IN THE SUPREME COURT OF NEW ZEALAND SC 82/2009

BETWEEN **BLAIR & CO LIMITED**

Appellant

AND **QUEENSTOWN LAKES DISTRICT COUNCIL**

Respondent

Hearing:	12 April 2010
Court:	Elias CJ Blanchard J Anderson J McGrath J Wilson J
Appearances:	M E Parker and D J Taylor for the Appellant D J Goddard QC and D J Heaney SC and R Karalus for the Respondent

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CIVIL APPEAL

MR PARKER:

May it please Your Honours, Mr Parker, I appear for the appellant with Ms Taylor.

ELIAS CJ:

Thank you Mr Parker, Ms Taylor.

MR GODDARD QC:

May it please the Court, I appear with Mr Heaney and Ms Karalus for the respondent counsel.

ELIAS CJ:

Thank you Mr Goddard, Mr Heaney, Ms Karalus. Yes Mr Parker?

MR PARKER:

May it please Your Honours. Subject to Your Honour's directions I have assumed that you have had the opportunity to read my submissions to some extent?

ELIAS CJ:

Indeed, we have.

MR PARKER:

That being so I will not read them to you of course but if I may go to the main points in my submissions and then at the end of that briefly traverse some of the points that have been raised by the respondents. As Your Honours will now apprehend this is a case concerning whether a council owes a duty of care, alongside its obligations, its duties and powers under the Building Act 1991, and we are considering that in the context of a strike out application which has its own considerations. But the central issue is whether this novel duty of care should exist and to divine that we have to see whether it is fair, just and reasonable and supporting that review we look at, as you well know, the issues of proximity and policy. And tucked in behind that consideration of course is to be mindful of the high threshold which has to be passed before a claim making such a proposition can be struck out.

It's the position of my client, speaking for itself and of course for the plaintiff in a sense, Charterhall Trustees Limited, that the council did indeed owe a duty of care in this case in the performance of its functions under the Building Act. I will be taking you to the relevant sections if you'll forgive me because it repays consideration in a little more detail than perhaps my submissions have done.

The Act doesn't exclude such a duty. In fact whilst I've put it in that term, those terms in my submissions I think one might go just a little bit further and say perhaps there's almost some encouragement in the Act for such duty to

exist. We also go on to say that there is indeed the proximity required between Charterhall Trustees Limited and the council by virtue of the relationship that's created by the statute and again I will be taking you to the provisions in the Act which I say assist you in coming to that view. The other significant matter, which I think we will be considering, will be to how – sorry, as to how we will properly classify the loss in this case. As you will know in the Court of Appeal it was decided that what we were considering was economic loss and it's the position of my client that the loss here is physical damage causing loss and there are consequent damages flowing from that in the normal way and that it is not economic loss or pure economic loss as the authorities have described that, in the authorities and we also say that on an analysis of the policy reason so far as we can do that at the stage of a strike out would also support that there would be such a duty of care.

I'll just briefly narrate the facts. Charterhall Trustees Limited is the owner of a property at Blanket Bay which is a physical location near to Glenorchy and at that place they had built a luxury lodge which is known as Blanket Bay Luxury Lodge and in December 2003 there was a fire which caused physical damage to the property. It is said that that fire arose because of a defect in the chimney flue system and that as a result costs were incurred for the repair, which has occurred, and as a result of the repairs having to be done the Lodge was closed and that caused loss to the owners of the property. They are the original owners. There is no subsequent owner so we don't have to consider those particular questions which have taxed the Judges in a number of jurisdictions over the years.

Charterhall says the fire was caused by defective design or construction and have sued the council primarily and then as secondary defendant, rather second defendant, Blair & Co which is my particular client which is an architect's firm that was a sub-contractor to an American architect's firm which was in a direct contractual relationship with Charterhall which was not the case so far as my client is concerned and you will now be aware that the history of this case has been that the council applied to strike out the claim against it. It did not succeed in the High Court, it did succeed in the Court of

Appeal and this appeal is now before you, originally brought by both Charterhall and my client but now just carried on by my client.

The strike out principles I've set out in some detail over four or five pages of my submissions. I do not propose, unless Your Honours wish me to do so, to go into those because they are pretty familiar to you of course, other than to note how cautionary many of the dicta are which I've quoted there so if I may Your Honours go to, move on to page 5 of my submissions which is where I start upon the criteria by which we should examine the argument for a novel duty of care and coincidentally one of the cases which I would have traversed if I'd spent a lot of time on the strike out issues, is *Couch v Attorney General* [2008] NZSC 45 which also outlines the criteria for the way we should approach assessing an argument for a novel duty of care and it's as I've already addressed upon, we must see whether it is fair, just and reasonable to impose such a duty and that is built upon the twin pillars, if I can call them that, of proximity and policy and helpfully the quote that I put in my paragraph 15, which itself quotes from paragraph 78 in *Couch*, "Proximity is concerned with the nature of the relationship between the parties whereas policy is concerned with the wider legal and other issues involved in deciding for or against a duty of care." And there was reference in Your Honour's decision to *Rolls Royce New Zealand Limited v Carter Holt Harvey Limited* [2005] 1 NZLR 324, again I won't dwell on that but if I may I'll go to paragraph 17. Reasonable foreseeability, a necessary pre-condition but not the determining factor of whether a duty will be imposed but that quote from *Attorney General v Body Corporate 200200* [2007] 1 NZLR 95 (CA), I think that's Sacramento it's not colloquially as, sets out these factors and that's what they are, helpful but no more than that and probably not exclusive. "Whether duties of care have been imposed in analogous situations; the substantiality of the nexus between the defendant's alleged negligence and the plaintiff's loss. General considerations of vulnerability - " and I will come back to that later in my submissions. It is a growing factor, it seems to me on review of the authorities, as to its ambit and significance. That may alter depending upon the context and I will be suggesting to Your Honours that its importance is lesser here because of the statutory framework in which we are

examining this question, and then "(d) The nature of the relevant risk." And halfway through that quote it says this, "Of course in building defect cases, it is not always easy to distinguish between property and economic loss." Any review of decisions relating to such defect cases would disclose that but I find some comfort in the fact that there is a recognition there of the ability to have property loss which is not necessarily going to be categorised as economic loss. So that part of the quote is particularly apposite to our case because of that statutory environment and because of the type of loss which has apparently occurred here which is physical damage by fire and consequential loss flowing there from.

The test in *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants Ltd* [1992] 2 NZLR 282, "Warned against laying down hard and fast rules," and there was that emphasis on the step by step process. Again that does not require me to dwell on that as it will be so familiar to Your Honours. It is interesting to note, as I have in paragraph 19 that the High Court of Australia's approach, though perhaps using a different nomenclature of times, appears to be a very similar approach to that which we are taking in New Zealand. It's been called in Australia, the multi-factorial approach based upon the multi faceted inquiry required in which salient features are considered. Perhaps we don't need to worry too much as to the terminology that's used.

ELIAS J:

I would have thought that the approach is quite different because in the *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 case the High Court majority did not follow the *Caparo* line and in particular rather diminished the impact of policy, did it not?

MR PARKER:

Yes I, Your Honour's right. I'm not sure that the stage of this examination of features that I – that was my reading of it but I'll make note of what Your Honour says and perhaps return to that if I may.

In any event, whether we – it is still appropriate to examine those relevant criteria or salient points, and I say that these I'm going to refer to are those that would be helpful to Your Honours in deciding this case. First of all, the focus of the analysis is the relevant legislation, in particular the degree and nature of the control exercised by the council over the risk of harm that eventuated. And I think when Your Honours have, with me, go through those sections, you will see that those specific terms control and type of harm, in this case fire, have a particular focus in the Building Act. The degree of vulnerability there I refer to, of those two depend on the proper exercise by the council of its duties and powers and that aptness of that vulnerability factor may not be so great as I've indicated earlier because of the relationship that is created by the statute, which on one hand requires the control and acts as a positive exercise of duties by the council and correspondingly, the requirement upon a building owner or property owner who's building on that property, to engage with the council has simply no choice about it. Whether there are or could realistically been other remedies available to a plaintiff is relevant to that assessment for vulnerability, although that factor appears on my reading to have come from cases where economic, pure economic loss is a history and of course as I've already disclosed, our position is that this is not one of those cases. The importance in tort law for maintenance for professional standards, that seems to me to be axiomatic and in the context of what we're considering here, to have a duty of care running in tandem or hand in hand with duties under the Act, is no bad thing and if there were not, as I indicate later in my submissions, then it would be a bad thing if that were not the case. And the absence of countervailing factors such indeterminacy of liability, the question is whether the existence of duty would override existing doctrines of law. And then again we come to the nature, categorisation of the loss claimed and I recognise that the Courts have been less willing to impose a duty in cases of pure economic loss than where there has been direct physical damage to property. And I note that the building defect cases, place particular issues in this regard and I think that was particularly noted in the *Attorney-General v Carter* [2003] 2 NZLR 160 (CA) case but we're not concerned with a latent building defect here, rather it's a claim, it's a straightforward claim or direct physical injury property with consequential

damages to be decided pursuant to *Donoghue v Stevenson* [1932] AC 562 at 580.

BLANCHARD J:

How would you define a latent building defect?

MR PARKER:

Well, it's one that exists but has not manifested itself in any physical damage. I –

BLANCHARD J:

So how that apply to leaky homes, for example. Do they have to be at the stage where they're falling down before it becomes a latent building defect?

MR PARKER:

No but where we're talking about homes, doesn't that fall under – in any event, the covenant situation so that we don't have to be concerned about that latent defect having manifested itself.

BLANCHARD J:

Well that may be so but I'm still interested in how you draw the line between a latent building defect and something which constitutes physical damage?

MR PARKER:

Well there's probably a spectrum of, this probably sounds like it's avoiding the question but it's not. The spectrum of one can detect a weakness part – in a building, which is clear from perhaps examining from the plans, but has not had any affect whatsoever on the building but clearly will do, but it's latent – of course it become patent as soon as it's seen, whoever's looking at the plans or the building itself. But then along at that path, going from it not having manifested itself at all, although perceivable to perhaps an expert, at some point there's going to be a deviation from how it should be according to the plans. This is probably not the most articulate expression of this Your Honour but –

ELIAS J:

Well I'm not sure that it's an articulate concept.

BLANCHARD J:

That's what I was leading up to.

MR PARKER:

My fallback position was going to be that many Judges have wrestled with this in many jurisdictions.

ELIAS J:

Well perhaps they've created more confusion. I must say I too queried this because on one view this, well these words are slippery. On one view this is a latent defect, the damage was when there was fire but the flue is said to have been defective and to have promoted fire. Well I just don't see that that's latent – you know I just don't see that that isn't latent. But it depends on the language and I'm not sure that it's very helpful at all.

MR PARKER:

No I think Your Honour's right in the respect it's caused great difficulty. I think it was McHugh J in the *Woolcock*, no Heydon J, I'll come back to it but one of the Australian Judges referred to this area as chaotic and in a sense it is, because it's very difficult to make sense of this latent defect issue. But to return – just to slightly alter what I'm saying, where the situation, even if there was a latent defect, but where it's manifested itself so clearly in a fire and caused damage to a property, that seems to me to fall within the *Donoghue v Stevenson* principle.

BLANCHARD J:

So there's a difference between somebody looking at it and saying, "If this isn't fixed, there'll be a fire" and somebody looking at the damage after the fire and saying, "Well now we've suffered loss because of the fire", that seems to me to pick up Justice Cooke's expression to be an impossible distinction.

MR PARKER:

Well, it seemed, what I propose to you seems to be supported by a number of comments which I'll come to particularly a couple of the Judges in *Murphy v Brentwood District Council* [1991] 1 AC398 (HL) where they're quite clear that where there has been that damage done, even if there had – the defect was latent, but there has been actual damage done at some point, then that is to be dealt with in the normal way.

I discuss each of these factors which I've just been traversing and I'll go to those now, just a small correction to be made at the bottom of paragraph 21, my apologies, it says, 'S' for section 186 that should be rule 186, it was the rule existing at the time that the application for strike out was meant, so my apologies for that.

Now in the next section of my submissions I go to the statutory scheme and I'd like to –

ELIAS CJ:

Before you go to the scheme, could you identify for us the respect in which the flue is said not to comply with some standard?

MR PARKER:

Um, it's in the –

ELIAS CJ:

There was reference to C7 or something like that, I just wanted to –

MR PARKER:

Yep, that's a standard in the Building Code Your Honour as I understand it –

ELIAS CJ:

Yes.

MR PARKER:

And I'm relying on the pleading for that. Can I just go to that?

ELIAS CJ:

Go to the pleading, yes.

MR PARKER:

Yes, it's in the case, and I think it's the first statement of claim is tab 4 and as my friend's pointed out, tab 9 has an amended statement, a draft amended statement applying, and I think –

ELIAS CJ:

Which one do you want us to go to?

MR PARKER:

I think we'll look at the first one, it's easiest.

McGRATH J:

The latter one is only different because it's got a new cause of action.

MR PARKER:

Indeed Your Honour yes, the health and safety cause of action if I can call it that.

McGRATH J:

But that's the only significant difference?

MR PARKER:

Yes. So if I take Your Honours to page 23 of the case, which is stamped in that statement of claim in tab 4 and if we look at the top of that page, which is paragraph 21(c) and these are requirements which the plaintiff says lay on my client, but also, these also apply, actually they're on page 21 as well, paragraph 18 and, I do apologise, I'm taking you backwards and forwards, it's better if we go to page 20 and that's the claim against the council and it says

this, “The council owe the plaintiff a duty to exercise reasonable care and skill in issuing an administering building consent 980371 which due to require the council to – ” then more specifically at (b) “– apprehend that the design represented in the detail drawings for the main tower, did not comply with the Building Code.” And then it goes on in (c), and I think this may be what Your Honour may have been referring to most specifically, “Apprehend that the design represented in the detailed drawings for the main tower did not comply with acceptable solution C1, AS1 and New Zealand Standard 7421-1990 –

ELIAS CJ:

Well what are they?

MR PARKER:

I couldn’t tell you Your Honour, I don’t know in any detail.

ELIAS CJ:

Well, doesn’t it matter, in terms of the understanding of the – what I am feeling for is there is some suggestion that the flue didn’t comply because it didn’t extend beyond the sheathing or something to that effect.

MR PARKER:

Yes, mantle.

ELIAS CJ:

All right. Well was there a requirement that flues extend beyond the cladding or is this simply a performance standard, because if it’s a performance standard, what you’re really asserting is that the local authority had to guarantee that there would not be a fire.

MR PARKER:

I’d have to say –

ELIAS CJ:

It's one thing to say –

MR PARKER:

Yes.

ELIAS CJ:

It's one thing to say that there is a standard that the building inspector had to measure and could – might have been negligent in not picking up non-compliance, but if it's simply that the flue must exclude the risk of fire, then that it seems to me, is a different matter, and it may well have quite a bearing, I would have thought, on whether a duty of care was owed.

MR PARKER;

I think it would go beyond mere measurement, but it's hard for me to say, but as this is the application not only of a provision of the Code which is referred to by a New Zealand Standard, it suggests to me that it goes beyond mere measuring, but does go to performance, but I –

ELIAS CJ:

Well can't – you can't show us the standard that is being pleaded here?

MR PARKER:

No, no I can't Your Honour.

ELIAS CJ:

All right.

ANDERSON J:

The only document that relates to your pleadings is in the first volume of the relevant legislation at page 62, whether the consideration of the Building Code, clause C1 and that's in very, very general terms, and the generality of the obligation maybe directly relevant whether a duty of care should be imposed.

MR PARKER:

Yes.

ANDERSON J:

If we don't know what the standard says, we can't conveniently evaluate –

MR PARKER:

But doesn't that underline there needs to be a very significant examination of such a question and that it's not appropriate to be doing it at this stage?

ANDERSON J:

Well it merges to some extent of the context in which one measures whether reasonable steps have been taken I suppose, but –

MR PARKER:

Well, mmm –

ANDERSON J:

If you're asking the Court to recognise a very, very broad standard of care, it raises different policy issues from a very confined standard of care, that's easily able to assess.

MR PARKER:

Isn't the question whether it's a broad or narrow standard of care, again something that has to be very carefully examined. The moment we start asking detailed questions about elements of the statement of claim whereby we need factual material to assist us to do that, then –

ELIAS CJ:

Now what is the statutory duty? That, it seems to me, is at the forefront of your argument, that the council is under a statutory duty.

MR PARKER:

Yes.

ELIAS CJ:

We're simply asking, what is the statutory duty?

MR PARKER:

Well, the statutory duty, is given a framework in the statute and it is to, and I do need to take Your Honours through that, because there are broad concerns here and, except the solutions and New Zealand Standards give flesh to that in a particular situation.

BLANCHARD J:

What are acceptable solutions? Are they another legislative requirement?

MR PARKER:

They're part of the Code, which itself is. Well, they're approved by the Code, I'm sorry.

BLANCHARD J:

Where do we find them?

MR PARKER:

I'm sorry, I can't help you on that.

BLANCHARD J:

Well can you help me to an explanation of how they fit in and how they're supposed to work? Because at the moment I don't understand them.

MR PARKER:

As I – my understanding is that they are acceptable solution which fit within the Code but they're separate but –

BLANCHARD J:

Who promulgates them?

MR PARKER:

The Building Industry Authority.

ELIAS CJ:

Can you help us with, just explaining, what is the statutory duty you say the building inspector was under?

MR PARKER:

Right. The building, can I take Your Honours through the legislation or –

ELIAS CJ:

Can you take me to any part of the legislation that identifies that?

MR PARKER:

There's nothing in the legislation that will say that the building inspector has to do this, that or the other but there are – first of all if I take you to –

ELIAS CJ:

All right Mr Parker, go ahead with the way you want it –

MR PARKER:

I'm sorry.

ELIAS CJ:

No, no that's fine.

MR PARKER:

I'm not dissembling –

ELIAS CJ:

It may well be quite important.

MR PARKER:

What I'll do firstly, just as a preface to going to the sections which I believe will answer Your Honour's question, is just first of all to look at part 2 which is in volume 1 of the bundle of relevant legislation and that starts at tab 1 with the Building Act 1991 at page 6, stamped in the top right hand corner, and there the prefaces and principles are set out and the first subparagraph is perhaps the most important, well it is the most important. "The purposes of the Act are to provide for necessary controls relating to building work and the use of buildings and for ensuring that buildings are safe and sanitary and have means of escape from fire and the co-ordination of those controls with other controls relating to building use and the management of natural and physical resources." So that is the object and the controls, as are specifically referred to, must achieve that and there at paragraph – sorry subsection (2) there's specific reference to what must be particularly regarded and importantly, "Safeguard people from possible injury, illness or a loss of amenity in the course of the use of any building," and then it goes on in (b) to refer to the provision of, "... protection to limit the extent and effects of the spread of fire particularly with regard to household units and other residential units ... and other property." It doesn't seem to exclude commercial property but there does seem, in just those two subsections I've referred you to, to be a specific focus upon the danger of fire. It's not excluding others but it does make specific reference to it. If I take you on, Your Honours, from there to part 4 section 24 which appears on page 11 of that tab.

McGRATH J:

Is your argument, just looking at section 6(2)(a) are you focusing on loss of amenity?

MR PARKER:

Not just that, Your Honour. The – it does, whilst it's not only focusing on safety of persons, but that does seem to be an important part of what is set out there and the purpose of controlling building and the use of building appears to be directed among other things such as the protection of the

building, from causing safety dangers to people who are in the buildings and use them.

McGRATH J:

I sense from the respondent's submissions that the argument is being taken into a level of detail that you're really replying to at this stage which is helpful but I think it would certainly help me if particular provisions within provisions or words within provisions that you're placing emphasis on –

MR PARKER:

Yes.

McGRATH J:

– were signalled at this stage.

MR PARKER:

Yes. Certainly I'm placing significance upon in that first subsection, which is the purpose section, to, for a number of reasons, the controls, the matter of controls and that those controls relate to building work and the use of the building so it doesn't simply relate, I think as the respondent's would have it, to people who are using the buildings, which is what I gathered from the respondent's submissions. So that the integrity of the buildings to achieve safety for users is as important as well, as one follows the other, and is that specific intention to ensure that buildings are safe and as I've said already have means of escape but from fire. And (b) is supported which is to coordinate those controls with other controls relating to building use.

Then moving on Your Honour to subsection (2) and I definitely do note and rely upon the safeguarding of people from injury on this loss of amenity in the course of use of any building and therefore it's not just the wellbeing of the persons and protecting them from injury, harm but the building itself and (b) protection from the effects of fire. Whilst there's particular regard to household units, as one would expect, that must also apply to premises such as my clients which have a number of people using them and as I've

mentioned in my submissions at a later stage a number of people will be using it who will not be familiar with it, in fact most of the guests I suspect, unless they're regular attendees there, will not be familiar with it and therefore perhaps a higher standard is required in relation to that.

ELIAS CJ:

Is the scheme, I'm not familiar with this Act, but is the scheme of the Act, these are general purposes and principles apply to the whole regime and that includes the setting of standards by the Building Industry Authority.

MR PARKER:

Yes.

ELIAS CJ:

The obligations on a territorial authority are only to administer the standards established by the Building Industry Authority, is that right?

MR PARKER:

Well I think it goes a bit further than that, which I hope my traverse of the sections will suggest to Your Honours, that it goes a bit further than that. Where I would take Your Honours was, as I was just moving on to deal with section 24 which is specifically headed, "Functions, Powers and Duties of Territorial Authorities." It says, without distinguishing between duties and powers, that a territorial authority shall have functions which include there at, "(a) The administration of this Act and the regulations." Which I think would touch upon the point Your Honour has just made. "(b) To receive and consider applications for building consents. (c) To approve or refuse any application for a building consent within the prescribed time limits." And again touching upon the point raised by Your Honour, "(e) To enforce the provisions of the building code and regulations." And then (f), which has some impact here, "To issue project information memoranda, code compliance certificates – " and that's a matter specifically pleaded by Charterhall as having not been properly done here, " – and compliance schedules." And those are services for which –

ELIAS CJ:

Code compliance certificates presumably are simply certificates that the Code has been complied with?

MR PARKER:

Yes. But there is a, there's a particular test in relation to the issue of that so it's just not a – it evaluates it in a test, perhaps I should take Your Honour to that now, which is at, it's on page 18 and although it's, yes, paragraph 43, code compliance certificate and here you see once the owner has notified the territorial authority that it believes that the work has been done. At 3, subsection (3) the authority is obliged to issue a certificate in the form prescribed on the proper claimant of the charge which has been faxed, if it is satisfied on reasonable grounds that the building work to which the certificate relates, complies with the Building Code and –

ELIAS CJ:

What's a building certifier under section 56? That's not the council is it?

MR PARKER:

No.

ELIAS CJ:

So was your client a building certifier?

MR PARKER:

No, my client was an architect, and is an architect.

ELIAS CJ:

Well who's the building certifier?

MR PARKER:

Um –

ELIAS CJ:

Because it looks from this, it looks from section 43, as if the function of the territorial authority is to check that it has received from building certifiers, confirmation that, oh a confirmation of compliance.

MR PARKER:

As I understand it Your Honour, for different aspects of a building project, there will be certificates which will be provided to the territorial authority and on the basis of that, can feed that into its decision as to whether it has the reasonable basis for issuing a Certificate of Compliance.

ANDERSON J:

I seem to recall on the papers, documents from people concerned with certifying for compliance relating to fire, would that be a building certifier?

MR PARKER:

Um, I don't think it's a building certifier, I think it's – it might be a particular contractor of which there seem to be one or two involved in this, I think there was a company Holmes who provided such. What aspect of fire or fire protection, I could not see from that affidavit which I think Your Honour's referring to and which has been filed by my learned friend in the matter.

ELIAS CJ:

Could this, the scheme of the Act, please correct me if I'm wrong, seems to be that the council's entitled to rely on certificates received from building certifiers?

MR PARKER:

It is. But it doesn't exclude it having to, in fact I think it says in the provisions that I've referred Your Honour to, is that it's got to come to its own decision and just relying upon Certificate of Compliance is not enough.

ELIAS CJ:

I see. Subsection (3)?

MR PARKER:

Yes.

ELIAS CJ:

"It has to be satisfied on reasonable grounds that the building work to which the certificate relates, complies with the Building Code."

MR PARKER:

I don't think that decision it has to come to is dependent on what mere certificates it receives, but it has to make an evaluation of its own.

ELIAS CJ:

Well it may depend on whether the building certifier is reputable. Matters such as that may affect whether it can be satisfied on reasonable grounds.

