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

**CIV 2009-463-285**

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| BETWEEN | BODY CORPORATE NO. 318596<br>First Plaintiff and Ors |
| AND | G C MATHIS<br>First Defendant & Ors |

**CIV-2006-470-922**

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| AND BETWEEN | BODY CORPORATE S91535<br>First Plaintiff & Ors |
| AND | DANEGELD LIMITED (IN LIQUIDATION)<br>First Defendant & Ors |

Hearing: 13 September 2011

Appearances: Mr G Brittain for Applicants
Mr B Easton for Respondents

Judgment: 7 October 2011 at 1:00 PM

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## JUDGMENT OF ASSOCIATE JUDGE DOOGUE

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*This judgment was delivered by me on*
***07.10.11 at 1 pm**, pursuant to*
*Rule 11.5 of the High Court Rules.*

*Registrar/Deputy Registrar*

*Date……*

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**Background**

[1] The plaintiffs in *Body Corporate No 318596 v Mathis* ("Beachside") are the Body Corporate and owners of nine residential units in the Beachside complex in Mt Maunganui. The Beachside development was built between 2002–2003. The units are subject to leaky building syndrome and are currently being repaired at a cost of $2,500,000.

[2] The plaintiffs in *Body Corporate S915535 v Danegeld Ltd (in liq)* ("Cutters Cove") are the Body Corporate and owners of 39 residential units in the Cutters Cove complex also in Mt Maunganui. The Cutters Cove development was built between 2000–2001. It, too, had leaky building-type problems and has had to be completely re-clad and re-roofed at a cost of over $9,000,000.

[3] The defendants/applicants were the employees of Bay Building Certifiers Ltd ("BBC") who physically inspected and approved the construction of both developments and, in the case of Mr Bruce, signed the code compliance certificates.

[4] It was their job to identify building defects and ensure that the developments complied with the Building Code. The plaintiffs say they failed to do so. The applicants say that they should not be held liable for their failure to detect serious building defects with Beachside or Cutters Cove.

[5] Prior to 1997, the Tauranga District Council ("TDC") operated a department of building inspectors, in the conventional way. In 1997, TDC's building services department largely became defunct, and those services were contracted out to BBC.

[6] BBC's core services were:

a) approving plans for building consent;

b) inspecting construction work; and

c) confirming that code compliance had been achieved.

[7] BBC performed these services pursuant to two distinct contractual/statutory frameworks:

a) as a contractor to TDC; and

b) when engaged by an applicant for consent as a private certifier under the Building Act 1991 ("the Act").

Under either framework, the actual tasks completed by the individual building inspectors were identical.

[8] The Cutters Cove inspections took place from August 2000 until October 2001.

[9] The construction of Cutters Cove proceeded in two stages:

a) Stage 1 was the foundations. The related inspection and certification work was performed by BBC pursuant to the TDC–BBC contract. BBC issued a code compliance certificate on 5 October 2001.

b) Stage 2 was the balance of the construction. The related inspection and certification work was performed by BBC as a private certifier engaged by the developer. BBC issued a code compliance certificate for stage 2 also on 5 October 2001.

[10] The Beachside inspections were carried out from September 2002 until July 2003.

[11] Although Beachside also proceeded in two stages, all of the related inspection and certification work was performed by BBC as a private certifier engaged by the developer. BBC issued two code compliance certificates, on 4 July and 28 July 2003.

[12] In summary, the inspections which have given rise to claims by the plaintiff against the inspectors were all carried out by the latter while employed by BBC and in circumstances where BBC contracted directly with the developer.

[13] The contract between TDC and BBC continued until 2005, when the Building Act 2004 came into force. The TDC then became Tauranga City Council ("TCC") in 2004 but otherwise remained the same. TCC then entered into a new arrangement with another company, CGAF Ltd, pursuant to which CGAF Ltd provided building inspection services to TCC.

[14] The arrangements again changed in 2010, when TCC reconstituted a full building services department. Throughout these transitions, the building inspectors were employed by TDC, then BBC, then CGAF, then TCC. When employed by TCC in 2010, they were treated as never having left the council's employment for the purpose of employment benefits.

