotorua District Council* [2005] 1 NZLR 504 (HC), Venning J held that a local authority did not owe a duty of care to the developer of a motel, although he did not rule out the possibility that in some circumstances a duty of care might arise in a commercial context: at [39] – [40]. The question of commercial context assumed particular significance in *Te Mata Properties*.

[24] 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*.

[25] 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.

[26] However, they were divided on the question whether the appellants should be given further time to amend their pleadings so as to formulate what we will describe as a health and safety claim. Baragwanath J noted that there was material before the Court which indicated that the defects in the motels (in particular, the rot resulting from the leaking) could affect the health of occupants. This, the Judge considered, provided a possible basis for distinguishing *Hamlin*. The decision in *Hamlin*, he said, was based on the need to protect the economic interests of homeowners (an inherently vulnerable class) in their habitations. It was not based on the need to protect the health and safety interests of the occupants of homes. Baragwanath J considered that it was arguable that the need to protect occupants' health and safety justified the imposition of liability on councils even in a commercial context. He would have given the appellants further time to amend their pleadings to include such a claim: at [78].

[27] The majority were not attracted to this suggestion, however. Writing for O'Regan J and himself, Robertson J said:

> [84] The appellants' case as presented by Mr Weston QC, was rooted entirely in the proper interpretation of [*Hamlin*] and its limits. That was not a matter of oversight but a calculated decision based on an appreciation that this Court's decision in *Attorney-General v Carter* [2003] 2 NZLR 160 stood in the way of such a cause of action succeeding. Mr Weston urged us to view the appellants' arguments through "a *Hamlin* lens". He asked us to evaluate the "sui generis" *Hamlin* duty and determine whether it was appropriate to extend it to cover the present case. His difficulty was that the underpinning logic of the *Hamlin* decision is the need to protect vulnerable home owners from economic loss, rather than the need to protect the health and safety of the occupants of the home. The Court is united in determining that it is not appropriate to extend the *Hamlin* duty in this way.
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> [85] The possibility of liability under "an interest in habitation and health" was not part of this case. The material in the affidavit from the building surveyor quoted by Baragwanath J at para [67] was not relied on by counsel as a suggestion that anything other than the *Hamlin* approach could be applied to the facts of the case. To the extent that the appellants made arguments based on the health and safety of occupants of the motels to which the claims relate, they did so only in support of that argument.

[28] As we have already noted, prior to the hearing of the present appeal Mr Hunt filed a draft amended statement of claim. In addition to amending the allegations in the claim against the Council based on its actions in considering, approving and administering the building consent, the draft amended statement of claim included a new cause of action. That alleged that the Council owed Charterhall:

> a duty to exercise reasonable care and skill to ensure that the Lodge would provide safe conditions for those occupying it and, in particular, that the [appellant] and all users of the Lodge would be safeguarded from injury, illness or loss of amenity, and protected from harm by fire.

Thus the appellant is attempting to invoke the health and safety argument adverted to in *Te Mata Properties*.

[29] Given this Court's decision in *Te Mata*, if Charterhall is to avoid having its claim against the Council struck out, it must show that it is arguable that under New Zealand law the Council owed it a duty of care to prevent the construction of a building which contained a defect that threatened the health and safety of anyone who might occupy it for the time being. We return to this below.

[30] Finally we turn to *Carter*. The Ministry of Transport gave an interim certificate of survey under the Shipping and Seamen Act 1951, to expire after three months, in relation to a vessel called the Nivanga. Then a company which had taken over this aspect of the Ministry's responsibilities gave a further interim certificate, this time for two months. After this, the Maritime Safety Authority gave a longer-term certificate of survey in relation to the vessel. The plaintiffs subsequently purchased the vessel. After the purchase, they discovered that the vessel was effectively a write-off, and consequently lost what they had paid for it. They issued proceedings against the Ministry and the company claiming that their surveys were negligent and had caused them loss. In particular, they claimed they had relied on the surveys in making their decision to buy the vessel.

