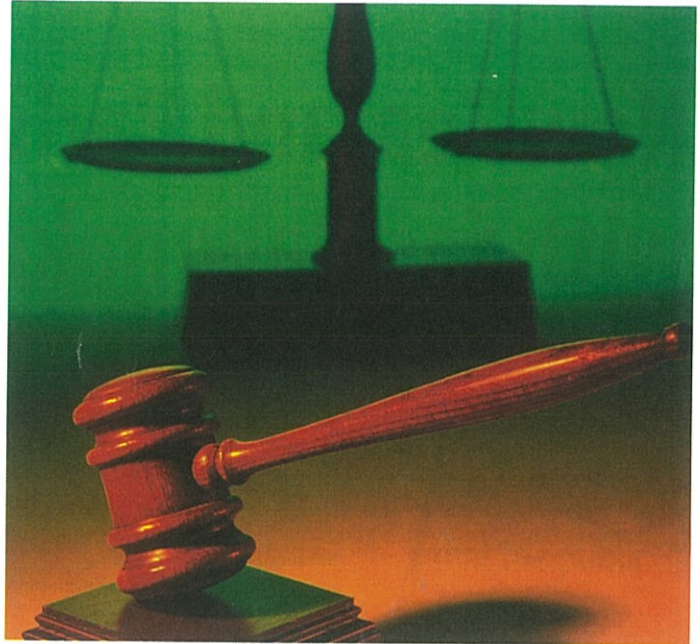
The mixed-use conundrum

Gareth Lewis examines the Court of Appeal's first judgment on a mixed-use leaky building



THE Court of Appeal considered a strike-out application in relation to a mixed-use leaky building for the first time in *North Shore City Council v Body Corporate 207624 & Ors* [2011] NZCA 164 (*Spencer on Byron*). At issue was whether the Council owed a duty of care in respect of a unit title development comprising 249 units used as hotel rooms and six residential apartments.

On one hand was the *Hamlin* line of cases, affirming that councils owe a duty of care in inspecting and certifying all residential property (including the Supreme Court's recent decision in *North Shore City Council v Body Corporate 188529 & Ors (Sunset Terraces) North Shore City Council v Body Corporate 189855 & Ors (Byron Avenue)* [2010] NZSC 158). On the other, were two recent Court of Appeal judgments holding that councils did not owe duties in respect of a lodge and a motel (*Te Mata Properties Ltd v Hastings District Council* [2009] 1 NZLR 460 and *Queenstown Lakes District Council v Charterhall Trustees Ltd* [2009] 3 NZLR 786).

The unit owners in *Spencer on Byron* claimed the building suffered from building defects resulting in water entry and the need to carry out extensive repairs. The claim against the council was based on the council's alleged failure to identify these defects in the course of its inspections.

It was common ground that the weathertightness of the entire building was interlinked and that in order to restore the position of the apartment owners, it was necessary to repair the entire building. It was also agreed that the nature of shared ownership under the *Unit Titles Act* 1972 was such that the private interests of the owners could not be separated from the interests of the owners as a whole.

The Court held that the council did not owe a duty of care to the owners of the hotel units. It rejected the notion that the presence of the residential units extended the council's duty of care to the hotel units, stating that the six apartments were no more than incidental to the commercial nature of the building as a whole and that a duty owed to one owner did not equate to an obligation to all.

In relation to the residential apartments, the Court decided by a two-one majority (Justice Harrison dissenting) that the council did not owe a duty of care either. The Court did not consider there was general reliance by the apartment owners on the council in circumstances where they bought into a complex that was largely non-residential. Therefore, there was a lack of proximity. The majority also took the view that it would be impractical to impose a duty in respect of the residential component only.

The *Spencer on Byron* judgment signals that the Court of Appeal is likely to take a pragmatic case-by-case approach to the issue of whether councils owe a duty of care in relation to mixed-use developments.

This approach does result in some uncertainty, and is likely to result in some difficult judgement calls for the Court in the future; for example, where there are a larger number of residential units or where it is the non-residential units that form a small part of the complex.

It also remains to be seen whether the Supreme Court agrees that a different approach should be taken to the council's duty of care when considering non-residential property. The differences between the two forms of ownership often appear blurred, a point illustrated at Byron Avenue in Takapuna. At one of end of the street, the Supreme Court held investors who purchased units to rent to tenants are owed a duty of care, whilst at the other, the Court of Appeal held investors who purchased units to let as hotel units are not.

The Supreme Court's decision on the non-residential duty of care issue will ultimately determine whether the mixed-use conundrum remains.

Gareth Lewis is a partner at Grimshaw & Co. He can be contacted on 64 9 375 2376 or gareth.lewis@grimshaw.co.nz.

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