IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

CP 48/94

BETWEEN **RICKY DONALD BRONLUND** of Coromandel fisherman and Mussel Farmer and **NICOLA MARIE BRONLUND** his wife

Plaintiffs

AND **THE THAMES COROMANDEL DISTRICT COUNCIL** a Local Authority duly constituted and having its principal office at Thames

Defendant

Hearing: 30, 31 March & 1 April 1998

Counsel: *Elliot Hudson* for the Plaintiffs
*David Heany & Paul Robertson* for the Defendant

Judgment: 2 April 1998

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**ORAL JUDGMENT OF TOMPKINS J**

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The plaintiffs, Mr and Mrs Bronlund, bought land near Coromandel. They wished to erect a house upon it. Having made the appropriate applications to the defendant, the Thames Coromandel District Council ("the Council"), it, on 16 August 1991, granted their application for a non notified controlled use and issued a building permit for the planned house. The plaintiffs commenced to build. On 25 February 1993 the Council issued to the plaintiffs a stopwork notice. This was followed by an abatement notice under s 322 of the Resource Management Act 1991. Although the plaintiffs have since undertaken some work on the house, it remains uncompleted. They have commenced these proceedings claiming general, exemplary, and special damages, together with interest and costs, arising out of the Council's actions in giving the planning consent and issuing the building permit incorrectly.

## THE SEQUENCE OF EVENTS

Sometime prior to July 1987 Mr Roy Fraser applied to the Council for a specified departure, pursuant to the Town and Country Planning Act 1977, relating to an area of land bordering on Coromandel Harbour. Part of the application sought the right to subdivide land at the southern end into several lifestyle lots. When the application was first lodged, Mr Cross, the Council's policy planner, was concerned about the subdivision proposal. After preliminary consideration by the Council, it was altered. Mr Fraser and Mr Cross walked over the land. They identified specified house sites that were set back from the ridges, and placed so that no house site overlooked any other house site. A resource consent plan was lodged that showed the various areas, including that intended for subdivision. That plan showed 9 lots. The 6 intended as residential lots had on them a square indicating the specified house sites that had been identified.

On 11 August 1987 the Council consented to the application, including the application to subdivide, subject to the conditions, restrictions and prohibitions set out in the resolution. Pertinent to the present case is condition 12, the relevant parts of which read

> "12. This consent permits not more than one house per lot to be erected on each of lots 3-9 inclusive. The location of that house shall be on the site shown on the attached plan ..."

The attached plan was the resource consent plan to which I have referred. It states it is not to scale, although Mr Cross said that it was to scale, and that the notation was there because it was likely to be copied. In due course the subdivider submitted to the Council a scheme plan which showed the subdivision with all relevant survey information, including, in the case of those lots to be used for building, a shape circle. The purpose of a shape circle is to ensure that the lot is of an appropriate shape to permit building on an appropriate minimum site area. The shape circles on the scheme plan did not coincide with the squares shown on the resource consent plan.

On 21 April 1988 there was deposited in the Land Registry Office at Auckland a deposited plan of the subdivision. This plan, in accordance with the legislation then in force, did not show either the squares from the resource consent plan nor the shape circles on the scheme plan, nor was there any other indication that there was any restriction of the location of a building site.

In May 1989 the Council prepared a planning map that showed the subdivision. This did not show the location of the specified house sites. On 18 July 1989 a certificate of title was issued in respect of lot 5. That too did not show the square or the circle nor that there was any building site condition or other covenant on the land.

In late 1990 the plaintiffs became interested in purchasing a lot in the subdivision. They consulted a land agent, Mr Radick. The outcome was that on 17 January 1991 they completed as purchasers an agreement for sale and purchase of lot 5 from Clam Shell Company Limited, a company in which Mr Fraser had an interest, as vendor which by then was the registered proprietor of the lot. The price was $50,000. The agreement was conditional upon finance. The plaintiffs obtained from Jordan Glenn & Associates, valuers of Thames, a valuation. It made no reference to any restriction on building sites. They proceeded with the purchase. Settlement was effected on 25 January 1991.

Plans for their house were prepared by the builder they engaged. In July 1991 they lodged with the Council an application for a building permit together with the necessary plans and specifications. Amongst these was a site plan that showed precisely the location of the house in relation to the boundaries of lot 5. This site plan proved to be some 150 metres from the specified house site square shown on the resource consent plan.

Following the lodging of the application, they were advised by the Council that a non notified controlled use application was required. They lodged such an application accordingly and paid the fee deposit of $112.50. By letter dated 16 August 1991 the Council's planning officer, Mr Wishart, notified the plaintiffs that consent to their non notified application was granted. The only condition was that the work was to be carried out in accordance with the plans approved in the application, which, of course, included the site plan submitted by the plaintiffs. Three days later, on 19 August 1991 the Council issued to the plaintiffs a building permit.

The Resource Management Act 1991 came into force on 1 October 1991

Construction commenced. The plaintiffs obtained the services of a builder on a labour only basis. Mr Bronlund assisted with the construction and obtained all the necessary materials. During the summer of 1991/92 the footings and floor were completed. Work on the house itself commenced in October 1992. The framing

was erected the following month. During this time the Council's building inspectors inspected the works at appropriate intervals.