[15] The other contractual configuration (TDC was mandated to carry out the inspections by the property developer under the TDC contract with BBC to provide services through the agency of its employees) did not apply to the inspections which took place in the specific circumstances of this case. However, Mr Brittain for the applicants considered that the fact that these different contractual chains had been entered into was a relevant background matter which ought to be before the Court on hearing of the present application.

**Matters relevant to exercise of strike out in this case**
*General approach*

[16] The parties agreed that the principles applying to strike out applications are:

a) that the pleaded facts are generally assumed to be true;

b) the cause of action must be clearly untenable to strike out a claim; and

c) the Court must be certain that the claim cannot succeed to strike out a claim. The jurisdiction is to be exercised sparingly.

[17] The Court can determine difficult questions of law requiring extensive argument on a strike out application, although the Court will be slow to strike out a claim where a duty of care is alleged in a new situation.[1]

[18] I intend to follow those principles in determining these applications.

**Issues raised by the present application**

[19] There is no doubt that councils can be liable in damages for acts and omissions of building inspectors who carry out negligent inspection of residential houses while in the course of construction.

[20] The points that arise for determination on the present strike out application are whether the building inspectors can be personally liable (as opposed to their employer) in the circumstances arising in the present case, and whether the fact that the inspectors were employed by a private company discharging the obligations to certify the building pursuant to a contract makes any difference.

**Duty of care**

[21] In *Rolls-Royce New Zealand Ltd v Carter Holt Harvey Ltd*, Glazebrook J stated the test to be applied in determining whether a duty of care is owed as follows:[2]

> The ultimate question when deciding whether a duty of care should be recognised in New Zealand is whether, in the light of all the circumstances of the case, it is just and reasonable that such a duty be imposed. The focus is on two broad fields of inquiry but these provide only a framework rather than a straitjacket. The first area of inquiry is as to the degree of proximity or relationship between the parties. The second is whether there are other wider policy considerations that tend to negative or restrict or strengthen the existence of a duty in the particular class of case. At this second stage, the Court's inquiry is concerned with the effect of the recognition of a duty on other legal duties and, more generally, on society.

[22] Glazebrook J discussed some of the other factors which may be taken into account when undertaking the inquiry into proximity, including:[3]

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1 *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [33].
2 *Rolls-Royce New Zealand Ltd v Carter Holt Harvey Ltd* [2005] 1 NZLR 324 (CA) at [58].
3 Ibid, at [59]–[65].

a) the degree of analogy with cases in which duties are already established;

b) the vulnerability of the plaintiff;

c) whether the loss is economic; and

d) the statutory and contractual background.

[23] She also concluded that the boundary between proximity and policy can merge, and the important object is that all relevant factors are properly weighed.[4]

*Background to the Building Act 1991*

[24] Mr Brittain drew my attention to the general structure of the Act which made substantial changes to the way in which the construction of buildings would henceforth be carried out. He said that the reforms were designed to provide an alternative source to consumers from which they could obtain building inspection services. Carrying out that work would no longer be the sole preserve of territorial authorities. Private individuals and organisations would be able to compete for the work previously done by territorial authorities. However, the Law Commission report which Mr Brittain referred me to and which preceded the reforms in the Act recognised that taking this course was not without risk and that those risks needed to be mitigated if possible.

[25] The principal hazard was that if the work was carried out negligently by the inspectors, if I may call them that, then it might turn out in future that any claim the building owner might have been able to bring would not be of substance if the building inspector was unable to meet any damages award. The Commission report envisaged that this risk would be mitigated by the provision of quality assurance provisions in the Act. These were to take two forms. In cases where a private sector inspector was a corporation, only those corporations whose owners were fit and proper persons would qualify as recognised inspectors. Further, the individuals who were to engage in the work of inspecting properties would be required to have minimum qualifications.

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4 Ibid, at [64].

