**IN THE SUPREME COURT OF NEW ZEALAND**

**I TE KŌTI MANA NUI O AOTEAROA**

**SC 92/2023**
**[2023] NZSC 149**

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| BETWEEN | BRIAN JOSEPH LINEHAN, SHANNON JAMES WALSH AND ROSS DOUGLAS BLAIR AS TRUSTEES OF THE ELIZA TRUST<br>Applicants |
| AND | THAMES-COROMANDEL DISTRICT COUNCIL<br>Respondent |

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| Court: | O'Regan, Ellen France and Kós JJ |
| Counsel: | T J Rainey and V A Whitfield for Applicants<br>D J Neutze for Respondent |
| Judgment: | 10 November 2023 |

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**JUDGMENT OF THE COURT**

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**A The application for leave to appeal is dismissed.**

**B The applicants must pay the respondent costs of $2,500.**

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**REASONS**

## Introduction

[1] The applicants (trustees of a trust settled by Dr Brian Linehan) brought a claim against the Thames-Coromandel District Council for negligence in issuing building consents, inspecting and issuing code compliance certificates in relation to remediation work carried out on a house in Whitianga. The claim related to the Council's actions for the remedial works undertaken in 2010/2011 and 2016. The High Court found the Council negligent in relation to the issuing of a code compliance

certificate in 2011 (the certification breach) and in respect of the issue of a building consent in 2016 (the consenting breach).[1] The High Court awarded damages for both the certification breach and the consenting breach (totalling $796,138) and general damages for stress and anxiety ($15,000). However, these figures were reduced by 50 per cent to reflect the applicants' contributory negligence. The Court of Appeal dismissed the applicants' appeal to that Court.[2] The applicants have filed an application for leave to appeal to this Court on the issue of contributory negligence.

**Background**

[2] The background is set out in detail in the Court of Appeal judgment.[3] We need only note the following. After the applicants' property suffered a significant water leak in 2010, the trustees engaged a builder, Bernard Barber, to undertake the necessary remedial work. The work commenced without a building consent but, after the Council issued a stop work notice, building consent was sought. The consent sought was based on design plans prepared by Sherri Simpson of Simpson Design Service. A building consent was issued on 20 September 2010 which, among other things, approved the design plans requiring the deck tiles to be placed on deck jacks (raised platforms above the deck membrane) and not directly on that membrane.

[3] During the remediation work, however, Mr Barber offered Dr Linehan the choice of either the deck jack option or directly attaching the tiles to the deck membrane. Dr Linehan's preference was for the latter option and the work proceeded on that basis. The Council inspected the building work authorised under the 2010 consent and issued a code compliance certificate on 19 December 2011.

[4] The failure to follow the approved design in relation to the deck tiles subsequently contributed to the development of further weathertightness issues. There was a further leak in December 2015 and Mr Barber was engaged again. Mr Brunton, who in 2010/2011 had been the building inspector undertaking the initial inspection

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1 *Linehan v Thames Coromandel District Council* [2021] NZHC 3234 (Hinton J) [HC judgment].
2 *Linehan v Thames-Coromandel District Council* [2023] NZCA 288 (Cooper P, Collins and Katz JJ) [CA judgment].
3 At [6]–[20].

on behalf of the Council, was engaged on two occasions in 2014 and 2016 to investigate the issue and provide some advice as to the necessary remedial work. That investigation and advice did not identify the direct fixing of the tiles to the deck membrane as the source of the problem.

[5] In mid-May 2016, the Council issued a building consent for the further remediation work. The application was for the balconies to be repaired on a like-for-like basis. That meant the tiles were again directly attached to the deck membrane. The building work was completed by about 4 August 2016. The Council carried out a final building inspection and issued a code compliance certificate on 6 September 2016. The tiles failed for a third time and this contributed to further water leakage into the house. On further review a number of other alleged defects were identified.