In December 1991 Mrs Rose Turner, who had built on lot 8 of the subdivision, wrote to Mr Cross pointing out that it appeared that lot 5 had been granted approval for a site well out of the selected area on top of the hill and directly behind her house. Mr Cross replied on 21 January 1992 that he "now had the opportunity to look through all the files both building and planning for the lots ..." in the subdivision. His letter continued:

> "All the dwellings which have been erected within the above subdivision have had both planning and building permit approvals. I have now taken the necessary steps to endorse all files to the effect that there is a specified house site for the lots and new dwellings must comply with that site."

Despite this investigation Mr Cross had failed to discover that the Bronlund house was being erected not on the specified house site.

On 23 November 1992, Mr Cross became aware of the concrete slab for the plaintiffs' house, and realised that it was not on the specified house site for lot 5 - it was some 150 metres away. Mr Kemp, one of the owners of the adjoining lot 9, expressed his views over the location of the Bronlund house, as it would overlook his proposed house site. After obtaining advice, Mr Cross decided that a stop work notice should be issued. It was served on the plaintiffs on or about 25 February 1993. It required all work on the dwelling to cease immediately and further required the owners to seek a variation to the conditions of the specified departure consent to locate the house in a position not in compliance with the specified house site stated in those conditions. This is a reference to the conditions attached to the original consent to the subdivision.

As the result of Mr Cross receiving advice that the stop work notice was not the correct procedure, on 8 March 1993 the Council served on Mr and Mrs Bronlund an abatement notice under s 322 of the Resource Management Act 1991. It required them to take the following action:

> "To cease any further building work/building activity on lot 5 DPS48837 Long Bay Road and to either remove the partly built house on to the approved house site or seek a variation to the conditions of specified departure consent KO2/30/809 to locate the house in a position on lot 5 DPS48837 not in compliance with the specified house site stated in those conditions, supported by the consent of the adjoining owners of land to lot 5 to the siting of the house in a position other than the specified house site stated in the planning consent and as required for a controlled activity application."

They made an application accordingly. All the adjoining owners consented but for Mr Kemp and Miss Autumn, the owners of lot 9 immediately in front of lot 5, who had bought about November or December 1991. The application therefore proceeded as a notified application opposed by Mr Kemp and Miss Autumn.

This application came before a commissioner appointed by the Council. Mr Cross prepared a report recommending that the Council refuse consent to the application to vary the specified house site. The planning commissioner issued her recommendation to the Council. It was to grant consent to the application of the plaintiffs to vary the condition specifying the house site, subject to certain conditions that included landscaping, a limit on the height of the house of seven metres, specifying the colour of the exterior cladding and roof and other conditions relating to the nature of the cladding, glass to be used and external lights. This recommendation was adopted by the Council on 15 September 1993.

In or about July 1992 the Council considered a request by Mr Kemp and Miss Autumn to alter the zoning of their lot 9. The effect of the alteration was to enable them to subdivide their lot. On 25 November 1992 the Council resolved to redraw the coastal residential policy area boundary along three of the lots proposed to be created, leaving the balance in the coastal zone. The Council then issued a new planning map that showed the entire lot as coastal residential policy area. Mr Arcus, counsel then acting for Mr and Mrs Bronlund, considered this map was inconsistent with the resolution. For that and other reasons he, on Mr and Mrs Bronlund behalf, on 9 February 1994 commenced proceedings for an application for a declaration under s 311 of the Resource Management Act to clarify the planning position of the whole of lot 9 and also an ex parte application for an interim enforcement order to prevent the subdivision and any building permit issuing. That interim order was made on 11 February 1994.

From the Council's decision Mr Kemp and Miss Autumn appealed to what was then the Planning Tribunal. The plaintiffs also appealed in respect of certain of the conditions. The appeal was to be heard by the Planning Tribunal in the week commencing 3 March 1994. Following negotiations between the parties, a settlement was reached subject to the approval of the Tribunal, which was given on 11 March 1994. The essential features of the settlement were:

1. The appeal and cross appeal was to be resolved by a consent order that allowed the plaintiffs' house to remain subject to conditions.

2. The application for a declaration that the plaintiffs had lodged relating to the proposed subdivision by Mr Kemp and Miss Autumn was withdrawn and the interim enforcement order cancelled.

3. There were mutual landscaping covenants between the parties.

4. The plaintiffs were to pay $15,500.00 to Mr Kemp and Miss Autumn.

6. The Council was to pay $9,500.00 to Mr Kemp and Miss Autumn.

In September 1993 the Council, pursuant to s 36 of the Resource Management Act, claimed from the plaintiffs $8,030.64 for costs incurred in connection with these applications. They objected pursuant to s 357. The Council reduced the bill to $6,884.23. The Bronlunds have refused to pay.

Although further work has been done on the house in order to make it habitable, it has still not been completed. Mr Bronlund said that this is because they have lacked the resources to do so as a result of the very substantial amounts that they were required to spend on legal and other costs relating to the various proceedings, and because of the increase costs that have occurred since the issue of the stopwork and abatement notices.