MR PARKER:

Your Honour I don't understand there's a building certifier involved in each building, I think that's – that can be the case where the job of the council in certifying is given to another party, not, it's not something that's part of the process, that every territorial authority is expecting a certifier to give a certificate.

BLANCHARD J:

Was there a building certifier here?

MR PARKER:

I don't know. Not on what I've seen. My friend's helping me out here. He says there was no certifier, there were producer statements.

ELIAS CJ:

There were what?

MR PARKER:

Producer statements, and I think that's the document of the type that Your Honour was referring to me earlier. There was this affidavit filed and you'll see within that –

ELIAS CJ:

Is a producer statement a statutory thing?

MR PARKER:

Yes.

ELIAS CJ:

It is.

MR PARKER:

Yes, yes.

McGRATH J:

So does that mean that on the pleadings, section 43(3) the exception with which that subsection commences, does not apply on the pleadings? Just referring back to subsection (2).

MR PARKER:

Yes. Yes, I mean that's an exception where one has already been provided, as you say under (2), but that wasn't the position here as I understand it.

McGRATH J:

But where building certificates have been issued by building certifiers?

MR PARKER:

No. No, it's compliance certificates which is different from, sorry, there's producer certificates which are different from Code Compliance Certificates which is the finishing document. And if I just refer you to 43(8) it says, "They're subject to subsection (3) of the Act, territorial authority may at its

discretion accept a producer statement establishing compliance with all or any of the provisions of the Building Code". But again I don't think that allows the council to abdicate its decision-making, that it has to do under (3), 43(3) And I should probably –

ELIAS CJ:

It must however, modify the statement that you made that inferentially the council is obliged to undertake independent assessments, because it can, subject to whether it's reasonable for it to do so, one would think is read in from subsection (3), accept a producer's statement.

MR PARKER:

Yes, yes I can see that might be so, but it would still have to make a decision as whether it should accept that producer statement.

ELIAS CJ:

If so, wouldn't the duty you allege to have been breached, was that the council unreasonably accepted producer statements?

MR PARKER:

That might be the case upon examination.

ELIAS CJ:

Doesn't seem to be what's alleged here.

MR PARKER:

Well no, I mean again we're at the state of reasonably broad pleading, but nevertheless, it's the sort of examination that should be done to properly assess whether in this case, the duty lies.

BLANCHARD J:

Was there a producer statement in this case?

MR PARKER:

There would've been numerous producer statements in this case.

BLANCHARD J:

Relating to this particular aspect of the work?

MR PARKER:

I've not found one that relates to this particular aspect of the cavity in the flue. There certainly was some correspondence, because it's attached to that affidavit, this one affidavit that's been filed and forms part of the case, in fact volume 2 of the case I think it is. And I was just – just before I leave, taking you through the Act but perhaps not leaving the question, is section 47, because it sets out a number of matters for consideration by territorial authorities in relation to exercise of powers and a number of those might be appropriate for an examination of this kind. The size of the building, complexity of the building, location of the building relation to others, intended life. The general thrust of the Act seems to be that a building should be capable of existing for 50 years as a minimum. And apposite here it would be "(e) How often people visit the building." It's not a residence per se except for some permanent staff I gather. "(f) How many people spend time in or in the vicinity of the building and (g) The intended use of the building." And all of those would be relevant and it seems to be an exclusive list. I suppose the distinct – there's no distinction made there between what would be a residential property or a commercial property. Perhaps in recognition that residential properties now are not quite of a type that the *Hamlin* case contemplated but it had become much larger, more sophisticated and therefore often there may be little difference between commercial and residential buildings, in fact the latter may sometimes outweigh in their complexity and size, those of business, commercial premises.

I should also take Your Honours to section 76 and that is the section that deals with inspection because as you will have seen from the pleading, Charterhall complains about failures in that regard and that is a power, the power of inspection rather than a duty. And you'll find it on page 29. And the

inspection there for the purposes of the Act, "Inspection means the taking of all reasonable steps to ensure (a) That any building work is being done in accordance with a building consent." Which seems to imply that regardless of what producer statements might come the council's way that if they decide to exercise their power of inspection, then that requires it to act in a reasonable way to ensure that that work's being done. It might include, of course, reliance upon producer statements but as I have suggested earlier that would –

ELIAS J:

What's a building consent under the Act, it must be defined is it?

MR PARKER:

Yes. Building consent is defined in section 2. It means, "A consent to carry out building work granted by a territorial authority under Part V of this Act; and includes all conditions to which the consent is subject."

ELIAS CJ:

The consent itself is not part of the claim, is it? It's not alleged that there is a, I can't remember –

MR PARKER:

No, it is part of the claim. I'm sure I've read it which is, it says this, that the building consent – the council breached its duty because the building was issued in reliance upon detailed drawings which did not meet the fundamental objective of clause 1 of the building, C1 of the Building Code, the object of which is that people are to be protected from harm by fire and there's other, other matters regarding the building consent of which complaint is made by Charterhall.

ELIAS CJ:

Right.

MR PARKER:

And the part V referred to in that definition is that which is headed, "Building work and use of buildings" and commences at paragraph 30 and perhaps in, most importantly for Your Honours, paragraphs – sorry section 32, which specifically deals with building consents and it is not lawful to build without having such a building consent and must not be constructed, altered or demolished without such. And indeed following on from that in section 33, "An owner intending to carry out any building work shall – " as was the case here, " – before the commencement of the work, apply to the territorial authority for a building consent in respect of the work." And has to be applied for in the prescribed form, paid for in the proper way and accompanied by, "Such plans and specifications and other information as the territorial authority reasonably requires." The processing of that is dealt with in section 34 which gives the council authority to grant or refuse that application for a building consent and subsection (2) shows that if the information is not adequate in the view of the council it can ask for further information before it has to grant or refuse the application.

BLANCHARD J:

What's the prescribed period?

MR PARKER:

The prescribed period, oh, I think it's – sorry that's, I thought it was 15 working days but it's not defined. I'm sorry Your Honour I'm not able to help you on that but I will –

BLANCHARD J:

Well it's surely relevant because the shorter it is the less one would expect the council to be exposed to liability for not managing to ensure compliance. In other words, if the council is expected to look at a complex set of plans and make a decision on them in a very abbreviated period of time, that would be a pointer to not imposing on the council an extended liability, whereas if it had months to do it, you perhaps could expect it to look at things more thoroughly?

MR PARKER:

Well isn't the answer to that though, on being presented with this statutory regime requiring it to act in a certain way, it must do so. It shouldn't –

BLANCHARD J:

Well for example, to take a ridiculous example, if the council had to turn the thing round within 24 hours, you couldn't expect it to do a particularly thorough job?

MR PARKER:

I agree, with respect Your Honour.

BLANCHARD J:

So therefore I'm asking the question, what's the prescribed period because it seems to me that is a relevance and it's something I would have thought you could have told us.

MR PARKER:

Well I'm sorry, my learned friend tells me it's 10 working days.

BLANCHARD J:

Ten working days, thank you.

MR PARKER:

I thought it was 15.

McGRATH J:

Presumably extendable in certain situations?

MR PARKER:

Well I believe so but can I –

McGRATH J:

I take it that might even be accepted.

MR PARKER:

If I can just come back to, Your Honour, this question about the shortness of time telling against the duty, I would respectfully suggest that it doesn't necessarily tell against the duty existing but it might tell against what is reasonably required under that duty, and therefore in a particular situation, if it's very complex and even if the 10 days was insufficient or any extended period was not sufficient, or alternatively not enough information was provided, then that would go to whether in that particular instance there was a breach of the duty that existed but rather than militating against there being a duty.

BLANCHARD J:

Well it just seems to me that we have to be conscious of the practical realities for councils who are given a limited period of time, maybe extendable, and we'd need further information on how extendable, but the law obliges them to make a decision within such a period of time, yet they maybe considering a large number of applications at any given time and there's a question of how much, how many staff they can afford to employ, or realistically employ, of the requisite skills in order to do that job. That must be something which has to be factored in somewhere.

MR PARKER:

I agree. Again with respect Your Honour it has to be factored in and again I would say it requires examination, but whether that's something we can deal with at the stage of strike-out, I doubt and that it does require the sort of examination that would disclose on factual inquiry, whether it's reasonable to expect, let's say a small territorial authority with very limited resources, not able to comply with its obligations. No, that's wrong, not able to comply but only able to achieve them to a certain level, which is tested by what's reasonable for that council, but it would require that examination.

ANDERSON J:

Is the essence of your claim on the issuing of the permit, there's been dereliction in relation to section 34 subsection (3) by reason of negligence, the council was not satisfied – should not have been satisfied on reasonable grounds, et cetera, et cetera.

MR PARKER:

Yes.

WILSON J:

Mr Parker on your argument would Charterhall have a claim against the council for damages for breach of statutory duty?

MR PARKER:

That did exercise me Your Honour. They might have. I can't put it any higher than that because I find, found this area quite difficult to grapple with, breach of statutory duty, and if I've understood the authorities, it is to avoid the complexities of that course of action to more favour the, what one would normally call the strictures and rules governing in placing a duty of care.

WILSON J:

Given for the reasons you've been submitting, this alleged duty of care and negligence seems very much founded in statutory provisions, why should there be a duty of care and negligence but no liability for as such, for breach of statutory duties?

MR PARKER:

Well, first of all I'm rarely using the statutory framework to suggest not that the action for breach of duty of care, is simply a breach of statutory duty dressed up, but that it is separate and possibly wider than the statute but really to indicate to Your Honours that the statute provides an environment that is encouraging of there being a duty of care in this case, sorry a duty of care in such a case. Now whether it actually lies here of course is another matter.

ELIAS CJ:

Just on the producer's statements and trying to work out how they fit within the scheme of the Act, I see there is a definition of producer's statement, "Any statement supplied by or on behalf of the applicant for a building consent that certain work's been carried out in accordance with the technical specifications." Was your client a source of the producer statements in this matter?

MR PARKER:

No, I don't believe so. No I think it's –

ELIAS CJ:

Well then did the – did the owner of the lodge, did it supply the producer statements?

MR PARKER:

I've said producer statements, they're not normally produced by architects as I understand, or on very rare occasions except where they have some other function as well. My experience –

ELIAS CJ:

Who was the applicant for the building consent here?

MR PARKER:

The applicant was Charterhall.

ELIAS CJ:

Yes, Charterhall, that's right.

MR PARKER:

Yes.

ELIAS CJ:

So presumably it is the source of the, in terms of this definition, except insofar as it may have engaged people on its behalf to produce those.

MR PARKER:

If I can given an example, if there'd been sort of metal work, girder-type work done in the building, which I suspect there was, it's normally the company that would put that in place, that would produce the producer statement and provide it directly to the council, although really on behalf of the applicant.

ELIAS CJ:

Right. So where does the Act deal with, does it deal – just flipping through I couldn't find any reference to producer's statements beyond the definition and the references that the council may rely reasonably.

MR PARKER:

No, I believe it's dealt with in the Code.

ELIAS CJ:

It's the Code?

MR PARKER:

Yes.

ELIAS CJ:

I see, okay thank you.

BLANCHARD J:

Are you going to deal with the linkage between the Code and the Act?

MR PARKER:

I wasn't proposing to do that Your Honour, but if –

ELIAS CJ:

Well I would find it helpful.

MR PARKER:

You would?

ELIAS CJ:

Yes.

MR PARKER:

Well I haven't –

ELIAS CJ:

Because it's been put to you by Justice Anderson that really the basis of the duty of care, the statutory background is section 34(3) which is about meeting the provisions of the Building Code.

MR PARKER:

Yes, but as I'm perhaps poorly articulating, the duty of care for which I'm contending, is no synonymous with the sections in the Act, it is something separate. It is to encourage of course compliance with the duties under the Act to ensure that buildings are integrally safe in themselves but mostly for obviously their uses.

ELIAS CJ:

I thought your argument made it critical that there was a duty on the council?

MR PARKER:

It's important in the sense of the authorities have indicated that the Courts have been, in a number of jurisdictions, more willing to impose a duty of care against a public authority where we are dealing with duties and therefore in this case, and I do address it in my submissions but we don't need to go to that, is that we have two sets, sorry two duties here. The first relates to the building, issue of the building consent and then the Certificate of Compliance.

Sandwiched between that is if the – if inspections are undertaken a power of inspection, that gives an environment, we would say, that gives rise to the duty, so not critical, but very important as an indicator that perhaps this is indeed a situation where a duty should be imposed.

ELIAS CJ:

Yes all right, but then compliance with the Building Code is critical to this argument, so please take us to the linkage between the Act –

BLANCHARD J:

I think the linkage is in section 48(1) which empowers the making of regulations to be called a Building Code for prescribing functional requirements for buildings and performance criteria with which buildings must comply and their intended use.

MR PARKER:

Yes, and tab 2 in that bundle takes you to the regulations that create the Building Code and if we go through the general provisions on the second page of the regulations you'll see reference to C1 which we already talked about this morning.

ANDERSON J:

What particular aspect of C1 are you relying on, because it's talking about safe-guarding people from injury or on this course by fire as a general objection.

MR PARKER:

Yes.

ANDERSON J:

And has specific requirements, which ones are you complaining about?

MR PARKER:

Well, without having got to the inquiry, on the facts it's difficult to be sure, but C1.3.1 talks about avoiding the accumulation of gases and the installation and in building spaces, um, as far as I can tell from the limited material we've had so far, the suggestion is that there's been an accumulation of gases from debris, the combustion of debris in a cavity.

ANDERSON J:

Well what's the fixed appliance? This is talking about stoves and things like that isn't it?

MR PARKER:

Well I would've thought it might go beyond that, but you know –

ANDERSON J:

One can understand that speaking from the point of view of design, there may have been negligent design, which may sound against your clients in the long run, but the issue is, why should the council have a duty of care to ensure that the architects haven't been negligent?

MR PARKER:

Well the requirement under the Act, and therefore under the Code, is that there should be compliance with the standards. How can –

ANDERSON J:

That's why I was taking you to the more particular one that you're on about.

MR PARKER:

I think that which I've referred to, because the circumstances disclose that that appears to be what has happened, we don't know for sure because of where we are, but there's certainly been an outbreak of fire, it's not entirely clear on the pleadings whether it caused danger to people, but one can assume that in an establishment that, although not a residence, was a place for accommodation of guests, would have caused that danger.

ANDERSON J:

Maybe C1.3.2 is more apt. Whereas you had a transfer of heat from the fire, if the fireplace is a fixed appliance, which it arguably is and a transfer of heat to the surrounding timbers.

MR PARKER:

Maybe. Yes, indeed. That may be so Your Honour. Simply I'm not at the level of knowledge and one would - normally wouldn't be at this stage of a proceeding.

ANDERSON J:

Are you trying to extrapolate from broad statutory duties? Duties in tort. Not identical, but extrapolating duties of care.

MR PARKER:

Yes.

ANDERSON J:

More onerous than ensuring compliance of the Code, or taking reasonable steps to under 34(3).

MR PARKER:

They may not necessarily be more onerous than the Code, but may sit alongside them. That's not an improper purpose for a duty of care to be imposed, because in many ways, rather than having a chilling effect, it would have an encouraging one upon Councils to comply with their duties. The concern might be is if there is no duty of care to stand alongside the obligations under the Act, there may be some lessening of attention to these matters.

ANDERSON J:

Just coming back to my earlier question Mr Parker, in practical terms what would be the difference in the scope of the duty imposed on the council by section 34(3) and the duty pleaded at paragraph 17 of the statement of claim?

MR PARKER:

Well, there may be little, but –

ANDERSON J:

What if any difference is there?

MR PARKER:

Well it may be that, given the particular circumstances, given for instance the size of the council's department of building inspectors, that adherence to a reasonable standard in the given situation may not be the same as in another where there are different circumstances obtaining, as far as the resources of the council are concerned, the type of application, type of building, what it's use its been put to. So there may be variations within that. Before I leave the statute I think I –

BLANCHARD J:

Well, can we continue to look at the Code, because there seem to be quite a few references to fire and the objectives in relation to fire. The one you've referred us to, C1, has an objective of safeguarding people from injury or illness caused by fire, but says nothing about safeguarding property.

MR PARKER:

Well, is it not the purpose of the Act and therefore the Code to ensure the integrity of building so that the wellbeing of people users is preserved.

BLANCHARD J:

Yes, but that doesn't necessarily mean that the council has a duty of care to protect against loss of the building or part of the building. The objective seems to be rather that people will be safeguarded and it's interesting – don't

know that I can find it again, something I noticed a few moments ago – yes, on page 65, "Structural Stability During Fire. C4.1. The objective ... to safeguard people from injury due to loss of structural stability during fire and (b) Protect household units and other property from damage due to structural instability caused by fire."

MR PARKER:

Yes.

BLANCHARD J:

Now here, I don't think that the property damage was because of structural instability caused by fire, in other words the collapse of the building in a fire.

MR PARKER:

No.

BLANCHARD J:

So the Code's fairly specific about its objectives when it wants to concentrate on property damage and when it wants to concentrate on the safeguarding of people from injury.

MR PARKER:

But, yes that's certainly so. I don't think that means that we would say that a council's not required to its job property so that the building is not safe in a general sense and in this case if we have a situation which is not envisaged by the Code, that would seem to tell in favour of a duty that's slightly broader and is more flexible to deal with situations that arise that can't be foreseen by the general terms of subordinate legislation such as this. Certainly the objective at B2.1 suggests that the integrity of the building should continue to satisfy the other objectives.

ELIAS CJ:

Sorry, B2?

MR PARKER:

Sorry, B. B for Barry.

ANDERSON J:

Household units and other property are in terms of precision in the Building Regulations and the planning concerned was the property of adjacent owners.

MR PARKER:

Mmm.

BLANCHARD J:

And you can see that clearly in C4.2(c) "Avoid collapse and consequential damage to adjacent household units or other property."

MR PARKER:

Yes.

BLANCHARD J:

So it's not concerned with the collapse of the lodge, it's concerned about the lodge collapsing and falling on a hypothetical other piece of property next door?

MR PARKER:

Yes. Yes that's quite specifically dealt with. I'm not sure that that therefore would exclude the Code being concerned with a C4.2 that says buildings being maintained, their structure and stability being maintained during fire to allow adequate time to evacuate safely. Now that's quite narrow and is – the duty of care being contended for here is broader –

BLANCHARD J:

Well that doesn't seem to suggest that the council under this has to be concerned with preventing fire as such but rather making sure that the building doesn't fall down during a fire on the people who are fleeing?

MR PARKER:

Yes.

BLANCHARD J:

It's quite narrow.

ELIAS CJ:

In fact it's illustrated by this building because we were told that the historic building, which is on a base isolator, is set up to protect the integrity of the structure of the historic building. This building is simply set up to protect people not the structural integrity of the building which does rather suggest that that's sufficient compliance. I was a little worried because I wondered whether we'd be dodging bricks coming down but that does seem to be a concept that runs through the Building Code.

MR PARKER:

It does and I can't ignore that but I do say this is why the duty contended for would necessarily be wider because it, surely it can't be the case that the law needs to ignore a situation such as this. It doesn't neatly fit between – sorry fit within C42 where we're talking about fire and structural stability during fire where there has been damage to property caused by the council's failure to act reasonably in its assessment of the material that comes its way. It's not meant to be just simply a duty replicating the Act.

ELIAS CJ:

Well I understand that you have to make that argument but it's not entirely consistent with the scheme of the Act that there should be a duty in negligence which extends beyond the obligation of the territorial authority under the legislation.

MR PARKER:

I hear what Your Honour says. It seems to me that the nub of what I'm putting to Your Honours is this degree of control that has to be taken in by the council

over anyone who is building seems to me so significant that it must be the case to follow that if nothing can be done to the building or nothing can be constructed without passing through those controls then the council should have a responsibility, if the circumstances upon examination deem it right. Shall I go on from – we were looking at the Code and Your Honour Justice Blanchard took me back to the Code before I moved on. Shall I move on to another point?

ELIAS CJ:

Well –

MR PARKER:

I'm still within the Act.

ELIAS CJ:

You're staying with the Act?

MR PARKER:

Staying with the Act for a moment.

ELIAS CJ:

Carry on then for a few moments, we'll take the morning adjournment shortly.

MR PARKER:

I'm so sorry.

ELIAS CJ:

We may get through the Act.

MR PARKER:

What I was going to take Your Honours to were section 89, 90 and 91. Again just to look at the possible available types of proceedings. There it deals with civil proceedings and defences. Section 89 provides that, "No civil proceedings shall be brought for an act done in good faith under this Act

against a member, building referee, or employee of the Authority ... or a member of a committee appointed by the Authority or territorial authority." That itself implies that a council maybe the subject of such civil proceedings and indeed *Te Mata* in the Court of Appeal noted that councils are not exempt and it suggests that their liability for civil proceedings was contemplated by the Act. Section 90 deals with civil proceedings against building certifiers and indicating that such in relation to, "Building certifiers statutory function in issuing a building certificate or a code compliance certificate are to be brought in tort and not in contract."

And perhaps more appositely section 91 which deals with limitation defences and provides that the Act, the Limitation Act is to, "Apply to civil proceedings against any person where those proceedings arise from – " and then (a) any building work associated with the design, construction, alteration, demolition or removal of any building or, "(b) The exercise of any function under this Act or any previous enactment relating to the construction, alteration – " et cetera. And then subsection (3) seems to specifically contemplate civil proceedings against the territorial authority. That does no more in this case than just to indicate that that lays the ground for the possibility of a claim in tort against the territorial authority.

BLANCHARD J:

But doesn't it really say no more than that there's no immunity?

MR PARKER:

Yes. I'm not –

BLANCHARD J:

It just recognises that there are circumstances, and it doesn't say what they are, where there could be a claim validly brought against the territorial authority in relation to something under the Act.

ANDERSON J:

Like *Hamlin*.

MR PARKER:

It may do no more than that, I am simply building it as – sorry, putting it in as one of the building blocks of my suggestion that the overall context of the Acts would indicate that a duty may lie and it's certainly not excluded by the statutory provisions.

ELIAS CJ:

Mr Parker, with that excursion through the Act can I take you back to the purposes and principles because it seems to me that section 6 is really against your argument that a duty of care additional to the particular requirements imposed by the Act should be recognised because first of all section 6(1) refers to "necessary controls" and then in section 7(2) except as specifically provided to the contrary no one is required to achieve performance criteria additional to or more restrictive than the performance criteria specified in the Building Code.

MR PARKER:

I do not believe that that excludes or saves a council from liability if it has been negligent in doing its job where there has been physical damage caused to a plaintiff as in this case.

ELIAS CJ:

If it has been negligent in performing its duty to achieve compliance with the Building Code, but you have been arguing that the Building Code doesn't encompass the scope of the duty and it seems to me that section 6 and section 7 are against you.

MR PARKER:

My argument in response to that is that what section 6 and 7 and other provisions are providing maybe a minimum level. Whether that, that must be complied with by way of statute. Whether that equates to the fact that if the council can tick off that it's done those things, those necessary things, that it

has acted reasonably and has not been negligent it, I would suggest, is a different question.

ELIAS CJ:

Well then the Court would be imposing further obligations than are contained in the Building Code.

MR PARKER:

Well that maybe so in a given situation. That's always been the contention we are putting forward which is not synonymity –

ELIAS CJ:

But that would be contrary to the thrust of sections 6 and 7 so there would be a statutory impediment to the recognition of wider duty.

MR PARKER:

In my submission, if it was found that there had been unreasonable action by the council, negligence, and that it was associated with the use of a building, the construction of a building whereby it was not safe and it caught – in fact, put that to one side, it resulted in damage to a building, then it would seem eminently reasonable to have, in addition to this minimum, a requirement of a duty of care which is always going to be tested by whether it is reasonable in the circumstances, has a reasonable standard been achieved.

ELIAS CJ:

I understand that, thank you. We'll take the morning adjournment now.

COURT ADJOURNS: 11.31 AM

COURT RESUMES: 11.51 AM

ELIAS CJ:

Yes Mr Parker?