[26] As a further backup, all inspectors would be required to have adequate insurance arrangements. To digress, in the present case, the insurance arrangements that would have been appropriate were actually held in earlier years but the arrangements for securing run-off insurance in future years by means of BBC providing an insurance bond proved to be ineffective, and so the owners in this case are faced with an insolvent defendant.

[27] The Commission considered in some detail the requirements of an effective insurance scheme. Limitation issues which might impact upon the availability and cost of insurance would have to be clarified in the Act — a proposal which was actually followed through with an enactment of the 10-year long stop limitation period. The theoretical underpinning of the insurance regime was that consumers who were contemplating retaining a private sector inspector would make enquiries about the adequacy of the insurance cover carried by that inspector. Further, qualification for registration as an inspector under the Act would require the candidate to have adequate insurance arrangements in place. This too was carried forward into statutory form.[5]

[28] It was the applicant's case that the existence of the insurance regime was intended to provide adequate insurance and was consistent with an implied intention on the part of the legislature to abrogate personal liability for employee–inspectors. In its full form, this submission was that there was another provision of the Act that, in combination with this inference to be drawn from the scheme of the Act, made it certain that such an employee–inspector would not be liable. Before I turn to examine that submission in detail, it will be helpful to make reference to another submission which needs to be considered as a preliminary point to resolving the substance of the applicants' submissions as to why employees should not be seen as being liable.

[29] It was said that there were aspects of the arrangements which the TDC made for building inspections in the post–1991 regime which were relevant. In practical terms, whether a building owner wished to retain the council to carry out the inspection or instead engage a private sector inspector, in many cases, did not

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5 See s 52(6) of the Building Act 1991.

ultimately affect who it was that would come to the property to physically carry out the inspection. That is because if the council were instructed to carry out an inspection, it would simply pass the work on to BBC. This was a consequence of the fact that the TDC had closed down its building inspection division and all of the building inspectors' employment contracts were terminated and they "migrated" to BBC.

[30] In the case of an inspection carried out, for example, for a code compliance certificate, the mechanics were that the inspector would himself draw up the form of certificate and send it to the council together with his report and the council would then issue the certificate. If the property owner elected to have BBC provide the certificate itself, the inspector would sign it off without any intervention from the council in the chain of events.

[31] Mr Brittain submitted that the council was not statutorily authorised to proceed in this way. It had a non-delegable obligation to issue the certificate itself. The person who issued the certificate in these circumstances would attract the immunity from suit contained in s 89 of the Act which did not refer to employees of building certifiers. However, in the view of the applicants, relying on *Sheehan v Watson*,[6] this was not a deliberate exclusion by Parliament, but an oversight.

[32] The applicant's case was that because the building certifier is carrying out the same role whether retained as a private sector inspector or a council agent, it would be anomalous for one to have statutory protection but the other not to.

*The status of the defendants as employees*

[33] There is no doubt that a potential defendant is not exempt from liability simply because when he purportedly breached the duty of care, he was acting in the course of his employment with another person.[7]

[34] Mr Easton submitted for the respondents:

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6 *Sheehan v Watson* [2011] 1 NZLR 289 (SC).

7 See references contained in Stephen Todd (ed) *The Law of Torts in New Zealand* (5th ed, Brookers, Wellington, 2009) at [22.1].

> It ought to have been reasonably foreseeable to employees of private certifiers and Councils alike that if they failed to carry out their inspections diligently that any future owners of the Units may have to carry out expensive repairs and suffer financial loss. In *Dutton v Bognor Regis Building Co* [1972] 1 All ER Lord Denning MR stated at [474]:
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> "Applying the test laid down by Lord Atkin in *Donoghue v Stevenson*, I should have thought that the inspector ought to have had subsequent purchasers in mind when he was inspecting the foundations — he ought to have realised that, if he was negligent, they might suffer damage."