[31] The plaintiffs' claims against the Ministry and the company were in negligence and for breach of statutory duty. This Court held that both categories of claim should be struck out. The Court treated the negligence claims as being based on negligent misstatements. In assessing whether a duty of care arose, the Court

emphasised the importance of the legislative framework within which the certificates of survey were issued. The Court said that the legislative purpose underlying the requirement for the certificates was safety, not the protection of economic interests of parties such as the plaintiffs. Delivering the Court's judgment, Tipping J said:

> [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 *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 plaintiff's 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.

[32] The present case is distinguishable from *Carter* in the sense that the new cause of action in the amended pleading does seek to invoke directly health and safety concerns (assuming for the moment that local authorities' obligations under the Building Act relate in whole or part to health and safety). However, in another sense it is not distinguishable. This is because, despite the previous point, Charterhall does not sue as a person whose health and safety has been put at risk. It is, after all, a company which owns and operates a luxury lodge. It sues because its economic interests have been injured, as is clearly shown by the loss of income component of its damages claim. We discuss the significance of this point below.

[33] In his submissions Mr Hunt emphasised that the hazard in the present case (fire) was of a different nature and quality than the hazard in *Te Mata Properties* (moisture ingress). He also noted that at least some of Charterhall's damages claim relates to physical damage. He called in aid the decisions of the Supreme Court of Canada in *Winnipeg Condominium Corp No 36 v Bird Construction Co* [1995] 1 SCR 85 and the High Court of Australia in *Pyrenees Shire Council v Day* (1998) 192 CLR 330. These, he said, recognised a duty to avoid dangerous defects in

buildings in a commercial as well as a residential context. (The duty in *Winnipeg Condominium* was owed by the company which constructed an apartment building to the original owner and also to a subsequent purchaser; the duty in *Pyrenees Shire Council* was owed by a council to the owners of partly residential and partly commercial properties which were damaged in a fire caused by a defective fireplace, the council knowing of the defect and having taken ineffective steps to have it remedied.)

[34] Mr Hunt analysed the provisions of the Building Act, arguing that they contemplated the possibility of claims in negligence against local authorities. He submitted that, in terms of the Building Act and the responsibilities of local authorities under it, there was no justification for drawing a distinction between commercial and residential buildings. Whatever the nature of the building, the legislative scheme meant that those undertaking building work were compelled to rely on the relevant local authority. He submitted that the imposition of tortious liability would reinforce the responsibilities of local authorities under the Act.

[35] Mr Parker's submissions for Blair & Co covered similar ground.

[36] Despite these submissions we are satisfied that the effect of the decisions of this Court in *Te Mata Properties* and *Carter* is that Charterhall's claim against the Council cannot succeed and must be struck out.

[37] As Casey J noted in *Hamlin*, the duty of care recognised in the New Zealand cases "has not always been limited to the avoidance of physical damage to the plaintiff's property, or danger to the health or safety of the occupants: in appropriate situations a wider duty not to cause economic loss to the plaintiff has been recognised and damages have been awarded on that basis": at 529. So the *Hamlin* duty of care is not based on a need to protect health and safety but on the wider considerations identified by Richardson J. The imposition of the 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.

[38] The majority judgment of Blanchard, Tipping and McGrath JJ in *Couch* notes that 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]. As this Court said in *Sacramento*, while foreseeability is a necessary pre-condition for the imposition of a duty of care, it does not of itself warrant a conclusion that there is sufficient proximity: at [37]. The Court said at [37] that factors relevant to the proximity assessment are:

(a) whether duties have been imposed in analogous situations;

(b) how substantial the nexus is between the defendant's alleged negligence and the plaintiff's loss;

(c) the vulnerability of the plaintiff and the potential burden on the defendant of taking precautions against the particular risk; and

(d) the nature of the relevant risk. "The Courts are most likely to find proximity where the underlying risk is associated with health, personal injury or death and more likely to do so where there is a risk of property damage than where the loss is purely economic."

[39] As we have already said, Charterhall cannot be characterised as "vulnerable" in the same way 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].

