

IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHU ROHE

CIV-2024-409-567
[2025] NZHC 1242

BETWEEN

COMPLETE SHELF COMPANY
NO8 LIMITED
Plaintiff

AND

CHRISTCHURCH CITY COUNCIL
Defendant

Hearing: 29 April 2025

Appearances: S D Campbell and T J McGuigan for Plaintiff
A C Harpur and S P Farnell for Defendant

Judgment: 20 May 2025

JUDGMENT OF ASSOCIATE JUDGE LESTER

[1] The plaintiff, Complete Shelf Company No 8 Ltd (Complete Shelf), seeks summary judgment against the Christchurch City Council (CCC) for what it says was the negligent processing and issue of a building consent for a residential property development that Complete Shelf was undertaking.

[2] Complete Shelf is related to a Christchurch developer known as the Wolfbrook Group (Wolfbrook). Wolfbrook intended to complete a substantial residential development at the Christchurch property acquired by Complete Shelf involving 60 units over nine blocks (the Development).

[3] The blocks were to be multi-storey. Complete Shelf raises two issues or “defects” in support of its argument that the Building Consent was negligently processed and issued. The first concerns the fire compliance of the balconies on the upper floor of the Development. To comply with the fire standard relied on by Complete Shelf in the consent application, the edge of a balcony had to be at least 300mm from the centre line of the party wall between each unit (the Balcony Clearance).¹

[4] The other defect² is related to the Balcony Clearance issue and came to light as a result of CCC’s internal audit undertaken after the Building Consent was issued. It relates to the same reason why the proposed Balcony Clearance as originally drawn was not compliant, and concerned whether an intertenancy wall had a sufficient fire rating. This was because part of an intertenancy wall had an overhang as part of the architectural design of the property. The “overhang defect” was not averted to by Complete Shelf’s architect but was identified as part of CCC’s internal audit and addressed as part of the overall review of fire compliance issues.

[5] Six weeks after the Building Consent was granted, CCC revisited the fire compliance of the proposed Balcony Clearance. In doing so, it identified the overhang

¹ In its consent application, Complete Shelf said it met Building Code fire protection requirements by complying with C/AS1 of the Code, which if satisfied is taken to meet the Code.

² In Mr Campbell’s written submissions the proposed Balcony Clearance is referred to as “Defect Two” but because it prompted the identification of the overhang defect in the claim, I deal with the Balcony issue first.

defect. Complete Shelf says CCC's review of fire compliance caused Complete Shelf to cease work on the Development, thereby causing it loss.

[6] Complete Shelf seeks summary judgment for liability and quantum based on CCC's alleged negligent processing and issuing of the Building Consent. In the alternative, it seeks summary judgment for liability.

Key dates

[7] Complete Shelf was nominated, pursuant to a contract dated 9 April 2021, to complete the purchase of the relevant property, with that purchase settling on 1 February 2022. The Building Consent application — having being made on 8 October 2021 — pre-dates settlement. On 14 February 2022, CCC issued its first request for information (RFI) which queried the absence of a fire report.

[8] On 2 March 2022 Complete Shelf's architect enquired about the fire compliance of the upper floors and whether they complied with the Building Code. The architects asked CCC to confirm the proposed Balcony Clearance complied with the Building Code. I set out in more detail below the exchange between the architects and CCC as, in my view, it is determinative of this application.

[9] On 16 March 2022, the Building Consent was issued and work commenced immediately. On 2 May 2022, CCC commenced an internal audit in which a CCC senior fire engineer reviewed the Building Consent, particularly the Proposed Balcony Clearance as shown in the consent drawings, and concluded the Consent did not meet the fire standard relied on by Complete Shelf.

[10] On 26 May 2022, CCC advised that the upper floors in blocks A, B, C, E, F, G and H of the Development were non-compliant with the Building Code because of the Proposed Balcony Clearance issue and the overhang defect. That was some six weeks after the Building Consent was issued. Complete Shelf says it then ceased works on the Development. However, as I will discuss below, it is not clear to me why that was necessary.

[11] Between 31 May 2021 and 3 July 2022, resolution of the fire compliance issues was discussed. CCC advised that if the issues were not addressed, a Notice to Fix would be issued. Variations to the Building Consent were ultimately issued on 7 June 2022.

Complete Shelf’s summary judgment claim

[12] Complete Shelf’s position is that the Building Consent it originally sought did not comply with the Building Code. It contended that CCC could not be satisfied on reasonable grounds that the provisions of the Building Code would be met if the building work was properly completed in accordance with the plans and specifications which accompanied the application for the Building Consent. Complete Shelf alleges that CCC was negligent in granting a Building Consent that did not comply with the Building Code, and that it failed to identify that the application plans did not comply with the Building Code.