MR PARKER:

Thank you Your Honour. If I may, unless Your Honours have any further questions on the statute, the statutory provisions, I'll move onto the nature of the loss which I deal with on page 17 of my submissions onwards. Here the council and the Court of Appeal seem to agree that the loss suffered by character here is economic loss in relation to which the Courts, as we know, are reluctant to find the necessary proximity or to impose liability in cases such as this. That thinking seems to be based on the thinking that any losses arising from latent defects in buildings are properly categorised at law as economic losses. We simply say that in this case the loss is as a result of a direct physical harm to a building, albeit as a result of an alleged design defect, not as a result of the discovery of a latent defect which has as the Courts have found in *Hamlin* and *Murphy v Brentwood District Council* [1991] 1 AC 398 (HL), and *Woolcock Streets Investments Pty Ltd v CDG Pty Ltd* [2004] HCA 16, sound in economic loss and I've referred there to Fogarty J agreement with that contention and it's, we would say, clearly arguable that the nature of this particular loss is distinguishable from that apparent in the building defect cases or the negligent misstatement cases and I've included a, I hope, helpful holding of Cooke J, as he was then, where he says, "An objection of a more doctrinal nature is that the loss is economic and that only contract should give a remedy. As to the first branch of this objection, the loss in the instant case is not purely economic. The building has undergone some damage and deterioration, the damages claimed being merely the measure."

ANDERSON J:

All the Judges of that Court would be on your side?

MR PARKER:

Yes.

ANDERSON J:

And even for the consequential loss involved there, an analogous state of loss of profits here or loss of revenue here. What's the case, what, 30 or 40 years old now?

MR PARKER:

Well maybe so but the principles –

ANDERSON J:

I suggest it's improved with age.

ELIAS CJ:

Well in suggesting that this objection is doctrinal, which I think is not kindly meant, I'm with Cooke J. I'm really, I get quite confused by the emphasis on economic loss. It just seems to me to turn everything on its head. In the end everything sounds in damages.

MR PARKER:

Yes and it's almost as though we're getting to the point that if it does sound in damages and therefore in monetary terms then somehow that is an economic loss and it is a struggle one has with this and I think perhaps the respondent is grafting onto this that because we are a commercial concern, that we cannot suffer some physical injury and that if there is such injury it sounds in damages for repair, as it is here, plus those consequential damages that have been claimed plus a small item of chattels I think is also an element, well that's an element of the claim but simply because Charterhall is a commercial lodge owner should not preclude it from the ability to make a claim and it should not mean that any loss that it suffers should necessarily and automatically be characterised as economic loss. I'm really proceeding in this argument on the basis of the way the, and I do apologise for not having put this in the bundle, but it's something that came in my reading in advance of this hearing, which is that in Clerk and Lindsell on Torts the learned authors there say, "Pure economic loss is the term used to describe an economic loss to the claimant which does not result from any physical damage to or interference with his person or tangible property." And they go on to say, "Pure economic loss will normally take two forms. Wasted expenditure or loss of again profits or profitability." And that can be found at paragraph 1-36 of

the current edition, this is the 19th edition, I believe that's the current edition and my apologies that I don't have that before Your Honours but it seems –

ELIAS CJ:

What paragraph?

MR PARKER:

1-36.

ELIAS CJ:

Thank you.

MR PARKER:

Page 24 Your Honour. It says here that there is very clearly physical damage to tangible property and the element of loss of profits immediately flows from that physical damage. The inability to use the lodge as a result of the fire. The loss here is not represented by costs being incurred to avoid a harm, which would be the case in a latent defect which becomes obvious and action is taken to put it right before it manifests itself in any harm to a building or person. It's the amount required to compensate Charterhall for the damage that the fire caused most immediately to the building and some chattels and the inability to use the property whilst those repairs were done. I dealt with that between pages 17 and 21, I don't propose to read through those Your Honour. I've encapsulated in what I have just said to you what that submission amounts to and tried to provide some guidance by reference to the cases which do deal and find a pure economic loss by way of contrast to a situation which is presented here by the fact, a situation disclosed by the pleading and the draft amended pleading that we've seen. I don't propose to say more on that topic. I think it's a very difficult one but I suggest in this case simple and I hope I don't understate it.

If I may I'll move onto the issue of vulnerability, if I may. This, as I've said in my prefatory remarks, is emerging both here and in Australia as an important criteria in cases where there maybe no sound reason for imposing a duty on a

defendant to protect a plaintiff from pure economic loss normally established by enquiry as to whether it was reasonably open to the plaintiff to protect its interests and in determining whether the plaintiff was vulnerable in the relevant sense. For this case an important consideration will be whether the plaintiff could have protected itself against the risk of economic loss by affirmative action. But it maybe that that factor of vulnerability is developing in the area of pure economic loss rather than that of the situation we have here and we would submit to Your Honours that it is not – if it is a consideration it's not one that should be determinative or guide, sorry, or controlling, because first of all the nature of the loss which I have just addressed, not being pure economic loss and the defendant's control of the plaintiff's right interest and expectation, which by authority has been determined as an important factor in assessing vulnerability.

Here you have a council exercising its duties and powers in a way which is explicitly stated to be controlling by way of the Act. One, a building owner person intending to build, has no choice but to engage with the council because of the provisions that require that, which we've looked at already this morning and there's a useful quote from McHugh J in the *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 case where he said in relation to this, "Except in cases where a statutory authority has assumed responsibility, taken control of the situation or is under a statutory obligation to act, it seems an essential condition for imposing a duty of care on an authority that the plaintiff is vulnerable to harm unless the authority acts to avoid that harm."

We would say that in this case the council does take control of the situation because it's under a statutory obligation to and the act as we've looked at this morning and the corollary of McHugh J observations that where an authority is under a statutory obligation to perform a statutory duty, vulnerability appears to have no place in the duty inquiry. And the cases we've referred to where this issue, this criterion has been considered, has been in the context of statutory powers rather than statutory duties, as in this case, also don't ignore that there is a statutory power where they're considering being inspection, but

overwhelmingly that is sandwiched, as I call it, between the other obligations, which are duties, relating to the building consent and Certificate of Compliance.

BLANCHARD J:

Is there no duty to inspect, is it merely a power?

MR PARKER:

Indeed it is. I think I may have said this earlier Your Honour, but if that power is exercised then it must be exercised reasonably to achieve its purpose, which is to ensure compliance.

ANDERSON J:

What's the relevance of inspection in this case? I mean was a design fault, but if it was going to be picked up, or if it ought to have been picked up, it ought to have been picked up on the papers.

MR PARKER:

I tend to agree with you Your Honour. That's right, again, because we've not had a factual inquiry, I don't know whether there is any relevance of the inspections to this issue, it's pleaded by the plaintiff and therefore presumably their pleading is based on some factual evidence of which we're not yet aware. One can only speculate it might be possible that inspection does assist.

ANDERSON J:

It's not like the negligent foundation cases is it?

MR PARKER:

No.

ANDERSON J:

It's a design feature that's an issue.

MR PARKER:

As I've submitted, the council has a large degree of control over the building process. The Court of Appeal in this case found that Charterhall and its advisors are much better placed than the council to identify, access and manage the risk of defects in design and construction. One has to question why that is necessarily so, surely it requires examination to come to such a conclusion. Councils necessarily have to have a level of expertise to discharge their statutory obligations to make an assumption that a building owner is better placed by virtue of its expert advisers if they are in place and if their work is of sufficient involvement engagement in the project for that to be so, seems to me to be a matter that simply cannot be assumed but must be examined before it can be said that that is the case. So therefore –

ELIAS CJ:

Do you accept that it's a valid classification, well it's valid to look at the circumstances of individual plaintiffs?

MR PARKER:

Yes it is, and I would say but at the property stage.

ELIAS CJ:

So you wouldn't say that the plaintiffs have to belong to a class, one would have to inquire into the means and ability of each particular plaintiff to protect themselves?

MR PARKER:

Yes. May I suggest Your Honour you've raised two matters within your comment. If I can address the first one, which is, yes certainly there must be an examination of the plaintiff to assess things such as causation and contributory negligence and whether they should've done more, and whether indeed there was that expertise available –

ELIAS CJ:

Yes.

MR PARKER:

– should it have been available. So that's certainly an inquiry, yes, it's a consideration and certainly it's one that should be examined.

ELIAS CJ:

No, but I'm speaking about duty of care.

MR PARKER:

Yes.

ELIAS CJ:

We're not dealing with matters of causation. The claim hasn't been struck out on that basis, it's been struck out on the basis that there's no possibility of there being a duty of care.

MR PARKER:

Yes. Yes, no I agree with Your Honour about that. What –

ELIAS CJ:

So are you saying whether there's a duty of care will always require examination of the particular circumstances of the individual plaintiff?

MR PARKER:

No, because authority is against me. There is authority from this Court that indicates that if the situation is sufficiently clear, and that there, in those circumstances the Court decides that there is a clear legal impediment, then it can be dealt with at this stage. What I'm saying is this is not one of those cases. If we're talking about vulnerability, I question whether it's appropriate or whether the information in this case that's available to us, is sufficient for that answer, sorry that question to be answered in the way that Court of Appeal has said it can, which is simply to assume that the plaintiff was much better placed than the council.

ELIAS CJ:

Okay.

MR PARKER:

I'm saying we don't know.

McGRATH J:

Is this a question that really goes to the owner's capacity to get the right advisors rather than whether or not it actually did so?

MR PARKER:

Yes, it can't go any further than that I expect.

McGRATH J:

Capacity is the key issue we should be looking at.

MR PARKER:

Yes, capacity, if we can still at this stage. We know that Charterhall has built a luxury lodge and there appear to have been advisors, but the extent of whether that was enough, whether the advice should have dealt with the problem that gave rise to the fire, we don't –

McGRATH J:

I think the argument against you is that in relation to commercial projects generally, it's always open for an owner, has always got the capacity to go out and get the right sort of advice in the way that the *Hamlin* consumer buying a building did not have.

MR PARKER:

Well, but that is a proposition which may not necessarily be so. There seems to be an assumption underlying that, that if we're dealing with a commercial concern, it has an unlimited ability to go and obtain that advice, that expert advice. That's not necessarily so. There maybe individual residential dwelling owners who have had a house built for them whose capacity to obtain the

advice was much greater than a commercial concern. One doesn't lose sight of the fact that many commercial concerns, the overwhelming number of commercial concerns in New Zealand are quite modest in their means and therefore their capacity.

McGRATH J:

They may choose to, you say, they may choose to take some risks, is that what you're saying?

MR PARKER:

No not at all. Their ability to, their ability to engage advice maybe limited. It maybe reasonable of them not to have got two engineers instead of one or a particular kind of engineer and compromises are made in building all the time, cutting cloth to measure as it were, so we cant simply make a leap from the particular party being commercial to it necessarily has therefore, without examination, the capacity to get the advice that would have avoided the problem.

McGRATH J:

Of a greater capacity than an individual who's buying a building in which they're going to live and I suppose you move immediately to the expense of house but that may yet be an issue as well.

MR PARKER:

Yes. It's possibly right that the commercial concern has a better ability. It might be as a general term, yes, a general consideration, yes.

ANDERSON J:

It's a matter of choice as well as ability. I mean they might say let's not waste money on code compliance, we'll put that into flashy advertising instead and we can always look to the ratepayers to meet any defects.

MR PARKER:

Well I don't think they would get their code compliance, would they, in those circumstances but –

ANDERSON J:

But that's what they're relying on. We got our code of compliance certificate, we did nothing wrong. The council let us down.

MR PARKER:

Maybe so.

ANDERSON J:

But this raises policy issues you see. Who carries the cost?

MR PARKER:

Well –

ANDERSON J:

Is it the developer or is it the ratepayer?

MR PARKER:

Or should it fall on one or the other or should it be a combination of both and I'm agreeing with Your Honour it very much is a policy consideration of where that burden should fall.

ANDERSON J:

Well it leads back then into a point that's made by the respondent that the people envisaged as the object of any duty are people who live in the properties not people who hold them as investment assets and so as far as the people who live in are concerned, perhaps it's a ratepayer burden. As far as the people who hold it as an investment, well it's their cost.

MR PARKER:

But why should that, of itself, preclude the council having a responsibility –

ANDERSON J:

It doesn't preclude. It's a question, it's a policy issue of, you know, should a duty be imposed in relation to commercial developers rather than say occupiers. Is it fair and just to do so and it takes a judgment.

MR PARKER:

Indeed. Is it not, not the case then that because of the obligation that there is on any builder, whether they're commercial or not, to have to engage with the council which has itself obligations under the statute to ensure that the building is to a certain level to provide for safety, that they should not bear some responsibility in that discharge and that it should all fall on the building, building owner simply because they're commercial.

ANDERSON J:

Maybe that's why the Building Code expresses concern for occupiers in adjacent properties and not the physical object itself? Health and safety are not economic advantage, they're disadvantaged. I don't know.

MR PARKER:

Would we be saying the same in relation to a very substantial second house of which there are many in a subject district? Would we in that circumstance then say, oh well, that person has a substantial second house, that's part of a choice, it's moving away from the occupier, it's –

ANDERSON J:

I think I'll adopt Justice McGrath's view on that and see if it ever becomes an issue.

ELIAS CJ:

Mr Parker, where are you wanting to take us?

MR PARKER:

I beg your pardon. I think I was wanting to move on, please if I may, to the nature of the harm.

ELIAS CJ:

I haven't –

MR PARKER:

And that's, sorry, I beg your pardon, page 24, paragraph 58 of my submissions. Sorry I didn't mean to digress there but to a large extent I feel we've been addressing these matters in the interchange that has been going on in the past few minutes –

ELIAS CJ:

Indeed, yes, and it maybe that you can move fairly quickly through this because you have read it of course.

MR PARKER:

Of course. I'll go then to page 26 which takes me very close to the end of my submissions heading, "Persons to whom a duty of the kind in question is owed," and of course we seem to have touched upon that a moment ago. But the standard of care, if there is one, must be created in a relationship that has sufficient proximity and I would suggest that because of the engagement that's required of a building owner wanting to build a property, and council, that that proximity is necessarily present and of course the risk that arises from a defendant not fulfilling its duty, under the duty of care, I'm not talking specifically about statutory duty, and the risk that's posed by not complying with that, would tend to give rise or indicate that there maybe a duty of care in a given situation and I quote there from *Couch* and I, of course, won't repeat that. We say that the risk of harm to Charterhall here, because the council failed to perform its duty to the required standard, was obvious. We say "manifest and obvious" to adopt Lord Morris' phrase in *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004 (HL) and there again at section 62 as I've already referred to using the word "engagement" but putting it in different

words, it's relevant that the relationship between the council and the plaintiff was both mandated and governed by the Act and there's sufficient special relationship there.

Maintenance of standards, I've really touched upon that already in passing. In *Stovin v Wise* [1996] AC 923 (HL) the council contended that a common law duty would achieve "little or nothing." That related, I think, to some mounding, on the highway. There they said highway authorities would qualify their decisions to act lest they expose themselves more readily to damages claims. A similar argument was advanced and recognised by Tipping J in *Carter* where he said, "There's a legitimate public interest in regulatory bodies being free to perform their role without the chilling effect of undue vulnerability to actions for negligence." Whilst it maybe seen as chilling my submission to Your Honours is that because it is in line, the duty for which the plaintiff is contending here is in line with at least in part what is required under the Act, that it would not have that chilling effect but perhaps would be more stimulating to it here and continually attain the standard of care which we would like to see in relation to buildings which are going to be used and occupied, whether residentially or for a situation such as this, for accommodation for people staying overnight. I have not touched upon it with Your Honours, but there is an indication that there are quite high standards applied to buildings which are going to be used for accommodation purposes as opposed to residential and that may be a function of the fact that you will have people unfamiliar with those premises and perhaps also implied and that is that mostly such premises will be of a commercial nature and therefore a particular expectation of the resources that would be applied to it.

I think it probably won't assist particularly the Court if I was to traverse the analogous cases distinguished, here it's pretty clear and I would simply submit that on the basis of what I tried to persuade Your Honours of in writing and in our submissions this morning, that this is a case where it is appropriate for the full inquiry to be made at trial as to whether there has been a breach of a duty of care. This Court I am asking to say that at least there is no substantial or

legal impediment, that is at the level which would permit the claim to be struck out as being so clear that really it should not go to that level of examination.

Your Honour, those are my submissions.

ELIAS CJ:

Thank you Mr Parker. Yes Mr Goddard.

MR GODDARD QC:

To begin I have some minor repairs to make to a defective casebook and a small lean-to to add to the back of it, if I could hand up through Madam Registrar this paper and just explain how it fits into the casebook.

First the Court asks my learned friend earlier about the time for compliance by the council with its consent processing functions. The relevant provision is on the first page of this bundle, it's regulation 6 of the Building Regulations 1992 and when I told my learned friend that it was 10 working days I was half right, it's 10 working days for buildings with a value under $500,000 and 20 working days for other buildings. That provision's not in the legislation bundle because regulation 6 has been revoked, so there's just a gap. So that's that gap in the casebook. Next the last page of Fleming and Securities Commission was missing, that should be in volume 3, page 711A I suppose of the casebook.

BLANCHARD J:

Sorry, oh I see.

MR GODDARD QC:

Sorry Sir, the last page –

BLANCHARD J:

Yes, yes I see.

MR GODDARD QC:

– of Fleming is missing, which I spotted in the weekend and thought I would remedy. The other error in the casebook which I noticed was that *Brown v Heathcote County Council* [1987] 1 NZLR 720 which appears in volume 2 at page 314 and following, the references in the submissions are in fact the Court of Appeal's decision but what's been included in the casebook is the Privy Council so this is the Court of Appeal decision which is referred to in submissions. I then provided two more cases which I may touch on later, the decision of the House of Lords in *Caparo Industries plc v Dickman* [1990] 1 All ER 568 and the decision of the Court of Appeal in *Boyd-Knight v Purdue* [1999] 2 NZLR 278 (CA) because they contain some helpful guidance on the importance of the interests protected by a statutory scheme, the type of harm that a person is responsible for guarding against under a statutory scheme and whether it's open to other people to piggyback on that, people who were not in within the contemplation of the scheme, who's interests have been harmed in a way outside its objectives in order to bring a claim on tort.

And that really brings me to how, after the housekeeping, I wanted to begin, which is to say that this is a case about some very well defined responsibilities of local authorities to secure compliance with the Building Code for purposes that are explicitly identified in the legislation, the persons whose interests are to be protected are identified, the nature of those interests is identified. And what the plaintiff and the other defendant seek to do, is to leap from those statutory responsibilities of which the plaintiff is not a relevant beneficiary and the interests sought to be protected here are not the interests identified, seeks to leap from that, essentially to a liability to all persons for all loss suffered of any functions, is very well established that one can't simply make that leap and in my submission there are compelling reasons when one looks at the statutory scheme to confine the responsibility of councils to the persons whose interests they are required to take action to protect and to protection of the particular interests sought to be protected, it is in fact inconsistent with the statutory scheme to go further. In that respect this case is very much on all fours, with *Attorney-General v Carter***,** decision of the Court of Appeal**,** that I'll come to a little later. The only complicating factor in that analysis is that of

course in relation to domestic dwellings, there is a long established line of New Zealand cases, the *Hamlin* case imposing liability on local authorities for the negligent performance of their functions. That's a line of cases which, for example in *Attorney-General v Carter* was described as sui generis, it's been described elsewhere as exceptional. The question of whether a similar duty might exist in the commercial context, was identified as a live question, even under the former regulatory regime in *Brown v Heathcote County Council* by Cooke J as he then was, so back in 1984 what some more than a quarter of a century ago, it was a question which was expressly parked by the president in Hamlin, it's one which has since been identified as an open question under the 1991 Act for example by the Court of Appeal in *Riddell v Porteous* [1999] 1NZLR 1 (CA), a judgment of the Court of Appeal delivered by His Honour Justice Blanchard and these cases, Te Mata Properties and now this case, Charterhall Trustees, are the first cases in which appellate Courts in New Zealand have been asked to answer this question that was parked really more than a quarter of century ago.

ELIAS CJ:

Well it was parked, because it was identified, but it seems to have been lost sight of until, probably Justice Blanchard pointed to it, because there's quite a gap isn't there, between Hamlin and that identification that it's still an open question.

MR GODDARD QC:

A 10, more than 10 year gap. It was identified repeatedly by Justice Cooke, Lord Cooke in different contexts, in his very famous article, an impossible distinction again, it's flagged as an open question. It's been tackled by appellate Courts in other jurisdictions, but –

ELIAS CJ:

Were we given that article by the way? I was thinking about it last night.

MR GODDARD QC:

No, would it be helpful to provide a copy?

ELIAS CJ:

No I'll obtain it, yes.

MR GODDARD QC:

Really, apart from identifying it as a question that hasn't yet been answered, there's not a great deal of assistance from that article that can't be had from His Honour's other decisions, the concepts that are raised there. For example the scepticism about the utility of concepts of economic loss and I'll come to that, are very well I think covered in some of His Honour's judgments which are in the casebook. But, what is striking is that during that lengthy gap, there have not been insofar as counsel are aware, successful cases brought by the owners of commercial property against local authorities. There's been a constant stream of house-owner cases, but although the question might have been open, it's not one where plaintiffs have felt sufficiently encouraged to pursue claims. There's only one reported case that my researches for this and a number of other proceedings, have dug up and that's the *Bevan Investments Ltd v Blackhall and Struthers* decision of Beattie J at first instance where the issue wasn't argued. Everyone proceeded on the assumption that there was a duty of care in tort on the part of the local authority. The case did go to the Court of Appeal but that issue was not live before it. So there's only one reported case in which a commercial building owner succeeded against a local authority. That happened without any argument on the point and it hasn't been considered by an Appellate Court. So Your Honour is quite right to say that it, that it all has been silent on that front but that silence in itself speaks volumes in circumstances –

ELIAS CJ:

It isn't a case where, because I have been wondering whether in fact things have moved on, on the assumption that there is liability?

MR GODDARD QC:

No I think the reverse is the case.

ELIAS CJ:

The reverse, yes.

MR GODDARD QC:

And the assumption until recent times has been rather the other way. Commercial building owners have regularly, of course, brought proceedings against contractors and against architects and others in respect of building defects. My learned friend Mr Heaney will know more about day to day practice than I do, and I'll check with him at the adjournment, but it's certainly not the case that against the backdrop of that question being raised, if one has assumed that it should have an affirmative answer, and I think that it's important also to bear in mind that since the question was flagged there have been some very significant changes of a legislation environment which very much point the other way. I'm going to talk a bit more about the 1991 reforms, the purpose of them and the nature of the regulatory regime from 1991 onwards. The role of councils, the fact that its performance based rather than prescriptive regime and a few other key features of it. But that really reinforces the focus of local authority's role on protecting health and safety interests and on a very limited responsibility in respect of risks to other property, and this really brings up some questions from members of the Court earlier today, where other property is in fact defined in the legislation by reference to separate certificates of title and separate household units. It's a defined term "other property" with a very specific and narrow compass under this scheme. The whole thrust of the 1991 legislation was to introduce a performance based regime where particular provisions of the Code had particular objectives and the goal was to achieve those objectives identified by reference to the interests to be protected, the Court has already seen some of those provisions and I'll come to it, but against that backdrop it would be even less appropriate than under the previous regime to assume any responsibility.

ELIAS CJ:

And your working definition of a commercial building?

MR GODDARD QC:

My working definition is that all buildings, other than the domestic dwellings to which *Hamlin* repeatedly refers. So rather than talking about commercial, and getting into a host of definitional difficulties, in my submission the statute provides no support at all for a duty of care in respect of the value of the building itself, the building to which the consent functions relate.

ELIAS CJ:

Does that apply also to domestic buildings?

MR GODDARD QC:

Yes. And the duty of care in respect of domestic buildings rests not on anything in the legislation and the Court of Appeal acknowledged this in *Hamlin*. They said, you could hardly read the 1991 legislation as a ringing endorsement of the duty of care developed by the Court of that line of cases. Rather it's a passive acquiescence in the line of cases developed by the Court. They haven't, it hasn't been ruled out so the Courts in *Hamlin* did not identify any statutory support at all for the imposition of a duty of care but rather imposed that duty of care squarely on the basis of New Zealand community practices and expectations in relation to dwellings and in particular in relation to dwellings of relatively modest value. I will go through *Hamlin* with some care because it is a very important case in this context and what is emphasised strongly by all members of the Court, and it's a striking judgment because it's really addressed more to Their Lordships in London than to the parties and it's a sustained explanation of why New Zealand law can and should be different from the English law that had been announced by Their Lordships in *Murphy v Brentwood District Council*. The emphasis is firmly on New Zealand conditions, New Zealand expectations. The extent to which it's common to see cottage builders building dwellings of relatively modest value in circumstances where no experts are retained and where, to quote more or less accurately I think, Richardson J, "It accorded with the spirit of the times for the council to provide that expert assistance." The spirit of the

times changed rather abruptly in New Zealand in the period which produced the Building Act 1991. The legislative regime changed very significantly.

ANDERSON J:

It's the aftermath of the building restrictions during the war years and immediately afterwards. House sizes were restricted and the value of houses was restricted.

MR GODDARD QC:

I didn't know that Sir.