These proceedings were commenced on 7 September 1994.

**The claim and the defence**

The first cause of action is founded on deceit. The plaintiffs allege that the Council represented to them that the non notified controlled use application was the consent required to site their house where shown on the site plan and that the building and other permits were the only other consents required. They allege that these representations were made carelessly or negligently or in careless disregard of their truth. The cause of action sets out further allegations of the Council's conduct alleging that the Council acted in the ways and manner it did towards them by malice or by preferring the interests of Mr Kemp at the expense of their interest

The second cause of action alleges that the Council breached its duty of care towards the plaintiffs by negligence, as a result of which they suffered damage. Alternatively it alleges that the Council gave them negligent advice or

failed to give appropriate advice. By acting in reliance on that negligent advice, the plaintiffs acted to their detriment and suffered damage.

The third cause of action is founded on equitable estoppel. This was abandoned during the course of the hearing.

In all causes of action the plaintiffs claim general damages of $100,000.00, exemplary damages of $50,000.00, special damages of $176,172.00, certain fees incurred, and interest. In the course of the trial the claim for special damages was amended to $207,392.00.

The defendant denies the allegations upon which the plaintiffs' three causes of action are founded. They further plead that, if the Council were negligent, the plaintiffs themselves were contributorily negligent in a manner that contributed towards their loss, and that the plaintiffs, with full knowledge and understanding of the requirement to obtain a variation to the conditions of the specified departure consent, commenced building work, voluntarily accepting the risks resulting from the acts and omissions complained of in the statement of claim, a plea of *volenti non fit injuria.* This latter defence was also abandoned.

## NEGLIGENCE AND NEGLIGENT ADVICE

It is convenient first to deal with the cause of action founded on negligence or negligent advice.

The first issue is whether in the circumstances of this case there was a duty of care owed by the Council to the plaintiffs. In *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd* [1992] 2NZLR 282, 305 Richardson J said that the Courts have found it helpful to focus on two broad fields of enquiry:

> "The first is the degree of proximity or relationship between the alleged wrongdoer and the person who has suffered damage.That is not of course a simple question of foreseeability as between parties. It involves consideration of the degree of analogy with cases in which duties are already established and as I shall develop shortly reflects an assessment of the competing moral claims. The second is whether there are other policy considerations which tend to negative or restrict - or strengthen the existence of - a duty in that class of case."

More recently Richardson P delivering the judgment of the Court in *Morrison v Upper Hutt City* CA48/97 18 February 1998 said:

> "The issue is whether a claim in negligence may lie. The ultimate question is whether in the light of all the circumstances of the case it is just and reasonable to recognise the duty of care by the defendant to the plaintiff. That depends on a consideration of all the material facts in combination and in that analysis New Zealand Courts have found it helpful to focus on considerations of proximity and policy. It is an intensely practical question."

As to the first field of enquiry Richardson J referred to in *New Zealand Security Consultants* it is common ground that the nature of the relationship between the plaintiffs as applicants for planning consent and a building permit and the Council as the body responsible for giving the consent and issuing the permit created a sufficient degree of proximity that would, in the absence of contrary policy considerations, give rise to a duty of care. The real issues in this case related to the second field of enquiry. It was submitted on behalf of the plaintiffs that there was a significant policy consideration which strengthened the existence of a duty. It was submitted on behalf of the Council that there were policy considerations relating to the economic resources of the Council that negatived a duty.

The Town and Country Planning Act 1977 was the relevant Act at the time of the giving of the consent and the issuing of the permit. Section 62 provided that it shall be the duty of the Council in respect of any of the subject matters of an operative district scheme to observe and enforce the observance of the requirements and provisions of the scheme.

Also relevant is s 86(1)(b) the relevant parts of which provide

> **"86. Record of changes, specified departures, and conditions -** (1) Every Council shall keep at the office of the Council -
>
> (a) ...
>
> (b) An adequate and properly annotated record in readily accessible form in respect of each property concerned, of all consents to specified departures and of all conditions, obligations, restrictions, prohibitions, and covenants imposed under this Act by the Tribunal or the Council in respect of any land or building in the district of that Council..."

Mr Robertson, who made the submissions on behalf of the Council on liability, accepted that the Council was in breach of this provision. It did not provide an adequate and properly annotated record in readily accessible form in respect of lot 5 that showed the consent to the specified departure granted to Mr Fraser, and in particular the requirement for houses to be erected on the specified house sites. The plaintiffs did not frame their claim on the basis of a breach of statutory duty, but they rely on the statutory duty as being relevant to the existence of a duty of care. In *Craig v East Coast Bays City Council* [1986] 1 NZLR 99, 106 in a judgment

delivered in the Court of Appeal relating to a local body's obligation to ensure compliance with its operative district scheme, I said:

> "... it is entirely consistent with a statutory duty to maintain an operative district scheme to find that there was a duty to exercise reasonable care to ensure compliance and not to permit a departure without observing the procedural requirements."