*The Trevor Ivory line of cases*

[35] In *Trevor Ivory Ltd v Anderson*,[8] the managing director and sole shareholder of Trevor Ivory Ltd gave advice as a consultant concerning weed control through use of herbicides. The advice given was negligent and resulted in fruit plants being killed. The owner of the plants sued the managing director, Mr Trevor Ivory. The basis on which the Court of Appeal declined to recognise personal liability seems to have been that, where a person is identified with the company, for example where he is the director and manages the business of the company, he may be viewed as the company's embodiment. Cooke P considered that in such cases, prima facie only the company should be liable and the Court should avoid imposing on the owner of a one-man company a personal duty of care which would erode the limited liability and separate identity principles relating to companies.[9] One circumstance in which the prima facie position can be departed from is where there has been an assumption of responsibility, actual or imputed. Hardie Boys J said that "[t]hat is an appropriate test for the personal liability of both a director and an employee".[10] He said further:[11]

> Assumption of responsibility may well arise or be imputed where the director or employee exercises particular control or control over a particular operation or activity…

[36] Hardie Boys J was of the view on the facts of that particular case that a duty of care may have arisen on the part of Mr Ivory, the director of the company, if there had been a sufficient assumption of responsibility by him which might have occurred if he had undertaken to do the spraying himself.

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8 *Trevor Ivory v Anderson* [1992] 2 NZLR 517 (CA).
9 Ibid, at 520.
10 Ibid, at 527.
11 Ibid.

[37] McGechan J in the same case also attached importance to the concept of assumption of responsibility. He seems also to have been of the view that a factor which militates against such an assumption of responsibility is where the defendant, as in that case Mr Ivory did, made it clear that he traded through a company and where that structure was negotiated and known — presumably by the plaintiffs.[12]

[38] The position was reconsidered in *Body Corporate 202254 v Taylor*.[13] In that case, there was a close discussion about the *Trevor Ivory* decision.

[39] It is not necessary to detail the facts of the decision in *Body Corporate 202254*. The principles underlying *Trevor Ivory* were examined and the majority of the Court of Appeal declined to depart from that decision. In his dissenting minority decision, Chambers J was of the opinion that the starting point is that the person who commits the tort is liable and the fact that some other entity may also incur liability because of vicarious responsibility principles means that a party in addition to the employee, and not in substitution for him, may also become liable.

[40] In the majority judgment, support for the *Trevor Ivory* approach was derived from several considerations including the unwillingness to cast doubt upon the doctrine of limited liability. This was viewed as being the corollary of a conclusion finding the director/employee of the company liable, but there were other grounds as well.

[41] However, *Trevor Ivory* was a case concerned with negligent misstatement where there were direct communications between the claimant and putative defendant. The present case is not of that kind. It is an ordinary *Hamlin*-type[14] case. Amongst other things, assumption of responsibility is not required. Nor is this a case of the "client" dealing directly with the certifier. I understand that it is agreed that the plaintiffs in this case are subsequent owners of the property who would never have dealt with the certifier. This sort of policy consideration which negatived a duty of care in *Trevor Ivory* are not present. However, the circumstances may make it clear that the acts of the individual person were in fact those of the company rather

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12 Ibid, at 532.
13 *Body Corporate 202254 v Taylor* [2008] NZCA 317, [2009] 2 NZLR 17.
14 *Invercargill City Council v Hamlin* [1996] 1 NZLR 513 (PC).

than of the person regarded as an individual. In such a case the company will be liable but the individual will not. It would seem that this group of persons are those who may be regarded as the alter ego of the company. The director of a so-called "one man company" is more likely to fall into this group than a low-level employee. Where a duty may otherwise be imputed, liability may not be allowed as a matter of policy because the individual concerned has incorporated a company for the purposes of carrying on the business activity which led to the claim in the first place.

[42] In the present cases, the building inspectors were in each case one of several employees of BBC. There is no reason to suppose that they were so closely identified with the company so as to in effect be its alter ego, so that the Court should conclude that all parties must have been treated as accepting that the owners would look to the company to the exclusion of the individual employees in the event that they were harmed by negligence. It is therefore arguable that this case is quite different from one involving a one-man company. If that were so, the tortfeasors would not therefore be protected from liability simply because of the background fact that the contracts to carry out the inspections were with the company that employed them.