ELIAS CJ:

You weren't there.

ANDERSON J:

Well I was.

MR GODDARD QC:

And I was striking as I read the decision in *Hamlin* in 1994 and realised the building happened in 1972 and one asked where one was in 1972, these are issues that were not concerning me very directly at that time.

ANDERSON J:

Well the big building booms of the 60s and 70s were modest group houses as new areas of land that opened up all around Auckland and other cities.

MR GODDARD QC:

There's reference in Richardson J decision to precisely those developments and to the support from both central and local government for that massive expansion of housing in that period in New Zealand. There's also a reference to the commission of enquiry into housing in New Zealand chaired by R B Cooke QC as he then was and the circumstances in which mostly modest houses were constructed in New Zealand and –

McGRATH J:

When you characterise a commercial building being all structures other than the *Hamlin* type domestic dwelling, you're setting your ground fairly wide, aren't you? It seems to be a little, rather than more widely than the Court of Appeal did?

MR GODDARD QC:

The Court of Appeal very deliberately prescinded from that question of where exactly the dwelling boundary lay because the Court knew that it had on its to do list the two appeals that it just decided a week ago in the *Sunset Terraces* and *Byron Avenue* case which raised the question of the application of *Hamlin* to multi-unit developments of a very substantial kind which are commercial in origin and where experts, architects and engineers and other people, can be expected to be employed, and generally are employed, and I think that it requires no special oracular powers to suggest that that's an issue which may also be sought to be raised before this Court in the not too distant future following that judgment.

McGRATH J:

What I want to make sure is it's not something you're going to encourage us to decide in this case Mr Goddard.

MR GODDARD QC:

No I was going to very explicitly identify the potential for that to come to this Court in the not too distant future and to suggest that it was important to, I talked about parking issues, not to decide that by a side wind here, because in my submission it's not necessary to do so, wherever the outer boundaries of the *Hamlin* reasoning may lie is very clear when one reads those decisions.

McGRATH J:

So shouldn't we have a definition of commercial building that's rather narrower than all buildings other than the *Hamlin* domestic dwellings?

MR GODDARD QC:

My suggestion is that – is the appropriate definition, but for the purposes of this appeal I think one would have to say buildings that are not dwellings.

McGRATH J:

Not residential.

MR GODDARD QC:

Not residential dwellings. And the – a concept from which the Court of Appeal derived some assistance in *Te Mata Properties* and in this case, is the concept of a dwelling house which is defined in legislation in the Weathertight Homes Resolution Services Legislation of 2002 and 2006, and also in the Building Act 2004, the term, I think it's "dwelling" is defined in a way which would include multiunit dwellings as well, but very clearly excludes hotels, motels and animals such as this lodge. I think Your Honour we'll see when we come to *Hamlin* that there is a huge focus on dwellings and on homes and houses and the interests of home owners and I think what is not necessary for the purpose of this case is to decide which homes and whether a home that is a low value free-standing one, is the only one which is covered, or whether more ambitious homes, when I was arguing *Te Mata Properties* before –

McGRATH J:

This goes back to your answer from the Chief Justice on what you meant by commercial building, and it may have been I misunderstood from your answer that you're going more broadly, but you're sticking basically to your submissions on this, you've written submissions on this.

MR GODDARD QC:

Yes, I am sir, but I would accept that it's neither necessary nor appropriate to decide in this case, which dwellings are in or out. The other question that arose in the course of a vigorous debate before Justice Williams at first instance and *Te Mata Properties* was the cliff-side, the cliff-top home of, I think His Honour said, prosperous Auckland silks perched on Waiheke Island and whether the council was responsible for ensuring the engineering integrity of that or not, and whether less modest homes fall within this, which was the

question raised in Riddell and Porteous is for another day, whether multi-unit buildings fall within the *Hamlin* principle, is for another day, but what is clear in my submission is that there's no way that *Hamlin* extends to buildings such as this lodge or buildings such as this Court, however long the hours that Your Honours may work, it's still not a dwelling.

ELIAS CJ:

Well, yes it's the definitions that are so bothersome in this area and I need to flag that I have trouble with the concept of commercial, and I'm also bothered by categories of negligence that depend on intense scrutiny of the circumstances of individual plaintiffs, because then one is invited to suck it and see really.

MR GODDARD QC:

Yes, and I'm not inviting Your Honour either to announce a rule –

ELIAS CJ:

No.

MR GODDARD QC:

– in terms of commercial buildings, except as shorthand for not dwellings and the legislature has seen fit to distinguish between dwellings and other types of building for a number of purposes. The Court will see when I come to it in the Building Act 2004, there's a transmissible warranty by the builder of compliance with the Code that attaches to dwellings under the 2004 Act but not other buildings, so that's –

ELIAS CJ:

So not motels or anything –

BLANCHARD J:

Does that apply to rented accommodation?

MR GODDARD QC:

Yes.

BLANCHARD J:

So the legislature has made no distinction in that respect between the house that I own and the house that I rent out to someone else?

MR GODDARD QC:

Precisely Sir. So there, in my submission, once there's legislative recognition class of building where presumptively there is a level of vulnerability of inability to contract oneself for appropriate protections which requires a contractual provision to be imposed as a default, that is, not present in relation to other classes of building and when one looks at the reasoning of the Court of Appeal in *Hamlin*, there's again precisely that same theme coming through in relation to homes, because of the particular social as well as economic interests that arise in relation to homes and because of the circumstances which in New Zealand typically surround both the construction of homes and their sale and purchase the fact that it's not normal practice for homeowners to seek expert reports, or at least it wasn't at the time, practices evolve, was one of which judicial notice was explicitly taken by the *Hamlin* Court.

ELIAS CJ:

Yes. What evidence do we have of current social circumstances if they are to be relevant to this strikeout?

MR GODDARD QC:

In my submission they're not relevant to this strikeout.

ELIAS CJ:

No.

MR GODDARD QC:

In short my argument will be that if one reads the legislation carefully then local authorities are not responsible for protecting the interests in respect of which this claim is brought.

ELIAS CJ:

The property earning interest of a non –

MR GODDARD QC:

The harm to the pocket of the owner of a non-dwelling. It's actually also apparent from the legislation that there's no statutory support for an obligation to protect the economic interests of dwelling owners, but rather that finds its source elsewhere.

ELIAS CJ:

In *Hamlin*.

MR GODDARD QC:

In *Hamlin*. And *Hamlin* stood on two legs. It stood on the greater breadth of the pre 1991 New Zealand legislation than the corresponding English legislation. It's important to remember that although Hamlin was decided in 1993 or 4, reported in 1994, it related to a building that was, a house that was constructed in 1972 under the pre 1991 regime. Under the, at that stage building was regulated under bylaws made separately be each council, although there was a New Zealand model bylaw which most councils followed, and as the Court of Appeal explained at some length in *Stieller v Porirua City Council* [1986] 1 NZLR 84 and as the Court noted in *Brown v Heathcote County Council* and again in *Hamlin*, the scope of the bylaw making power was much broader than health and safety. The Court has repeatedly said under the bylaw power, the power of local authorities to make bylaws and enforce those bylaws, extended to the economic interests. Interests in the quality and value of housing stock. So one pillar that *Hamlin* rested on was that in New Zealand the statutory regime was broader, it protected a broader range of interests, so it was appropriate for there to be a broader duty of care. That's clearly no longer the case, post 1991.

The other leg on which *Hamlin* was built was community practices and community expectations encouraged by a long history of local government, support for guidance in relation to building work. *Hamlin* now remains perched on one leg and whether it is sustainably perched there in relation to dwellings is a question that I think is likely to come before this Court in the not too distant future. But for the purposes of this appeal, no attack is being made on Hamlin so far as it extends to dwellings, which is both the express language in which that decision is couched and the limit of the reasoning which supports it.

ELIAS CJ:

In the Building Act when we were going through it, it was striking that there was reference to use of the building. What do you say is the position of an occupier who suffers harm? Somebody who's in the building, not an occupier necessarily in the sense of some –

MR GODDARD QC:

For example if I was standing here and one of the tiles were to fall on my head, could I sue the Crown?

ELIAS CJ:

Well one of the guests, one of the guests, one of the guests in the lodge?

MR GODDARD QC:

If anyone has a private law right of action against a local authority or careless performance of their statutory responsibilities under the Building Act 1991, it would be that person. Because it's that person whose interests are squarely at issue. Again my submission to this Court doesn't need to decide the extent to which there would be such a claim and of course the Accident Compensation legislation means that in New Zealand, such claims have not been a feature of the legal landscape. Occupiers liability for harm for health and safety doesn't come regularly before the Courts but if, for example, I was staying in the lodge and there was a fire and all my clothes and my computer

were burned up, it seems sad things about one's life if one assumes one takes one's computer away on holidays to luxury lodges, but if that were the case then, one would have to ask, is that interest within the scope of the protection legislation. I'm actually going to come to that because in my submission chattels are also outside the scope of the interests protected and that's part of the definition of "other property" I want to come to.

ELIAS J:

Mhm.

MR GODDARD QC:

But putting aside the Accident Compensation legislation, if I was injured or a guest was injured while staying at the lodge, then if anyone could sue it would be that person.

ELIAS J:

So then the controlling concept is not necessarily the residential – oh I see you'd say that the, it's the property interest of the owner is only protected in relation to a residential dwelling.

MR GODDARD QC:

Exactly Your Honour.

ELIAS J:

But it's just that we will have to be very careful because there are different combinations in the context of this legislation.

MR GODDARD QC:

And that's why it's so important to actually go through the legislation with some care and look at the primary legislation for Code in the way of structuring its objectives and then also the report which gave rise to it, which sets out what it was thought to be achieved, what was intended to be changed as compared with the previous regime. But Your Honour drew attention to section 7(2), no additional requirements. That would actually be a

fundamental part of the 1991 reform. One of the concerns was the cost imposed on building in New Zealand. It was estimated in the report that something like 10 percent of the cost of a new home resulted from regulatory compliance issues and was potentially able to be saved through modifications of regulation. So concerns about cost and concerns about stifling innovation, in relation to materials and building techniques, now with the benefit of hindsight, we may feel that stodgy old building techniques were a less of an evil, but that wasn't the policy of the legislation of course. The Court needs to apply the legislation in the manner in which it was intended to operate and consistently with the policy that that motivated it, even if there are some respects which one might now question, the wisdom of aspects of the policy. So that was extremely important and councils weren't able to impose additional requirements. They weren't about to be prescriptive anymore. Anything that achieved the performance outcomes specified in the Code was required to be accepted and the way it worked was you had these performance requirements and you could use any technique you liked, as long as it actually delivered that performance standard. There were a number of ways in which you could seek to provide as the building owner, grounds for the council to be satisfied that the technique would work. One was to obtain a producer statement saying that compliance had been achieved and the council then had to consider whether or not to accept that. Another was to comply with acceptable standards, I'll come to those a bit later, but one of the things that BIA could do was issue acceptable solutions, sorry acceptable solutions. And that was a safe-harbour way of meeting the performance standard. If you met the specific requirement or the acceptable solution, you were treated as meeting performance standard at –

ELIAS J:

Who promulgated the acceptable solutions?

MR GODDARD QC:

The Building Industry Authority, BIA. So the Building Code was contained in regulations made by the Governor-General and council on the recommendation, ultimately of the BIA. BIA recommended it to the Minister,

the Minister to the Governor-General and the council. The BIA had a range of responsibilities under the legislation, including the issuing of acceptable solutions. The potential liability of the BIA in relation to some of its functions came before the Court of Appeal in the Sacramento case in *Attorney-General v Body Corporate 200200*, that didn't in the end come to this Court, but there is another claim by, a third party claim by the North Shore City Council against the Crown which is the successor to the BIA in respect of the BIA's performance of a review of the council's performance of its regulatory functions which the Crown sought to strike out, that was rejected in the High Court by Andrews J, the Crown appealed, the Court of Appeal has heard that appeal but not yet delivered that decision and the whole question of the interface between the statutory responsibility of local authorities and the responsibility of the BIA is also one which, I think, may yet trouble this Court. But I think after the trailers were – the forthcoming cases which –

BLANCHARD J:

Are we going to get them in 3D?

MR GODDARD QC:

I will – whether the Court's willing to wear the special glasses – I think counsel can be hazy enough without those complications.

ELIAS J:

Well it's really that we need to be careful enough to have stray dicta that trip everybody up.

MR GODDARD QC:

And that's what I wanted to just flag, so after trailers will be coming attractions, I shouldn't get back to the feature in this case –

ELIAS J:

Well we'll do that perhaps after the lunch adjournment if that suits.

MR GODDARD QC:

Yes. Can I just clarify with the Court whether – I know that a second day has been in fact to be available if required, would the Court prefer that I move at a "great lick" through my submissions and aim to finish to day or should I take a little bit longer as I go through the statutory scheme and the cases but risk –

ELIAS J:

Let us try to conclude if we can decently without pressing you, but by all means if it's necessary we can go into tomorrow.

COURT ADJOURNS: 12:57 PM

COURT RESUMES: 2.14 PM

MR GODDARD QC:

Just one thing that I said I would come back on after lunch, the question of whether there had been other commercial building claims, and my learned friend Mr Heaney tells me that there have not, that the only commercial building claims that he's aware of, apart from the *Te Mata Properties* and the claim in this claim is the 3 Mead Street claim in relation to a motel, which was unsuccessful before Venning J, and that's in volume 5 of the cases. So it's not the case that everyone's been working on the assumption that commercial buildings are covered and settling them, that is, that they have not been in pursuit.

ELIAS CJ:

Yes, thank you.

MR GODDARD QC:

So there are four things that I want to focus on now. First, the legislation, second, the claim against the counsel, third, the general principles and approach and *Attorney General v Carter* and fourth, the exception in *Hamlin.* Before launching into the legislation, though, and I will come to the detail of the claim later, I think it's helpful to read the legislation bearing in mind that

the complaint that is made by the plaintiff in relation to the council is that the council failed to take reasonable care to ensure compliance with the Code and, in particular, clause C1 of the Building Code in relation to outbreak of fire. And the complaint relates both to grant of the building consent. There was a certain rich irony in the architects who prepared the plans arguing forcefully today that it was negligent for the council not to identify the patent flaws in them, but that is the argument of the architects. So there's a complaint that the council was negligent in granting a consent on the basis of plans which didn't comply with clause C1. And there is also a complaint in relation to inspection, and I'll come to that later, but it's said that the work was not, in fact, done in accordance with the consent. There was some cladding which was not appropriately installed, fireproof cladding, and there was an inspection issue as well. And, as a result, it said the issue of the compliance certificate was negligent.

Anyway, against that backdrop, the complaint is that the council failed to take reasonable care to ensure compliance with clause C1 of the Building Code. I think it's worth looking at the legislation and just getting very clear what the role of the council is. And I want to begin at the very beginning of the Act, which is in legislation volume 1 under tab 1 section 2 interpretation, because there are a couple of defined terms which are a little bit different from what one might otherwise assume the words mean. And the first of those is the term "amenity". Your Honour Justice McGrath asked a question about amenity earlier today. Amenity is defined in section 2 as, "An attribute of a building which contributes to the health, physical independence and wellbeing of the building's users, but which is not associated with disease or a specific illness." So it's also a user wellbeing issue, not an enjoyment of economic value issue. An example is given in the building industry commission report, included freedom from smells and noise and other things that like that affect the amenity of users, without actually causing specific diseases or illnesses. So amenity has a very specific meaning.

The next definition that I wanted to just pause on is household unit. Just to note, Your Honour, that this is a particular type of building that's singled out for special attention in this Act as well. "Any building or group of buildings, or

part of any building or buildings, used or intended to be used solely or principally for residential purposes, and occupied or intended to be occupied exclusively as the home or residence of not more than one household." So we're not talking here about a household unit.

The next important definition when it comes to understanding the purpose of the legislation, and who's intended to be protected, is other property. And this has a very specific meaning. "Any land or buildings, or part thereof" – so not personal property, not chattels – "which are (a) not held under the same allotment or (b) not held under the same ownership." And allotment is defined in section 4 as essentially being a parcel of land that's comprised in one certificate of title. So other property protected references to protection of other property are references to protection of land or buildings or a road – I should have said it includes any road – that is not within the same certificate of title, or not under the same ownership. And what I think leaps out immediately is that we are not here concerned with anything that falls within the definition of other property. So whatever protection might have been intended for other property under this Act is not engaged in this case, because there's no complaint of any harm to anything that would count as other property.

I think I can move over the rest of the definitions in section 2. I've already noted the meaning of allotment in section 4. We come, then, to part 2, purposes and principles. And I'll move fairly quickly through this, because the Court's already been taken to it. But the purposes are to provide for necessary controls. Your Honour the Chief Justice noted that word, "necessary" controls, and that's a very important part of the 1991 legislative scheme. It also links into the concept of building certifiers. I'll come to them later. But one of the more revolutionary developments under the 1991 legislation was that regulatory functions were to be contestable. Instead of local authorities having a monopoly on performing regulatory functions, certain people would be approved as building certifiers by the BIA, and they could grant consents and code compliance certificates in lieu of the council, and the council was then obliged to accept those as determinative. So there was both

the direction to the council to focus on necessary controls, and not go beyond the Code in section 7 subsection (2), but also, these functions were contestable. And if councils were inefficient and charged too much, then the idea was you could go to a certifier, and they would do it more efficiently at lower cost. So necessary controls relating to building work and the use of buildings, and ensuring buildings are safe and sanitary and have means of escape from fire, nothing there about their value or the economic interests, and co-ordination with other building controls.

Subsection (2). To achieve the purposes of this Act, particular regard should be had to, first of all, safeguarding people from possible injury, illness, or loss of amenity in the course of the use of any building. There are two respects in which that's important. The first is that you're safeguarding people from injury, illness, or loss of amenity, those other wellbeing features of natural persons. Companies can't have amenity in the sense in which this is defined by the Act, as the 19th Century English cases, company law cases say a company has neither a body to be kicked nor a soul to be damned, nor can they suffer from various ills identified here. And the second is the reference to, in the course of the use of any building. It's the protection of those interests vis-à-vis users, not the protection of economic interests vis-à-vis owners that's referred to in (a). (b) Is the fire-specific provision to which my friend referred, but that's also very carefully circumscribed. Provide protection to limit the extended effects of the spread of fire, particularly with regard to household units and other residential units on the same land or other property, and other property. So the concern there is not with the property within which fire breaks out, that's outbreak of fire, that's a whole separate Code provision, which I'll come to in a moment. That's the one complained about here, C1 is outbreak of fire. It's about spread to other household units, other residential units, and other property. And, again we're not concerned here with spread of fire. There's no suggestion that there was any non-compliance with the requirements of clause C3 of the Building Code which relates to spread of fire.

ELIAS CJ:

But the Code may make a distinction between spread and ignition. This is an overarching purpose and principle for the Act. So it may well embrace both. I just wonder whether that's a little refined, the argument, in the sense that one could take the view that here there is spread of fire, because it's gone from the place where it was lit to the cavity where it shouldn't have been.

MR GODDARD QC:

I suppose there are two responses to that. The first is that there hasn't been a spread to the things identified in (b). There hasn't been a spread to household units and other residential units. It's all stayed within the same lodge, and within the guest area, the main lounge of that lodge, and it hasn't spread to other property, which I took Your Honour to the definition of.

ELIAS CJ:

Yes, yes.

MR GODDARD QC:

So that's my first answer, that the spread protectees, I think that's probably not a word, are not in issue here, the beneficiaries of that concern. But the other is that, at the end of the day, one does need to come back to the specific complaint that is made about what the council has got wrong, and that relates to a provision which has a narrower objective, which doesn't engage that broad ones. I'll come to that later. And the other specific issues identified in subsection (2) are not directly relevant here. There's a direction in subsection (3) to have regard to national costs and benefits of control, including, but not by way of limitation, safety, health and environmental costs and benefits. It is not a limited list, but nonetheless, it's striking that there's no identification of the value of property. Then 7, all building work to comply with the Code. There's a requirement that all building work comply with the Building Code to the extent required by the Act, whether or not a consent is required. As Your Honour will see in a moment, this is a case where a building consent was required, and it was actually the owner of the property that had the obligation to obtain it and comply with it. So, in fact, Charterhall is an obligor under this Act, not an obligee. And it has responsibilities to

comply with this in the interests of the people who will use its property. It isn't the beneficiaries of protections. It has obligations under the statutory scheme. And then, critically, subsection (2), which is a lynchpin of the statutory scheme, unless there's specific provision to the contrary, no person undertaking any building work shall be required to achieve performance criteria additional to, or more restrictive, in relation to that building work than the performance criteria specified in the Building Code. So local authorities were not allowed to go beyond those criteria. Those criteria have bound up with them certain specified objectives. That was the way the Code was required to be drafted, and so far as C1 is concerned, those objectives were all about health and safety. So if a council had said no, we're worried that your building will be damaged by fire. In your economic interests, you need to do this extra thing that would actually have been inconsistent with the statutory scheme. It's positively prohibited by the legislation. Those were not factors that the council could properly have regard to.

Picking up, really, that whole point about exercising powers for the purpose for which they're conferred, which Your Honour Justice McGrath, if I may say so, with respect, encapsulated very neatly in *Unison v Commerce Commission*. So there's a direction under section 9 to avoid unreasonable delay. Then part III provides for the establishment of the building industry authority. Its functions are set out in section 12. That includes advising the minister on matters relating to building control. Approving documents for use in establishing compliance with the provisions of the Building Code, that's the acceptable solutions that we'll come to in a moment. Determining matters of doubt or dispute in relation to building control. If a local authority refused a consent, for example, an applicant could go to the BIA and have the BIA determine that. And (d), undertaking reviews of the operation of territorial authorities and building certifiers in relation to their functions under this Act, that's rather more centre stage in one of the forthcoming attractions. So the power is conferred for that purpose in 13.

Reviews by the authority under 15. Provision for dealing with certain matters of doubt or dispute. I think I can move on through those. Part III (a) provided for the building industry authority levy. It was funded by a levy on building

consents. Part IV, the functions, powers and duties of territorial authorities. Section 24, my learned friend has already taken the Court to, particularly paragraph (b), the function of receiving and considering applications for building consents, (c) approving or refusing the applications within the prescribed time limits, and (e) enforcing the provisions of the Building Code and Regulations, (f) issuing project information memoranda, code compliance certificates and compliance schedules.

A power to charge under section 28, which linked into section 150 of the Local Government Act, but also an ability in subsection (2) to recover actual and reasonable costs in respect of the matter concerned where that exceeded the prescribed charge. I'll come back later to the question of charging, but in short, one of the submissions made by the council is that it wasn't contemplated by the statutory scheme that insurance of buildings against non-compliance with the Code would be bundled with every consent and that the council would charge for that, indeed to charge for that would have been to charge for protection of an interest which the council was not permitted to have regard to in the exercise of its regulatory powers. So, yes there is a power to charge for performance of functions, but no, it doesn't extend to charging effectively an insurance premium in respect of the value of the property, which is the subject of the consent, because it wasn't any part of the council's role to protect that.

We come then to part V, building work and use of buildings. There's some provisions in relation to project information memoranda which don't concern us and then the cross-heading Building Consents above section 32, subsection (1), "It shall not be lawful to carry out building work except in accordance with a consent to carry out building work, (in this Act called a 'building consent"), issued by the territorial authority, in accordance with this Act." So there needs to be a consent and what's more, the work needs to be carried out in accordance with it, and that's an obligation of the owner of the property. In this case its pleaded –

ELIAS CJ:

Do you say, does the Act say that? I'm just looking for a provision which imposes this on the owner, it's probably implicit.

MR GODDARD QC:

I think the way it works is first of all 32, which says it's not lawful to carry out except on a building consent –

ELIAS CJ:

Yes.

MR GODDARD QC:

– and then 33(1) which says, "An owner intending to carry out building work shall, before commencement of the work, apply for a building consent." And then section 80 Your Honour, if we jump to that, Offences, every person commits an offence who, with a certain exception, does any building work, or permits any other person to do any building work otherwise then in accordance with the current building consent.

ELIAS CJ:

Yes.

MR GODDARD QC:

So I think from that group of provisions it's very clear that it's the owner who must apply and then must do the work in accordance with the consent.

ANDERSON J:

But some of you, contrary to the owner's direction, but engaged by the owner, does work, does work that's non-compliant commits an offence also, yes.

