



**MARTIN TAYLOR, BARRISTER (B.A., L.L.B.)**

LEVEL 7 SYBASE HOUSE, 101 LAMBTON QUAY - PO BOX 5241, WELLINGTON 6145  
PH +64 4 471 4274 - MB +64 27 448 0841 - FAX +64 4 473 1105  
EMAIL: MARTIN.TAYLOR@CUBACHAMBERS.COM

## **Commercial Weathertightness Update**

### **Summary**

1. In **Te Mata Properties Limited & Ors v The Hasting District Council** ([2008] NZCA 446, O'Regan, Robertson and Baragwanath JJ) the Court of Appeal squarely considered commercial weathertightness issues. In the context of a leaky motel complex, the question was whether local authorities (and by implication construction contractors) owe common law duties of care in construction of commercial property.
2. In what was otherwise a resounding “no” to liability, Justice Baragwanath left open the possibility of a duty of care being founded in health and safety considerations. This duty would be not to construct or allow construction of defective buildings which could be injurious to health and safety.
3. This issue was discussed obiter, such a duty not having been pleaded by the Appellants. The question therefore remains open. In spite of a singular lack of interest from the majority, Justice Baragwanath’s invitation will persuade some owners, facing hefty repair bills, to take this risk.
4. Given the likely result, a preventative approach remains of utmost importance. Thorough pre-purchase inspections are a must. Every effort should be made to gain warranties from vendors, especially where properties fit the high risk profile of 1990’s plastered finish buildings.
5. Still, the lack of warranties typically agreed in moderately priced commercial property deals, and the hidden nature of weathertightness defects, will continue to lead to some disappointed purchasers. One hopes that with a more mature approach to the performance-based regime under the Building Act 1991, the high water mark for weathertightness claims is approaching.

### **Background – Residential Buildings, and The High Court’s View**

6. The law is now well settled in New Zealand that a duty of care is owed to the original and subsequent owners of domestic dwellings to avoid loss to a property owner by reason of faulty construction. This is however a departure from the ordinary rule that duties of care are generally not recognised in relation to pure economic loss. In the United Kingdom no duty of care now arises even in respect of residential buildings.
7. The High Court in **Three Meade Street v Rotorua District Council** [2005] 1 NZLR 504 had previously rejected any such duty of care in respect of commercial premises. Venning J’s reasoning was based primarily on:
  - 7.1. The ordinary rule that pure economic loss is not subject to a duty of care;
  - 7.2. The view that the network of contractual relationships and liabilities in a commercial or industrial project is sufficient to allow recovery for construction defects;
  - 7.3. There is no particular vulnerability in the circumstance of a transaction between commercial parties.

8. These points mitigate against a duty of care being owed by contractors. The Court found that local authorities should be in no worse a position, as they generally have neither the resources nor expertise to second guess architectural, engineering or other contractors.

### **Te Mata – The Door Left Ajar on Commercial Claims**

9. In the only substantive judgment in **Te Mata** Justice Baragwanath adopted the **Three Meade Street** approach to reject any general duty of care. He also points to the floodgates argument, and the current statutory context as supporting no general duty of care. There, the Weathertight Homes Resolution Services Act relates only to residential buildings, and does not extend to commercial premises.
10. In another recent decision referred to, **Rolls-Royce New Zealand Ltd v Carter Holt Harvey Limited** [2005] 1 NZLR 324 (CA), the Court of Appeal rejected a duty of care in somewhat similar circumstances. That matter concerned the general construction of a co-generation power plant which failed to meet contractual standards, rather than a weathertightness issues. The Court focused on lack of vulnerability, the potential of the contractual relationship to regulate rights, and the purely economic status of the claim. None of this, nor the many other factors referred to, supported a duty of care.
11. So **Te Mata** might have been a reasonably authoritative answer to commercial weathertightness liability. However, Baragwanath J specifically left open the possibility of a duty of care arising on health and safety grounds. He referred to the fact of the Building Act being directed towards ensuring safe and sanitary buildings, a thread which runs through most historic building control legislation. He characterised these at [57] as “values of such a high order as to warrant special protection”, noting that no distinction was made between domestic and residential buildings in this respect. Justice Baragwanath was able to find support in a dissenting Australian judgment of Kirby J in **Woolcock Street Investments Pty Limited v CDG Pty Ltd** (2004) 216 CLR 515, and a Canadian case **Winnipeg Condominium Consortium Corporation No 36 v Bird Construction Co** [1995] 1 SCR 85.
12. Justice Baragwanath concluded at [77] that it is arguable that a duty of care founded “squarely on the statutory health and safety considerations” contained in the Building Act ought to exist. As such a duty in the **Te Mata** case that was not pleaded, despite numerous opportunities to amend the pleadings, the matter was dismissed. Given Justice Baragwanath’s invitation, this possibility will be pleaded and pursued with some vigor by unfortunate owners of leaky commercial buildings.