[40] Further, 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. Rather, the allegation is that the Council allowed the lodge to be built with an inherent defect, which, some years after construction, resulted in damage to the lodge and loss to Charterhall (in other words, the Council failed to identify the deficiencies in the work of Charterhall's contractors). Whether or not such loss is properly or usefully characterised as simply economic loss (see Cooke P in *Hamlin* at 521), it is of the same type as loss resulting from leaky building syndrome or from defective foundations. That is, it is loss of the same type as was at issue in *Te Mata Properties*. We do not see the type of physical damage suffered in the present case as justifying a different approach to that taken in *Te Mata Properties*.

[41] Mr Hunt sought to argue that fire as a hazard justified a different approach from that applied in *Te Mata Properties* in relation to water ingress. Fogarty J gave some weight to the idea that the law has traditionally treated fire as a "dangerous thing" and "frequently the subject of recognition of tortious liability": at [49] and [52]. For our part, we see no principled basis for such a distinction in the present context. As Mr Goddard submitted, it is illogical to say that the Council owed Charterhall a duty of care to secure compliance with the appropriate standards in relation to fire safety but not those in relation to matters such as weathertightness or foundations.

[42] Nor do we see the new cause of action based on health and safety as affecting the analysis. Clearly 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 to 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.

[45] In our view, these considerations point against a finding of proximity of the sort that exists in relation to the owners of residential dwellings. Further, it is implicit in what we have already said that we do not consider that policy factors justify the imposition of a duty of care on councils in cases such as the present. In particular:

(a) As Asher J pointed out in the *Mount Albert Grammar* case at [65], the duty of care would be owed to all users of commercial buildings. This 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, Charterhall could not build it without a building consent), the party best placed to protect Charterhall's interests in the design and construction of the lodge was Charterhall itself. It was able to, and did, retain architectural and other experts. Among these are the people primarily responsible for the defect in the chimney design, and

therefore for the losses which Charterhall suffered. It is to them that Charterhall should look to recover its losses. 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, so that the owner cannot recover from them. Mr Parker pointed out that there was no contractual relationship between Charterhall and Blair & Co, the latter having been retained by the overseas architects. But that does not meet the point. Charterhall was able to protect its position in relation to the work performed by its architects.

(c) In our view, the Building Act provides little or no support for the imposition of a duty in a case such as this. In this context, it is important to note that the Court in *Hamlin* justified the imposition of a duty in respect of house-owners essentially on the basis of public expectation, house-owner reliance and practice. Rather than identifying anything positive in the Building Act to support the imposition of the duty, the Court noted that there was nothing in it to cast doubt on the many earlier judicial decisions which had held there was a duty: see the extract from Richardson J's judgment quoted at [21] above and the observations of this Court in *Rolls-Royce New Zealand Ltd* at [115] – [116]. Given the absence of expectation, reliance and practice in the present context, and the absence of positive indicators in the Building Act, we see no policy justification for the imposition of a duty of care.

(d) Finally we note that the imposition of a duty of care in the context of commercial buildings has been rejected in the United Kingdom (this follows from the decision in *Murphy*) and in Australia (see *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515). There is no reason that New Zealand should adopt a different approach in the commercial context. We acknowledge that the Canadian courts have recognised a duty to take care to avoid

> dangerous defects in the context of commercial buildings (see *Winnipeg Condominium Corp No 36*). But the distinction between dangerous defects and other defects has difficulties (see *Murphy* per Lord Oliver of Aylmerton at 488 – 489 and *Rolls Royce* at [79]), and, in any event, that approach does not seem to be consistent with this Court's analysis in *Carter*.

[46] Accordingly, we consider that neither the existing nor the proposed cause of action against the Council has any prospect of success, so that Charterhill's statement of claim against the Council must be struck out.

Decision

[47] The appeal is allowed. The first respondent's statement of claim against the Council is struck out. The first respondent must pay costs for a complex appeal on a band A basis to the appellant. We certify for two counsel.

Solicitors:
Heaney & Co, Auckland for Appellant
Young Hunter, Christchurch for First Respondent
Michael E Parker, Queenstown for Second Respondent