MR GODDARD QC:

Yes. Both the owner and that person. And the whole position – the section 82 contains the not unfamiliar sort of provision that one finds in regulatory statutes of liability of principle for acts of agents, so that makes it

very clear that as well as the agent being liable, the principle will be liable in those circumstances. So you need to get a building consent and carry out the work in accordance with it. The obligation under 33 of the owner to apply. Section 34 provides for the processing of building consents by territorial authorities, must make a decision within the prescribed period, which I clarified earlier, was either 10, or in this case it would be 20 working days because the value of the work to be done was clearly in excess of $500,000 and with abilities to extend for reasonable grounds.

Conditions can be imposed under subsection (4) and one of the conditions that was imposed in this case was that the fireplace complied with C1 of the Building Code, that's pleaded and it appears from the building consent which is in the case on appeal, I'll come to that later.

Then 35 governs the issue of the building consent. We can move on then –

ELIAS CJ:

I don't think I've got 35 – oh yes I have, yes I have, sorry.

MR GODDARD QC:

It's not very exciting anyway Your Honour. And slightly more interesting is section 42, notices to rectify. "Territorial authorities have the ability to issue to the owner or the person undertaking building work, a notice to rectify, requiring any building work not done in accordance with this Act or the Building Code to be rectified." So again it's worth just noticing that what happens is that the local authority issues a notice to the owner saying, you haven't complied with the Building Code, you must now fix that. Again, this idea of the owner as having obligations under the Act rather than benefiting from it.

The code compliance certificate provision, section 43. Once work's finished, the owner is supposed to tell the local authority that the work's completed. Subsection (2), "The owner includes with that advice any building certificates issued by building certifiers," not relevant in this case, "Or a code compliance

certificate issued by a building certifier," again not relevant in this case. And in subsection (3), "Territorial authority must issue to the applicant in the prescribed form on payment of charge, a code of compliance certificate if it's satisfied on reasonable grounds that the building work to which the certificate relates complies with the building code or complies except to the extent of any waiver previously granted." So what's been certified, unsurprisingly in something called a code compliance certificate, is that the local authority has reasonable grounds for believing that the building work complies with the Code.

A couple of things that are important about that. First of all we're talking about compliance with the Code, which sets the performance and the functional standards, not prescriptive standards. Second, what's certified has got to be based on reasonable grounds, and actually a third and related point, those grounds will stem either from inspection, pursuant to the power to inspect, and it is a power not a duty as my learned friend confirmed earlier, or in reliance on producer statements. And we see the ability to accept producer statements in subsection (8), it's a discretion the territorial authority has and there of course the focus will be on the reliability of the source of the statement.

Not concerned with the next couple of groups of provisions. Section 47 perhaps worth noticing in passing, "Matters for consideration by territorial authorities in relation to exercise of powers." In deciding how to go about exercising its powers, the territorial authority has regard to various things including size and complexity of the building, the way it's used and so forth. Baragwanath J described this in *Dicks v Hobson Swan Construction Limited* (2006) 7 MZCPR 881 as a proportionality provision, I think that's a very helpful way of thinking about it.

Part VI, over the page, provides for the National Building Code and it's worth just noticing that the structure of the Code is a required featured under subsection (1). The Governor-General may from time to time, by order in council, make regulations, to be called the Building Code, for prescribing the

functional requirements for buildings and the performance criteria with which buildings must comply in their intended use." So the legislation requires that the Building Code have this functional requirement performance criteria structure. Get away from the old prescriptive rules of what type of nails you had to use and how long they had to be, which really were things prescribed by the old bylaws. Subsection (3), the point I made earlier, that the Code is, "Made on the advice of the Minister following the recommendation of the Authority." And then 49, "Documents for use in establishing compliance with building code." This is where acceptable solutions come in. "The Authority may prepare or may approve … documents for use in establishing compliance." And such documents, subsection (2), "Shall be accepted for the purposes of this Act as establishing compliance with those provisions of the building code to which it relates but it shall not be the only means of establishing such compliance." So you can follow an acceptable solution but you can't be forced to. Even the BIA can't make you do things a particular way, it can just say, if you do it this way that's definitely okay. but if you can come up with some novel way of building something that you can provide reasonable grounds for showing meets the performance criteria, that also is permitted.

And over the page, section 50, establishing compliance with the Building Code, we see in subsection (1) an obligation imposed on the territorial authority to accept certain documents as establishing compliance. One, certificate issued by a building certifier, authority determinations and so forth and in subsection (3) it's made clear that you can't bring civil proceedings against a territorial authority for anything done in good faith and reliance on a document of that kind. So there's that absolute protection where a building certifier has certified that doesn't apply to producer statements as my learned friend Mr Parker quite rightly said earlier.

McGRATH J:

But that's because really of the regulatory schemes contestable structure, the building certifier is someone who is doing the council's job if I can put it in that way.

MR GODDARD QC:

Exactly right Your Honour.

McGRATH J:

So they're not to blame for that but that's not so with the producer –

MR GODDARD QC:

Exactly.

McGRATH J:

– who is the person who's done the work, who's produced, put the document up.

MR GODDARD QC:

Or it might, it will often be an expert like an engineer so for example there's a producer statement from the engineer in relation to the structural stability requirements of the lodge.

McGRATH J:

But not exercising the regulatory functions of the statute.

MR GODDARD QC:

Exactly Your Honour and the council has a discretion under section 43(8) as to whether or not to accept producer statements but no discretion at all in relation to building certifier outputs. The role of building certifiers, their approval, their supervision and so forth are provided for in part VII. This was the subject of the, very much the focus of the Sacramento litigation. It's not material here nor is part VIII which provided for the BIA to accredit certain building products and processes. Part IX, legal proceedings under miscellaneous provisions, there are a few provisions which it's worth noticing here because they shed some light on what happens if a building is, in fact, unsafe. There's section 64 in relation to buildings which are dangerous or insanitary. They're defined in section 64 and then in section 65 local

authorities are given certain powers in relation to dangerous and insanitary buildings to put up hoardings around them and to give notices requiring the owner to do work. So again what happens is the owner is told, you're building is dangerous, you must fix it, and there's then a legal obligation to do so. Some issues about earthquake prone buildings we're not concerned with. appeals from notices to the District Court and High Court.

Section 70 there's an exceptional power to avert immediate danger or rectify insanitary conditions whether a local authority can actually do the work and then recover the cost and it runs down to section 75. Section 76 is the inspection provision. Inspection defined to mean, "Taking of all reasonable steps to ensure (a) That any building work is being done in accordance with a building consent … That buildings remain safe, sanitary and have means of escape from fire," and that buildings that are dangerous or insanitary come to the attention of the local authority so that's the power and at subsection (3), "It shall be a condition of every building consent that the territorial authority's authorised officers shall be entitled, at all times during normal working hours or while building work is being done, to inspect the land and the building work." So that's where the power to inspect comes from and it's linked into every consent as an implied condition.

Then I've already taken the Court to section 80, offences and 82, liability of principal for acts of agents. Finally there's the cluster of provisions my learned friend referred to, 89 through 91 in relation to civil proceedings and limitation defences and really I just wanted there to echo what Your Honour Justice Blanchard said, that plainly these provisions contemplate the possibility that legal proceedings will, in some circumstances, be able to be brought against local authorities but they are completely silent as to the circumstances in which that will be possible, leaving that to be determined by the Courts and the Court of Appeal in *Rolls Royce*, which I think Your Honour Justice Anderson was on the Bench, said at paragraphs 115 to 116, really this is neutral in relation to the scope of the duty. It simply says whatever is there may continue but if a neutral factor it points neither for nor against the

existence of a duty in a particular context and that in my submission, respectful submission, just must be right.

ANDERSON J:

I suppose it would operate, for example, to prevent a personal proceedings in judicial review against a particular officer of a council?

MR GODDARD QC:

There's care and attention to prevent proceedings being brought against the individual inspector in tort for example also but there's no protection given to the local authority. That of course begs entirely the question, when can you sue the local authority. This neither prevents such claims nor can be taken as any sort of authorisation of liability. It is striking, when one works one's way through the legislation, that there is no provision of any kind that could, by any feat of imagination, be described as creating a right of action against local authorities for any person but certainly not for building owners. I mean we've come to the end to he Act now –

McGRATH J:

Doesn't that just really signal that Parliament is going to leave that to the Courts?

MR GODDARD QC:

To the Courts, yes.

McGRATH J:

Again it's neutral isn't it?

MR GODDARD QC:

It's neutral in relation to whether or not there can be proceedings. It rather points against the existence of a statutory duty, picking up some of Justice Wilson's earlier question, the relationship between the negligence claim and a breach of statutory claim. That does depend on discerning an intention on the part of parliament, implicit in the statutory scheme, to create a

right of action. In my submission there's no way one could construct that here nor has anyone ever sought to and I think then one needs to bear in mind the warning of Lord Hoffmann in *Stovin v Wise* that in circumstances where Parliament has not created a right of action or set up any guarantee fund or any insurance scheme or anything like that, the Courts should be cautious to create a financial compensation regime in relation to the performance of statutory functions that Parliament didn't see fit to create. It's not an absolute barrier to the imposition of a duty of care but it is important to bear in mind that Parliament enacted a scheme. It conferred certain functions, it had certain people in mind as the intended beneficiaries of those functions in other areas of the law especially with modern drafting techniques which are comprehensive compared with older style drafting, let's get longer not shorter.

Normally one does see compensation schemes provided for in some detail complete with the criteria for obtaining that compensation, defences that are available, how they'll be funded in legislation, where there's a positive intention to create them and one just does need, in my submission, to be a little bit cautious about judicial creation of broad compensation schemes under legislation of this kind and Lord Templeman made precisely that point in *Stovin v Wise*.

I think next it would be useful to go to the Code that is set out in the Building Regulations 1992, under tab 2. The issues that are covered are apparent from the table of contents. Some, "General Provisions", "Stability", "Fire Safety", "Access", "Moisture", "Safety of Users", so on and so forth. I, in fact, share Your Honour Chief Justice's lack of enthusiasm for the commercial label because in fact it's quite a narrow label as Your Honour will see looking at these definitions. There are seven categories of building under the Code. There's housing, which is basically in my submission a group that includes, but I will argue on another day is much wider than the *Hamlin* duty, but for present purposes *Hamlin* sits within housing. Then there's communal residential which includes hotels and motels and lodges like this.

McGRATH J:

Sorry I've missed a step here.

MR GODDARD QC:

I'm sorry Your Honour.

McGRATH J:

Where are these seven categories. What page are you at?

MR GODDARD QC:

Clause A1, page 54 of the stamped numbers.

McGRATH J:

Thank you.

MR GODDARD QC:

Just at the very bottom, clause A1 classified uses, 1.0.1 the numbering is headed –

McGRATH J:

Thank you, yes.

MR GODDARD QC:

Buildings are classified according to type under seven categories, "2.0 Housing." The seven categories begin numbering with 2 rather unhelpfully which is why they get up to it so housing, which is not this building, communal residential, which it does fall within, that's 3.0.2 because that includes hostels and hotels and motels, retirement villages and so forth. And then various other uses including "5.0 Commercial", "6.0 Industrial" and so on and so forth so I'm not saying that the argument is just limited to commercial in this narrow sense. My argument is that there is no duty in relation to anything except some to be ascertained subset of the housing category.

The interpretation provision A2 largely just echoes the definition. It sets out again the definitions in the Act including the definitions of allotments and other

property and amenity, so the same sense, as one would expect here. And then we come to the first substantive provision under clause B1 which is on page 60 of the stamped numbers and this really picks up the point made by the Court earlier this morning that every clause of this very clearly identifies the interests that are to be protected and by reference to which the local authority is empowered to act. So structure, it's to safeguard people from injury, safeguard people from loss of amenity, in relation to structural failure and protect other property from physical damage caused by structural failure so it's not the building in question. There's no concern at all in relation to the interest of the owner in the building that's being consented collapsing but there is a concern that it not fall on the neighbour's house or on the road. And then there are functional requirements and the Court will see that these are very general, Buildings, building elements and site work shall withstand the combination of loads that they are likely to experience during construction or alteration and throughout their lives." It's a long way from how long the nails should be.

And then performance, buildings and so forth, "Shall have a low probability of rupturing, becoming unstable, losing equilibrium, or collapsing." It's a very generic way in which this is calculated, low probability of these adverse events occurring and so it continues with certain matters that are to be taken into account. Clause B2 "Durability" is important because it's caused some confusion in some of the discussion around the legislation. It's sometimes been suggested that there's a freestanding obligation here that buildings will last for 50 years. That's very clearly not the case. rather the durability requirement goes to how long the other requirements must be met. It's not a freestanding requirement, it's just a how long must we comply with everything else requirement. So objective B2.1 "The objective … that a building will throughout its life continue to satisfy the other objectives of this code." The functional requirement really seems to me to say exactly the same thing but in more words and the performance requirement, "Building elements must, with only normal maintenance, continue to satisfy the performance requirements of this code for the lesser of – " certain things, specified intended life or if not stated the life of the building being not less than 50 years. And then there are

certain elements which are entitled to last for shorter periods. So this is really an ancillary provision that goes to how long the other requirements must be satisfied for. It's not a freestanding requirement that the building maintain its value, for example, for 50 years.

Then we come to C which concerns fire and there are, and this is the last bit I'll go through in detail, there are four parts to the fire provisions in C. "Clause C1 - Outbreak of Fire" is the one respect in which it's suggested that the Building Code was not complied with by this building so this is the nub of the complaint. Well, what's the purpose of C1? It's, in C1.1, "To safeguard people from injury or illness caused by fire." It doesn't even identify other property as within its purview, it's just about safeguarding people from injury or illness and the functional requirement talks about fixed appliances being installed in a way which reduces the likelihood of fire. I think Your Honour Justice Anderson's question of what a fixed appliance is, is an interesting one that I'm going to need to follow up. I think there's been a tacit assumption that it extends to fireplaces and chimneys.

McGRATH J:

And chimneys yes.

MR GODDARD QC:

And that's been the working assumption of everyone but –

McGRATH J:

I would have thought that was a reasonable assumption.

ELIAS CJ:

Mmm.

MR GODDARD QC:

I hadn't wondered about it until Your Honour asked earlier and then I thought perhaps it was a whole new issue that I needed to think about. I'll put it well down the list.

ANDERSON J:

I don't think there's a serious argument that it doesn't include fires and flues.

MR GODDARD QC:

It hadn't occurred to me as one before. And then the performance standards, again in these very general terms, "C1.3.2 Fixed appliances installed in a manner that does not raise the temperature of any building element by heat transfer or concentration to a level that would aversely affect its physical or mechanical properties or function." I think that's really the one that's primarily in issue here. But again what is the purpose of this? It's to safeguard people from injury or illness caused by fire. Then there's means of escape, there's no issue raised about that but again the objective, "Safeguard people from injury or illness from a fire while escaping to a safe place and (b) Facilitate fire rescue operations." C3 - Spread of Fire. First of all, no suggestion that there's any breach of this then in any event when we look at the objective we see that it's to safeguard people from injury or illness when evacuating a building during fire. (b) Provide protection to fire service personnel," so that's all about people, then "Protect adjacent household units [other residential units] and other property from the effects of fire." And there's no suggestion of any concern in relation to that, no claim in relation to adjacent household units or other residential units or other property i.e. property that's not part of the lodge on the same CT and safeguarding the environment from the adverse effects of fire and the functional requirement really just confirms that. Occupants need to be able to escape, firefighters need to be able to get in, "(c) Adjacent household units, other residential units and other property are protected from damage and (d) Significant quantifies of hazardous substances are not released to the environment during fire."

And then there's rules about fire cells and fire separation and external walls and roofs and so on so that really completes the picture in relation to the regulatory regime under which the local authority was operating. It was required to grant a consent if the plans and specifications would, if implemented, be likely to comply with the Code. It was then required to

consider when it was told that the building work was completed, whether or not to issue a code compliance certificate. In deciding whether or not to do that, it had to decide whether it had reasonable grounds for believing that the Building Code was complied with and that source of reasonable grounds could be a mixture of producer statements and its own inspections.

But through all of this what it was concerned with was compliance with these very specific, well, these particular requirements of the Code. It wasn't permitted to roam outside them and impose additional requirements and when it turns to applying those provisions of the Code, what it was being asked to do was to consider whether there were reasonable grounds for believing that the objective, which in the relevant case is about protecting users, people who use the building from injury or illness, would be achieved by the various means adopted. So it's, to use a term that turns up in quite a few of the cases, a health and safety regulator and there's not a whisper of a suggestion anywhere in the primary legislation or the Code that the value of, economic value of the property in question, the property that's the subject of the regulatory action, is to be protected and that's because it was very deliberately part of the policy of the regime that it not be protect.

I talk about the Act in section 8 of my submission which begins on page 12 and I deal with the Act and the Code through to 8.5. At 8.6 I refer to the objectives of the legislation set out in the Building Industry Commission Report. That's in volume 2 of the legislation, the second legislation bundle. It's under tab 8, the form of building controls. This is volume 1, volume 2 contained draft legislation, very similar to the Act and the Code but I proceeded so far on the basis that enough trees were being felled already without providing the draft legislation. If the Court would find that of assistance, of course I'd be very happy –

ELIAS CJ:

No, is there anything in the legislative history?

MR GODDARD QC:

Nothing which sheds light on this.

ELIAS CJ:

No.

MR GODDARD QC:

I've hunted through it looking for specks –

ELIAS CJ:

Yes.

MR GODDARD QC:

– of gold many times in many different cases and haven't learned anything yet.

ELIAS CJ:

That's usually the case.

MR GODDARD QC:

But this report very much provided the conceptual framework and a lot of the detail of what was implemented and it's very much a document of its time, it's very focussed on economic efficiency and reducing costs and contestability of regulatory functions. The particular paragraphs that I've emphasised my submissions at 8.6. First of all in section 2, part 2 of the document, that control system which begins on page 154 of the stamped numbers, there's a rather critical description of the present building control system in paragraphs 2.3 and following.

McGRATH J:

What page are you at?

MR GODDARD QC:

154. 2-154. And over at 157 the concerns with the present system are set out. It says, “The complex system of control authorities agencies, the documents has ensured that buildings which endanger health and safety are rare in New Zealand. Incidents of these events throughout the country, very low. Concerns of the present system stem from other areas. Requirements are complex and descriptive. System unresponsive to technological change and inhibits innovation, absorbs large amounts of resources in its administration and by building produces in compliance imposing heavy costs on the consumer.” So expensive fragmented and slow to change, although it achieves its health and safety objective well.

The economic framework for reform is set out in 2.12 and following and if one looks at 2.16, ones sees a statement of purpose. It really flows through the rest. “The purpose of a building control system should be to ensure that a central provision to protect people from likely injury and illness and to safeguard their welfare will be satisfied in the construction, alteration, and maintenance and use in demolition of buildings”. The purpose of reform at 2.18. Quite a lot of discussion of risk management, costs of regulatory control in the following paragraphs. On page 161, para 2.33, “The review was completed in 1983, the control system imposed up to 10% on the cost of a building in New Zealand,” a figure I mentioned earlier. Issues about liability. And then I think if we move on to a set part III, bearing in mind the time, begins on page 172, the New Zealand Building Code. This is where the concept of the Code and how it will work is set out and paragraphs 3.7 and 3.9 again I think really capture very clearly the orientation, 3.7 “Protection of the economic interests of people and getting value for money is not a justification for building controls, since value and quality can be supplied through forces of the market”. It’s the policy of the legislation Your Honour. And in many ways true, the problem with this as with so many reforms is that pendulums, when they swing often swing too far and one has to allow a few iterations for them to end up in a sensible place.

In 3.9, “The protection or preservation of people’s own property is not by itself, a justification for control. Insurance is an available choice and people should

be able to make their own decisions balancing the risk of loss against the cost of insurance or the cost of incorporating risk reduction measures in a building. However, the property of others, including public property and utility services must be protected from risks that a building might pose to them." So that's exactly what we've seen come through in section 6 and this concept of other property being protected but not the property itself. I refer to other paragraphs, but that's really the heart of it and the rest of this is a working out of how that will be achieved, including explaining why the Building Code should have the structure that we've seen in the Code of being functional requirements, rather than prescriptive. And you know, one wonders if this building could have been built under the old Code with the specific requirements in relation to nails and cladding, so it's not all downside. So essentially a scheme that is not –

McGRATH J:

It doesn't seem to relate to I suppose safety, I suppose that's your point, it's really, it seems to relate to quality in the sense of, do you want a cheap building or do you want an expensive building? I'm just really wondering, it doesn't seem to relate to a defect, it makes the building more in flammable, if I can put it that way.

MR GODDARD QC:

The whole thrust of this is that regulation is justified where it protects people who are not themselves making those choices. So, for example, visitors to buildings, users of buildings who might be put at risk through fire or through structural defects. Your Honour the Chief Justice referred to things falling on people, that's exactly the sort of issue that users of a building have made no choices about, but that's very sharply distinguished in this report, from the interest of the owner in the value of the building and in reductions to that value caused by defects which might also have safety implications.

But the point that's made here is that you can regulate for safety but that's the purpose for which you're regulating. It seems to me that two things really drop out of this. The first is that it's plainly inconsistent with the legislative scheme

for councils to be responsible for anything that goes outside the health and safety. It's fair they're positively prohibited from regulating to seek to achieve that, so far as the building itself is concerned. Then we're left with what this claim really is, which is a question of whether owners of buildings can say, "Well you were supposed to regulate for health and safety, this defect creates a safety risk to users of the building. It also harms our economic interests and we want to sue for that harm to our economic interests. In other words even though that's not an objective, of the regulatory scheme, they're not the intended beneficiaries of it and that's not an interest which is thought to be protected, can you say, well by a coincidence –

McGRATH J:

Yes, it's the coincidental link you take exception to.

MR GODDARD QC:

Exactly, and it's just pure coincidence that we would like to piggyback on this health and safety scheme to protect our economic interests and that's not something which the Courts have, I think, accepted in any case that I can identify, that's considered to be good law in New Zealand today, with the exception of Hamlin and that really rests, not on the statutory scheme, not just on piggybacking on that, but on a whole set of community expectations built up over a very, very long period and it now exists, if it exists at all, as a freestanding duty not supported by the statutory regime.

So yes, it's just a coincidence. This happens to be bad for the health and safety of some other people, so we would like to sue for the economic loss we've suffered as a result of it and not only is not supported by authority, but *Attorney-General v Carter* is very strong authority that that is not an appropriate form of duty of care to impose, that regulatory bodies are not required to pay financial compensation when interests that they are not intended to protect, happen to be harmed along with the interests they are concerned with.

I'll come to *Carter* but it's hard to believe that the *Nivanga*, the ship in that case which was sold for scrap for $500 was not dangerous but that wasn't the point. The owners couldn't recover because of the survey, claim reliance on the survey in question. The coincidence didn't profit them and the other context where this has cropped up, and that's why I've provided these two additional cases, is the auditor liability cases where one has a function in some ways not unlike what council's do. A review process, an audit process, an inspection process, coupled by the issue – followed by the issue of a certificate so if that borderline between services and representations resulting form the service and the Courts have consistently said, well you need to look at the purpose for which the audit in question is carried out and the persons to whom the report is addressed and you can only sue if you are one of the intended addressees and you are using the report for the purpose for which it was expected to be provided.

That's dealt with and spelled out pretty much in those terms in the decision of the House of Lords *Caparo Industries v Dickman* and applied by the New Zealand Courts in, for example, *Boyd Knight v Purdue*. No piggybacking of an unrelated interest off the back of a particularly statutory scheme designed to protect other interests.

In section 8 of my submissions, after dealing with the Building Industry Commission Report I go on at 8.7 to look at the previous regulatory regime. I won't take the Court, I think, to the cases that I refer to here in this context. The most helpful is really *Stieller v Porirua City Council*, that's a decision of the Court of Appeal. It's a judgment that's in volume 4 of the authorities at page 1233, if the Court wants to make a note of that, delivered by McMullin J which really addresses this question. First, why is the law in New Zealand different from the law in England and says, well it's because our bylaws are much broader, they protect much broader interests. I quote the key passage at my 8.8, the powers are, "Wide enough to cover the construction of soundly built houses and the resultant safeguarding of persons who may occupy those houses against the risk of acquiring a substandard residence." That simply couldn't be said of the 1991 Act and that was also expressly comment on by

Richardson J in *Hamlin*, I will go through that later, and by the president Cooke J in *Brown v Heathcote County Council*. The president said there that local authorities were concerned generally with matters going well beyond the range of personal health and safety. The preservation of community building and living standards, property values and amenities, and I don't think this was in the narrow sense of no noises or smells, was part of their proper sphere.

