



Supreme Court of New Zealand

9 May 2012

MEDIA RELEASE – FOR IMMEDIATE PUBLICATION

McNamara v Auckland City Council
(SC 85/2010) [2012] NZSC 34

PRESS SUMMARY

This summary is provided to assist in the understanding of the Court’s judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at Judicial Decisions of Public Interest www.courtsofnz.govt.nz

The case concerns a house built pursuant to a building consent granted by the Auckland City Council (the Council) on the basis of an August 2001 building certificate issued by Approved Building Certifiers Ltd (ABC), an approved certifier under the Building Act 1991. It was envisaged at the time that ABC would carry out the necessary inspections while the house was under construction and would later issue a code compliance certificate. The house was duly built and, in 2004, ABC issued a code compliance certificate in relation to it.

The appellants acquired the house in 2004 pursuant to a contract which was conditional on a code compliance certificate being issued. They confirmed the contract after their solicitors (a) were told by the Council that it held a code compliance certificate and (b) received a copy of the code compliance certificate from the vendor.

As it turned out the house leaked and the appellants have been put to considerable associated expense which they wish to recover from the Council.

The appellants' case was premised on the contention that ABC was not competent to issue the code compliance certificate. This is because, on 4 December 2002, the Building Industry Authority, the industry regulator, limited ABC's certifying authority so that its ability to certify compliance with cl E2 of the building code (addressed to moisture control), was confined to instances where compliance was achieved in accordance with Acceptable Solution E2/AS1. E2/AS1 was a document issued by the Building Industry Authority which specified particular building systems which, if implemented, would ensure compliance with cl E2 of the building code. The appellants alleged that the house was not designed or built in accordance with E2/AS1. On this basis they contended that ABC lost its competence to certify in relation to the house from 4 December 2002.

The Council did give some consideration to ABC's certification competence in relation to the house when it approved the building consent. But because this was before 4 December 2002, it is common ground that ABC, at that time, did have authority to certify in relation to the project. Under s 57 the Council was required to take over inspection and certification functions when notified that a certifier could not complete a project. No such notification was given although the Building Industry Authority and ABC carried out an exercise to identify ABC projects involving buildings affected by the 4 December 2002 restrictions. As a result of this exercise the Council was invited to take over inspection and certification functions in relation to a number of such buildings but not in respect of the house in issue in this case. The Council did not carry out an independent exercise to determine from its own records the projects with which ABC was associated which were affected by the 4 December 2002 decision. As well, when it received the code compliance certificate, it did not address the question whether ABC retained authority to issue it.

Section 50 obliged territorial authorities to accept code compliance certificates issued by certifiers and provided immunity from civil liability for actions taken in good faith on the basis of such certificates

The appellants argued that when ABC's certifying competence was restricted, the Council should have carried out its own checks to determine what, if any, ABC-supervised building projects were no longer within its competence and ought to have assumed inspection and certification responsibilities in respect of those projects. They also argued that the Council could have ascertained that the code compliance certificate had been wrongly given by checking the plans for the house which it held. Broadly they alleged that the Council owed them duties of care and was negligent in (a) not taking over inspection and certification responsibilities, (b) accepting ABC's code compliance certificate and (c) advising the appellants' solicitors that a code compliance certificate had been issued. They denied that the Council could avail itself of s 50

because they maintain that it applied only to certificates within the certifier's competence and that, in any event, the Council could not show that it had acted in good faith.

The Council applied to the High Court for summary judgment and the striking out of the claim. The High Court rejected this application on the basis that engagement of a certifier did not supplant the Council's own statutory responsibilities to inspect and certify in circumstances when the certifier lost competence to complete a code compliance certificate. Reversing the High Court, the Court of Appeal entered summary judgment for the Council. It considered that the Council did not owe a duty of care; this because the building owner had opted to use a private certifier instead of the Council to certify for code compliance. Given this election, the Council's statutory responsibilities would only be "enlivened" where it knew that the certificates exceeded the authority of the certifier or by notification, from the owners or certifier, under s 57 of the Act that the certifier was no longer able to act.

The appellants appealed to the Supreme Court.

The majority (with Elias CJ dissenting) upheld the decision of the Court of Appeal. Three members of the majority (Blanchard, McGrath and William Young JJ) regarded the duties of care contended for by the appellants as inconsistent with the scheme of the Building Act and in particular with s 50 while Tipping J, the fourth member of the majority based his conclusion on the good faith immunity under s 50.

Elias CJ considered that the scheme of the Building Act was consistent with the imposition of duties of care and agreed with the High Court that the claim should not be struck out.

The appeal was accordingly dismissed.

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