

BIA escapes liability for leaky building – again

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In *Body Corporate 346930 & Anor v Argon Construction Limited & Anor* [2015] NZHC 129 (Asher J) (the “*Scholar* decision”) released by the High Court on 10 February 2015 Katz J struck out a claim by Auckland City Council against the Building Industry Authority (“BIA”). Council alleged that BIA owed Council and Scholar (the building owners) a duty of care to investigate queries concerning the activities of private building certifiers (“a duty to investigate”) which it breached by failing to investigate a certifier, Compass. Secondly, Council alleged that the BIA owed Council and the owners a duty to notify them in a timely manner when the scope of authority of Compass was modified (“a duty to notify”).

Council’s claim was perhaps optimistic given the decisions of the Court of Appeal in *Sacramento* (2005) and of the Supreme Court in *The Grange* (2012) which found against a duty being owed by the BIA to Councils in different circumstances. The High Court in the *Scholar* decision found that it was not reasonably arguable that the BIA owed a duty of care to Council or the owners to investigate the conduct or ability of the private certifier. There were no pleaded factual allegations that even if found to be true could have reasonably triggered an

investigation of the private certifier by the BIA.

Katz J considered the duty to notify allegation was somewhat more finely balanced than the alleged duty to investigate. However she found that even if there was a duty to notify a change in the level of authority of the private certifier a claim on that basis would fail in the particular circumstances of that case because of a lack of causal connection between the Scholar owners’ claim against the Council and the Council’s duty to notify claim against the BIA. This is because the owners alleged that the Council knew or ought to have known that the private certifier could not certify unit title developments and should therefore not have accepted certificates from that private certifier. Council in turn said it could not have known that the private certifier was not entitled to certify unit title developments because the BIA breached its alleged duty to notify by not keeping the register of certifiers up to date. Katz J noted that if this was proven to be true then the claim by the owners against the Council must presumably fail (although she noted the owners could potentially have a direct claim against the BIA). Only if Council did know or could have found out that Compass could not certify could it be liable to the

Scholar owners on this aspect of the claim.

We note though that if there was thought to be an arguable claim against the BIA by owners (for inaccurate records or not notifying a change in the authority of the certifier) then this would normally count against striking out a third party claim by Council against the BIA as a joint tortfeasor who also owes duties to the plaintiff. The mere fact that the plaintiffs may struggle to succeed against the council if the claim against the BIA succeeded should not of itself preclude the BIA being a third party if there was an arguable duty to owners.

Cases like *Altmarloch* (Supreme Court, 2012) recognise that Councils owe duties and can be liable when they keep inaccurate records relied on by purchasers. It is difficult to see why the position should be different for the BIA in respect of its register of building certifiers.

The High Court also found that a further negligent misstatement claim by council against the BIA could not succeed as there was no “assumption of responsibility” in relation to the alleged representation that Compass was entitled to certify works and additionally that Council could not have reasonably relied on the alleged representations (which contained various disclaimers

indicating that they were not binding).

As noted above, Council's application here was always likely to face difficulty given the approach taken by the Court of Appeal in *Sacramento* and the majority of the Supreme Court in *The Grange*, which for various reasons found against a duty being owed by the BIA to Councils or owners in circumstances of those cases. For the opposing view of why it may be arguable that a duty owed by the BIA to council or owners is arguable see the dissenting judgment of the Chief Justice, Elias CJ in *The Grange*. The majority disagreed and considered the role of the BIA under the statute and its relevant involvement did not give rise to a duty in the circumstances of those cases.

The alleged factual circumstances in the *Scholar* case were somewhat different to those in *Sacramento* and *The Grange* but appear from the High Court Judgment to have lacked any sufficient factual basis upon which to find an arguable case for a duty being owed in the circumstances.