By the same token it is consistent with the statutory duty to maintain an adequate and properly annotated record as required by s 86(1)(b) to find that there is a duty to exercise reasonable care to ensure that such an adequate and properly annotated record was maintained. This statutory duty strengthens the claim to the existence of a duty of care.

Mr Robertson submitted that the consideration that negatived a duty of care arose out of the economic resources available to the Council. It was his submission that the constraints upon the Council's resources meant that it was simply not feasible for it to keep the records that were required. This submission requires consideration of the system that was in operation at that time. When an application for a building permit was received the person responsible for processing it in the Council consulted what was called a "Property Information - Index Card". Such a card was created when the Council received notice that a lot in a subdivision had been sold. The card recorded the valuation reference number, the legal description, the address of the property, scheme plans, planning applications and miscellaneous. If there were planning files referred to on the card, the files, or at least the conditions of any consents granted, were brought up so that the planners could see whether there were any outstanding conditions that needed to be complied with.

In the present case the crucial omission was that the card did not record the planning file relating to the application made by Mr Fraser and the planning decision imposing the building restriction. Thus when the planning officer consulted the card he or she would have been unaware of the existence of the restriction.It was that lack of knowledge that resulted in the non notified control use application being granted and a permit being issued, contrary to the condition attaching to the earlier consent. Mr Cross said that in 1987 the Council had no system for ensuring that information concerning the conditions of consent to a subdivision were carried over onto the Property Information - Index Card. He said that they had a very busy office. They had minimum staff. They had no system for flagging the individual property files with conditions. The Council was not a large local authority and had only limited resources. It was embarking on an ambitious

programme of capital works and expenditure on matters such as sewerage schemes, water supplies, and other public works. It had substantial debt. It was processing a very large number of applications for building consents. Since that date the Council has installed a very expensive computer system that ensures that the necessary information is immediately available.

There is a further respect in which the Council failed adequately to note the condition relating to the specified house sites. In May 1989 the Council compiled a planning map that showed the Fraser subdivision including lot 5. This was not done because of the consent to the subdivision but rather in the course of the Council reviewing its District Scheme. It would have been a simple matter for that plan to have shown the designated sites or at least to have on it a notation that there were designated house sites on certain of the lots. Mr Cross said that doing so was not a simple matter. I do not understand why that should be so. After all, if the Council needed some authority for inserting information of that kind onto the planning map it had it in s 86(b). That would have been a simple and inexpensive way to keep an adequate and annotated record in readily accessible form as required by the section. Then it would also have been simple for any person processing an application for a building permit to check the planning maps to see whether there was any condition noted on them that could affect the issue of a building permit.

That the Council's recording system was significantly inadequate is also demonstrated by the correspondence between Mrs Rose Turner and Mr Cross to which I have referred. When there was a specific complaint to the Council about the plaintiffs building on lot 5, it is remarkable that Mr Cross, who claims to have had a look through the files, both building and planning, for the lots in the subdivision, failed to realise that the plaintiffs were in breach of the planning condition.

The issue becomes whether, in all of these circumstances, the duty of care that may otherwise be found to exist between the Council and the plaintiffs should not be imposed. I am satisfied that it should be imposed for two principal reasons. First, I do not find the evidence given by Mr Cross sufficient to justify the Council failing to carry out a clear statutory duty. If detailed accounting information had been given to show that the Council was in a precarious financial position verging on bankruptcy, that may have been sufficient, although even then it is difficult to see how financial considerations can justify a departure from a statutory obligation.

Secondly, there is the importance of this function being properly carried out. As Mr Cross himself said, for the Council to perform its function properly it is "absolutely vital" that the cards have recorded on them any relevant planning information. In the present case the condition as to building sites was no minor or inconsequential condition. It was crucial that any person applying for building consent be made aware of it, as this case only too vividly illustrates. It was equally crucial for the Council to be aware of it, so that it could ensure that any permit it issued complied with this condition. It is no doubt because of these very considerations that legislature has imposed the statutory obligation in s 86(1)(b).

It is my conclusion therefore that any financial or staff constraints resulting from the Council's economic resources at the time, or any alternative demands on the Council's resources are not sufficient to negative the duty of care the Council owed to persons such as the plaintiffs to keep proper records in a form that would enable the Council to identify such an important planning condition. More specifically, it does not negative the duty the Council owed to the plaintiff to bring to their notice the condition, and not to issue a permit or consent unless either the condition were complied with, or there had been granted an application for consent to build the house otherwise than in accordance with the condition. The Council was in breach of the duty that it owed to the plaintiffs in these respects and was negligent.

That part of the cause of action founded on negligent misstatement is based on the statement of principle in *Hedley Byrne and Co Ltd v Heller and Partners Ltd* [1964] AC465. That principle gives rise to a duty of care when a person in a professional position gives advice and the person to whom that advice is given acts in reliance upon it.

The statement relied upon in the present case is contained in the building permit issued on 19 March 1991 by the Council to the plaintiffs. It gives the following notice to the applicant:

> "PERMISSION IS HEREBY GRANTED YOU to carry out the works proposed in accordance with the drawings and other documents submitted and with any conditions defined; such work to be subject to inspection at times during progress and to be carried out in strict conformity with the requirements of the Council bylaws."