Summary judgment principles

[13] These are well known. Complete Shelf must show that CCC has no defence. Mr Campbell, counsel for Complete Shelf, accepts this means the absence of any real question to be tried.³

[14] Mr Campbell also accepts that it is difficult in negligence claims to establish the absence of a defence.

[15] I note the learned authors of *McGechan on Procedure* provide: “building disputes that rely on expert evidence are generally regarded as unsuitable for the summary judgment procedure”.⁴ The Court of Appeal has held that summary judgment “cannot be granted where the defendant has produced credible expert evidence”.⁵

³ *Pemberton v Chappell* [1987] 1 NZLR (CA) at 3.

⁴ Jessica Gorman and others *McGechan on Procedure* (online ed, Thomson Reuters) at [HR12.1.08], citing *Savoy Holdings Ltd v Royal Oak Mall Ltd* [1992] 1 NZLR 12 and *MacLean v Stewart* (1987) 11 PRNZ 66 (CA).

⁵ *Savoy Holdings Ltd v Royal Oak Mall Ltd* [1992] 1 NZLR 12 and *MacLean v Stewart*, above n 4.

Correspondence on the Proposed Balcony Clearance issue

[16] On 2 March 2022, Mr Phiskie of Figure and Ground Limited (Complete Shelf's architect), sent an email to Mr Laird, who was the person responsible at CCC for processing the Building Consent. Mr Phiskie's email was copied to a Mr Dow at Wolfbrook, the developer.

[17] Mr Phiskie referred to the RFI issued by CCC which included reference to the fire review noted at [7] above. Mr Phiskie says:

I wanted to check the first Floor balconies of Block D and I with you and your fire team. We had a fire engineer review our plans and their advice was to shift the first-floor balconies in 300mm from the boundary (*as per attached*). This was because the Intertenancy wall wasn't going all the way to the edge of the balcony and would require soffit protection being that close.

This was assessed after the BC was lodged so these changes haven't been made as yet.

The council Fire Team have not said that this is a problem (in their RFI), can you confirm that this is the case and that the balconies can stay as they are?

(emphasis added)

[18] The "as per attached" plan is not included in the copy of the email I have, but it was a plan that set out a satisfactory solution to the proposed Balcony Clearance issue.

[19] Mr Laird referred Mr Phiskie's email to a Mr Pan, who is a fire engineer with CCC's engineering services team. Mr Pan responded to Mr Laird the following day, on 3 March 2022, advising:

Yes. As the intertenancy walls in the current design do not extend to the outer edge of the balconies, the balconies do not have sufficient separation by distance to the adjacent property for compliance. The 300mm setback to create the separation to the relevant boundary between two units, *as shown in their drawing*, will be one method for these balconies to comply with the Building Code.

Can you please respon[d] to the email and clarify that this 300mm separation will be required to all balconies in Block D and I in order to comply with Building Code?

(emphasis added)

[20] As noted at [17], this email is confirmation that the drawing provided by Mr Phiskie was one method that would comply with the Building Code in respect of the Balcony Clearance issue — hence Mr Pan referring to “as shown in their drawing”.

[21] Shortly after receiving Mr Pan’s email, Mr Laird sent it on to Mr Phiskie and Mr Dow at Wolfbrook.

[22] Accordingly, it cannot be in issue whether CCC should or ought to have identified the Balcony Clearance issue on the face of the plans prepared by Complete Shelf’s architect, as the issue was expressly raised with them by the architect on 2 March 2022. CCC assessed the issue raised by Figure and Ground Ltd and advised that the 300mm separation will be required to all balconies in Block D and I in order to comply with the Building Code, and that their drawing set out an acceptable solution.

[23] For reasons that are not adequately explained, despite the email exchange of 2 and 3 March 2022 and notwithstanding revised drawings that were provided to CCC by Complete Shelf’s architects on 7 March 2022, addressing aspects of CCC’s RFI, the 7 March 2022 drawings did not address the Proposed Balcony Clearance issue. The Building Consent nevertheless issued and CCC does not explain why. However, as noted, CCC had approved via Mr Pan a separate drawing approving the solution to the Balcony Clearance issue.

[24] Accordingly, all parties concerned had knowledge the Proposed Balcony Clearance issue existed, that the 300mm separation was required to all balconies to comply with the Building Code, and that the final consent drawings tendered did not provide for the variation. The parties also knew that a separate drawing with a solution to the issue had been approved by CCC.

