



# Case in Brief:

## *Pool-owners snooker Council*

*The owners of a property based around a majestic swimming pool successfully sue the Tasman District Council in Buchanan v Tasman District Council [2023] NZHC 53 for acting negligently in their inspections of the pool.*

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### **The facts**

A Nelson home which won numerous design awards, was based around a pool in its courtyard area. It obtained a building consent in 2004 and a code compliance certificate in October 2006. The plaintiffs purchased the property for \$780,000 in 2008, relying on the code compliance certificate.<sup>1</sup> The Council inspected the pool and signed off on it again as compliant in 2009 and 2012.

When the plaintiff family trust went to sell the property in 2019, the Council determined

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<sup>1</sup> *Buchanan v Tasman District Council* [2023] NZHC 53 at [110].

## Snookering the Council



Pool owners sue local council for loss of amenity in their award-winning home



the pool was non-compliant. The owners had not made any changes to the pool.

On 23 December 2020 the owners issued proceedings against the Council, unable to sue on the original 2006 CCC due to being time-barred under the 10-year longstop provisions of the Building Act 2004. The Judge noted:<sup>2</sup>

...the 2009 and 2012 pool inspections failed to identify that the pool barrier, which had been thought originally to be compliant, was not and never had been compliant with the Building Code and the FOSPA [Fencing of Swimming Pools Act 1987].

The plaintiffs sought *special damages for the loss of the opportunity to sue for the negligently issued CCC, general damages, interest, costs, and a declaration*.<sup>3</sup>

Justice Palmer for the High Court, following a three day trial, noted in his judgment:

A key issue in considering whether the Council was negligent is whether the Council owed a duty of care to Ms Buchanan and Mr Marshall to use reasonable skill and care in inspecting their pool under the FOSPA in 2009 and 2012. This is apparently the first occasion on which such a duty of care has been

litigated in New Zealand.

### The decision

The issuing of the building consent in 2004 and the CCC in 2006 were not especially relevant in the end:<sup>4</sup>

They sue for the loss of that chance to sue that was caused by the negligent pool inspections by the Council, in August 2009 and January 2012, and their subsequent statements to Ms Buchanan and Mr Marshall that their pool and pool barriers complied with regulatory requirements.

The claim based on the 2009 inspection was barred by the statutory longstop.<sup>5</sup> In terms of the Limitations Act 1950 and 2010:

2 Above at [49].

3 Above at [19].

4 Above at [82].

5 Above at [89].

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Ms Buchanan and Mr Marshall reasonably gained knowledge of the fact they had suffered damage or loss, due to the lost opportunity caused by that inspection, only when the 2019 inspection incurred.

Therefore they were within the six-year limitation period and three-year further late-knowledge

period under the 2010 Act.

*The Council's negligence was not an omission but a positive act of inspecting the pool followed by a misstatement.*<sup>6</sup> The claim in negligent misstatement as well as in pure negligence was made out.

In formulating the novel duty of care, Justice Palmer relied on the decision *North Shore City Council*

*v Attorney-General [The Grange]* in particular,<sup>7</sup> and noted that the pool owners rely on the authorities to inspect with reasonable skill and care.<sup>8</sup>

The cause of action for breach of statutory duty (the Council failing to fulfil their duty to inspect properly under section 10 of FOSPA) was dismissed, but all other elements of the plaintiffs sought-for relief were granted save for the costs of applying for an MBIE determination of compliance. The main element of damages was for the loss of amenity value caused by the remediation, that is, *architectural excellence butchered*,<sup>9</sup> and amounted to \$195,000 (plus interest from the date of purchase). The total damages were approximately \$270,000 with legal costs additional.

## Conclusion

The issuing of inspection certificates for swimming pools is undertaken in the performance of a valuable public safety regime. However, it is not for the pool owners to have to go behind the certification as the Council owes a duty of care to perform the task with all reasonable skill and care.

This case appears to be the first of its kind and sets a precedent in the field – inspections need to be undertaken once every three years for each pool. Councils need to think twice before diving headlong into the task!

6 Above at [111].

7 *North Shore City Council v Attorney-General [The Grange]* [2012] NZSC 49, [2012] 3 NZLR 341.

8 Above at [52] and [63].

9 Above at [114](a) and (b), and [117].