[6] In relation to the 2011 certification breach, the High Court found the Council was negligent in issuing the certificate even though the deck tiling was directly fixed to the deck membrane contrary to the approved design, building consent and Building Code. Similarly the Council was negligent in issuing the 2016 building consent because that application was again for directly fixed tiles.

[7] In reducing the damages award by 50 per cent for the trustees contributory negligence, the High Court set out a number of factors as having "causative potency" for the loss suffered.[4] On appeal, the Court of Appeal rejected reliance on three of these factors. The remaining factors were upheld as findings of contributory negligence although they were slightly recalibrated. Accordingly the 50 per cent figure was upheld too. For present purposes the key findings on contributory negligence related to Dr Linehan's knowledge that Mr Barber, the builder, was someone who "cut corners", Dr Linehan's failure to take other advice and, instead, continuing to rely on Mr Barber in those circumstances.

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4 HC judgment, above n 1, at [178].

**Proposed appeal**

[8] The applicants say that the proposed appeal raises matters of general or public importance.[5] In particular, the applicants say the appeal will allow this Court to consider the standard of care applicable to homeowners in relation to leaky home cases. The applicants also say the appeal will raise questions about the extent to which a party's case is constrained by its pleadings and the approach to drawing adverse inferences of fact in civil cases. Reference is also made to the need to consider the burden of proof for a defendant in relation to a claim for contributory negligence.

[9] The applicants also say that an appeal is necessary in the interests of justice to avoid a substantial miscarriage of justice.[6] The level of contributory negligence imposed in this case was very high and the applicants say the evidence established that they did meet the standard of a reasonably prudent homeowner. Various factual findings in the Courts below are challenged (with a focus on the key findings noted above at [7]). In terms of those key findings, it is also said the Court of Appeal erred in ignoring the engagement of Mr Brunton. Finally, there is a challenge based on the extent to which the applicants had the opportunity to respond to some of these factual matters.

*Our assessment*

[10] The Court of Appeal recorded that the parties were largely in agreement on the relevant contributory negligence principles, particularly that the inquiry was a factual one directed to the reasonableness of the plaintiff's actions in the circumstances.[7] Nor is there any challenge now to the applicable contributory negligence principles. Rather, the proposed appeal would reprise the arguments in the Court of Appeal about the application of those principles to the specific facts. The other proposed issues, relating to pleadings, the drawing of inferences and the burden of proof, on analysis also turn on the particular facts of this case. Accordingly, no questions of general or public importance arise.

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5 Senior Courts Act 2016, s 74(2)(a).

6 Section 74(2)(b).

7 CA judgment, above n 2, at [95] citing Stephen Todd "Defences" in Stephen Todd (ed) *Todd on Torts* (8th ed, Thomson Reuters, Wellington, 2019) 1151 at 1159–1160 (footnotes omitted) quoting *Jones v Livox Quarries Ltd* [1952] 2 QB 608 (CA) at 615 per Denning LJ.

[11] Nor do we consider that the approach taken by the Court of Appeal to this aspect gives rise to the appearance of a miscarriage of justice as that concept is applied in the civil context.[8] As the respondents submit, the assessment as to the appropriate reduction for contributory negligence was based on a number of circumstances the Court of Appeal considered raised the need for further inquiries (including, for example, what the Court described as a "simple phone call to Ms Simpson or the Council") to be made about the decision to direct fix the tiles to the deck.[9] In terms of Mr Brunton's engagement, as the respondent also submits, the Court of Appeal did refer to the High Court's finding that Mr Brunton did not provide the necessary level of expert advice. Finally, the respondent points out that the appropriateness of reliance on Mr Barber was put to Dr Linehan.

**Result**

[12] The application for leave to appeal is dismissed.

[13] The applicants must pay the respondent costs of $2,500.

Solicitors:
Braun Bond & Lomas Ltd, Hamilton for Applicants
Brookfields Lawyers, Auckland for Respondent

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8 *Junior Farms Ltd v Hampton Securities Ltd (in liq)* [2006] NZSC 60, (2006) 18 PRNZ 369 at [5].
9 CA judgment, above n 2, at [128].