[25] At least for the purposes of the summary judgment application Complete Shelf, in my view, is taken to know what its architect knows.⁶ Mr Campbell submitted that

⁶ The extent to which Complete Shelf will be bound by the knowledge of its architects in this situation is open to debate. In *Southland Indoor Leisure Centre Charitable Trust v Invercargill City Council* [2017] NZSC 190, [2018] 1 NZLR 278 at [62], the Supreme Court in the context of discussing the obligations on a Local Authority said: “Further, as matter of policy, the actions and

Complete Shelf had engaged a suitably qualified expert to carry out the design and consenting process. The application for a Building Consent was signed by Mr Phiskie on behalf of the then applicant and records he was the authority of the owner to sign the application.⁷ It is at least arguable for the purposes of summary judgment that Complete Shelf is fixed with the knowledge of its agent and who is named as the “First point of contact for communications with the building consent authority”. In any event, Mr Dow at Wolfbrook was copied into the 2 and 3 March 2022 emails, so he had actual knowledge.

The pleaded duty and breach

[26] The statement of claim pleads:

32. CCC [owed] a non-delegable duty of care to the plaintiff to exercise reasonable skill and care in processing and issuing building consent BCN/2021/9798.
33. In breach of its duty of care, CCC:
 - (a) Processed and granted building consents:
 - (i) that did not comply with the Building Code; and
 - (ii) for which CCC could not be satisfied on reasonable grounds that the provisions of the Building Code would be met if the building work was properly completed in accordance with the plans and specifications accompanying the application.
 - (b) Failed to identify issues in the building consent application, plans and specifications that did not comply with the Building Code.

Mr Campbell’s submissions

[27] Mr Campbell’s oral submissions primarily focused on the *issuing* of the Building Consent. In his written submissions, he says that:

CCC owed an indisputable non-delegable duty of care to [Complete Shelf] to exercise reasonable skill and care in processing and issuing.... the consent.

knowledge of independent contractors have not been attributed to the owner”. Here, however, the architects were the agents for Complete Shelf, not only an independent contractor.

⁷ Complete Shelf must be taken as ratifying Mr Phiskie’s authority when it completed the purchase of the property on 1 February 2022, having been nominated by the original purchaser utilised by Wolfbrook to acquire the property.

[28] Mr Campbell submitted:

CCC breached this duty of care when it issued the Consent by failing to identify non-compliance with the Act and the Building Code and by not having reasonable grounds to believe in compliance with the Building Code.

[29] Mr Campbell focused on the issue of the Building Consent. He submits:

47. Section 49(1) of the Building Act provides:

A building consent authority must grant a building consent if it is satisfied on reasonable grounds that the provisions of the building code would be met if the building work were properly completed in accordance with the plans and specifications that accompanied the application.

48. In *Sunset Terraces*, Health J described the duty to take care with [the] Building Act's regulatory functions as follows:⁸

The obligation of the Council can be no higher than expressed in statute itself; namely, to be satisfied on all reasonable grounds that a building consent should issue; to take reasonable steps in carrying out inspections and to be satisfied on reasonable grounds that code compliance should be certified.

[30] Mr Campbell characterises the email exchange between CCC and Figure and Ground Ltd on 2 and 3 March 2022 as:

Discussion between CCC and [Figure and Ground Ltd] over potential non-compliance issues that cleared the issues and CCC confirmed compliance had been achieved;

[31] In my view, this arguably mischaracterises the exchange.

The balcony defect

[32] In respect of the Balcony Clearance issue, Complete Shelf's strongest argument is that the Balcony Clearance issue was brought to CCC's attention, recognised by CCC as requiring rectification yet CCC issued its Building Consent without the remedial solution referred to in the 2 and 3 March 2022 email exchange being incorporated into the Building Consent. However, I cannot accept it is unarguable that CCC breached whatever duty it may owe to Complete Shelf as developer by issuing the Building Consent when, as I have said, all concerned knew of the balcony issue, knew it had not actually been addressed in Figure and

⁸ *Body Corporate 188529 v North Shore City Council* [2008] 3 NZLR 479 (HC) [*Sunset Terraces*] at [220]—[221].

Ground Ltd's response to the RFI, but knew a solution had been tendered to CCC and approved.

[33] As far as the "processing" aspect of the alleged duty and breach, it is arguable CCC acted correctly up until the issue of the consent. I say that as during the processing stage, there is no suggestion that CCC did not respond appropriately to Figure and Ground Ltd's email of 2 March 2022.