So this reference to building property values was seen as part of the old statutory regime. It's clearly not part of the 1991 Act and I say at 8.12, "It narrowed the objectives … to focus on health and safety of building users, and protection of other property," in that narrow sense to find it, "Shifted responsibility for prescribing standards to central government, in the form of the Building Code … sets performance based (i.e. not prescriptive) standards." It expressly prohibited imposing additional requirements over and above those in the Code and conferred responsibility for day to day administration and enforcement of legislation on local authorities.

And that focus of the 1991 Act on health and safety in the absence from it of any purpose of safeguarding property values has been noted by the Courts in this case and the Court of Appeal discussed that and in a number of other cases where this issue has come up. *Te Mata Properties*, a case about two motels. *Kerikeri Village Trust v Nicholas & Ors* (Unreported, High Court, Auckland, CIV-2006-404-005110, 27 November 2008, Andrews J), a retirement village, retirement home in Kerikeri. *Mt Albert Grammar School Board of Trustees v Auckland City Council* HC Auckland, CIV-2007-404-004090, 25 June 2009, Asher J, a case about three schools in Auckland and *Spencer on Byron* which is a, from memory, 22-23 storey building on the North Shore in Auckland which is a hotel except for the top two floors which are penthouse apartments and there's, that claim also was struck out except in relation to the penthouse apartments and that's the subject of appeals and cross-appeals to the Court of Appeal which have not yet been heard.

ELIAS CJ:

Isn't – in 8.13 does the reference to safeguarding property values add very much? Is it not that your submission is that the Act doesn't have the purpose of safeguarding –

MR GODDARD QC:

The property itself.

ELIAS CJ:

– the property.

MR GODDARD QC:

Yes. I was really just echoing –

ELIAS CJ:

Yes I'm just on the same groove of being a little concerned about the emphasis on the economic value.

MR GODDARD QC:

Yes. Your Honour is exactly right, that is what I say, and the reason that property values pops up there is just that I was saying look, the president said that was part of the old regulatory regime, that was the language His Honour used –

ELIAS CJ:

Yes.

MR GODDARD QC:

– certainly not part of this one but it's not the language –

McGRATH J:

What's the date of this report?

MR GODDARD QC:

The Building Industry Commission Report?

McGRATH J:

Yes.

MR GODDARD QC:

1990 I think.

McGRATH J:

Sorry?

MR GODDARD QC:

1990. The legislation happened really very fast because there was draft legislation associated with it so it was just before the legislation. The legislation went through Parliament rather fast.

McGRATH J:

That's helpful, thank you.

ANDERSON J:

BIC says 1990.

MR GODDARD QC:

Thank you Your Honour. And I just note in passing at 8.14 the UK provision, which was set out in *Stieller* as part of an explanation of how much broader the New Zealand bylaws then were, actually maps rather neatly onto the objectives of the 1991 Act so that difference and that rationale for a different approach have now dropped away. So that's the statutory framework. I think it is important just to have a little bit of a look at what the complaint is in this case. Before I do that, if I do that and then go through *Hamlin* and *Attorney-General v Carter*, you're definitely, I think, committed to going into tomorrow. Is that all right Your Honour?

ELIAS CJ:

Sorry what –

MR GODDARD QC:

The three things I wanted to do were –

ELIAS CJ:

The first I missed, what was –

MR GODDARD QC:

Look at the claim.

ELIAS CJ:

–that, look at the claim.

MR GODDARD QC:

In more detail and what the complaint is against the council and then go through with some care the *Attorney-General v Carter* and *Hamlin* in the Court of Appeal. I suspect actually that even just doing those last two means that my learned friend won't have much –

ELIAS CJ:

Yes.

MR GODDARD QC:

– of a chance to reply but I just wanted to check that I shouldn't –

ELIAS CJ:

Yes.

MR GODDARD QC:

I could just do *Hamlin*.

ELIAS CJ:

No let's proceed with the three and we will go on tomorrow.

MR GODDARD QC:

Right. Thank you Your Honour.

ELIAS CJ:

We'll stop at four, yes.

MR GODDARD QC:

I assumed we'd be keeping the usual hours of the Court. So turning then to the statement of claim that's in volume 1 of the case on appeal under tab 4. Have a quick look at the original one and then turn to the amended one to see what's been added. The, after pleading various background matters, perhaps just another thing at 14, that the way in which the fire arose is described, the complaint is that hot embers came out of the chimney tops and accumulated in a cavity and that heated building elements that were not properly protected by heat proof shielding so both the design, the way that cinders could fall back and in the absence of shielding being properly installed are complained about and that resulted in the fire within the cavity of the tower it's alleged. The loss is pleaded. One respect in which the claim changes between this version and the draft amended statement of claim is that as well as the two items in paragraph 16, cost of repairs and loss of income about $16,000 worth of damage to chattels is also pleaded in the amended claim but that's the only material change there. And then the claim in negligence, paragraph 16, the allegation of a duty to exercise reasonable care and skill in issuing and administering the building consent and the thrust then of the requirements on the council is to consider the detailed drawings with care, skill and due regard to the requirements of the Code. Apprehend the design did not comply with the Code, apprehend it didn't comply with acceptable solution C1 AS1. Where acceptable solutions were issued they were given a number which related to the code provision and then the different – so you had C1 if it related to C1 outbreak of fire, and then AS1 for the first acceptable solution, AS2 if there was – which because sometimes there were multiple acceptable solutions. But of course Your Honour will remember that you were never

limited to those, they were safe harbours but not obligations. Apprehended design, posed an inherent fire risk –

BLANCHARD J:

How did the New Zealand standard fit in with this?

MR GODDARD QC:

The acceptable solutions typically said, "If you comply with New Zealand standards so and so then that's okay". So they were typically incorporated by reference and that as how this one worked. So you had the Standards Association issuing standards for certain building features or elements and then what would happen is the BIA would consult on that and say, "Is this standard and acceptable way of achieving this outcome?" And after consultation would, if it was satisfied, issue an acceptable standard, if you comply with this New Zealand standard, or if you comply with it and do this other thing or that other thing, then that will meet C1. And what that meant was that there was a rather more specific target that you could choose to aim for, both designing a building and then building it and for the council something somewhat more specific against which to measure what was being done.

ELIAS CJ:

So it's the standard that the acceptable solution scoops up the standard?

MR GODDARD QC:

Yes Your Honour.

ELIAS CJ:

And we don't have the standard –

MR GODDARD QC:

No.

ELIAS CJ:

– here?

MR GODDARD QC:

And we say that that's not a level of detail the Court needs to get –

ELIAS CJ:

No, no, that's probably entirely right.

MR GODDARD QC:

– to at all. My eyes start to glaze over a little bit by the time one gets down to those and happily I think I can say that that there is a principled response, at least in this case, that's because of irrelevance.

ELIAS CJ:

Well it's just that if the nails were not the required length, then you'd have something obvious that perhaps a building inspector could have picked up, and I was simply curious to know whether the standard said the flue must be taller than the cladding, or something like that.

MR GODDARD QC:

Even if it said that, the council could not insist on that. The council would still have to approve the plans, if even though you didn't do that, nonetheless you met the functional requirement.

ELIAS CJ:

Yes.

MR GODDARD QC:

And that's really why I say it.

ELIAS CJ:

If it had reasonable grounds to believe that it met the functional requirement.

MR GODDARD QC:

That's right.

ELIAS CJ:

Yes.

MR GODDARD QC:

So either through its own knowledge or because it was given a producer statement, the fury I think was that the more unusual and innovative the means of achieving the standard, the more likely it was that a producer would effectively accept responsibility if they were reputable you would accept that, or an engineer with expertise in the area, would issue, producer statement saying this achieves that outcome even though it's not. And there were areas in which there were no acceptable solutions at all, so you just had the performance criteria, but even where there were acceptable solutions many buildings, you know, could be and were built, other than by reference to those, they weren't mandated. So, you could never say as a council, the nails are not long enough, so we won't approve this.

ELIAS CJ:

Yes.

MR GODDARD QC:

And the next line when we look for an example at 17(d) apprehend the design represented in the detailed drawings for the main tower posed an inherent fire risk, that was only something the council was authorised to pay attention to, to the extent that the risk was one of the risks identified in section (c) of the Building Code. It can't possibly be alleged that the council should've been exercised by risks outside those risks, because it was prohibited by section 7 subsection (2) from regulating more broadly than that.

Then over at 18, the breach of duty, and again I think it's helpful to focus on this. The council breached its duty, why? Well it breached its duty because it said the building consent was issued in reliance on detailed drawings prepared by the appellant, which in relation to the main tower did not meet the

fundamental objective of clause C1 of the Building Code, the object of which is that people are to be protected from harm by fire. So that's the complaint. And then it said well, "The consent didn't meet the specific requirements so – of the acceptable solution, the fireplace compliance with which the council made a condition of the building consent" and so on down, not meeting the method of compliance in the standard. Inherently imprudent or unsafe. Again that's only relevant insofar as it goes to the concerns in the Code.

Over on page 22, subparagraph (g), this is, I think something I need to flag in fairness, is that the complaint does go to inspections as well. It said, "That the inspections of building work conducted by the council failed to identify that some of the fire protection in the form of Hardytex cladding, which was required by the detailed drawings on which it issued the consent, was absent." So there is a complaint that there was something shown on the drawings which wasn't in fact installed and that the inspections didn't pick that up.

And then (h) issued code of compliance certificate, "We had no reasonable grounds on which to conclude the building work had been conducted in accordance with the code or the consent," and that really links back to (g), because there's no other respect in which it said that a code of compliance certificate should not have been granted. Well (g) and the plans I suppose to be precise.

And then the claim to recover the loss in terms of cost of repairs and loss of profits while the repairs were carried out. That was the only course of action against the council in the original statement of claim. That was the form in which it stood before the High Court and that was formally also the statement of claim before the Court of Appeal, but just before the Court of Appeal hearing a draft amended statement of claim was produced which is under tab 9, it's never been filed since. Of course after the decision of the Court of Appeal it couldn't be because the claim was struck out, it wasn't filed in the interim. It's a little bit more detailed, but the general pleadings don't differ materially. Paragraph 19 pleads the loss in a bit more detail, including repairs 81,000, chattels 16,000 and loss of income 207,000. The first course

of action tracks the previous complaint, 24, and then 25 and you'll see the same reference for example on page 13, paragraph C3 to not meeting the fundamental objectives of clause C1 of the Building Code.

Then after that on page 44 there's the new proposed second course of action and its accepted that if this was a viable course of action, then the amendment should be permitted, but the council says it's actually even more flawed if that's possible than the first, because it contains an obvious logical inconsistency. Paragraph 28 alleges, "The council owed the plaintiff a duty to exercise reasonable care and skill, to ensure the lodge would provide safe conditions for those occupying it and in particular that the plaintiff and all users of the Lodge would be safeguarded from injury, illness or loss of amenity and protected from harm by fire." Well the problem with that is really the inclusion of the plaintiff as the object of that duty and as one of the people to be protected from injury, illness or loss of amenity because companies cannot suffer those harms.

There's then a pleading which is in all respects, identical to the first course of action as to duties and breaches and over at paragraph 35 on page 48, there's a pleading, "That as a result of the fire the Lodge was damaged and the plaintiff suffered loss, but the loss is still the loss set out in paragraph 19 above". So after complaining that there was a duty to protect this incorporeal plaintiff's health and safety, the loss that's claimed actually has nothing to do with anyone's health and safety.

ANDERSON J:

It's more substantial, your opposition on that, isn't it? It's really that the issue isn't whether the council had a statutory duty, it's whether it had a duty of care to the plaintiff?

MR GODDARD QC:

Yes, exactly Your Honour. And it just wasn't, it was a duty to perform its statutory functions owed to the users from time to time with the building to protect certain interests. I've always thought that the *Attorney-General v*

Carter really said two things to the plaintiff that said, you are the wrong plaintiff and this is the wrong loss, and that's –

ANDERSON J:

Well you say that in your submissions don't you?

MR GODDARD QC:

Yeah. And that's really – I could've just said that and gone away but instead, in the best traditions of the bar I'm going on for hours. I should've said, the other thing I should've said at the beginning is that really I do gratefully adopt the judgment of the Court of Appeal as I think a very helpful and cogent explanation of what it is that I'm trying to say rather less effectively, I think it captures the issues if I can so respectfully, extremely clearly and extremely well and in fewer pages and in fewer hours.

One last thing to notice about this is the plaintiff's own case of cause against the second defendant, Blair & Co continues at paragraph 36 and following and says that Blair & Co owed the plaintiff a duty to exercise reasonable care and skill in preparing the plans and specifications for the Lodge to be constructed which duty required Blair & Co to (d) consider and meet the requirements of the Building Code clause C1 when preparing the plans and specifications. Well just so says the council. In fact, to be precise Charterhall, the owner of the lodge had a legal obligation to build in accordance with the Building Code, it retained Blair & Co to advise it and supervise, carry out the design and supervise construction to ensure that Charterhall complied with its legal obligation imposed for the benefit of building users and its perverse for Charterhall and obligor under the statutory regime to be suing the council for the loss that it's incurred because the experts it retained to help it perform its obligation, didn't deliver. So that's the second of my four point check list, items.

WILSON J:

Mr Goddard, just before you move on from that, given that Charterhall has abandoned its appeal against the Court of Appeal judgment, on what basis can there be, these matters now be pleaded?

MR GODDARD QC:

I did wonder whether I should take a procedural point in relation to the continuation of Blair & Co's appeal.

WILSON J:

It seems to be that more than procedural as substantive isn't it?

MR GODDARD QC:

But it did seem to me Your Honour that Blair & Co could issue a cross-claim against the council and –

WILSON J:

Oh quite, yes, but that would raise different wouldn't it? That would then raise the issue of what, if any, duty was owed by the council to Blair & Co not Charterhall.

MR GODDARD QC:

Well no, if it was a cross-claim seeking contribution then the issue would be the extent to which the council owed a duty to the plaintiff. So a claim for contribution would raise the question of whether the council could have been held liable at the suit of Charterhall.

ELIAS CJ:

I have rather proceeded on the basis that that is the cause that is to be assumed here.

MR GODDARD QC:

If – if I had taken that procedural point, anticipated that the next thing that would happen would be that a third party notice would be issued, and –

ELIAS CJ:

Yes, no I'm sorry, I meant that I had rather assumed we were effectively dealing with it on the basis that it was.

MR GODDARD QC:

It's now really just a contribution claim.

ELIAS CJ:

Yes.

MR GODDARD QC:

Yes, that's the basis on which I have proceeded as well and my learned friend Mr Parker.

ELIAS CJ:

Yes.

MR GODDARD QC:

I mean there is no cross-claim filed as of now.

ELIAS CJ:

No. Are we giving an advisory opinion?

MR GODDARD QC:

It's always difficult to know whether, when a substantive issue is still essentially live between the parties. It's helpful to raise –

ELIAS CJ:

Which pleadings are we looking at here, are we looking at the - are we looking at Charterhalls?

MR GODDARD QC:

We're looking at Charterhall's pleadings, there is no cross-claim.

ELIAS CJ:

There is no cross-claim?

MR GODDARD QC:

No, there is no cross-claim.

ELIAS CJ:

Well what's live?

WILSON J:

Yes exactly.

MR GODDARD QC:

I mean –

WILSON J:

That was my concern, what is live?

ELIAS CJ:

I had assumed it was cross-claim but I haven't followed it through.

MR GODDARD QC:

I had assumed that if I took the point, then before it ever came before this Court there would be a cross-claim and therefore I would just be taking up the Court's time on a procedural point that could not sooner be raised than despatched. But if I have – and this is an issue which I think both parties are keen to have the Court's guidance on, so –

McGRATH J:

Well that's why I rather suspect it was the case. You had a respondent in the Court of Appeal who is appealing now and against the adverse judgment, the Court of Appeal and your client wants this issue resolved on a fairly wide melodic principle basis.

MR GODDARD QC:

An authoritative basis, yes, that's precisely right Your Honour and it seemed to me I could take a technical point on behalf of the council but that it would immediately be met by a claim for contribution and that the Court would not have much enthusiasm for that, but if I'm wrong –

ELIAS CJ:

I'm not sure that this is a technical point at all. I think it's jurisdictional. It may be that you'll need to return to this tomorrow, I want to think about it too.

MR GODDARD QC:

Well it really – yes it may be that it's worth giving some consideration to overnight, because in many circumstances a respondent standing here, being told that the Court has no jurisdiction to deal with an appeal, would respond –

ELIAS CJ:

Be in a happy position.

MR GODDARD QC:

– with glee.

ELIAS CJ:

Yes I know.

MR GODDARD QC:

But I'm not sure that I will be instructed to be gleeful.

ELIAS CJ:

No, but you might tell us what sort of – if you were to be successful, what sort of order would you get from us?

MR GODDARD QC:

An order dismissing the appeal. An award of costs.

ELIAS CJ:

Well you don't need that. You don't need an order dismissing the appeal.

MR GODDARD QC:

Well the question of whether – let me view it with another way. The question of whether the Charterhall has a cause of action against the council is an issue which can potentially arise in a contribution claim whether brought in this proceeding or another proceeding by Blair & Co against the council. At present the council has the benefit of an issue a stopple, these are the Blair & Co arising out of the determination of the Court of Appeal in an appeal to which Blair & Co was a party, finding that there is no cause of action, and we could plead that –

ELIAS CJ:

By Charterhall?

MR GODDARD QC:

Yes.

ELIAS CJ:

There's no cause of action by Charterhall, but this cross-claim would have to be a claim that Blair & Co were owed a duty of care.

MR GODDARD QC:

No Your Honour, it would be a claim for contribution under the section 17 of the Law Reform Act, alleging that the council was someone who would have been liable if sued. At present we have the benefit of a judgment that we're not such a person and that gives rise to an issue a stopple, so if a separate

contribution proceeding would were brought by Blair & Co against the council claiming contribution under section 17 of the Law Reform Act, we could seek summary judgment, relying on an issue a stopple arising out of the determination of –

BLANCHARD J:

The council would've been liable if sued, but it was sued and it was found it wasn't liable.

MR GODDARD QC:

So, that's what we would plead, and now what Blair & Co are saying is, well we want to –

BLANCHARD J:

Well it's not just a matter of pleading, that's a matter of fact.

MR GODDARD QC:

Yes Your Honour. I had assumed that because it would mean that Blair & Co. could – Blair & Co is bound by that determination, not only in this proceeding, but also in any future proceeding it might bring against the council, a dismissal of that claim by the Court of Appeal, which now Charterhall has decided not to challenge. The assumption I was working on, and I am conscious that I'm really running my friend's argument here and perhaps I should pause and get instructions overnight.

ANDERSON J:

The appellant's been embarrassed by the abandonment of the appeal. By the original plaintiff, or by the present plaintiff.

MR GODDARD QC:

Yes.

ANDERSON J:

And perhaps there's a procedural solution to it that you might come to overnight between you. It's just that what – there would've been no difficulty at all if –

MR GODDARD QC:
Charterhall.

ANDERSON J:
– Blair & Co had issued their equivalent of a third party claim...

WILSON J:
Oh well is that necessarily the case, that if that had happened, couldn't the issue of stopple still apply on the basis that the Charterhall was found not to have a cause of action against the council, it hadn't appealed against that so issue of stopple then applies.

MR GODDARD QC:
I see what Your Honour is saying and what Your Honour just – yes.

ANDERSON J:
If the Blair & and Co's entitled with leave to bring an appeal on that issue. This is the difficulty, it's sort of got a bit of itself.

ELIAS J:
I think you might need to return to this in the morning –

MR GODDARD QC:
I think that would be better.

ELIAS J:
– but if you would, you really finish what you were going to say about pleadings, it's been very illuminating. So you were going to turn, and perhaps we should take the next 15 minutes to look at *Hamlin*, is that – no you were going –

MR GODDARD QC:

I thought I my do *Attorney-General v Carter* first and I think that the 15 minute window will be plenty of time for that. That's in volume 1 of the cases. It begins at page 26 and it's a claim brought by the owners of a ship, *Nivanga* alleging that they relied on interim and final certificates of survey issued by the Ministry of Transport and then a successor agency certifying that the ship was sea-worthy. They say they relied on that in purchasing the ship, in fact it turned out that it wasn't sea-worthy and was also valueless, so it's the same coincidence of interest issue and they sought to recover that from the Crown and M&I.

The judgment of the Court which Your Honour Justice Blanchard was a member of was delivered by Justice Tipping and at paragraph 1 it's noted the plaintiffs, Court proceedings in the High Court, came to have suffered economic loss as a result of the negligent survey of the ship the *Nivanga.* I'll come back to this whole question of the economic loss label, it's not one that's helpful for the purpose of thinking about these issues and particularly there isn't any pure economic loss and other economic loss is not especially illuminating and really I –

BLANCHARD J:

You're going to say it makes no difference whether the ship was hopelessly unseaworthy and couldn't be used or whether it had actually sunk?

MR GODDARD QC:

Yes. Or whether it sailed out of port and there was a fire in the engine room and –

BLANCHARD J:

It sank.

MR GODDARD QC:

Yes. Exactly. It makes no difference at all. If someone had been on it and had gone down with it that might raise a different issue because those are the

persons intended to be protected but not the owners. Your Honour's stolen my punchline.

BLANCHARD J:

Sorry.

MR GODDARD QC:

But the background to the proceedings as set out in paragraphs 3 and following, "The planners were interested in acquiring the *Nivanga* from the Fijian owner."

BLANCHARD J:

Yes, interesting, it's another boat that was bought in Fiji.

MR GODDARD QC:

I had noticed that sir. Another unseaworthy boat on sale there. Um, and "agreement entered into in April '94" paragraph 6, "Mr Peter Chard of Ministry of Transport inspected the *Nivanga* and issued an interim certificate of survey". Separately a company called Dunsford Marine Ltd inspected the *Nivanga* and prepared a valuation addressed to the BNZ, they are also sued but that's of no present moment.

ANDERSON J:

I acted for them once in a case where they alleged the granting a certificate negligently, about the condition of the ship, in front of Mr Justice Roper and Captain Dunsford went down on that one.

BLANCHARD J:

I think it's a reported decision.

MR GODDARD QC:

And in my submission, notwithstanding Your Honour's role, that's exactly how it should've panned out, that's the right defendant in relation to the economic interests.

ANDERSON J:

Well it was based – it was pleaded in negligence, but it had a contractual base to this to some extent.

MR GODDARD QC:

And they're essentially in the same position as the architects in this case, they're the people that the owner contracts with to protect their economic interests.

ANDERSON J:

It was brought on the basis of negligent advice I recall now, so that comes within some of the exceptions with dealing with economic loss.

MR GODDARD QC:

Yes. A classic *Hedley Byrne.* But you can also, as Your Honour said a contractual issue, if you were contractually retained to provide advice in connection with something that someone was looking to purchase, plainly you're in the gun for contractually and in tort.

ANDERSON J:

I thought it was a very bold judgment at the time, but it was just a forum.

MR GODDARD QC:

Yes sir. It's always a shame when one makes that sort of innovative and legal history, I've done it a few times on the wrong side of that. Um, so it was an interim certificate which operated for three months, paragraph 7 a further one, further interim certificate issued and then finally the Maritime Safety Authority issued a Certificate of Survey. The normal kind. There were some negotiations between the plaintiffs and the vendors, paragraph 9, "Not necessary to traverse in detail, the sequence of events which then ensued." The company which bought it was placed in liquidation a little more than a year later. Auckland Harbour seized the *Nivanga* and sold it for scrap, realising $500, which can be compared with the original purchase price, which

in New Zealand dollars was about 200,000. It seems hard to believe that a ship worth $500 did not raise any safety issues, but that as not seen as rescuing the plaintiffs.

The plaintiffs assert the various survey certificates were issued negligently and that the condition of the *Nivanga* at the relevant times didn't justify their issue. In their statement of claim they sue for a variety of financial losses in several different capacities. And down the bottom of paragraph 10, line 28 and following, "All that needs to be said for present purposes about these various capacities is that they each allege different forms of economic loss, said to have been incurred by the plaintiffs as a result of relying on the allegedly negligent and erroneous survey certificates."

There's then a careful review of the legislative environment, paragraph 12 it's recorded at line 46, "The purpose of the survey set out in section 2062 as follows." The passage italicised by the Court over the page, "Whether the ships in all respects satisfactory for the service for which the ship's intended to be used." Section 207, "Can require additional survey whether concerns in relation to seaworthiness or safety of the ship." Section 216, "Declarations of survey." Again the italicised passage relates to the fitness of the ship to ply on the voyages or the trade for which the certificates issued.