### **The Extent of a Commercial Construction Duty of Care**

13. If such a duty existed, what would it look like? A first point is that such a cause of action would probably be limited to the actual cost of health and safety repairs, rather than extending to consequent economic loss.
14. Ironically, the broader the extent of the duty, the less likely it will in future be held to exist. The Canadian case of **Winnipeg** found a duty of care to exist where a large section of cladding fell from a high rise building, thus creating a very direct, but nonetheless exceptional, danger to public health. In the author’s view, this type of case may be left open, but will have limited applicability to the problems routinely encountered.

15. The primary construction defect cases in New Zealand are weathertightness issues, likely to threaten public health through toxic moulds. Will the Courts be tempted to find that toxic moulds are an obvious and direct danger justifying a duty of care? Baragwanath J referred specifically to this issue, and it is the most obvious candidate. But if there is an applicable duty in relation to mould, is the precursor condition, dampness itself, sufficient to breach such a duty of care? The logical answer is yes. However, the Court have already rejected a generalised duty in respect of weathertightness. It seems unlikely that a co-extensive duty will be found simply because the basis of the duty is reconceived.

## Discussion

16. This argument appeared to get short shift from the majority, being Justices O'Regan and Robertson. They profess themselves as not speculating on unpleaded causes of action at [88]. However, Baragwanath J reports them at [74] as considering that once a health or safety issue is identified, local authorities can, through their regulatory powers, require the building owner to remedy such dangers, thus satisfying the public interest. This contains no deterrent element, and leaves innocent (albeit commercial) parties at risk of loss from often hidden defects. However, this appears likely to be the ultimate result.
17. One would expect that the Court will follow a path trodden in most of these cases. The Courts are at pains not to lay down a blanket rule, but to require an application of principle to the facts of each situation. That said, only in the most extraordinary or dangerous construction cases (eg **Winnipeg**), or positive acceptance of duty cases (think **Hedley Byrne**), is a commercial duty of care likely to arise.
18. There are aspects of this commercial position which do not sit comfortably with the liability arising in respect of domestic dwellings. Councils are scarcely more equipped to deal with high value and complex residential projects (including multi-unit claims) than many small commercial buildings. It seems that the assumed vulnerability of the domestic building owner and the importance attached to home ownership in New Zealand are the most robust of the distinguishing factors. Further, the fact that commercial buildings are foremost financial assets may justify commercial claims being dealt with primarily as economic losses.

## Conclusion

19. It is worthwhile reflecting on the proactive precautions which can and ought to be taken by clients purchasing commercial properties which fall into a weathertightness risk category. Construction warranties will be important for new builds, as will be the acceptance process. Very thorough inspections must be essential in the purchase of buildings constructed with monolithic cladding. In the current market, there may be more prospect of purchasers obtaining warranties as to the fitness of a building, even in lower value situations.
20. However, there are already unfortunate owners out there with costly repairs to be undertaken and very little recourse. The problem will continue. Given this, expect to see Court's reconsidering a potential health and safety-based duty of care in the near future. Watch this space.

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