This notice carries with it by necessary implication a representation that the plaintiffs could carry out the works in accordance with the drawings, including the site plan, lawfully. That was a misstatement because carrying out the works in

accordance with the drawings, including the site plan, necessarily resulted in a breach of the condition attaching to the Fraser consent.

Since I have concluded that the Council was negligent in failing to ensure that the necessary planning information was entered onto the Property Information - Index Card as a result of which the person processing the permit was unaware of the condition, it follows that the Council through its officers were also negligent in issuing the permit carrying with it by necessary implication the representation I have set out. That part of the cause of action is also established.

DECEIT

To establish the tort of deceit the plaintiffs must prove that the defendants made a representation of fact knowingly or without belief in its truth, or recklessly or carelessly as to whether it was true or false, and that the plaintiffs relied and acted upon the truth of the representation suffering damage as a result.: *Bradford Equitable Benefit Building Society v Borders* [1941] 2 All ER205, 211

I do not find it necessary to dwell on this cause of action. While I have found that the Council was negligent in the respects to which I have referred, this in my view falls far short of establishing the ingredients required for the tort of deceit. The representation the Council made that the plaintiffs were entitled to build on the site was false in the sense that it was not correct. But there is no sufficient evidence to establish that that representation was made with knowledge of its falsity or without belief in its truth or recklessly. The essential cause of the misrepresentation was the defective system in operation at that time.

The cause of action founded on deceit cannot succeed.

CONTRIBUTORY NEGLIGENCE

The defendants allege that the plaintiffs were contributorily negligent in a manner that contributed towards their loss in, knowing that there was a specified building site on the section, they failed to obtain advice as to where they were entitled to build, and to comply with the conditions relating to the specified building site. This submission relies on the evidence of the land agent, Mr Radick, who was the agent involved in the sale of lot 5 to the plaintiffs. Mr Radick said that the plaintiffs visited his offices in Coromandel. Prominently displayed on the wall of the main office were the two plans of the subdivision that had the house sites marked,

one plan marked with drawing pins and the other with ballpoint pen crosses. These plans were produced. Mr Radick said that he explained to Mr Bronlund that the drawing pins and crosses indicated designated house sites approved, and that if he wanted to build elsewhere he would need to seek the Council's permission.

Mr Radick also had a copy of the resource consent plan, showing the designated house sites. He initially said that he showed this plan to Mr Bronlund, but when pressed said he could not recall whether he showed the plan but thinks it likely that he would have.

Mr Bronlund accepts that in Mr Radick's office he was shown the plans on the wall on which he pointed out to Mr Radick the section in which they were interested. He accepts that the plans had crosses or pins on them, but did not ask Mr Radick what they were and Mr Radick did not tell them. He denies that he was shown the resource consent plan. He said that he and Mrs Bronlund went to the site with Mr Radick in the course of which Mr Radick made some comment that a particular area was "where the Council wants you to build". Mr Radick does not recall that visit.

Even if there were some discussion between Mr Radick and Mr Bronlund about building sites, I do not consider that this gives rise to contributory negligence on the part of the plaintiffs. A reasonable person would be entitled to assume that if there were some restrictions on building sites, these restrictions would have been brought to his notice when the Council considered the application for a building permit. This is all the more so when there is also a planning application for consent. When the Council approved the planning application and granted the building permit a reasonable person could properly assume that any comment made by the land agent relating to building sites was not material. The plaintiffs can hardly be considered negligent when they relied on such a clear representation from the Council that they could build in accordance with the plans, including the site plan, they had lodged with the Council.

The defence of contributory negligence does not succeed.

## DAMAGES

### *General Damages*

The plaintiffs claim for general damages for stress, hardship and uncertainties are in two broad areas. The first relates to the living conditions following the issue of the stopwork notice, the second to the planning litigation they were required to prosecute.

Evidence of their living conditions was given by Mrs Bronlund. At the time the stopwork and abatement notices were served in February 1993, the house was at the stage where the framing had been erected, some plumbing and drainage had been installed, but little further had been done. They were in a dilemma. They had drawn down the majority of the $120,000.00 loan they had arranged and were therefore liable for the principal and interest payments. They were living in rented accommodation. They could not afford to pay both the rent of $125.00 a week and the mortgage payments of $496.00 per fortnight. They decided their only course was to live in the house. Fortunately the drainage work had been completed. To make the house occupiable plywood was placed on the outside and they put in a toilet and shower, a kitchen sink, a gas stove and a washing machine, although these were not properly installed. There were no power points. They had to take power from the builder's pole. They put in windows and a roof. There was only a door on the toilet and one between the garage and the house. It was draughty and unpleasant. There was little privacy. The kitchen facilities were primitive. The floors were concrete. The house with the temporary cladding leaked. There was no insulation or ceiling. Initially the walls were unlined but later gibraltor board was installed. Initially there were no bathing facilities - they travelled to Mr Bronlund's parent's house to wash. In the winter there was mud and clay brought in from the unformed gardens outside. There were no lights upstairs. Mrs Bronlund considered that their health suffered. The girls then aged five and three had more colds and flu than previously. She was pregnant with their third child when they moved in. She also had poor health and Mr Bronlund developed high blood pressure. She referred to the emotional impact. The conditions placed a strain on the relationship between the two of them. There was also a social impact. Due to the state of the house they did not consider they could invite friends in.