Paragraph 15, this is a critical paragraph, "From these provisions it can readily be seen that the survey requirement was and is focussed on matters of safety and seaworthiness of ships. The Court rejects a suggestion that there's a difference between the concepts of safety and seaworthiness, but obviously has in context a safety connotation, the purpose of the survey requirement, underlined, by the passages we've emphasised, also power of the general scheme of this part in the legislation. Further support for the proposition of safety as the purpose statutory regime, comes from the times and uses to which a ship may be put so as to justify an exemption from survey."

Then down at line 39, "There is nothing in the legislative scheme, or in the individual sections, suggesting that survey certificates were intended to be

issued or relied on for economic purposes." Just so with building consents and certificates of codes compliance in our case. Further discussion that the purpose of survey is safety in paragraph 17 and at the foot of the page, lines 48 and following, "The very name of the new authority emphasises its purpose and the purpose of the functions transferred to it. In short that purpose was the safety of ships and the safety of the sea in the sense of protecting it, as far as possible, from pollution." Eighteen, discussion of new Maritime Safety Authority, and at line 11, "The point is that the statutory changes in 1993 ... and 1994, underlined the safety connotations of the statutory requirement for survey of ships." Line 16, "There is no suggestion anywhere in any of the relevant legislation that survey certificates were intended by Parliament to be relied on by anyone, let alone the owners (actual or prospective) of ships, when making commercial decisions concerning a particular vessel. The protection of commercial interests is not a purpose of the legislation. It is against that background that the legal issues must be considered." There's a discussion of the High Court judgment, Williams J and then over the page there's a heading, "Common law negligence, general principles," paragraph 22, which was the paragraph set out in the majority judgment in *Couch,* as a very helpful summary of the current state of the law in relation to when a duty of care is owed by defendant to plaintiff in a situation not covered by authority.

There's a discussion of the role of assumption of responsibility and the interplay between duties of care and tort in relation to statements and other duties, and the point's made that it's not actually a different test, it's just that different features of the analysis will be of particular importance in different contexts. Over the page, paragraph 27, "Hence before the law of torts will impose on the author of the statement a duty to take care," and of course we are partly concerned with that because the code compliance certificate's one of the matters in issue here. It's a very similar process really, an inspection regime followed by issue of a certificate. "Plaintiff must show it's appropriate on the foregoing basis to hold the author has or must be taken to have assumed responsibility to the plaintiff to take reasonable care in making the

statement if that's shown, necessary proximity will have been established, leading to a prima facie duty of care."

Second inquiry, of course, where the policy considerations negate or confirm that prima facie duty, and this Court I think has deliberately refrained from deciding whether there is a prima facie duty once the proximity phase is passed and, you know, I don't think that's necessary for a decision in the present case. "Whereas in the present case the environment which brings the parties together is legislative, the terms and purpose of the legislation will play a major part in deciding the issues which arise. It is the legislation which creates and is at the heart of the relationship between the parties. It will often contain policy signals bearing on that aspect of the inquiry. It's as well to indicate no new criteria involved in the foregoing discussion, our purpose is simply to set out a structure within which the necessary analysis can take place."

The Court then engages with some commentary in relation to the analytical method and explains that it doesn't matter which analytical framework is adopted, the legislative statement one or the more general one. Paragraph 31 actually is the one I was thinking of earlier. "Cases of negligent mis-statement, as we have seen, the concepts of assumption of responsibility and foreseeable and reasonable reliance have been adopted to assist in reaching a principled and reasonably predictable answer to the proximity inquiry. It is only to be expected that in deciding different cases, Courts have tended to highlight matters seen as particularly material in the individual circumstances of those cases." Can also be influenced by the way the case has been argued, but it's still the same inquiry.

Then common law negligence, this case. "Mr Ring and Mrs Fee argued that as the legislative purpose in the present case was safety, it was not reasonable for the plaintiffs to rely on the survey certificates for the quite different purpose of protecting their economic interests. Mr Hooker, who accepted that safety was certainly one of the purposes of the survey regime, did not, in our view, advance any other tenable purpose. He argued that the

Court should find that protection of economic interests was within the statutory purpose. We find ourselves quite unable to accept that contention. The statutory scheme and language simply do not support it. It cannot reasonably be said that the MOT and M&I assumed or should be deemed to have assumed responsibility to the plaintiffs to take care in issuing the certificates not to harm their economic interests in the *Nivanga.* Hence the necessary proximity between the parties is absent. There are essentially two reasons for that conclusion, one more fundamental than the other, albeit each is favourable to the plaintiffs' case. The first and more fundamental problem the plaintiffs face is that, as we have discussed, the statutory environment is such that the purpose of the certificate was entirely different from the purpose for which the plaintiffs claimed to be entitled to place reliance on it. The second is that in none of the capacities in which the plaintiffs claim to have suffered loss were they the person or within the class of persons who were entitled to rely on the certificates. They do not sue as passengers on the vessel or as crew or other seafarers, damaged in a material way by the allegedly negligent certificates. In a sense the second problem can be viewed as a manifestation of the first. We mention it simply to exemplify the plaintiffs' essential difficulty in another way. For these reasons we hold there was no relevant proximity between the parties so as to satisfy that criterion and for the imposition of duty of care. Had it been necessary to address policy issues we would have found the plaintiffs were in difficulty on that limb of the inquiry as well."

This is really the same point about not requiring regulatory bodies, "Making them liable for failing to protect interests outside those for which they are responsible, lest that distort the performance of their regulatory functions," and at line 10 the Court notes that it agrees with Mrs Fee that the New Zealand building inspector cases are sui generis, in the sense that what this case is about is defining some of the outer boundaries of that genus. "The safety focus of the survey regime is another policy reason which, in addition to its influence on the question of proximity, points away from the imposition of a duty of care to guide against economic loss. From a policy point of view this factor reinforces the lack of proximity." And then down at 39, "For all these reasons our ultimate conclusion is that it would not be fair, just or reasonable

to impose on the MOT and M&I duties of care of the kind asserted against them, i.e. to take care to guard the plaintiffs against economic loss as a result of their relying on the survey certificates upon which the case is based ... uphold the strikeout decision."

And Your Honour Justice Blanchard anticipated precisely how I was going to follow on from this, which is say, well, suppose that the survey had been carried out, suppose it had been done negligently, suppose the ship had sailed out of Auckland harbour and had promptly sunk. It follows necessarily from the analysis of the Court that the plaintiffs could not say, well, either your survey was careless and you failed to identify the defects in the ship that rendered it dangerous and liable to sink, or your certificate was negligent, the issue, they're really the same complaint. You didn't do a proper job in your inspecting, your surveying, and therefore your certificate of survey was carelessly issued. We relied on the survey you conducted and the certificate you issued to tell us that the ship was safe, we put to sea and, look, we've lost our ship. And if one looks at the Court's analysis here, the basic objection that the purpose of the regime was not to protect the owner and was not to protect their interest in the value of the vessel, applies in exactly the same way to a loss of that kind as it would to a simple complaint that it's diminished in value by $199,500, there's just no different.

That's really why the whole latent defence deliberate thing is a bit of a red herring in this case –

ELIAS CJ:

Yes.

MR GODDARD QC:

It just doesn't matter.

ELIAS CJ:

It's just a factor of timing really.

MR GODDARD QC:

Exactly right, Your Honour. This was latent for some time, and suppose that an insurer had said, well, we want to see the plans of the lodge before we insure, and had somehow noticed this defect and said, oh, look, we've got a concern about your chimney here, we don't think it's safe. Could Charterhall have sued the council for negligent approval of the chimney and sought to recover the cost of fixing it then? Surely not, because that wasn't an interest sought to be protected. But why should the fact that the risk has materialised and caused some loss to other property which was not within the protective scope of the legislation in any way change that analysis? Also, I think it has to be –

ELIAS CJ:

Are there any cases on warrant of fitnesses of cars, purchasers relying on those? Because it does really depend on the context, doesn't it, and maybe on the social background.

MR GODDARD QC:

There are some old cases on that –

ELIAS CJ:

Mmm, I thought…

MR GODDARD QC:

– and I was trying to remember how they ran.

ELIAS CJ:

Yes.

MR GODDARD QC:

Yes, Your Honour's right, I have come across some like that.

ANDERSON J:

I recall now that old *Captain Dunsford Limited* case was like that. The owner of a boat commissioned a survey, which was prepared in writing, and then showed by the owner to a prospective purchaser, who certainly relied on it.

MR GODDARD QC:

And there are cases against accountants who have done audits of companies in precisely that situation too, where you know that the accounts you're preparing or the audit you're carrying out is being done for the very purpose of being shown to a purchaser.

BLANCHARD J:

Candler v Crane, Christmas & Co [1951] 1 All ER 426.

MR GODDARD QC:

Exactly, Your Honour, a very famous Lord Denning decision. Then they are with the scope of duty, but otherwise *Caparo* purchasers are not owed a duty of care, unless they are specifically in contemplation by an auditor carrying out a statutory audit, which is done for the benefit of existing shareholders for the purpose of informing the exercise of the powers attached to their shares.

ELIAS CJ:

Yes, *Caparo* in result perhaps more debatable.

MR GODDARD QC:

I think accepted in result by the New Zealand Courts and certainly in –

ELIAS CJ:

The test, the approach.

MR GODDARD QC:

But also, I think –

ELIAS CJ:

Oh, yes, I think that's right, recently.

MR GODDARD QC:

Yes.

ELIAS CJ:

I have some reservations. Does that get to the end of this?

MR GODDARD QC:

Yes, that's an absolutely logical time, Your Honour, to stop.

ELIAS CJ:

Thank you. We'll take the evening adjournment now and resume at 10.00 tomorrow.

COURT ADJOURNS: 4.01 PM

COURT RESUMES ON TUESDAY 13 APRIL AT 10.00 AM

ELIAS J:
Yes Mr Goddard?

MR GODDARD QC:
Your Honour. I did a little bit of work overnight on the issue raised by the Court and it is indeed an issue of some significance and one which based on the authorities, I am not the first counsel to have the Court's assistance in identifying part way through *Orsay* a New South Wales Court of Appeal case to similar effect, in the bundle of materials that I've handed up through Madam Registrar. And it is a fairly fundamental issue and in fact not one that springs off whether a cross-claim had been previously filed or not. It goes to whether there can be any claim for contribution at all, in circumstances where judgment has been entered in favour of the council against the plaintiff, so let me step through that and then perhaps pause and ask how the Court wants to deal with the issue, whether hear from my learned friend on this or whether I should then continue with the substantive matter.

So the starting point, my paragraph 1 of my little note is that the plaintiff's claim against the council was struck out by the Court of Appeal and the plaintiff abandoned its appeal to this Court. So judgment on the merits of the plaintiff's claim against the council has been entered in favour of the council. What claim could Blair & Co have? Well there's no suggestion the council owed them, as architects, a duty of care. It can only be a claim for contribution on the basis that the council would also have been liable to the plaintiff, to the lodge owner. There's been no claim for contribution brought to date, under section 17(1)(c) of the Law Reform Act. What that provides, and I set it out under my paragraph 2, is that a tortfeasor liable in respect of that damage, that's potentially the architects if they're held liable, may recover contribution from any other tortfeasor who is or would of certain time have been liable in respect of the same damage, so two limbs, one – someone who

is liable and that's been held to refer to someone who is in fact found liable by the Court, or someone who would if sued in time, have been liable and that's been interpreted as applying to someone who has not been sued but would, had they been sued, have been held liable to the plaintiff in respect of the same damage.

Contribution, and this I think is the point that Your Honour Justice Wilson and Justice Blanchard were making before close of yesterday, contribution cannot be claimed against a defendant who's been sued by the plaintiff and has been held not to be liable on the merits, that's in the bundle in the material underneath my little note – the first attachment, if all has gone well, should be an extract from Todd, Law of Torts in New Zealand, I've copied the section 24.3 on contribution between tortfeasors. If we turn over to page 1101, that's where the discussion of liability to make contribution begins, from whom can contribution be sought and the relevant paragraphs begin – what the learned author says in the last paragraph in 1101 is, "Take first of all the case where D2 has not sued by P, that's not our case that's discussed."

Then if we turn over to 1102, the last paragraph on that page, "D2's liability to make contribution to D1 similarly unaffected, where the claim by P against D2 has been dismissed for want of prosecution and that's because in that case D2 has not been sued to judgment for dismissal for want of prosecution simply in interlocutory order. The position where a consent judgment has been entered in favour of D2," that's the council obviously in our case, "Is controversial". The High Court of Australia divided on this, *James Hardie & Co Pty Ltd v Seltsam Pty Ltd* (1998) 196 CLR 53; and I'll come back to that case in a moment. The majority held that a consent judgment in favour of D2 precluded D1 seeking contribution against D2. The learned authors of the text suggest that the minority view is the better view at the top of 1103, that consent judgment should be treated in the same way as a settlement and shouldn't preclude a claim to contribution, but then the second paragraph on 1103 is the critical one for our purposes. "On any view" the author says, "Where D2 has previously been sued by P and found not

liable on the merits, clearly a claim for contribution cannot succeed." There's an exception to that in New Zealand where the failure is due to the limitation defence because of the insertion of the words "In time". And just going back to *James Hardie & Co v Seltsam,* all the Judges of the High Court of Australia agreed that if the plaintiff has failed against D2 on the merits, then contribution can't be sought against D2. The only issue that divided the Court was whether a consent judgement was such a judgment on the merits as to warrant the same treatment.

Now the cases referred to in footnote 93 of Todd in support of this, provide varying degrees of assistance. The New Zealand case from 1975 provided none because in that case it was an appeal from a decision where the second defendant was held not to be liable in the same proceeding. It didn't actually help with this except in the most general of terms but the English Court of Appeal case *Nottingham Health Authority v Nottingham City Council* is quite helpful as an indication of the prevailing position in England, which is consistent with Todd. That was a case where the Nottingham Health Authority had brought proceedings against three defendants, the Nottingham City Council and GK and Keller, some engineers I think in Midland Design Group Architects. GKN and MDG were successful in having the claim against them dismissed on the grounds that it was frivolous and vexatious and in one case frivolous and vexatious in an abusive procedure. Perhaps the best place to look is the judgment of Lord Justice Balcombe on page 905 of the report and the history is set out and at letter H, the proceeding before the District Registrar is noted in order that the claim, statements of claim against GK and MDG be struck out, second to last line, "No appeal from those orders". The following year the plaintiff claim against the council was struck out but it was reinstated on appeal, so the council found itself as the only defendant on the appeal and promptly sought to issue third party notices against the two defendants who had previously escaped and an application was then made to set aside those third party notices and they were set aside at first instance and this is the appeal from that decision.

At letter D, the Court of Appeal sets out the result reached in the *Melville Dundas Limited (in receivership) and others (Respondents) v George Wimpey UK Limited and others (Appellants)* (Scotland) [2007] UKHL 18, House of Lords held by a majority, that the words "Tortfeasor who would have sued had been liable do not extend to a tortfeasor who has been sued to judgment and found not liable." In that case as it happened the reason why the tortfeasor who was sued to judgment was found liable because the Limitation Act was successfully pleaded but as Viscount Simmons said at page 178 that was irrelevant to the issue. Now that's specific ground for defining contribution has been removed by the insertion in the New Zealand Act of the words "in time", but the basic principle was not –

ELIAS J:

It's only the third party claim that the "in time" –

MR GODDARD QC:

Well any claim for contribution whether between two –

ELIAS J:

Yes.

MR GODDARD QC:

Yes, yes Your Honour's exactly right. But what happened in the *George Wimpy* case was the House of Lords said, and I think all of their Lordships were in agreement on this, well if a plaintiff has lost against a defendant, another defendant can't seek contribution against them and the issue was whether that applied if the reason they lost was not a judgment on the substantive merits of the dispute but because the claim against the D2 by the plaintiff would, by the time that claim was made, by time barred.

ELIAS J:

Yes.

MR GODDARD QC:

And we've legislated to ensure that that is not a barrier to a claim for contribution in New Zealand and the UK has also done that using slightly different language. So basic principle excepted, its application to a time bar defence varied and that's explained on the rest of page 906. Then over on 907 Their Lordships set out a decision in *Hart v Hall & Pickles Ltd* that was a case where the claim by the plaintiff D2 was dismissed for want of prosecution and the Court of Appeal, Lord Denning held that that also was not a judgment on the merits, which precluded a contribution claim against the defendant in question. There's a passage from Lord Denning set out, "An order seems to me – " His Lordship said, " – in order that a person should be exempted from contribution, he must have been sued to judgment and found to be not liable." Go down a few lines, but an action's been dismissed for want of prosecution, the defendant has not been sued to judgment at all there's been no finding on the merits, no judgment, the defendant's not liable, only an interlocutory order, a matter of procedure, which does not affect substantive rights. It is not a final decision, it does not give rise to estoppel by a raise judicature, of course a strike out is different from that. It is a determination on the merits, it does give rise to a raise judicature it's a final decision as between the parties.

The judgment really then goes on to try to work out what happened before the District Registrar, because there was no written decision and what the basis of the decision had been, the conclusion appears to be that the basis for the decision was not clearly a determination on the merits that appears at page 911 in between letters G and H, Lord Justice Balcombe, "In these circumstances I can't accept the judgment of the District Registrar constituted a final judgment on the merits in relation to the limitation point" and therefore the appeal was allowed and the third party claims were permitted to continue. So I don't think sets the limits of the rule quite neatly going back to the *George Wimpy* proposition a tortfeasor who would have sued have been liable, doesn't extend to a tortfeasor who has been sued to judgment and found not liable, that doesn't apply where the claim against that defendant has been dismissed for purely procedural reasons, not substantive reasons, not reasons on the merits, but in my submission a decision striking out a claim,

finding that it's not arguable tort, is a decision on the merits, it's the clearest of decisions on the merits, it says there are no merits at all, and therefore the rule precluding contribution applies.

As always with apparently simple things, there are a couple of wrinkles which I should, I think, bring to the attention of the Court, I think they're not fatal, but it's I think important that I flag them. First of all my paragraph 4, what that means I think is that if Blair & Co now bring third party proceedings against the council, a step they haven't yet taken, the claim for contribution couldn't succeed and indeed that would be the position even if Blair & Co had previously filed a cross-claim against the council.

WILSON J:

And in that connection Mr Goddard, it does seem to me that apart from the substantive difficulty of entitlement to contribution, which you've explained very clearly, there's also a procedural bar in the way of Blair & Co now seeking to proceed against the council in the form of High Court Rule 4.18 where the authorities, as I read them, make quite clear that unless a cross-claim notice has been filed and served prior to discontinuance, the claim cannot be pursued after discontinuance.

MR GODDARD QC:

A cross-claim certainly can't be pursued, so it's definitely too late for a cross-claim and that's why it seems to me, the only procedural option that might be on the table for Blair & Co not, would be to issue a third party notice and the council's dropped out of this proceeding, it's no longer a party to this proceeding, which I think raises one of the issues which Your Honours were putting to me yesterday afternoon, "Why are you here Mr Goddard?" And "Haven't you then sent away?" And I think, yes, that was the effect of the Court of Appeal's decision and then, well there was a right of appeal on the part of the plaintiff of course, leave to appeal was sought and was granted, but at the point where that appeal was abandoned the council could not be pulled back into the proceeding.

But a third party claim is a theoretical possibility. What basis could it be brought on? Only as a claim for contribution and that can't be now done. There's also, I should just mention, although I haven't deal with it here, a limitation issue, which is the subject of conflicting authority in the High Court, more than 10 years has elapsed since the last step taken by the council, that 10 year time point passed in January this year and there's an open question, on the subject of which there's conflicting High Court authority, whether the 10 year long stop limitation period applies to claims for contribution or not. It's well established that the six year period for a contribution claim only starts to run once the defendant seeking contribution has been held liable and therefore that period won't have run, but the 10 year long stop is the subject of conflicting authority, there are two decisions *Cromwell v de Geest* and *Ross Keith Dustin v Weathertight Homes Resolution Service & Ors* [2006] NZHC 564, which reached different conclusions on that, and that's something which will no doubt in time, find its way to an appellate Court.

But, putting that to one side, what can Blair & Co say I thought, I should try to identify the best argument that might be made against me and then explain what the answer is. The best argument I think is the one I identify in paragraph 5 of my note, "That it shouldn't be deprived of an effective right of appeal to this Court from a judgment of the Court of Appeal to which it was a party and which affects its rights", which goes to whether or not it could now launch third party proceedings against the council, subject of course to any limitation issue that might arise. That's its best argument that the Court of Appeal has made a decision which is adverse to its substantive rights and if it's not able to challenge that before this Court now, it will never be able to bring it to this Court because it will never be able to start again.

Well, I think there are three overlapping problems with that. The first is that what it's arguing about is a theoretical claim it might pursue, but has not yet taken any steps to pursue. It hasn't taken any steps to day t make a claim against the council. One of the other cases I provided in this little bundle, is the decision of the New South Wales Court of Appeal I mentioned a moment

ago, *Ballina Shire Council v Volk.* This was a wedding reception that went rather wrong and a guest fell over, slid on the beer in the Shire Council hall.

ELIAS CJ:

It's an Australian wedding.

MR GODDARD QC:

An Australian wedding Your Honour, and quite a lot of judicial notice is taken of the propensity of kegs to leak and other things like that and so forth – an Australian wedding –

BLANCHARD J:

Or explode. Not funny, I had a friend killed.

MR GODDARD QC:

It's wrong to smile at the misfortunes of others, but it's quite a story. Anyway, the result is that the injured guest, Mrs Beryl Smith, sued both the council, whose parquet floor had become slippery and the parents of the bride, who, it was suggested, had failed to exercise proper control over the dispensing of beer and the consequent slipperiness of the floor. The Judge at first instance found that the fault was all the council's for having a defective bar set up which was always going to lead to beer and to a moist floor, I think was the phrase, and the parents of the bride were not at fault at all, except in the looses of causal senses I guess and no bride, no wedding. But that's time barred. So the council paid the injured guest, but the council then appealed because it was unhappy that it had been held wholly liable and the parents of the bride not liable at all.

The appeal is essentially a challenge to the factual findings that were made about the risks associated with kegs of beer and parquet floors and there's some great cross-examination set out in the course of the judgment. But what we see at the end of – towards the end of the judgment, page 8 and following is that the president, Justice Kirby identified in the course of hearing a legal question, which had not been identified by the parties, which was whether the

appellant, the council, a defendant, could mount its challenge to the orders of the first instance charge, having regard to the fact that it had not challenged the order entering a verdict for the second respondent. And then there's then a discussion of the procedural issues that arose in circumstances where the plaintiff was perfectly happy. They'd been paid and they'd gone away and the appellant wasn't actually seeking to disturb the judgment reached by the Judge and hadn't in fact directly challenged the order dismissing the claim for contribution.

But there was a contribution claim, sorry I should have said that, because that's critical to my distinction of this case. What His Honour goes on to say is that the right course to take, and this is in particular on page 10, would have been, beginning at the third line, an appeal from the order made by the first instance Judge dismissing the appellant's third party proceedings for a contribution. That would be the appropriate vehicle to challenge the dismissal of the appellant's claim for contribution and down sort of halfway between B and C, "By an appeal against the order in the third party proceedings the issue of the liability of the first respondents could be raised just as effectively as by a challenge to the entitlement of the second respondent to recover judgment in her proceedings only against the appellant."

So what His Honour suggests is that it is open to the defendant to appeal in those circumstances without seeking to disturb the judgments vis à vis the plaintiff but I think it's well summarised in the head note at one – "The unsuccessful tortfeasor may without challenging the verdict for damages awarded on appeal fro the order of dismissal challenge the apportionment of contribution the measure of which is to be regarded as having been fixed at nil." Well that's all very well where there's been a claim for contribution and a decision on that but that, of course, is not the case here.

And as I say at my 5.2, "If the appeal were to succeed that couldn't resurrect the plaintiff's claim against the council. The position would remain that the council was not a party to these proceedings and the judgment in favour of the council had been entered against the plaintiff." And as I note in a sense it's a

coincidence that Blair & Co is able to be here today challenging the outcome of the council's, of the plaintiff's claim against the council because if the plaintiff had first brought separate proceedings against the council which had been determined in the council's favour, on a strike out or by judgment, then Blair & Co couldn't seek to reopen that decision. That would preclude a claim for contribution. So in circumstances where there's no cross-claim it seems to me there's no good reason to arrive at a different result so that's the first complication is the suggestion that there is a vehicle for raising this issue on appeal. I say well that turns on there being an extant claim for contribution which is not the case here.