[34] At no point after 3 March 2022, other than the issue of the Building Consent itself, did CCC expressly communicate that its position had changed from that recorded in Mr Pan's email of 3 March 2022.

Decision in respect of the Balcony Clearance Issue

[35] There is a need to assess the alleged duty in the context of Complete Shelf being the developer/owner of the property and the loss complained of, being pure economic loss.

[36] The exercise is complicated by Complete Shelf itself having a duty to see that proper care and skill were exercised in the building of the units. That duty could not be avoided by delegation to an independent contractor such as its architect.⁹ In the *Sunset Terraces* decision, Heath J, when assessing whether the Council had breached its duty at the Building Consent stage, held that the Council pursuant to s 34(3) of the Building Act 1991, must predict whether there are reasonable grounds to conclude the work could be carried out in a manner that complied with the Building Code. To make that prediction, it is necessary for a Council officer to assume the developer will engage competent builders or tradespeople and that their work will be properly co-ordinated. If that assumption were not made it would be impossible for the Council to conclude that the threshold for granting a Building Consent had been reached.¹⁰

⁹ *Body Corporate 188529 v North Shore City Council*, above n 8.

¹⁰ See *Body Corporate 188529 v North Shore City Council*, above n 8 at [399].

[37] It was because the Council was entitled to make this assumption that in the circumstances before Heath J, he held the Council was not negligent at the Building Consent stage.

[38] CCC was aware of the role and knowledge of the architect engaged by Complete Shelf. It was Figure and Ground Ltd who raised the potential issue with the Balcony Clearance having consulted with a fire engineer. While the drawings included in the Building Consent did not show the 300mm clearance between the edge of the balcony and the centre line of the party wall, this requirement was shown and agreed in the 2 and 3 March 2022 email exchange. Arguably, CCC was entitled to assume that the competent architect engaged by Complete Shelf would, as they had full knowledge of the issue, address it when progressing the works.

[39] It might be said this view is inconsistent with CCC's actions after its review in late May 2022, but the difficulty to address was the overhang issue, as the solution for the balcony issue was for the architect to insert "300mm" at the appropriate point on the plans.

[40] Mr Campbell's response no doubt will be to say the obligation on Complete Shelf was to build in accordance with the plans and specifications that are referred to in the Building Consent. However, it cannot be the case that Complete Shelf, with actual knowledge of the non-compliance surrounding the Balcony Clearance, can act as if that issue has disappeared when its architect identified the issue and proposed a solution which was approved by CCC.

[41] The expert evidence produced by CCC supports this conclusion. Mr Sparrow qualifies himself as an experienced building surveyor and as having experience in agencies responsible for the standards of construction and building legislation in New Zealand. He was also senior advisor to the Building Industry Authority and became director for building performance at the Ministry of Business Innovation and Employment (MBIE). While Mr Sparrow was at the Department of Housing, Mr Sparrow was the manager for the Consent Authority Capability and Performance Group. At least for the purposes of the summary judgment application, I am satisfied that Mr Sparrow is able to give expert evidence in relation to how a Local Authority

would approach the issue of a Building Consent. Mr Sparrow, in his evidence with regard to the email exchange of 2 and 3 March 2022, says:

8.2 There was grounds to grant the building consent in relation to the first allegation (300mm separation) as there was clear communication from the designer, amended plans and details provided.

The reference to amended plans is to the plan provided by the architect in their 2 March 2022 email.

[42] I am not in a position to dismiss this evidence at a summary judgment stage. The evidence called on behalf of Complete Shelf is from a fire expert, so does not directly engage with the evidence of Mr Sparrow that there was a reasonable basis for CCC to issue its consent.

[43] The extent and scope of the alleged duty of care owed by CCC is also, in my view, not a matter for summary judgment. In my view, Complete Shelf's approach brings a narrow focus to the obligations of CCC.

[44] As stated in *Todd on Torts*:¹¹

In accordance with ordinary principle, the defendant must be able reasonably to foresee harm to the plaintiff. Further, it must be reasonable for the plaintiff to rely on what the defendant had said, and certainly the courts have recognised that reasonable reliance causing foreseeable harm is a requirement in all cases.

(emphasis added)

[45] The above passage, while made in the context of when a duty arises in negligent mis-statement, shows that whether the issue of the consent is analysed in the present case as being a negligent misstatement or giving rise to claim in negligence, it is reasonably arguable that CCC would not reasonably foresee harm to Complete Shelf in respect of the Proposed Balcony Clearance issue given the express communication on 2 and 3 March 2022.¹²

¹¹ Stephen Todd (ed) *Todd on Torts* (9th ed, Thomson Reuters, Wellington, 2023) at [4.4.8].