*The Building Act 1991*

[43] There are two principal ways in which the provisions of the Building Act 1991 are relevant. First, the Act makes provision for the allocation of liability as between employees and employers than the public and private sector and between criminal and civil liability of employees. It does not deal with the matter of civil liability of building inspectors employed by private companies. The submission is made for the applicant that this was because of oversight. As I will explain, the fact that the draftsperson made provision for some but not other aspects of the problems that arose indicates to me that it is not very likely that the issue of individual liability was overlooked. Secondly, while legislative oversight or mistake is not unknown, it is a conclusion that I would not be prepared to come to readily unless there seems to be no other explanation for the form of the legislation as it is. Thirdly, while provision was made to protect the public body employees from civil liability but

none for private employees, there are factors which explain the different treatment that the two groups receive under the Act — as I shall explain shortly.

*Other provisions of the Act dealing with civil and criminal liability*

[44] In a separate part of the Act, there was to be found a provision in terms of which immunity was granted to employees of local authorities. There were considerable differences between counsel as to whether this provision, s 89, should also be seen as providing immunity to employees of private certifiers.

[45] That provision, s 89 of the Act, read:

> **89 Civil proceedings against members, employees, etc**
>
> No civil proceedings shall be brought for an act done in good faith under this Act against a member, building referee, or employee of the Authority, or a member or employee of a territorial authority, or a member of a committee appointed by the Authority or a territorial authority

[46] Mr Easton submitted that the section was not wide enough to cover building certifiers employed by private organisations.

[47] I do not understand Mr Brittain to take a different view. Mr Brittain, though, said that this was simply a matter of oversight: the drafters of the legislation failed to turn their minds to employees of corporate certifiers. Following on from his submissions based upon s 89 of the Act, Mr Brittain submitted that different legal outcomes could result for employees of private sector certifiers depending upon the circumstances in which they performed their obligations.

[48] Besides civil liability under the Act, the legislation also dealt with criminal liability. I accept that rather than extending liability of criminal law to employees, the provisions of the Act dealt with vicarious liability on the part of employers for the actions of their employees. Sections 82 and 82A are other sections in question.

[49] Given the extent to which the legislation went into dealing with the treatment of questions of liability incidental to the liability of building certifiers in the Act, it does not seem very likely to me that the omission was through oversight.

*Policy reasons for not exempting private sector employees from liability*

[50] The Act permitted for the (for the first time) certification of buildings to be carried out by private organisations and individuals whereas previously only territorial authorities could do so. Consistent with that approach, Part 7 of the Act provided for the qualifications of persons who could carry out the actual certification work under the Act.

[51] Section 51(3)(a) provided that the applicant must provide to the registration authority:

> Information that will enable the Authority to decide whether or not the applicant has appropriate qualifications, adequate relevant experience and sufficient knowledge of the building code, and, if so,—
> (i) The specific provisions of the building code in respect of which the applicant should be approved; and
> (ii) Any limitations which should be placed on such approval:

[52] The Act also made provision for the registration of providers of inspection services. For the protection of the public, one of the Act's objectives was to ensure that those interested in carrying out the work had proper insurance arrangements in place, whether they were companies or individuals. Section 51(3)(b) provided that an applicant had to provide:

> Evidence that a scheme of insurance approved by the Authority will apply in respect of any insurable civil liability of the applicant that might arise out of the issuing by the applicant of a code compliance certificate under section 43 of this Act or a building certificate under section 56 of this Act.

[53] Under s 51(5) in a case where continuation or renewal of a building certifier's qualification was sought, the information to be provided was to include:

> A list of any additional qualifications that the applicant has acquired since that person's previous application[.]

[54] I consider that Mr Easton was correct in submitting that there is another explanation that may be more credible than that put forward by Mr Brittain.