The other point that I thought I ought to raise in response to Your Honour Chief Justice's question, does this go to jurisdiction is, does that go to jurisdiction, does that mean the Court has absolutely no option but to dismiss the appeal and I don't think I can go that far. Looking at particular at this Court's recent decision in *Deborah Gordon-Smith v Queen* [2009] NZSC 20, the decision of Your Honour Justice McGrath for the Court, and I've included this in the bundle, what Your Honour said to cut to the chase is that, perhaps it's best to go straight to paragraph 16, reference to a passage from Lord Slynn in *R v Secretary of State for the Home Department ex Salem* [1999] 1 AC 450 and then Your Honour says, 'Mootness is not a matter that deprives a Court of jurisdiction to hear an appeal." And again over at paragraph 29, "In summary, the Court has jurisdiction to hear the appeal but must exercise its discretion on whether to do so because the issue is moot." And it seems to me that in principle the position must be the same here.

This Court has regularly granted leave. The fact that the appeal subsequently became moot in the sense that it can't determine any live issue as to the rights of these two parties, doesn't deprive the Court have jurisdiction but it does create very strong reasons, the reasons for not giving advisory opinions, for not embarking on controversies that are no longer real controversies identified in *Gordon-Smith* and in my submission none of the exceptional circumstances which justified on embarking on consideration of the moot point in *Gordon-Smith* here present. It is not a major public law issue with

significant consequences of a widespread kind and although the issue is a very important one, how far does *Hamlin* extend, to what cases does it apply, there's every reason to expect that this Court will have other opportunities to give careful consideration to that. And picking up Your Honour the Chief Justice's concerns about cutting across those cases, it might perhaps be seen as positively desirable that this Court not express views on that issue in the context of a case where there is no longer a live issue between the parties rather than waiting until the very hotly contested.

ELIAS CJ:

I just wonder really whether I haven't reconsidered of course the ex parte *Salem* case in the context of that but certainly this isn't a case, or the *Gordon-Smith* case is one where there was no practical effect but there were status issues involved. Here it can't even be said that the reason why there's not something extant is that there's no practical effect. There's no proceeding –

MR GODDARD QC:

To which my client is a party.

ELIAS CJ:

Yes.

MR GODDARD QC:

Yes.

ELIAS CJ:

It's not, it's not mootness in the same sense as is being discussed in the, at least the *Gordon-Smith* case, I'm not sure about the *Salem* case.

MR GODDARD QC:

It's more like the *Salem* case or *Attorney-General v David* at the Court of Appeal's decision in relation to cross-examination before the Employment Relations Authority.

ELIAS CJ:

We'd be a busybody in this case it seems to me.

BLANCHARD J:

We'd really be contradicting the Court of Appeal's decision which hasn't been challenged.

MR GODDARD QC:

By the one party –

BLANCHARD J:

By the one party who could challenge.

MR GODDARD QC:

– whose interests have, and whose rights and whose proceeding have been effected by that decision.

BLANCHARD J:

Yes and I think you're saying, and we'd be doing that to no advantage because it's too late to issue a cross-claim so the, so that you could never be brought back in by another means.

MR GODDARD QC:

No I don't think I could go quite that far. It's too late for a cross-claim as His Honour Justice Wilson said. It's not too late in terms of the High Court rules for a third party notice which would bring the –

BLANCHARD J:

I see.

WILSON J:

And the possibility of the limitation issue.

MR GODDARD QC:

But there the limitation issue arises and I don't think this Court wants to hear that for the first time.

BLANCHARD J:

That's de nova, no, certainly not.

MR GODDARD QC:

De nova, no, especially as it is a really live practical issue in many cases and there is conflicting High Court authorities. I don't think that will be a sensible thing to launch into spontaneously now with respect. But so that's –

ANDERSON J:

Wouldn't there be res judicata in relation to a third party notice? I mean it'll be an attempt to obtain contribution in proceedings where previously between the same parties it's been held that your client is not liable.

MR GODDARD QC:

And paradoxically I think that's the appellant's best argument for this Court continuing to hear the appeal is, well if we try to issue third party proceedings now you'll just turn around and say, well there's a res judicata, and I will.

ANDERSON J:

If you're not a party, and it looks as though you're not, there can't be an appeal against a non-party.

MR GODDARD QC:

Yes.

ANDERSON J:

You're appealing against –

MR GODDARD QC:

I agree Sir.

ANDERSON J:

You're appealing against no one.

MR GODDARD QC:

Yes quite a vocal no one but a no one nonetheless.

BLANCHARD J:

Is it res judicata or issue estoppel?

WILSON J:

I think it's issue estoppel.

MR GODDARD QC:

Yes Sir you're right.

BLANCHARD J:

Well if it's issue estoppel, I doubt that it would apply in circumstances where the party against whom the issue estoppel is being argued was unable to appeal.

MR GODDARD QC:

And that really brings us full circle to the question of whether there is an ability to appeal.

BLANCHARD J:

I think we might have said something about that in *Arbuthnot*.

MR GODDARD QC:

I didn't – there's a, the reason I included –

BLANCHARD J:

There was an issue estoppel point in *Arbuthnot.*

MR GODDARD QC:

That, I think, must be right. But that takes us back in a circle to the question of whether one can appeal. The reason I included the *James Hardie & Co v Seltsam* decision was for two reasons. One, to demonstrate to that the High Court of Australia has reached the same conclusion as the House of Lords on this question of whether there can be a claim for contribution against someone who's been found not liable on the merits, but also because I thought that I ought to draw to the Court's attention some dicta in it suggesting that there might be a right of appeal.

This was a case all about construction of the relevant provision and the issue raised by the appeal as set out in the joint judgment of Gaudron and Gummow JJ at 13 and following. The plaintiff sued three defendants for damages for injuries and disabilities following from asbestos related disease. There were cross-claims in all directions, but what happened was that the plaintiff settled with all three defendants. The settlement with D1 and D2 involved the entry of judgment in favour of the plaintiff against those defendants. The settlement with D3 involved judgment being entered in favour of D3, and the question then was whether D1 and D2 could pursue a claim for contribution against D3 in circumstances where there was a consent judgment. The majority said that they couldn't, but suggested rather that what should have happened is that D1 and D2 should have opposed entry of the consent judgment in favour of D3 and, if it had been entered against their protests, could have appealed against that. That suggests that there is a right of appeal in the circumstances analogous to this, and that appears at, it is obiter, but it's at paragraph 20, against a decision by the tribunal, the Dust Diseases Tribunal, which was the first instance Court, "To enter consent judgment as sought by the respondent and the plaintiff but against the wishes of the appellant, the appellant would have had standing to appeal, by that

means the appellant would have kept in play the question whether it was entitled to recover contribution from the respondent, this would have been achieved without falling foul of certain procedural difficulties."

When one looks at footnote 20 there's a note that says, "As happened in similar circumstances in the re-litigation, which reached its Court as – " and that was a claim by the Trade Practices Commission against over a hundred defendants with various outcomes and various, and a third party effectively intervening at first instance, who then exercised appeal rights, because their commercial interest were affected by the orders made by the Court. So there they had a practical interest in it, although they weren't a party, and had effectively intervened in it.

It seems to me that that's the most favourable authority I could find, in an overnight search, in favour of the appellant in this proceeding, but that it just doesn't reach the situation where, as matters stand, there is no cross-claim against us. So far as the proceeding is concerned the council is no longer a party, we've just dropped out, and, as Your Honour Justice Anderson said, "I am really a nobody, I'm not here."

I don't know whether Your Honour wants to hear from my learned friend from this before I –

ELIAS CJ:

Yes, I think we should hear from him on this point, thank you. Yes, Mr Parker.

MR PARKER:

Thank you, Your Honour.

My friend's quite right, it would never be the position of Blair & Co that it would argue for a duty of care owed to it by the council, and certainly its position in this appeal and, indeed, to the Court of Appeal, is based in section 17(1)(c) of the Law Reform Act which, if I can characterise it this way, is an entitlement to seek a contribution. As His Honour Justice Wilson has indicated, we do need

to also have reference to the High Court Rules when we consider the ability of my client to bring such a cross-claim rather than third party notice, and we have copies for you of the Law Reform Act provisions, which I think you've already had from my learned friend, but also I would like to draw to your attention High Court Rule 4.18, which has been referred to already. That is the High Court Rule that provides the right to give a notice of cross-claim.

WILSON J:

Mr Parker, can I clarify? Are you seeking an ability to file a cross-claim or a third party notice, or both?

MR PARKER:

Cross-claim.

WILSON J:

Just cross-claim?

MR PARKER:

Yes. The way I believe it operates, Your Honour, is firstly to go to Rule 4.18, which provides for claims between defendants. Because it says there, "If a defendant claims against another defendant in circumstances in which, had that other defendant not been a defendant, it would be permissible to issue and serve a third party notice on that other defendant, the claiming defendant may at any time before the setting down date for the proceeding file and serve that other defendant and the plaintiff with a notice to that effect." So that would be the basis upon which would activate, as it were, the entitlement under section 17 and, in my submission, that's the position my client is in. It is able, under that statute, to claim for contribution against the council, if it would be liable in respect of the same damage, and the context here is that we would say that the council was liable for the same physical damage and consequential loss that flows from that.

Now, the appeal to the Court of Appeal obviously put in question whether the council could indeed be liable in this proceeding. The Court of Appeal, as we

know, struck out the claim against the council. But my client, as it was entitled as a respondent to the Court of Appeal proceedings, sought leave of this Court, which was granted, and proceeded to this hearing. The change that's –

WILSON J:

Because leave was granted at the same time that leave was granted to the Charterhall, wasn't it?

MR PARKER:

Indeed, that's right, but it was a separate leave, granted to my client. And therefore it brings me to, stimulated by Your Honour's question, is to rhetorically say, does withdrawal of leave for one appellant, as a matter of –

WILSON J:

It's not a question of withdrawal of leave, it was an abandonment of the appeal pursuant to –

MR PARKER:

Sorry, I beg your pardon.

WILSON J:

– the leave to Charterhall.

MR PARKER:

I misspoke, Your Honour, what I meant to say was, "Withdrawal by Charterhall from the appeal process." I'm sorry, I misspoke there. Does that then take away my client's entitlement, firstly, to pursue the appeal? And that is worthy of consideration, because in pondering this question overnight one looked at the Act which sets up this Court and also the Rules that relate to it, and there seems to be an absence of anything that refers to entitlement or status of parties to bring an application for leave to appeal and therefore appeal.

ELIAS CJ:

Can I just ask you, do you have to maintain that leave – don't you have to convince us that leave was properly granted to your client if it hadn't filed a cross-claim?

MR PARKER:

Yes, I do, yes, I –

ELIAS CJ:

Because it may well be that it shouldn't have been granted.

MR PARKER:

Well, that's obviously a question that arises as well, Your Honour.

ELIAS CJ:

Yes.

MR PARKER:

I would say that there is no need for the cross-claim itself to have been filed, that is not the barrier. The barrier is if the counsel would not be liable, because I'm resting my position on, the interest of my client here, on section 17, rather than the procedural step of issuing a cross-claim, and I think –

WILSON J:

You need to satisfy both points, don't you, the substantive and the procedural?

MR PARKER:

Well, I'll respectfully disagree with Your Honour here, because when we go to the rules, there is quite a lot of latitude to, a party in my client's position, as to when it files at such a cross-claim. And in –

BLANCHARD J:

But those rules must subordinate to the Law Reform Act provision?

MR PARKER:

Yes I agree with Your Honour.

BLANCHARD J:

So you've got to get over the hurdle presented by that provision and the limitations on that provision and then you've got to get over the hurdle presented by the rules –

MR PARKER:

Yes.

BLANCHARD J:

– which may be a lesser hurdle, possibly.

MR PARKER:

Yes I think that, that hierarchy, limited hierarchy is absolutely so.

ANDERSON J:

If I could just raise this with you before you move on Mr Parker. When a cross notice is given, a lis arises between the giving of the, the giver of the notice and the receiver of it.

MR PARKER:

Yes.

ANDERSON J:

And until that step's taken there is no lis. At present there is no lis between either clients and the respondent in this appeal, so how can you have an appeal when there's no point?

ELIAS J:

There's no claim.

MR PARKER:

Well yes. I understand what His Honour's saying to me there but it's not mooting the sense that there is no entitlement. The issue of the cross notice, I do understand, creates a lis, but nevertheless the absence of it doesn't

remove the entitlement to create that lis. What would remove it is if the process whereby the council can be found liable, has not been exhausted, then one is still able to continue with the appeal in my submission. The issue as to whether the council can be liable is still alive because we are in the appeal process which stemmed from the first decision upon it and therefore whilst Charterhall itself may not have pursued the appeal, in my submission it was right for leave to be given.

ELIAS J:

But the question really is, it's not just should Mr Goddard be here, should you be here – are you in the appeal process, that's the question really?

MR PARKER:

Indeed, indeed I recognise that that is implied in the questions of my learned friend, indeed.

ELIAS J:

But I'm not sure, for myself, that these are procedural matters. It may be that they're not jurisdictional although I still, I still have a doubt about that. I just am not sure that you have a claim on foot at all.

MR PARKER:

Well I certainly have no cross-claim –

ELIAS J:

Yes.

MR PARKER:

– and recognise that. Whether that is the total bar that seems to be suggested, I'm not sure and it may be that there has to be some consideration of the sort of proceeding we are within, which is an appeal in relation to a strike out proceeding. I suggest that the latitude given to a defendant to make a cross-claim against another, as far as time is concerned, which is quite unrestrained in comparison to other requirements, such as issuing a

third party notice, which without leave must be done within quite a confined period of time. Here it can be done anytime before.

ELIAS J:

But the latitude pre-supposes that there is something to fasten onto and you're asking us to raise from the dead an action that has gone and that has been disclosed of on the merits, and you require that, in order to bring your parasitic claim?

MR PARKER:

That's a very biblical term, resurrection, it's a – Your Honour if I can suggest that perhaps that issue is still alive and therefore I'm not resurrecting it, it's still apply in this appeal process.

BLANCHARD J:

I don't think it's been conceived yet.

MR PARKER:

Sorry?

BLANCHARD J:

I don't think it's been conceived yet. But because Charterhall has lost as against the Queenstown Lakes District Council, the situation is that the Queenstown Lakes District Council is not a tortfeasor and section 17(1)(c) gives a right to recover contribution only against another tortfeasor.

MR PARKER:

Yes. If the question has been ultimately decided and that this approach, sorry –

BLANCHARD J:

Well it has been ultimately decided.

MR PARKER:

That is what I'm –

BLANCHARD J:

You may still have possibly an ability to use the third party procedure, I'm not expressing a view on that but it seemed to me the more I listened to this, that there's a real difficulty in saying that you now can make a claim for contribution because you can't say that Queenstown Lakes District Council is a tortfeasor who has a liability or would if sued in time have had a liability to the plaintiff.

MR PARKER:

If by virtue of the Court of Appeal decision –

BLANCHARD J:

Yes.

MR PARKER:

And in my position must be that that, by virtue of this appeal is still alive, but I know that becomes circuitous because at that point without Charterhall pursuing its decision –

BLANCHARD J:

Well it's not circuitous really because of the problem that there is no cross-claim.

MR PARKER:

But I think as I submitted earlier, the fact that there is no cross-claim in fact having been issued, it still doesn't take away the fact or the entitlement under section 17.

BLANCHARD J:

Well there is no entitlement under section 17 as matters stand.

MR PARKER:

Well I'm not sure I can advance it much further Your Honour than to indicate that the matter is here and if there is any proper basis for it to be here, I know that's my difficulty. That question of liability is still alive. My submission is that this is not a theoretical claim and that a question for this Court was properly given leave and therefore it doesn't have the abstract quality that perhaps is

being suggested. But I think I've put to you the matters I really think I can in relation to this issue, it is difficult and I make the point, that we've come this far without challenge on this and it's been known for sometime that Charterhall was not proceeding with its appeal here.

ELIAS J:

Well that may sound in costs.

MR PARKER:

Yes indeed I understand.

WILSON J:

Mr Parker can I ask, have you had an opportunity to consider the authorities referred to in the McGechan commentary at paragraph 4.18.02?

MR PARKER:

Yes I suppose, look the answer to that is Your Honour I haven't considered those authorities but I do note the point that is made there, where a contribution notice is not precluded. Sorry I'm looking – 4.18.01 was that Your Honour, 02 I beg your pardon.

WILSON J:

18.02.

MR PARKER:

Yes, where there seems to be some basis for saying, until this continuation a 4.18 notice would be appropriate as a third party notice.

WILSON J:

I think that's more relevant – more relevantly I've had a quick look at those authorities and they all seem to support the proposition that subsequent to discontinuance, a cross-claim cannot be pursued if a notice hasn't been filed and served prior to discontinuance. In the judgment of, unreported judgement of Baragwanath J addressed in some ways the converse to the present

situation in that, in that case a cross notice had been filed prior to the striking out. His Honour held the cross notice remained effective, but more relevantly for present purposes, equated strikeout and discontinuance for the purposes of the rule, do you have any comment on that?

MR PARKER:

That would seem to cause me just as much difficulty as I've been facing until now.

ELIAS CJ:

Certainly not helpful.

MR PARKER:

No, not at all. I think I've exhausted what I can say on that point.

ELIAS CJ:

Thank you Mr Parker. I think we've all been caught a little on the hop here. Mr Goddard was there anything arising out of that?

MR GODDARD QC:

I was only going to make precisely the point that Justice Wilson had made Your Honour that the position must be the same where someone's struck out and ceases to be a defendant as if the proceedings discontinued against them, they're not a defendant and therefore it is definitely too late for a cross notice. That's just impossible. The only question can be whether the theoretical possibility of a third party proceedings, the possibility of a new claim not yet brought by Blair & Co against the council, is a sufficient basis for the Court to entertain an appeal and in my submission there are two things that need to be present for this Court to consider. An appeal one, is an arguable right that could be asserted by the claimant against the defendant, and that's absent because of the determination of Charterhall's claim. And the second is a live proceeding in which that right is asserted because this Court doesn't give decisions on matters which are not the subject of any live proceeding, or any finely determined proceeding between the parties to the

appeal except in the most extraordinary of circumstances. So there is neither the possibility of a substantive right being asserted here, nor the live proceeding, which is a necessary prerequisite, in particular for entertaining an appeal from what is essentially an interlocutory order. But there is nothing else I can say on this issue, and then I'm very much in Your Honour's hands as to whether the Court wants to consider this first before –

ELIAS CJ:

Well I think we'll take a short adjournment and consider how we should proceed. We'll take an adjournment for 15 minutes.

COURT ADJOURNS: 10.52 AM

COURT RESUMES: 11.12 AM

ELIAS CJ:

We think it best to reserve the point that's just been argued not to proceed with the further argument because as will be apparent, we are quite concerned about our ability to give a judgment on the merits in this case.

If that proves to be the outcome, we are minded to leave costs where they lie. If either party wants to raise that matter, we would like them to address it now.

MR GODDARD QC:

Your Honour does seek costs. This is a situation where leave was sought and obtained at the stage where legal is sought and obtained, this issue, which necessarily involved costs to the council, this issue had not arisen because Charterhall was also pursuing its appeal and there was inevitably some cost involved in that and while it's true that the full significance of the abandonment by Charterhall of its appeal, was not identified until the parties were before this Court. The relatively late date at which that happened, I think it was a few days after the filing of Blair & Co's submissions, that Charterhall had not produced any submissions said in response to promptings, were going to give up and filed a notice of abandonment. So up to that point it seems to me that

the cost of respond to the leave application, and then receiving and considering the submissions is clearly an issue, that didn't leave a great deal of time between then and this hearing. It wasn't a matter in my submission which went to jurisdiction, but rather to the appropriateness of the Court hearing the appeal. If the issue had been identified, it wouldn't have been practicable to have a separate hearing on it in the time available in any event, so it would've been necessary to prepare both that issue and this appeal in those circumstances. It is submitted that if the appeal by Blair & Co is unsuccessful, then the council is entitled to the cost of responding to that appeal, regularly bought initially and then pursued by Blair & Co despite the loss of the substratum in circumstances where there was really no practical alternative but to continue to be ready for whatever the Court might want us to do on the day in any event.

Your Honour looks doubtful about the plausibility of that. Are there any specific questions I can help with –

ELIAS CJ:

No, no –

MR GODDARD QC:

– or is just all implausible?

ELIAS CJ:

It wasn't all implausible.

MR GODDARD QC:

That's a relief.

ELIAS CJ:

Mr Parker?

MR PARKER:

May it please Your Honours. My friend's quite right about the timing of the withdrawal by Charterhall which was indeed shortly after the submissions of Blair & Co were filed, so that has left a time between then and now. If I understood my learned friend's submission to you, or when he was first taxed with the issue we've just addressed yesterday, it was that he, or he and his client had appreciated that this may be an issue, but had not raised it and of course whilst it may not have been possible or difficult to have prepared submissions or raised this as an issue for a hearing, it certainly did not preclude communication between the parties on this issue, which may have indeed resulted in an agreement, that may indeed may not have brought us to Wellington for this hearing. In my submission I think it's quite appropriate that costs should fall where they lie in this circumstance, given the indication by Your Honour as to reservation of judgment now and bringing it to a close and therefore the reason for it. Those would be my submissions on that point.

ELIAS CJ:

Thank you. Anything arising?

MR GODDARD QC:

Perhaps just the point I should've made that of course the bulk of the cost is actually involved in preparing the council's submissions, rather than the appearance, and there was no way that that could've been avoided within the timetable fixed by the Court's rules, even if this issue had been raised, it would've been necessary to comply with that, before there could've been any consideration of this. So, up to the point of finding submissions, at least in my submission, the council had no choice but to do that work and to incur those costs in an appeal, which, if the Court dismisses it on this basis, will have failed and therefore costs should be awarded at least to that point, in relation to today. It all depends on whether Your Honour accepts my submission that the most practical course was to then appear prepared to deal with both the substantive issue and any procedural issues that might have arisen, in which case the process, the history of this has not had an impact on costs.

BLANCHARD J:

Had the matter been flagged immediately Charterhall withdrew, this Court might well have sought submissions on the procedural question, and determined that at a separate hearing. Because it would've been clear that there could then be a waste of time in the preparation of full argument.

MR GODDARD QC:

The issue in the form in which it's been raised by the Court, let me be clear, was not identified by either party plainly at that time. It was seen as a procedural issue that if raised would be responded to in a way that resolved it, so it really is only in response to the Court's questions.

BLANCHARD J:

I didn't mean that as a criticism.

MR GODDARD QC:

No.

BLANCHARD J:

Because we ourselves didn't see the point until late in the day literally.

MR GODDARD QC:

That's some small comfort for the council Your Honour. But it seems to me that this is a ball that Blair & Co started rolling, that the issue obviously couldn't be raised until the point when Charterhall withdrew, which was after submissions had come in from the appellants. We had then less than the 10 working days contemplated by the rules, to complete and file our submissions and I really doubt whether this matter could've been dealt with in that sort of timeframe.

BLANCHARD J:

Oh well, I think the timetable would probably have been suspended in that event.

MR GODDARD QC:

But, be that as it may, it seems to me that the responsibility for continuing to pursue a misconceived appeal must lie primarily with the person pursuing it, and that it's a little rough to say to the council, you wouldn't get the costs you would normally get in circumstances where you succeed on the appeal because you didn't spot and point out earlier this flaw in the appellant's –

BLANCHARD J:
This shortcut.

MR GODDARD QC:
This shortcut, but rather proceeded in the normal way with the matter being dealt with when it arose at the hearing. So, in the absence of any culpability in, on the council's part, in failing to identify and raise this issue – and I think it would be going a long way, with respect, to suggest that it was culpable. Your Honour gave me some, you know, comfort on, it's not obvious where things, the Court listened to it for a day and, indeed, to the extent that the issue relates right back to the grant of leave, one might suggest that this miscued to some extent many months ago. But, be that as it may, it seems to me the council's been put to this cost through no fault of its own. It can choose to come before this Court, it's incurred these costs, if it turns out that it's entitled to succeed for a reason which has been identified in the course of the hearing, there's no reason to refrain from awarding costs in the ordinary way.

My learned friend points out, and he's entirely right, that I have referred to the timeframe for submissions, but that ignores his very great patience or the other constraints that I was under in a trial, which I'm also in today, which continues to run over time, and I did have two extensions in his client's agreement, so I can't say that I had to get submissions in within 10 working days in circumstances where the appellant agreed to two extensions of that and I did have more time. And it's really the – but the point remains that the parties proceeded in accordance with the normal process for the appeal, a process originated by the appellant, and unless there can be some criticism of the council for not having sought to take a shortcut, it seems

to me that costs of an unsuccessful appeal should follow the event in the ordinary way.

ELIAS CJ:

Thank you, Mr Goddard. We'll reserve our decision on this matter. Thank you.

COURT ADJOURNS: 11:23 AM