They also referred to the worry and uncertainty surrounding the planning application to the Council and the appeal to the Planning Tribunal, compounded by the large legal and other bills that they incurred.

I have no doubt that these conditions caused the plaintiffs considerable mental and physical hardship. Had the Council, at the time the building permit was

lodged, told them the correct situation, much, but not all, of this would have been avoided. I will discuss later in this judgment what the likely consequences would have been.

Not all of this mental and physical hardship would have been eliminated. The plaintiffs did not have the financial resources to complete the house within a normal time. It was also going to be a lengthy process stretching over a year or more. They would in any event have been living in an incomplete house, but not to anything like the extent that they were forced to. Even when planning consent was finally given, their ability to proceed with the house was severely affected by the costs totalling some $66,000.00 that they had incurred.

Also, as I shall shortly elaborate, the plaintiffs are likely to have applied for resource consent in any event. There would have been a degree of stress in that process.

I accept the submission made on behalf of the Council that general damages cannot be awarded for the stress of litigation: *Rowlands v Collow* [1992] 1NZLR 178. However, that relates to the stress of this litigation. It does not exclude my taking into account the stress relating to the planning litigation, to the extent that it was caused by the negligence of the Council.

Having regard to all of these factors, an appropriate award for general damages is $20,000.00.

*Exemplary Damages*

The plaintiffs found their claim for exemplary damages on an allegation that the Council acted unreasonably towards them, and disregarded or was heedless of their welfare. They allege that the Council in acting in the way it did was motivated by malice and that it preferred the interests of Mr Kemp.

The object of exemplary damages is to punish and deter the wrongdoer, not to compensate the person upon whom the harm was inflicted. In *Taylor v Beere* [1982] 1 NZLR 81, 93 Somers J said that up until 1964 (when the House of Lords delivered its judgment in *Rookes v Barnard* [1964] AC1129) the circumstances in which such damages were appropriate could be stated with confidence. He referred to *Mayne and McGregor on damages* (12th ed, 1961) B196:

> "[Exemplary damages] can apply only where the conduct of the defendant merits punishment which is only to be considered to be so where his conduct is wanton as where it discloses fraud, malice, violence, cruelty, insolence or the like or as it is sometimes put, where he acts in contumelious disregard of the plaintiff's rights."

In *Taylor* the Court of Appeal declined to accept the three categories of cases in respect of which the House of Lords stated exemplary damages could be granted. So the general approach as described in *Mayne and McGregor* remains applicable.

There are two further areas of potential difficulty if the facts of the case were otherwise to justify an award of exemplary damages. The first is whether liability for exemplary damages should be restricted to torts of intention or whether it can be extended to cases of negligence. The judgment of Tipping J in *McLaren Transport Ltd* v *Somerville* [1996] 3NZLR 424 indicates that it can be, but the issue may not yet be free from doubt. The second is whether it is appropriate for an employer to be held vicariously liable in respect of a tort giving rise to a personal liability by an employee to pay exemplary damages. Having regard to the view I take of the facts in this case, I do not find it necessary to decide either of these issues.

Mr Hudson submitted that there were three aspects of the Council's conduct which called for condemnation. They were the failure by Mr Cross to take immediate steps in November 1993, on becoming aware of the Council's error, to bring that error to the plaintiffs' attention. The second was the failure of the Council to bring to the plaintiffs' notice the problem prior to the service of the stopwork notice. The third was what he described as the casual and offhand manner in which the stopwork notice was served on the plaintiffs. They were asked to call at the Council's office when the stopwork notice was handed over to them without any prior notice.

I do not consider that any one of these actions or all three taken together come anywhere near the sort of conduct that would justify the award of exemplary damages. Whilst it may be said that the Council's conduct was insensitive and even thoughtless, it does not amount to conduct of the kind that merits punishment by the award of exemplary damages. That claim fails.

*Special Damages*

To determine special damages, I first consider what the position is likely to have been had the plaintiffs been told, when they lodged their application for a building permit in July 1991, that the site plan did not comply with the specified house site on lot 5. They had two alternatives.They could have either decided to build their house on the specified site, or applied for planning consent to enable the house to be built on their preferred site. It is likely that they would have chosen the second alternative. I reach this conclusion for these reasons. First, it was their preferred site because of the far more extensive views that were obtained from it. Secondly, to build the house on the specified house site would have meant a complete redesign. Their house as designed would not fit on the site. Thirdly, had they investigated the possibility of building on the specified house site, they would have learnt what the Court was told by Mr Mitchell, a consulting geotechnical and civil engineer. His evidence was that because of soil instability it would have been necessary to set back the building to a degree that would have reduced the area upon which the house could have been built to less than the site as shown on the plan. Further it would in his opinion have been necessary to make considerable excavations because of the contour of the land in the area of the site. Mr Mitchell estimated the cost of the soil excavation and its removal at $50,000.00.