[55] There is considerable discussion in the Law Commission report preceding the legislation about the risks of opening up the certification process to non-territorial

authority certifiers. The discussion in the paper makes it clear that the Commission thought the insurance elements in the scheme were vital to the viability of including private certifiers in the certification process. But that does not mean that the Commission (or the legislature thereafter) considered that because the proposed insurance held by employers should provide protection, that there was no need to for the liability of individual employees to continue. Insurance might be available in many cases. But invalidating events may occur which means that cover is not provided. So while the insurer of the building certifier–employer would normally indemnify the actual certifier if he carried out the work against legal liability, circumstances could be imagined where that would not happen. For these reasons I regard it as being at least arguable that the legislature made a conscious decision to exclude liability on the part of employees of territorial authorities, but not to intervene in the case of their private sector counterparts. There were increased risks where private sector providers were engaged than there were when a local authority was carrying out the work.

**Delegation**

[56] Mr Brittain also mounted an argument based upon a primary contention that the arrangements between the TDC and BBC were inconsistent with Parliament's intentions when enacting the Building Act 1991. The argument summarised was that certifying was either to be carried out by a territorial authority or by a private provider. It was not envisaged that there would be a hybrid arrangement whereby a consent, while issuing from the council, could actually be based on certification by a private sector certifier such as an employee of BBC. He said that there was a significant consequence that where that occurred, as for the purposes of the liability, a private inspector had to be treated as the equivalent of a council employee and, as such, entitled to the "good faith" defence in s 89, inter alia.

[57] Whatever the merits of Mr Brittain's arguments about unauthorised delegation having occurred, in that the council could not delegate its certifying function where it was asked to certify, I cannot agree that it resulted in the certifier being regarded as an employee of the territorial authority. It is not clear to me that such a result follows from the Act or as a matter of contract. As to contract, I cannot

agree that all affected parties including the inspector can be viewed as impliedly re-configuring their contractual arrangements so that where such unauthorised delegation had occurred, the parties agreed that for the purposes of that particular job, he or she was to be treated as an employee of the council and not of BBC. Such an outcome could not be sufficiently clear and certain to constitute a ground for striking out the plaintiffs' claim.

[58] In those cases where the hybrid model, if I may call it that, was adopted and where an individual inspector carried out the inspection process negligently, it was likely that a consent would be wrongly issued, whether by the council or BBC, and harm would result to owners of the properties. It is not clear to me that the fact that the consent was ultimately issued by the wrong agency (if that occurred) would excuse the inspector for any carelessness on his part. Had he done his job properly, no consent would have issued from any party and no harm would have been caused.

[59] I acknowledge that there is room for argument about these matters but all this demonstrates is that deciding the matter on a strike out application is not possible.

*No reliance*

[60] This submission for the applicant can be set out in full:

> Given the scheme of the 1991 Act, and that the notions of general community reliance that underpin the duty of care owed by Councils, it cannot be said that members of the public can be taken to have generally relied on the employees of either Councils all corporate certifiers. Reasonable reliance was on Council or the corporate Certifier. This is not a case where owners can be reasonably said to have relied on the pocket books of employees.

[61] I agree with Mr Easton's submission which was to the following effect:

> The Applicants' submission is contrary to authority. In *Invercargill City Council v Hamlin* [1994] 3 NZLR 513 at 530 Casey J specifically recognised homeowners' reliance on Council inspectors properly carrying out their duty:
>
> > "With respect, the circumstances of home buyers in New Zealand include factors going well beyond those described by His Lordship and support a conclusion of reliance on the local body's inspectors doing their job properly."

[62] In his speech in *Invercargill City Council v Hamlin*, Lord Lloyd said:[15]