¹² I note in *Southland Indoor Leisure Centre Charitable Trust v Invercargill City Council*, above n [6] at [62] and [67], the court referred to the duty of the Council in respect of building consents in terms of negligence — not negligent mis-statement.

[46] Mr Campbell seeks to sideline the actions of Figure and Ground Ltd by saying it does not matter that there may have been negligence on the part of its experts, and whether or not others were negligent does not prevent Complete Shelf seeking judgment for liability against CCC. Mr Campbell submits Complete Shelf is entitled to pick its defendant and it is up to CCC to seek a contribution from others. However, this submission is not of itself an answer to Mr Sparrow's evidence that the 2 and 3 March 2022 email exchange made it reasonable for CCC to issue its Building Consent. Nor to Wolfbrook having actual knowledge of the 2 and 3 March 2022 emails.

[47] At its most basic, I am not satisfied it was reasonable for Complete Shelf's architect, and therefore Complete Shelf, to assume that the issue of the Balcony Clearances had gone away when the revised drawings presented to CCC by the architects did not address that issue. How that factor will influence the scope of any duty owed, issues of reliance, or whether the duty was breached, are not matters suitable for summary judgment.

The overhang defect

[48] The overhang defect, as noted, was only identified as part of the audit by CCC in May 2022. There is competing expert evidence as to whether CCC should have picked this up at the consenting stage. Recall that Mr Phiskie, in his email of 2 March 2022, said he had a fire engineer review their plans. That engineer did not pick up the overhang defect. Nor did Mr Pan, albeit it may be that Mr Pan's attention was directed only to the Balcony Clearance issue.

[49] While Mr Campbell was critical of the expertise of the expert relied on by CCC, this is not a situation where I can determine whether a reasonable Council ought to have picked up the overhang defect. This was not an issue evident on the face of the plans in the same way it is said the absence of a 300mm balcony separation was. I am satisfied the conflict of evidence between the experts means a finding of negligence at summary judgment is not possible in respect of this overhang defect.

[50] Even if I had not had these reservations, I would have declined to enter summary judgment. Mr Campbell submits no issue of contributory negligence arises

because while Complete Shelf accepts it has obligations imposed on it as developer to ensure compliance with the Building Act 2004 and the Building Code, it discharged those obligations by engaging its suitably qualified expert, Figure and Ground Ltd. However, I am not satisfied that the situation is as simple as that. Mr Dow at Wolfbrook, the developer, received a copy of Mr Pan's email of 3 March 2022 advising that the Proposed Balcony Clearance issue needed to be addressed. What Mr Dow of Wolfbrook did in that regard is unknown.

[51] My conclusion in relation to the overhang defect reinforces my view that I would not have entered judgment for liability in respect of the Balcony Clearance Issue — even if I did not have the reservations I have expressed. This is because a liability hearing in respect of the overhang defect, which is related to the Balcony Clearance Issue, would be required in any event. As noted, had the Balcony Clearance been the only issue it could have been easily and readily rectified as the solution already existed.

[52] Because of the need to consider contributory negligence and because, as I will touch on briefly, there are substantial issues in relation to the alleged loss, the entry of judgment for liability will not substantially reduce the hearing time in this proceeding.

[53] Accordingly, even if I had considered that the scope of the duty owed by CCC and issues of reasonable foreseeability and reliance were straightforward, I would have declined to enter summary judgment as to liability.

Quantum

[54] The statement of claim divides loss into two heads — remedial construction costs and consequential costs.

[55] I have real doubts that much of the remedial construction costs are recoverable. Had CCC required the revisions put in place in June 2022, prior to issuing its Consent, then the additional design work and additional building costs and the like would have been incurred anyway.

[56] There is also an issue as to whether the change of materials on the balconies claimed for by Complete Shelf was in fact required to satisfy C/AS1 — recall Mr Pan said the 300mm setback would comply.

[57] As far as consequential costs go, these relate to internal additional project management, quantity surveyor and construction manager costs, additional holding costs because of further design work being required, interest, Local Authority rates and contract works insurance. Again, had CCC in March 2022 rejected the amended Building Consent application, there would have been delays from the plans having to be revised in any event.

[58] Further, the claim for delay is hard to understand. It is said that construction commenced upon the issue of the Building Consent on 16 March 2022 but counsel for CCC advised me the building inspection for the pouring of the foundations took place some time early in June 2022. Why building of the foundations would have to be put on hold because of issues with balconies is not explained.

Costs

[59] Costs are reserved.

Associate Judge Lester

Solicitors:
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Rice Speir, Auckland