It is next necessary to consider what is likely to have been the result had the plaintiffs applied for planning consent to build their house on the preferred site in 1991. It is my conclusion that it is likely that that consent would have been granted by the Council for these reasons.

Paragraph 412.13 of the District Plan set out the criteria to be applied when assessing a planning application of this kind. They are that the proposed use must not:

> "(1) Detract from the natural character and features of the coast-related hinterland.
>
> "(2) Cause more than a minimal impact on the natural character of the landscape, coastal features, or natural features of the coats-related hinterland.
>
> "(3) Blend into the landscape and not obtrude into or tend to destroy the overall character and coastal features of the block.
>
> "(4) Tend to dominate any of the particular natural features - either alone or in combination with other buildings (either on the same or on other blocks) - which make up the amenities of the area."

These criteria would have been considered at the time of the planning application by the plaintiffs in 1991, even though that application did not expressly

relate to changing the specified house site. The application was nevertheless granted.

Secondly, when the matter came before the Planning Commissioner at the opposed application in 1993 the Commissioner was, in the submissions prepared by Mr Cross, expressly referred to these criteria. Nevertheless the application was granted by the Council in accordance with her recommendation.

Thirdly, at the time of that application in 1993 all the owners of adjoining properties consented to the application but for Mr Kemp and Miss Autumn. They were not the owners of lot 9 in July 1991. They did not buy that lot until December of that year. Hence it is reasonable to assume that the other land owners would again have consented and that the application would not have been opposed by any land owner.

Fourthly, when the 1993 application was heard, it was opposed by Mr Cross on behalf of the Council. It was his recommendation that the Council should refuse to grant consent. That recommendation was rejected. However, in July 1991 Mr Cross was overseas on an exchange. Mr Wishart, who was the exchange planner at the Council at the time, did not have the interest in the subdivision that Mr Cross had. It was he who granted the plaintiffs' application for planning consent in 1991. It is less likely that he would have expressed the opposition that Mr Cross did later.

Finally the plaintiffs would have had a strong argument in support of the change, based on the fact that the specified house site was unsuitable for building for the engineering reasons to which I have referred.

It is my conclusion therefore that had the planning application been made in or shortly after July 1991 it is likely to have been granted by the Council, probably without opposition, although there remains a possibility that the Council planners, despite Mr Cross' absence, may have opposed. But even if they had, I think it likely that the application would have been granted.

I now consider the special damages claimed in the light of this conclusion. The plaintiffs claim $66,418.00 costs incurred in the resource management consent obtained in 1994. This includes counsel and solicitor's costs, expert witnesses costs, the $6,884.23 claimed by the Council, the $15,500.00 paid to Mr Kemp on settlement and $3,480.00 being an assessment of Mr Bronlund's time and travelling expenses.

The Council has waived its claim to the $6,884.23 so that item can be deleted. I am also not prepared to allow the item claimed for Mr Bronlund's own costs, as I do not consider that it has been satisfactorily proved. I can do no more than make an estimate of what costs are likely to have been for an unopposed or not significantly opposed application. The amount should include legal, engineering and possibly some landscaping costs. I estimate them at $10,000.00.

Mr Heany challenged the claim in two other respects. He submitted that it should be disallowed because, had consent been sought in 1991, the application is likely to have been opposed, and the same costs incurred. For the reasons I have already given I do not accept that submission, but I do accept that some legal and expert, particularly engineering costs, may have been incurred.

Mr Heany next submits that Mr Arcus' fees totalling $28,262.69 should be reduced by that proportion of them attributable to the plaintiffs challenge to Mr Kemp and Miss Autumn's application to change the zoning areas on their lot. Mr Arcus estimated that of his total fees about one third was attributable to this application. Mr Hudson submits that the Kemp/Autumn proportion of the fee is properly claimed on the grounds that that application by the plaintiffs was a tactical move to support their resistance to the Kemp/Autumn appeal against the granting of the plaintiffs' consent. To put it another way, had the plaintiffs obtained the necessary consent in 1991, the probabilities are that they would not have objected to the Kemp/Autumn application and therefore would not have incurred the costs. There is no direct evidence on this issue. Mr Arcus was not asked whether the plaintiffs' opposition to the Kemp/Autumn application was a tactical move, and therefore an integral part of the whole appeal process. But I consider there is force in the submission that, had the application been brought and granted in 1991, the likelihood is that the plaintiffs would have taken no action on the Kemp/Autumn application in 1994.

The $15,500.00 paid on settlement would certainly not have been incurred had the application been made in 1991 when Mr Kemp and Miss Autumn were not on the scene.

In the result of this claim I allow $46,053.40 made up as follows:

| | |
|---|---|
| Amount of claim | $66,417.63 |

| | | |
|---|---|---|
| Less | | |
| Legal and other costs on 1991 application | $10,000.00 | |
| Council claim | $6,884.23 | |
| Bronlund costs dissallowed | $3,480.00 | |
| | $20,364.23 | |
| Allowed | | $46,053.40 |

The plaintiffs claim $14,000.00 being the cost of temporary work necessary at the time of the stopwork notice to protect the asset and to enable them to live in the house. This is made up of items such as supplying and installing the galvanised roof and the necessary purlins, electrical and plumbing work, gibraltor board and exterior plywood cladding. The figures were assessments made by Mr Henderson, the registered architect with Babbages, architects of Tauranga.