> Miss Bates, for the appellants, attacks the decision on a number of grounds. Quite apart from the about turn which the House of Lords executed in *Murphy*, she submits that the decision represents a departure from the previous line of authority in New Zealand. The previous cases (so it was argued) were all based on a straightforward application of the principle in *Donoghue v Stevenson* [1932] AC 562. In the present case the Court seems for the first time to have imposed a duty of care on the basis of *Hedley Byrne v Heller & Partners*. But there was no evidence that the appellants ever assumed responsibility for economic loss caused by the builders' failure to comply with the building bylaws; nor was there any evidence of any reliance by the plaintiff. Indeed reliance was not even pleaded.
>
> Their Lordships are unable to accept this argument. *Hedley Byrne v Heller & Partners* was scarcely mentioned in the Court below. Moreover general reliance (as distinct from specific reliance established on the facts of a particular case) has been a feature of this branch of New Zealand law for many years. As early as 1976 Chilwell J said in *Hope v Manukau City Council* (Supreme Court, Auckland, 1553/73, 2 August 1976) at pp 30–31:
>
> > "There is no direct evidence that the plaintiff relied upon the flat having been built in accordance with the bylaws and regulations. She did not say that she did. But she did say that she saw the plans and specification before she agreed to purchase the flat.
> >
> > …I would be prepared to draw the inference as a matter of common sense that the average prudent purchaser of a new residential flat expects that the bylaws and regulations will have been complied with. I would classify this plaintiff as an average purchaser. In our cities there would be few citizens who would be unaware of the necessity for buildings to comply with the bylaws and health regulations and unaware of the control which city councils exercise over building works."

The same point was made by Casey J ten years later in *Williams v Mount Eden Borough Council*, in a passage which has already been quoted, and by Cooke P in the *South Pacific Manufacturing Co* case at p 297. So there was nothing new in the concept of reliance by house buyers generally as an element in the imposition of a duty of care. Cooke P drew attention in that connection to the "Report of the Commission of Inquiry into Housing in New Zealand", (1971) 4 AJHR H-51, over which he presided. He made the following comment at p 519:

> "… 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 the bylaws."

[63] In my view the authorities are against the applicants on the reliance issue.

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[15] *Hamlin*, above n 14, at 518–519.

**Summary**

[64] The starting point must be that a tortfeasor is liable for his torts regardless of whether at the time when the act or omission occurred he was the employee of the company.

[65] For the reasons I attempted to set out earlier when discussing the *Trevor Ivory* line of cases, it is unlikely that the involvement of an incorporated company/employer will be influential to the outcome of this case.

[66] In his judgment in *Body Corporate 202254 v Taylor*, Chambers J said:[16]

> The primary tortfeasor is the *natural person* whose acts or omissions led to the harm in question. It is possible that the net of defendants might be widened to include others, such as employers or principals. The doctrine of vicarious liability is the means by which the law widens the net. But the primary focus is [nonetheless] on the individual or individuals whose acts or omission caused the harm.

[67] There would, with respect, be convincing reasons why Chambers J's approach would be followed in the present case. That points to the individual inspectors being liable rather than the company.

[68] As I have also tried to explain, some aspects of the background legislation are also relevant to the existence of a duty of care.

[69] There are several authorities that have warned against the difficulties inherent in attempting to embark upon analysis of causes of action which are very much fact-dependent enquiries at the stage of a strike out application.

[70] In *Trevor Ivory* the Court declined to strike out the proceeding before trial. The Court said:[17]

> In the end, the answer to the questions associated with the negligence claim will have to be very fact-specific. Because we do not know the exact detail of the role and conduct of Mr Taylor, we are required to deal with this case in a frustratingly abstract context. Further, an analysis of the relevant policy considerations will necessarily be more complete if it occurs in the context

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16 *Taylor*, above n 13, at [132].
17 *Trevor Ivory*, above n 8, at [97].

> of factual findings, which the trial Judge will be in a position to make. And, as foreshadowed in the passage we have cited from [*Attorney-General v Prince and Gardener* [1998] 1 NZLR 262 (CA)], there is also more scope at trial than there is in this Court on a strike-out appeal for evaluation of the competing policy considerations.

[71] I do not consider that the question of whether an employee in the position of the building inspector in this case ought to be personally liable for his alleged defaults is a matter that ought to be disposed of on a strike out application. Cases involving claims against building inspectors of this kind have to be considered in context. The necessary matters for consideration will include the background to the rights of residential homeowners to depend upon persons such as building inspectors carrying out their statutory obligations under the (then) Building Act 1991.

**Result**

[72] The application therefore will be dismissed. The parties should confer on the matter of costs. If they are not able to agree they should file memoranda not longer than five pages in length within 14 days of the date of the judgment.

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J.P. Doogue
Associate Judge