The duty of care question continues

When it comes to duty of care cases involving commercial property owners, recent Court of Appeal decisions indicate that, unlike councils, construction industry parties may have a duty of care to commercial property owners.

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Recently, the Court of Appeal has confirmed that councils do not owe a duty of care to commercial property owners. Owners of leaky motels and lodges, for example, have been unable to succeed with negligence claims against councils.

However, this issue is yet to be considered by the Supreme Court – the first appeal to the Supreme Court is due to proceed early this year. In that case, the body corporate and owners of apartments are challenging the Court of Appeal’s decision that the North Shore City Council did not owe any duty to them. The case involves a property with both residential and non-residential apartments.

Commercial and residential divide

The position with commercial property owners is, therefore, currently distinguishable from that of residential property owners. It is now well established that councils and other construction parties owe a duty of care to residential property owners.

One of the key factors in the current treatment of these two groups is the idea that commercial property owners are less vulnerable than residential owners. Generally, commercial property owners are viewed as able to protect their own interests by, among other things, their contracts.

Construction parties may owe duty of care for commercial

Even if the Supreme Court also finds that councils do not owe a duty of care to commercial owners, will it follow that builders, designers and other construction parties will not owe the duty either? This is an important question for those involved in commercial construction. If those involved in commercial construction do owe a duty of care to commercial property owners, they may have wider obligations than what is set out in their contracts and they may be responsible to parties other than the original contracting parties.

The Court of Appeal has indicated there may be a basis for different treatment between councils and construction parties. In September 2011, the Court of Appeal refused to strike out a tort claim by the Minister of Education against a builder. In December 2011, the Supreme Court also refused an application by the builder for leave to appeal that decision.

Glen Innes Primary School case

The Minister of Education’s case is against the builder of a school hall at the Glen Innes Primary School. The builder, Econicorp Holdings Limited (trading as Ahead), entered into a contract with the board of trustees of the school and, in turn, engaged the designer. Several years after the hall was constructed, however, it became apparent that it had serious defects in the foundations, cladding, joinery and plumbing. In 2006, the board issued proceedings against Ahead in contract and tort. In October 2008, the Minister commenced her own proceedings against Ahead, in tort, and those proceedings were joined to the board’s claim.

In the High Court, Ahead successfully struck out the board’s contract claim because it was time barred. It also struck out the Minister’s tort claim on the basis that it did not owe the Minister a duty of care. The only claim that survived the High Court strike-out application was the board’s tort claim against Ahead.

What the Court of Appeal decided

The majority of the Court of Appeal was not prepared to rule out the Minister’s claim. Justice Arnold delivered the judgment for the majority. He started his judgment by referring to the Court of Appeal’s previous decision in Rolls Royce New Zealand Ltd v Carter Holt Harvey Ltd. In that case, the Court of Appeal found a subcontractor who built a cogeneration plant at the Kinleith Mill did not owe a duty of care to the owner of the mill, Carter Holt Harvey. One of the key factors behind that decision was the fact that the parties were sophisticated commercial parties who had managed the allocation of risk through quite comprehensive contracts between them.

In Rolls Royce, the Court of Appeal said that whether or not a duty of care should be recognised in New Zealand depended on whether, in all the circumstances, it was just and reasonable that such a duty is imposed. This, in turn, involves two broad fields of inquiry. First is the degree of proximity or relationship between the parties, and second is whether there are any wider policy considerations that might negate or restrict or strengthen the existence of a duty in any particular class of case.

PRELIMINARY COMMENTS

Before evaluating the Minister’s case, Justice Arnold made some preliminary comments. He noted that the High Court had not struck out the board’s tort claim against Ahead. This had practical implications for the strike-out application against the Minister. Given that the tort arguments were proceeding to trial between the board and Ahead, there was arguably no disadvantage in the Minister’s arguments also proceeding to argument at trial.

Justice Arnold also said that policy and proximity issues are likely to differ between councils, builders and others. Unlike builders, councils were
not primarily responsible for the construction of defective buildings. As a
final preliminary point, he noted that the commercial/residential divide
that applies in respect of council liability may or may not be relevant in
guard to other construction parties.

PROXIMITY
On the question of proximity, Justice Arnold referred to arguments either
way. For the against, the Minister was a very well resourced party and
she may not have sufficient vulnerability. She could also have taken
steps to protect her position such as contracting directly with Ahead.
However, factors that might point towards proximity included the statutory
background of Tomorrow’s Schools.

POLICY
On the policy question, two factors were pointing towards liability:
• The duty of care alleged was not creating any liability that was
disproportionate to any wrongdoing. The liability alleged was to the
owner of the property being built – which was the Minister despite the
Minister not being the party to the contract with Ahead. Justice Arnold
noted a duty of care between builders and property owners is standard
in respect of residential property owners so, in that sense, the duty is
orthodox.

• The duty tended to reinforce a builder’s obligations. The proposed duty
did not place an unfair burden on Ahead – or on builders in general
– in terms of taking precautions to avoid the risk, because builders
are required to comply with the Building Code and relevant standards
anyway.

• The most powerful policy consideration against imposing liability,
however, was the non-residential context. In finding no duty in Rolls
Royce New Zealand Ltd v Carter Holt Harvey Ltd, particular weight was
given to the commercial context. However, Justice Arnold pointed to a
number of particular features that were arguably distinguishable from
Rolls Royce:

• The situation of the Glenn Innes School was not a true commercial
situation. School boards act not as commercial parties but because
of a policy that holds there are public benefits in their managing
schools. The relationship between the Minister and the board is also
not commercial.

• Although there were contracts with Ahead, the contractual matrix was
not as sophisticated as that in the Rolls Royce case.

In conclusion, it was not clear beyond argument that it was not fair, just
and reasonable that the builder should owe a duty of care to the Minister.

Outcome should interest builders
Builders and other construction parties should be very interested in the
eventual outcome of this litigation. Although the Minister has overcome the
hurdle of defeating a strike-out application, this does not mean she has a
strong claim. There are still significant hurdles.

One filter may be the Supreme Court’s decision in the North Shore
City Council case. If the Supreme Court does find the North Shore City
Council owes a duty to those commercial owners, then builders and other
construction parties are unlikely to avoid a duty being imposed on them.

If the Minister is eventually successful in this litigation, however, the
implications could be quite significant as there are a large number of
schools in New Zealand with building defects.