Mr Crowe, an investigating accountant and loss adjustor who gave evidence on behalf of the Council, agrees with that figure, but claims that it should be reduced by $2,300.00 being the likely value of salvage when the temporary work was undone to enable the permanent work to be carried out. Mr Henderson challenges this approach, contending the cost of removing the material was likely approximately to equate the salvage value. One of Mr Crowes items is $1,000.00 for the salvage of the galvanised roof. For reasons to which I shall shortly refer I am not satisfied that the roof should be removed. So this item would not be salvaged in any event. It is my conclusion that no allowance should be made for salvage.

However, for reasons to which I shortly refer, I do not regard the roof and supporting purlins to be temporary work. The amount claimed for those two items totalling $8,200 should be deducted from the $14,000. $5,800.00 is allowed under this head.

The plaintiffs claim $33,710.00 for the cost of removing the temporary works prior to completion of the residence and also the cost of landscaping. The Council challenges some of the items and also challenges the 4% for preliminary and general, 7.5% for contractor profit and 15% contingency sum added to the costs assessed by Mr Henderson. My conclusions are these.

1. $1,200.00 for removing the temporary roof is disallowed. I am not satisfied on the evidence that, as the plaintiffs now submit, the roof should be removed and a different roof installed.

2. Included in the costs are a total of $18,989.00 for landscape planting, fencing to planting and the irrigation system These costs were or will be incurred to comply with the landscaping conditions imposed on the grant of the consent in 1994. The plaintiffs claim that they would not have been incurred in 1991, since they were principally incurred as the result of the Kemp/Autumn opposition. I do not consider these items should be allowed in full for two reasons. First, there is a possibility that on an application for consent in 1991 and even without the Kemp/Autumn opposition, planting may have been required in order to comply with the criteria to which I have referred, although the planting may not have been to the same extent. Secondly, the planting together with the irrigation system is likely to constitute a permanent betterment to the property. For these reasons I allow the plaintiffs $9,000.00 under the landscaping head.

3. I do not allow the amounts claimed for preliminary and general contractors profit and contingency. Mr Henderson has estimated the cost of doing each item of the work. I accept his estimate, but do not find there to be any justification for adding items to it. Contingencies may be up or down. There is no basis for assuming they will be adverse. Also I note that included in the figure excluding these three items is $1,000.00 for the owners time in obtaining requotes etc.

The result is an allowance of $15,030.00 under this head.

The plaintiffs claim $77,600.00 for the increased cost to complete the residence arising from delays based on the inflation index up to March 1997. Mr Henderson arrived at this amount by taking the value of the house assessed at September 1993 of $383,000.00, deducting the value of the work completed up to that date of $81,600.00, arriving at the balance cost for completing the work of $301,400.00. He then applied the inflation indices from the dwelling and outbuildings portion of the residential building section of the capital goods price index as issued by Statistics New Zealand to arrive at an inflation adjusted cost of $378,951.00 or an increase of $77,600.00.

There are difficulties with this approach. It assumes that in September 1993, or shortly thereafter, the plaintiffs would have spent the amount required to complete the building. In fact they did not do so. This was in part because of the substantial costs they had incurred in relation to the resource management consent

plus the costs of the temporary works, but it is also because, apart from these costs, they did not have the financial resources to complete the building within a normal time. There may be a case for allowing for inflation between 1991 when I have found that planning consent would have been available had it been sought and 1994 when the planning consent was available but no figures have been supplied upon which I could make an assessment.

I am satisfied that there will have been some increased cost as the result of the problems that flowed from the Council's negligence, but I do not have sufficient evidence upon which I can make an appropriate allowance. This item is disallowed.

The Council called evidence from a valuer who expressed the opinion that the plaintiffs' property is worth $35,000.00 more as the result of the resource consent having been granted to build on the preferred site. It was submitted on behalf of the Council that this amount should be deducted from the special damages on the grounds of betterment. I do not accept that submission. If, as I have found to be the case, the plaintiffs are likely to have been granted resource consent to build on the preferred site in 1991, the same betterment would have occurred.

I summarise the special damages allowed as follows:

| | |
|---|---|
| Resource Management costs | $46,053.40 |
| Temporary work | $ 5,800.00 |
| Removing the temporary work | $15,030.00 |
| Total | $66,883.40 |

**JUDGMENT**

There will be judgment for the plaintiffs for $86,883.40 made up of $20,000 general damages and $66,883.40 special damages.

The plaintiffs are entitled to interest on the judgment at the Judicature Act rate of 11% calculated from 11 March 1994.

**COSTS**

I understand from counsel that there has been a payment into court which is likely to be close to the total amount of the judgment. The preferrable course is to reserve the question of costs. If counsel are unable to agree they may file memoranda.